Human rights and democratic governance in Kenya:
A post-2007 appraisal

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FOREWORD

Human rights and democracy can aptly be described at once as the mother's milk, the life blood and the touch stone of human civilisation. Kenya, like most colonies inherited a raft of Laws whose *raison d'etre* was the subjugation of the colonised people. Indeed, the clamour for decolonisation in Kenya, as elsewhere, was informed by the peoples' desire to regain their independence and dignity, this legitimised the Africa-wide clarion call for political freedom which was aptly captured in Kwame Nkrumah's famous words: 'Seek you first the political Kingdom and the rest will come later'.

Kenya's Independence Constitution was not a product of popular participation. It was a compromise document woven quickly to transit Kenya from her colonial past to her new status of freedom as an independent nation. Even the leading politicians of the day did not embrace it wholly. They saw it as a transient stop-gap document which would be amended later to answer to the 'needs' of the new Nation. However, on assuming office, the founding fathers engaged in amendments aimed at emasculating the key organs of state, namely, the executive, the legislature and the judiciary and to concentrate power in the hands of the Presidency which metamorphosed into an 'Imperial Presidency'. Prof HWO Okoth-Ogendo's captured this trend in his now famous article: 'Constitutions without constitutionalism: Reflections on an African political paradox', the essence of which is that constitutions can exist without underwriting constitutional governance.

The constitutional amendments that took place in the 1960s through to the 1990s had the effect of reducing democratic space, undermining the rule of law and human rights. During this era, key institutions became mere instruments in the hands of the executive to be directed and used to address short term political interests in a neo-Machiavellian way to the detriment of the society.

The clamour for constitutional change in the late 1990s was therefore a product of peoples' renewed desire to regain their independence and to place premium on democratic governance as a *conditio sine qua non* for better life.

The uniqueness of this treatise, which may be described as a medley of scholarly 'thoughts', is that it puts together a range of ideas on the subject of democratic governance and human rights in Kenya since the year 2007.

The authors touch on key areas germane to the discourse on democratic governance, such as the place of institutions in the scheme of governance, the impact of ethnicity and related socio-economic factors, the rights of indigenous communities, women's rights, electoral reforms, leadership and integrity, fiscal accountability, judicial reforms, and the creation of a human rights culture amongst others.

The book recognises that the promulgation of the Constitution of Kenya 2010 was Kenya's 'Big Bang' moment but warns appropriately that the

mere promulgation of a robust Constitution is not in itself sufficient to usher the country into 'democratic utopia'.

The *pièce de résistance* of this collection of essays is that it has woven together a wide range of thoughts in the areas of human rights and democratic governance in a manner that will inform intellectual and political discourse for a long time. Scholars, judges, politicians and students will find this book useful.

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CHAPTER 1

HUMAN RIGHTS AND DEMOCRATIC GOVERNANCE IN POST-2007 KENYA: AN INTRODUCTORY APPRAISAL

Morris Kiwinda Mbondenyi

1 Introduction

Kenya opened a new chapter in her history when two wrangling political parties – the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) – signed a power sharing agreement in February 2008.[1] The agreement brought to an end months of civil unrest and political bickering, following the declaration of Mr Mwai Kibaki (PNU's presidential candidate) as the winner of the 2007 Presidential Elections.[2] The wave of atrocities that resulted from the declaration of Kibaki's disputed victory caught the eye of the international community, which stepped in to restore order and peace in the country. The African Union (AU) appointed a team of international experts to mediate over the crisis. At the on-set, the mediators constituted the Kenya National Dialogue and Reconciliation (KNDR) team, comprising of representatives of both the ODM and PNU.[3]

It came to the attention of the team that the post-elections crisis was a culmination of both long-term and immediate causes. Accordingly, behind the façade of alleged election fraud were decades-old tensions that instigated the national pandemonium. The long-term causes of the crisis therefore encompassed many unresolved issues, some dating back to the time the country attained her independence. Endemic failures in

1 The deal was contained in two documents, namely, the *Agreement on the principles of partnership of the Coalition Government* and the *National Accord and Reconciliation Act 2008*. See The Standard Team 'New Dawn as MPs convene' www.eastandard.net (accessed 22 May 2014).

2 According to estimates, at least 1 000 people were killed and 350 000 internally displaced. See The Standard Team 'New Dawn as MPs convene' (n 1 above).

3 See B Namunane 'Annan pleads for grand coalition government' *Daily Nation* 13 February 2008 www.nationmedia.com, (accessed 22 May 2014).

governance and gross violation of human rights were at the pinnacle of such unresolved issues.[4]

The KNDR team therefore formulated a four-item agenda of issues that required urgent attention in order to transform the country positively and to forestall any future recurrence of violence and political instability. The items in the agenda were: measures to end the violence and restore fundamental rights and freedoms; immediate measures to address the humanitarian situation and promote reconciliation, healing and restoration; how to end the political crisis; and critical long-term issues including land reform, poverty, inequity, transparency and accountability.[5]

With such a robust agenda therefore, the imperatives of institutional and legislative reforms that are sensitive to the country's diversity could no longer be ignored. It is unnecessary to emphasise that in the wake of the 2007 post-elections violence, Kenya was in desperate need of a 'watertight' system of governance that would ensure greater citizen participation and promote accountability and transparency in public affairs. Such is a system that would ordinarily provide equal opportunities for all citizens by creating conditions that would encourage their input in democratic governance of the country. Secondly, the system ought to provide for the effective transfer of power and periodic renewal of political leadership through representative and competitive elections. This would mean establishing an accountable and transparent electoral mechanism. Thirdly, the system should strengthen legislative and administrative institutions, such as parliament, the judiciary and other state institutions. Fourthly, it should empower citizens to hold public officials accountable for their conduct, omissions and decisions. Fifthly, it should ensure effective public sector management, stable economic policies, effective resource mobilisation and efficient use of public resources. Lastly, it should adhere to the rule of law in a manner that would protect human rights and democracy and ensure equal access to justice for all.

Soon after the signing of the power sharing agreement between PNU and ODM, the country embarked on the implementation of the agenda items identified by the KNDR team. In this regard, one of Kenya's greatest achievements so far was the promulgation of a new Constitution on 27 August 2010. Courtesy of this Constitution, the country is undoubtedly experiencing a transition of unprecedented proportions. Like every other transitional society, Kenya has embarked on intense re-evaluation of the existing system of laws and institutions with a view to bringing them into conformity with the new Constitution. In the process, the daunting task

4 Human Rights Watch 'Ballot to bullet: Organised political violence and Kenya's crisis of Governance' (2008) 20/1 (A) 3.

5 See the Standard Team 'It's up to you, Annan tells House members' http://www.eastandard.net (accessed 22 May 2014).

has been to reverse the flawed systems that have been in existence for many decades and in their place entrench systems that would promote and respect democratic governance and human rights in all their facets.

2 Flashback: An overview of Kenya's human rights and governance situation prior to the 2007 post-elections violence

Since independence, or even prior thereto, Kenyans have been subjected to political regimes that have sought to define and implement governance within the context of violence, intimidation, corruption and the general lack of transparency and accountability. The country has largely been plagued with many of the factors that undermine the implementation of human rights and good democratic governance. These factors include strong ethnic divisions, polarised politics, political manipulation, socio-economic disparities, deepening levels of poverty and endemic corruption.[6] These factors can broadly be categorised as socio-historical, ethno-political, socio-economic and legislative. As will be shown in the discussion below, these factors were a major contributor to the violence witnessed in the country after the 2007 elections.

2.1 Socio-historical factors

A number of socio-historical factors hampered the thriving of human rights and democratic governance in Kenya in the period prior to the 2007 post-elections violence. In the main, colonialism perpetuated and subsequently left behind an undesirable legacy on inter-communal interactions in the country, in that the notion of statehood was imposed on communities that historically lacked inter-communal coherence. By forcing ethnic communities that previously lived independently of each other to live together, the British colonisers gave no thought to the possibility of the emerging state being ethnically polarised.[7]

Further, through its policies that favoured the investment of resources only in high potential areas that had ample rainfall and fertile lands, colonialism spawned asymmetrical development in Kenya.[8] The colonial government focused on developing infrastructure and social services in 'productive' areas at the expense of the rest of the country, and this

6 As above.
7 For a similar argument, see generally K Hopkins 'A new human rights era dawns on Africa' (2003) 18 *South African Public Law* 350.
8 African Peer Review Mechanism 'Country Review Report of the Republic of Kenya' http://www.polity.org.za/article.php?a_id=99422 and http://www.nepad.org/aprm (accessed 22 May 2014) 46. The areas in question were in the Central Province, the Rift Valley Highlands and parts of the Western Province.

inequality remains largely unaddressed in the policies and practices of independent Kenya.[9] Indeed, soon after independence, the government reiterated the colonial position that public resources would only be invested in areas where they would earn the highest returns.[10] Consequently, inequalities in the development of the various regions of the country were evident. Similarly, the GDP *per capita* disparity between the various regions of the country was very wide; about 45 per cent of the country's employment was concentrated in fewer than 15 towns.[11]

The resultant disconnection between the various ethnic communities and regions of the country provided the ethno-regionalised basis for political and economic discrimination of some citizens. It is rather unfortunate that this trend found support from a class of post-colonial political elite, who preferred it, both as a bargaining chip to bolster their political influence and as a tool to lock out of government their perceived opponents. Although successive post-colonial governments were expected to dispel the problems that had been evolved by the colonial legacy, this went largely unaddressed. For various reasons, the political class in successive governments opted to entertain and nurture these inequalities. It is therefore not surprising that the underlying regional imbalances and the attendant inter-ethnic inequalities easily informed the persistent struggles over the country's resources, such as land, and access to public services. This socio-historical reality had a negative effect on the implementation of human rights and democratic governance.

2.2 Ethno-political factors

The 2007 post-elections violence in Kenya was partly a culmination of citizens' dissatisfaction with a system of governance that demonstrated overt weaknesses and inherent inequities. At the time of the outbreak of the violence, two things were overt. First, ethnocentrism transpired throughout the country's political substratum. Secondly, because of vested ethnic interests, presidential power was personalised. These two issues have endlessly posed certain challenges to the effective realisation of democracy and human rights in the country.

It is important to note that Kenya, like many other African countries, was, and still is, guilty of deliberately defining citizenship within the narrow prism of ethnic belonging. Consequently, one of the most acute problems the country has been facing is the endless struggle to integrate its different communities into a democratic modern nation, without compromising their respective ethnic identities. Generally, ethnocentrism

9 As above.
10 See 'African socialism and its application to planning in Kenya' (sessional paper no 10, Government Printer, 1966).
11 As above.

has had manifold implications: it has encouraged the politicisation and manipulation of ethnic identities to extreme measures; and it has led to the exclusion of some communities from government affairs.[12] In other words, it has more often than not led to the personalisation of political power. Prior to the enactment of the 2010 Constitution, personalisation of political power was made possible by the unilateral amendment of the now repealed Constitution by the then subsisting political class. By 1991, for example, the country's Constitution (now repealed) had been amended about 32 times in order to afford more comfort and power to the incumbent presidents, their tribe-mates and cronies. Amongst the amendments was the insertion of section 2A, which legally made Kenya a one party state until that provision was repealed in 1991.

Generally, Kenya's ethno-politics led to the misplaced assumption that it was essential for one's ethnic community to win the Presidency in order to have unrestricted access to state resources, office and services.[13] Hence, governmental authority, particularly the Presidency, was perceived, more or less, as the preserve of the person in office and his tribe-mates, and could therefore be abused without any serious repercussions. This explains why every tribe in the country coveted the Presidency, and why losing it was so costly and therefore unacceptable. It is also understandable why, since the re-introduction of multi-party politics in 1991 to date, the country's political parties are mainly regional, ethnically-based and poorly institutionalised.

It is rather unfortunate that the ethnic factor in Kenya's politics has often been dismissed, overlooked or considered secondary, although it has been one of the staunchest challenges to the realisation of democracy, human rights and socio-political reconstruction. Rothchild rightly warned against such an attitude by emphasising that 'as long as observers cavalierly dismiss ethnicity as an irrational relic of the past, they will be unable to recognise its force and attraction in contemporary times'.[14] True to Rothchild's words, the governance crisis in Kenya and the attendant undermining of democracy and human rights could not have reached the 2007 magnitude if the underlying ethno-political factors had been resolved beforehand.

2.3 Socio-economic factors

Although Kenya was the largest economy in East Africa in the period prior to the 2007 post-elections violence, its economic performance was below

12 African Peer Review Mechanism (n 8 above) 49.
13 As above.
14 D Rothchild 'Ethnic insecurity, peace agreements and state building' in R Joseph (ed) *State, conflict and democracy in Africa* (1999) 320.

its potential.[15] The country's poverty levels were seriously escalating, as the number of poor increased from 12.5 million in 1997 to 15 million in 2005.[16] An alarming 56 per cent of the population lived in absolute poverty. This phenomenon was attributed to a combination of factors, including natural calamities, corruption, deteriorating infrastructure, weak implementation capacity and low levels of donor funding.[17] Poverty in the country was also quite structured, with certain regions being disproportionately affected due to political and historical reasons.[18] The country also lacked effective anti-corruption laws and policies.

Kenya has had, and continues to have, a worrisome problem with corruption. Corruption has exacerbated the country's socio-economic crisis to such a magnitude that the rules of fair play are either simply ignored or have been replaced with influence peddling and nepotism. This has eventually affected the competence, integrity and output of government. Moreover, it has entrenched socio-economic inequality as well as inequitable access to public resources and services amongst citizens. Whereas the government has attempted to establish anti-corruption commissions and agencies, there has been a general lack of political will to end corruption in all spheres of society. In fact, serious corruption is prolific in some government ministries, departments, corporations, the judiciary and even local authorities. This is not an attribute of good governance because corruption and related vices fail to ensure the most efficient utilisation of resources in the promotion of development, the enhancement of human rights and accountability.[19]

Another socio-economic issue that was a sore point in the country in the period prior to the 2007 post-elections violence pertained to land allocation and distribution. Statistics indicated that more than half of the arable land in the country during that time was in the hands of only 20 per cent of the population.[20] This was partly because the post-colonial land redistribution policy was deliberately designed to favour the ruling class and not the landless masses. With the aid of such a policy, politicians in successive governments used land to induce patronage and build political alliances.[21] Thus, much of the land ended up in the hands of the political class, members of their families, friends and tribe-mates rather than the

15 African Peer Review Mechanism (n 8 above) 17. This report indicates that the country's GDP fell precipitously from an annual growth rate of 7,5% in 1971 - 1980 through 4,5% in 1981 - 1990, to a mere 1% in 1997 - 2002.
16 As above.
17 As above.
18 See generally UNDP *Fourth human development report for Kenya* (2005); and Society for International Development *Pulling apart facts and figures on inequality in Kenya* (2004).
19 K Hope 'The UNECA and good governance in Africa' Paper presented at the Harvard International Development Conference, Boston Massachusetts, 4–5 April 2003 2.
20 See generally G Njuguna 'The lie of the land evictions and Kenya's crisis' (2008) 2.
21 Kenya National Commission on Human Rights 'Unjust enrichment' (2004) 1.

communities from which the colonialists had taken it.[22] An investigation on unfair allocation of land found that:

> the practice of illegal allocations of land increased dramatically during the late 1980s and throughout the 1990s … and land was … granted for political reasons or [was] … simply subject to 'outright plunder' by a few people at the expense … of the public.[23]

The practice of illegal allocation and distribution of land led to a general feeling of marginalisation amongst some communities as well as the ethnicisation of the land in question. While the repealed Constitution permitted individuals to own land in any part of the country without any form of discrimination, this, in reality, was not the case. Many areas outside the major cities and towns were ethno-geographically demarcated, a phenomenon that led to the emergence of 'ethnic reserves'. Besides being a source of corruption in terms of illegal or irregular land allocation, this phenomenon was also tapped by politicians to instigate ethnic violence, especially during election campaigning periods.[24]

2.4 Legislative factors

As argued earlier, the repealed Constitution was the government's handmaiden for undemocratic tendencies such as ethnic polarisation, electoral malpractices and unbalanced access to public resources. Democracy, strictly so called, was therefore not tenable in Kenya, largely due to an 'authoritarian Constitution' that vested enormous powers in the Presidency. For example, it empowered the President to be the Head of State and Commander-in-Chief of the Armed Forces of the Republic.[25] Additionally, the President could hire and fire the Vice-President and Cabinet Ministers;[26] enjoyed immunity from criminal and civil proceedings;[27] and appointed Permanent Secretaries,[28] the Attorney-General,[29] the Chief Justice and other judges,[30] the Controller and Auditor-General,[31] Commissioner of Police[32] and Chief of General Staff of the Armed Forces of the Republic.[33] Moreover, he or she could summon, prorogue and dissolve Parliament at whims;[34] assented to

22 As above.
23 Kenya National Commission on Human Rights (n 21 above) 146.
24 See generally, Republic of Kenya 'Report of the commission of inquiry to the illegal/irregular allocation of public land' (2004) (known as the Ndungu Report).
25 See Repealed Constitution of Kenya, sec 4.
26 Repealed Constitution of Kenya, secs 15 & 16.
27 Repealed Constitution of Kenya, sec 14.
28 Repealed Constitution of Kenya, sec 111.
29 Repealed Constitution of Kenya, sec 109.
30 Repealed Constitution of Kenya, sec 61.
31 Repealed Constitution of Kenya, sec 110.
32 Repealed Constitution of Kenya, sec 108.
33 As above.
34 Repealed Constitution of Kenya, sec 59.

legislation before it became law;[35] and unilaterally appointed members of the then Electoral Commission.[36]

It is clear that apart from vesting enormous powers in the Presidency, the repealed Constitution also granted the institution overwhelming influence over the executive, judicial and legislative functions of government. As correctly emphasised in the African Peer Review Mechanism report on Kenya:

> The subordination of Parliament to the Executive in law making and parliamentary oversight functions; the failure of the Executive to heed to Parliamentary recommendations; Executive interference in appointments to the Judiciary, do not conform to the accepted norms of democracy and are a source of disquiet in certain segments of Kenyan society. The traditional democratic notion of checks and balances is seen as a safety net that can best ensure that government organs work in a perfect equilibrium to deliver to the citizen an acceptable governance package. [37]

Disquiet with the overly-amended authoritarian Constitution, therefore, coupled with detest for the abuse of executive powers by incumbents, led to the agitation for comprehensive constitutional and legislative reforms. It was strongly believed that only such comprehensive reforms could ensure separation of powers and bring to an end the abuse of executive powers. It was equally believed that a new constitutional order would set the country on a firm path toward human rights and good democratic governance. This explains why, for decades, constitutional reforms became a central talking point in the country, leading to the promulgation of a new Constitution on 27 August 2010.

3 The road towards the realisation of human rights and democratic governance in Kenya: An overview of the book

In the foregoing, this book appraises the state of human rights and governance in Kenya in the aftermath of the 2007 elections violence. The book interrogates whether and how the country's tattered social, economic and political fabrics could be rebuilt on the foundations of the new Constitution. The book comprises a collection of essays appraising the implications of the new Constitution – whether real or perceived – on human rights, democratic governance and the overall reconstruction of Kenya after the historic events that took the country to the brink of civil war.

35 Repealed Constitution of Kenya, sec 46(2).
36 Repealed Constitution of Kenya, sec 41.
37 African Peer Review Mechanism (n 8 above) 50.

The book contains 14 chapters. The chapters are divided into five parts, namely, towards the realisation of a human rights culture; entrenchment of democracy through electoral reforms; implementation of good governance principles; the accountability and integrity conundrum; and unravelling judicial reforms and the state of justice.

3.1 Towards the realisation of a human rights culture

This part of the book contains essays on the transition the country has taken towards the realisation of a human rights culture. In Chapter 2, John Osogo Ambani and Morris Kiwinda Mbondenyi analyse the salient features of the Bill of Rights in Kenya's 2010 Constitution. The authors argue that the 2010 Constitution encompasses a robust Bill of Rights whose provisions surpass those that subsisted in the repealed Constitution. Thus, this new Constitution differs with its repealed Constitution counterpart in the promotion and protection of human rights. With its seriousness in providing deserved recognition to human rights and fundamental freedoms, the authors argue, the 2010 Constitution has given Kenyans a golden opportunity to redefine the future of their nation. They conclude that the future of human rights in Kenya is, after all, not as bleak as it may have been thought to be.

In Chapter 3, Nicholas Orago provides a guide to litigating the socio-economic rights under the 2010 Constitution. According to the author, Kenya has laboured under the challenges of poverty, inequality and political as well as socio-economic marginalisation, with the result that the country has struggled to achieve sustainable development. These challenges led to the struggle for a new political as well as socio-economic emancipation, a struggle which culminated in the promulgation of a new Constitution on 27 August 2010. The author observes that for the first time in Kenya's history, the 2010 Constitution entrenches justiciable socio-economic rights aimed at the amelioration of the situation of the poor, vulnerable and marginalised individuals, groups and communities in the country. Due to the novelty of these rights in the Kenyan context, efforts at their litigation and adjudication in the courts have not been undertaken effectively with the objective of comprehensively and holistically responding to the concerns of the majority of the vulnerable Kenyans. The chapter therefore aims to fill this lacuna in the litigation of socio-economic rights by providing a practical and comparative guide to litigators in order to enhance research, preparation and litigation of socio-economic rights cases in the Kenyan courts.

In Chapter 4, Tom Kabau advocates for a coherent legal, policy and institutional regime of safeguarding the rights of indigenous communities. The author notes some uncertainty on the criteria for identifying ancestral land. He is of the view that, in the absence of interpretative guidelines, the concept can contribute to ethnic tension and conflict. Despite the critical

necessity of addressing historical injustices, a liberal interpretation of the concept of ancestral land is a recipe for ethnic tension and conflict. The concept of ancestral land is a critical principle in safeguarding the land rights of the indigenous communities. Indigenous peoples are generally disadvantaged and require special legal safeguards with regard to land rights. The chapter is therefore based on the thesis that the concept of ancestral land should be interpreted in the context of indigenous peoples in order to consolidate a coherent legal, policy and institutional regime of safeguarding the rights of indigenous communities.

3.2 Entrenchment of democracy through electoral reforms

The essentials of free and fair elections as a prerequisite for democratic governance cannot be over-emphasised. Although it would be too simplistic to identify democratic governance with the holding of elections, it will not at all be simplistic to say that entrenchment of appropriate long-term electoral reforms is a recipe for democratic governance. In Chapter 5, Ochieng Walter Khobe makes the point that state legitimacy can only be strengthened and democratic governance consolidated, if diverse interests and concerns are taken into consideration in the entrenchment of such electoral reforms. To him, although elections are necessary, they are not sufficient to legitimise the state. His chapter therefore explores the extent to which under-representation of women and minorities in the Kenyan legislature is attributable to Kenya's poor electoral system. The author contends that women and minority groups constitute more than half of the Kenyan population, and if their voices remain insufficiently heard then the Kenyan democracy is malfunctioning. He concludes that more women and members of minority groups are needed in Kenya's Parliament to work and push for the emergence and consolidation of a gender and minority inclusive developmental state. The chapter makes a strong case for electoral reforms based on a gender and minority friendly mixed-member representation electoral system.

In Chapter 6, Paul Ogendi vouches for party primaries, arguing that they are not only an important electoral phase but also an election properly so-called. He believes that it is pretentious to ignore the application of free and fair elections standards during party primaries only to recognise the same in the actual elections. This is because the failure to be consistent in both cases could potentially undermine the will of the people. Where this is allowed to happen with impunity like in the January 2013 party primaries in Kenya, the result is that democracy is undermined.

3.3 Implementation of good governance principles

The 2010 Constitution has revived optimism amidst Kenyans by, amongst others, opening up the country to a new political culture. The Constitution lays down national values and principles of governance to guide the

country into the future. It has also attempted to expand the country's democratic space by embracing aspects of 'all-inclusive' and 'participatory' governance. In Chapter 7, Winifred Kamau evaluates one of these aspects, the two-thirds gender representation principle. The chapter explores the issue of women's representation, specifically the implementation of the 'two-thirds gender principle', namely that not more than two-thirds of the members of any elective or appointive body shall be of the same gender as provided in articles 27(8) and 81(b) of the Constitution, amongst others. It concludes by projecting on the future prospects for women's rights in Kenya. The question it seeks to answer is whether and to what extent the Constitution's promises for advancement of women's human rights are being realised through this principle of gender representation.

In Chapter 8, Conrad Bosire analyses another aspect of all-inclusive and participatory governance, namely, devolution. He argues that while the devolved system of governance is generally relevant to development, the institutional arrangements need to be complemented with effective implementation that is conscious of the practical and developmental purpose of counties that is envisaged in the devolution framework. His chapter therefore examines the effectiveness of Kenya's system of devolution.

3.4 The accountability and integrity conundrum

Lack of accountability and integrity in the management of public resources and in governance generally has remained one of the main challenges facing the move towards a prosperous Kenya. This lack not only diverts resources meant for public development to individual pockets but also downplays the need for hard, honest labour and toil as the rush to quick and easy wealth takes over. In this regard, Kenyans have recognised that for them to meaningfully move forward, accountability and integrity must first be guaranteed. This recognition is reflected in the 2010 Constitution, in which a number of provisions demanding for accountability and integrity have been expressly included.

In Chapter 9, Ken Obura addresses the question of corruption as an impediment to national prosperity. The author argues that despite the almost universal acceptance of the undesirability of corruption amongst Kenyans, disagreement still abounds in its definition. This disagreement can be attributed to the complex and multifaceted nature of corruption which makes it take on various forms and functions in different contexts. This disagreement, if unresolved, could discourage or slow down the effort to eradicate corruption as there would be no agreement on which corruption to fight. To ensure a focussed fight, the author asserts, it is imperative that the meaning and contours of corruption be clearly demarcated. His chapter therefore discusses the various theoretical perspectives on, and dimensions of, corruption with a view to

differentiating with clarity and delimiting the terrain of operation of corruption. The aim of the chapter is to resolve the disagreement on the meaning of corruption and provide a clear understanding of the concept of corruption for purposes of post-constitution analysis of the corruption problem in Kenya.

In Chapter 10, Juliet Okoth analyses the elusive threshold of the leadership and integrity chapter of the 2010 Constitution of Kenya. She argues that there was much debate on the threshold of the integrity test set out in this chapter before the March 2013 presidential elections in Kenya. Central to this debate was whether the current President and his Deputy, who face charges before the International Criminal Court, satisfied the integrity standards set out in the Constitution. The High Court declined to decide on the issue citing that it had no jurisdiction. It nonetheless held that the presumption of innocence was an inalienable right. The election of the President and his Deputy is a clear indication that the people of Kenya seem to have endorsed the integrity threshold set out by the High Court. The author is of the view that this course of events raises the question of whether a new threshold has now been set for the integrity chapter in the Constitution.

In Chapter 11, Attiya Waris evaluates Kenya's fiscal accountability between 1962 and 2010. The author contends that in constitution making and analysis, the right of the government to tax seems almost superfluous. No real analysis goes into analysing and tying down the right or power of government to tax, the amount collectible and the use to which it is put. Instead there remains the presumption that taxes cannot be tied to services at all. However, this has proven to encourage a culture of impunity, corruption, lack of responsibility and accountability and outright theft. The author finds Kenya to be of particular interest because when the 2010 Constitution came into place, the issue of taxation and public finance was almost completely overhauled even though the issue of the government's right to tax did not come up in the decade-long constitutional debate that to date continues nationwide. The author therefore argues that despite its silence, the economy in the country and the numerous government crises all show that there is a need for control on government: both its revenue and expenditure power.

3.5 Unravelling judicial reforms and the state of justice

Prior to the enactment of the new Constitution in 2010, Kenya's judiciary faced the difficult task of maintaining the intricate balance between the country's socio-political transformation, on the one hand, and interpretation of law, on the other. When called upon to determine matters of a political nature, the judiciary was on most occasions seen to favour the reigning political class to the detriment of other litigants. Undoubtedly, therefore, Kenya's judiciary was then the government's handmaiden for

undemocratic and mundane practices such as ethnic polarisation, electoral malpractices and uneven access to public resources. This part of the book therefore evaluates whether the judiciary has learnt any lessons from the 2007 events that would inspire its reformation; and if it has, what then is the state of justice in the country.

In Chapter 12, Morris Kiwinda Mbondenyi presents the argument that the promulgation of a new Constitution in 2010 signaled the dawn of a new beginning in so far as judicial transformation in Kenya is concerned. According to him, the Constitution envisages provisions that are indicative of the fact that judicial transformation in Kenya is in the offing. The author believes that the realisation of such transformation will however not be tenable unless those provisions are fully implemented. He points out that the mere promulgation of a robust Constitution does not necessarily guarantee judicial transformation. What really matters, according to the author, is how seriously the Constitution is implemented to ensure such transformation. His chapter critiques the process of judicial transformation in the country in the post-2007 period.

In Chapter 13, Evelyne Owiye Asaala exposes the challenges encountered in prosecuting the 2007 post-election-violence-related-international-crimes in Kenyan courts. According to the author, any society undertaking transitional justice measures must address the question of impunity for past atrocities. For societies like Kenya where the International Criminal Court (ICC) is involved in the prosecution of those who bear the greatest responsibility in the commission of international crimes, the question that invites address is how to hold accountable those who do not bear the highest responsibility. Thus, local prosecution of these individuals becomes an important indicator of successful transitional process. The chapter therefore critically analyses the major challenges affecting effective prosecution of international crimes in Kenyan courts and also assesses the effectiveness of these prosecutions within the broader picture of Kenya's transitional justice process.

In Chapter 14, Ruth Aura-Odhiambo wraps up the discussion in this part of the book by analysing the judicial responses to women's rights violations in Kenya in the post-2007 period. She bases her discussion on the premise that women continue to be marginalised and discriminated against in almost all aspects of their lives, a situation which is reinforced by the existing laws and policies, institutional and structural framework as well as biased socio-cultural norms. According to the author, this situation has been compounded by a male-dominated judiciary which has over the years reflected patriarchal tendencies in its decisions. The judiciary has been inconsistent in protecting women from the claws of patriarchy. The chapter therefore advocates for appropriate and adequate judicial responses if women victims of violence are to have a remedy against human rights violations and if those violations are not to go without redress.

Part 1: Towards the realisation of a human rights culture

CHAPTER 2

A NEW ERA IN HUMAN RIGHTS PROMOTION AND PROTECTION IN KENYA? AN ANALYSIS OF THE SALIENT FEATURES OF THE 2010 CONSTITUTION'S BILL OF RIGHTS

John Osogo Ambani
Morris Kiwinda Mbondenyi

1 Introduction

One dominant view holds that human rights are those entitlements which become due to every human person at the commencement of life. Thus, the only qualification for earning them is the act simply of being human. It follows that rights are not granted by government(s) but accrue to human beings naturally.[1] Law and governments only affirm this reality. Because of their centrality to human worth and dignity, rights have become an important subject and pillar of contemporary constitutions. The issue of their recognition, promotion and protection is generally given centre-stage.[2] Indeed, as Mutakha-Kangu observes, most countries claim to be founded upon a jurisprudence and culture of protection and promotion of fundamental rights and freedoms.[3] Constitutions are therefore judged based on how effectively they secure fundamental human rights and liberties. In the modern society, it is becoming increasingly difficult to fathom a constitution without a Bill of Rights.

So crucial are human rights that in Kenya's context the problems of the Bill of Rights in the repealed Constitution were a prominent reason why the people opted for a review of the Constitution in the first place. There are several accounts why the preceding Bill of Rights was invariably considered retrogressive and obsolete. One explanation is that the chapter of the Bill of Rights[4] was replete with limitations, whose enormity had rendered the enjoyment of human rights peripheral. A writer noted of the repealed Bill of Rights thus:

1 The 2010 Constitution at art 19(3)(a) takes cognisance of the fact that rights and fundamental freedoms 'belong to each individual and are not granted by the State'.
2 J Mutakha-Kangu 'The theory and design of limitation of fundamental rights and freedoms' (2008) 4 *The Law Society of Kenya Journal* 1.
3 As above.
4 See Chapter V of the repealed Constitution on 'protection of fundamental rights and freedoms of the individual'.

> Indeed, one of the biggest problems with fundamental human rights in Kenya stems from the issue of limitation of rights. The Kenyan Bill of Rights has even been described as a bill of exceptions rather than rights.[5]

True, the Bill of Rights was littered with 'claw-back' clauses which often defeated the very essence of guaranteeing human rights.[6] Hiding behind the internal limitations assigned specific rights as well as the general limitation clause entailing that rights would be restricted for greater public interests,[7] for example, of public safety, security and health,[8] state authorities tended to restrict rather than promote and protect human rights. Due to these limitation clauses, the Bill of Rights ended up taking away rights more than it guaranteed them.[9]

The 'claw back' clauses also found favour in the manner in which the repealed Constitution was interpreted. The judiciary, which was entrusted with the task of protecting fundamental rights and individual liberties, had adopted a very restrictive approach to human rights litigation and constitutional interpretation. In one instance, the High Court dismissed an applicant's pleadings on the technical ground simply that he did not

5 Mutakha-Kangu (n 2 above).

6 The following excerpt from the repealed Constitution is illustrative of how rights would be provided for and limited extensively within the same clause in what came to be called 'claw back' clauses. Section 80, for instance, read:

> '(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
> (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
> (c) that imposes restrictions upon public officers, members of a disciplined force, or persons in the service of a local government authority; or
> (d) for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration, and conditions whereby registration may be refused on the grounds that another trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

7 Repealed Constitution, sec 70.

8 See for example the limitations in sec 81(3)(a) & (b) of the repealed Constitution.

9 WV Mitullah et al *Kenya's democratisation: Gains or losses? Appraising the post Kanu state of affairs* (2005) 3.

identify which constitutional provision had been contravened.[10] In *Koigi wa Wamwere v Attorney General*,[11] the Court held that section 72 of the Constitution protected the fundamental right to liberty, but did not specify the manner in which arrests could be made, or where such arrests could be effected. The tribunal declined to concern itself with extradition or the manner in which police officers carry out their duties.

Regarding the general approach to constitutional interpretation, in *Republic v Elman*,[12] the High Court early on set the precedent that the Constitution is to be taken as any other piece of legislation and ought to be interpreted in a strict, rigid, legalistic and conservative manner which was to the detriment of human rights. That position, however, seemed to change during the last days of the old constitutional order.

Within the decade prior to the 2010 Constitution, there were many other progressive judicial precedents although it was still difficult to establish a trend. For instance, in *Roy Richard Elirema and Another v Republic*,[13] a superior court of record held, inter alia, that the right to fair trial means that one must be prosecuted by a competent person. In *George Ngothe Juma and two Others v Attorney General*,[14] the High Court held that an accused person had the right to access prosecution's information relating to the charge in advance, especially witness statements, to be able to adequately prepare his/her defence. The challenge, however, was that the judiciary never evolved a certain and predictable philosophy to guide in the interpretation of the Bill of Rights, and the realisation of rights remained a coincidence rather than a guarantee. A writer correctly observed:

> That the issue of the proper approach to constitutional interpretation has haunted Kenyan courts for as long as we have been independent … the courts adopted an unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation.[15]

While Chapter V of the repealed Constitution contained provisions relating to the protection of fundamental rights and freedoms and the circumstances for derogation, these entitlements were limited to the traditional civil and political rights and did not expressly encompass other fairly important genres of rights like socio-economic rights, women's rights, children's rights, rights of persons with disabilities or even concerns such as non discrimination of persons with HIV/AIDS. For example,

10 *Kenneth Njindo Matiba v The Attorney General* HCCC Misc Application No 666 of 1990.
11 *Koigi wa Wamwere v Attorney General* Misc Application NC No 574/90.
12 *Republic v Elman* [1969] EA 357.
13 *Roy Richard Elirema and Another v Republic* Nairobi Criminal Appeal No 67 of 2002.
14 *George Ngothe Juma and two Others v Attorney General* Nairobi High Court Misc Application No 34 of 2001.
15 M Thiankolu 'Landmarks from *El Mann* to the Saitoti ruling: Searching a philosophy of constitutional interpretation in Kenya' 7 www.kenyalaw.org (accessed 22 May 2014). See, also, G Muigai 'Political jurisprudence or neutral principles: Another look at the problem of constitutional interpretation' (2004) *East African Law Journal* 1.

despite ratifying the International Covenant on Economic Social and Cultural Rights (CESCR),[16] the state hardly took any deliberate legislative steps to wholly domesticate its obligations under the Treaty.[17] Socio-economic rights were neither contained in the former Constitution nor in a separate Bill of Rights. Moreover, judicial tribunals did not play a critical role in their enforcement using the international instruments ratified by the state. It was therefore an accurate assessment that:

> The scope of the human rights protections is rather limited, in terms of those who are protected, in the types of rights protected and in the range of those who are bound by the duties associated with the rights. There is no provision of social and economic rights; and nothing to ensure the basic needs of Kenyans. There is nothing on solidarity rights (peace, development, or environment). Such cultural rights as exist are somewhat negative; culture, in the form of customary law, justifies exceptions to equality rights, which mainly disadvantages girls and women. There are no special provisions for minorities; the Constitution says nothing about the rights of the child, the elderly or disabled persons; the protection against discrimination applies only to citizens of Kenya. Even in the area of civil and political rights, not all are protected: for example there is no recognition of privacy, or rights of political or other forms of people's participation'; the right of an accused to fair trial does not oblige the state to provide a lawyer to the accused even in cases where the death penalty may be imposed. Many modern constitutions are more explicit in the rights of particular sections of society, which in the Kenyan context should include pastoral communities, consumers, prisoners and people on remand, refugees, trade unionists. It does not give citizens a right to obtain information held by the government and thus minimises opportunities for people to scrutinise the efficiency, integrity and honesty of public authorities.[18]

Hansungule was equally correct when he commented:

> The current Constitution is not exactly 'human rights friendly'. Since 1963, Kenya has ratified or acceded to a number of international and regional human rights instruments which have increased the range of human rights standards designed to benefit the people. For example, there are now specific protections of women's rights as well as those of children in international conventions and declarations, which are not captured in the post colonial constitution of Kenya. In theory, at least, Kenya has a Bill of Rights just like any other country with a written constitution. However, in practice, the Bill, far from reflecting the interests of the ordinary Kenyans, represents the parochial interests of the ruling class.[19]

16 International Covenant on Economic Social and Cultural Rights (CESCR) Adopted by the UN General Assembly on 16 December 1966, entry into force 3 January 1976; acceded to by Kenya on 1 May 1972.

17 Concluding observations of the Committee on Economic, Social and Cultural Rights: Kenya (3 June 1993) UN Doc E/C.12/1993/6 (1993) para 10.

18 Constitution of Kenya Review Commission (CKRC) 'The peoples' choice: Report of the Constitution of Kenya Review Commission' (2002) 35.

19 M Hansungule 'Kenya's unsteady march towards the lane of constitutionalism' (2003) 1 *University of Nairobi Law Journal* 43.

Kenya's repealed constitutional dispensation also fell far below the 'equal protection' threshold in at least three cardinal respects. First, although the Constitution prohibited discrimination on a number of grounds, differentiation (especially on the basis of gender) was permitted in matters of personal law such as adoption, marriage, divorce, burial and devolution of property on death.[20] Second, the repealed Constitution did not list exhaustively the grounds upon which discriminated was proscribed. Glaringly omitted from this Constitution were exclusions on the grounds of disability, health status, sexual orientation, to list but a few. It is important to point out however, that a number of 'sectoral' legislations were later enacted to cater for some other categories of people who were not sufficiently protected constitutionally. Such categories include persons with disabilities, whose needs are addressed by the Persons with Disabilities Act,[21] persons with HIV/AIDS, through the HIV/AIDS Prevention and Coordination Act,[22] women, through the National Commission on Gender and Development Act[23] and children, through the Children Act.[24] These sectoral approaches to equality and human rights were hardly successful hence the desire for a comprehensive equality and non-discrimination law.

Third, affirmative action, as a substantive equality principle, was without constitutional expression in Kenya. The Bill of Rights was further faulted as inadequate by modern standards, because its enforcement procedures and institutions were wanting.[25] The repealed Constitution had no specialised bodies like an Ombudsman or Human Rights Commission for promoting or enforcing rights; there was no proper legal aid to enforce rights, and few effective remedies.[26]

The central argument in this chapter therefore is that the 2010 Constitution encompasses a robust Bill of Rights whose provisions surpass those that subsisted in the repealed Constitution. The second part of this chapter analyses the salient features of the 2010 Constitution's Bill of Rights with a view to vindicate the argument that Kenya is indeed experiencing a new dawn in the promotion and protection of human rights. The third part of the chapter concludes the analysis.

20 Repealed Constitution, sec 82(4)(b).
21 Persons with Disabilities Act, 2003.
22 HIV/AIDS Prevention and Coordination Act, 2006.
23 National Commission on Gender and Development Act, 2003.
24 Children Act, 2001.
25 Constitution of Kenya Review Commission (n 18 above).
26 As above.

2 Salient features of the 2010 Constitution's Bill of Rights

Under the 2010 Constitution, the Bill of Rights is presented as an integral part of Kenya's democracy and the framework for social, economic and cultural policies.[27] It thus has both juridical and extra-juridical utility. Applied in the later form, it runs beyond the precincts of the law and judicial tribunals to be the thread that weaves through national policies and agenda. This is consistent with the purpose of the Bill of Rights which is 'to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'.[28] The Bill of Rights is envisioned to have all round application.

Compared to the Bill of Rights in the repealed Constitution or those in many other contemporary jurisdictions, the Bill of Rights in the 2010 Constitution is unique in a number of critical respects. It exhibits the following salient features – it has an exhaustive catalogue of entitlements, contains the different genres of human rights; provides for an expansive 'non-discrimination clause'; expresses regard for substantive equality (affirmative action); reserves certain rights from derogation; carries special regulation of emergencies; espouses a conservative strain of moral philosophy; opts for a centralised limitation clause as opposed to multiple internal limitation clauses; and has both vertical and horizontal implications. The Bill of Rights also comes with viable enforcement apparatuses. These salient features are systematically analysed below.

2.1 Bill of Rights as a near exhaustive catalogue of entitlements

The new Bill of Rights contains a most exhaustive catalogue of human rights. These entitlements include the right(s) to: life, equality and freedom from discrimination, human dignity, freedom and security of the person, slavery, servitude and forced labour, privacy, freedom of conscience, religion, belief and opinion, freedom of expression, freedom of the media, access to information, freedom of association, assembly, demonstration, picketing and petition, political rights, freedom of movement and residence, protection of the right to property, labour relations, environment, economic and social rights, language and culture, family, consumer rights, fair administrative action, and access to justice.[29] In addition, the Bill of Rights has elaborate protection of arrested persons,[30]

27 2010 Constitution, art 19(1).
28 2010 Constitution, art 19(2).
29 See, 2010 Constitution, arts 26 to 48.
30 2010 Constitution, art 49.

the right to a fair hearing[31] and the rights of persons detained, held in custody or imprisoned.[32] There is express and specific protection of children,[33] persons with disabilities,[34] youth,[35] minorities and marginalised groups[36] and older members of society.[37]

The 2010 Constitution defies the nomenclature of human rights into generations. Indeed, it is accurate to describe the new Bill of Rights as a collage of all generations and genres of human rights, a rare development in municipal law. In addition to the usual civil and political rights, it also carries social and economic rights like the right to the highest attainable standard of health;[38] the right to accessible and adequate housing, and to reasonable standards of sanitation;[39] the right to be free from hunger, and to have adequate food of acceptable quality;[40] the right to clean and safe water in adequate quantities;[41] the right to benefit from social security;[42] and the right to education.[43] As noted above, there is further protection of environmental rights in addition to other special and specific rights of children, youth, women, and the elderly, amongst others. Provision is also made for consumer rights setting the Bill of Rights apart from many others.

According to a traditional categorisation of human rights, often ascribed to the French jurist Karel Vasak,[44] human rights unveiled at different epochs along the three-dimensional call of the French revolution, to wit, *liberte, equalite,* and *fraternite*. First to arise were what are now called 'first generation' rights. They are also referred to as civil and political rights. There then emerged 'second generation' rights, or social and economic rights. The human rights discourse, according to this dichotomy, has lately witnessed yet another facet of entitlements termed 'group', 'solidarity' or 'third generation' rights. All these categories collectively grace the Bill of Rights which is seldom for municipal constitutions. The rights could be enjoyed individually (individuals' rights) or collectively (group or collective rights).

Noteworthy, while civil and political rights mostly impose restraints on the exercise of state power and are therefore 'negative' rights, socio-

31 2010 Constitution, art 50.
32 2010 Constitution, art 51.
33 2010 Constitution, art 53.
34 2010 Constitution, art 54.
35 2010 Constitution, art 55.
36 2010 Constitution, art 56.
37 2010 Constitution, art 57.
38 2010 Constitution, art 43(1)(a).
39 2010 Constitution, art 43(1)(b).
40 2010 Constitution, art 43(1)(c).
41 2010 Constitution, art 43(1)(d)
42 2010 Constitution, art 43(1)(e).
43 2010 Constitution, art 43(1)(f).
44 The categorisation of rights into generations is often ascribed to Karel Vasak. See this classification in, for example, PC Aka 'The military, globalisation and human rights in Africa' (2002) *New York Law School Journal of Human Rights* 361.

economic rights tend to extend the scope of state activities, translating them into 'positive' rights.[45] Therefore, the inclusion of all generations of human rights in the Bill of Rights underscores the fact that one category of rights cannot survive without the other. This development is in line with the prevailing wisdom which claims that human rights are interrelated, interdependent, interconnected and equal in status.[46]

2.2 Bill of Rights with an expansive 'non-discrimination clause'

In the new Bill of Rights, discrimination, whether direct or indirect, is prohibited. The Constitution lists grounds for such discrimination to include race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[47] This menu is broad when compared to the repealed Constitution which only listed race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex.[48] The repealed Constitution curiously omitted the very crucial grounds of pregnancy, marital status, health status, age, disability, conscience, belief, and dress amongst others. Liberal critics may however, still fault the new Bill of Right's non-discrimination clause for not including 'sexual orientation' as is the case in South Africa.[49]

Litigating the non-discrimination clause may present problems especially where the litigant(s) claims to be differentiated on the basis of a ground not expressly listed. Such a case may beg the questions: are the grounds listed under the 'non-discrimination clause' exhaustive? Are there other possible areas of discrimination not anticipated but which qualify for protection? Most certainly, these are pertinent questions to be determined by superior courts of record preferably by way of development of progressive jurisprudence. Judicial officers confronted with these issues may take cue from South Africa's Constitutional Court which as a matter of principle does not condone differentiation of any kind on the listed grounds 'unless it is established that the discrimination is fair'.[50] But where the distinction is not listed, the Constitutional Court takes the differentiation in question through a rigorous fairness test. The stages entailed in such an enquiry were enumerated in *Harksen v Lane NO*[51] in the following terms:[52]

45 W Eno 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa' LLM thesis, University of South Africa, 1998 7.
46 See art 5 of the Vienna Declaration and Programme of Action.
47 2010 Constitution, art 27(4) and (5).
48 Repealed Constitution, sec 70 and 82(3).
49 See Constitution of the Republic of South Africa, 1996, sec 9.
50 Constitution of the Republic of South Africa, sec 9(5).
51 *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.
52 I Currie & J de Waal *The human rights handbook* (2005) 235.

(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 9(3) and (4).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

2.3 Bill of Rights with regard for substantive equality

As is already explicit, it is now an accepted principle that the law should treat all human beings equally.[53] However, even with laws and policies that provide for equality and non-discrimination *per se* it is still possible that inequalities could thrive in the given society. This is because persons are stationed differently and certain further remedial measures may be required to attain real equality. For example, despite express recognition of gender equality, women are hardly equal to men due to traditional, cultural, and even legal distinctions which have conventionally perpetrated the subordination of the female gender. Structurally reinforced practices such as patriarchy and capitalism have traditionally led to an unequal status for the sexes.[54] Thus, certain measures are called for to bring women and men on a par before (or as) usual equality procedures are implemented. Often, the measures preferred take the form of affirmative action. Affirmative action measures could also be useful in the amelioration of other sections of society such as ethnic or racial minorities who have suffered past discrimination and prejudices.

53 See, for instance, S Skogly 'Article 2' in G Alfredsson & A Eide (eds) *The universal declaration of human rights: A common standard of achievement* (1999) 75.

54 As above.

These factors impel that the concept of equality be broken down into two: procedural and substantive equality. Procedural or formal equality implies that all sectors of society be treated equal in procedures and means. It means sameness of treatment.[55] With respect to legislation, 'the law must treat individuals in like circumstances alike'.[56] Procedural equality does not dig deeper to understand the society itself or the various stations occupied by the actors upon whom the equality provisions have to be exerted. Procedural equality might provide, for example, that 'both men and women have equal chance to vie for political office'. It may not go further to address circumstances such as gender-based violence, patriarchy and women's economic subordination which might hinder their full realisation of equal political rights.

On the other hand, substantive equality seeks to ensure that equality provisions have impact – both *de jure* and *de facto*. It 'requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal'.[57] Substantive equality emanates from the philosophy that justice is attained when equals are treated equally and injustice when unequals are treated in like manner. Substantive equality reckons, for instance, that while equal educational opportunities might be constitutionally granted, there could be further need to address the underlying cultures and limitations that may hinder girl child's access to education. Thus, substantive equality would insist on affirmative action and other programmes such as social engineering to change society's perception about girl education. In other words, it

> [r]equires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld. The results or effects of a particular rule are highlighted rather than its mere form.[58]

This approach is salient throughout the 2010 Constitution. As an overarching principle, the Bill of Rights obliges the state to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.[59] Similarly, the state is required to 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.[60] Other constitutional measures aimed at substantive equality include the provision for:

55 Currie & De Waal (n 52 above) 232.
56 As above.
57 Currie & De Waal (n 52 above) 233.
58 As above.
59 2010 Constitution, art 27(6).
60 2010 Constitution, art 27(8).

(a) Affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life.[61]

(b) An electoral system that complies with *inter alia* the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender as well as fair representation of persons with disabilities.[62]

(c) Party lists comprising an appropriate number of qualified candidates and which alternates between male and female candidates in the priority in which they are listed; and (c) except in the case of county assembly seats, each party list ought to reflects the regional and ethnic diversity of the people of Kenya.[63]

(d) Respect, by every political party, of the right of all persons to participate in the political process, including minorities and marginalised groups.[64]

(e) Respect and promotion of human rights and fundamental freedoms and gender equality and equity[65] by every political party.

(f) The membership of forty-seven women[66] and twelve members representatives of special interests (including the youth, persons with disabilities and workers)[67] in the National Assembly.[68]

(g) The nomination of sixteen women members to Senate[69] and two further members, being one man and one woman, representing the youth,[70] in addition to the nomination of two members, being one man and one woman, representing persons with disabilities.[71]

(h) The enactment of legislation to promote the representation in Parliament of – (a) women; (b) persons with disabilities; (c) youth; (d) ethnic and other minorities; and (e) marginalised communities.[72]

(i) The appointment of at least four women to the Parliamentary Service Commission.[73]

(j) The representation of both genders in the Judicial Service Commission.[74]

(k) The promotion of gender equality in judicial service.[75]

61 2010 Constitution, art 56.
62 2010 Constitution, art 81.
63 2010 Constitution, art 90(2).
64 2010 Constitution, art 91(1)(e).
65 2010 Constitution, art 91(1)(f).
66 2010 Constitution, art 97(1)(b).
67 2010 Constitution, art 97(1)(c).
68 These members are in addition to two hundred and ninety members, each elected by the registered voters of single member constituencies and the Speaker, who is an *ex officio* member – see 2010 Constitution, art 97(1)(a) & (d).
69 2010 Constitution, art 98(1)(b).
70 2010 Constitution, art 98(1)(c).
71 2010 Constitution, art 98(1)(d). Other members of the Senate are: forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency and (e) the Speaker, who shall be an *ex officio* member. See 2010 Constitution, art 98(1)(a) & (e).
72 2010 Constitution, art 100.
73 2010 Constitution, art 127(2)(c)(i), (ii) & (d).
74 2010 Constitution, art 171(2)(d), (f) & (h).
75 2010 Constitution, art 172(2)(b).

(l) A devolved system of government aimed *inter alia* at protecting and promoting the interests and rights of minorities and marginalised communities.[76]

(m) County governments reflecting *inter alia* the principle that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.[77]

(n) Special seats necessary to ensure that no more than two-thirds of the membership of the respective county assembly is of the same gender.[78]

(o) The inclusion in county assemblies of a number of members of marginalised groups, persons with disabilities and the youth as prescribed by an Act of Parliament.[79]

(p) None inclusion of more than two-thirds of the members of any county assembly or county executive committee from the same gender.[80]

(q) The requirement for the enactment of legislation to prescribe mechanisms to protect minorities within counties.[81]

(r) The principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.[82]

These and similar stipulations have put Kenya in key with international human rights standards such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which, for instance, allows for temporary special measures (affirmative action) to accelerate the achievement of equality in practice between men and women,[83] and actions to modify social and cultural patterns that perpetuate discrimination

> with the view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or the stereotyped roles for men and women.[84]

2.4 Bill of Rights that saves certain rights from derogation

The rights enshrined in the 2010 Constitution may be derogated from with the exception of the right to freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus.*[85] This exclusion of certain rights from derogation, aside from being a unique

76 2010 Constitution, art 174(e).
77 2010 Constitution, art 175(c).
78 2010 Constitution, art 177(1)(b).
79 2010 Constitution, art 177(1)(c).
80 2010 Constitution, art 197(1).
81 2010 Constitution, art 197(2)(b).
82 2010 Constitution, art 150(4).
83 2010 Constitution, art 4.
84 2010 Constitution, art 5.
85 2010 Constitution, art 25.

landmark in Kenya's constitutional history, is also controversial. Generally speaking, the idea of derogation from human rights during emergencies is not inconsistent with international human rights law. Under the framework of the International Covenant on Civil and Political Rights (CCPR),[86] for example,

> derogations are allowed, but States are also required to immediately inform the UN Secretary-General of the provisions from which they have derogated and the reasons for their derogation. A similar communication must be made when the derogation ends.[87]

Being party to this instrument, and international law having the force of law locally,[88] these requirements should be applicable in Kenya. Regrettably, however, the rights saved from exclusion under the new Bill of Rights are few and inexhaustive. The right to life;[89] the right not to be subjected to retroactive penal laws and the right to freedom of conscience and religion are not exempted from derogation as required by the CCPR.[90] South Africa, also a party to the CCPR, constitutionally protects more human rights from derogation, namely:[91] the right to equality,[92] the right to human dignity, the right to life, the right to freedom and security of person,[93] the right to protection from slavery, servitude and forced labour,[94] certain rights of children[95] and rights of arrested, detained and accused persons.[96]

Further, the derogation provisions of the Kenyan Bill of Rights put the country at odds with the African human rights system and particularly the African Charter on Human and Peoples' Rights (African Charter). Although the main regional instrument, the African Charter, is silent on the effect of the suspension or derogation of rights,[97] its treaty body, the African Commission on Human and Peoples' Rights (African Commission), has made it clear that:

86 Kenya acceded to the CCPR on 1 May 1972.
87 F Viljoen *International human rights law in Africa* (2007) 251. See also 2010 Constitution, art 4(3).
88 2010 Constitution, art 2(5) & (6).
89 Judge Emukule in *Republic v John Kimita Mwaniki* [2011] eKLR, was stunned that: 'Strangely also, life is not one of those fundamental rights which may not be limited under section 25 of the Constitution'.
90 Under art 4(2) of the CCPR the right to life; the prohibition on torture, slavery, forced labour, application of retroactive penal laws and the right to freedom of conscience and religion may under no circumstances be derogated from.
91 See Constitution of the Republic of South Africa, sec 37(5).
92 The right is non-derogable with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
93 The right is protected with respect to subsecs 1(d) and (e) and (2)(c) of art 12.
94 The right is protected with respect to slavery and servitude.
95 The following subsections of art 28 are protected (1)(d) and (e); 1(g)(i) and (ii) and 1(i) with respect of children of 15 years and younger.
96 The following subsections of art 35 are protected: (1)(a), (b) and (c); 2(d); (3)(a) to (o), excluding (d); (4) and (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.
97 Viljoen (n 87 above) 251.

> The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.[98]

The African Commission has also held that 'the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter'.[99] The apparent contradictions at both municipal and international levels may pose challenges especially during review of the state by the relevant treaty bodies as well as in the course of litigating the Bill of Rights. An appropriate compromise, perhaps, would be to hold that while the 2010 Constitution permits the derogation from certain rights in particular contexts, the state has further international obligations not to derogate from certain rights at the global level[100] and ultimately it is disallowed to derogate from almost all human rights at the regional level. After all, any legislation enacted in consequence of a declaration of a state of emergency has to be consistent with the Republic's obligations under international law applicable to a state of emergency.[101]

Overall, in the event that certain rights are suspended in accordance with the 2010 Constitution, there is room to hold the state accountable for slightly more non-derogable rights under the CCPR and for all the rights provided for in the African Charter. State organs, officers and individuals are answerable, at the municipal level, for the Bill of Rights and the state is responsible internationally and regionally for her respective obligations. Needless to mention, resort to derogation should be discouraged even in extreme cases of emergency.

2.5 Bill of Rights that carries special regulation of emergencies

Seldom, situations arise in the life of a nation that seriously threatens its security or stability.[102] In response, a government may legitimately declare a state of emergency and make emergency regulations designed to counter the danger.[103] The *African Conference on the Rule of Law* suggested that emergency measures should be invoked only where regular operations of authority are impossible.[104] So long as a situation exists where authorities can operate and the problems arising can be overcome, a state of emergency may not be declared. In addition, the Conference resolved that

98 Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v Chad* para 21.
99 See Gambian Coup case as cited in Viljoen (n 87 above) 252.
100 As discussed above, the CCPR bars states from derogating from more rights than those in those reserved in the Bill of Rights.
101 2010 Constitution, art 58(6)(a)(ii).
102 J Hatchard et al *Comparative constitutionalism and good governance in the commonwealth: An Eastern and Southern African perspective* (2004) 276.
103 As above.
104 See African Conference on the Rule of Law 1961 'Report on the Proceedings' 162 as cited in Hatchard et al (n 102 above).

emergency measures should be exceptional only lasting the duration of the national threat. Even more crucial, the reasons for the emergency must be clearly articulated.

Sufficient safeguards have been taken in the regulation of emergencies. For instance, although the declaration of a state of emergency may justify the limitation of human rights, this is only to the extent that the limitation is strictly required by the emergency and the legislation under which the limitation is hinged is consistent with the Republic's obligations under international law applicable to a state of emergency. The Bill of Rights makes it clear that no limitation shall take effect until it is published in the *Gazette*.[105]

Efforts are also made to ensure that emergency situations occur rarely and are short-lived if they have to happen. A state of emergency may be declared only when the state is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration is necessary to meet the circumstances for which the emergency is declared.[106] Such declaration only applies prospectively for no longer than 14 days.[107] The National Assembly may however extend this period but only on attaining special majorities.[108]

As an additional measure, the Supreme Court has jurisdiction to decide on the validity of a declaration of a state of emergency, any extension of a declaration of a state of emergency and any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.[109]A further safeguard is that a declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration may not permit or authorise the indemnification of the state, or of any person, in respect of any unlawful act or omission.[110]

2.6 Bill of Rights espousing a conservative strain of moral philosophy

A notable attribute of the new Bill of Rights is its high regard for morality and the natural law philosophy. For instance, in a most controversial way, it is stipulated that the life of a person begins at conception.[111] This resolution is both intricate and delicate for it excites very sensitive

105 2010 Constitution, art 58(6).
106 2010 Constitution, art 58(1).
107 2010 Constitution, art 58(2).
108 2010 Constitution, art 58(4). The first extension of the declaration of a state of emergency requires a supporting vote of at least two-thirds of all the members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all the members of the National Assembly.
109 2010 Constitution, art 58(5).
110 2010 Constitution, art 58(7).
111 2010 Constitution, art 26(2).

discourses especially in the areas of jurisprudence and reproductive health rights. During the deliberations that eventually resulted in the Convention on the Rights of the Child (CRC), for example, the Holy See had made the case for reference to the unborn child in defining who a 'child' is. Using this approach, the definition of the child would encompass 'before as well as after birth'. In the end, narrates Veerman:

> It was stated that since national legislation on the question of abortion differed greatly, the Convention could only be widely ratified if it did not take sides on the issue.[112]

However, this position may not have settled the controversy given that the Preamble to the Treaty carries the very position the Holy See had championed. The relevant preambular section (paragraph nine) reads:

> *Bearing in mind* that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*'.

As expected, 'most people now interpret the Preamble as a statement against abortion'.[113] In fact, the Holy See itself has expressed confidence that the ninth preambular paragraph will serve as the perspective through which the rest of the Convention will be interpreted.[114] Kenyans by dint of the 2010 Constitution have heeded this religious and moral call.

It is further important to note that although the Bill of Rights, while emulating South Africa's Constitution,[115] prohibits discrimination on an exhaustive list of grounds, it curiously leaves out only the ground of 'sexual orientation'. Sexual orientation is not one of the protected grounds leaving it open to the view that there is no room for same sex relationships in the legal system. Another example of morally cautious provision is article 45(2) granting every adult the right to marry *only* a person of the opposite sex, based on the free consent of the parties.

2.7 Bill of Rights with centralised general limitation clause

As noted above, the Bill of Rights in the repealed Constitution was often criticised for belabouring the limitations of human rights more than it guaranteed the entitlements. Human rights would be limited in two major ways: by way of internal limitations assigned to particular rights; and through a general limitation clause which stated that human rights could be limited for the sake of greater interests of public health, security and

112 PE Veerman *The rights of the child and the changing image of childhood* (1992) 185.
113 Veerman (n 112 above) 186.
114 Holy See 'interpretative declaration' declaration under the CRC.
115 See Constitution of the Republic of South Africa, 1996, sec 9(3).

morality. These provisions were often utilised to defeat the realisation of human rights. But the anomaly has since been corrected. With the exception of three human rights – right to property, right to freedom of the media and the right to freedom of expression – the new Bill of Rights does not make use of internal limitations or 'claw back clauses'. This leaves the limitation of all human rights to be operated by one general and arguably progressive clause:

> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the nature of the right or fundamental freedom;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. [116]
>
> (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom –
>
> (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
>
> (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
>
> (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
>
> (3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.
>
> (4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.
>
> (5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service –
>
> (a) Article 31 – Privacy;

116 See 2010 Constitution, art 24(1).

(b) Article 36 – Freedom of association;

(c) Article 37 – Assembly, demonstration, picketing and petition;

(d) Article 41 – Labour relations;

(e) Article 43 – Economic and social rights; and

(f) Article 49 – Rights of arrested persons.

Six important points could be noted about the general limitation clause.[117] First, that it provides for limitation of the Bill of Rights only by way of law.[118] Thus, limitations by executive or military decrees or other extra-juridical devices have no place in the new legal dispensation.

Second, that where a limitation is sanctioned by law, it has to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account, inter alia: the nature of the right or fundamental freedom; the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.[119] This exercise is a balancing act of which it was stated:

> In the balancing process the relevant consideration will include that nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[120]

Third, human rights cannot be limited by inference or implication. Legislation limiting the Bill of Rights must specifically and expressly state the intention to limit a particular right or fundamental freedom as well as the nature and extent of the limitation in question.[121] Despite this, legislation may limit the application of certain stipulated rights and fundamental freedoms[122] to persons serving in the Kenya Defence Forces or the National Police Service.[123]

117 2010 Constitution, art 24.
118 2010 Constitution, art 24(1).
119 2010 Constitution, art 24(1).
120 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) 104. The phraseology in art 24(1) of the Constitution of Kenya is adopted entirely from art 36(1) of the Constitution of South Africa. Jurisprudence on it from South African courts especially the Constitutional Court is therefore imperative.
121 2010 Constitution, art 24(2)(a) - (b).
122 Right to privacy; right to freedom of association; right to assembly, demonstration, picketing and petition; labour relations rights; economic and social rights; and rights of arrested persons.
123 2010 Constitution, art 24(5).

Fourth, it is required that no limitation goes so far as to derogate from the core or essential content of the right in question.[124] Fifth, the burden of demonstrating, before courts, tribunals and other authorities, that a limitation meets the above requirements is vested with the state or person(s) justifying the limitation[125] and not the individual(s) or group(s) entitled to a particular right.

Finally, perhaps in appreciation of the fact that certain globally acclaimed human rights may not always be palatable to all sections of society, the 2010 Constitution concedes that the provisions on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.[126] This qualification may be justified because, as cultural relativists argue, global human rights standards which greatly influenced the new Bill of Rights often fail to take into consideration that each region has its own unique rights problems or priorities. Consequently, 'regional specifities often are the victims in processes of universal consensus-seeking'[127] and the provision under investigation could be understood as an effort towards a practical cultural equilibrium.

2.8 Bill of Rights with both vertical and horizontal application

A bill of rights customarily regulates the 'vertical' relationship between the individual and the state.[128] Usually, this is an unequal relationship in which

> The state is far more powerful than any individual. It has a monopoly on the legitimate use of force within its territory. State authority allows the state to enforce its commands through the criminal law. If not protected by a bill of rights against abuse of the state's powers, the individual would be in an extremely vulnerable position.[129]

It is therefore quite natural for Kenya's Bill of Rights to bind *all* state organs.[130] What may not be conventional is the 'horizontal' application of the Bill of Rights whereby *all persons*[131] are bound. Thus, both state authorities as well as private individuals are expected to fulfil their part otherwise they could be held liable for their respective violations. Already, in *Purity Kanana Kinoti v Republic*,[132] a police officer found individually

124 2010 Constitution, art 24(2)(c).
125 2010 Constitution, art 24(3).
126 2010 Constitution, art 24(5).
127 Viljoen (n 87 above) 262.
128 Currie and De Waal (n 52 above) 43.
129 As above.
130 2010 Constitution, art 20(1).
131 As above. 'Person' under art 260 of the Constitution includes a company, association or other body of persons whether incorporated or unincorporated.
132 *Purity Kanana Kinoti v Republic* [2011] eKLR.

responsible for violations of an accused person's human rights was held to be liable to compensate his victim. This means horizontal application is real and the state is no longer the only *direct* duty-bearer.

2.9 Bill of Rights with viable enforcement apparatuses

In the last two decades, states appear to have developed interest in complementing the traditional organs of state (executive, legislature and judiciary) ostensibly to secure more protection for human rights.[133] The bodies that have emerged to buttress the bulwark of human rights enforcement mechanisms have taken the form of human rights commissions, ombudsmen offices or more specialised institutions, for instance, on racial discrimination or gender equality. It is not uncommon to find hybrid bodies exhibiting a mixture of these traits. Indeed, Reif defines National Human Rights Institutions (NHRIs) as the ombudsmen, human rights commissions or hybrid human rights ombudsmen.[134]

The human rights enforcement mechanism which the 2010 Constitution articulates (in addition to courts) is a NHRI, the Kenya National Human Rights and Equality Commission.[135] The functions assigned the Commission are –

(a) to promote respect for human rights and develop a culture of human rights in the Republic;

(b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;

(c) to promote the protection, and observance of human rights in public and private institutions;

(d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;

(e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;

(f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs;[136]

(g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;

133 See AE Pohjolainen *The evolution of national human rights institutions: The role of the United Nations* (2006) 2.

134 LC Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) *Harvard Human Rights Journal* 2.

135 2010 Constitution, art 59.

136 2010 Constitution, art 59(2).

(h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;

(i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;

(j) to report on complaints investigated under its mandate and to take remedial action; and

(k) to perform any other functions prescribed by legislation.

Exercising the latitude given to it by article 59(4) of the 2010 Constitution, which provides that legislation may restructure the aforementioned Commission into two or more separate commissions, Parliament has established all the categories of NHRIs discussed above – a human rights commission, Kenya National Commission on Human Rights (KNCHR);[137] an ombudsman, the Commission on Administrative Justice (CAJ);[138] and a specialised gender equality commission, the National Gender and Equality Commission.[139] The three institutions complement each other in the promotion and protection of human rights.

3 Conclusion

This chapter has illustrated how Kenya's 2010 Constitution differs with the repealed Constitution in the promotion and protection of human rights. The departure is timely because one of the underlying themes in Kenya's constitutional history has been the question of how to establish a constitutional regime that would guarantee everyone equal rights regardless of their status. The struggle to entrench a workable human rights regime is also evident in the country's constitutional history. Although the repealed Constitution came with a flowery package of guarantees, it failed to satisfactorily establish a workable human rights regime, thus posing a big threat to democracy and good governance. With its seriousness in providing deserved recognition to human rights and fundamental freedoms, the 2010 Constitution has given Kenyans a golden opportunity to redefine the future of their nation.

137 Established by the Kenya National Commission on Human Rights Act 14 of 2011.
138 Established by the Commission on Administrative Justice Act 23 of 2011.
139 Established by the National Gender and Equality Commission Act 15 of 2011.

CHAPTER 3

SOCIO-ECONOMIC RIGHTS AND THE POTENTIAL FOR STRUCTURAL REFORMS: A COMPARATIVE PERSPECTIVE ON THE INTERPRETATION OF THE SOCIO-ECONOMIC RIGHTS IN THE CONSTITUTION OF KENYA, 2010

Nicholas Wasonga Orago

1 Introduction

The struggle for a new constitutional dispensation in Kenya was underpinned by the desire for a new political, economic and social dispensation capable of eradicating poverty, inequality and marginalisation. The review process for the new Constitution took place in a stressed political and socio-economic environment resulting from decades of socio-economic mismanagement and poor governance.[1] Poor economic performance and the economic liberation policies of the World Bank saw a general reduction in public social spending from 20 per cent in 1980 to 13 per cent in 1995.[2] Hunger and malnutrition had generally increased across the population from 32,1 per cent in 1987 to 34 per cent in 1998, and most families in the rural areas and informal urban settlements were experiencing increased food insecurity despite Kenya being broadly self-sufficient in food production.[3] Other well-being indicators were similarly deteriorating, with infant mortality rate increasing from 70 per 1 000 live births in 1990 to 74 per 1 000 live births in 1999; and maternal mortality rate being estimated at 549 per 100 000 live births as compared to the global average of 193 per 100 000.[4] On the fiscal front, the Kenyan economy, which was the most vibrant in Africa in the first decade of independence, declined steadily due to serious mismanagement and high level corruption in government, with economic growth dwindling from 4,6 per cent in 1996 to 0,3 per cent in 2000, leading to a ranking as one of the countries with the fastest declining economy.[5]

1 Constitution of Kenya Review Commission (CKRC) Final Report (10 February 2005) 52 http://mlgi.org.za/resources/localgovernmentdatabase/bycountry/kenya/commissionreports/Main%20report%20CKRC%202005.pdf (accessed 28 December 2014).
2 As above.
3 CKRC Report (n 1 above) 53 - 54.
4 As above.
5 CKRC Report (n 1 above) 56 - 57

The decline in the economy has affected all sectors of the economy leading to increased unemployment, fluctuating interest rates, widening trade deficits, widening inequality gap and widespread poverty.[6]

The above socio-economic strain spurred the struggle for the emancipation of the Kenya people through the negotiation, review and promulgation of a new Constitution. The aim of the Kenyans who struggled for the new political and socio-economic dispensation was the entrenchment of a just system of government that will enhance access to the basic socio-economic goods and services for the Kenyan people, especially the poor, vulnerable and marginalised. This is starkly captured by the then President of the Republic of Kenya, Mwai Kibaki during the promulgation of the new Constitution when he stated as follows:[7]

> The New Constitution gives our nation a historic opportunity to decisively conquer the challenges that face us today. It provides us an avenue to renew our fight against unemployment and poverty; an opportunity to work and become a developed people and nation … As we embark on a journey of national renewal, I ask all of us to keep in mind the vision of the NEW KENYA. A New Kenya where we no longer have people living in poverty or facing unemployment … where food insecurity will be a thing of the past … where there will be more opportunity for employment and business … where there is better housing, healthcare and education for our people … where citizens will lead productive and dignified lives. This is the promise of the new Constitution.

The transformative aim of the 2010 Constitution has been affirmed by the High Court of Kenya in the case of *Satrose Ayuma and Others v The Attorney General and Others* as follows:[8]

> The crave for the new Constitution in this country was driven by people's expectations of better lives in every aspect, improvement of their living standards and just treatment that guarantees them human dignity, freedom and a measure of equality.

The entrenchment of justiciable socio-economic rights (SERs) in the 2010 Kenyan Constitution promulgated on the 27 August 2010 was one of the mechanisms aimed at the achievement of these aspirations of the Kenyan people.

This chapter seeks to develop a comparative guide for the interpretation and adjudication of the SERs entrenched in the 2010 Kenyan Constitution. It is divided into six related sections. After this brief

6 As above.
7 The Promulgation Speech by HE Hon Mwai Kibaki during the promulgation of the Kenyan Constitution on 27 August 2010 http://english.alshahid.net/archives/11884 (accessed 28 December 2014).
8 *Satrose Ayuma and 11 Others v The Attorney General and 2 Others* High Court Petition No 65 of 2010 22.

introduction, section two elaborates on the nature, scope and the obligations arising from the entrenched SERs. This section delves into an analysis of the standard of progressive realisation, teasing out the components of that standard such as the obligation to take steps, the maximum of available resources as well as the prohibition of retrogressive measures. The import of the section is to illustrate that even though the standard of progressive realisation accords the government a margin of appreciation in determining measures for the realisation of SERs, it contains immediate obligations that the state must realise as soon as it assumes SER obligations. Section three entails an analysis of the litigation strategies that have been used in the judicial adjudication of SERs such as the individualised strategy and the structural litigation strategy. Due to the imperfections of the two systems, the section proposes the adoption of a mixed strategy in the litigation of SERs in Kenya. This mixed strategy seeks to achieve structural reforms to enhance the overall realisation of SERs while at the same time taking into consideration the immediate needs of the claimants before the courts. Section four examines the approaches to SER adjudication, being the reasonableness approach and the minimum core approach. It proposes the adoption of an integrated approach that encapsulates the progressive aspects of the minimum core and the reasonableness approaches. Section five reflects on the importance of remedies in SER litigation, proposing the adoption and use of creative and innovative remedies such as the suspended declaration of invalidity and the structural interdict. The chapter ends with a brief conclusion in section six.

2 Understanding the nature, scope and content of socio-economic rights in the 2010 Kenyan Constitution

2.1 Definition and importance of socio-economic rights

SERs are defined as the rights concerned with the material bases of the well-being of individuals and communities, that is, rights aimed at securing the basic quality of life for the members of a particular society.[9] These rights are aimed at ensuring that human beings have the ability to obtain and maintain a decent standard of living consistent with their human dignity.[10] They include the right to shelter, food, water, healthcare, education, work and social security.[11] Though these rights are relevant to

9 P O'Connell *Vindicating socio-economic rights: International standards and comparative experiences* (2012) 3.

10 F Viljoen 'The justiciability of socio-economic and cultural rights: Experience and problems' in Y Donders & V Volodin (eds) *Human rights in education, science and culture: Legal developments and challenges* (2007) 53 54.

11 As above.

all sectors of society, they are more pertinent in the protection of poor, marginalised and disadvantaged groups due to these groups' material deprivation as well as their lack of political voice.[12] The importance of the entrenchment of these rights in the 2010 Constitution has been affirmed by the High Court of Kenya in the case of *John Kabui Mwai and Others v Kenya National Examination Council and Others* as follows:[13]

> In our view, the inclusion of [SERs] in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources … The realisation of [SERs] means the realisation of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need.

The interpretation and the implementation of SERs be it in the development of social policy or the enactment of social legislation by the executive or legislative arms of government, or be it in the context of litigation in the courts must critically seek to transform the lives of the poor, marginalised and vulnerable sections of society, who benefit most from the scrupulous implementation of SERs. Litigation, especially public interest litigation (PIL) is key in shattering the executive bottlenecks and legislative inertia in the realisation of SERs, but PIL institutions or organisations do not always give proper weight to the views, needs and priorities of the poor, vulnerable and marginalised communities, with the consequence that the results of litigation are counter-productive to these vulnerable groups. It is therefore imperative that SER litigation aimed at the achievement of structural reforms in institutions with the mandate of implementing SERs, must take into account the needs, priorities and views of these vulnerable groups.

2.2 The nature of the socio-economic rights in the 2010 Kenyan Constitution

The 2010 Kenyan Constitution has, for the first time, entrenched SERs as part of a comprehensive Bill of Rights encompassed in a bold Constitution

12 O'Connell (n 9 above) 5.

13 *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others* High Court of Kenya at Nairobi, Petition No 15 of 2011 6. This is further strengthened by the affirmation by the High Court in the case of *Okwanda v The Minister of Health and Medical Services & 3 Others*, High Court of Kenya at Nairobi, Petition No 94 of 2012 para 13 that the incorporation of SERs in art 43 of the Constitution was aimed at dealing with issues of poverty, employment, ignorance and disease, and to achieve the above, the state has to deliver tangible benefits especially to those living in the margins of society. The Court contended that failure to enforce SERs will undermine the whole foundation of the Constitution.

aimed at the egalitarian transformation of the Kenyan society.[14] The main provisions on SERs in the Constitution are contained in the following articles 20(5),[15] 21(2),[16] 21(3),[17] 43,[18] and 53(1)(a)[19] and (b)[20] and they encapsulate the major SERs that have been captured by the constitutions of countries that have entrenched SERs.[21] The 2010 Constitution deems these rights as justiciable. According to Professor Frans Viljoen, justiciability entails three related factors: first, the nature of the claim – meaning that the claim must be based on the infringement of a clear subjective right; secondly, the setting within which the claim can be resolved – meaning that the claim must be resolved by a judicial body or a body with judicial characteristics; and, thirdly, the consequences of a

14 The 2010 Kenyan Constitution, art 19 earmarks the Bill of Rights as an integral part of Kenya's democratic state and the framework for all social, economic, and cultural policies. It further states the objective entrenchment of fundamental rights in the Constitution, which is to preserve the dignity of individuals and communities as well as the promotion of human rights and the realisation of the potential of all human beings.

15 This is a very important provision as it requires the state to prioritise the allocation of resources towards the realisation of the entrenched SERs in art 43. It provides as follows:

> 'In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles –
> (a) it is the responsibility of the State to show that the resources are not available;
> (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
> (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.'

16 Article 21 deals with the obligations of the state in the implementation of rights and fundamental freedoms (duty to observe, respect, protect, promote and fulfil entrenched rights) and sub-art 2 requires the state to 'take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under article 43'.

17 Requires the prioritisation of the socio-economic needs of the poor, vulnerable and marginalised communities in Kenya. It provides as follows:

> 'All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.'

18 Article 43 is entitled 'Economic and social rights' and it provides in article 43(1) that 'Every person has the right –

> to the highest attainable standard of health, which includes the right to healthcare services, including reproductive health;
> to accessible and adequate housing, and to reasonable standards of sanitation;
> to be free from hunger, and to have adequate food of acceptable quality;
> to clean and safe water in adequate quantities;
> to social security; and,
> to education'
> Article 43(2) prohibits the denial of emergency medical treatment;
> Article 43(3) requires the state to provide social security to persons who are unable to support themselves and their dependants.

19 Every child's right to free and compulsory education.

20 Every child's right to basic nutrition, shelter and healthcare.

21 See the 1996 South African Constitution, secs 26, 27 & 28.

successful invocation of the claim by a petitioner – meaning that should the judicial body positively determine a violation of the subjective right in question, it must remedy the violation.[22] These criteria of justiciability of SERs are met by the 2010 Kenyan Constitution which encompasses these rights as an integral part of the Bill of Rights, providing standing to a wide array of parties to access the courts in instances of the violation, infringement, denial or the threatened infringement of these rights.[23] Justiciability is further affirmed by article 23 as read with article 165 of the Constitution which gives jurisdiction to the High Court to hear and determine applications for the violation of rights and to redress such violations through the adoption of effective remedies.

The justiciability of similarly worded SERs in the South African Constitution was affirmed by the South African Constitutional Court (SACC) in the *First Certification* Judgement where the Court stated as follows:[24]

> Nevertheless, we are of the view that these rights are, at least to some extent, justiciable … The fact that [SERs] will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, [SERs] can be negatively protected from improper invasion.

The justiciability of the entrenched SERs has also been affirmed by the Kenyan Courts in several cases.[25] However, despite this affirmation, there continues to be disturbing jurisprudence from the Kenyan Courts, including the Supreme Court, which views some entrenched constitutional rights as general principles or general aspirations to be realised at some future point in time.[26] In litigating SERs, practitioners must thus be firm in asserting the justiciability of SERs.

2.3 The nature and scope of the obligations arising from the entrenched socio-economic rights

When a state entrenches human rights in the Bill of Rights of its constitution, it assumes a continuum of negative and positive obligations for the realisation of those entrenched rights. This continuum of obligations applies to both civil and political rights (CPRs) and SERs as

22 Viljoen (n 10 above) 55.
23 2010 Constitution, art 22.
24 *Re Certification of the Constitution of the Republic of South Africa* (*First Certification* case) 1996 (10) BCLR 1253 (CC) para 78.
25 See *Mitu-Bell Welfare Society v Attorney General & 2 Others* Nairobi Petition No 164 of 2011 20 - 21; and *Ibrahim Songor Osman v Attorney General & 3 Others* High Court Constitutional Petition No 2 of 2011 7, amongst others.
26 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Supreme Court of Kenya, Advisory Opinion Application 2 of 2012 paras 60 - 73; *Charo Wa Yaa v Jama Abdi Noor & 5 Others* High Court of Kenya at Mombasa Misc Civil Application No 8 of 2011 12.

was acknowledged by the African Commission on Human and Peoples' Rights in the case of *SERAC and Another v Nigeria* as follows:[27]

> Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both [CPRs] and [SERs]-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.

The obligation to respect requires the state to

> refrain from interfering in the enjoyment of all fundamental rights, to respect right-holders, their freedoms, autonomy, resources and liberty of action ... to respect the free use of resources owned or at the disposal of individuals alone or in association with others … for the purpose of rights-related needs.[28]

The obligation to protect entails the state putting in place a legislative framework and other measures aimed at creating a conducive atmosphere for the protection of right-holders from violation of their SERs by third parties, and the provision of effective remedies should such violation by third parties occur.[29] This is a positive obligation requiring the state to protect right-holders from political, economic and social interference. It also requires the state to put in place appropriate measures to ensure governmental accountability, as SER claims are mostly claims against governmental action or inaction that violates individuals and group SERs. The obligation to promote requires the state to put in place measures aimed at the promotion of tolerance, raising awareness, and the building of infrastructure to enhance the enjoyment of human rights.[30] The obligation to promote human rights, especially SERs, is closely linked with article 25 of the African Charter on Human and Peoples' Rights which engenders the duty of the state to promote and ensure, through teaching, education and publication, that Charter rights as well as its obligations are understood by everybody within its national jurisdiction. The obligation to fulfil is a positive one requiring the state to undertake all the necessary measures towards the actual realisation of SERs either through the creation of a conducive and enabling atmosphere to allow individuals to realise their own SERs or the provision of basic needs such as food or social security resources to those who, due to circumstances beyond their powers, are unable to provide for themselves.[31] Though this obligation is closely linked

27 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR) 2001 para 44.
28 *SERAC* (n 27 above) para 45.
29 *SERAC* (n 27 above) para 46. The duty to provide effective remedies is closely linked with the duty of states as provided in art 26 of the Charter which provides for the duty of the state to guarantee the independence of the courts and ensure the establishment and improvement of other appropriate national institutions entrusted with the protection and promotion of Charter rights.
30 *SERAC* (n 27 above) para 46.
31 *SERAC* (n 27 above) para 47.

to the standard of progressive realisation and availability of resources, the government still has an obligation to prove that they have put in place effective, efficient and inclusive policies and programmes for the fulfilment of SERs to the populace, especially the most vulnerable sectors of society. In the Kenyan context, these obligations are contained in article 21 of the Constitution which provides that '[i]t is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights'.[32] Due to the similarities in the wording of the obligations, the Kenyan courts should seek guidance from the African Commission's interpretation of these SERs obligations.

The scope of the above obligations are however not absolute, and can be limited by the state either through internal limitations, as is the case with the SERs contained in article 43 of the Constitution, or by the article 24 external limitation clause, for those SERs not subject to internal limitations. In relation to the SERs contained in article 43, their scope is internally limited by the adoption the standard of progressive realisation, requiring the state to take legislative, policy and other measures for the progressive realisation of those rights.[33] The standard of progressive realisation in the Constitution has been adopted from article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides as follows:[34]

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The standard has similarly been adopted in other international human rights instruments providing for SERs[35] as well as in national constitutions that entrench justiciable SERs.[36] Therefore, a proper understanding of the standard necessitates a comparative analysis of international and foreign national jurisprudence.

32 The 2010 Constitution, art 21(1). For an elaboration of the content of these obligations in relation to the SERs in the Kenyan Constitution, see *Mitu-Bell Welfare Society* (n 25 above) 22 - 23.

33 The 2010 Constitution, art 21(2).

34 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976 http://www2.ohchr.org/english/law/cescr.htm (accessed 10 September 2013).

35 Convention on the Rights of the Child (UNCRC), art 4; Convention on the Rights of Persons with Disabilities (UNCRPD), art 4

36 The Constitution of the Republic of South Africa, 1996, secs 25(5), 26 & 27. See *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC) para 45, where the South African Constitutional Court adopted, in the South African context, the meaning of the standard of progressive realisation as developed internationally by the CESCR Committee.

2.3.1 Progressive realisation

The standard of progressive realisation was adopted as a flexibility device which acknowledges that the full realisation of SERs cannot be achieved in a short period of time due to the realities of the world and the difficulties, in terms of human and financial resources, faced by most of the developing countries.[37] The flexibility does not, however, mean that states should be lethargic or unduly delay the realisation of SERs at the national level. The CESCR Committee, in interpreting the standard of progressive realisation, has affirmed that states must move as expeditiously, and as effectively, as possible towards meeting their goal of the full realisation of SERs, the *raison d'être* of the Covenant.[38] The Maastricht Guidelines also acknowledges this requirement for expeditious realisation of Covenant obligations by providing the following:[39]

> The fact that the full realisation of most [SERs] can only be achieved progressively … does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible ... The State cannot use the "progressive realisation" provisions in article 2 of the Covenant as a pretext for non-compliance.

The requirement for expeditious realisation of SERs has been affirmed, at the national level, by the SACC in the *Grootboom* judgment when it interpreted 'progressive realisation', with regard to housing, to impose obligations on the state to

> progressively facilitate accessibility and examine legal, administrative, operational and financial hurdles with the aim of lowering them over time and making housing accessible to a larger number, and a wider range, of people as time progresses.[40]

Even though the Covenant adopts the 'progressive realisation' standard, it also contains immediate obligations.[41] They are as follows: non-

37 CESCR Committee General Comment No 3: The Nature of States Parties' Obligations (art 2, para 1, of the Covenant) 14 December 1990, E/1991/23, paras 1 & 9 http://www.unhcr.org/refworld/docid/4538838e10.html (accessed 28 September 2013); M Sepulveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 312. For an elaboration of 'progressive realisation' in the Kenyan context, see the Supreme Court Advisory Opinion (n 17 above) paras 27 - 59.

38 CESCR Committee General Comment No 3 (n 37 above) para 9.

39 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22 - 26, 1997, guideline 8 http://www.escr-net.org/resources_more/resource (accessed 30 September 2013). See also the Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights, (hereafter Limburg principle) principle 21 http://www.acpp.org/RBAVer1_0/archives/Limburg%20Principles.pdf (accessed 30 September 2013), which obliges states to expedite the realisation of the rights and not to use the 'progressive realisation' standard to defer indefinitely efforts to ensure full realisation.

40 *Grootboom* (n 36 above) para 45.

41 See CESCR Committee General Comment No 3, para 1; General Comment No 4, para 8; General Comment No 9, para 10, General Comment No 13, paras 31 & 43;

discrimination;[42] an obligation to take steps (as discussed herein below); an obligation to realise the minimum core content of substantive SERs;[43] trade union rights;[44] an obligation to ensure fair wages and equal remuneration for equal work;[45] an obligation to take measures for the protection of children and young persons without discrimination; an obligation to penalise by law the employment of young children and young persons in dangerous or harmful work, and the duty to prohibit child labour;[46] the duty to provide compulsory primary education free of charge;[47] an obligation to respect the freedom of parents to choose schools for their children;[48] the freedom to establish and direct educational institutions;[49] the freedom essential for scientific research and creative activity;[50] an obligation to monitor implementation of the Covenant rights,[51] which include the duty to submit initial and progressive reports to treaty monitoring bodies,[52] amongst others.[53] The immediate nature of these duties is reflected by the wording of the rights which provides for an undertaking to 'ensure' and 'guarantee'.[54] These obligations are thus not subject to the internal limitations of progression and availability of resources. Further, they are binding on Kenya by dint of its accession to the ICESCR on 1 May 1972 due to article 2(6) of the Kenyan Constitution which provides that '[a]ny treaty or convention ratified by Kenya shall

General Comment No 14, para 30; General Comment No 15, paras 17 & 37; General Comment No 16, paras 16, 32 & 40; General Comment No 17, paras 25 & 39; General Comment No 18, paras 19 & 33; General Comment No 19, para 40; General Comment No 20, para 7; and, General Comment No 21, paras 25, 44 & 66 - 67. See also Limburg Principles, principles 16 & 21.

42 CESCR Committee General Comment No 20, para 7, which provides that '[n]on-discrimination is an immediate and cross-cutting obligation in the Covenant'. The CESCR Committee has also stated, in General Comment No 13, para 43 that state parties have an immediate obligation in relation to the right to education, such as the guarantee that the right will be exercised without discrimination of any kind.

43 Limburg Principles, principle 25, which provides that 'State Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all'.

44 ICESCR, art 8.

45 ICESCR, art 7(a)(i).

46 ICESCR, art 10(3).

47 ICESCR, art 13(2) (a); CESCR Committee General Comment No 13, para 51.

48 ICESCR, art 13(3).

49 ICESCR, art 13(4).

50 ICESCR, art 15(3).

51 In relation to housing, see, CESCR Committee General Comment No 4, para 13. Monitoring requires the development of relevant indicators and benchmarks for each of the substantive SER, see Sepulveda – Nature of SER obligations (n 37 above) 363. According to the Maastricht Guidelines, guideline 15(f), failure to monitor the realisation of SER is a violation of the Covenant.

52 AR Chapman 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23 25.

53 See Sepulveda – Nature of SER obligations (n 37 above) 175 & 345; L Chenwi '*Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court'* (2010) 37ff http://www.spii.org.za/agentfiles/434/file/Progressive%20realisation%20Research%20paper1.pdf (accessed 10 September 2013).

54 Chenwi (n 53 above) 27; P Alston & G Quinn 'The nature and scope of state parties obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 185 - 186.

form part of the laws of Kenya under this Constitution'.[55] They can thus only be validly limited by the state as per the general limitation clause provided for in article 24 of the 2010 Constitution.

2.3.2 Obligation to take steps

In an effort to expeditiously realise SERs, the standard of progressive realisation requires the state to immediately take deliberate, concrete and targeted steps aimed at, and capable of fully realising, SERs.[56] De Schutter avers that in order to fulfil this obligation as swiftly as possible, the state should adopt national strategies entrenched in legislative, policy and programmatic frameworks with quantified and time-based objectives reflected in sufficient benchmarks and monitoring indicators.[57] UN Food and Agriculture Organisation (FAO) in their *Voluntary Guidelines for the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* (2004) also reiterate that strategies for the progressive realisation of SERs must include:

> objectives, targets, benchmarks, time-frames; and actions to formulate policies, identify and mobilise resources, define institutional mechanisms, allocate responsibilities, coordinate the activities of different actors, and to provide for monitoring mechanisms.[58]

The necessity for the adoption of reasonable steps in the realisation of SERs is also affirmed, at the national level in the South African SER jurisprudence which indicates that for such measures to be reasonable, the must meet the following criteria:[59]

(a) Be comprehensive, coherent and coordinated, and must also be properly conceived and implemented;

(b) Be inclusive, balanced, flexible and make appropriate short-, medium- and long-term provisions for people in desperate need or in crisis situations, whose ability to enjoy all human rights is most in peril;

(c) Clearly set out responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation;

55 For a comprehensive analysis of the place and status of international law in the Kenyan domestic jurisdiction after the promulgation of the 2010 Constitution, see N Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13 *African Human Rights Law Journal* 415.

56 CESCR Committee General Comment No 3, paras 2 & 4.

57 O de Schutter *International human rights law: Cases, materials and commentaries* (2010) 462.

58 FAO *Voluntary Guidelines for the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* 23 September 2004, para 3.3 http://www.fao.org/docrep/meeting/008/J3345e/j3345e01.htm (accessed on 10 September 2013).

59 Chenwi (n 53 above) 35 - 37.

(d) Be tailored to the particular context in which they are to apply and take account of the different economic levels in society;

(e) Be continuously reviewed because conditions change;

(f) Be transparent and have its contents made known appropriately and effectively to the public; and

(g) Allow for meaningful or reasonable engagement with the public or affected people and communities.

Apart from the adoption and implementation of national strategy for the realisation of SERs, the state must also put in place sufficient, practical, accessible, affordable, timely and effective remedies, both judicial and administrative, for the enforcement of SERs should there be violations.[60] Some of the remedies which are effective in the realisation of SERs are discussed more elaborately in section 5 below.

2.3.3 The maximum of available resources

An important component of the standard of progressive realisation is resources, and due to the reality that states are not equally endowed in terms of resources, it acknowledges that the realisation of SERs in any particular state is vitally dependant on the economy of the state.[61] Even though the link between available resources and realisation of SERs calls for a margin of appreciation to be given to the government in the measures put in place to realise SERs, the discretion is not absolute, as it requires the prioritisation of social spending, especially to meet the urgent needs of the poor and vulnerable groups in society. This has been affirmed, at the international level, by the CESCR Committee which has emphasised that even in situations of severe economic constraints, marginalised and vulnerable groups must be protected through the adoption of low-cost targeted programmes.[62] This need for prioritisation has also been affirmed at the national level in the South African SER jurisprudence.[63]

In the Kenyan context, the Constitution accords a margin of appreciation to the government in its adoption of measures and the allocation of resources in the realisation of SERs by providing as follows:[64]

> [T]he court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

60 CESCR Committee General Comment No 3, para 5; and General Comment No 9, para 9.
61 Alston & Quinn (n 54 above) 177 - 181.
62 CESCR Committee General Comment No 3, para 12; and General Comment No 15, para 13.
63 See *Grootboom* (n 36 above) paras 24, 52 & 99; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) paras 38 - 40.
64 The 2010 Constitution, art 20(5)(c).

However, this discretion of the government to rely on the unavailability of resources as a defence for the non-realisation of SERs is not absolute, and is constrained by the Constitution itself which places the onus on the government to demonstrate the unavailability of resources.[65] The Constitution further requires the government to prioritise its resources in the realisation of its SERs obligations by providing as follows:[66]

> [I]n allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.

In relation to vulnerable and marginalised groups, the Constitution provides for the prioritisation of resources towards the fulfilment of their needs as follows:[67]

> All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

The requirement that the SER needs of marginalised and vulnerable groups be prioritised is further reflected in article 53 of the Constitution, which is not made subject to the standard of progressive realisation.

The maximum available resources do not refer only to the state's budgetary appropriations, but to all the real resources it can muster though the harnessing of public and private resources (creation of a conducive legal and social environment to encourage the voluntary use of private resources in the realisation of SERs),[68] and the resources available through international cooperation and assistance.[69] This has been affirmed by the CESCR Committee, in its statement on the meaning of 'maximum available resources' in the context of the OP-ICESCR, where it avers that this phrase refers to resources existing within the state as well as those

65 The 2010 Constitution, art 20(5)(a).

66 The 2010 Constitution, art 20(5)(b). For an affirmation of the obligation of the state to protect the rights of vulnerable and marginalised groups, see *Mitu-Bell Welfare Society v Attorney General & 2 Others* (n 25 above) 27 - 29.

67 The 2010 Constitution, art 21(3).

68 RE Robertson 'Measuring state compliance with the obligation to devote the "maximum available resources" to realising economic, social and cultural rights' (1994) 16 *Human Rights Quarterly* 693 698 - 699. Government practices such as the enhancement of access to land and agrarian reforms are capable of enhanced individual, group or community realisation of SERs such as the right to food, housing, and improved standards of living. See also A Eide 'Economic and social rights' in J Symonides (ed) *Human rights: Concepts and standards* (2000) 109 126 - 127; D Bilchitz 'Health' in S Woolman et al (eds) *Constitutional law of South Africa* (2nd Edition) 2 (2009) 56A-1 42 - 46.

69 CESCR Committee General Comment No 3, para 13; M Sseyonjo *Economic, social and cultural rights in international law* (2009) 62.

available to the state from the international community through the facility of international cooperation and assistance.[70]

2.3.4 Prohibition of retrogressive measures

The use of the term 'progressive' necessarily prohibits the adoption of retrogressive measures by the state in the full realisation of SERs. According to Sepulveda, progression entails two complimentary obligations: 'the obligation to continuously improve conditions, and the obligation to abstain from taking deliberately retrogressive measures except under specific circumstances'.[71] The CESCR Committee has been very assertive against retrogressive measures in its general comments, delineating very stringent conditions for such retrogressive steps to be acceptable. It has affirmed that deliberately retrogressive measures must be fully justified in relation to the totality of the Covenant rights and in the context of the maximum use of available resources.[72]

The CESCR Committee has further elaborated in General Comment Number 19, in relation to social security, the criteria that it will use when considering the justifiability of retrogressive measures. The criteria entails: the reasonableness of the action; comprehensive examination and consideration of alternatives to the retrogressive action; genuine participation of the affected groups in decision-making; the long term adverse impact of the action and whether it deprives access to the minimum essential levels of rights; and, the presence or otherwise of independent national review.[73] However, despite the flexibility allowing states to justify retrogressive measures, the CESCR Committee in General Comment Number 14 has further stated that any such measures which affect the minimum core content of Covenant rights is a violation of the Covenant.[74] The Maastricht Guidelines also provide that the adoption of deliberately retrogressive measures by states is a violation of their obligation under the Covenant.[75]

The adoption in the 2010 Constitution of the standard of progressive realisation does not thus leave the entrenched SERs bereft of content or meaning, but requires the Kenyan government to move expeditiously towards their realisation by taking immediate, comprehensive and targeted

70 See CESCR Committee Statement: An evaluation of the obligation to take steps to the maximum of available resources under the Optional Protocol to the Covenant, para 5 http://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf (accessed 12 September 2013).
71 Sepulveda – Nature of SER obligations (n 37 above) 319.
72 CESCR Committee General Comment No 3, para 9; General Comment No 13, para 45; General Comment No 14, para 32.
73 CESCR Committee General Comment No 19, para 42. Retrogression must be justified by a reference to the totality of the rights in the Covenant taking into account the state's full use of the maximum of its available resources.
74 CESCR Committee General Comment No 14, para 48.
75 Maastricht Guidelines, Guideline 14(e).

steps capable of their realisation. This obligation was affirmed by the High Court of Kenya in *Mitu-Bell Welfare Society v Attorney General & 2 Others*[76] and further reiterated in the case of *Okwanda v The Minister of Health and Medical Services & 3 Others*[77] as follows:[78]

> Article 21and 43 require that there should be "progressive realisation" of [SERs], implying that the state must begin to take steps, and I might add be seen to take steps, towards realisation of these rights … Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the [SERs], and what policies, if any, it has put in place to ensure that the rights are realised progressively, and how the petitioners in this case fit into its policies and plans.

These cases thus provide a good base for the continued litigation of SERs in the context of the standard of progressive realisation.

76 *Mitu-Bell Welfare Society* (n 25 above), the case was filed by a group of 3065 households against their forced eviction by the Kenya Airports Authority from land they had been occupying for 19 years in December 2011. They sought an order from the Court that their constitutional right to housing, human dignity and property had been violated by the forced evictions. In their defence, the Respondents argued that SERs were subject to progressive realisation and availability of resources, and could not thus be delivered by the state immediately upon demand. In determining that the Petitioners' right to housing had been violated by the eviction, the Court emphasised the interdependence, indivisibility and interrelatedness of rights, affirming that SERs, just like any other right in the Constitution, was justiciable and was ripe for enforcement, at 19 - 23. For a more elaborate analysis of the *Mitu-Bell* case, see East African Centre for Human Rights (EACHRights) 'Compendium on economic and social rights under the Constitution of Kenya, 2010' (October 2014) 32 - 33 http://www.eachrights.or.ke/pdf/2014/A-Compendium-On-Economic-And-Social-Rights-Cases-Under-The-Constitution-Of-Kenya-2010.pdf (accessed 28 December 2014).

77 *Okwanda* (n 13 above), the case was filed by an indigent elderly man suffering from diabetes mellitus who sought assistance from the Court based on his right to the highest attainable standard of health, accessible and adequate housing, clean and safe water, food, social security and other SERs entrenched in art 43 of the 2010 Constitution and art 11 of the ICESCR as read with art 2(6) of the Constitution. In determining the case, the Court affirmed the importance of the constitutionally entrenched SERs in the amelioration of the conditions of the poor and vulnerable sectors of society who live in the margins, contending that failure of realisation of SERs will undermine the foundations of the 2010 Constitution. However, due to lack of proper particularisation of the violations of the Petitioner's rights, the Court felt constrained to make any positive orders as there was no sufficient evidence on record to indicate a violation of the SERs obligations of the state. For a more elaborate analysis of the *Okwanda* case, see East African Centre for Human Rights (EACHRights) 'Compendium on economic and social rights under the Constitution of Kenya, 2010' (October 2014) 24 - 25 http://www.eachrights.or.ke/pdf/2014/A-Compendium-On-Economic-And-Social-Rights-Cases-Under-The-Constitution-Of-Kenya-2010.pdf (accessed 28 December 2014).

78 *Mitu-Bell Welfare Society* (n 25 above) 21 - 23 & 31; *Okwanda* (n 13 above) paras 15 & 16.

3 Socio-economic rights litigation strategy – individualised or structural litigation?

The viability and effectiveness of constitutional SER litigation in achieving socio-economic transformation will depend a lot on the litigation strategy to be adopted by the prospective litigants. A choice of litigation strategy must aim at the overall achievement of the transformative agenda, which is, shielding the poor, marginalised and vulnerable individuals and groups from the uncertainties and harshness of a pure market model, and extending to them the benefits of public goods and services.[79] A distinction can be drawn between two strategies – the individualised strategy as has been predominantly used in access to health in the Latin American countries such as Brazil and Argentina, and the class action/public interest litigation which is the hallmark of SER litigation in Colombia and India.[80]

3.1 Individualised litigation strategy and social transformation

This strategy of litigation entails individuals approaching the courts for the provision of specific socio-economic requirements, such as the provision of a specific medical procedure or medical drugs, and the courts issuing mandatory injunctions to compel the state to immediately provide the corresponding goods and services to the litigant.[81] This approach has been extensively used to litigate the right to health and the right to education in the Latin American countries, especially Brazil and Argentina.[82]

However, concerns have been raised about the viability of this approach in achieving social transformation. Critics argue that the strategy makes it harder for indigent, voiceless and marginalised individuals and groups to benefit from SER programmes at the expense of middle class litigants.[83] Daniel Brinks and William Forbath contend that private individual litigation has the potential of producing beneficiary inequality and may operate as a rationing device in which access to social goods and

79 DM Brinks & W Forbath 'Commentary: Social and economic rights in Latin America: Constitutional Courts and the prospects for pro-poor interventions' (2010 - 2011) 89 *Texas Law Review* 1943 1949. See also A Nolan 'Litigating housing rights' Conference on Economic, Social and Cultural Rights, 9 - 10 December 2005, 11 - 12 http://www.ihrc.ie/publications/list/aoife-nolan-litigating-housing-rights-conference-o/ (accessed 10 September 2013), who emphasises the importance of proper case selection in SER litigation, as poorly chosen litigation strategies may lead to adverse precedents that may take years to reverse.

80 See C Rodriguez-Garavito 'Beyond the courtroom: The impact of judicial activism on socio-economic rights in Latin America' (2010 - 2011) 89 *Texas Law Review* 1669 1671. On India, see S Muralidhar 'The expectations and challenges of judicial enforcement of social rights: India' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 102 106 & 108 - 109.

81 OM Ferraz 'Harming the poor through social rights litigation: Lessons from Brazil' (2010 - 2011) 89 *Texas Law Review* 1643 1645 - 1646.

82 As above.

services is a preserve of those with sufficient resources and the ability to access courts and retain private advocates.[84] Paola Bergello concurs, contending that continued individual litigation exacerbate intra-policy inequalities.[85] The unviability of providing individualised benefits in the context of SER adjudication was affirmed by the SACC in the *Soobramoney* case where the Court held as follows:[86]

> The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

The inanimacy of providing purely individualised remedies in the context of SER litigation has also been affirmed in the High Court of Kenya in the case of *John Kabui Mwai*[87] where the Court stated as follows:[88]

83 For an affirmation of this claim, see Ferraz (n 81 above) 1646ff; S Gloppen 'Public interest litigation, social rights and social policy' in AA Dani & AD Haan (eds) *Inclusive states: Social policy and structural inequalities* (2008) 343 359 - 360; DP Chong 'Five challenges to legalising economic and social rights' (2009) 10 *Human Rights Review* 183 190; B Rajagopal 'Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective' (2007) *Human Rights Review* 157ff; F Hoffman & FR Bentes 'Accountability for social and economic rights in Brazil' in V Gauri & DM Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 100 119 - 132.

84 Brinks & Forbath (n 79 above) 1946 - 1950. See also DM Brinks & V Gauri 'A new policy landscape: Legalising social and economic rights in the developing world' in V Gauri & DM Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 303 336 - 342.

85 P Bergallo 'Courts and social change: Lessons from the struggle to universalise access to HIV treatment in Argentina' (2010 - 2011) 89 *Texas Law Review* 1611 1640 - 1641.

86 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 31. See also *Grootboom* (n 36 above) para 95; and *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) 2002 (5) SA 703 (CC) paras 34 - 36.

87 This was a right to education case that challenged a quota system adopted by the Ministry of Education giving more opportunities into national secondary schools for learners from public primary schools as compared to learners from private primary schools. It was argued by the Petitioners that the quota discriminated against children from private primary school on the basis of their social status contrary to article 27 of the Constitution and was thus a violation of their right to education entrenched in articles 43(1)(f) and 53(1) of the Constitution. In determining the constitutionality of the quota system, the Court noted that not all differential treatment lead to discrimination, adopting the dicta of unfair discrimination as was adopted in the South African case of *President of the Republic of South Africa & Another v Hugo*. The Court further affirmed that in it had to look at the history of inequality in determining the case, and held that the government's policy was not unfairly discriminatory as it was aimed at tempering merit with equity taking into account Kenya's history of marginalisation and entrenched vulnerability of the poor people. The Court thus recognised the importance of a substantive conception of equality in the achievement of social justice and the enhancement of human dignity, noting that education was one of the major tools to ensure flight from poverty, and the poor too should have equitable opportunity in receiving quality education. For a more elaborate analysis of the *John Kabui Mwai* case, see East African Centre for Human Rights (EACHRights) 'Compendium on economic and social rights under the Constitution of Kenya, 2010' (October 2014) 37 - 38 http://www.eachrights.or.ke/pdf/2014/A-Compendium-On-Economic-And-Social-Rights-Cases-Under-The-Constitution-Of-Kenya-2010.pdf (accessed 28 December 2014).

88 *John Kabui Mwai* (n 13 above) 6.

> One of the obstacles to the realisation of [SER] is the limited financial resources on the part of the government. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.

Apart from entrenching intra-policy inequality, individualised litigation also has the potential to frustrate structural socio-economic reforms through the individualisation of universal social problems, thus disrupting long-term strategic plans and programmes aimed at overcoming structural problems that are at the root causes of societal socio-economic deprivation.[89]

3.2 Pure structural litigation and chariness towards individual litigants

Structural litigation strategy is a form of PIL which entails the filing of structural cases involving the violation of the rights of a large number of people; implicating multiple state institutions and agencies whose failure in policy development and implementation contribute to the rights violation; and, leading to the adoption of structural injunctive remedies requiring government's coordinated action to protect the entire affected population.[90] Taken to its most extreme – where the courts are absolutely oblivious to the individualised concerns of litigants – this litigation strategy also has adverse effects on the fulfilment of SERs. This is exemplified by the reasonableness approach to SER litigation through which the SACC has consistently shown chariness and a lack of concern to individual litigants, though the Court has of late developed a right to alternative accommodation that has benefited individuals in some of the eviction cases that it has decided.[91]

In their analysis of the remedial results of the reasonableness litigation standard of the SACC, both Marius Pieterse and Danie Brand contend that the failure of the SACC to adopt the minimum core approach, and its consequent adoption of the reasonableness approach, was partly motivated by its aversion to the notion of individual entitlements.[92] Pieterse further argues that this approach has a chilling effect to constitutional SER litigation as individuals and organisations find it

89 M Pieterse 'Resuscitating socio-economic rights: Constitutional entitlements to healthcare services' (2006) 22 *South African Journal on Human Rights* 473 476 - 477.

90 Rodriquez-Garavito (n 80 above) 1671.

91 For an analysis of some of these cases, see S Liebenberg 'Towards a right to alternative accommodation? South Africa's Constitutional jurisprudence on evictions' (2005) 2 *Housing and ESC Rights Law Quarterly* 1; SERI 'Evictions and alternative accommodation in South Africa: An analysis of the jurisprudence and implications for local government' (November 2013) 1 http://abahlali.org/wp-content/uploads/2008/04/Evictions_Jurisprudence_Nov13.pdf (accessed 28 December 2014).

worthless to participate in the identification and elaboration of rights claims as the courts will not award to them any immediate and tangible relief.[93] Liebenberg similarly affirms the inability of the reasonableness approach adopted by the SACC to be used to elicit benefits for an individual or a class of individuals.[94]

The gravitation towards an approach that shows chariness to individual litigants has already been reflected in the Kenyan High Court cases of *John Kabui Mwai* and affirmed in the case of *Okwanda* as follows:[95]

> The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.

It is hoped that despite resource constraints, litigants will not be sent away empty handed by the courts, and that the courts will adopt a mixed approach that looks into the specific situation of the litigants in addition to ordering structural reforms to ensure the remediation of SER violations at their source, as is discussed in the proposed mixed strategy below.

3.3 The proposed strategy for the litigation of socio-economic rights in the 2010 Constitution

To enhance the achievement of the structural institutional reforms for the realisation of SERs, the strategy being advocated here is a mix of the two extremes, that is, where litigants mostly concentrate on structural litigation through the preparation of test cases on SER issues of most concern to the people. This strategy of litigation is supported by Daniel Brinks and Varun

92 See M Pieterse 'On dialogue, translation and voice: A reply to Sandra Liebenberg' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 331 341; and D Brand 'Proceduralisation of South Africa's socio-economic rights jurisprudence, or "what are socio-economic rights for?"' in H Botha et al (eds) *Rights and democracy in a transformative constitution* (2003) 33 46. See also J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214 215ff, who contends that the South African judiciary has remained relatively untransformed due to its institutional unresponsiveness to the problems of the poor and its failure to advance transformative justice, and thus its general failure to collectively act as an institutional voice of the poor.

93 Pieterse – Reply to Liebenberg (n 92 above) 343 - 344. See similarly Dugard (n 92 above) 236ff; KG Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8 *International Journal of Constitutional Law* 385 395; and, C Scott & P Alston 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 *South African Journal on Human Rights* 206 254 - 255, who all contend that chariness toward the needs of individual litigants has a chilling effect on SER litigation by individual claimants.

94 S Liebenberg 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 303 304.

95 *John Kabui Mwai* (n 13 above) 6; *Okwanda* (n 13 above) paras 16 & 21.

Gauri who contend that in order to produce a 'rights revolution', repetitive and coordinated litigation is a requirement, a feat that cannot be achieved by individuals litigating on their own, and which, therefore, require PIL organisations that can undertake a prolonged and strategically planned litigation campaign.[96] To enhance the viability of this approach, the courts must establish proper guidelines and outline correct parameters for the acceptance and adjudication of PIL cases so as to curtail the filing of frivolous and vexatious petitions.[97]

The viability of this approach depends a lot on the type of remedies that litigants seek from the courts. Litigants, especially PIL institutions, should seek remedies that balance individualised concerns of claimants and all other similarly placed individuals,[98] while at the same time targeting the structural inadequacies or challenges that militate against the realisation of SERs for the masses.[99] In support of this remedial approach, Iain Currie and Johan de Waal contend that constitutional violations do not only cause harm to individuals, but cause harm to the entire social spectrum as they impede the realisation of the constitutional project aimed at the creation of a just and democratic society.[100] This is further affirmed by Sandra Liebenberg who similarly states that constitutional remedies should not only be aimed retrospectively at the vindication of the right-violations that have already occurred, but must also be aimed at deterring future violations of the right in respect of all people.[101] The aim of the test cases, especially the initial ones, should, therefore, be to tackle government's structural and institutional deficiencies that result in the non-realisation of SERs, with the consequential objective of ensuring

96 Brinks & Gauri (n 84 above) 340; V Gauri & D Brinks 'Introduction: The elements of legalisation and the triangular shape of social and economic rights' in V Gauri & D Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 1 15. See also Dugard (n 92 above) 216 - 226, who calls for a comprehensive system of legal representation for poor people to enable their issues to be adequately, equally and effectively articulated so as to promote parity in the legal process.

97 See V Gauri 'Fundamental rights and public interest litigation in India: Overreaching or underachieving?' (2010) 1 *Indian Journal of Law and Economics* 71 75 - 76, who argues that the lack of such a guideline has led to the Indian Supreme Court entertaining frivolous PIL petitions, to the detriment of the real administration of justice. He documents calls by the bench for the establishment of PIL parameters and also indicates that a Parliamentary Bill was tabled in 1996 to regulate PIL in the Indian Courts.

98 See Pieterse (n 89 above) 478, who contends that the affirmative and empowering potential of SERs can only be achieved if the manner of their enforcement connects directly with the needs and experiences of indigent individuals and communities, and that these groups will only seek to rely on SER adjudication if litigation will concretely improve their physical living conditions.

99 See Gloppen (n 83 above) 344, who affirms that PIL is aimed at the transformation of not only the individual litigant, but also similarly situated individuals through the alterations of structured inequalities and power relations. It is thus aimed at the transformation of social policy, public discourse on social rights, and the development of progressive jurisprudence.

100 I Currie & J de Waal *The Bill of Rights handbook* (2005) 196.

101 S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 378.

policy changes, shattering the bureaucratic bottlenecks, and enhancing inter-branch and societal dialogue in the design of SER implementation frameworks.[102]

The need for a mixed litigation strategy to enhance the achievement of the transformative aspirations of a transformative constitution is also acknowledged by David Bilchitz who identifies both the positive and negative consequences of each of the specific litigational strategies mentioned above.[103] He advocates a flexible approach in which the courts make orders that are just and equitable in light of the facts and context of each particular case.[104] He proposes that in litigation challenging an existing SER implementation framework, the court should proceed and grant individual remedies requiring the inclusion of the litigants and similarly placed individuals into the existing programmes, so as to enhance the equality of treatment and to respect the principle of equal importance of all people.[105] He further proposes that in litigation where there is no existing SER framework, the court should order the state to adopt a policy and develop a programme aimed at the provision of the right in question to all similarly situated individuals.[106] He contends that this ensures that all individuals benefit from the state's programmes in an orderly and systematic manner.[107]

The viability of the mixed approach is evidenced by the Indian right to food (PUCL) case, which concerned the failure of the government to put in place measures to ameliorate extreme hunger and malnutrition caused by drought and famine.[108] In reacting to this situation, the Indian Supreme Court made extensive orders requiring the government to introduce midday meals in all government assisted primary schools; provide food security benefits through a card system and nationwide food security schemes to the most vulnerable groups; and to increase its budgetary allocations to schemes aimed at enhancing employment.[109] To ensure that these orders were fulfilled, the Supreme Court proceeded to appoint two commissioners to monitor their implementation, and to work with both the government and non-governmental organisations to enhance the realisation of the right to food.[110] Through this monitoring mechanism, the Court was further able to make follow-up orders in instances where

102 See Bergallo (n 85 above) 1614 - 1615 & 1631 - 1638.
103 D Bichitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 203 - 206.
104 Bichitz (n 103 above) 204.
105 As above. For an illustration of this point, see *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).
106 Bichitz (n 103 above) 204.
107 Bichitz (n 103 above) 205.
108 *People's Union for Civil Liberties v Union of India* (Writ Petition [Civil] No 196 of 2001) http://www.righttofoodindia.org/case/case.html (accessed 13 September 2013).
109 Bichitz (n 103 above) 241 - 242; Chong (n 83 above) 187.
110 Bichitz (n 103 above) 241 - 242.

implementation was either slow or had not taken off.[111] David Bilchitz contends that the PUCL case portrays the positive benefits that properly balanced SER litigation can have in enhancing the realisation of SERs, by shattering bureaucratic bottlenecks as well as placing SER issues on the political agenda.[112] The mixed litigation strategy thus has the potential to represent the million faceless poor who are too indigent to undertake litigation of their own, and to ensure that their situation is brought to bear in national decision-making.[113]

The success of litigation as a strategy to achieve institutional reforms depends a lot on public mobilisation, civic education and awareness campaigns aimed at informing and gaining the support of the masses for the test cases to be filed in court. Siri Gloppen contends that the key to success in such structural litigation is the 'associative capacity' that is, the capacity to join forces and resources both human and financial, undertake societal mobilisation around the issues of concern, and engage in media campaigns to enhance knowledge and awareness of the test cases and their intended social impact.[114] Gloppen emphasises the importance of social mobilisation at all the levels of litigation, contending that it is easier for judges to adopt progressive judgments if a case has already been 'won in the streets'.[115] Therefore, to be effective, structural SER litigation must be aimed at the empowerment[116] of the masses, especially the poor, vulnerable and marginalised groups, so as to enable them use the available legal and administrative institutions to enforce their rights. Structural litigation should thus be aimed at the achievement of the legal empowerment of the claimants and similarly placed individuals.[117]

111 Bichitz (n 103 above) 245.
112 Bichitz (n 103 above) 242 - 243.
113 Dugard (n 92 above) 226ff. See also J Easterday 'Litigation or legislation: Protecting the rights of internally displaced persons in Colombia (2008) 36 - 38 http://works.bepress.com/jennifer_easterday/1 (accessed 13 September 2013), where she affirms the decision by the CCC in the Internally Displaced Persons (IDPs) case did not only apply to the specific applicants in the case, but was directed at the amelioration of the conditions of all IDPs in Colombia.
114 Gloppen (n 83 above) 348.
115 Gloppen (n 83 above) 355.
116 Empowerment has been defined as the restoration to individuals of a sense of their own value, strength and capacity to handle life's challenges as well as the expansion of their ability to make strategic life choices, see D Banic 'Rights, empowerment and poverty: An overview of the issues' in D Banic (ed) *Rights and legal empowerment in eradicating poverty* (2008) 12.
117 Legal empowerment has been defined as a process of systematic change through which the poor and excluded become able to use the law, the legal system and legal services to protect and advance their rights and interests as citizens and economic actors, see Banic (n 116 above) 13.

4 Approaches in the adjudication of constitutionally entrenched socio-economic rights – a proposed integrated approach

Transformative litigation depends a great deal on the choice of interpretive approach that the courts are persuaded to adopt in the adjudication of SERs. The two most common adjudicative approaches are the minimum core approach developed by the CESCR Committee and the reasonableness approach that has been developed by the SACC. A brief analysis of the important components of these two approaches is undertaken below.[118]

4.1 Reasonableness approach

This approach was developed as a standard of scrutiny for the positive obligations arising from the SERs entrenched in the 1996 South African Constitution.[119] It was first expounded by Justice Yacoob in the *Grootboom* case where he held that for a measure aimed at the realistion of SERs to be reasonable, it must be coherent, well-coordinated and comprehensive.[120] The Court thus held that the government's housing programme in question failed the reasonableness test mainly because it was not responsive to the short-term needs of those in desperate need, as a society based on human dignity, equality and freedom must seek to ensure that the basic necessities of life are provided to all.[121]

With the increase in SER litigation, the SACC has elaborated on the components of the reasonableness approach, and Sandra Liebenberg details these components as follows:

(i) The programme must be a comprehensive and coordinated one, which clearly allocates responsibilities and tasks to different spheres of government and ensures that appropriate financial and human resources are available. It must also reflect the overall responsibility of national government in ensuring that the programme is adequate to meeting the State's constitutional obligations.

(ii) The programme must be capable of facilitating the realisation of the right.

118 For a more elaborate critique of the minimum core approach and the reasonableness approach, see Orago N 'Achieving the transformative aspirations of the 2010 Kenyan Constitution: A proposal for the adoption of a substantive interpretive approach for the realisation of the entrenched socio-economic rights' (on file with author).

119 Bilchitz (n 103 above) 142; Brand (n 92 above) 39; and C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* 264 265.

120 *Grootboom* (n 36 above) para 41.

121 *Grootboom* (n 36 above) paras 44 & 83.

(iii) Policies and programmes must be reasonable both in their conception and in their implementation.

(iv) The programme must be balanced and flexible and make appropriate provision for short-term, medium-term and long-term needs. It must not exclude a significant segment of society.

(v) The programme must be responsive to the urgent needs of those in desperate situations.

(vi) There must be meaningful engagement with the affected communities and civil society in the design and implementation of programmes aimed at the realisation of SERs [*Grootboom* paragraph 87 and *TAC* paragraph 123].[122]

(vii) In instances of exclusion of specific groups from programmes aimed at the realisation of the right in question, reasonableness analysis must take into account the purpose of the right in question, the impact of the exclusion on the affected groups as well as the impact of the exclusion on the enjoyment of other intersecting rights such as equality, dignity and freedom [*Khosa* case, paragraphs 45 - 53].[123]

The reasonableness approach has been transposed to the international level through its elaboration as a key component of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights which provides in article 8(4) as follows:[124]

> When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

It has thus become an important standard of scrutiny for the assessment of measures that have been put in place by governments for the realisation of SERs.[125]

One of the advantages of the reasonableness approach is that its design allows courts to give the requisite deference and margin of appreciation to the political institutions in their development and implementation of a

122 Liebenberg (n 101 above) 153.

123 Liebenberg (n 101 above) 158 - 159; Bilchitz – Health (n 68 above) 14 - 15; K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 163.

124 http://www2.ohchr.org/english/law/docs/a.RES.63.117_en.pdf (accessed 12 September 2013).

125 For an analysis of this provision and its importance to the complaint mechanism under the Optional Protocol, see F Viljoen & N Orago 'An argument for South Africa's accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its importance and implications' (2014) 17 *Potchefstroom Electronic Law Journal* (forthcoming); B Porter 'The reasonableness of article 8(4) – Adjudicating claims from the margins' (2009) 27 *Nordic Journal on Human Rights* 39.

legislative, policy and programmatic framework for the realisation of SERs, and is thus respecful of the doctrine of separation of powers.[126] It also envisages historical and contextual analysis in the adjudication of SERs, one of the major requirements for substantive transformative reasoning in the adjudication of SERs.[127] Despite the above advantages, the reasonableness approach, as adopted and implemented by the SACC, has faced severe criticisms. It has been argued that its narrow focus strips SERs of meaningful content, shifts SER litigation away from the satisfaction of urgent material needs, denies the existence of immediate and enforceable individual entitlements thus making a mockery of the justiciability of SERs, as well as unduly restricting the remedial potential of SERs.[128]

Due to the similarities in the design of the SERs in the Kenyan Constitution, the reasonableness approach, as developed by the SACC, can play a prominent role in the adjudication of SERs in the Kenyan context.

4.2 The minimum core approach

The minimum core approach is aimed at developing the essential minimum content for SERs that should be subject to immediate realisation so as to ameliorate the socio-economic conditions of the poor, vulnerable and marginalised sectors of society, with the result that their non-realisation is a violation by the state of its SER obligations. The approach was developed by the CESCR Committee in its General Comment Number 3 as follows:[129]

> The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party ... If the Covenant were to be read in such a way as not to establish the minimum core obligation, it would largely be deprived of its *raison d'être.*

The South African Constitutional Court in its *Grootboom* judgment remarked that the minimum core of a right is the 'floor beneath which the conduct of the State must not drop if there is to be compliance with [its SERs] obligations'.[130] The approach has been further developed extensively and comprehensively by the Committee detailing the content

126 Bilchitz (n 68 above) 11 - 12; Steinberg (n 119 above) 266; Liebenberg (n 101 above) 151 & 173.
127 Liebenberg (n 101 above) 152 & 174; and Bilchitz (n 103 above) 161 - 162.
128 Pieterse (n 89 above) 474.
129 General Comment No 3, para 10.
130 *Grootboom* (n 36 above)para 31.

of each of the SER provisions in the Covenant.[131] It has been reiterated in the Limburg Principles, principle 25 which posits that 'State parties are obligated, regardless of the level of economic development, to ensure respect for the minimum subsistence rights for all'.

The approach complements the progressive realisation standard, insisting that even though states have the latitude to realise SERs progressively taking into account available resources, the minimum essential levels of these rights must be realised so as to ensure dignified existence to the poor, vulnerable and marginalised groups as they await the maximal progressive realisation of the rights. It encompasses the concept of global re-distribution, urging developed states that are able to assist to contribute resources through the facility of international cooperation and assistance to poor states who are incapable, due to resource unavailability, of realising the minimum essential levels of SERs to their citizens.[132] Though it was developed at the international level, it has now generally been accepted that the approach is context-sensitive, as it is impossible to develop the minimum core of SERs that is applicable internationally, or even domestically, due to the differing socio-economic situations of different countries as well as differing intra-country situation of different individuals and groups.[133] The intra-country difficulty in determining the minimum of rights in relation to the right to housing was aptly captured by the South African Constitutional Court in the Grootboom judgment as follows:[134]

> The determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people.

Despite that challenge, the minimum core approach can be used by the courts in SER adjudication in specific cases where the courts can take into account the context and circumstances of the litigants before them and ensure that the dire socio-economic conditions, especially for the poor is

131 See for example: General Comment No 4 on the right to adequate housing; General Comment No 7 on the right to adequate housing: forced evictions; General Comment No 12 on the right to adequate food; General Comment No 13 on the right to education; General Comment No 14 on the right to the highest attainable standard of health, amongst others.

132 K Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 113 123.

133 See *Grootboom*, para 32, where the Court stated that the minimum core in any particular situation will vary according to the history and economic situation of a country, with access to housing being determined by factors such as poverty, employment, income and availability of land.

134 *Grootboom* (n 36 above) para 33.

ameliorated. In the Kenyan context, the courts can especially use the values of human dignity, equality, equity and freedom that have been entrenched as the key values in the interpretation of the entrenched rights in article 20(4) of the Constitution as the building blocks for the elaboration of the minimum core content of SER in specific SER cases that come before them. This will ensure that the minimum content of SERs developed in the kenyan context is respectful of the unique history of Kenya, is respectful of Kenya's political and socio-economic situation and is also responsive to the needs of the poor, vulnerable and marginalised individuals and groups in Kenya.

Adoption of the minimum core approach in the adjudication of SERs has several advantages. It has been argued that the approach, with its clear specification of the minimum essential elements that the state must provide, gives the government a better standard with which to monitor implementation and provides better protection of SERs generally, and of the basic needs of vulnerable groups in particular.[135] This is captured by Brand who contends that the interpretation and enforcement of entrenched SERs should, in the first instance, be aimed at 'the creation of a society that provides for everyone's basic needs, and that protects everyone against deprivation'.[136] He argues that a court, in undertaking SER litigation, must determine whether the state is pursuing its constitutionally mandated goal correctly in its policies, and in doing so must, of necessity, develop substantive content to the entrenched SERs.[137] This has also been affirmed by Liebenberg who, in her analysis of the *Soobramoney* judgment, argues that the failure by the SACC to expound on the nature, scope and content of the right to health left the state with no clear guidelines for its implementation, thus adversely affecting the capacity of the right to exert a fundamental influence on the state's decision-making concerning social programmes and budgetary allocations.[138]

The minimum core approach further makes it possible for the courts to adopt a more stringent scrutiny in the evaluation of the state's defences for

135 For a more complete development of the above arguments, see Bilchitz (n 103 above) 150 - 166 & 221; Bilchitz (n 68 above) 31 - 32, where he avers that one of the evils sought to be remedied by the introduction of the minimum core concept was the lack of practical benchmarks against which to evaluate state efforts at the realisation of entrenched SERs.

136 Brand (n 92 above) 36 - 37 & 51 - 56.

137 Brand (n 92 above) 44 - 51. He points out that the major failure of the SACC's reasonableness approach is the failure to develop a substantive content for SERs. He states that due to this failure, the Court cannot, in the conduct of its reasonableness analysis, determine whether the state's policy in question is capable of achieving the relevant right (as the substantive content of the essential referent right is not developed), leaving the Court only with the option of evaluating whether the policy in question is rational, coherent, comprehensive and inclusive, among other good governance standards, at 48 - 49.

138 Liebenberg (n 101 above) 142.

the non-realisation of the minimum essential needs of the most vulnerable,[139] makes it more feasible for the courts to provide the government with clear timelines within which to implement the court's orders, and also enables the court to properly monitor and supervise compliance with its own orders.[140] This is in line with the Constitutional requirement that the courts grant effective relief in instances of violations of constitutionally entrenched rights.[141]

Though the minimum core approach has not been adopted in many national jurisdictions, it is found under the German Basic Law which provides in article 19(2) that 'in no case may the essential content of a basic right be encroached upon'. These shows that even though basic rights in the German legal system can be limited, limitations should not detract from the minimum core or the essential elements of the particular right.[142] Similarly, the minimum core concept has been adopted and developed by the Colombian Constitutional Court. The commitment of the Court to the minimum core approach has been exemplified by its development of the concept of 'the minimum conditions for dignified life' a concept constructed from the right to life, human dignity, health, work and social security.[143] This approach has been used in individual cases such as in a case on the right to health, in a situation of 22 *Tutela*[144] actions dealing with a systematic violation of the right to health in Colombia.[145] The Court, adopting the right to health framework expounded by the CESCR in General Comment Number 14, restructured the entire Colombian health system by giving content to the right to health.[146] It distinguished essential minimum core aspects of the right to health which were immediately enforceable, from those aspects which were subject to progressive realisation taking into account the available resources.[147] The Court thus ordered the provision of specific health goods and services such

139 Bilchitz (n 103 above) 146.
140 As above.
141 2010 Constitution, art 23.
142 Young (n 131 above) 124.
143 M Sepulveda 'The Constitutional Court's role in addressing social injustice' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 144 148.
144 A *tutela* is an innovative writ of protection of fundamental rights enshrined in art 86 of the Colombian Constitution and which can be filed by any person whose fundamental rights are threatened or violated, and requires immediate protection. It entails a summary proceeding with the judge obliged to provide a resolution within ten days of a writ being filed. See Sepulveda (n 143 above) 146.
145 CCC Decision T-760 of 2008, discussed in MA Olaya 'The right to health as a fundamental and judicially enforceable right in Colombia' (2009) 10 *ESR Review* 16 http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr review (accessed 10 June 2013); AE Yamin & OP Vera 'The role of courts in defining health policy: The case of the Colombian Constitutional Court' (2008) 1 http://www.law.harvard.edu/programs/hrp/documents/Yamin_Parra_working_paper.pdf (accessed on 10 June 2013).
146 Yamin & Vera (n 145 above) 3.
147 Yamin & Vera (n 145 above) 3 - 4; Olaya (n 145 above) 16 - 17. Olaya's analysis of the Court's minimum core reasoning indicates that the Court acknowledged that the right to health has both positive (which require resources to implement) and negative

as the provision of viral load tests and anti-retroviral treatment for HIV/AIDS, costly cancer treatment, the implementation of which were resource intensive.[148] The Colombian Constitutional Court in *Sentencia T-426/92* further developed the *minimo vital* doctrine (vital minimum), a systematic (not individual) right which it deduced from the social welfare state principle entrenched in the Colombian Constitution, the entrenched SERs and the right to human dignity.[149] The concept connects individuals to their basic material needs, and is aimed at the overall achievement of redistribution, equality, solidarity and social justice.[150] At its inception, the concept was basically aimed at the amelioration of the condition of the extremely poor, marginalised and vulnerable individuals and groups who were incapable of self-help in accessing basic socio-economic goods and services.[151] In that role, the concept served the following two functions:[152]

- Means to determine when SERs were sufficiently connected to fundamental rights to warrant protection via a *tutela* – if non-implementation threatened the minimum level of subsistence of claimants.
- Emphasised the social needs of the vulnerable and marginalised groups in society – the rule of prioritisation of urgent needs and requirement that social spending be directed towards the poorest so as to redress poverty.

The concept has been expanded and effectively used by the Court to enhance the realisation of essential rights for the poor, vulnerable and marginalised people in Colombia through the *tutela* system. Taking into account the similarities in constitutional provisions of the Colombian and the Kenyan Constitution, especially in relation to the direct incorporation of international law into the national legal system via article 2(6) of the Kenyan Constitution, a careful adoption of the vital minimum concept in the context of the minimum core approach can be considered by the Kenyan courts, taking into account the history and context of Kenya.[153]

obligations (which require state abstention); enforceability of positive obligations (as the vital minimum) depended on their urgency and the impact of their non-implementation on human dignity; and that non-implementation of positive obligations which did not have adverse impact on human dignity were subject to progressive realisation.

148 Yamin & Vera (n 145 above) 2.

149 D Landau 'The reality of social rights enforcement' (2012) 53 *Harvard International Law Journal* 401 419.

150 P Rueda 'Legal language and social change during Colombia's economic crisis' in J Causo et al (eds) *Cultures of legality: Judicialisation and political activism in Latin America* (2010) 25 33 - 40.

151 As above.

152 Landau (n 149 above) 420.

153 For an extensive analysis of the applicability of the minimum core approach in Kenya, see N Orago 'The place of the "minimum core approach" in the realisation of the entrenched socio-economic rights in the 2010 Kenyan Constitution' (2015) *Journal of African Law* (forthcoming).

4.3 Which approach for Kenya?

The applicability of both the minimum core and the reasonableness approaches in the Kenyan context was acknowledged in by the High Court of Kenya in the *Federation of Women Lawyers (FIDA-K)* case[154] where the Court affirmed the obligation of the state to realise the minimum core of rights entrenched in article 27 as follows:[155]

> In order for a State to be able to attribute its failure to meet at least its minimum core obligations due to any event or circumstance, it must demonstrate that every effort has been made within its disposition in an effort to satisfy as a matter of priority the minimum obligations set out in Article 27 as a whole. It is clear from the extract from International Conventions that every party state is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum enjoyment of the rights enshrined under Article 27.

In this case, however, the Court noted the difficulty of determining the minimum core for the realisation of the right to affirmative action due to the differing societal needs, a challenge that requires a holistic assessment of the vulnerability of a variety of groups.[156] The Court then resorted to the standard of reasonableness, but retained the applicability of the minimum core approach in determining the reasonableness of a measure for the realisation of rights as follows:[157]

> An issue which would arise is whether the measures taken by the State or State organ to realise the rights awarded by Article 27 are reasonable. In that regard we think there may be cases or situations where it may be possible and appropriate to have regard to the content of a minimum core obligation to

154 *Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another* High Court Petition No 102 of 2011. The case challenged the gender composition of the Supreme Court and was based on article 27(8) of the 2010 Constitution which required the state to take legislative and other measures to implement the principle that no more than 2/3 of members of elective or appointive bodies were to be of the same gender. The issue in the case was whether this provision was of immediate application or was subject to progressive realisation. The Petitioners argued that as an equality provision, article 27(8) was subject to progressive realisation while the Respondents argued that since it required the state to take legislative and other measures, the provision was subject to progressive realisation, and at the time of the case, had not yet crystallised (had not yet generated a specific and substantive right on which an individual or organisation can purport to base a claim) as the state had not yet enacted the required legislation. In its determination of the case, the Court held that art 27(8) had not yet crystallised as it was subject to the standard of progressive realisation as per art 21(2) of the Constitution (this was a misreading of the Constitution as art 21(2) refers specifically to the SERs entrenched in art 43 of the Constitution, and does not extend to the equality rights entrenched in art 27 of the Constitution). Having determined that art 27(8) was subject to progressive realisation, the Court then stated that in order to assess government's affirmative action efforts aimed at the realisation of the 2/3 gender rule, the Court could either adopt the minimum core approach or the reasonableness approach, approaches that have most commonly been used in SER litigation, see specifically pages 46 - 53 of the decision.

155 *FIDA-K* (n 154 above) 47 - 48.

156 As above.

157 *FIDA-K* (n 154 above) 48.

> determine whether the measures taken or to be taken are reasonable and satisfy the needs and aspirations of all vulnerable groups.

This judgment of the Court is in line with arguments of several authors that these two approaches are not incompatible,[158] and is thus in line with the integrated approach containing aspects of the two approaches that the current author has proposed should be adopted in the adjudication of SERs in the Kenyan context.[159]

5 Remedies for the violation of socio-economic rights – a proposal for the adoption and use of innovative and dialogic remedies

The 2010 Constitution provides for wide array of remedies for the violation of the fundamental rights entrenched in the Bill of Rights and they include: a declaration of right, an injunction, a conservatory order, a declaration of invalidity of any law that violates rights, an order of compensation as well as an order of judicial review.[160] The wide remedial choice for the vindication of rights is important as the choice of remedies is one of the most important elements of SERs litigation. This is because most SERs violations, especially those dealing with the positive obligations of states, cannot be effectively redressed using the traditional constitutional remedies such as damages, prohibitory injunctions or immediate declarations of invalidity. Despite the importance of remedies in constitutional SER litigation, most litigators rarely dedicate sufficient effort in substantively elaborating on the most appropriate remedies for the redress of the violations in question, leaving it to the courts to grapple with. In this context, judges will mostly revert to what they know best, the traditional constitutional remedies, which cannot adequately initiate structural reforms in the relevant institutions of the state. To achieve the transformative aspirations of the 2010 Constitution, especially in relation to the entrenched justiciable SERs, both practitioners and the courts must contemplate, develop, adopt and employ more creative and innovative remedies for the redress of SERs, as has been done in national jurisdictions that have recently adopted transformative constituting documents such as Canada and South Africa. This section looks at two of these new and innovative remedies, the suspended declaration of invalidity and the structural interdict.

158 See generally Liebenberg (n 101 above) Chap 4; SA Yeshanew *The justiciability of economic, social and cultural rights in the African Human Rights System: Theories, laws, practices and prospects* (2011) Chap 6.

159 See N Orago 'A gender perspective of socio-economic rights under the 2010 Kenyan Constitution: A mirage or a path towards gender equality and women empowerment in Kenya' in Biegon J & Musila G (eds) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011) 275, Nairobi: ICJ-Kenya 295 - 303.

160 The 2010 Constitution, art 23(3).

5.1 Suspended declaration of invalidity

This remedy, which has mostly been used by the Canadian courts, allows a court undertaking the judicial review of a law to declare that the law is unconstitutional, but that the law will remain in force for a particular specified period of time in order to allow the government to enact a new law that is consistent with the constitution.[161] It acknowledges that there is more than one appropriate way in which the government can rectify the violation of rights, and that the government possesses adequate capacity and constitutional competency to make proper choices.[162] This declaration envisages the continuation of an unconstitutional state of affairs for the period specified in the order, and thus allowing the political institutions of the state to rectify the situation though a legislative sequel or executive action, failure of which the declaration takes effect invalidating the previous unconstitutional state of affairs.[163]

In analysing this remedy, Liebenberg argues that it is appropriate in two instances, the first being when an order of immediate invalidation will result in an unacceptable legal situation, such as the creation of a lacuna in the legal system.[164] This application of the remedy was evident in the Canadian case of *Reference re Manitoba Language Rights*, where, in reacting to the Canadian Province of Manitoba's failure to publish its laws in English and French as per its constitutional obligations, the Court did not immediately strike down the unconstitutional laws, but gave them temporary validity to preserve the rule of law while exercising supervisory jurisdiction to ensure that the laws were translated.[165] The second instance when the suspended declaration of invalidity can be used is when it is appropriate to afford the government the opportunity to adopt the requisite comprehensive and balanced remedial scheme to cure the unconstitutional state of affairs.[166] Liebenberg contends that this order, especially its application in the second instance, has the effect of enhancing public participation in governmental decision-making as it allows policy choices for the realisation of SERs to be made in democratic and collaborative deliberative structures where all the societal concerns and interests are

161 K Roach 'The challenges of crafting remedies for the violations of socio-economic rights' in M Langford (ed) *Social economic rights jurisprudence: Emerging trends in international and comparative law* (2009) 46 50.

162 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just, equitable' (2005) 122 *South African Law Journal* 325 339 - 340

163 Liebenberg (n 101 above) 389 - 390.

164 S Choudhry & K Roach 'Racial and ethnic profiling: Statutory discretion, constitutional remedies and democratic accountability' (2003) 41 *Osgoode Hall Law Journal* 1 21.

165 *Reference re Manitoba Language Rights* [1985] 1 SCR 721 724, more elaborately discussed in K Roach 'Constitutional, remedial and international dialogues about rights: The Canadian experience' (2004 - 2005) 40 *Texas International Law Journal* 537 546.

166 Liebenberg (n 101 above) 390.

represented.[167] The use of the suspended declaration of invalidity to enhance democratic dialogue is exemplified by Canadian case of *Corbiere v Canada (Minister of Indian & N Affairs)*, where the Court, in finding that a legislation violated the rights of aboriginal people suspended its declaration of invalidity for 18 months to give the government an opportunity to rectify the legislation in consultation with the affected aboriginal people.[168] One of the justices in the case, Justice L'Heureux-Dube, held as follows:[169]

> The best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it ... The principle of democracy underlies the Constitution and the Charter, and is one of the important factors guiding the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur ... The remedies granted under the Charter should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation.

The remedy, therefore, does not only enhance the rule of law, but it also strengthens democracy and the respect for human rights and fundamental freedoms, especially for those in the margins of society who do not generally have a political voice.

Despite its positive dialogical virtues, the suspended declaration of invalidity burdens claimants and similarly situated persons as it allows the unconstitutional state of affairs to subsist during the currency of the suspension of invalidity. In responding to this negative aspect of the remedy, Liebenberg calls for an appropriate balance to be struck between the benefits to be achieved by the suspension of the order *vis-à-vis* the burden placed on the claimants and similarly situated individuals in allowing the unconstitutional state of affairs to subsist for the suspension period, suggesting that interim measures should be put in place to cushion the claimants from the adverse effects that may result from the suspension of the order.[170] Liebenberg's recommendations above are enhanced by Roach's suggestion that a court issuing a suspended declaration of invalidity order should also retain jurisdiction so as to deal with any emergency or interim situations that may cause irreparable harm or other inordinate hardships to claimants during the period of the court-sanctioned delay.[171]

167 Liebenberg (n 101 above) 390 - 391. See also Choudhry & Roach (n 164 above) 21 - 22 for an elaboration of the dialogical credentials of this remedy.
168 *Corbiere v Canada (Minister of Indian & N Affairs)* [1999) 2 SCR 203.
169 *Corbiere* (n 168 above) para 116.
170 Liebenberg (n 101 above) 391 - 397. She further contends that in suspending an order, the courts should not leave parliament to their own devices, but must lay down the normative parameters within which the resultant legislative sequels or executive action must meet, at 93. See also Roach & Budlender (n 162 above) 340 - 341.
171 Roach (n 161 above) 55 - 56.

Kent Roach affirms the viability of the suspended declaration of invalidity in the adjudication of SERs, stating that such an order is 'appropriate when enforcing rights that require positive actions from the government and require comprehensive reform'.[172] The viability of the remedy in enforcing positive rights has also been affirmed by the Canadian Supreme Court which has stated the dangers of striking down under-inclusive benefit schemes, terming such a remedy as ensuring 'equality with a vengeance'.[173] The court has recommended that such schemes should be retained for a period through the issuance of a suspended declaration of invalidity so as to give the government sufficient time to extend the benefit to the excluded groups or to modify the benefits accordingly.[174]

In the Kenyan context, even though the Constitution enumerates the declaration of invalidity as one of the remedies available to the courts for the vindication of fundamental rights, it does not specifically provide for the timespan, that is whether the declaration is prospective, retrospective or can be suspended to apply at a later date. The Constitution, in article 23(30(d), provides for the remedy of declaration of validity as follows:

> In any proceedings brought under Article 22, a court may grant appropriate relief, including – (d) a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24.

This provision is not as specific in relation to the time span of a declaration of invalidity as the provision of the South African Constitution, section 172(1) which provides as follows:

> When deciding a constitutional matter within its power, a court –
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including –
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

The Kenyan Courts, especially the Supreme Court, has grappled with the lack of specific guidance as to the time span for the declaration of invalidity in several election petitions which related to its invalidation of section

172 Roach (n 165 above) 540 & 547 - 548.
173 *Schachter v Canada* [1992] 2 SCR 679, 702 & 715 - 716.
174 As above.

76(1)(a) of the Election Act as being inconsistent with article 87(2) of the Constitution and thus unconstitutional.[175] In the case of *Suleiman Said Shahbal v Independent Electoral and Boundaries Commission (IEBC) and Three Others*, which dealt with the retroactivity or prospectivity of the declaration of invalidity of section 76(1)(a) of the Election Act, the Supreme Court, relying on persuasive jurisprudence from Canada and South Africa determined that it had authority to determine the time span of a declaration of invalidity and can determine on a case-by-case basis whether such a declaration should be retrospective, prospective or suspended.[176] In making its determination, the full bench of the Supreme Court stated as follows:[177]

> The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, *including: the suspension of invalidity*; and the application of "prospective annulment". Such recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of the Constitution, as it stands (emphasis added).

It is clear from the above determination of the Supreme Court that a suspended declaration of invalidity is a remedy that can be adopted in the Kenyan system when so required by the exigencies of a case, and can thus be employed in SER litigation. With the development of the legislative, policy and programmatic framework for the realisation of the SERs entrenched in Constitution of Kenya still at their infancy; this is a remedy that would suit the Kenyan situation. The courts can use this remedy to review the SER realisation framework being developed by the government to ensure that they are compliant with the Constitution, without delaying or annulling the socio-economic benefits that have been provided through such framework; have taken into account the immediate-, short-, medium-, and long-term socio-economic needs of all Kenyans; and have been developed in an inclusive deliberative environment where the concerns of all Kenyans have been brought to bear on governmental

175 Some of the cases in the long line of authorities include: *Hassan Ali Joho and Another v Suleiman Said Shahbal and 2 Others* Sup Ct Petition No 10 of 2013 (Joho case); *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others* Sup Ct Petition No 7 of 2013 (Mary Wambui case); *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* Sup Ct Application No 5 of 2014 (Peter Munya case); *Paul Posh Aborwa v Independent Election & Boundaries Commission & 2Others* Civil Appeal No 52 of 2013; *Anami Silverse Lisamula v IEBC & 2 Others* Sup Ct Petition No 9 of 2014; *George Mike Wanjohi v. Steven Kariuki & 2 Others* Sup Ct Petition No 2A of 2014.

176 *Suleiman Said Shahbal v Independent Electoral and Boundaries Commission (IEBC) and Three Others* Sup Ct Petition No 21 of 2014 (*Suleiman Said* case).

177 *Suleiman Said* (n 176 above) para 42.

decision-making. The application of the remedy will ensure that the state is given sufficient direction and opportunity to improve its framework for the realisation of SERs without in any way occasioning legislative lacunae or unjustly divesting those who are already benefiting from the imperfect legal framework that requires amendment so as to effectively realise SER goods and services for all.[178]

5.2 Structural interdicts/injunctions

In situations or cases of systemic or entrenched structural violations of SERs, especially where the government show intransigence, recalcitrance, inaction or unduly delay in the development and implementation of an appropriate framework for the realisation of SERs, the courts should adopt more coercive remedies such as prohibitive and mandatory injunctions.[179] The advantage of using mandatory injunctive orders, as opposed to prohibitory injunctive orders, is that the orders have an affirmative element which makes them conducive to enforcing the positive SER obligations.[180] Liebenberg contends that courts should use these mandatory injunctive remedies in the following situations: where few policy alternatives for the remedy of the violation exist; where the type of violation requires 'the provision of direct, speedy and concrete form of relief'; and where compliance with the court order is possible through the adoption of straightforward and expeditious measures.[181] The advantage of the injunctive orders, relative to the declaratory orders, is that they can be enforced through contempt of court sanctions, and thus have a legal bite.[182]

One such injunctive remedy with dialogical credentials is the structural interdict. It is a remedy aimed at the elimination of systemic violations existing in institutional or organisational settings, especially resulting from complex bureaucratic inadequacies or large-scale governmental failures.[183] Its objective is to achieve systemic structural reforms by tackling the root causes of violations and it has been used as a means of enforcing constitutional rights in several countries, especially the civil right

178 See Roach (n 161 above) 53 - 54, where they argue that declaration work in instances where the government has been inattentive to rights but is willing to take steps in good faith to vindicate rights violations, but that in instances where the government is unwilling or incompetent to enforce rights, stronger relief such as injunctions coupled with retention of jurisdictions should be the appropriate remedy.

179 See *TAC* para 112, where the SACC affirmed its authority to issue mandatory injunctions in appropriate cases when then state's obligations are not being performed diligently and without delay. See also Roach & Budlender (n 162 above) 325.

180 C Mbazira *Litigating socio-economic rights in South Africa* (2009) 171.

181 Liebenberg (n 101 above) 414.

182 Mbazira (n 180 above) 168 - 169.

183 Mbazira (n 180 above) 177 - 178.

reforms in the United States of America.[184] Structural interdicts have also been employed by the South African Courts, the SACC in the context of CPR adjudication[185] and the High Courts in SER adjudication.[186]

The structural interdict is a flexible remedy which involves the court retaining jurisdiction over the case and undertaking supervisory role to ensure compliance with its orders by the government.[187] It involves the court either issuing a reporting order requiring the parties to report to it periodically on the implementation of the judgment, or an order requiring the parties to engage each other and come up with an implementation plan to be adopted by the court for the vindication of the right at issue.[188] To ensure that judicial deference does not lead to abdication of judicial responsibility in the implementation and enforcement of SERs, the structural interdict envisages the court adopting a monitoring mechanism, either undertaking the monitoring itself by requiring the government to report to it within a given period of time as to progress of implementation,[189] or appointing a judgment monitoring commission as has been the practice of the Indian Supreme Court[190] and the Colombian Constitutional Court.[191] This ensures that the substance of the remedy is elaborated in deliberative processes involving the government and a broader spectrum of societal stakeholders, including those who are not directly involved in the litigation but might be affected by the subsequent orders of the courts.[192] The court, to further enhance the implementation of its judgments, retains a supervisory role on the implementation of the remedial orders, thus ensuring a continuing dialogue between the courts, the government and other societal actors.[193]

184 See D Hirsch 'A defense of structural injunctive remedies in South African Law' (September 2006) Bepress Legal Series, Working Paper 1690 14ff http://law.bepress.com/expresso/eps/1690 (accessed 13 September 2013).

185 The cases include: *August v Electoral Commission* 1999 (3) SA 1 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC); *Sibiya v The Director of Public Prosecutions: Johannesburg High Court and Others* 2005 (5) SA 315 (CC), amongst others.

186 The cases include: *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) 88E-H; *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W); *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C); *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T); *President of the Republic of South Africa v Modderklip Boerdery* 2004 (8) BCLR 821 (SCA), amongst others.

187 For an extensive discussion of the structural interdict in the enforcement of SERs, see Mbazira (n 180 above) Chap six, especially 176ff.

188 Liebenberg (n 101 above) 424; Mbazira (n 180 above) 178.

189 For an analysis of the use of this aspect of the structural interdict in the context of South Africa, see Bilchitz (n 103 above) 151 - 163.

190 See Muralidhar (n 80 above) 110; S Shankar & PB Mehta 'Courts and socio-economic rights in India' in V Gauri & D Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 146 174 - 176.

191 See Rodriguez-Garavito (n 80 above) 1685.

192 See Mbazira (n 180 above) 187 - 188 & 215 - 217; and Young (n 93 above) 398 - 401.

193 See Rodriguez-Garavito (n 80 above) 1676; M Tushnet 'Social welfare rights and the forms of judicial review' (2003 - 2004) 82 *Texas Law Review* 1895 1911.

Due to its focus on structural reforms to enhance government responsiveness to rights, structural injunctive remedy have been acknowledged as important remedial mechanism for the enforcement of SERs.[194] Hirsch contends that due to the explicit nature of the order, the clear time-frames for its implementation and the clear accountability and monitoring frameworks put in place by the courts to enhance its implementation, it has the capacity to protect the economically, socially and politically powerless, those who need SERs realisation the most.[195] Positive jurisprudence in the use of the structural interdict, in the Kenyan context has so far been provided by the High Court in the *Mitu-Bell* case[196] where Justice Mumbi Ngugi made the following orders:[197]

- That the respondents do provide, by way of affidavit, within 60 days of today, the current state policies and programmes on provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements.
- That the respondents do furnish copies of such policies and programmes to the petitioners, other relevant state agencies, Pamoja Trust (and such other civil society organisation as the petitioners and the respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the petitioners' grievances), to analyse and comment on the policies and programmes provided by the respondents.
- That the respondents do engage with the petitioners, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identifying an appropriate resolution to the petitioners' grievances following their eviction from Mitumba Village.
- That the parties report back on the progress made towards a resolution of the petitioners' grievances within 90 days from today.

The progressive adoption of the structural interdict in the *Mitu-Bell* case was followed in a similar eviction case of *Satrose Ayuma and Others v Attorney General and Others*, a petition filed by the residents of Muthurwa Estate, Nairobi who were being threatened with eviction by the Kenya Railway Staff benefits Authority from the Estate that they had occupied for a considerable period of time.[198] The Respondents wanted to demolish the Estate, which was situated on their land, and build a micro-metropolis with modern high end apartments for the middle and upper class sections of society and other commercial buildings.[199] In finding that the land actually belonged to the Respondents, the court contended that the

194 See Liebenberg (n 101 above) 434 - 438.
195 Hirsch (n 184 above) 47 - 48. See also J Weiner 'Institutional reform consent decrees as conservers of social progress' (1996) 27 *Columbia Human Rights Law Review* 355 359ff.
196 For the facts and context of this case, see footnote 76 above.
197 *Mitu-Bell Welfare Society* (n 25 above) 31 - 32.
198 *Satrose Ayuma & 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others* High Court of Kenya, Petition No 65 of 2010 (*Muthurwa* case).
199 *Muthurwa* case (n 198 above) para 51.

Constitution required a balancing of rights to enhance the achievement of social justice, and so the right to housing of the Applicants had to be balanced with the right to property of the Respondents. The Court then adopted expansive structural remedies aimed at spurring structural reforms for the realisation of the right to housing in general and the protection of Kenyans against forced evictions in particular. The remedial orders were worded as follows:[200]

> (a) It is hereby declared that the 1st Respondent violated the Petitioners' rights to accessible and adequate housing contrary to Article 43 of the Constitution but limited to the manner in which the forced evictions from Muthurwa Estate was conducted on or about 12th July 2010.
>
> (b) The 3rd Respondent is directed to consider amendments to the Water Services Act of 2002 to bring it in line with the expectations of Article 43(1)(d) of the Constitution 2010,
>
> (c) The 3rd Respondent shall within 90 days of this Judgment file an Affidavit in this Court detailing out existing or planned State Policies and Legal Framework on Forced Evictions and Demolitions in Kenya generally and whether they are in line with acceptable International standards.
>
> (d) The 3rd Respondent shall within 90 days of this Judgment file an Affidavit in this Court detailing out the measures the Government has put in place towards the realisation of the right to accessible and adequate housing and to reasonable sanitation in Kenya as is the expectation of Article 43(1)(b) of the Constitution.
>
> (e) Within 21 days of this Judgment, a meeting shall be convened by the Managing Trustee of the 1st Respondent together with the Petitioners, where a programme of eviction of the Petitioners shall be designed taking into account all the factors clearly outlined at paragraph 83 of this judgment ... The agreed programme shall be filed in this court, in any event within 60 days of this judgment.

The progressive pronouncement of the courts and the adoption of these transformative remedies have been met by obstinacy from the state, with the Attorney General stating severally that these orders are un-implementable and goes contrary to the doctrine of separation of powers. The Attorney General's Office has thus sought to appeal these cases to the Court of Appeal, a process that is still on-going. It is hoped that the Court of Appeal and the Supreme Court will similarly adopt a progressive interpretation of the SERs entrenched in the 2010 Constitution and also embrace these transformative remedial choices in vindicating SERs. Hope on this front can be gleaned from the pronouncement of the Supreme Court that has consistently asserted its role as the guardian on the Constitution by stating that comity between the arms of the state should not prevent it from undertaking its role as the chief interpreter and protector of the Constitution. The Supreme Court affirmed this role in its

200 *Muthurwa* case (n 198 above) para 111.

Advisory Opinion in the matter of *Speaker of the Senate & Another v Hon Attorney-General & Another & 3 Others*[201] as well as in the case of *Suleiman Said* case[202] in relation to the legislative arm of the state as follows:

> It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution … The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another. However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land ... If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution ... Understood in this context therefore, by rendering this Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act.

From the above pronouncement, it is clear that the courts will not shirk their responsibilities as guardians of the Constitution in instances of the violation of the Constitution solely on the basis of the doctrine of separation of powers. It should thus be possible for the courts to adopt the structural interdict remedies in proper cases despite the prevailing argument that they violate the doctrine of separation of powers. It is hoped that more litigants will urge the courts to adopt these innovative remedies with a view to enhancing the full realisation of the entrenched SERs, and consequently the achievement of the transformative potential of the 2010 Constitution.

201 *Speaker of the Senate & Another v Hon Attorney-General & Another & 3 Others* [2013] eKLR paras 61 - 62.

202 *Suleiman Said Shahbal v Independent Electoral and Boundaries Commission (IEBC) and Three Others* Sup Ct Petition No 21 of 2014 para 46.

6 Conclusion

Poverty, inequality and lack of basic socio-economic goods and services have bedevilled Kenya in the last two centuries due to the decline in the economy resulting from poor political and socio-economic governance. These challenges led to a prolonged struggle for constitutional reforms to generate new impetus for better political and socio-economic governance, with the struggle culminating in the adoption of a new Constitution on the 27 August 2010. The major objective of the Constitution is to enhance equity and social justice, entrenching the entire corpus of fundamental rights and freedoms in its Bill of Rights and obligating the government to observe, respect, protect, promote and fulfil these fundamental rights and freedoms. Amongst the rights entrenched in the Bill of Rights are socio-economic rights, which are aimed at the amelioration of the conditions of poor, vulnerable and marginalised individuals, groups and communities, with the aim that national resources are geared towards enhancing access to socio-economic goods and services for these groups.

Despite the entrenchment of these SERs, Kenya has not had a history of their implementation and enforcement, with the consequence that indigenous jurisprudence on their interpretation and judicial adjudication is lacking. This chapter undertook a comparative analysis of the key concepts that have been developed at the international and comparative national level for the interpretation and implementation of these rights with the aim of providing a guide to the Kenyan courts and litigators on how these should be interpreted and adjudicated. The chapter also undertook a jurisprudential analysis of some of the SER cases that have been adjudicated in these comparative jurisdictions, with the aim of directing Kenyan courts to persuasive judicial authorities that may guide our Kenyan judges in the adjudication of these newly entrenched rights. The chapter acknowledges that with the entrenchment of these rights in the Bill of Rights, they are properly justiciable and individuals can file cases in court should they be violated or threatened with violation, and the courts are empowered to give efficient remedial orders for the vindication of these rights. The chapter also looked the concept of progressive realisation of SERs, indicating that even though the Kenyan Constitution provides in article 21(2) that these rights are subject to progressive realisation, it does not give the government carte blanche to delay in their realisation, but requires it to take steps and put in place the legislative, policy and programmatic framework for their realisation, effectively prioritising social spending and looking for resources from the international community should the available national resources prove inadequate. The chapter also asserts that even though a progressive realisation standard requires progressive planning, it also has aspects that are subject to immediate realisation such as aspects to do with equality and non-discrimination in accessing SERs, the realisation of the minimum core

content of SERs, the realisation of the right to basic education, amongst others.

Secondly, the chapter looked at the possible strategies that litigators can adopt in the adjudication of SERs, with an analysis being made of the individualised approach that has predominantly been used in the right to health litigation in the Latin American Countries on the one hand, and the structural reform oriented public interest litigation that has been predominantly used in India and Colombia. Though these strategies are not mutually exclusive and can be used concurrently or conjunctively depending on the nature of the case, the chapter recommends that at this nascent stage of the implementation of SERs in our domestic legal system, Kenyan litigators should focus more on structural public interest litigation with the aim of enhancing the development of a comprehensive and inclusive national legal, policy and programmatic framework for the realisation of SERs for all Kenyans. Such litigation will benefit all Kenyans, especially the poor, vulnerable and marginalised groups who need the realisation of SERs the most, but who might not have the knowledge and resources to undertake individualised litigation on their own.

The chapter then looked at the standard of assessment that can be adopted and used by the Kenyan courts in its adjudication of SERs. The chapter directs the judges to the minimum core standard that has been developed by the Committee on Economic, Social and Cultural Rights and which has been adopted by the courts in Germany and Colombia, though it has been rejected in South Africa. The chapter also details the reasonableness approach that has been developed by the South African Constitutional Court for the adjudication of SERs, and which has been adopted at the international level in article 8(4) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, with the effect that the reasonableness approach is now a key tool at the international level for the assessment of violations of SERs. These two assessment standards are, however, not mutually exclusive, and can be integrated together in the assessment of violations of SERs. The possibility of this integration has been acknowledged by the Kenyan High Court in the *FIDA-Kenya* case and has been advocated by several prominent SER commentators such as Sandy Liebenberg and David Bilchitz. The chapter encourages the Kenyan courts to adopt this integrated approach to ensure that SERs adjudication does not show chariness towards individual litigators while at the same time ensuring that structural reforms are undertaken to create a better legislative, policy and programmatic framework at the national level for the realisation of SERs for all Kenyans.

Lastly, the Chapter looks at two remedies that the Kenyan courts should adopt in the adjudication of SERs, being the suspended declaration of invalidity and the structural interdict. These and other remedies can be adopted by the courts at different times depending on the peculiarities of

each case and the conduct of the state in ameliorating the conditions of the poor, vulnerable and marginalised individuals and groups.

It is the hope of the author that this chapter will be a key resource in enhancing SER litigation with the aim of achieving the transformative potential of the 2010 Kenyan Constitution.

CHAPTER 4

TOWARDS A COHERENT LEGAL REGIME FOR THE PROTECTION OF INDIGENOUS PEOPLES' LAND RIGHTS IN KENYA

Tom Kabau

1 Introduction

Ancestral land is deemed to be part of community land under article 63 of the 2010 Constitution, with persons entitled to interests in such land being 'identified on the basis of ethnicity, culture or similar community of interest'.[1] However, there are no interpretative guidelines on what the concept of ancestral land refers to either under the Constitution or legislation. On the face of it, the concept of ancestral land may be seen to imply that all Kenyan ethnic communities are entitled to the land that they historically possessed (especially in the pre-colonial period), placing it in tension with current private and public tenure systems.

Land is a highly contentious resource in Kenya, and often leads to ethnic tension and conflict. The 2013 Report of the Truth Justice and Reconciliation Commission (TJRC) states that 'historical grievances over land constitute the single most important driver of conflicts and ethnic tension in Kenya'.[2] There are critical and valid claims to land based on historical injustices arising from expropriation of land during the colonial period and even in the era of independence.[3] Some communities have suffered from systematic dispossessions of their ancestral land both in the colonial and post-colonial period, and claims for such land 'are part of the cinder, which keeps igniting ethnic clashes in the Rift Valley and the Coast provinces'.[4]

1 Constitution of Kenya (promulgated 27 August 2010) http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010 (accessed 15 February 2014).

2 Truth Justice and Reconciliation Commission 'Report of the Truth, Justice and Reconciliation Commission: Volume I' 2013 vii.

3 Republic of Kenya 'Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration' (2002) 58.

4 As above.

Some of the communities that lost their ancestral land during the colonial period did not get back the land upon the attainment of independence, as it was transferred to individuals and groups through the property market.[5] In addition, there were widespread cases of irregular and illegal allocations of land in post-colonial Kenya. Despite land claims being a major contributor to ethnic conflicts, the TJRC Report regrets that successive governments have failed to address and resolve the issue of historical injustices both in the colonial and post-colonial period.[6] The Commission of Inquiry into the Land Law System of Kenya (Njonjo Commission) had, in 2002, proposed that a mechanism to address and resolve historical injustices in relation to allocation of land resources was necessary as part of tenure reforms, especially in the Rift Valley and Coastal regions.[7] In addition, as Patricia Kameri-Mbote opines, proper '[g]overnance and management of land is critical to the quest for cohesive nations and democratising societies'.[8]

The question of historical claims to land has been particularly problematic during elections, especially in 1992, 1997 and 2007. During elections, politicians often exploit land grievances for personal gain.[9] Events such as the post-2007 elections ethnic violence, which resulted in deaths and evictions, demonstrates the manner in which 'outsiders' have been targeted for expulsion, especially in the Rift Valley region.[10]

Generally, a liberal interpretation of the constitutional concept of ancestral land is likely to be problematic, and may end up being a powder keg for national cohesion and political, economic and social progression in Kenya. First, it is unrealistic to expect that all ancestral land can be returned to all the historical owners. It is in realisation of the complexity of ancestral land claims that prompted elders from the Ogiek indigenous community, in their 2009 Memorandum to the Committee of Experts on the Constitutional Review Process, to state as follows:

> Notwithstanding the complexity of land claims, if a land restitution programme were run on the basis of aboriginal title, Ogiek would be entitled to claim much of Kenya and the Mau Forest to boot. Given present realities,

5 GM Wachira 'Vindicating indigenous peoples' land rights in Kenya' unpublished LLD thesis, University of Pretoria, 2008 239. The lack of a major shift in land redistribution policies of the government at independence, for instance, on the basis of ancestral ownership, may be attributed to the continuation of the colonial legal and policy framework. Okoth-Ogendo has particularly pointed out that despite independence, the basic principles that defined the colonial land laws and institutions remained. HWO Okoth-Ogendo *Tenants of the crown: Evolution of agrarian law and institutions in Kenya* (1991) 164.

6 Truth Justice and Reconciliation Commission (n 2 above) xiv.

7 Republic of Kenya (n 3 above) 58.

8 P Kameri-Mbote 'Community land in EA is not a "primitive" precursor of private ownership' International Environmental Law Research Centre, 2013 1 http://www.ielrc.org/content/n1302.pdf (accessed 4 December 2013).

9 Truth Justice and Reconciliation Commission (n 2 above) xiv.

10 Wachira (n 5 above) 6 - 7.

> such a course of action is neither desirable nor realistic. It would also verge on the impossible to delineate the boundaries of ancestral claims given the fluid and multiple forms of tenure arrangements negotiated in pre-colonial Kenya. Ogiek request for recognition and land should not be viewed in terms of restitution of traditional lands or compensation for part injustices, but rather as an attempt to effect a more equitable present, taking cognizance of these matters. Ogiek calls for greater access to land are neither unrealistic nor unreasonable since they are bound up in present socio-economic concerns and needs.[11]

It is worthy to observe that the above statement was from elders of a marginalised indigenous community, which, as argued in this chapter, deserves special and preferential treatment in relation to claims for ancestral land on the basis of the concept of 'indigenous peoples'. The concept of indigenous peoples is a human rights approach that will be defined and elaborated on in this chapter. Second, a liberal interpretation of the concept of ancestral land may be inconsistent with other important constitutional provisions on the right to own property in any part of the country, and those against discrimination on the basis of ethnicity or race, if the subject land was lawfully acquired. For instance, article 40(1) of the Constitution provides that any Kenyan citizen, irrespective of his ethnicity or race, has the right to own property of any description in any part of state. Articles 27(4) and 27(5) of the Constitution prohibit discrimination on the basis of ethnicity and race.

Third, there are opportunities of addressing the historical injustices of irregular and illegal allocations of land without primarily emphasising that, for all Kenyan communities, any ancestral claims on public and private land translate to community land for the benefit of the claimants. The other general mechanisms that the National Land Commission (NLC) of Kenya can recommend to be utilised in order to address historical injustices, and ensure equity in the distribution of land, include revocation of illegal and irregular titles.[12] In addition, the NLC can recommend to Parliament legislation on maximum acreage of land that an individual is permitted to hold under either freehold or leasehold, and the rest acquired by the state for purposes of redistribution to squatters.[13] Further, the NLC may recommend that idle parcels of land beyond a certain size be subjected to huge taxation, with the revenue utilised by the government to purchase

11 Ogiek Elders 'Ogiek memorandum to the Committee of Experts on the Constitutional Review Process' 24 July 2009 http://www.forestguardian.net/news/news-00-09-1.htm (accessed 10 January 2014).

12 Article 67 of the Constitution establishes the National Land Commission and grants it the mandate to investigate historical injustices in relation to land and recommend appropriate remedies. That responsibility is reaffirmed by section 5(1)(e) of the National Land Commission Act of 2012. National Land Commission Act http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%205D (accessed 10 February 2014).

13 Article 68(c)(i) of the Constitution requires Parliament to enact legislation that stipulates the maximum acreage of land that a person may hold under private tenure..

land for squatters.[14] In addition, when leaseholds granted by the government expire, rather than renewing huge parcels of the land to the original lessees, local landless communities should be granted rights to part of the land. Squatters with legitimate claims to the land that they inhabit, but have failed to obtain title instruments due to political, economic and social factors, should also be granted such documents.

It should be noted that, even in the context of 'indigenous peoples', the constitutional concept of ancestral land has not prevented the dispossession of indigenous communities from their traditional land, or contributed to an equitable arrangement of exploitation of land based resources. Recent dispossessions of the Endorois, Ogiek and Sengwer indigenous communities will be examined.

Based on the discussed issues, this chapter argues that where the concept of ancestral land is utilised, the same should be in the context of the right of indigenous communities to their traditional land. It would, therefore, be a mechanism of recognising and affirming, in Kenya, the special concern for indigenous peoples' land claims that such communities have under international legal instruments. However, it should be noted that the special dimension and meaning of 'indigenous peoples' in relation to their traditional land under international law, especially the emerging practice in the African region, is not merely on the basis of nativity or aboriginality. As the African Commission on Human and Peoples' Rights observed, 'though some indigenous populations might be first inhabitants, validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims'.[15] The African Commission has also instructively clarified that being categorised as an indigenous population is not based on being 'first inhabitants' in the context of aboriginality. [16]

Previous ethnic based evictions such as those witnessed after the 2007 elections, which were partly linked to land problems as their root cause, indicated the need for comprehensive land reforms.[17] However, the mechanism for land reforms has to balance between the 'rights of land holders who have legally acquired land in any part of the country with those of the original inhabitants'.[18] The approach discussed in this chapter may be one of the mechanisms of addressing the highly contentious issue of rights to ancestral land. This chapter postulates the view that the interpretation of the concept of ancestral land be linked to that of

14 See article 67(2)(g) of the Constitution and section 5(1)(g) of the National Land Commission Act (n 12 above).
15 *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 154.
16 *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (2007) African Commission on Human and Peoples' Rights, 41st Ordinary Session, para 13.
17 Wachira (n 5 above) 7.
18 As above.

'indigenous peoples', which has a special meaning under international law, is premised on a human rights approach, and is helpful in developing a progressive and coherent domestic legal framework for protecting the rights of the indigenous communities.

2 Justifications for the indigenous peoples' approach in interpreting the ancestral land concept

Article 61 of the Constitution classifies the core forms of land 'tenure' in Kenya as being public, community and private.[19] Public land includes land held by the state or a state organ, and land containing resources such as minerals and mineral oils.[20] In addition, forests (excluding those held by communities as 'community forests'), 'government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas' are categorised as public land.[21] Under article 62(2) of the Constitution, public land that is not held or occupied by a national state organ is possessed by the national and county government, and is administered by the National Land Commission on behalf of the people.[22] Public land is highly susceptible to government economic policies and interests and, therefore, is not directly available for utilisation and exploitation by the indigenous peoples in accordance with their aspirations like in the case of the land constitutionally categorised as community. The current constitutional categorisation of public land may, however, include areas traditionally occupied by indigenous communities, for instance, forests, game reserves and water catchment areas. The issue of conflict between public and community land categories is discussed in section three of the chapter.

Private land is another important category of land in Kenya, and it essentially comprises land held by an individual under either a freehold or leasehold tenure.[23] The focus of this chapter is on 'ancestral land,' a

19 Tenure refers to the terms and conditions that define and regulate the nature and extent of a person's interests in a particular parcel of land. See, C Harpum et al *Megarry & Wade: The law of real property* (7th ed, 2008) 2; N Jackson et al *Land Law* (4th ed, 2008) 28 - 29; RM Kibugi 'Governing land use in Kenya: From sectoral fragmentation to sustainable integration of law and policy' LLD thesis, University of Ottawa, 2011 11.

20 Art 62(1) of the Constitution.

21 Art 62(1)(g).

22 As above. Article 6(1) of the 2010 Constitution divides Kenya into national and county administrative units for purpose of engendering a devolved system of governance. The National Land Commission is established by article 67 of the Constitution 'to manage public land on behalf of the national and county Governments' amongst other functions. A national state organ, which can hold public land by virtue of article 62(2) of the Constitution, may include parastatals such as Agricultural Development Corporation (ADC), Kenya Airports Authority (KAA) and Kenya Institute for Public Policy Research and Analysis (KIPPRA).

23 Art 64.

concept that is used in article 63(2) of the Constitution in the context of community land, the third category of the core tenure systems in Kenya. Besides ancestral land, other forms of community land include property 'lawfully held, managed or used by specific communities as community forests, grazing areas or shrines' and 'lands traditionally occupied by hunter-gatherer communities'.[24] As explained in the introductory section, this chapter advocates for the use of the constitutional concept of ancestral land only in the context of the right of indigenous communities to their traditional land. This section discusses the justifications for adopting the indigenous peoples approach while interpreting the concept of ancestral land.

The phrase 'indigenous,' when used in Africa, does not directly translate to communities that may be referred to as first inhabitants in the context of aboriginal title.[25] As Gabrielle Lynch observes, the common notion that all Africans are indigenous to Africa contributed to the evolution of the concept of subjection to certain forms of inequalities and marginalisation as a core element of 'indigenous communities'.[26] Therefore, the recognition of indigenous peoples' rights is not automatically and solely on the basis of first habitation or pre-colonial ownership.[27] In its special context, the phrase 'indigenous' is used in reference to marginalised communities in order to highlight and alleviate their discrimination from the mainstream political, social and political state structures,[28] and also in order to emphasise their cultural and spiritual attachment to land.

On that basis, the concept of indigenous peoples has a human rights perspective rather than merely that of 'first inhabitants,' as it is largely premised on the notion of 'shared experiences of dispossession and marginalization'.[29] A human rights approach focuses largely on those 'most vulnerable, excluded or discriminated against'.[30] Under such an approach, governments are deemed to have obligations to establish a legal and policy framework that ensures respect, protection and fulfilment of the

24 Art 63(2).
25 *Advisory Opinion of the African Commission on Human and Peoples' Rights* (n 16 above) para 13.
26 G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois' (2011) 111 *African Affairs* 24 26.
27 *Centre for Minority Rights Development and Others* (n 15 above) para 154.
28 African Commission on Human and Peoples' Rights 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (2003) DOC/OS(XXXIV)/345 para 4.
29 United Nations General Assembly 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, on his mission to Kenya' (26 February 2007) UN Doc A/HRC/4/32/Add.3 para 9. The modern use of the phrase 'indigenous' is based on the need to highlight and bring to an end certain forms of discrimination that some communities undergo, and not merely the issue of aboriginality. Wachira (n 5 above) 15.
30 United Nations Population Fund 'Human rights: The human rights-based approach' http://www.unfpa.org/rights/approaches.htm (accessed 10 February 2014).

right. [31] The human rights' approach enhances the tackling of the indigenous peoples' problems within the framework of international legal standards.[32] It has been argued that if there is lack 'of a principled human rights framework' governments and courts are likely to continue treating the issue of breaches and depravations of the rights of indigenous peoples with casualness.[33]

Although indigenous communities regard themselves as having distinctive characteristics, it is difficult to accurately define the concept of 'indigenous peoples'.[34] This is due to the fact that there lacks a global consensus on the meaning of the phrase 'indigenous peoples'.[35] As was expressed in the *Centre for Minority Rights Development and Others v Kenya* (also referred to as the *Endorois* case), there lacks a universal and definite definition of the indigenous peoples' concept that comprehensively takes into account 'the diversity of indigenous cultures, histories and current circumstances'.[36] In addition, as the African Commission's Working Group of Experts on Indigenous Populations/Communities pointed out in 2003, a

> strict definition of *indigenous peoples* is neither necessary nor desirable. It is much more relevant and constructive to try to outline the major characteristics, which can help us identify who the indigenous peoples and communities in Africa are.[37]

The Inter-American Commission has instructively cautioned that 'a strict and closed definition will always risk being over – or under – inclusive'.[38]

Tribunals and institutions of intergovernmental organisations and scholarly works have postulated characteristics that may be helpful in determining which communities qualify to be regarded as indigenous peoples. First, as the African Commission's Working Group stated, the cultures and lifestyles of indigenous communities fundamentally differ from those of the main society, and therefore, the survival of their culture

31 As above.
32 P Joffe 'UN Declaration on the Rights of Indigenous Peoples: Canadian Government positions incompatible with genuine reconciliation' (2010) 26 *National Journal of Constitutional Law* 121 135.
33 Joffe (n 32 above) 136.
34 JK Asiema & FDP Situma 'Indigenous peoples and the environment: The case of the pastoral Maasai of Kenya' (1994) 5 *Colorado Journal of International Environmental Law and Policy* 149 149.
35 Wachira (n 5 above) 10. See also, B Kingsbury '"Indigenous peoples" in international law: A constructivist approach to the Asian controversy' (1998) 92 *American Journal of International Law* 414 414.
36 *Centre for Minority Rights Development and Others* (n 15 above) para 147.
37 African Commission on Human and Peoples' Rights (n 28 above) para 4. See also *Advisory Opinion of the African Commission on Human and Peoples' Rights* (n 16 above) para 10.
38 Inter-American Commission on Human Rights 'Indigenous and tribal peoples' rights over their ancestral lands and natural resources: Norms and jurisprudence of the Inter-American Human Rights System' OEA/Ser.L/V/II. Doc 56/09 (30 December 2009) 9.

is threatened, and at times can be in danger of extinction.[39] There exists a dichotomy between the cultural distinctiveness of the indigenous peoples and the lifestyles of the national mainstream populations. [40]

Second, indigenous peoples have a special cultural and spiritual attachment to their traditional land, which may even be critical to their survival due to the land-based resources that they obtain from the land. The African Commission's Working Group observed that the capacity of the indigenous communities to sustain their unique way of life is dependent on access to their traditional land and its natural resources.[41] The predicaments that confront indigenous communities in Africa include being denied their cultural identity and traditional land, which are important for their survival.[42] In the *Endorois* case, the African Commission affirmed that the linkage between land and culture is a critical aspect of the identity of the indigenous communities.[43] In addition, the Inter-American Commission on Human Rights pointed out that lands traditionally occupied by indigenous communities are essential for their cultural and spiritual life.[44] It has generally been accepted 'that indigenous land rights serve the purpose of protecting indigenous identity as defined by the cultural and spiritual attachment of the community to its traditional lands'.[45]

Third, in order to determine whether a certain community qualifies to be regarded as indigenous in relation to a particular place, it is important to consider whether there is a history of continued occupation of the region. The Inter-American Commission observed that a 'historical continuity of its presence in a given territory' is essential in order to determine whether a certain community may be regarded as indigenous in a particular territory.[46] It may include, 'an ancestral relationship with the societies that pre-existed a period of colonisation or conquest'[47] for the community that has continued to occupy the land.

Fourth, there is often discrimination of the indigenous communities from the mainstream political and economic activities as they are deemed

39 African Commission on Human and Peoples' Rights (n 28 above) para 4.1.
40 J Igoe 'Becoming indigenous peoples: Difference, inequality, and the globalization of East African identity politics' (2006) 105 *African Affairs* 399, 404.
41 African Commission on Human and Peoples' Rights (n 28 above) para 4.1.
42 Igoe (n 40 above) 403.
43 *Centre for Minority Rights Development and Others* (n 15 above) para 151.
44 Inter-American Commission on Human Rights (n 38 above) 1. The traditional lands occupied by indigenous communities are largely what defines their identity. G Pentassuglia 'Towards a jurisprudential articulation of indigenous land rights' (2011) 22 *European Journal of International Law* 165 165 - 166.
45 Pentassuglia (n 44 above) 167.
46 Inter-American Commission on Human Rights (n 38 above) 11. See also, J Gilbert 'Historical indigenous peoples' land claims: A comparative and international approach to the common law doctrine on indigenous title' (2007) 56 *International and Comparative Law Quarterly* 583 609.
47 Inter-American Commission on Human Rights (n 38 above) 11.

as less advanced in comparison to other dominant communities in society.[48] Indigenous peoples, therefore, experience various forms of political, economic and social marginalisation and exploitation by the mainstream and national systems.[49] This is because the national and mainstream political, economic and social systems are often designed in accordance with the interests and aspirations of the dominant communities.[50] In addition, the culture and lifestyle of indigenous communities is at times viewed as being retrogressive and an obstacle to national progress and pride.[51] As the African Commission's Working Group observes, the

> discrimination, domination and marginalisation violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in deciding on their own future and forms of development.[52]

It should be noted that the implementation of neoliberal politico-economic reforms by African states from the 1990s, due to the influence of powerful capitalist states such as the United States and multinational financial institutions such as the World Bank, resulted in greater alienation of land based resources of indigenous communities for more 'productive' activities.[53]

Based on the above criterion, hunter-gatherer and pastoral communities have often been regarded as indigenous peoples.[54] According to the UN Special Rapporteur, the pastoral communities of Kenya such as the Gabra, Borana, Endorois, Maasai, Turkana, Somali, Pokot and Samburu, and hunter-gatherers such as the Sengwer, Awer and Ogiek, qualify to be categorised as indigenous peoples.[55] In addition, the Special Rapporteur has observed that minority communities such as Nubians suffer serious marginalisation and exclusion that is similar to that of indigenous peoples although in the urban context.[56] There is, therefore, justification for granting the Nubians similar legal and policy safeguards as that afforded the indigenous peoples.

The concept of indigenous peoples is flexible in terms of ethnic and community identity. Therefore, distinct groups within the larger ethnic community may be regarded separately as indigenous communities, even where the larger society does not qualify. Therefore, as Gabrielle Lynch

48 African Commission on Human and Peoples' Rights (n 28 above) para 4.1.
49 As above.
50 As above.
51 DL Hodgson *Being Maasai, becoming indigenous: Postcolonial politics in a neoliberal world* (2011) 26.
52 African Commission on Human and Peoples' Rights (n 28 above) para 4.1.
53 Hodgson (n 51 above) 38.
54 United Nations General Assembly (n 29 above) para 10.
55 As above.
56 As above.

points out, some communities, such as the Ogiek, Endorois, Sengwer and Pokot, which are also part of the larger Kalenjin ethnic group, have come to be regarded as indigenous peoples on their own.[57] The Inter-American Commission has also clarified that 'indigenous communities may be composed of persons and families that belong to more than one ethnic group, but regard and identify themselves as a single community'.[58]

3 Continuing uncertainty in indigenous peoples land rights: An appraisal of recent practice

Article 63 of the 2010 Constitution recognises ancestral lands, and lands traditionally occupied by hunter-gatherer groups, as community land whose rights of use shall vest on the relevant community on the basis of ethnicity, culture or similar community of interest. However, as will be demonstrated in this section, there is constitutional uncertainty on the relationship between community land and public land, and the interests of indigenous communities, in the context of important land based resources such as game parks, forests and minerals. Some of the recent practices will be examined in order to demonstrate the continued marginalisation and subjugation of indigenous peoples, and practice that is inconsistent with the standards postulated under international instruments. The continued absence of a coherent and consistent legal and policy framework to safeguard the special interests of indigenous peoples will be examined, despite the constitutional recognition of the concept of ancestral land.

For instance, community land is specifically defined by article 63(2) of the Constitution as including that which is held by specific ethnic groups as community forests, shrines, grazing areas, ancestral lands and lands that have traditionally been occupied by hunter-gatherer communities. There is, however, public land, which according to article 62(1) of the Constitution, includes minerals, water catchment areas, government game reserves, government animal sanctuaries, national parks, and specially protected areas. In addition, although article 62(1) of the Constitution exempts land held as community forests, grazing areas or shrines from public land, it is instructive to note that such land may still be deemed as public if there are minerals, is designated a water catchment area, or is a game reserve or park. This creates tension between community and public land tenure systems. Since the public tenure is based on mainstream and national political and economic aspiration, the communal tenure, which is partly geared towards protecting special and minority interests, is likely to be subjugated in case of a conflict between the two systems. It is in appreciation of the insufficiency and vulnerability of the public tenure

57 G Lynch 'Kenya's new indigenes: negotiating local identities in a global context' (2011) 17 *Nations and Nationalism* 148 148.

58 Inter-American Commission on Human Rights (n 38 above) 12.

system in addressing their special land use needs that indigenous communities such as the Ogiek and the Sengwer requested that their ancestral forest lands be transferred from public to community land status, in a September 2014 memorandum to the NLC Task Force on Historical Land Injustices.[59] The transferring of ancestral forests of indigenous communities from public to community land may be achieved through a gazette notice by the NLC.

It is on the basis of uncertainty in the legal and policy framework that indigenous communities such as the Endorois, Ogiek and Sengwer continue to suffer eviction from their ancestral land, an issue that is examined later in this section. It has been observed that the broad conceptualisation of public land under the Constitution may contribute to severe tensions between the interests of some minority communities and conservation efforts of government.[60] In addition, some of the laws that may be used to bar indigenous communities from inhabiting or accessing their ancestral land include the Forests Act.[61] Section 22 of the Forests Act states that none of its provisions should be deemed as barring

> any member of a forest community from using … such forest produce as it has been the custom of that community to take from such forest otherwise than for the purpose of sale.[62]

However, section 22 of the Act also includes a negating and drawback clause to the effect that such rights are 'subject to such conditions as may be prescribed …'[63] In addition, section 55 of the Forests Act proscribes and criminalises certain activities within a public forest without a licence or permit, such as grazing livestock, gathering or taking *any* forest produce, collecting honey and cultivation.[64] Such inconsistent provisions under the Forest Act contribute to interpretative differences and have permitted the continued eviction of indigenous peoples from public forests.

It is important to note that the National Land Commission, established under article 67 of the Constitution, has the mandate of investigating both historical and current land injustices, either due to a complaint or on its own initiative, and recommend appropriate remedy. Under section 5(1) of the National Land Commission Act, the role of the Commission to investigate and recommend remedies for historical

59 'Forest dwelling communities position statement: Securing our rights, our lands and our forests' 11 September 2014 3 http://www.forestpeoples.org/sites/fpp/files/news/2014/10/Forest%20Dwellers%20Position%20Statement%20to%20the%20NLC%20Task%20Force%20Historical%20land%20Injustices-1.pdf (accessed 14 January 2015).

60 AS Korir 'Kenya at 50: Unrealized rights of minorities and indigenous peoples' Minority Rights Group International, 2012 22 http://www2.ohchr.org/english/bodies/hrc/docs/ngos/MRG_Annex1_Kenya_HRC105.pdf (accessed 3 December 2013).

61 Forests Act, chapter 385 of the laws of Kenya.

62 As above.

63 As above.

64 As above.

injustices is reaffirmed.[65] Other important functions, as outlined by the Act in section 5(1), include recommendation of the national land policy to the national government, conducting research on land use, and advising the relevant authorities on appropriate mechanisms of exploitation of land based resources.[66] Section 15 of the Act specifically requires the Commission to recommend to Parliament, within a period of two years since its appointment, appropriate legislation for the purposes of investigating and resolving historical injustices in relation to land.[67]

The members to the National Land Commission were appointed in February 2013.[68] The Commission commendably expressed concerns on the January 2014 questionable evictions of the Sengwer community from the Embobut Forest, and gave an undertaking to resolve the issue with relevant state agencies.[69] The NLC has also established the Taskforce on the Formulation of Legislation on Investigation and Adjudication of Complains Arising out of Historical Land Injustices, which was gazetted on 9 May 2014.[70] The Taskforce is required to develop, within a period of nine months, draft law to be submitted to Parliament by the NLC to address and resolve land claims arising out of alleged historical injustices, and should include appropriate remedies to affected communities and individuals.[71]

The Commission, in particular, provides a great opportunity for indigenous and minority communities to highlight their concerns with regard to both historical and contemporary land injustices.[72] This chapter

65 National Land Commission Act (n 12 above).
66 As above.
67 As above.
68 E Fortunate 'Kibaki appoints National Land Commission' *Daily Nation* 20 February 2013 http://www.nation.co.ke/news/Kibaki-appoints-National-Land-Commission-/-/1056/1699838/-/ddfxaxz/-/index.html (accessed 24 January 2014).
69 For the NLC statement, see, National Land Commission 'In response to the land and human rights advocacy organizations' Open letter to the Government of Kenya and other state actors on land, environment and natural resources http://www.nlc.or.ke (accessed 14 January 2015). On the eviction of the Sengwer indigenous community from the Embobut forest, see: United Nations Human Rights 'Kenya / Embobut Forest: UN rights expert calls for the protection of indigenous people facing eviction' 13 January 2014 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14163&LangID=E (accessed 24 January 2014); C Kemboi 'Indigenous rights clash with forest protection in Kenya' *Thomson Reuters Foundation* 17 January 2014 http://www.trust.org/item/20140117123825-xp43b/ (accessed 24 January 2014); 'Forest guards set on fire houses left by squatters to protect water tower' *Daily Nation* 17 January 2014 http://mobile.nation.co.ke/news/Forest-guards-set-on-fire-houses-left-by-squatters/-/1950946/2150210/-/format/xhtml/-/qbq4x3z/-/index.html (accessed 25 January 2014); M Newsome 'Kenya's scorched earth removal of forest's indigenous' *International Press Service News Agency* 24 January 2014 http://www.ipsnews.net/2014/01/kenyas-scorched-earth-removal-forests-indigenous/ (accessed 25 January 2014).
70 Kenya Gazette 'Gazette notice no 3139: Taskforce on the Formulation of Legislation on Investigation and Adjudication of Complains Arising out of Historical Land Injustices' (Vol CXVI-No 60, 9 May 2014) 1170.
71 As above.
72 Korir (n 60 above) 22.

examines some of the issues that the Commission should focus on while drafting the recommendations for the legal and policy framework, especially with regard to the necessary safeguards for indigenous communities in Kenya.

3.1 The Endorois community and the Lake Bogoria Game Reserve

The Kenyan Government established the Lake Hannington Game Reserve in 1973 via a gazette notice, which was within parts of the Baringo and Koibatek County Councils in the territory of the Endorois community, and was renamed Lake Bogoria Game Reserve in 1974.[73] The Endorois community was evicted without adequate compensation, and in the subsequent years, did not benefit from the earnings of the Reserve.[74] In addition, they were denied unrestricted access to Lake Bogoria and the surrounding land, which besides violating their land rights, also dismantled their cultural, spiritual and economic attachments with the land.[75] Further, the Endorois were restricted to a section of semi-arid land without sufficient and conducive land to sustain their pastoral and beekeeping livelihood.[76]

In 2003, the Endorois community filed its claim for the restitution of its land and compensation for material and spiritual losses at the African Commission through the Centre for Minority Development (CEMIRIDE) and Minority Rights Group International (MRG).[77] In its declaration, the African Commission was of the view that the 'Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands - Lake Bogoria and the surrounding area'.[78] It specifically stated that 'without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors'.[79] In its recommendations, the Commission requested the Kenyan Government to restitute the Endorois ancestral land, and recognise the ownership rights of the community.[80] Second, the Government was required to grant the community 'unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle'.[81]

73 *Centre for Minority Rights Development and Others* (n 15 above) para 177. See also, Korir (n 60 above) 9.
74 Minority Rights Group International 'Trouble in paradise' 2007 http://www.minorityrights.org/6779/trouble-in-paradise/the-facts.html (accessed 26 January 2014).
75 As above.
76 As above.
77 Korir (n 60 above) 9.
78 *Centre for Minority Rights Development and Others* (n 15 above) para 156.
79 As above.
80 *Centre for Minority Rights Development and Others* (n 15 above) para 298.
81 As above.

Third, the state was required to provide adequate compensation to the Endorois for the loss suffered, ensure payment of royalties for economic benefits accruing from the Reserve and provide employment opportunities to the community.[82] As has been observed, the Commission's decision to uphold the Endorois community's claims is a call for the Kenyan Government 'to re-evaluate the status of rights and protections accorded to minorities and indigenous peoples in Kenya'.[83]

3.2 The Ogiek and the Mau Forest

The Mau Forest is one of the most important and main water towers in Kenya, and is the catchment zone of rivers such as Nyando, Yala, Mara, Ewaso Ngiro, Naishi, Nzoia, Kerio, Nderit, Makalia, Molo, Njoro and Sondu, which in turn feed lakes that include Victoria, Turkana, Nakuru, Baringo and Natron.[84] The Ogiek community was evicted without prior consultation or compensation upon the gazettement of the Mau Forest as a National Forest in 1974.[85] Consequently, they were reduced to a pathetic livelihood as they were barred from hunting or collecting honey within the forest.[86] However, there were cases of illegal logging by outsiders, and subsequent excision of sections of the forest for the benefit of non-indigenous private developers, which contributed to severe endangerment of both the forest as a water catchment region and the general environmental security of the country.[87] Although the government has in the subsequent years distributed title deeds to some sections of the Ogiek population, [88] the community is still restricted from inhabiting or accessing some regions of the forest. It has also been highlighted that when the government degazetted parts of the forest for resettlement in 1992, the politically motivated activity included the resettlement of other poor and landless people in the Ogiek's ancestral land[89] despite some members of the indigenous community continuing to suffer land depravation. In 2007, the Special Rapporteur on Indigenous Peoples observed as follows:

> Being considered as squatters on their own land and legally banned from using the forest resources for their livelihood, their attempt to survive according to their traditional lifestyle and culture has often been criminalized

82 As above.
83 Centre for Minority Rights Development 'A call to re-evaluate the status of minority and indigenous rights in Kenya: Decision on the Endorois communication before the African Commission on Human and Peoples' Rights' http://www.minorityrights.org/download.php?id=749 (accessed 15 December 2013).
84 G Rambaldi et al 'Through the eyes of hunter-gatherers: Participatory 3D modelling among Ogiek indigenous peoples in Kenya' (2007) 23 *Information Development* 113 113.
85 United Nations General Assembly (n 29 above) para 37.
86 As above.
87 As above. There are allegations that the Kenyan Government has, in the previous years, 'overtly or tacitly permitted logging' within the forest. Rambaldi et al (n 84 above) 114.
88 United Nations General Assembly (n 29 above) para 38.
89 Rambaldi et al (n 84 above) 114.

> and their repeated recourse to the courts has not been successful. Ogiek attribute this vulnerability to the fact that they are not recognized as a distinct tribe and therefore lack political representation.[90]

In July 2012, the African Commission filed a case in the African Court on Human and Peoples' Rights due to an eviction notice that had been issued to the Ogiek community in October 2009, which required that they vacate the Mau Forest as it was deemed a water catchment region and government (now public) land.[91] In the application to the African Court, the Ogiek requested that orders be issued restraining the government from evicting them and that it recognises their historical claims to the land.[92] The community also sought to have the government ordered to pay compensation for loss due to their dispossession of the land and natural resources, and their restriction from practicing their religion and culture.[93] The Court found it necessary to grant provisional measures on 15 March 2013 in order to preserve the status quo until the case is determined in full.[94] According to Ogiek elders, their demand for 'greater access to land are neither unrealistic nor unreasonable' as they are premised on contemporary socio-economic realities.[95]

3.3 The Sengwer Community and the Embobut Forest

The Sengwer community has inhabited the Embobut Forest of the Cherangany Hills in the Rift Valley for centuries, on the basis of a hunter and gatherer livelihood.[96] However, evictions began to be carried out in the mid of January 2014.[97] The government had resolved to compensate each of the family to be evicted with an equivalent of Kenya Shillings 400000 (approximately 4700 United States Dollars) to about 3000 families that had been identified.[98] However, there have been complaints that the identification programme was politically motivated, with some genuine cases being left out while some undeserving supporters of certain politicians and relatives of the relevant task force ended up benefiting.[99] Government representatives argued that members of the community who had been compensated left voluntarily.[100]

90 United Nations General Assembly (n 29 above) para 38.
91 *African Commission on Human and Peoples' Rights v Republic of Kenya* (2013) African Court on Human and Peoples' Rights (Application Number 006/2012) (provisional measures) paras 1 - 3.
92 *African Commission on Human and Peoples' Rights v Republic of Kenya* (n 91 above) para 5.
93 As above.
94 *African Commission on Human and Peoples' Rights v Republic of Kenya* (n 91 above) para 23.
95 Ogiek Elders (n 11 above).
96 United Nations Human Rights (n 69 above).
97 'Forest guards set on fire houses left by squatters to protect water tower' (n 69 above).
98 Kemboi (n 69 above).
99 As above.
100 'Forest guards set on fire houses left by squatters to protect water tower' (n 69 above).

However, credible reports such one co-authored by the International Bank for Reconstruction and Development (IBRD), which is part of the World Bank Group, noted that there were allegations of inadequacies in the amount and procedure of compensation.[101] In addition, the burning of houses belonging to the community seriously negates the consensual nature of the eviction.[102] There were also reports of gunshots aimed at intimidating the residents.[103] Even the UN Special Rapporteur reminded the government of its obligation under international instruments to prevent forcible relocation of indigenous peoples, upon reports of security forces being amassed in the region in order to forcibly evict the Sengwer.[104] The President of the World Bank Group expressed the Institution's reservations on the evictions, and requested the Kenyan Government to thoroughly investigate allegations that the evictions were inconsistent with applicable legal procedures.[105] The government justified the evictions on the basis of the need to conserve the forest and environmental concerns.[106]

4 Indigenous peoples and ancestral land: Justification for differential and special treatment

African states seem concerned that recognising a section of their population as indigenous in relation to others would amount to granting the community unjustifiable preferential treatment.[107] However, this chapter justifies categorisation of certain Kenyan communities as indigenous on the basis of internationally recognised characteristics. It further endorses differential and special treatment of such indigenous communities, including recognition of their claims to ancestral land, on the basis of their marginalisation and exclusion from mainstream political, economic and social activities of the national government. The African Commission has specifically clarified that the use of the concept of indigenous peoples in Africa is not a mechanism for uplifting the

101 International Bank for Reconstruction and Development & International Development Association 'Management report and recommendation in response to the inspection panel investigation report: Kenya natural resource management project' 7 July 2014 para 30 http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/07/10/000442464_20140710100909/Rendered/PDF/893690INVR0P0900IPN0Request0RQ01302.pdf (accessed 15 January 2015). The IBRD is part of the World Bank Group. See, World Bank 'International Bank for Reconstruction and Development' http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,menuPK:3046081~pagePK:64168427~piPK:64168435~theSitePK:3046012,00.html (accessed 15 January 2015).

102 'Forest guards set on fire houses left by squatters to protect water tower' (n 69 above).

103 Newsome (n 69 above).

104 United Nations Human Rights (n 69 above).

105 International Bank for Reconstruction and Development & International Development Association (n 101 above) para 33.

106 Kemboi (n 69 above); Newsome (n 69 above).

107 Wachira (n 5 above) 11.

protection of certain categories of populations over those of the rest.[108] It is, on the contrary, a concept that attempts 'to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalized'.[109] The chapter is, therefore, based on the view that such kind of differential treatment is not necessarily preferential action, but rather, a remedy for marginalisation suffered, and the continued position of disadvantage and exclusion.

First, the Inter-American Commission has reaffirmed the view of the Committee for the Elimination of Racial Discrimination that territorial rights of indigenous peoples are unique, as they are founded upon a tradition and culture of an identity with and through their lands.[110] Joy Asiema and Francis Situma have aptly captured the phenomenon of the unique attachment to the ancestral lands as follows:

> Of the common traits that indigenous peoples share, probably the most notable are the retention of a strong sense of their distinct culture and a strong identity with their ancestral homelands. They conceive of their land as a substance endowed with sacred meanings, which defines their existence and identity and to which they are inextricably attached.[111]

Second, it was not until 2010 (with the promulgation of the new Constitution) that customary land tenure, the predominant mode ownership of property in land amongst indigenous communities, was given constitutional backing within the Kenyan legal system in the form of community land. However, as has already been pointed out in this chapter, some inconsistencies in the Constitution in relation to public and community land are likely to contribute to interpretative differences, and can be a basis for continued subjugation of customary tenure and the rights of indigenous peoples to ancestral land. The continued subjugation of the ancestral claims of the Endorois, Ogiek and the Sengwer, in the post-2010 Constitution context, has been highlighted.

As Patricia Kameri-Mbote has pointed out, the recognition of customary law in the 2010 Constitution 'has not addressed the historical perception of it as backward and inferior to written law'.[112] She observes that there is a fundamental need to challenge the notion that customary norms relating to land ownership are inferior, and that private or

108 *Advisory Opinion of the African Commission on Human and Peoples' Rights* (n 16 above) para 19.
109 As above.
110 Inter-American Commission on Human Rights (n 38 above) 1. The Committee on the Elimination of Racial Discrimination monitors the implementation of International Convention on the Elimination of All Forms of Racial Discrimination by state parties. Office of the United Nations High Commissioner for Human Rights 'Committee on the Elimination of Racial Discrimination' http://www2.ohchr.org/english/bodies/cerd/ (accessed 28 January 2014).
111 Asiema & Situma (n 34 above) 150.
112 Kameri-Mbote (n 8 above) 2.

individual ownership is a superior and more desirable system. [113] On that basis, she has cautioned that practical realisation of community rights (despite the new constitutional dispensation) will be a daunting task.[114] She recommends heavy investment on comprehensive and coherent legal, policy and institutional framework for community land tenure.[115]

The subjugation of customary tenure was a colonial adventure that was aimed at legalising and legitimising land acquisition from African natives. Its subjugation, including through the concept of its inferiority in relation to the English system of land ownership, was continued in the post-colonial period, which placed the political elite and mainstream communities at an advantaged position. Despite the existence of customary tenure system in the pre-colonial period, the colonialists dispossessed native Africans of their land without any compensation on an erroneous assumption that such land was *terra nullius* (land that belongs to on one).[116] Okoth-Ogendo has observed that there is abundant literature with erroneous arguments to the effect that African commons (a phrase used in relation to community tenure under customary law in Africa) 'are not and cannot be regarded as *property systems*', and are, therefore, deemed as being *terra nullius* or open access resources for any person.[117] The African Commission's Working Group observes that in most parts of Africa, there exists the notion that land inhabited by pastoral and hunter-gatherer communities (who often fit within the concept of indigenous communities) is *terra nullius*.[118]

Third, as has been observed, the Kenyan legal framework had, in the previous years (before the promulgation of the 2010 Constitution) generally been for the benefit of mainstream communities as indigenous communities continued to lose their ancestral land.[119] There is, therefore, the need for a legal and policy framework that will address the historical marginalisation of the indigenous peoples in relation to their land based resources. As the African Commission's Working Group observes, African Governments (including the Kenyan one) often implement development models premised on assimilationist philosophy that is 'designed to turn indigenous peoples into sedenterized crop cultivating

113 As above.
114 As above
115 As above.
116 Wachira (n 5 above) 240.
117 HWO Okoth-Ogendo 'The tragic African commons: A century of expropriation, suppression and subversion' University of the Western Cape, 2002 4 http://www.plaas.org.za/sites/default/files/publications-pdf/OP%2024.pdf (accessed 10 February 2014). Okoth-Ogendo defines commons as 'ontologically organised land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities'. As above, 2.
118 African Commission on Human and Peoples' Rights (n 28 above) para 2.2.
119 Wachira (n 5 above) 83.

farmers' due to an erroneous assumption that such communities lifestyles are primitive, unproductive and a threat to the environment.[120] In addition, the African Commission's Working Group has credibly pointed out that dispossession of land and its resources is a major human rights predicament that confronts the indigenous peoples in Africa.[121] Government policies that are often informed by economic interests of dominant communities and large scale development initiatives have resulted in indigenous communities being driven out of their ancestral land, often threatening the survival of the community.[122]

Fourth, the survival of the indigenous communities is seriously threatened by climate change due to the changing weather patterns. The changing weather patterns partly result from encroachment on their traditional land by 'outsiders' and over-exploitation of their resources. From a moral and ethical perspective, indigenous communities deserve protection and recognition of their ancestral land by the government. There is need for a coherent legal, policy and institutional framework, which, besides recognising and protecting ancestral lands of the indigenous communities, supports their sustainable and environmental friendly use of the land. As will be noted in the relevant section, the traditional land use activities of the indigenous communities are sustainable and are conservation oriented. Often, environmental degradation of ancestral land of the indigenous communities has arisen from the activities of the 'outsiders' and the national government's economic and political policies. Indigenous communities are more vulnerable to climate change and diminishing natural resources. In particular, hunter-gatherer communities are dependent on diminishing resources that are being affected by climate change, such as forests and delicate arid or semi-arid ecosystems.[123] The African Commission's Working Group has aptly observed that:

> The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them. Large-scale extraction of natural resources such as logging, mining, dam construction, oil drilling and pipeline construction have had very negative impacts on the livelihoods of indigenous pastoralist and hunter-gatherer communities in Africa.[124]

120 African Commission on Human and Peoples' Rights (n 28 above) para 2.2.
121 African Commission on Human and Peoples' Rights (n 28 above) para 2.1.
122 As above.
123 B Feiring 'Indigenous peoples' rights to lands, territories, and resources' International Land Coalition, 2013 http://www.landcoalition.org/sites/default/files/publication/1615/IndigenousPeoplesRightsLandTerritoriesResources.pdf 50 (accessed 22 January 2014). With regard to Kenya, the UN Special Rapporteur has stated that indigenous pastoral and hunter-gatherer communities have significantly suffered in the recent decades due to inappropriate land use and development policies in the arid and semi-arid regions, and within forested regions. United Nations General Assembly (n 29 above) para 82.
124 African Commission on Human and Peoples' Rights (n 28 above) para 2.1.

In the next section, we shall examine how the international legal system has progressively developed a strong regime of rights for differential treatment of indigenous peoples, which specifically recognises their unique entitlement to their ancestral lands. Concepts developed in the international legal system can be incorporated into our legal and policy framework regulating property rights in order to develop a coherent and consistent system with respect to indigenous peoples' rights to ancestral lands.

5 International legal instruments and the rights of indigenous peoples to their ancestral lands

As has been acknowledged, international law is progressively addressing historical claims of indigenous peoples *partly* on the basis of 'traditional occupation and indigenous laws and customs relating to land ownership'.[125] Relevant international legal norms and standards can provide guidance to Kenya in the development of a coherent legal and policy framework to address the issue of indigenous peoples in relation to ancestral land.[126] We have already relied on the jurisprudence of the African Commission, Inter-American Court and the Inter-American Commission, and the findings of the African Commission's Working Group and the UN Special Rapporteur in order to justify the special protection of indigenous peoples. In addition, that jurisprudence and literature has been the basis of outlining the characteristics of the 'indigenous peoples', a criterion that can be utilised in the Kenyan context.

It should be noted that by virtue of articles 2(5) and 2(6) of the 2010 Constitution, customary international law and treaties ratified by Kenya are part of the domestic legal system. However, as already pointed out, some provisions on public land in the 2010 Constitution may subjugate customary tenure and claims to ancestral land by the indigenous communities. In that sense, some provisions under the Constitution on public land need to be interpreted in a manner consistent with international law norms in relation to rights of indigenous peoples to ancestral land.

Some of the more progressive international legal instrument with regard to the rights of indigenous peoples to ancestral land are the 1989 Indigenous and Tribal Peoples' Convention[127] under the auspices of the International Labour Organisation (ILO), which is also referred to as the

125 Gilbert (n 46 above) 584.
126 Wachira (n 5 above) 8 - 9.
127 Convention concerning Indigenous and Tribal Peoples in Independent Countries (adoption 27 June 1989, entry into force 5 September 1991) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO (accessed 28 December 2013).

ILO Convention Number 169, and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[128] However, the two core international instruments have some limitations in the Kenyan context. First, Kenya has not ratified the ILO Convention.[129] In fact, states have generally been reluctant to ratify the treaty since, as of January 2014, 25 years after its adoption, it had only 22 ratifications, with the Central African Republic being the only African state to do so.[130] Therefore, the ILO Convention cannot be deemed to be a direct source of law in Kenya. However, it can provide useful guidelines for shaping the legal and policy system on indigenous peoples' claims to ancestral land. With regard to the UNDRIP, as a General Assembly resolution, it is not a proper legal norm but in the form of soft international law. However, General Assembly resolutions are a vital element of state practice.[131] State practice and *opinio juris* are the requisite elements for the development of customary international law, as was affirmed by the International Court of Justice.[132] In addition, General Assembly resolutions provide an important interpretative tool for ambiguous rights and obligations both in international and domestic forums.

As has been observed, the notion of indigenous peoples has been coherently articulated in international law and 'corresponds with a well-defined set of individual and collective rights, including to lands, territories, and resources'.[133] Certain forms of rights in relation to ancestral land have been articulated. On the basis of article 25 and 26 of the UNDRIP and articles 14 and 15 of the ILO Convention, indigenous peoples have rights over lands, territories and resources that they have traditionally owned or occupied.[134] Under article 5 of the UNDRIP, indigenous communities have the right to adopt and uphold distinct legal, political, economic, social and cultural institutions from the mainstream societies within the state.[135] In particular, article 8(2)(d) of UNDRIP obligates states to prevent or remedy any forced assimilation.[136] In addition, articles 8(2)(b), 11(2) and 28(1) of UNDRIP obligates states to prevent or remedy any dispossession of indigenous peoples of their land,

128 United Nations General Assembly 'United Nations Declaration on the Rights of Indigenous Peoples' (13 September 2007) UN Doc A/RES/61/295.

129 See, International Labour Organisation 'Ratifications of C169 ? Indigenous and Tribal Peoples Convention, 1989' http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 (accessed 23 January 2014). See also, United Nations General Assembly (n 29 above) para 13.

130 See, International Labour Organisation (n 129 above).

131 R Higgins 'The attitude of western states towards legal aspects of the use of force' in A Cassese (ed) *The current legal regulation of the use of force* (1986) 435 435.

132 See: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (1986) ICJ Reports 14 para 207; *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) (1969) ICJ Reports 3 para 77.

133 Feiring (n 123 above) 14.

134 United Nations General Assembly (n 128 above); Convention concerning Indigenous and Tribal Peoples in Independent Countries (n 127 above).

135 United Nations General Assembly (n 128 above).

136 As above.

territories or resources without their free, prior and informed consent, which may include restitution.[137]

Articles 8(2)(c) and 10 of UNDRIP and article 16 of the ILO Convention require states to prevent or remedy forced eviction of indigenous populations, which occurs if they are relocated without free, prior and informed consent, and before they have agreed upon fair and just compensation.[138] Under article 27 of UNDRIP, mechanisms to resolve claims by indigenous persons concerning their land, territories and resources should be impartial, independent and transparent, and they should recognise the community's customs and tenure system.[139] Further, article 17(3) of the ILO Convention requires that states establish mechanisms that prevent non-indigenous and mainstream communities from taking advantage of the customs or lack of understanding of property laws in the part of the indigenous community members in order to secure ownership or possession of the land.[140]

With regard to the 1966 International Covenant on Civil and Political Rights (ICCPR), article 27 states that minorities within a state shall not be denied the right to live in accordance with their culture, and to practise their own religion.[141] In its General Comment 23, the Human Rights Committee has stated that article 27 of the ICCPR envisages the obligation of states to protect the special ways of life and exploitation of land resources by indigenous peoples.[142] The Human Rights Committee comprises of a group of independent experts who monitor the implementation of ICCPR by the state parties.[143] Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (CESCR) protects the right of every person within a state to take part in the relevant cultural life.[144] In its General Comment 21 on article 15(1)(a), the Committee on Economic, Social and Cultural Rights (Committee on ESCR) has stated that the right to cultural life includes 'the rights of indigenous peoples to their cultural institutions, ancestral lands, natural resources and traditional knowledge …'[145] The Committee on ESCR

137 As above.
138 As above; Convention concerning Indigenous and Tribal Peoples in Independent Countries (n 127 above).
139 United Nations General Assembly (n 128 above).
140 Convention concerning Indigenous and Tribal Peoples in Independent Countries (n 127 above).
141 International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.
142 Human Rights Committee 'General Comment 23, article 27' Compilation of general comments and general recommendations adopted by human rights treaty bodies, UN Doc HRI/GEN/1/Rev.1 38 (1994) para 7.
143 United Nations Human Rights 'Human Rights Committee' http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx (accessed 28 January 2014).
144 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3.
145 Committee on Economic, Social and Cultural Rights 'General Comment No 21, right of everyone to take part in cultural life (Art 15, Para 1 (a))' UN Doc E/C.12/GC/21 (2009) para 3.

comprises of a group of experts who monitor the implementation of the CESCR by state parties.[146]

Article 5(v) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) recognises the right of people within a state to own property without discrimination on the basis of ethnicity, race or origin.[147] On the basis of the ICERD, the Committee on the Elimination of Racial Discrimination (CERD) has urged states:

> … to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.[148]

The Committee on the Elimination of Racial Discrimination has the responsibility of monitoring the implementation of ICERD by state parties, and comprises of a group of experts.[149] Within the African region, the African Commission's Working Group on Indigenous Populations has argued that articles 20, 21, 22 and 24 of the African Charter on Human and Peoples' Rights are applicable to indigenous peoples.[150] The Working Group based its view on the fact that the provisions are concerned with the protection of rights relating to land and natural resources, which are critical for the survival of indigenous communities.[151]

The African Commission has, in the recent years, become active in matters concerning indigenous peoples' rights, and is, therefore, influencing state practice in the region.[152] For instance, it established the Working Group on Indigenous Populations in 2000.[153] In 2003, the Working Group produced a report that discussed various critical issues relating to the land rights of indigenous peoples, and some of the relevant ones have been incorporated in this chapter.[154] The Report generally reaffirmed the existence of indigenous populations in the African region, discussed their exceptional attachment to the lands that they have traditionally occupied, and highlighted issues of dispossession and marginalisation.[155] It has been pointed out that despite the African

146 United Nations Human Rights 'Committee on Economic, Social and Cultural Rights' http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx (accessed 28 January 2014).
147 International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, entry into force 4 January 1969) 660 UNTS 195.
148 Committee on the Elimination of Racial Discrimination 'General Recommendation 23, rights of indigenous peoples' UN Doc A/52/18, Annex V at 122 (1997) para 5.
149 Office of the United Nations High Commissioner for Human Rights (n 110 above).
150 African Commission on Human and Peoples' Rights (n 28 above) para 2.2.
151 As above.
152 Pentassuglia (n 44 above) 184.
153 African Commission on Human and Peoples' Rights (n 28 above).
154 As above.
155 Pentassuglia (n 44 above) 185.

Commission having been the first institution for enforcement of rights granted under the African Charter, it is not a proper judicial body and, therefore, its decisions are not binding upon states.[156] However, the African Court on Human and Peoples' Rights, whose decisions are binding, was subsequently established and is currently addressing a case concerning the Ogiek indigenous community of Kenya.[157] The African Court provides an important forum for complementing and reinforcing the work of the Commission.[158]

6 Probable solutions to the issue of ancestral land claims by indigenous peoples in Kenya

As the TJRC Report proposed, the National Land Commission should hasten the process of recovering illegally or irregularly acquired land, especially where indigenous peoples are concerned.[159] The UN Special Rapporteur had also proposed that illegal and irregular titles on ancestral land of indigenous peoples be revoked or rectified, which would include restitution of the land or compensation.[160] In that regard, the Kenyan Government should provide remedies for indigenous peoples in the form of restitution or compensation where they were dispossessed of their land without free, prior and informed consent. The government should, therefore, implement the 2010 declaration of the African Commission in the *Endorois* case.[161] As previously stated, the Commission requested the government to restitute the ancestral land of the Endorois, and recognise the community's ownership rights.[162]

Where feasible, restitution of the indigenous peoples to their ancestral land should be the primary objective of any legal or policy framework to address historical injustices concerning such communities. As already pointed out, article 67(2)(e) of the Constitution and section 5(1) of the National Land Commission Act[163] grant the NLC the mandate to investigate historical injustices in relation to land and recommend appropriate action. As a way of ensuring restitution is effectively undertaken where deserved, there is need for further legislation that would

156 S Lemaitre 'Indigenous peoples' land rights and REDD: A case study' (2011) 20 *Review of European Community and International Environmental Law* 150 155.
157 African Court on Human and Peoples' Rights 'African Court in brief' http://www.african-court.org/en/index.php/about-the-court/brief-history (accessed 28 January 2014). For the case concerning the Ogiek indigenous community, see, African Commission on Human and Peoples' Rights (n 91 above).
158 M Mbondenyi *The African system on human and peoples' rights: Its promises, prospects and pitfalls* (2010) 411.
159 Truth Justice and Reconciliation Commission 'Report of the Truth, Justice and Reconciliation Commission: Volume IV' 2013 55.
160 United Nations General Assembly (n 29 above) para 99.
161 *Centre for Minority Rights Development and Others* (n 15 above).
162 *Centre for Minority Rights Development and Others* (n 15 above) para 298.
163 National Land Commission Act (n 12 above).

expressly recognise and legitimise the right to restitution for indigenous peoples under certain circumstances, with such grounds and the procedure also enumerated.[164] Restitution may even be carried out in gazetted forests and water catchment areas by permitting unrestricted access to the members of the relevant community only, an issue that is discussed later. In circumstances where it is not feasible to restitute the original land of the indigenous communities, there should be focus on compensation with land of similar qualities, or adequate monetary compensation that reflects the market value of the land that the indigenous communities were evicted from.

With regard to future acquisition of indigenous peoples land, a *sui generis* (unique in characteristics) approach is required, rather than the general framework of compulsory acquisition spelt out in the Land Act of 2012.[165] Under section 110(1) of the Land Act, the government may compulsorily acquire land if the National Land Commission certifies, in writing, that the land is required for public purposes or in the public interest.[166] Section 110(1) of the Land Act implements article 40(3)(b) of the Constitution, which identifies public purpose or public interest as one of the basis for compulsory acquisition of land by the state. In addition, article 40(3)(b) of the Constitution requires that just compensation for the acquisition be paid promptly. With regard to the acquisition of land belonging to indigenous communities, besides the existence of the public purpose or interest, and the provision of just and prompt compensation, evictions should be carried out only on the basis of free, prior and informed consent of the concerned community.

As previously observed, articles 8(2)(b), 11(2) and 28(1) of the UNDRIP requires states to prevent or remedy dispossessions of indigenous peoples of their land without their free, prior and informed consent.[167] The need for free, prior and informed consent before the land of the indigenous peoples is alienated by the Kenyan Government was also expressed by the United Nations Special Rapporteur in his 2007 Report to the UN General Assembly.[168] However, there are concerns that the right to be consulted translates to the right of the indigenous community to veto a state's economic and development activities. As Gaetano Pentassuglia observes:

> While specialized instruments generally recognize the right of indigenous peoples to be consulted in relation to matters affecting them, ambiguities persist over whether indigenous land rights encompass a right to veto

164 Wachira (n 5 above) 247.
165 Land Act http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20280 (accessed 11 February 2014).
166 As above.
167 United Nations General Assembly (n 128 above).
168 United Nations General Assembly (n 29 above) para 100.

> decisions regarding development projects, which are likely to affect indigenous traditional lands and resources. [169]

The right to be consulted does not, however, imply that the indigenous communities will necessarily veto development projects of the state. It generally provides a framework through which the special interests of the indigenous communities are taken into account, and guarantees their participation in the state's exercise of its power of compulsory acquisition. The special concerns could be compensation with alternative land of similar characteristics due to their unique cultural and religious activities that are attached to their land, or an equitable framework through which the government may still undertake its development projects in the land without evicting the community. As Patricia Kameri-Mbote observes, 'land includes resources such as minerals, wildlife, forests and water. Policies and laws on these resources must take community rights in to consideration as entitlements, not charity from the government'.[170] In particular, the UN Special Rapporteur emphasised the need for indigenous peoples in Kenya to receive an equitable share of revenue obtained from exploitation of natural resources within their traditional lands, through a participatory resource management scheme.[171]

Another critical issue relates to environmental conservation and management of important public resources such as forests that serve as water catchment areas and national game parks and reserves. Valuable land based resources are often found in land owned by indigenous communities.[172] Such land based resources and environmental conservation concerns often contribute to a conflict between the interests of the state and those of the indigenous community. This chapter endorses a participatory resource management scheme between the indigenous community and the state, as proposed by the UN Special Rapporteur,[173] with regard to land-based resources such as minerals, forests and game parks. It is an approach that can also permit environmental conservation where the land-based resources are, for instance, gazetted forests that are critical water catchment areas.

The disappearance of the forest cover and unsustainable encroachment in water catchment areas in Kenya has largely resulted from the activities of 'outsiders' rather than through the actions of the indigenous communities. As the UN Special Rapporteur observed:

> Settlement schemes, logging and charcoal production have put a severe strain on Kenya's rich and varied forests, and have resulted in the loss of the traditional habitat of Kenya's forest peoples, the indigenous hunter-gatherers

169 Pentassuglia (n 44 above) 169.
170 Kameri-Mbote (n 8 above) 2.
171 United Nations General Assembly (n 29 above) para 98.
172 Kameri-Mbote (n 8 above) 1.
173 United Nations General Assembly (n 29 above) para 98.

> … While existing laws are oriented to the protection of wildlife and forest resources, many of these communities can no longer live by their traditional livelihoods, and their cultures and language are rapidly vanishing as a result; illegal logging has played a major role in this as well.[174]

It has, for instance, been pointed out that although there have been efforts to evict the Ogiek from the Mau forest, justified on the necessity of environmental conservation, the forest is more at risk from large scale logging that has previously taken place in the region rather than the traditional and sustainable practices of the Ogiek community.[175] The African Commission's Working Group on Indigenous Populations has instructively stated that '[i]ndigenous knowledge systems have evolved over many years, and natural resources have been utilised and managed in sustainable ways'.[176] Indigenous communities, especially the hunter-gatherer societies, have specialised livelihood strategies that permit them to exploit natural resources in an environmentally sustainable manner, which are premised on their traditional knowledge and practices.[177] It has been pointed out that the specialised knowledge and land use practices of indigenous peoples, and their livelihood strategies, can significantly contribute to 'sustainable development and ecosystem management, biodiversity conservation, and climate change adaptation'.[178]

In a September 2014 memorandum to the NLC Task Force on Historical Land Injustices, indigenous communities that included the Sengwer and Ogiek requested that their traditional forests be returned to them under community land titles.[179] In their request, they expressed their commitment to utilising such land sustainably and within any agreed structures with relevant conservation agencies.[180] While requesting the NLC Task Force to recommend restitution of some of their ancestral forestlands by transferring them from the public to community land category, the indigenous communities gave an undertaking that they would diligently rehabilitate, conserve and manage the resources for the benefit of all Kenyans.[181] They pointed out that they have historically protected the forest ecosystems, and were, therefore, capable of doing it once more.[182] They stated that they were willing to take requisite actions

174 United Nations General Assembly (n 29 above) para 36.
175 Minority Rights Group International 'African Court issues historic ruling protecting rights of Kenya's Ogiek community' 20 March 2013 http://www.minorityrights.org/?lid=11822 (accessed 26 January 2014).
176 African Commission on Human and Peoples' Rights (n 28 above) para 2.2.
177 Feiring (n 123 above) 50.
178 Feiring (n 123 above) 15. See also, Lemaitre (n 156 above) 150.
179 'Forest dwelling communities position statement: Securing our rights, our lands and our forests' (n 59 above) 2.
180 As above.
181 'Forest dwelling communities position statement: Securing our rights, our lands and our forests' (n 59 above) 3.
182 As above.

to rehabilitate the forests, prevent degrading practices, and protect such resources from irregular occupation and use by outsiders.[183] The indigenous communities were categorical that they 'want the bees, the wildlife ... the diversity of trees and plants, and the water to come back'.[184]

In addition, Kenya can obtain vital lessons on best practices and possible challenges on community based forest management from other African states that are implementing such practices, such as neighbouring Tanzania, which is regarded as one of the most progressive in that aspect in Africa.[185] Further, as the indigenous communities pointed out in their Memorandum to the NLC Task Force on Historical Land Injustices, they would require and appreciate technical support in the form of guidance and evaluation on the appropriate conservation practices from relevant agencies, which may be governmental institutions or civil society organisations.[186]

There are already some commendable and progressive community based efforts between conservation agencies and indigenous communities that are aimed at supporting forest conservation.[187] For instance, the Ogiek community in Mount Elgon region has already developed conservation rules based on their traditional norms.[188] In the on-going collaboration, Ogiek scouts are trained by the Kenya Wildlife Service (KWS) on conservation issues, while the community has handed over charcoal burners to the Kenya Forest Service (KFS).[189] In addition, the dangers of some forms of forest farming were brought to the attention of the KFS by the Ogiek.[190] Through collaboration with conservation agencies such as KWS and KFS, the community is now more informed on the permissible and inappropriate activities in the protection of the forest ecosystem.[191] Such progressive initiatives by the KFS, KWS and some indigenous communities require support through comprehensive and coherent legal guidelines.

The 'new conservation paradigm' is based on the principle that conservation practices should recognise the rights of indigenous peoples,

183 As above.
184 As above.
185 See, T Blomley et al 'Seeing the wood for the trees: An assessment of the impact of participatory forest management on forest condition in Tanzania' (2008) 42 *Oryx* 380 381; T Blomley 'Mainstreaming participatory forestry within the local government reform process in Tanzania' (2006) 128 *Gatekeeper Series* 1 1.
186 'Forest dwelling communities position statement: Securing our rights, our lands and our forests' (n 59 above) 3.
187 'Forest dwelling communities position statement: Securing our rights, our lands and our forests' (n 59 above) 4.
188 As above.
189 As above.
190 As above.
191 As above.

including their full participation in the policy formulation and implementation.[192] The traditional approach of evicting indigenous peoples from their traditional lands, rather than consulting and empowering them to continue living in their territories in a sustainable manner that protects the forests and biodiversity, may be counterproductive.[193] On the other hand, Community Based Forest Management (CBFM) approach has the capacity 'to provide a "win-win" management strategy in which local communities receive benefits from forests whilst ecosystem integrity and biodiversity are maintained'.[194] It is possible for the Kenyan Government to grant special passes or identification documents to members of the indigenous communities so that they can continue inhabiting or accessing gazetted forests and game parks, provided their activities are sustainable and do not degrade the environment. The government should focus on penalising the activities of 'outsiders' through illegal activities such as logging, settlement and poaching, while supporting and training the indigenous communities to adopt better environmental conservation practices. As the UN Special Rapporteur recommended, the rights of indigenous communities to inhabit gazetted forest and exploit resources in such areas should be legally recognised and upheld, such as the case of the Ogiek with regard to the Mau Forest.[195] While giving an undertaking to work with government conservation agencies such as the KFS to adopt conservation best practices, the Ogiek and Sengwer communities have been categorical that they want to be recognised, legally, as the owners of the protected forests, whose resources, they agree, are of national importance.[196]

Kenya can obtain vital lessons from Tanzania, which has some of the most progressive legal and policy structures for community participation in the management of forest ecosystems in Africa.[197] The Tanzanian Government generally utilises two approaches in its participatory forest management framework, namely, the Community Based Forest Management and the Joint Forest Management (JFM).[198] The CBFM has been an important aspect of forest ecosystem conservation since its inclusion in the National Forest Policy in 1998 and Forest Act.[199] It is implemented in forests within areas legally designated as 'village land',

192 International Union for Conservation of Nature 'IUCN to review and advance implementation of the "new conservation paradigm," focusing on rights of indigenous peoples' 2 May 2011 http://www.iucn.org/news_homepage/news_by_date/?7399/IUCN-to-review-and-advance-implementation-of-the-new-conservation-paradigm (accessed 10 February 2014).

193 Newsome (n 69 above).

194 CK Meshack et al 'Transaction costs of community-based forest management: Empirical evidence from Tanzania' (2006) 44 *African Journal of Ecology* 468 468.

195 United Nations General Assembly (n 29 above) para 102.

196 'Forest dwelling communities position statement: Securing our rights, our lands and our forests' (n 59 above) 4.

197 Blomley et al (n 185 above) 381; Blomley (n 185 above) 1.

198 Blomley (n 185 above) 4; Blomley et al (n 185 above) 380.

199 Meshack et al (n 194 above) 469. See, Forest Act of 2002 http://www.mnrt.go.tz/uploads/Forest_Act_2002.pdf (accessed 14 January 2015).

which implies regions with land registered under the provisions of the 1999 Village Land Act.[200] Under the arrangement, the village council is in charge of the management of the forest within its jurisdiction, and the locals 'can harvest timber and forest products, collect and retain forest royalties and undertake patrols (including arresting and fining offenders)'.[201]

On the other hand, JFM is a collaborative management approach that shares conservation responsibilities and benefits arising from public forests between the government and adjacent local communities.[202] It is established through the execution of a Joint Management Agreement (JMA) between the government, acting through the District Council or Ministry of Natural Resources and Tourism), and village representatives.[203]

Case studies have demonstrated that participatory forest management in Tanzania has resulted in greater conservation.[204] It has been pointed out that:

> A range of variables, such as increases in basal area, mean annual growth rates, levels of harvesting, presence of trees used for timber and poles, and recorded incidences of forest disturbance through human activity, all point to this conclusion. This contrasts with measurements taken on land administered solely by government agencies with no community involvement, or on village land under open access arrangements, where forest condition is typically declining.[205]

A case study has also found CBM to be more effective than JFM in reducing illegal logging and in the implementation of various conservation activities in Tanzania.[206] The greater success of CBFM over the JFM in Tanzania indicates that there are also likelihoods of greater success of forest conservation in Kenya where the locals have legal title to land (under the concept of community forests) than where they are merely incorporated as mere participants in the use and conservation of public forests.

Transitioning to participatory forest management is not devoid of challenges. For instance, sufficient civic awareness is required among the

200 Blomley (n 185 above) 4. See, Village Land Act of 1999 http://polis.parliament.go.tz/PAMS/docs/5-1999.pdf (accessed 15 January 2015).
201 Blomley (n 185 above) 4.
202 As above.
203 As above.
204 See, for instance, Blomley et al (n 185 above) 389.
205 As above. See also, United Republic of Tanzania Ministry of Natural Resources and Tourism 'Participatory forest management in Tanzania: Facts and figures' December 2008 4 http://www.tfs.go.tz/uploads/E-MNRT-FBD_PFM_Facts_and_Figures_2008.pdf (accessed 15 January 2015).
206 L Persha & T Blomley 'Management decentralization and montane forest conditions in Tanzania' (2009) 23 *Conservation Biology* 1485 1493.

community forest managers and users for purposes of local technical capacity and downward accountability.[207] In the case of Tanzania, there were conflicting views on the functions of the government forest and environment officials and those of the villagers, to the extent of some locals being of the opinion that forests did not really belong to them.[208] However, despite the stated challenges, as the case study cited in this section has indicated, forest conservation in Tanzania has generally and substantially improved under the community participation approach. Therefore, in spite of the challenges, there are also opportunities of implementing community based forest management in a manner that improves forest ecosystem conservation in Kenya.

Effective institutionalisation of participatory forest management involving indigenous communities requires comprehensive legal and policy reforms. Amendments should, therefore, be carried out to the relevant statutes, such as the Forests Act,[209] so that they facilitate rather than obstruct access to land based resources by indigenous communities in their traditional territories. With regard to amendments to the Forests Act, there is the Forest Conservation and Management Bill of 2014 which incorporates aspects of community participation in the conservation of forestlands.[210] The Bill, however, still requires approval by Parliament before enactment into law. Section 4(d) of the Bill recognises the rights and responsibilities of communities to utilise and manage forest resources.[211] Section 2 of the Bill also recognises forest communities, and defines such a society as 'a group of persons who have a traditional association with a forest for the purposes of livelihood, culture or religion …'[212] Community forests are recognised in section 31(3) of the Bill, and they include 'ancestral forestlands and forestlands traditionally occupied by hunter-gatherer communities …'[213]

County governments are required to ensure that forests within their region are utilised and managed in a sustainable manner and in accordance with an approved management plan.[214] On the basis of section 49 of the Bill, indigenous peoples recognised as a forest community may register an association and apply to the relevant county government department or the KFS for permission to participate in the management and conservation

207 Blomley (n 185 above) 17.
208 H Vihemäki 'Politics of participatory forest conservation: Cases from the East Usambara Mountains, Tanzania' 2005 4 *Journal of Transdisciplinary Environmental Studies* 1 10.
209 Forests Act (n 61 above).
210 See, Forest Conservation and Management Bill of 2014 http://www.kenyaforestservice.org/documents/Forests%20Conservation%20and%20Management%20Bill,%202014%20%2826-2-2014%29.pdf?Itemid=196 (accessed 14 January 2014).
211 As above.
212 As above.
213 As above.
214 Forest Conservation and Management Bill of 2014 (n 210 above) sec 33(3).

of a public or community forest.[215] Section 50 of the Bill outlines the responsibilities of a community forest association registered to participate in the conservation and management of a forest.[216] They include the obligation to manage and conserve forest resources in accordance with the approved management agreement. [217] It is also required to 'formulate and implement forest programmes consistent with the traditional forest user rights of the community concerned in accordance with sustainable use criteria …'[218] In addition, the association has the duty of informing the KFS or relevant county department of any changes, developments or incidences within the forest that have an implication on the conservation of biodiversity.[219]

According to section 50(2) of the Bill, various forest user rights may be granted to the community association.[220] They may include community user rights for: collection of medicinal herbs; harvesting of honey, fuel wood and grass; grazing; development of wood and non-wood industries; establishment of plantations; and other activities that may be agreed upon between the association and the KFS. [221] Part IX of the Bill outlines prohibited activities in community and public forests and penalties for contravention, mostly in the form of fines and imprisonment.[222] Under section 67(1) of the Bill, members of an indigenous community are exempted from criminal liability even if they carry out otherwise proscribed activities such as cultivation, grazing livestock and collecting forest produce if they do so under a licence, permit or a management agreement.[223] Based on the above provisions, the Bill has progressive safeguards to ensure that forest communities in Kenya utilise forestlands in a manner that conserves such resources. The government should support the expeditious enactment of the Bill into law, and subsequently, ensure its effective implementation.

Courts and tribunals in Kenya also have a significant role in developing progressive jurisprudence with regard to the rights and responsibilities of indigenous peoples in relation to land based resources such as forests. In particular, courts and tribunals should interpret the 2010 Constitution and statutes in a manner that is consistent with developments under international instruments, and be cautious not to permit the subjugation of customary rights by those that arise from public and private tenure systems.

215 As above.
216 As above.
217 As above.
218 Forest Conservation and Management Bill of 2014 (n 210 above) sec 50.
219 As above.
220 As above.
221 As above.
222 As above.
223 As above.

There is also the problem of identifying communities that should be categorised as 'indigenous peoples'. There is, therefore, the need for legislation that spells out the characteristics upon which a group of people may be designated as such. This chapter has discussed the criterion that is emerging under international instruments, and through the work of international courts and intergovernmental organisations. Such a criterion may be incorporated in the Kenyan domestic legislation and in the jurisprudence of local courts and tribunals. In sum, the characteristics include unique cultures and lifestyles that are fundamentally distinct from those of the mainstream society.[224] Second, such communities have a special cultural and religious attachment to their traditional land, and the resources found in such land are critical for their survival. Third, the test of a history of continued occupation of the land is necessary. Fourth, there should be evidence of marginalisation and domination of the group in its relations with mainstream communities and with regard to national political, economic and social policies.

In addition, other measures to empower indigenous peoples beyond legal reforms are necessary. It has been suggested that legal reforms 'should be coupled with other socio-economic empowerment measures that include rights awareness, sensitization and the means to invoke rights when they are violated'.[225]

7 Conclusion

As pointed out in this chapter, a liberal interpretation of the constitutional concept of ancestral land may be problematic, and may undermine national cohesion. Ethnic tension and conflict in Kenya has partly been linked to historical injustices in the distribution of land resources. While it is critical that historical injustices and previous illegal and irregular allocations of land should be addressed, the rights and interests of Kenyans who have acquired legally valid titles to land in any part of the country also require to be protected. This chapter briefly outlined the various mechanisms that the National Land Commission and government institutions can rely upon while addressing historical injustices, and in ensuring equitable distribution of land, especially where mainstream communities are involved. In particular, the chapter was premised on the argument that the constitutional concept of ancestral land should be interpreted in the context of 'indigenous peoples' in order to consolidate a coherent legal, policy and institutional regime of safeguarding the rights of indigenous communities.

As discussed, the concept of 'indigenous peoples' and their right to their traditional land is a human rights based approach that has the

224 African Commission on Human and Peoples' Rights (n 28 above) para 4.1.
225 Wachira (n 5 above) 277.

objective of addressing marginalisation, domination and subjugation, rather than merely attaching land rights to aboriginality or nativity. The defining elements of 'indigenous peoples', as articulated in international instruments, the jurisprudence of international courts and tribunals, and the work of intergovernmental organisations, have been examined. They provide important precedents and literature that can provide guidance while addressing similar issues within the Kenyan domestic sphere. The chapter has justified differential treatment of indigenous peoples in Kenya with regard to ancestral land, and pointed out that such conduct is not necessarily preferential action. It is a remedy for marginalisation suffered, and a preventive solution for continued subjugation and exclusion.

The chapter has examined recent practice in order to demonstrate that there is continuing uncertainty with regard to the rights of indigenous peoples to their traditional land. This is despite the 2010 Constitution, in article 63, expressly recognising ancestral land as part of community land, with rights to such land based on ethnicity or culture. The precarious position of indigenous communities in Kenya is partly due to the fact that there is constitutional uncertainty on the relationship between community and public land, and the interests of such communities, in relation to important land based resources such as forests, game parks, and minerals.

The chapter has discussed probable solutions to the issue of ancestral land claims by indigenous peoples in Kenya. Recovery of illegally or irregularly acquired land in the territories previously occupied by indigenous communities has been proposed, for purposes of restitution. In addition, compensation with land of similar characteristics, or monetary reparation that reflects the current value of the land from which the indigenous communities were evicted, has been proposed. The chapter has also pointed out that a *sui generis* approach, which is based on the concept of free, prior and informed consent, is required in any acquisition of land by the government in territories inhabited by indigenous communities. Acquisition of land from indigenous peoples should not be based merely on the general framework of compulsory acquisition provided under the Land Act of 2012.[226] A participatory resource management scheme between the state and indigenous communities has been proposed. Under such a framework, indigenous communities would access and benefit from gazetted forests and game parks while they are trained and empowered so that their activities are sustainable and conservative. The necessity of amendments to legislation such as the Forests Act[227] so that they facilitate rather than hinder access to land based resources by indigenous communities in their traditional territories, has been highlighted. In addition, domestic courts and tribunals should be cautious in order to prevent the subjugation of customary rights by those that arise from public

226 Land Act (n 165 above).
227 Forests Act (n 61 above).

and private tenure systems. In particular, courts and tribunals in Kenya should interpret claims to traditional land by indigenous peoples in a manner that is consistent with developments under international instruments.

Part 2: Entrenchment of democracy through electoral reforms

CHAPTER 5

THE QUEST FOR A MORE PERFECT DEMOCRACY: IS MIXED MEMBER PROPORTIONAL REPRESENTATION THE ANSWER?

Ochieng Walter Khobe

1 Introduction

Kenya's independence Constitution of 1963 was, in the words of Ghai and McAuslan, 'based on two important principles – parliamentary government and minority protection'.[1] The question of minority protection – for Europeans, Asians and certain indigenous groups – largely informed the architecture and design of the independence constitutional framework.[2] A succession of constitutional amendments followed, ending regionalism, abolishing the Senate and strengthening the presidency.[3] By 2010, the often-amended independence constitution had done away with the minority protection measures all in an attempt to re-structure the power map by strengthening the hand of the presidency in the governance framework.

In 2010, Kenya adopted a transformative Constitution as the fundamental law of the country. The Constitution characterises the country as a republic and multi-party democratic state.[4] It further states that '[a]ll sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution'.[5] It elaborates that: '[t]he people may exercise their sovereign power either directly or through their democratically elected representatives.'[6] Sovereign power is delegated to state organs, including '[p]arliament and the legislative assemblies in the county governments'.[7] The picture emerging is that the idea of representative multiparty democracy is a dominant feature of the

1 YP Ghai & JPWB McAuslan *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present* (1970) 180.
2 Government of Kenya *Report of the Committee of Eminent Persons* (Kiplagat Report) (2006) para 28.
3 M Mutua *Kenya's quest for democracy: Taming Leviathan* (2008) 64.
4 Art 4 of the Constitution of Kenya, 2010 (Constitution).
5 Art 1(1) of the Constitution.
6 Art 1(2) of the Constitution.
7 Art 1(3)(a) of the Constitution.

Kenyan political system. This assigns an important role to the electoral system within the political framework of the country.

The electoral system can either enhance or hinder the development of the political system. In reality, whatever the electoral system, it is always more than a simple, technical and neutral instrument designed to produce the political representation of the society. As the product of the history of the struggles of the opposing political forces and the interests of the country, the electoral system – given its practical purposes – plays a director's role in the configuration of both the political arena and its main actors, the political parties.[8]

In undertaking electoral reforms under the larger umbrella of constitutional review, there was legitimate expectation that these historical anomalies in representation would be addressed. This speaks to the choice of electoral system given that the type of system and the constitutional framework in which it operates have very definite consequences – the system may encourage or discourage inclusion of ethnic and racial minorities and women in the democratic process.[9] These anomalies in the representation process ought to have been addressed in the 2010 Constitution. However, as this chapter argues, they were only partially addressed. Against the above background, and given the centrality of elections to Kenya's political system, this chapter argues that adoption of a mixed member proportional (MMP) electoral system would solve the identity representation deficit in Kenya's polity.

This brief historical context of constitutional reforms with regard to the electoral system sets the stage for the rest of the chapter. Part two analyses the Kenyan electoral system. Part three of the chapter theorises the concept of democracy as a substantive process that should improve people's lives. It is argued that democracy entails the establishment of an institutional framework, norms and standards for facilitating free and fair elections and effective oversight of democratic procedures to ensure transparency and accountability.[10] The section makes the point that it is only when elected bodies reflect a cross-section of society that the society's needs are addressed adequately. It is argued that this objective can only be attained when the electoral system produces elected bodies that are inclusive. Part four outlines the main families of electoral systems throughout the world, namely: plurality; proportional representation; and mixed member

8 In his enduring analysis of political parties as players in the constitutional process, Professor JB Ojwang took the view that 'so important, is the political party at a general level that a constitutional analysis which fails to acknowledge it is unlikely to bear a full relation to reality'. See JB Ojwang *Constitutional development in Kenya: Institutional adaptation and social change* (1990) 24.

9 B de Villiers 'An electoral system for the new South Africa' (1991) 16 *Tydskrif vir Regswetenskap* 44.

10 MG Molomo 'Democracy and Botswana's electoral system' (2006) 5 *Journal of African Elections* 22.

representation. This anchor section provides a blow-by-blow description, analysis and illustrations of how the systems work. Part five concludes the chapter by emphasising the need to address the present ethnic and racial asymmetry in representation and to unshackle the country from its embedded patriarchal representation structures. The adoption of a mixed member proportional representation system is advocated as a means for consolidating democratic governance in Kenya.

2 The Kenyan electoral system under the 2010 Constitution

One of the principal arguments of those who advocated constitutional reform is that the political, economic and social climate of Kenya had evolved to levels where the existing machinery that had been 'patched-up' over the years did not adequately meet the expectations of the people for a system capable of delivering elections which they would readily endorse.[11] This necessarily envisaged addressing whether the single member plurality/first-past-the post (SMP) electoral system should continue or whether an alternative system should be adopted. The argument was informed by the idea that for democracy to be sustainable, it must be seen to deliver beyond the ballot box and must be experienced as a process that betters the lives of the citizens and ensures that citizens are integrated into national development in a meaningful way. The constitutional reforms offered an opportunity for the country to design a system that was expected to ensure political stability and fair representation and sustain nation-building efforts.

Two groups at the centre of this agitation were women and members of ethnic and racial minorities. A traditionally male-dominated culture permeates every facet of life in Kenya and Parliament remained a men's club with the representation of women in the National assembly never reaching 20 per cent.[12] Before the March, 2013 General Elections, the first under the 2010, Constitution, women representation in parliament had been dismal as borne out by the table below:[13]

11 FO Kowuor 'The 2007 general elections in Kenya: Electoral laws and processes' (2008) 7 *Journal of African Elections* 121.

12 N Kamau 'The value proposition to women's leadership: Perspectives of Kenyan women parliamentary and civic leaders (2003 to 2007)' in N Kamau (ed) *Perspectives on gender discourse: Enhancing women's political participation* (2010) 8.

13 See M Nzomo (ed) *Women in politics: Challenges of democratic transition in Kenya* (2003).

Parliamentary period		**Total number of constituencies**	**Number of women Elected**	**Number of slots for nomination**	**Number of women nominated**
1st parliament (1963 - 1969)		158	0	12	0
2nd parliament (1969 - 1974)		158	1	12	1
3rd parliament (1974 - 1979)		158	4	12	2
4th parliament (1979 - 1983)		158	5	12	1
5th parliament (1983 - 1988)		158	2	12	1
6th parliament (1988 - 1992)		188	2	12	0
7th parliament (1992 - 1997		188	6	12	1
8th parliament (1997 - 2002)		210	4	12	5
9th parliament (2002 - 2007)		210	10	12	8
10th parliament (2008 - 2013)		210	16	12	6

While women in Kenya have always enjoyed the legal right to vote, in reality a web of obstacles – cultural, social, economic, legal and educational – obstruct their participation at all levels of political decision-making. An attempt had to be made to remove or reduce these barriers in

order to motivate women to participate in all decisions that affect the country in the short, medium and long term. In essence, women should have access to decision-making and only an electoral system that is tailored to guarantee their entry into Parliament would provide an avenue for them to have an impact on the political development of the country.

Kenya is comprised of diverse ethnic and racial groups, languages, cultures and religions. Such a diverse and divided country needs an electoral system which ensures a fair representation of political and ethnic groups for purposes of political stability and nation building. Kenya's electoral system has delivered a flawed representation since independence, characterised by the lack of equity of the voices in Parliament. This has meant that minorities in Kenya have either had very weak representation in the representative bodies or none at all. Such minority groups include racial minorities such as Asians, Arabs and Europeans and ethnic minorities such as the Sengwer, the Nubian, the Ogiek, the El Molo, the Sakweri and the Illchamus.[14]

All the four multi-party elections since 1992 were held under the SMP system, a system that could not effectively cater for the representation of women and minorities. However, without any reference to PR as an electoral device, the Inter-Parties Parliamentary Group (IPPG) reforms, adopted prior to the 1997 elections, had a semblance of a parallel system because it in effect allocated 'national seats' to parties on the basis of their share of directly elected seats, rather than the proportion of total votes cast that the proportional representation (PR) system calls for. Loosely speaking, the successive Kenyan elections in 1997, 2002 and 2007 were run on a 'mixed parallel' basis, even though the seats allocated on party PR basis amounted to only 6 per cent of the total seats in the legislature.[15] Moreover, this allocation of seats was not based on votes cast for the parties, but seats won under the SMP system, thus the 'parallel' allocation of seats did not incorporate the essence of proportional representation. While the word 'proportion' has often been used to describe the representation envisaged in these slots, it is actually misleading in that the MPs are nominated in proportion to the distorted single-member district results. The nominations are inherently not proportional because they merely enhance the dis-proportionality of the existing system. Therefore, this is not a PR segment because the nominations are not based on percentages of the national vote.

The 2010 Constitution prescribes the electoral system in detail; there is no room to adopt a proportional representation system overall, nor for a general system of ethnic or racial quotas. In brief, the core of the electoral

14 A Oloo 'Minority rights and transition politics' in P Wanyande et al (eds) *Governance and transition politics in Kenya* (2007) 179 - 213.
15 As above.

system, at national and county level, is based on single member electoral constituencies, elected on a SMP basis.[16] Article 97 of the Constitution provides that the National Assembly consists of: 290 members, each elected by the registered voters of single member constituencies; 47 women, each elected by the registered voters of the counties, each county constituting a single member constituency; and 12 members nominated by parliamentary political parties according to their proportion of members of the National Assembly, to represent special interests including the youth, persons with disabilities and workers. Article 98 of the Constitution provides that the Senate consists of: 47 members each elected by the registered voters of the counties, each county constituting a single member constituency; 16 women members who shall be nominated by political parties according to their proportion of members of the Senate; two members, being one man and one woman, representing the youth; and two members, being one man and one woman, representing persons with disabilities.

The special seats are intended to begin to address the issue of identity representation. One group that is given specific attention in terms of electoral representation is women. Aside from mandating the state in article 27(8) to 'take legislative and other measure 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 Constitution allocates women at least 47 seats in the National Assembly and 16 in the Senate.[17] First, as already noted, it stipulates that of 350 members of the National Assembly, 47 will be women. In addition, the party lists from which the 12 special members of the National Assembly are to be chosen are to alternate between men and woman. In the Senate, there will be 18 women. Second, article 81 of the Constitution, setting out the 'general principles for the electoral system' states that 'not more than two-thirds of the members of elective public bodies shall be of the same gender'.[18] The Supreme Court has meanwhile determined that the gender equity rule in article 27(8) can only be progressively realised and the necessary steps to bring the principle into effect should be taken by 2015.[19]

In the March 2013 General Elections, 16 women were elected for the 290 'general' constituency seats.[20] Six women were nominated[21] and together with the 47 women representatives, the number of parliamentary

16 See arts 97 and 98 of the Constitution.
17 Arts 97(b) and 98(b) of the Constitution.
18 Art 81(b) of the Constitution.
19 *In the Matter of the Principle of Gender Representation in the National Assembly and Senate* Supreme Court of Kenya, Reference No 2 of 2012 (Opinion of the majority delivered on 11 December 2012) http://kenyalaw.org/CaseSearch/view_preview1.php?link=72192428290745838687923 (accessed 30 March 2013). It is noteworthy that as at June 2015 there were no significant steps taken to comply with this directive by the court.
20 The Kenya Gazette Vol CXV-No 45, 13 March 2013.
21 The Kenya Gazette Vol CXV-No 50, 20 March 2013.

seats held by women following the election comes to 65 out of a total of 350 members of the National Assembly (18,57 per cent). This is way below the constitutional threshold of at least one third of the seats. With regard to the senatorial elections, no woman was elected as a senator.[22] This means that the composition of women in the Senate is only comprised by those who have obtained the seat by virtue of constitutionally guaranteed seats. There are 18 women out of a total of 67 members of the Senate (26,7 per cent). Again this is less than one-third. Under the provisions allocating seats, the Senate is close to this target (22 women are required) but the National Assembly is far from the 116 women members required to reach a target of one-third. This means that legal intervention is necessary to 'engineer' the system to deliver seats to women that are compliant with the constitutional requirement of at least a third of the seats going to women.

However, what is most striking about the electoral framework is that it does not provide for 'ethnic or racial representation'. This is despite the fact that other special interests (youth, persons with disabilities and workers) have been designated seats. The only provisions concerning the representation of ethnic or racial minorities are 'soft': Article 100 of the Constitution requires Parliament to enact legislation promoting the representation of 'ethnic and other minorities; and marginalized communities' along with women, persons with disabilities and youth. In addition, article 90(2) of the Constitution requires the Independent Electoral and Boundaries Commission to ensure that party lists for filling the small number of special seats 'reflect the regional and ethnic diversity of … Kenya'. This arrangement is a shift from the original Constitution of Kenya Review Commission proposal of a mixed system with 90 of 300 seats to be elected on lists, which were to 'take into account the need for representation of … minorities' and to 'reflect the national character'.[23]

It can be argued that the interests of 'ethnic and racial minorities' can be catered for within the 12 seats in the National Assembly designated to 'special interests'. These are specified to 'include' youth, persons with disabilities and workers; 'include' implies there are others. This provision has received judicial consideration. The High Court, in a case brought on behalf of a small minority community, the Ilchamus,[24] held that they and other small marginalised communities constituted special interests under the former Constitution. In the absence of any definition, it might be open to such communities to argue that they are still 'special interests' under the 2010 Constitution.

22 The Kenya Gazette (n 20 above).
23 Art 107(5) of the Constitution of Kenya Review Commission Draft.
24 See *Rangal Lemeiguran v Attorney General and Others* Misc Civil Application No 305 of 2004 [2006] http://www.kenyalaw.org/CaseSearch/view_preview.php?link=7289963624218718327314 9&words= (accessed 30 March 2013).

The method of identification of these 12 special interests is different from the old Constitution: they are to be taken from party lists, published in advance, and the numbers are to be taken from a party's list in proportion to the number of seats it wins in constituencies. The Elections Act, 2011, makes no attempt to indicate the make-up of the lists intended to provide the 12 'special interest candidates' for the National Assembly, presumably leaving it to the parties to comply with the Constitution. When parties are offered a *carte blanche* then there is no guarantee that they will use these seats to ensure the inclusion of ethnic and racial minorities in parliament.

The choice of an SMP electoral system would reflect, on the one hand, coherence with the logic of the system of the presidential government that has been provided for in the Constitution and, on the other, the concern to give the country a parliament that is not fragmented and a cohesive executive. However, the question that arises is whether the choice of electoral system has addressed the concerns that informed the agitation for constitutional, including electoral, reforms. The argument is that Kenya's electoral system under the 2010 Constitution does not ensure and facilitate broad-based and inclusive political participation in the decision-making process. Moreover, the results from the March 2013 General Elections show that the attainment of the principle that not more than two-thirds of one gender should occupy elective public bodies will not be attained under the SMP electoral system.

3 Democracy and identity representation

Since the advent of the 'third wave' of democratisation that began in the 1990s, a great deal of emphasis has been placed on holding regular elections, and this has often led to the misconception that they are an end in themselves and not a means to an end.[25] However, the mere holding of regular elections, although an important ingredient of democracy, does not, in itself, amount to democracy. It remains, nevertheless, a central pillar of its institutionalisation and consolidation; without elections, democracy cannot exist. In theory, elections are perceived to enhance democratic governance, but in practice, some elections are merely a charade geared to legitimating authoritarian rule.[26]

Democracy as a minimum has been defined as a process of electing leaders into office in an open and transparent manner and holding them accountable to the electorate.[27] More substantively, it entails the establishment of an institutional framework, norms and standards for facilitating free and fair elections and effective oversight of democratic

25 S Huntington *The third wave: Democratization in the late twentieth century* (1991) 52.
26 Molomo (n 10 above).
27 C Ake *The feasibility of democracy in Africa* (2000) 8.

procedures to ensure transparency and accountability. As a process, democracy is a never-ending, ever-evolving project. Perceptions and definitions of democracy may differ depending on people's historical experiences. For those who have experienced oppression, corruption, authoritarian rule and ethnic dictatorship, democracy may be associated with human dignity and a better life. However, for people who have never experienced oppression, democracy may be taken for granted and only appreciated at face value.[28]

The whole process of governance refers to the manner in which the government deliberates on public policy. This raises the question as to whether those at the margins of governance have a voice in formulation of public policy. Parliament, as the body charged with legislative and oversight authority within the governance set up, must as a necessity be truly representative of the myriad voices in a given polity. As argued by Tlakula et al,[29] a defining characteristic of democracy is that parliament must be 'an accurate map of the whole nation, a portrait of the people, a faithful echo of the voices, a mirror which reflects accurately the various parts of the public'. It is only when parliament reflects a cross-section of society that society's needs can be addressed adequately.

Unequal gender relations permeate almost every layer of Kenyan society in both the private and the public sphere. It is therefore difficult to speak of good governance when women, who constitute more than 50 per cent of the population, are so inadequately represented in various organs of the state, including Parliament.[30] This raises the question of legitimacy of the political system. For Bunwaree, there can be no legitimisation of the political system if the interests and opinions of half or more of the electorate are not adequately reflected.[31] In the same vein, it is noteworthy that some minority groups have never had representation in Parliament since independence.[32] This has a direct bearing on the nature of governance and, in turn, on the human condition, equity and social justice.

Electoral process should produce representative government that inspires the confidence and trust of all stakeholders. They should be acceptable to all parties and groups with respect to gender, ethnicity and age. Gender is particularly important because it is generally accepted that 'a government by men for men cannot claim to be a government for the people by the people' and that

28 Molomo (n 10 above).
29 P Tlakula et al 'Panel contribution' in P Tlakula et al (eds) *Electoral models for South Africa: Reflections and options* (2003) 28.
30 M Nzomo 'Women in Kenya's political leadership: The struggle for participation in governance through affirmative action' (2011) 2 *Perspectives* 18.
31 S Bunwaree 'State legitimacy, women and elections: Leveling the playing field' (2005) *L'Express* 13.
32 J Cottrel-Ghai et al 'Taking diversity seriously: Minorities and political participation in Kenya' Minority Rights Group International Briefing (2013) http:// www.minorityrights.org (accessed 20 March 2013).

> the concept of democracy will only assume true and dynamic significance when political parties and national legislation are decided upon jointly by men and women with equitable regard for the interest and aptitudes of both halves of the population.[33]

It is, therefore, expected that to give effect to free and fair elections a democratic political system should give all citizens – men and women – an equal opportunity not only to participate in elections but also to guarantee fair opportunity of winning seats.[34]

There are several reasons why an electoral environment that promotes gender equality is ideal. One argument is that the election of more women to public office is desirable because women are more likely than men to fight for women's rights.[35] It is also noteworthy that women's experiences, particularly as mothers and in their traditional roles in the home and family, make them more conscious and aware than men of the needs of other people.[36]

Another argument is based on the idea that elections are the engine of democratic governance and the primary means of political representation.[37] Therefore, if election dynamics change with the involvement of a new political group (such as men or women) it is of central importance to grapple with the ramifications of how this change affects the selection of top leaders. For example, Darcy et al[38] have argued that if the female segment of a population enters political competition with the same intensity as the male segment, the quality of political leadership will necessarily improve because of the larger number of individuals involved. It is also often argued that it is only through participation in elections that the electorate influences public policy-making and implementation[39] and, to the extent that women have knowledge of and insights into some matters and issues that men do not, the participation of women in policy formulation is imperative if these policies are to be intelligent and effective.[40]

The need for representation on grounds of identity is also justified on the argument that democracy is about the self-interest of participants and problems arise when participants represent the interest of groups that are very different from themselves.[41] There can be no democracy where

33 G Somolekae 'Widening the frontiers of democracy: Towards a transformative agenda in Botswana politics' (2000) 14 *Pula: Botswana Journal of African Studies* 76.
34 E Kiondo *Elections, electoral processes and women's empowerment in the coming millennium* (1999) 2; R Gaidzanwa *Gender, women and electoral politics in Zimbabwe* (2004) 1.
35 R Darcy et al *Women, elections and representation* (1987) 15.
36 As above.
37 RL Fox *Gender dynamics in congressional elections* (1997) 17.
38 Darcy (n 35 above) 17.
39 Gaidzanwa (n 34 above) 3.
40 Darcy (n 35 above) 16.
41 P Chaney & R Fevre 'Is there a demand for descriptive representation? Evidence from the UK's devolution programme' (2002) 30 *Political Studies* 897 - 915.

> decisions about changing the lives of people are taken without the participation of more than half of the very lives that have to be changed. It cannot be participatory democracy when decisions are taken by some on behalf of others.[42]

Further, it has been argued that the participation of women in leadership positions has brought about 'another perspective' and resulted in increased focus, attention and allocation of resources to life quality issues such as health and education. The participation of women has been credited with bringing about a qualitative transformation of institutions, laws and policies.[43] If women or minorities are not included in decision-making, their views and interests are likely to be overlooked. In addition, if these groups are not represented in proportion to their presence in the population, the principle of parity is violated.[44] In sum, the inclusion of women and minority groups in decision-making is a fundamental human rights concern and an issue of social justice.

Legitimisation of the political system and representation of the electorate can only be achieved when all categories in the society are included in governance.[45] In other words, the political system cannot be entirely legitimate if some segments of the population remain inadequately represented in deliberative bodies. But discussing elections without looking at the electoral and voting system would be meaningless. Any argument that suggests that democratic governance is all about regular elections is both narrow and shallow for it reduces democracy and democratisation to electioneering *per se*. However, to the extent that electoral systems serve to distribute power and representation in order to define the legitimacy and political mandate of rulers, they do have a bearing (direct and indirect) on democratic governance and stability.[46] While elections basically refer to a periodic process of selecting local and national leaders, an electoral system refers to a method of selecting these leaders and translating votes into parliamentary seats.[47] It is therefore the constitutional and institutional process by which government by consent and fair representation is put into practice in democratic systems.[48]

42 T Mtintso 'Keynote address – Into the future: Gender and SADC' in EISA (ed) *Intra-party democracy and the inclusion of women* (1997) 6.

43 A Molokomme *Representation of women and men in politics and decision-making positions in SADC* (2001) 6.

44 C Albertyn et al 'Making a difference? Women's struggles for participation and representation' in G Fick et al (eds) *One woman, one vote: The gender politics of South African elections* (2002) 24 - 52; AM Goetz et al *No shortcuts to power* (2003) 34; R Voet *Feminism and citizenship* (1998) 100 - 112.

45 Bunwaree (n 31 above) 2.

46 K Matlosa 'Ballots and bullets: Elections and conflict management in Southern Africa' (2001) 1 *Journal of African Elections* 5.

47 DP Wessels 'Electoral system and system of representation – Election of 27 April 1994' (1994) 19 *Journal of Contemporary History* 143.

48 As above.

Electoral systems are in essence the bases upon which democratic elections are held and are considered the foundation upon which other democratic processes are built.[49] They are critical to a panoply of issues, including identity representation, a point that has been made by Perelli thus:

> The design of electoral systems cannot be considered in isolation from the wider context of constitutional and institutional design, and it can be critical for areas as diverse as conflict management, gender representation and the development of political party systems. Done well, electoral system design can add momentum to political change, encourage popular participation, and enable the emergence of legitimate representatives who are capable of handling a wide range of needs and expectations, immediately and in the future. Done badly, it can derail progress towards democracy or even political stability.[50]

This speaks to an undeniable nexus between electoral systems and their effects on election results, political inclusivity, and political legitimacy.[51] It is also a key determinant of the nature of the relationship between elected representatives, political parties and constituencies.[52] Lijphart argues that the electoral system is probably the most powerful instrument for shaping the political system.[53] In societies in transition, the electoral system can play an important role in 'engineering' the results of democratic voting and, along with other institutional choices, can, to a certain extent, determine the nature of political parties and the general character of democracy.[54] Electoral system design arguably creates strategic opportunities for political manoeuvring to ensure identity representation thus consolidation of democracy.[55]

4 Types of electoral systems

Narrowly defined, an electoral system consists of a set of rules for conducting an election and the legal and administrative framework and

49 N Carrilho 'The electoral legislation in Mozambique and the political and social achievement' in B Mazula (ed) *Elections, democracy and development* (1996) 27.

50 C Perelli 'Foreword' in A Reynolds *Electoral system design: The new international IDEA handbook* (2005) 4.

51 L Diamond *Developing democracy: Towards consolidation* (1999) 32; CJ Anderson et al *Losers' consent: Elections and democratic legitimacy* (2005) 63; A Lijphart *Thinking about democracy: Power sharing and majority rule in theory and practice* (2008) 75 - 88; A Reynolds *Electoral systems and democratization in Southern Africa* (1999) 46; A Lijphart & B Grofman (eds) *Choosing an electoral system: Issues and alternatives* (1984) 39.

52 S Hassim 'A virtuous circle? Gender equality and representation in South Africa' in J Daniel et al (eds) *The state of the nation: South Africa 2004-2005* (2004) 340.

53 A Lijphart 'The alternative vote: A realistic alternative for South Africa?' (1991) 18 *Politikon* 91.

54 TD Sisk 'Choosing an electoral system: South Africa seeks new ground rules' (1993) 4 *Journal of Democracy* 79.

55 WA Munro 'The political consequences of local electoral systems' (2001) *Comparative Politics* 297.

procedures adopted for translating votes into seats.[56] Rae has defined electoral systems as

> those which govern the processes by which electoral preferences are articulated as votes and by which those votes are translated into distributions of governmental authority (typically parliamentary seats) among competing political parties.[57]

The choice of an electoral system is perhaps one of the most profound ways of institutionalising and consolidating democracy particularly if the socio-economic and political environment within which it is implemented informs it.[58] There is consensus that 'each system offers certain benefits and disadvantages in terms of the representation of different groups in society'.[59] It is, therefore, necessary that the functioning of the three types of electoral systems: the plurality system, proportional representation and the mixed member proportionality system be interrogated.

4.1 Plurality systems

Plurality systems can be differentiated as SMP systems, which are used mostly in African Commonwealth states, and two-round (majority) systems, used mainly in former French African colonies.[60] The two systems are simple to understand, offer strong geographical representation and accountability, and lead to clear majorities. The whole country is divided into constituencies (electoral zones) of almost equal size, in terms of the population of eligible voters. Candidates contesting elections do so as individuals who are either endorsed by the party or run as independent candidates. Each constituency elects one candidate to represent its interests in parliament. It is this feature that gives plurality systems their reputation for accountability, for it links the Member of Parliament (MP) directly with his/her constituency and, in this regard, is indeed stronger than all other electoral systems, particularly the proportional representation system.

56 A Heywood *Politics* (2002) 232.
57 D Rae *The political consequences of electoral laws* (1971) 14.
58 P Norris *Democratic phoenix: Reinventing political activism* (2000) 17; A Reynolds & B Reilly *The international IDEA handbook of electoral systems and design* (1997) 21; J Linz 'The virtues of parliamentarism' (1990) 1 *Journal of Democracy* 7; A Lijphart 'Proportional representation: Double checking the evidence' (1991) 2 *Journal of Democracy* 73; P Norris *Electoral engineering: Voting and rules of political behaviour* (2004) 49.
59 R Jackson & D Jackson *A comparative introduction to political science* (1997) 371.
60 S Lindberg 'Consequences of electoral systems in Africa: A preliminary inquiry' (2004) *Electoral Studies* 24.

4.1.1 Single member plurality system (SMP)

The system is based on the single-member constituency and pays attention to geographical representation. The SMP is also known as 'first-past-the-post', 'winner-takes-all', 'simple majority' or 'relative majority'. The principle underlying the SMP is simple: the winner is the candidate who receives a minimum of one more vote than each of the other candidates, and does not have to obtain more votes than all the others combined.[61] The victor is, moreover, not required to secure an absolute majority of the valid votes cast.[62] Molomo observes that under this system,

> a candidate who gets a mere plurality of the vote stands duly elected as an MP and the other candidates irrespective of the size of their poll are declared losers, and do not make it to parliament.[63]

Four other important elements of SMP that flow from this are the possibility that a constituency will be represented by a candidate with a minority of votes; a ruling party may have a minority of votes at national level; a one-party legislature may be created by the absence of opposition in the National Assembly and the system may result in the marginalisation of smaller parties.[64]

Since independence, Kenya has used the SMP electoral system.[65] The feeling amongst many critics of Kenya's electoral system is that it encourages the winner take all practice especially in the formation of government. Related to this is the fact that it disadvantages the smaller and newer parties that may represent interests not represented by the bigger parties.[66] It is thus a system that does not encourage inclusiveness. Instead it encourages ethnic polarisation. It is the failure to mirror society by facilitating the representation of as many interests as possible that made the system unpopular to Kenyans.[67]

The first argument in favour of the SMP is that it is the simplest system, as all voters have to do is to put an unequivocal mark next to the name of the candidate of their choice on the ballot paper. The system is said to be easy to implement even in countries where the rates of illiteracy are the highest. The SMP has also been argued to have a positive effect on

61 N Mahao 'Why Lesotho should change its electoral model' in C Sello (ed) *Lesotho national election: Lessons for the future* (1998) 64.
62 K Asmal & J de Ville 'An electoral system for South Africa' in N Steytler et al (eds) *Free and fair elections* (1994) 3.
63 M Molomo 'In search of an alternative electoral system for Botswana' (2000) 14 *Pula: Botswana Journal of African Studies* 112.
64 Asmal & de Ville (n 62 above) 55.
65 A Oloo 'Elections, representations and the new Constitution' in *Society for International Development, Constitution Working Paper No 7* (2011) 11.
66 P Wanyande 'Electoral systems' (2003) 5 *Report of the Constitution of Kenya Review Commission* 118.
67 Constitution of Kenya Review Commission *The final report of the Constitution of Kenya Review Commission* (2005) 166.

political stability. The system has been noted 'to exaggerate the winning party's lead, making it easier to win a clear majority of seats, hence promoting greater parliamentary stability'.[68] Indeed, proponents of the SMP praise it for its propensity to produce stable governments and, therefore, stable political systems and regimes. However, this argument is questionable. The system has the negative effect of side-lining opposition parties[69] and it alters the relationship between seats won and the votes each party receives.[70] This over-represents the big parties, under-represents the smaller ones and fails to provide the space needed for new parties to insert themselves into the political discourse.[71] The resultant exclusion from SMP systems creates a feeling of marginalisation that results in political instability.[72] Reynolds has argued that 'presidencies, single member plurality electoral systems and majoritarianism combine to create the democratic cousin of Hobbes's all-powerful Leviathan state, thus leaning towards an *ethos* of exclusion'.[73] It leads to instability due to the feeling of exclusion amongst those who vote for the opposition. In young democracies, non-proportional systems, such as the single member plurality, are inherently destabilising because a parliament that comes to power by virtue of a simple majority may be perceived as illegitimate. Consequently, radical elements may resort to extra-constitutional means to overthrow such governments.

Even where SMP is generally credited – for its capability to yield stable legislative bodies – it has routinely failed Kenya. Indeed, while parties such as Kenya African National Union (KANU), Forum for the Restoration of Democracy (FORD)-*Asili*, the Democratic Party, and the National Democratic Party led in the 1992 and 1997 elections, 2002 saw their dissolution and marginalisation as Mwai Kibaki's National Rainbow Coalition came to the forefront. 2007 witnessed a further disintegration of these groups as Raila Odinga emerged with the Orange Democratic Party, contesting against Kibaki's Party of National Unity. All the more, the Orange Democratic Party itself fractured into ODM and ODM-K. The beauty of SMP is said to be its propensity to create two strong and stable parties – one of the right and one of the left – which broadly encompass the vast majority of the population through moderate platforms and present

68 DM Farrell *Electoral systems: A comparative introduction* (2001) 39.
69 Molomo (n 63 above) 34.
70 Jackson & Jackson (n 59 above) 23.
71 J Elklit & A Reynolds 'The impact of election administration on the legitimacy of emerging democracies: A new comparative politics research agenda' (2002) 40 *Commonwealth and Comparative Politics* 104.
72 A case in point is the Lesotho crisis in the aftermath of its 1998 election that was resolved only by electoral reform that included abandoning the SMP and adoption of mixed member representation system. The size of parliament was increased from 80 to 120 MPs. The SMP/PR split is 80/40.
73 Reynolds (n 51 above) 54.

credible opposition to one another. Clearly this has not been the case in Kenya where weak fragmented party systems have been the norm.[74]

Another argument in favour of the SMP system is that it maintains a link between an elected representative and his/her constituency, thereby offering a high level of representative accountability. SMP offers direct connection, via geographic constituencies, between voters and individual representatives. The system is therefore perceived to enable voters to select legislators more directly than is allowed for by the party list system, and to have more direct access to legislators so that they can better represent their interests and opinions. This argument is debatable for many reasons. The minority voters in a given constituency may perceive the losing candidate as their own representative. This is more manifest in ethnically divided societies like Kenya, where levels of hostility and mistrust between candidates from different parties are high, especially where the electioneering period is accompanied with inter-ethnic or clan rivalries. In addition, decisions in national parliaments are taken on the basis of lobbying and votes. An individual action by a member of parliament is often of limited impact. More importantly, the focus of national parliaments is on national matters.[75]

On the other hand, critics of SMP have identified many weaknesses in the system. First, in a country like Kenya, where there is no national majority ethnic group, only regional majorities, the single member plurality has the effect of encouraging the emergence of ethnically and regionally concentrated parties.[76] The main reason for this is the absence of well-organised political parties.[77] Second, the SMP system makes it difficult for Parliament to reflect the diversity of the social structure. The system has been criticised for its failure to ensure a fair representation of women and minorities.[78] There is overwhelming evidence to suggest that women have a better chance of being elected under a proportional

74 SW Nasong'o 'Political transition without transformation: The dialectic of liberalization without democratisation in Kenya and Zambia' (2007) 50 *African Studies Review* 97.

75 It should be noted that where the role of legislature is restricted to legislation, then the constituency accountability role of members of parliament is greatly diminished. In the case of Kenya, the question time that members of parliament used to seek answers on specific constituency problems from ministers has been phased out under the new dispensation and cabinet secretaries only appear before parliamentary committees to address issues of national concern.

76 S Birch 'Single-member district electoral systems and democratic transition' (2005) *Electoral Studies* 24. This is evident in Kenya where the Orange Democratic Movement has a massive support in Nyanza region, the Wiper Democratic Movement gets most of its support in Eastern region, The National Alliance in the Mount Kenya region and the United Republican Party gets most of its support in the Rift-Valley region. This has created what is referred to as 'strongholds' in Kenyan political parlance, which is in essence a euphemism for ethnic bases for various parties.

77 RG Moser 'Electoral systems and the number of parties in post-communist states' (1999) *World Politics* 51.

78 P Norris 'Women's legislative participation in Western Europe' (1985) *West European Politics* 8; W Rule 'Electoral systems, contextual factors, and women's opportunity for elections to parliament in twenty three democracies' (1987) *Western Political Quarterly*

representation (PR) system than under a constituency-based system.[79] The reason for this, it has been argued, is that in the former case

> candidates focus on the party and its policies rather than on a particular individual. This works in favour of women – at least in getting their foot in the door – because of the inbuilt prejudices against women.[80]

The 'most broadly acceptable candidate' syndrome also affects the ability of women to be elected to legislative office because they are often less likely to be selected as candidates by male-dominated party structures.[81]

Third, the system is said to increase voter apathy as it rewards the supporters of the winning party and throws away the votes of those who support the losing party. Voters whose votes are lost feel disempowered because their vote did not count in the making of government. Remarking on the 2002 Kenyan elections, Nasong'o points out that

> [n]onetheless, twenty-five other minor political parties cumulatively received 12 percent of the total votes cast but none of them secured representation in parliament. The significance of this is that the SMD-FPTP electoral system tends to encourage the proliferation of minor political parties that have the consequence of scattering votes but have little real chance of earning representation in the National Assembly.[82]

Since smaller parties are permanently shut out of government, they tend to lose interest in politics. Where this leads to the permanent exclusion of certain parties or groups, it encourages conflict in deeply divided societies, especially if the division is along ethnic lines.[83]

Fourth, an additional shortcoming of the SMP system is its vulnerability to gerrymandering – manipulating the demarcation of electoral boundaries for electoral gain. The process of delineating constituencies become prone to political manipulation to give an advantage to a political party or a candidate, or to make it harder for a particular party to win an election. This is due to the premium in having more constituencies within a party's perceived 'strong holds' in order to get more seats in parliament.

40; R Matland 'Women's representation in national legislature: Developed and developing countries' (1987) *Legislative Studies Quarterly* 23.

79 C Lowe-Morna 'Strategies for increasing women's participation in politics' Paper presented to the Fifth Meeting of Commonwealth Ministers Responsible for Women's Affairs (1996) 13.

80 As above.

81 A Reynolds (n 51 above).

82 SW Nasong'o 'Political transition without transformation: The dialectic of liberalization without democratisation in Kenya and Zambia' (2007) 50 *African Studies Review* 100.

83 Sisk (n 54 above) 81.

4.1.2 The majoritarian system

The SMP and majoritarian system have several common features, including the fact that they are both non-proportional, single seat-based systems. The most distinctive difference between them is that the former requires the winner to receive a simple majority of the votes cast, while in the latter, the victor is required to receive an absolute majority of votes, that is, a minimum of 50 per cent plus one.[84]

The main advantage of majoritarian systems over SMP is that they ensure that the victor wins with a substantial majority. However, it has been observed that majoritarian systems produce results that are even more inequitable than those produced by the SMP. In addition, they treat smaller parties even more unfairly than the SMP.[85] Gerrymandering also occur in majoritarian systems because, like the SMP, majoritarian systems are constituency-based and, therefore, entail the delimitation of electoral boundaries.

4.2 Proportional representation

Proportional representation systems, as implemented with the wave of democracy in Spain and Greece and with the second wave in Eastern Europe, Latin America and, later, in South Africa, strengthen inclusiveness and allow minority representation.[86] Fair representation of significant segments of the population has been one of the most conspicuous strengths of the proportional representation system. The aim of the PR is that the composition of a representative parliament should closely reflect the viewpoints, interests and demographic composition of the electorate. Parliament should therefore be a 'microcosm' of society.[87] The PR system also encourages greater proportionality between votes cast and seats won. In the event of a seat falling vacant for whatever reason there is no need for a by-election, the next candidate on the party list is automatically elected.

There are two types of PR list systems – the 'open list' or 'preferential' and the 'closed list' or 'non-preferential'. In the open list, electors are given the choices between casting a vote for a party or for a candidate. A vote cast for a candidate will result in that candidate moving higher up the

84 This is similar to Kenya's constitutional requirement in presidential elections as envisaged in art 138(4)(a) of the Constitution where a presidential candidate has to get more than half of all the votes cast in an election.
85 Farrell (n 68 above) 39.
86 R Jackman & R Miller 'Voter turnout in the industrial democracies during the 1980s' (1995) 27 *Comparative Political Studies* 47.
87 Sisk (n 54 above) 82.

ranking order. The open list allows voters to choose their preferred candidate within the party.[88] Closed list PR systems are characterised by the following features: They are not constituency-based; voting is party-based (not candidate-based); party headquarters finalise the list of candidates and rank them; parties may have as many candidates as there are seats in parliament; and the allocation of seats to a party is, as closely as possible, proportional to the percentage of votes received. The closed list system gives the party inordinate power over the electoral process and determines the order of the candidates on the party list.[89]

The Constitution of Kenya Review Commission (CKRC) identified the following as amongst some of the problems of Kenya's electoral system:

> Support for parties is concentrated in specific geographical areas; the candidate of the party in such an area is sure to win; the country is thus divided between parties in a kind of electoral 'zoning'; there arises the notion that different parts of the country are preserves of particular parties and competing parties face obstacles, including intimidation, in campaigning there; In addition, this notion of 'safe areas' or 'safe seats' means that parties make no serious efforts to win support in areas deemed to be strongholds of other parties; the people there have no genuine choice between candidates.[90]

Yash Ghai has argued that adoption of the PR electoral system would be a possible antidote for these problems.[91] The goal of all PR systems is to deliberately translate a political party's share of the vote nation-wise into a corresponding proportion of parliamentary seats. Thus a political party would be awarded a proportion of the parliamentary seats that equal the share of the votes cast in its favour nationally. The system is lauded for providing fair representation. Representation in Kenya is one of the most contentious issues. Consequently, a system that is seen to improve representation would be attractive.[92] However, it is a system that requires certain circumstances to obtain, for example, the existence of organised political parties. It will be necessary to address that first.[93]

By and large the PR system has numerous advantages that must be underscored in making a case for electoral reform. Perhaps it should be pointed out that when benchmarked against democracy indicators, it performs very well. In this system there is no need for delimitation of

88 As above.
89 As above.
90 Constitution of Kenya Review Commission *The final report of the Constitution of Kenya Review Commission* (2005) 166.
91 Y Ghai 'Could 2002 draft have saved us from current problems' *The Star* 19 March 2013 http://www.the-star.co.ke/news/article-112893/could-2002-draft-have-saved-us-current-problems (accessed 20 July 2013)
92 E Kramon & DN Posner 'Kenya's new constitution' (2011) 22 *Journal of Democracy* 90.
93 SM Kivuitu 'The electoral process in Kenya' (2003) 5 *Report of the Constitution of Kenya Review Commission* 109.

constituencies, as the whole country is treated as one big constituency. This is considered an important attribute because in the plurality system, where the country has to be divided into constituencies, it is argued that gerrymandering often takes place to advantage the incumbent party over others, and the PR system is immune to such gerrymandering.[94]

The PR system is the most suitable system of representation as far as the fair representation of majorities and minorities is concerned. Women and minorities standing in single-member majority or plurality systems are less successful in getting parliamentary seats than those who stand in PR systems.[95] The PR system achieves this when women and minorities are placed high on the list. However, the system privileges power brokerage within parties rather than constituency formation and representation.[96] It therefore offers better representation to women and other under-represented groups only when the political party leaderships are committed to improving this representation or if the law enforces it. In South Africa, only the ruling African National Congress (ANC) applies a gender quota system to ensure an increase in the political representation of women.[97] Taking into consideration the importance of the ranking in closed list PR system, the ANC's regulations provide that at least every third candidate on the list shall be a woman. The ruling Frelimo party in Mozambique also uses a quota system in its lists to ensure better representation of under-represented groups, such as women, the youth and former freedom fighters.[98] The ability of women and minorities to mobilise and to challenge the power structures within parties will, to a large extent, determine whether they are effectively represented in this system.[99]

Well-designed PR list system can be effective in national building efforts as it tends to encourage political parties to seek votes and membership across communities.[100] This limits the attractiveness of mono-ethnic, racial or religious parties and prevents the political instability that would result from the *de facto* exclusion of some communities from parliament. It therefore provides 'the foundational level of inclusion needed by precariously divided societies to pull themselves out of the maelstrom of ethnic conflict and democratic instability'.[101]

94 As above.
95 M Yoon 'Explaining women's legislative representation in Sub Saharan Africa' (2004) XXIX (3) *Legislative Studies Quarterly* 56.
96 S Hassim (n 52 above) 340.
97 D Kadima *The June 1999 South African elections: ECF observer mission report* (1999) 73.
98 D Kadima *The December 1999 Mozambique presidential and national assembly elections: ECF observer mission report* (1999) 23.
99 Hassim (n 52 above) 340.
100 K Kanyinga 'Governance institutions and inequality in Kenya' in D Okello et al (eds) *Readings on inequality in Kenya: Sectoral dynamics and perspectives* (2006) 52.
101 Reynolds (n 51 above).

However, like any electoral system, it is not faultless. It is weak on geographical representation and voters often do not know who to go to when things go wrong. This problem is attributable to the fact that list PR system does not create a link between the elected representative and the electorate, since electors vote for political parties and not for individual candidates.[102] The value of associating representative accountability with constituency-based electoral systems is debatable because in list PR systems parties can organise themselves and maintain a regular link with the electorate in *de facto* sub-national constituencies. In South Africa, to minimise the absence of formally established constituencies inherent to the list PR, the ANC and several other political parties have subdivided the country into 'constituencies'. They strive to maintain a regular link between the MPs and their supporters in those constituencies, thus ensuring some representatives accountability. Prior to elections, some MPs lose their rank on the candidate lists and others are dropped from the lists during 'party primaries' because they have failed to be accountable to the electors during their tenure. Moreover, the individual accountability of a representative to his or her constituency is not as important and relevant as the collective accountability of a parliament *vis-à-vis* the nation because national parliaments are not concerned with matters of local interest but with those of national interest.

The PR system is blamed for allowing small parties into representative chambers, thus creating opportunities for extremist and chauvinistic parties to find their way into government through coalitions and cause political instability by shifting their allegiance at will. These parties would also be able to advance their minority interest at the expense of the majority. The system

> has the potential to destroy democracy from within by creating a fragmented, multiparty system … may also give rise to extremist or narrow-interest parties … all cabinets must be based on fragile coalitions of parties … [and it] promotes cabinet instability and increases the possibility of government problems.[103]

Admittedly it is worth avoiding the danger of having extremist parties enter the system and destabilise it. Nonetheless, it would be preferable to have those extremist parties within the system where their views would be moderated through interaction with others, rather than to keep them outside the system, where they might resort to extra-parliamentary means to destabilise the country. When there is a serious risk associated with the easy entry of small extremist parties into parliament, electoral system designers may set legal thresholds to contain the rise of such parties. Legal thresholds may also be used to discourage the proliferation of ethnically

102 R Southall & R Mattes *Popular attitudes towards the South African electoral system: Report to the electoral task team* (2002) 35.
103 Jackson & Jackson (n 59 above) 374.

based parties. The Netherlands has one of the lowest thresholds (0.67 per cent) and Poland one of the highest (7 per cent). In Africa, Mozambique has set the legal threshold at 5 per cent, creating a *de facto* two-party political system, while in South Africa there is no such threshold. In South Africa, a party may be elected with just 0,25 per cent of the valid votes cast. The levels of distortion of proportionality are directly related, amongst other things, to the levels of the legal threshold.

Fixed lists very often lead to accountability and voter choice problems where the parties, rather than the voters, decide which candidates have the best chance of reaching Parliament. They can also limit the ability of the electorate to affect intra-party debates.[104] The system inherently makes representatives accountable to party leaders not to voters. Given the absence of a base in a constituency, representatives 'have little incentive … to champion any cause which may run counter to party policy or practice'.[105] Moreover, given that the party list system allows the party to choose, move and remove parliamentary representatives in convenient ways, it flouts norms of responsibility and accountability between representatives and electors and devalues parliamentary activity.[106] The system 'constrains the free flow of changing opinion in a democracy'[107] given that members are constrained to tow the party line.[108]

4.3 Mixed member proportionality

Some countries have designed electoral systems that combine the features of plurality systems and list PR in order to benefit from the advantages of both systems.[109] These systems are known as mixed electoral systems. The MMP is practised in Albania, Bolivia, Germany, Hungary, Italy, Lesotho, Mexico, New Zealand and Venezuela. It retains the geographic link between the electorate and the representative of the plurality system, leading to greater accountability. Invariably, the plurality aspect appropriates a disproportionate share of the popular vote for the dominant parties. However, the PR component, which is put in place by the second ballot, restores the proportionality of support for the various parties and, through this balancing act, determines the composition of Parliament.

104 Sisk (n 54 above) 83.
105 B Martha 'Parliament, foreign policy and civil society in South Africa' (2002) 9 *South African Journal of International Affairs* 72.
106 R Southall 'The state of democracy in South Africa' (2000) 38 *Commonwealth and Comparative Politics* 158; R Southall 'The centralization and fragmentation of South Africa's dominant party system' (1998) *African Affairs* 448.
107 H Kotze 'Institutionalising parliament in South Africa: The challenges to parliamentary leadership' (2001) 33 *Acta Academica* 40.
108 H Giliomee et al 'Dominant party rule, opposition parties and minorities in South Africa' (2001) 8 *Democratization* 173; A Heribert et al *Comrades in business: Post-liberation politics in South Africa* (1998) 86 - 88.
109 KT Matlosa *Electoral system reform, democracy and stability in the SADC region: A comparative analysis* (2003) 112.

Depending on how low the threshold is, only a few votes are lost in the system, and this inspires confidence and leads to greater participation.

The mixed electoral system can take three forms.[110] The first form, the MMP, refers to a system where two types of vote counting are mixed: plurality system and proportional system. Both systems are used to determine representation. The plurality system is used to determine the allocation of legislative seats, while the proportional representation systems is used to compensate for the inequalities that may arise from the use of the plurality system. The second form, the parallel system, refers to a system of separate voting and vote counting, where the allocation of legislative seats is not dependent on each other. Under this system, a voter casts separate ballots: one vote indicating his or her party list choice under the PR system, and another indicating his or her preferred constituency candidate under a plurality formula. The third form refers to a system of voting and vote counting where the two systems are integrated. In principle, one round of ballots is cast for candidates on a plurality basis and then a percentage of the legislative seats are allocated on the basis of a PR formula that reflects the strength of various political parties in an electoral contest

Although the implementation of the MMP system differs from country to country, its most distinct features are: a pre-determined proportion of parliamentary seats is constituted on the basis of a constituency vote; another proportion is constituted on the basis of a party vote; the system allows for the use of a double ballot – either two votes on one single ballot or two votes on two separate ballot papers; independent candidates may only contest elections in constituencies; a threshold or quota is used to determine both the winners and the composition of an elected parliament.[111]

In considering the feasibility of an MMP electoral system in the Kenyan context, it is noteworthy that Kenya has a history of appeals for the adoption of MMP. In 2002, a number of major stakeholders in the electoral process convened in order to create a package of reforms under which a switch to MMP was a key proposal. The group contained a broad survey of Kenya's political scene, including the now defunct Electoral Commission of Kenya, the National Alliance for Change (a grouping of three major opposition parties), the Kenya Peoples' Coalition and numerous civil society organisations and religious organisations. The package, agreed upon by the stakeholders, contained the provision of 90 parliamentary seats, in addition to Kenya's existing 210, which would be elected on the basis of 'national' list-PR, where the entire country serves as

110 L Massicote & A Blais 'Mixed electoral systems: Conceptual and empirical survey' (1999) 18 *Electoral Studies* 341.

111 M Chege 'The case for electoral system reform in Kenya' in M Chege et al (eds) *The electoral system and multi-partyism in Kenya* (2007) 56.

one multi-member district. In addition to the obvious better representation of minority groups, supporters of the proposal asserted it would reduce election-related apathy, increase voter turnout, counter the distortions caused by boundary delimitation and provide for inclusion of women in the political process.[112] Though a number of KANU MPs were integral in the design of the reform package, the party eventually blocked legislation. The change of heart was due to the fact that KANU won both the presidential and the parliamentary vote in the 1992 and the 1997 elections through a minority vote thus feared that infusion of elements of proportionality will disadvantage the party in its quest for control of parliament.

The proposal for an MMP electoral system also featured during the 2007 post-election crisis as a means for guaranteeing peaceful elections. Njoki Ndung'u embraced this position stating that

> [p]arliament should ensure that electoral reforms contain a clause introducing a formula for the distribution of seats based on a mixed form of proportional representation to ensure the representation of minorities and marginalized groups. It should also include a specific reference to gender equity.[113]

The same view was also espoused by Michael Chege, who argued that

> [p]arliament should ensure that electoral reforms contain a clause introducing a formula for the distribution of seats based on a mixed form of proportional representation to ensure the representation of minorities and marginalized groups. It should also include a specific reference to gender equity.[114]

Each of the past draft constitutions suggested a slightly different system for the election of members of the National Assembly. All the drafts required measures to be taken to ensure the fair representation of women and men, persons with disabilities, and minorities. As far as the electoral system itself was concerned, the CKRC Draft proposed a 'mixed member proportional system' in which 210 members would be elected from constituencies and another 90 drawn from lists provided by the parties so that, as far as possible, the number of seats each party had in the Assembly would be proportionate to the number of votes it received.[115] The Bomas Draft did not have a proportional component. It provided for the election of MPs from constituencies (the number was to be determined by law), the election of a woman from every district, and 14 representatives of marginalised groups elected through electoral colleges. Like the CKRC Draft, the PSC proposed a mixed member proportional system although

112 R Oduol 'KANU MPs, others want a poll under two systems' *Daily Nation* 8 April 2002 http://www.nationaudio.com/elections/politicalparties/Parties_Kanu101.html (accessed 8 August 2013).
113 NS Ndungu 'Kenya: The December 2007 election crisis' (2008) 19 *Mediterranean Quarterly* 118.
114 M Chege 'Kenya: Back from the brink?' (2008) 19 *Journal of Democracy* 138.
115 Committee of Experts *Final report of the Committee of Experts* (2010) 117.

with variations in the detail. In addition to MPs elected from constituencies, it provided for women elected from 'special constituencies'. An additional number of members were to be drawn from lists in proportion to the votes received by parties. These lists were to be used to secure the fair representation of women and minority groups.[116]

The advantage of the MMP is that while it retains the proportionality benefits of PR systems, it also ensures that elected representatives are linked to geographical districts. The system result in representatives linked with parliamentary seats determined by the election outcomes of both components, and creates room for a compensatory factor to counter the effect of dis-proportionality in plurality systems.[117] Thus the MMP aims to broaden representation (through the PR component), retain accountability of elected representatives (through the plurality component) and, given its inclusiveness, can make a considerable contribution to political stability.[118] Equally important, the MMP system may enhance women's representation in the legislature, provided there is political commitment, and deliberate measures are put in place by the political leadership.

However, no electoral system is free of flaws and the MMP is regarded as complicated and not easily understood by the electorate.[119] Therefore, it does not do well on the simplicity scorecard, but the effects of this variable may be minimised by an intensive voter education campaign.[120] The other problem is that it produces two tiers of MPs, with those returned through the plurality feeling they are the true representatives of the people and those elected through the PR system representing the party. However, it should be noted that the mere fact of combining features of constituency-based electoral systems with those of proportional representation does not ensure a better system. Care is needed because the combination may result in 'bastard-producing hybrid' combining defects of PR and plurality systems.[121]

It is clear that there is no perfect electoral system. Furthermore, the same electoral system has different political consequences in different countries because such systems do no function in a vacuum. They are affected by each country's specific political context, institutions, culture and actors. It is impossible to find a made-to-measure electoral system that

116 As above.
117 A Reynolds et al *Electoral system design: The new international IDEA handbook* (2005) 90; MS Shugart & MP Wattenberg 'Mixed-member electoral systems: A definition and typology' in MS Shugart & MP Wattenberg (eds) *Mixed-member electoral systems: The best of both worlds?* (2001) 13.
118 K Matlosa 'Electoral systems, constitutionalism and conflict management in Southern Africa' (2004) 4 *African Journal on Conflict Resolution* 11.
119 Jackman & Miller (n 86 above) 85.
120 This could be a concern in the Kenyan scenario where the high number of spoilt ballots during elections has been of concern.
121 G Sartori *Comparative constitutional engineering: An inquiry into structures, incentives and outcomes* (1997) 119.

fits all countries, all national levels and all sizes of political communities. As Farrell observes,

> one country's circumstances can vary dramatically from another's, and a judgement on which electoral system is best for a given country should be made in the light of that country's history, social composition and political structure.[122]

The size of a country, its social structure and democratic maturity seem to play an important role in this regard.[123] According to Katz, the best electoral system is based on path dependency and goal-dependency: it is important 'who you are, where you are, and where you want to go'.[124]

5 Conclusion

Kenya's electoral system structural deficiency makes it difficult to make headway in improving the quality of democratic practice. The system leads to the exclusion of those at the margins of the democratic process. Taking into account the diversity of Kenyan social formations, it is imperative that the electoral system finds a way to ensure that all shades of political opinion are filtered into the political system. It has been shown in this chapter that the SMP electoral system tends to exclude marginalised communities such as women and members of minority ethnic groups from participating in the democratic process.

This chapter underscores the fact that Kenya remains deficient in the application of democratic norms. The electoral system that Kenya uses, the SMP system, is one of the elements held accountable for the limited extent of democracy in the country. The system is considered to be wanting in many important indicators of democracy such as popular representation, inclusiveness and consensus building. In light of this, the chapter recommends electoral reform that would not throw away the positive attributes of the SMP system but build on them to introduce more inclusive processes. The chapter recommends that instead of taking the extreme position of introducing proportional representation, which also has its fair share of problems, leading to government instability and lack of accountability and effective links between politicians and the electorate, it recommends a middle of the road solution – the mixed member proportionality system – which strives to include the best elements of the other two electoral systems.[125]

122 Farrell (n 68 above) 207.
123 RA Dahl & ER Tufte *Size and democracy* (1974) 45.
124 R Katz *Democracy and elections* (1997) 308.
125 It is noteworthy that both the Bomas and Kilifi Drafts of the Constitution contained a recommendation that a mixed member proportional representation (MMP) system be introduced, combining constituency-based elections with nominations based on proportional representation.

The case for Kenya to move to a form of MMP is now stronger than it was before the 2010 Constitution. This is indicated, firstly, by the constitutional requirement that gender and minorities be incorporated in public life, and secondly the need to take measures to ensure that not more than two-thirds of members of elected public bodies are of the same gender. The need to attain this objective has strengthened the case for electoral reform featuring the introduction of multi-member constituencies, alongside a compensating proportional list system. The proposed addition of a PR list system to the existing constituencies will correct representative imbalances. The introduction of multi-member constituencies alongside a PR list will allow political parties to adjust their candidate selection procedures. It will also mean that, to ensure an appropriate representation of women and other marginalised groups, parties will have to devise suitable procedures to use the national list to ensure adequate gender and minority group compensation. To be effective, legislation must be enacted compelling political parties to use the proposed proportional list to address identity deficit.

CHAPTER 6

POLITICAL PARTIES AND 'FREE AND FAIR' NOMINATIONS IN KENYA

Paul Ogendi

1 Introduction

Kenya has 59 registered political parties[1] governed primarily by the Political Parties Act.[2] The principal purpose of a political party in Kenya or elsewhere is to get individuals elected on its ticket to administer the government once they obtain its control.[3] A political party periodically embarks on a process of identification and selection of appropriate individuals, usually amongst its membership, to contest in an upcoming election for public offices.[4] This process of selection is called, party primaries. A party primary, therefore, is ideally a form of an election but is different from 'an election to public office'.[5] It is essentially

1 Office of the Registrar of Political Parties 'Independent Electoral and Boundaries Commission registered political parties' (2013) http://www.iebc.or.ke/index.php/political-parties/registered-political-parties (accessed 21 January 2014). In practice, political parties enjoy a greater degree of control with regards to the conduct of nominations as long as they conform to the rules in place including under the Political Parties Act, 2011. Some of the main political parties in Kenya include The National Alliance (TNA), Orange Democratic Movement (ODM), United Democratic Forum Party (UDFP), United Republican Party (URP), Wiper Democratic Movement-Kenya, NARC-Kenya, Forum for Restoration of Democracy – Kenya (FORD) and Kenya African National Union (KANU)

2 Political Parties Act 11 of 2011. See below section 5.1.2 for further discussions of the provisions of the Political Parties Act, 2011 on nominations.

3 PO Ray *An introduction to political parties practical politics* (1924) 58.

4 As above.

5 *Line v Board of Elections Canvassers* (1908) 154 Mich 329, 117 NW 730, 16 Ann Cas 248 quoted in N Sargent 'The law of a primary elections' (1917-1918) 2 *Minnesota Law Review* 104.

> a formal gathering where the sole business is to vote; just as at an election, with this difference, that the members of only one party vote, and that they vote only on representatives of the party.[6]

The requirement that members should 'vote' is usually not strictly adhered to in Kenya because many political parties are yet to develop robust recruitment mechanisms that have presence in all areas including the remote places. What is more, the political culture in Kenya does not support active membership participation.[7] In fact, some political parties in the past during the 2013 general elections resorted to conscripting membership from unsuspecting persons without their knowledge or permission.[8] In some instances, those allowed to vote during party primaries are issued with membership cards a few days before the actual voting date. Since a party primary is generally regarded as an election, it is also possible to argue that it has to adhere to the 'free and fair' standard that is the 'central component of any democratic transition'. In most countries, 'free and fair' party primary is an exception.[9] As a result, democracy is inevitably undermined even where election observation missions, not covering the nominations event, enter a verdict of 'free and fair' elections.

This paper argues for the adoption of a free and fair standard for party primaries. This is because, as democratic institutions, political parties are bound by the requirement of free and fair elections as enshrined in both binding and non-binding instruments at the national, regional and international level. According to the Political Parties Act, 2011, a political party may be deregistered if it does not promote free and fair nominations.[10] To exempt party primaries from observing this requirement is not only undermining the participation of party members but also the general democratic situation in the country. The first part of this chapter comprises a general introduction to the issue of the implication of party primaries on 'free and fair' elections. The second part relates to the justifications for focusing on party primaries in Kenya. In particular, it extensively refers to the Independent Review Electoral Commission (IREC) Report published in 2008 to support the notion that 'free and fair' party primaries has remained elusive in Kenya since the advent of multi-

6 M Ostrogorski & F Clarke *Democracy and the political parties* (1902) 209. The Kenya Election Act, 2011 defines 'nominations' as follows: '[T]he submission to the [Independent Electoral and Boundaries] Commission of the name of candidate in accordance with the Constitution [of Kenya] and this Act.'

7 The reality in Kenya is that political parties are subordinate to party leadership. In most cases, the party leader's position is assumed to be also the membership position. The process of consultation is usually not democratic in most parties. The main challenge to political participation in my view is lack of resources and ignorance or indifference among party members.

8 'Kenyans unknowingly registered as political parties members' *CIO East Africa* 30 May 2012 http://www.cio.co.ke/news/main-stories/kenyans-unknowingly-registered-as-political-party-members (accessed 21 January 2014).

9 Ostrolgorski & Clarke (n 6 above) 216.

10 Political Parties Act 11 of 2011.

party democracy in 1992. The conceptual framework forms the third part. Broad concepts such as democracy, constitution, and political parties have been briefly discussed as used in this paper. The fourth part deals with the norms at the national, regional and international levels on the standards applicable for party primaries. Some electoral malpractices and irregularities as documented by the media[11] during the January 2013 party primaries have been described in the fifth part. The main finding in this part is that the party primaries were marred with extensive irregularities and malpractices and, therefore, failed the test of free and fair elections. The sixth part contains the conclusions of the botched January 2013 party primaries. The last part enumerates the recommendations of this paper.

2 Why focus on party primaries in Kenya?

The Independent Review Electoral Commission Report, published in 2008, is the most comprehensive documentation on Kenya's electoral system.[12] It is, therefore, a key reference point in any electoral reform initiatives and research in Kenya. In relation to party primaries, the IREC Report observes that they have been consistently imperfect for 'decades-long, probably longer'.[13] It is noteworthy that Kenya has only had about two decades of multi-party democracy. More importantly, the IREC Report complained that the legal standard for a valid nomination in Kenya had failed to appreciate 'the primacy of fair nominations procedures for the fairness of the overall election itself'.[14] It was on this basis that the Report recommended, inter alia, that nomination of candidates by political parties conform to established standards of fair practice.

There are at least three reasons to justify this strict requirement. First, the report noted that nomination of candidates is crucial in the electoral process because they not only make an aspirant, who is not an independent candidate, eligible for elections but also, where a party has a stronghold and enjoys massive support, being nominated is as good as being elected.[15] Second, party primaries are a vital component of political parties with far

11 This paper under sec 7 entitled 'irregularities and malpractices during the January 2013 party primaries' relies heavily on media reports since this study was conducted in 2013 following the general elections. At the time of writing, the literature sources relevant to the discussion in this paper were scanty.

12 The report was published after the country descended into chaos after the 2007/2008 general elections. Over 1000 people were killed and property worth millions of shillings destroyed. The conflict also created the challenge of internally displaced persons (IDPs) which was absent in Kenya beforehand.

13 Kriegler Report 'Report of the Independent Review Commission on the general elections held in Kenya on 27 December 2007' (2008) 82 http://www.dialoguekenya.org/Agreements/Independent%20Review%20Committee.pdf (accessed 24 April 2013).

14 As above.

15 n 13 above, 80.

reaching consequences in the recruitment and selection of party candidates.[16] In this manner, it also secures participation of party members in selection of candidates for elections forming a good measure of a party's internal democracy.[17] Elections are not the only measure of democracy but 'it is difficult to imagine democracy without elections'.[18] Lastly, nominations in Kenya have continued to experience extensive irregularities, signalling that political parties in Kenya still lack adequate capacity to conduct credible primaries even today.[19]

The IREC report formed the basis of electoral reforms in the country during the lifetime of the grand coalition government.[20] Currently, the Constitution and the Political Parties Act, 2011[21] and its Code of Conduct under Schedule One jointly envisage a 'free, fair and credible political party nominations'.[22] However, as argued in this chapter, the party primaries practice has not yet evolved with the law. As will be discussed in another section, the irregularities and malpractices are still manifest and widespread thereby undermining the very purpose for carrying out such a process. The result is that the individual has been given the right to elect but denied the right to nominate, which is 'as much a part of the franchise as the right to elect'.[23]

From the foregoing, it emerges that Kenya's electoral process has been under considerable focus with the aim of initiating and realising comprehensive reforms. This paper argues for more enforcement of the new rules including during the nomination of candidates.

3 Conceptual framework of party primaries: Democracy, constitution and political parties

To secure clarity and avoid confusion, it is important to define a number of concepts as used in this chapter. The concepts include constitution,

16 Z Kebonang & WR Wankie 'Enhancing intra-party democracy: The case of the Botswana Democratic Party' (2006) 2 *Journal of African Elections* 142.
17 As above.
18 JS Robbins 'Introduction: Democracy and elections' (1997) 21 *Fletcher Forum of World Affairs* 1.
19 Centre for Multi-Party Democracy 'Party nominations towards the March general elections 2013' 2013 http://www.cmd-kenya.org/files/party-nominations-spot-on-analysis.pdf (accessed 23 April 2013). For specific examples on this point please refer to sec 7 of this paper.
20 The grand coalition government was formed via a constitutional amendment in 2008 to include the two main protagonists, Party of National Unity (PNU) and Orange Democratic Movement (ODM), in the 2007 general elections. The Constitutional amendment granted the two parties the mandate to govern the country jointly after the post-election violence negotiations.
21 Political Parties Act 11 of 2011 www.kenyalaw.org/klr/fileadmin/.../Acts/PoliticalPartiesAct2011.doc (accessed 5 May 2013).
22 See specifically rule 6(I) of the Code of Conduct.
23 AH Tuttle 'Limitations upon the power of the legislature to control political parties and their primaries' (1901-1903) 1 *Michigan Law Review* 468.

democracy and political parties. The term 'democracy' is not defined in the Universal Declaration of Human and Peoples' Rights (Universal Declaration)[24] despite the international instrument introducing the right to participation.[25] Elsewhere, it is evident that democracy has been defined in a similar language as participation.[26] For instance, in 1993, the Vienna Declaration of Programme and Action[27] observed that democracy is expressed freely by the people to determine 'their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.[28] Democracy, as a term, can also have a clear and independent meaning.[29] It is, however, important to note that many definitions of democracy cannot shy away from the element of 'participation'. Holden, for instance, describes democracy as a system of politics where people, positively or negatively, are allowed to make decision on important public policy matters.[30] What is clear though is that democracy is closely associated with multipartyism and elections.[31] Relying on the Constitution of Kenya, international and regional instruments, there seems to be an emerging consensus on democracy as a universal concept because:

> In the 1990s, the dismantling of communism and the resurgence of democracy has *(sic)* become facts of life. As part of this sweeping transition, many are working to establish the practice of free and fair elections as the cornerstone of a new world order based on democratic government and institutions.[32]

The relevance of democracy as a concept in this chapter can be traced to the 2001 United Nations (UN) resolution on promoting and consolidating democracy. This called for the promotion and consolidation of democracy through 'developing, nurturing and maintaining an electoral system that provides for the free and fair expression of the people's will through genuine and periodic elections'.[33] Free and fair elections are thus an important step towards consolidating and promoting democracy based on the will of the people. Democratic theory is, therefore, based on the notion

24 Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948).
25 European Commission *Compendium of international standards for elections* (2007) 4 eeas.europa.eu/human_rights/election.../docs/compendium_en.pd (accessed 29 April 2013).
26 See in particular art 25 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.
27 Vienna Declaration of Programme and Action, UN Doc A/CONF.157/23 (1993).
28 (n 27 above) para 8.
29 CM Zoethout & PJ Boon 'Defining constitutionalism and democracy: An introduction' in CM Zoethout et al (eds) *Constitutionalism in Africa: A quest for autochtonous principles* (1996) 7.
30 B Holden *Understanding liberal democracy* (1993) 8.
31 AMB Mangu & M Budeli 'Democracy and elections in Africa in the Democratic Republic of Congo: Lessons for Africa' (2008) 12 *Law, Democracy and Development* 103.
32 KJ Jason 'The role of non-governmental organizations in international election observing' (1991-1992) 24 *New York University Journal of International Law and Politics* 1795.
33 Promoting and Consolidating Democracy, UN Doc A/Res/55/96 (2001) para 1(d).

of human dignity and relates to adults exercising autonomy by sharing in the governance of their community.[34] But, since it is not possible for everyone to participate directly in government, the majority must share in self-government through delegating authority to freely chosen representatives.[35] One way to achieve actual representation is via free and fair elections that can be achieved by putting in place legislation, institutions and mechanisms to freely form political parties that can participate in elections.[36] This paper investigates this requirement with respect to party primaries in Kenya.

Another concept that needs clarification is the constitution. It is hard to proffer a 'single or authoritative definition' since there is no minimum set of principles to qualify the meaning of a constitution.[37] In philosophical terms, Rawls' *Theory of justice* regards a constitution as an example of imperfect procedural justice, meaning that it is instrumental in setting up a form of fair rivalry for political office and authority.[38] The constitution can also be clarified by understanding a related concept, constitutionalism.[39] Constitutionalism is distinct but related to constitution in that it is 'the necessity of limiting state power by means of the law'.[40] Arguably, constitutionalism therefore has two related sides – state organisation and a political ideal.[41] State organisation is a function of the constitution. Constitutions therefore, amongst other things, provide space within which 'politics is supposed to be carried on by the nonviolent means of deliberation and voting where interests diverge, and by means of deliberations and consensus where they do not'.[42]

By providing a public space, a constitution also defines what a free and autonomous person is as emphasised in the previous paragraph on democracy.[43] In Kenya, the Constitution provides for elections under its Chapter on the 'Representation of the people'.[44]

34 WF Murphy 'Constitutions, constitutionalism and democracy' in D Greenberg et al *Constitutionalism and democracy: Transitions in the contemporary world* (1993) 1.
35 As above.
36 n 33 above, para 1(d)(iv).
37 HWO Okoth-Ogendo 'The quest for constitutional government' in Y Crawford (ed) *The African colonial state in comparative perspective* (1994) 34.
38 R Gargarella 'The Constitution and justice' in M Rosenfeld & A Sajo *The Oxford handbook of comparative constitutional law* (2012) 336.
39 See generally HWO Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African Paradox' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991).
40 CM Zoethout & PJ Boon 'Defining constitutionalism and democracy: An introduction' in CM Zoethout et al (eds) *Constitutionalism in Africa: A quest for autochthonous principles* (1996) 4.
41 As above.
42 M Warren 'Liberal constitutionalism as ideology: Marx and Habermas' (1989) 17 *Political Theory* 513.
43 As above.
44 This chapter is divided into three parts. Part one deals with the electoral system and process in secs 81-87. Part two deals with Independent Electoral and Boundaries Commission and delimitation of electoral units in secs 88-90. The last part deals with political parties under its secs 91 & 92.

The last concept that requires clarification relates to the meaning and role of political parties. They are regarded as the foundation of pluralist democracy.[45] The need for alternative programmes and leaders by the electorate drives the central role played by political parties in a pluralist democracy.[46] In the context of mass politics, political parties are vehicles of mobilisation and control of support to capture power and secure the legitimacy of political office.[47] Political parties, therefore, are an indispensable part of democracy.[48] Put differently, political parties are the 'kingpins of democratic development' in most liberal societies.[49] According to Wanjala, alternative policies offered by political parties provide the electorate, and by extension citizens, choice which in turn spurs competitive politics which is a cardinal principle of the democratic process.[50] The importance of political parties can be summarised therefore as follows: they mobilise citizens and make them active participants in the affairs of the nation; by being responsive to citizens' aspiration and public opinion, they have the capacity to pressurise the government to formulate policies which are in line with the aspirations of the people; by carrying out intensive public education, they can inform the citizens about the critical issues of the day and the available alternatives thus enabling the citizens to make informed choices; and they can be a major link between the civil society and the state.[51]

Notwithstanding the important role a political party plays, its meaning is not precise either in the Constitution or any other laws of Kenya. Illustratively, section 2 of the Political Parties Act, 2011, dealing with interpretations, provides that political parties are assigned the meaning stipulated under article 260 of the Constitution. A review of article 260 of the Constitution, on the other hand, provides that political parties are an association contemplated in part three of chapter seven of the Constitution. However, part three of chapter seven of the Constitution does not contain any specific definition but contains the basic requirements for political parties. It is, therefore, impossible to legally define political parties in Kenya despite the fact that they play a central role in democratic consolidation.[52]

45 BC Smith *Good governance and development* (2007) 132.
46 As above.
47 As above.
48 See generally SM Lipset 'The indispensability of political parties' (2000) 1 *Journal of Democracy* 48.
49 S Wanjala 'Elections and the political transition in Kenya' in LM Mute et al (eds) *Building an open society: The politics of transition in Kenya* (2002) 33.
50 As above. In reality, however, party ideological position play a very limited role in the electoral process in Kenya. Political competition is largely about tribal mobilisation.
51 n 49 above, 34.
52 Some countries have attempted various definitions. For example, the Political Parties Act, 1967 of Germany defines political parties under its sec 2(1) as follows: 'Political parties are associations of citizens which, on a continuing basis or for a longer period of time, wish to influence the development of informed political opinion at the federal level or in any of the Länder and to participate in representing the people in the German Bundestag or a Land parliament (Landtag), provided that they offer a

4 An overview of the nominations structure in Kenya

This part has the objective of describing the nominations structure in Kenya with the aim of clarifying the scope of the process that is relevant to this chapter.[53]

According to the Independent Electoral and Boundaries Commission (IEBC) handbook on elective positions (the handbook), Kenyan electoral system has two different stages of nominations. Tier one is strictly restricted to political parties' nominations. In order to participate in the general elections for public offices, political parties are entitled to nominate candidates. The nomination of candidates by a political party takes place at two levels. The first level of the nomination process by a political party is the party primaries. Party primaries must be done within 45 days before a general election to allow for the adequate preparations by the IEBC, which includes printing of ballots. The relevant provisions of the law relating to this are sections 13 and 31 of the Elections Act, 2011.[54] The second level of nominations by a political party is through a 'party list'. In this category, political parties send a list of potential candidates to IEBC for filling special seats in the Senate, the National Assembly and County Assemblies. Nominations to these positions, however, are proportional to the number of seats secured by each party. The relevant sections of the law applicable in this case are sections 34 to 44 of the Elections Act, 2011.

The second tier consists of nominations at the IEBC level. It takes the form of clearance process to contest for an elective position. It basically involves scrutiny to ensure compliance with the electoral laws and regulations. All aspirants must meet all the requirements set for each position in order to be cleared to contest in the general elections. The process for clearance is provided under sections 33 to 44 of the Elections Act, 2011. The focus of this chapter is on party primaries rather than the nominations conducted by the IEBC.

sufficient guarantee of their sincerity in pursuing that aim, as evidenced by their actual overall situation and standing, especially as regards the size and strength of their organization, their membership numbers, and their visibility in public. Only natural persons may be members of a political party.' In Estonia, the Political Party Act sec 1(1) defines political parties as follows: 'A political party is a voluntary political association of Estonian citizens, which has been registered pursuant to the procedure provided for in this Act and the objective of which is to express the political interests of its members and supporters and to exercise state and local government authority.'

53 This part has been adapted from the Independent Electoral and Boundaries Commission *Handbook on elective positions* (2012) 42-43 http://www.iebc.or.ke/index.php/resources/downloads/item/handbook-of-elective-positions (accessed 30 May 2014).

54 Elections Act 24 of 2011.

5 National, regional and international normative framework for nominations

Currently, there exists a plethora of elections standards that have been developed over the last five decades, particularly after the Cold War, from separate but related perspectives.[55] This part describes the normative framework that governs nominations in Kenya as traced from both 'soft' and 'hard' laws and as developed at the national, regional and international sphere.

5.1 Constitution of Kenya and other relevant laws

The main laws discussed include the Constitution, Political Parties Act, the Elections Act, 2011 and the IEBC's qualification and requirements for nomination document.

5.1.1 The Constitution

The Constitution of Kenya[56] was promulgated into law on 27 August 2010. With regards to elections, the starting point is chapter seven on the representation of the people. In this chapter, the first part has provisions on the general principles of an electoral system. In this regard, one of the principles provided for is that Kenya's electoral system must be free and fair.[57] This principle is further explained to mean that elections must be: by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and acceptable manner.[58] Failure to meet any of the above conditions, therefore, violates an important principle provided for in the Constitution. The Constitution also requires that Parliament enact legislation that will provide for, amongst other things, the nomination of candidates[59] and the 'conduct … regulation and efficient supervision of … the nominations of candidates'.[60] Part three of chapter seven is also important since it deals with political parties. Article 91 stipulates the basic requirements of a political party in Kenya. Under article 91(1)(d), an obligation is imposed on political parties to 'promote and practice democracy through regular, fair and free elections within the party'. In conclusion, therefore, party primaries must meet free

55 A Davis-Robberts & DJ Carroll 'Using international law to assess elections' *Democratization* (2010) 416 http://www.cartercenter.org/des-search/des/Documents/UsingInternationalLaw-Democratization.pdf (accessed 5 May 2013).
56 Constitution of Kenya of 27 August 2010.
57 Art 81 (e).
58 As above.
59 Art 82(1)(b).
60 Art 82(1)(d).

and fair standards like any other elections pursuant to the above constitutional provisions.

5.1.2 Political Parties Act

The Political Parties Act, 2011[61] was enacted by Parliament to 'provide for the registration, regulation and funding of political parties, and for connected purposes'.[62] Being the principal legislation on political parties in Kenya, it is surprising to note that there is lack of a direct provision dealing with nominations. The closest is section 9(1), which requires that all political parties put in place certain provisions in their constitution or rules. The second schedule imposes nomination rules and regulations without specifications.[63] Political parties are therefore accorded a very wide unfettered discretion in deciding the contents of the provisions relating to nominations.[64] However, as discussed above, whatever rules are adopted must meet the free and fair standard imposed by the Constitution. Another limitation may be found in article 91(h) of the Constitution providing for the requirement that political parties 'subscribe to and observe the Code of Conduct for political parties'. Section 6(2)(e) of the Political Parties Act elaborates on this constitutional provision by requiring an undertaking from political parties to be bound by the Code of Conduct under the First Schedule at the time of provisional registration application. Rule 6(l) of the Code of Conduct imposes on political parties a direct obligation to 'respect, uphold and promote democratic practices through free, fair and credible political party nominations'. As stated in the introduction, section 21(b) also allows for the deregistration of a political party if it does not promote free and fair nominations.

5.1.3 Elections Act, 2011

The Elections Act, 2011 is the principal legislation providing for the conduct of the general elections in Kenya. The relevance of this legislation in party primaries relates to the period set for nomination of candidates by political parties. The period has been set at 45 days before a general election.[65] Once a candidate has been nominated and his or her name submitted to IEBC by a political party it cannot be withdrawn.[66] Another relevant provision is that a political party may request IEBC to conduct its nominations at its (party's) own cost.[67] In practice, political parties have rarely allowed IEBC to conduct their nominations despite the daunting challenges they face trying to conduct their own primaries. This reflects on

61 Political Parties Act 11 of 2011.
62 See the short title of the Act.
63 See clause 19 of the Political Parties Act, second schedule.
64 See generally section 3 of the Judicature Act, Chap 8 of the Laws of Kenya.
65 Sec 13(1).
66 Sec 13(2).
67 Sec 31(2).

the unwillingness of political parties to cede control of their nomination processes. In this regard, personal interests especially that of the party leader may very easily trump on party ideals including the requirement to hold free and fair nominations. Last, section 28 requires that political parties submit its membership list at least three months before the nomination of candidates. This requirement as will be seen later was not strictly adhered to.

5.1.4 IEBC's qualification and requirements for nomination document

In order for a successful nomination of a candidate at the primaries, certain qualifications and requirements must also be met.[68] They will form the basis of the vetting process conducted by the IEBC after the party primaries. The relevant part for the purposes of our study is the requirement for a nomination certificate for all candidates sponsored by political parties.[69]

68 Independent Electoral and Boundaries Commission, 'Qualifications & requirements for nomination of candidates for elective positions' (undated) http://197.248.2.46/index.php/media-center/press-releases/item/qualifications-and-requirements-for-candidates-for-elective-positions (accessed 30 April 2013). See also n 53 above.

69 To begin with, the qualifications for election as President and Deputy President include that one must be a Kenyan citizen by birth and not hold dual citizenship. He or she must also be qualified to stand for elections as a Member of Parliament. Also included is that a candidate must hold a degree from a recognised University. The qualification that a candidate must be nominated by a Political Party or be an independent candidate is also included. In addition, if a candidate is nominated by a political party, he or she has to present a nomination certificate from the party, duly signed by authorised official of the party. In addition, both party and independent candidates have to present a soft and hard copy of a list of at least 2000 supporters from a majority of the counties. The supporters must be members of the candidate's party while those of an independent candidate must not belong to any political party. According to the requirements, a nomination fee of Ksh 200 000 is payable by candidates. However, a candidate who is a woman, a person with disability or youth only pays Ksh 100 000.
The qualifications to contest the position of a Governor are slightly laxed since one only needs to be a Kenyan citizen for at least ten years and also not to hold dual citizenship. One also needs a certified copy of a degree certificate and a nomination certificate if sponsored by a political party. A candidate for the Governor position also has to be proposed and seconded appropriately. However, independent candidates have an additional requirement to submit a soft and hard copy list of 500 supporters. The nomination fees for the Governor position are set at Ksh 50 000 but women, persons with disabilities and youth fees are at a discounted rate of Ksh 25 000 only.
The qualifications to be elected to the Senate are fairly similar to the Governors, only that the requirement of a university degree is waived. One may also choose to be nominated by a political party or contest as an independent candidate. Candidates for this position also need proposers and seconders and for independent candidates, an additional requirement of submitting a list of at least 2000 supporters is imposed. The nomination fees are as the Governor's slot.
To qualify for elections as a member of the National Assembly, including as a woman county representative, one does not need a degree certificate. However, a contestant must either be nominated by a political party or in the alternative contest the elections as an independent candidate. Both candidates must also be proposed and seconded,

In order to guarantee the representation of marginalised sectors of the society, the IEBC has also stipulated that a political party must submit six party lists containing: nominees to the National Assembly; Nominees to the Senate; Youth Nominees to the Senate; Persons with Disability nominees to the Senate; marginalised group nominees to the County Assembly; and gender special seats nominees to the County Assembly. Alongside party nominees are independent candidates also. Article 25(b) of the International Convention on Civil and Political Rights (ICCPR) also encompasses independent candidates provisions that can be developed beyond the:

> … ordinary concerns related to the nomination of candidates, so as to target a number of special groups such as women and minorities that may be at a disadvantage in the exercise of their rights in general, and political rights in particular.[70]

Independent candidates do not have to present themselves for elections at the party level since they are not members of any political party. In reality though, most independent candidates end up associating with one or more political parties should they get elected.

In conclusion, Kenya's electoral system must be conducted in line with the set principles but emphasis must be on the equality of the vote, proportional representation, gender equity and free will of the voter.[71] The current electoral system comprises a 'direct election to elective positions, proportional representation based on party lists and special seats allocation for the youth, the disabled and the worker'.[72] Those who are elected and nominated based on the party list are regarded as state officers and leaders who have satisfied the requirement of good leadership qualities and the legal requirements set by law as discussed above.[73]

5.2 Regional treaties and instruments

Regional treaties now form part of the Kenyan laws pursuant to article 2 of the Constitution. The main treaties and instruments discussed in this category include the African Charter on Human and Peoples' Rights

with the independent candidate having to bear an additional requirement of submitting a list of at least 1000 supporters. The nomination fees are set at Ksh 20 000 while women, persons with disabilities and youth pay a discounted rate of Ksh 10 000 only.
To qualify for election as a member of the County Assembly Ward, the minimum qualifications apply including that a candidate must be nominated by a political party or stand as an independent candidate. They must also be proposed and seconded, with independent candidates having to submit a list of 500 supporters as an additional requirement. The nomination fees have been set at Ksh 5 000. However, women, persons with disabilities and youth only pay Ksh 2 500.

70 European Commission (n 25 above) 10-11.
71 Independent Electoral and Boundaries Commission (n 53 above) 5.
72 As above.
73 As above.

(African Charter), the African Charter on Democracy, Elections and Governance, and the Declaration on Democracy, Political, Economic, and Corporate Governance.

5.2.1 The African Charter

Article 13(1) of the African Charter on Human and Peoples' Rights[74] provides that participation in government may either be directly or through freely-chosen representatives. However, the African Charter standard for fairness of elections is hinged on the relevant laws of the country. As such, the same provision stipulates that participation in government must also be in 'accordance with the provisions of the law'. It should be noted that article 13 of the African Charter does not operationalise participation in the field of elections. The use of the words 'freely chosen' by the African Charter is fundamentally different from other standards elsewhere that require representation in government to be determined by way of periodic and genuine elections. Others have observed that '[t]he African Charter despite being the most comprehensive fails to include the right to vote and to be elected in periodic elections by secret ballot'.[75] In conclusion, the standard set by the African Charter with regards to elections is not free and fair. This gap was partially addressed by the enactment of another Charter on Democracy, Elections and Governance discussed below.

5.2.2 NEPAD's Declaration on Democracy, Political, Economic, and Corporate Governance

The NEPAD's Declaration on Democracy, Political, Economic, and Corporate Governance[76] in paragraph 13 commits African Union members to enforcing 'the inalienable right of the individual to participate by means of free, credible and democratic political process in periodically electing their leaders for a fixed term of office'.

5.2.3 Declaration on the Principles Governing Democratic Elections in Africa

The Declaration on the Principles Governing Democratic Elections in Africa[77] adopted in 2002 provides for, amongst other things, rights and obligations in elections including the right of every citizen to fully

74 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev. 5.

75 JE Rousellier 'The right to free elections: Norms and enforcement procedures' (1993) 4 *Helsinki Monitor* 27.

76 Declaration on Democracy, Political, Economic, and Corporate Governance, Doc AHG/235(XXXVIII).

77 Declaration on the Principles Governing Democratic Elections in Africa, adopted at the 38th Ordinary Session of the Organization of African Unity, 8 July 2002, Durban South Africa.

participate in the electoral process of the country either as a voter or a candidate.[78]

5.2.4 The African Charter on Democracy, Elections and Governance

The African Charter on Democracy, Elections and Governance (ACDEG)[79] is seen as an important regional instrument that reinforces the norms provided for under the 2002 Declaration on Democracy, Political, Economic, and Corporate Governance discussed earlier. Nomination of candidates is not specifically addressed under this law but it is definitely an improvement on the African Charter to the extent that it provides for specific general election principles including that elections must be held regularly, transparently, freely and fairly.[80] The African Commission on Human and Peoples' Rights (African Commission) through its resolution noted that since many countries in Africa are embracing multi-party democracy, it is 'imperative that the objectives and principles set out in the African Charter on Democracy should be respected and implemented'.[81]

5.3 International treaties and instruments

At the international plane, there are a number of treaties and instruments that relate to elections and nomination of candidates by political parties. These instruments are discussed below.

5.3.1 Universal Declaration of human rights

The starting point in any international inquiry about human rights is the International Bill of Rights starting with the UDHR. The UDHR is undoubtedly an important evidence of customary law.[82] As a matter of fact, some UDHR provisions are actually customary law.[83] With regards to elections, the UDHR in article 21(1) enshrines the right of everyone to take part in the government of his country. This is the provision that introduced participation as a human right. In the same vein article 21(3) affirms that the will of the people is the basis of the government authority. The above provisions have been given specificity in the subsequent legally-binding treaty discussed below.

78 n 77 above, para IV(2).
79 African Charter on Democracy, Elections and Governance (ACDEG), adopted by the eighth ordinary session of the Assembly, held in Addis Ababa, Ethiopia, on 30 January 2007.
80 Art 3(4).
81 See preamble, ACHPR/Res 164 (XLVII) 10 on Elections in Africa, adopted at its 47th Ordinary Session held on 12 to 26 May 2008 in Banjul, The Gambia.
82 Davis-Robberts & Carrol (n 55 above) 8.
83 As above.

5.3.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR)[84] gives specificity and the force of law to some of the provisions contained in the UDHR discussed earlier. It is also important to note at this earliest opportunity that pursuant to article 2 of the Kenyan Constitution, the ICCPR also forms part of the Kenyan law. With regards to elections, article 25(b) of the ICCPR introduces the 'right to genuine and periodic elections'. Indeed, as noted above, the UDHR broad provisions did not have the specificity comparable to particularly this provision of the ICCPR, which is just one form of participation in government. The limit of democracy is, however, not clear under the ICCPR.[85] What is clear is that an election is a major component of participation in government and by extension exemplifies democracy.[86] One would want to interrogate further what is meant by 'genuine' elections. Some scholars have interpreted this to be 'elections which offer voters a real choice and where other essential fundamental rights are fulfilled'.[87] Others have identified two components of the meaning of 'genuine' elections.[88] The first component relates to the broader matters including that of political freedoms and rights including the freedom of expression, assembly, association and movement.[89] The second component, however, relates to the element of real choice as pointed out earlier.[90] Article 25(b) of the ICCPR fails to stipulate any particular system of elections.[91] It nevertheless entrenches the right to offer oneself as a candidate in an election.[92] It finally recognises the 'continuous character' of elections which is a very important element if nominations are also to be addressed under this treaty.[93]

5.3.3 General Comment No 25 on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service

The next international instrument to be interrogated in this study is the United Nations General Comment No 25 on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public

84 International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.
85 European Commission (n 25 above) 8.
86 As above.
87 Davis-Roberts & Carrol (n 55 above) 11, 12.
88 European Commission (n 25 above) 6.
89 As above.
90 As above.
91 n 25 above, 9.
92 As above.
93 n 25 above, 10.

Service.[94] In a nutshell, the General Comment No 25 is an authoritative interpretation of article 25 of the ICCPR. Accordingly, it clarifies that 'genuine periodic elections … are essential to ensure the accountability of representatives for the exercise of the legislative and executive power vested in them'.[95] With specific regards to nomination of candidates, the General Comment No 25 provides for both nomination of candidates by political parties and eligibility for elections as an independent candidate.[96] While reporting, therefore, states are required to describe conditions for nominations including qualifications and restrictions.[97] This requirement serves to underscore the overall importance of nominations as comparable to a general election.

5.3.4 The 1991 General Assembly Resolution on Enhancing the Principle of Periodic and Genuine Elections

The 1991 General Assembly Resolution on Enhancing the Effectiveness of the Principles of Periodic and Genuine Elections emphasises, amongst other things, that the will of the people is dependent on an electoral system that provides an equal opportunity for everyone to be a candidate and to put forward their political views.[98]

5.3.5 The 2001 General Assembly Resolution on Promoting and Consolidating Democracy

The 2001 General Assembly Resolution on Promoting and Consolidating Democracy calls for an enabling environment to establish democratic political parties that can participate in elections.[99]

5.3.6 Declaration on Criteria for Free and Fair Elections

The Declaration on Criteria for Free and Fair Elections of 1994[100] recognises, in paragraphs 3(2) and 4(2), the use of political parties by everyone for purposes of competing for election and the promotion of a code of conduct for elections respectively.

94 Human Rights Committee, 'General Comment No 25: Article 25 (participation in public affairs and the right to vote), the right to participate in public affairs, voting rights and the right of equal access to public service' UN Doc CCPR/C/21/Rev.1/Add.7 (1996).
95 n 94 above, para 9.
96 n 94 above, para 17.
97 n 94 above, para 18.
98 General Assembly Resolution on Enhancing the Effectiveness of the Principles of Periodic and Genuine Elections, A/Res/46/137 (17 December 1991) para 4.
99 General Assembly Resolution on Promoting and Consolidation of Democracy, A/Res/55/96 (28 February 2001) para 1(d)(iv).
100 Declaration on criteria for free and fair elections, unanimously adopted by the Inter-Parliamentary Council at its 154th Session (Paris, 26 March 1994).

6 Election observation: Towards a common standard of free and fair elections

According to the harmonisation theory, international and regional norms *may* be regarded as being superior to the national statutes but not necessarily so to the Kenyan Constitution due to its inherent supremacy at the national level.[101] Due to relatively similar normative standards at the international and national levels in Kenya, much controversy is avoided. However, this question is still relevant when it comes to elections observation. Reliance on international legal norms should be encouraged because they are based on a state's voluntary or customary law obligations, and are flexible to change thus responding to both the needs of the international community and those of specific states.[102]

The obligations set in the regional and international instruments are also more broad and stated in general terms, meaning that they provide the 'highest level of guidance for assessing elections'.[103] Further, international standards enjoy both political and moral force in addition to the legal force.[104] Therefore, while national standards may enjoy the strict enforcement at the national level; the standard to be preferred particularly in election observation should be drawn from the regional and international treaties and instruments, which must also be understood by all stakeholders and observed in practice.[105] The African Union Guidelines for African Union Elections Observations and Monitoring Missions[106] recognises the diversity of each country and the impact on elections of factors such as organisational capacity, financial and human resources as well as infrastructural development (including roads, telecommunication and technological infrastructure) but refuses these factors to compromise free, fair and transparent elections. The Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers also notes that in order to determine the will of the people '[a] significant number of rights and freedoms, processes, laws and institutions are therefore involved in achieving

101 T Kabau & C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonization of the legal system' (2011) XLIV *Comparative and International Law Journal of Southern Africa* 299. This paper does not delve into deeper discussions on the status of international law in Kenya. For more discussions on this topic, see also: M Oduor 'The current status of international law in Kenya' (2013) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326135 (accessed 2 June 2014); and NW Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 2 *African Human Rights Law Journal* 415.

102 Davis-Roberts & Carrol (n 55 above) 3.

103 Davis-Roberts & Carrol (n 55 above) 8.

104 European Commission (n 25 above) 1.

105 European Commission (n 25 above) 5.

106 AU Guidelines for African Union Elections Observations and Monitoring Missions (2002) para 4.8 http://www.achpr.org/instruments/guide-elections/ (accessed 29 January 2015).

genuine democratic elections'.[107] The two instruments serve to emphasise the need for harmonised guidelines for election observer missions that will cover the period before, during and after elections including the nomination of candidates by political parties in order to deliver on democratic elections.

The African Commission on Human and Peoples' Rights (African Commission) in the case of *Constitutional Rights Project and Another v Nigeria*[108] has already affirmed the above position. In this case, the African Commission stated that 'a basic premise of international human rights law is that certain standards must be constant across national borders, and government must be held accountable to these standards'.[109] The facts of the case were that the then President Abacha's Government decided to annul election results on the basis that they were not free and fair despite being certified by international observers as free and fair. The African Commission, in disagreeing with Abacha's Government, observed that 'the criteria for what constitutes free and fair elections are internationally agreed upon'.[110] The challenge, however, is that not all election observation groups use the same normative standards. For instance, the Commonwealth Observers Group relies principally on the national law of a member country.[111] Similarly, the United Nations election observer missions have been criticised in the past for being lethargic in their enforcement of the free and fair elections standard as the cornerstone of election monitoring programmes.[112] There is clearly a need to harmonise election observation missions in order to coherently and effectively guide countries towards free and fair standards in elections based on international norms across the board. The use of different standards may bring about unnecessary conflicts since:[113]

> [O]bservers when making their judgment are making a decision of serious political dimensions. Inevitably, political considerations must be taken into account instinctively. No doubt the freeness or fairness *(sic)* of the election is a conclusion of the existing legal rules. Yet it is not a legal judgment in the strict sense … The finding or ruling that the government so elected, although it might affect its stature internationally in the eye of the community of nations.

107 Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers (2005) para 3 https://www.ndi.org/files/1923_declaration_102705_0.pdf (accessed 29 January 2015).
108 *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998).
109 Para 48.
110 As above.
111 B Otlhogile 'Observing for democracy: A note on the practices of commonwealth observer groups' (1994) 6 *African Journal of International and Comparative Law* 298.
112 SS Gibson 'The misplaced reliance on free and fair elections in nation building: The role of constitutional democracy and the rule of law' (1998-1999) 21 *Houston Journal of International Law* 23.
113 Otlhogile (n 111 above) 299.

Similarly, in Africa, socio-political chaos after an election happens when 'the legitimacy of the election has been deeply compromised.[114]

7 Irregularities and malpractices during the January 2013 party primaries

According to the Kenya National Dialogue and Reconciliation (KNDR) Report, political parties continue to exhibit same characteristics as in the past despite the introduction of 'new laws and efforts to institutionalize reforms'.[115] Consequently, the reality on the ground is that political parties in Kenya have no institutions and are lethargic in defending the public interest.[116] The level of public confidence that begun appreciating gradually after the introduction of the Political Parties Act needs to be harnessed and steered in the right direction away from the current irregularities and malpractices condoned particularly during nomination of candidates.[117] In this part, the author discusses at least ten malpractices and irregularities that were observed and documented by the media during the party primaries concluded in January 2013.

7.1 Election violence

In Kenya, much focus has been on preventing post-election violence (PEV) and not violence at the party primaries level. Yet, party primaries often lead to intense competition often resulting into violence. Violence at any level of the electoral process undermines democracy and must be stopped.[118] This section highlights some of the violence during the 2013 party primaries as reported in the media. In some of the Orange Democratic Movement (ODM) Party strongholds, violence defined party primaries particularly in Nyanza and some parts of Nairobi. In Nyanza, for instance, violence reports came particularly from Kisumu for the Governor's race and Kisumu Central for the Member of Parliament seat. Siaya Governor's nomination was equally not spared. Other areas affected by violence included Nyando and Homa Bay after contested results were announced. Pockets of violence were also recorded in Migori and Nairobi including at the ODM party offices. Media reports indicate that most of the

114 A Reynolds 'Elections, electoral systems, and conflict in Africa' (2009-2010) 16 *Brown Journal of World Affairs* 78.

115 Kenya National Dialogue and Reconciliation 'Kenya's 2013 general elections: A review of preparedness' February 2013, 16 http://www.dialoguekenya.org/Monitoring/%28February%202013%29%204TH%20Review%20Report%20on%20Electoral%20Preparedness.pdf (accessed 29 July 2014).

116 Kenya National Dialogue and Reconciliation (n 115 above) 17.

117 As above.

118 D Bekoe 'Trends in elections in sub-Saharan Africa' *United States Institute of Peace* Peace Brief 13 (10 March 2010) http://www.usip.org/sites/default/files/PB13Electoral%20Violence.pdf (accessed 24 July 2014).

areas affected were ODM strongholds and that some party members were involved in perpetuating violence.[119]

The consequences of violence led to the destruction of nomination materials in at least three counties including Kisumu, Homabay and Migori. This meant that nominations were not conducted in these areas.[120] Candidates contesting elections on the party ticket were selected using alternative undemocratic methods.[121] Most of them were elected on the basis of party affiliation. Those who were believed to be 'more loyal' and had close relationship with one or more of the party leaders were often favoured with direct party nominations at the expense of their competitors.

Apart from ODM, which was majorly affected, other parties affected at a comparatively smaller scale included the National Alliance (TNA), Wiper Democratic Movement (WDM), and United Republican Party (URP). The violence often occurred in some areas where these parties were thought to have considerable advantage over the others specifically in Central for TNA, Ukambani for WDM and Rift Valley regions for URP. Apart from violence, corruption is also a major challenge during party primaries.

7.2 Corruption

Corruption is a major challenge bedevilling most political parties in Kenya particularly during the party primaries. It is partly responsible for making campaigning for political office an expensive affair and therefore eliminating the participation of the poor. A candidate usually finds himself in a position that he has to bribe both the voters and the party officials in order to have a chance at the elections. In an attempt to curb corruption amongst others, the government of Kenya passed the Election Campaign Financing Act, 2013[122] 'for the regulation, management, expenditure and accountability of election campaign funds'.[123] During the 2013 party primaries, there were reports of corruption. In ODM, for instance, the party was forced to cancel the nomination of candidates exercise in some areas after it uncovered major frauds involving the selling of nomination certificates in Nyanza and some parts of Western.[124] County representatives contestants were required to part with up to Ksh.100000/- and Ksh.200000/-. Members of Parliament (MPs) contestants were also required to part with one million to two million shillings.[125] The ODM

119 'ODM in a spot over chaotic nominations' *The Standard* 22 January 2013 4.
120 'No exercise in three counties, confirms ODM' *The Standard* 21 January 2013 3.
121 As above.
122 Election Campaign Financing Act 42 of 2013. Art 23(1)(d) contains the punishment for violating the law which is 'by a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years or to both'.
123 Election Campaign Financing Act (n 122 above) preamble.
124 'ODM official arrested over certificate scam' *The Standard* 24 January 2013 9.
125 As above.

National Election Board (NEB) had to nullify all the certificates that were issued 'irregularly', and in the process, also had one of its Commissioners arrested for being implicated in the fraud.[126] If corruption failed, some candidates resorted to manipulation or even direct attacks to election officials to force their way on the party ticket.

7.3 Manipulation and attacks on officials

Manipulation and attacks on officials in charge of the nominations is usually a last minute strategy when all others have failed. Nomination officials particularly in areas prone to violence often find themselves victims of the intense political competition and violence amongst the candidates. Candidates from across the board, on various occasions, have been accused of manipulation and perpetrating attacks on officials. In Kisumu, a returning officer released 'results' for Nyando, Kisumu West and Muhoroni Constituencies while voting was on-going in these areas.[127] Attempts to announce Ruth Odinga as the Governor nominee for ODM were thwarted by the ensuing protest by party members.[128] In Homa Bay, the presiding officer was kidnapped while preparing to announce results for the ODM primaries.[129] Elsewhere, a returning officer was attacked and robbed of Ksh.23000 and two mobile phones by youth who also stripped him naked.[130] Another presiding officer acting on behalf of the Ford People party died after being stabbed.[131] In Kipipiri, a returning officer for TNA was forced to denounce announcement that claimed that former Transport Minister won the nominations after police intercepted ten ballot boxes at Kinangop.[132] A URP agent was also shot dead at a polling station in Eldama Ravine after he allegedly attempted to stab a police officer.[133]

7.4 'Party hopping' from one party to another

Party primaries are ideally supposed to be an exclusive party affair. However, in January 2013, many aspirants who failed to secure nominations in one party were free to 'hop' to another party, usually after paying some amounts of money. This situation was exacerbated particularly amongst member parties of a particular coalition. For instance, the Jubilee alliance comprised mainly of TNA and URP amongst others. The CORD alliance on the other hand comprised of ODM, WDM and FORD amongst others. Candidates in an alliance who fail to secure the party ticket of his or her choice would often resort to securing

126 As above.
127 'How Kisumu was turned into a battlefield' *The Standard* 21 January 2013 4.
128 As above.
129 'Returning officer succumbs to stab wounds' *The Standard* 21 January 2013 5.
130 'Voting put off after election official attacked and robbed' *Nation* 18 January 2013 5.
131 As above.
132 'Kimunya win dismissed' *The Standard* 21 January 2013 8.
133 'URP agent shot dead after bid to stab police officer' *Nation* 18 January 2013 19.

nomination in another party belonging to the same alliance as his or her previous party. In Mombasa, for instance, aspirants who failed to clinch the ODM nominations defected to the sister coalition partner, WDM, contrary to the relevant provisions of the Elections Act, 2011.[134] One such aspirant confirmed that their nomination certificates were dated 19 January 2013, which was outside the acceptable legal limits set under the Election Act.[135] Small parties were the major beneficiaries of party hoping where they promptly issued nomination certificates on a 'first-come-first-serve' basis.[136] A good example is Nairobi and Central where majority of aspirants who failed to clinch their preferred TNA party tickets also defected to the Grand National Union (GNU), SabaSaba Asili, National Rainbow Coalition (NARC), Farmer Party, Agano and Democratic Party.[137] The IEBC issued a reprieve to such defectors terming the 2013 elections as transitional.[138]

7.5 'Zoning out' practice

With most political parties belonging to various coalitions, zoning out of certain areas in favour of the dominant party meant that certain candidates of other parties were unfairly locked out of the electoral process. For instance, the former Central province was zoned out to TNA meaning that URP candidates in the region could not secure their nomination certificates.[139]

7.6 Tampering with candidates' names and election details

There were instances where the names of aspirants were tampered with thereby undermining their fair nominations. A URP aspirant, for instance, found her name missing in the ballot paper despite paying nomination fees of about Ksh.68000.[140] There were also controversies reported in the Coalition for Reforms and Democracy (CORD) alliance against the inclusion of some names in Mombasa County including at the Ganjoni, Shimanzi and King'orani Wards.[141] Perhaps the most dramatic tampering with an aspirant's names and details was that witnessed in the Machakos County WDM aspirant for governor, Dr Alfred Mutua, when he found campaign posters with his picture and a rival party symbol near various polling stations.[142]

134 'CORD aspirants defect to sister party in Mombasa' *The Standard* 21 January 2013 7.
135 As above.
136 'Small parties reap big from botched polls' *Nation* 18 January 2013 18.
137 As above.
138 'IEBC chairman hints at giving defectors lifeline' *The Standard* 24 January 2013 4.
139 'Winners camp at URP offices demanding their certificates' *The Standard* 21 January 2013 8.
140 As above.
141 'Delays mar CORD primary elections' *Nation* 18 January 2013 8.
142 'Candidates accuse rivals of dirty tricks' *Nation* 18 January 2013 19.

7.7 Withholding of nomination certificate by political parties

There were cases where winners of nominations had to fight bitterly to get hold of their nomination certificates. The TNA nomination certificate for Othaya parliamentary seat was one such instance. Despite having been declared the winner, the candidate's nomination certificate was temporarily withheld. It took protest by her supporters in Othaya as well as at the IEBC offices for the candidate's name to be included in the TNA's list of nominees. She was eventually issued a nomination certificate by the party officials following her protest. The IEBC later issued a warning against aspirants storming into their offices terming it as being contrary to the Code of Conduct signed by all political parties.[143]

7.8 Poor time and logistical management of party primaries

This was one of the glaring irregularities that affected many political parties. According to media reports, at least three main coalitions participating in the 2013 national elections had to suspend their party primaries to avoid losing candidates to the rival coalition.[144] However, other reasons were given for this postponement including lack of ballot papers, claims of rigging, and violence.[145] This reflects badly on the democratic situation in the country. Political parties are often used as disposable vehicles to political office without any form of ideology binding its members. The most notorious party was the TNA, which had to postpone the whole nominations exercise by one day after the deadline, particularly in some parts of the former Central region. ODM promised to repeat its botched primaries in at least four counties including Nairobi (Kibra Constituency), Homa Bay (Suba, Homa Bay town, Mbita, Rangwe and Kasipul Kabondo), Kisumu (Muhoroni, Nyando, Kisumu Town West, Seme and Kisumu West), and Migori (Nyatike, Kuria West, Awendo and Uriri constituencies) due to the violence and logistical challenges, but it never kept its word.[146] However, the nominations in some counties such as Kisumu, Migori and Homa Bay were agreed upon by consensus.[147]

7.9 Failure to observe IEBC's timelines by political parties

Most parties failed to adhere to the timelines set by the IEBC. The IEBC, for example, had to extend its own deadline of 45days time limit at least twice to give political parties a chance to conclude their primaries. Initially, the lists of nominated candidates were scheduled for submission to the

143 'Former MPs face sanctions over Wambui ticket saga' *The Standard* 24 January 2013 2.
144 'A lesson in vote chaos' *Nation* 18 January 2013 2.
145 As above.
146 'ODM to repeat polls in key areas' *Nation* 18 January 2013 8.
147 'Parties battle to tackle rows ahead of IEBC deadline' *Nation* 21 January 2013 2.

IEBC on 18 January 2013. This was postponed to 21 January 2013 at 17h00. This new deadline was further extended to midnight of the same day when it became apparent that most political parties could not comply with the deadline. Another deadline, which was set by IEBC and was broken, was that nominations were to be conducted between 4 January 2013 and 17 January 2013. As discussed above, some parties, particularly the TNA, conducted their nominations on 18 January 2013 and, therefore, submitted their party lists sometime after the deadline.

7.10 Sham dispute resolution processes

Most political parties' dispute resolution mechanisms failed to remedy the malpractices observed during the party primaries. The ODM dispute resolution mechanisms particularly failed to address the violence that erupted in Nairobi and Nyanza.[148] The handling of the Siaya Governor's seat case was particularly concerning. The results in Siaya were nullified and both candidates disqualified with the nomination certificate being issued to a third party, Cornel Rasanga, had not participated in the botched nominations.[149] Another instance reported in the media involved the issuance of nomination certificate for Member of Parliament position to a loser in Siaya as opposed to the alleged winner.[150] TNA also had its fair share of challenges when they were faced with the task of resolving about 170 disputes filed within a short period of time.[151] The question of time also haunted the IEBC's National Dispute Resolution Committee (NDRC) and the High Court.[152] The latter, for example, had to resolve over 50 cases in a record five days.[153] Democracy under these circumstances cannot function properly especially since many cases were decided on a point of technicality for failing to exhaust the jurisdiction of NDRC and Political Parties Dispute Tribunal for pre-poll petitions.[154] IEBC's NDRC, on the other hand, received 110 complaints which it had to resolve in six days.[155]

148 'Deadline: IEBC gives more time as confusion reigns' *The Standard* 22 January 2013 6.
149 'Oburu, his rival lose battle for governor as Midiwo gets reprieve' *The Standard* 22 January 2013 9.
150 As above.
151 'Cord, Jubilee battle to clear poll disputes' *Nation* 21 January 2013 1.
152 Judiciary Working Committee on Election Preparation 'Judiciary pre-election report: September 2012 – February 2013' (2013) 54 http://www.icj-kenya.org/dmdocuments/reports/Judiciary%20Pre-Election%20Report%2027th%20feb.pdf (accessed 30 May 2014).
153 As above.
154 As above.
155 'IEBC warns dishonest candidates' *Nation* 24 January 2013 3.

8 Conclusions from the botched January 2013 party primaries

From the discussions in the previous parts, the following conclusions can be reached. First, some of the January 2013 party primaries in Kenya failed to meet the standard of free and fair elections. In some areas, the party primaries were manifestly a sham. The issuance of nomination certificates to candidates was therefore arbitrary and not necessarily in tandem with the will of the people. In such cases, the will of the people as a central tenet of democracy may have been subverted. The main challenge remains the ignorance or indifference of party membership to such subversions. The political parties also lack adequate technical, organisational and financial capacity to undertake nominations throughout the country in one day for all available positions.

Second, electoral laws and regulations often do not translate into actual practice during party primaries. Extensive reforms have been undertaken since 2008 in order to streamline the electoral process in the country. These reforms have culminated in the enactment of some progressive legislation including the Political Parties Act, the Elections Campaign Financing Act and the Elections Act, 2011. Despite the existence of these progressive legislations, the management and conduct of party primaries remain unsatisfactory. Indeed, the January 2013 nominations had no clear break from the past signalling a persistent undemocratic culture in Kenya's political parties. This undemocratic culture may be partly attributable to the fact that most of the laws on elections were recently enacted starting from the Constitution in 2010 and the Political Parties Act in 2011, therefore, leaving very limited time for the transformation of the political culture in Kenya. The institutions established to provide oversight may also have been inadequately prepared due to time factor. It is hoped that in the future as the laws continue to operate a better democratic culture will emerge.

Third, the registration of political parties a few months before an election makes it technically unprepared to carry out free and fair party primaries throughout the country. The law allows for the registration of political parties and mergers at any time.[156] The only exception is that coalitions between or amongst political parties may not be formed three months before an election.[157] From the discussions above, some of the problems canvassed could be traced directly to the fact that some political parties and in particular the TNA and URP were registered a few months before the general election thus undermining the democratic culture in the country. This was further exacerbated by the fact that most nomination

156 Political Parties Act 11 of 2011, secs 3 and 11 respectively.
157 Political Parties Act, sec 10.

organs in the political parties were *ad hoc* committees, with staff members working on a part time basis except during the actual nomination days.

Fourth, the enforcement of rules and regulations on party primaries in the country is weak. The following breaches occurred with impunity. One, the Election Act, 2011 requirement that nomination of candidates by political parties must be within 45 days before elections.[158] Two, the requirement that candidates must be a member of a political party three months before nominations.[159] Last, no political party was deregistratered despite the fact that they failed in some cases to conduct free and fair nominations.[160]

Fifth, the regulation of coalition parties should be reviewed to deter undemocratic practices particularly in the area of 'zoning out'. The coalition of political parties, for the purposes of contesting an election, is an accepted reality in Kenya. This is because no single community in Kenya has 50 per cent plus one votes that is requisite for the election of the presidency. Politics in Kenya is ethnic based. The democratic challenge is that where zoning out is agreed upon between political parties, some members are unfairly locked out of party primaries. The effect is that the will of the people may also be subverted particularly if those locked out had a real chance of winning the elections despite the popularity of a political party in that area. Universal suffrage should inform future practices.

9 Recommendations

Based on the findings of this paper, the following recommendations are proposed.

First, with regard to election observation missions, free and fair standards should be premised on clear guidelines based on international accepted norms of universal character. Election observation should not be based on disjointed subjective guidelines, national legislations or other socio-political considerations in order to guarantee consistency and legitimacy.

Second, the Political Parties Act should be amended to elaborate on the standard of free and fair nominations. If possible, more offences relating to party primaries should be legislated and stiffer penalties provided. For instance, it should be an offence to breach the time limits on nominations as set out under various legislation, including the Election Act, 2011. Most importantly, the applicable rules and regulations on nominations should be strictly enforced. Section 7 of the Political Parties

158 Election Act, 2011, sec 13(1).
159 Election Act, sec 28.
160 Political Parties Act 11 of 2011, sec 21(b).

Act, 2011 should also be amended to provide that one of the conditions for full registration should be that the political party is not established six months before an election.

Third, political parties should consider collaborating with the IEBC, pursuant to the Election Act, 2011 during their party primaries in order to avoid technical, logistical and other organisational constraints that are currently manifest. Despite having its challenges, the IEBC is the best prepared to carry out a countrywide nominations exercise. Since it is an independent body, it may also deliver on free and fair nominations.[161] In the alternative, Kenya should consider establishing a Nominations Commission within the Political Parties Act, 2011 with the main function of conducting free and fair nominations within the political parties.

Fourth, coalition agreements deposited by political parties should expressly prohibit undemocratic practices including 'zoning out'. The relevant electoral body should also impose sanctions where a party expressly engages in undemocratic practices with impunity, particularly in the party's stronghold areas.

161 In *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 2 Others* [2013] eKLR, the Supreme Court of Kenya found that the IEBC delivered free and fair presidential nominations in accordance with the Constitution and other relevant Acts.

Part 3: Implementation of good governance principles

CHAPTER 7

WOMEN'S REPRESENTATION IN ELECTIVE AND APPOINTIVE OFFICES IN KENYA: TOWARDS REALISATION OF THE TWO-THIRDS GENDER PRINCIPLE

Winifred Kamau

1 Introduction

Women in Kenya have historically been marginalised in the public and political sphere. Despite their numerical strength,[1] they have been grossly under-represented at all levels of government in both elective and appointive positions. For instance, after the 2007 general elections, women made up only 9,8 per cent of the Members of Parliament. In the Executive women made up 15 per cent of Cabinet Ministers and only 12 per cent of Assistant Ministers.[2] Similarly, in the judiciary, women have been under-represented in the higher courts and over-concentrated in the lower courts.[3] Kenya has continued to lag behind her neighbours regions such as Uganda, Tanzania and Rwanda in terms of gender-balanced political representation.[4] The Constitution of Kenya 2010[5] brought the promise of a new era in the protection and advancement of human rights. Premised on national values and principles, it embodies an enhanced commitment to egalitarianism, social justice, inclusion and public participation of the populace in decision-making. The Constitution provides for equality of men and women and non-discrimination[6] while categorising women as a

1 The population of women in Kenya as at 2009 was 19 417 639 compared to 19 192 458 men; women therefore make up slightly more than half of the total population: Kenya National Bureau of Statistics 'The 2009 Kenya population and housing census' Vol 1C 23 (2009) 23.

2 Federation of Women Lawyers (FIDA-Kenya) 'Gender audit study of the 10th Parliament' (2008) 16 - 17.

3 As at 2006 there were no women in the Court of Appeal, then the highest court in the land. Women made up only 20% in the High Court. Conversely, they made up 41% of magistrates in the subordinate courts: National Commission on Gender and Development, 2006.

4 Women's representation in Parliament as at 2012 was 56,3% for Rwanda, 35% for Uganda and 36% for Tanzania: United Nations Development Programme (UNDP) 'Report on the regional dialogue on women's political leadership; championing women's political leadership: delivering the one-third promise in Kenya' 14 - 16 August 2012, 2.

5 Promulgated on 27 August 2010.

6 Art 27.

marginalised group worthy of special protection.[7] In recognition of the historical marginalisation of women in the public sphere, the Constitution provides for affirmative action measures. More specifically, the Constitution provides for the promotion of women's representation in public bodies through the special provision which stipulates that not more than two-thirds of members of elective or appointive bodies should be of the same gender (two-thirds gender principle).[8] However, the Constitution does not provide a clear mechanism for implementation of this principle. This has led to controversy in terms of the correct approach regarding its realisation, namely whether the principle should be realised immediately or progressively.

This issue took on special significance shortly after promulgation of the Constitution, notably in relation to appointments to the newly formed Supreme Court as well as appointments to the new offices of County Commissioner in the national executive. Petitions were filed in the High Court, where conflicting interpretations were given. Thereafter, in the run up to the General Elections of March 2013, the same issue arose regarding the composition of the National Assembly and Senate. The Advisory Opinion of the Supreme Court on the matter ultimately settled the question by ruling that the two-thirds gender principle was not intended for immediate implementation but was to be implemented progressively with the necessary legislation to be put in place by 27 August 2015. However, even after the Advisory Opinion, there is still a lingering uncertainty regarding what kind of legislation is necessary and what measures need to be put in place to ensure compliance with the principle. With the deadline of 27 August 2015 looming and in view of the approaching General Elections of 2017 the resolution of this issue remains one of critical importance to governance and the electoral process.

This paper examines the two-thirds gender principle in the post-2010 Kenyan context in relation to elective and appointive positions. I argue that disharmony in constitutional provisions relating to the principle and lack of clear implementation mechanisms, exacerbated by conflicting judicial approaches to the interpretation of the principle have resulted in serious challenges in the realisation of the principle. Part 2 of the paper explores the principle in the context of affirmative action, and traces its historical development in Kenya culminating in its inclusion in the Constitution of 2010. Part 3 analyses the key court decisions in Kenya on the interpretation of the principle, and ends by considering the implications of the Advisory Opinion on women's representation in Kenya. Part 4 concludes the paper and makes suggestions on the way forward towards attainment of gender-balanced representation in the public sphere.

7 Art 260.
8 Arts 27(8) & 81(b).

2 The two-thirds gender principle

2.1 Affirmative action and the two-thirds gender principle

It is widely accepted by the global community that there is need to increase women's participation in public and political life. This is justified, firstly, on the grounds of equity on the reasoning that as women make up half of the world's population, they should therefore be equally represented in participation and decision-making at all levels of society, including the public sphere. Secondly, women as a group are affected by decisions and it is therefore important for them to be part of decision-making process so that their interests are articulated and considered. Thirdly, women bring different perspectives and concerns to decision-making and their increased participation leads to improvement in the quality of governance and representation.[9] The need for women's active participation, on equal terms with men, at all levels of decision-making is supported by many international instruments as an essential factor in the achievement of equality, sustainable development, peace and democracy. For example, article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides for the right of women to participate in the formulation of government policy and its implementation, and the right to hold public office and to perform all public functions at all levels of government. Article 9 of the Protocol on the Rights of African Women[10] calls on state parties to ensure women's equal representation with men in political and decision-making processes at all levels.[11]

However, women across the globe, including Kenya, face serious systemic obstacles when seeking to enter the public and political realm. This is largely due to the 'public/private divide', whereby women have historically been consigned to the private sphere of home and family and excluded from the more prestigious and highly regarded public arena of politics and employment.[12] Due to socialisation patterns within a patriarchal dispensation, women are generally not perceived as worthy or capable leaders. Some of the major hindrances include gender-discriminatory attitudes and practices, family and child-care responsibilities, and low education levels. In the context of elective politics, obstacles to women's participation as candidates include inadequate financial resources, electoral violence meted against women

9 WM Kabira & EN Kimani 'The historical journey of women's leadership in Kenya' (2012) 3 *Journal of Emerging Trends in Educational Research and Policy Studies* 842.

10 Protocol to the African Charter on Human and People's Rights.

11 Similar international obligations are to be found in the Universal Declaration of Human Rights, the Beijing Platform of Action and the Millennium Development Goals (MDGs).

12 C Nyamu-Musembi et al *Promoting the human rights of women in Kenya: A review of the domestic laws* (2009) 21.

candidates and unfavourable media coverage.[13] The type of electoral system also has a bearing on women's representation. Studies have established that First Past the Post (FPTP) electoral systems generally have lower representation of women compared to Proportional Representation (PR) systems.[14] Kenya by and large operates a FPTP system albeit with some limited space for proportional representation.[15]

The uneven political playing field on which women and men compete has led to affirmative action initiatives designed to increase women's participation in politics and public life. Affirmative action refers to a deliberate move to reforming or eliminating past and present discrimination of specific minorities using a set of public policies and initiatives. It takes into account under-representation and insignificant occupation of positions by specific minorities in the society.[16] The underlying motive for affirmative action is the need to achieve substantial equality as opposed to formal equality. In terms of gender, this means giving women not merely formal equal opportunities but an enabling environment in which they can attain equality of results.[17] Affirmative action measures are essentially temporary in nature and are put in place until such time as parity is achieved or the disadvantage is ameliorated. Under article 4 of CEDAW, the adoption of such temporary special measures is held not to constitute discrimination.[18]

In the context of electoral politics, affirmative action measures have primarily taken the form of quotas and other positive action strategies directed towards the acceleration of the attainment of substantive equality between women and men in the political sphere. Electoral quotas may be constitutionally, as in Rwanda and Uganda,[19] or legislatively mandated, as in Namibia, or they may be voluntarily introduced by a political party under its own manifesto.[20] Quotas usually set a target or minimum threshold for women, and may apply to the number of women candidates

13 J Ballington (ed) *The implementation of quotas: African experiences* (2004) 350; FIDA-Kenya (n 2 above) 350.

14 Musembi et al (n 12 above) 22.

15 Arts 97(1)(c) and 98(1)(b) of the Constitution of Kenya provide for proportional representation in the election of 12 candidates to represent special interests of youth, persons with disabilities and workers in the National Assembly and the election of 16 women candidates in the Senate.

16 C Kaimenyi et al 'Analysis of affirmative action: The two-thirds gender rule in Kenya' (2013) 3 *International Journal of Business, Humanities and Technology* 91.

17 CEDAW Committee, General Recommendation 23 of 1997.

18 Note, however, that affirmative action is sometimes referred to as positive discrimination or reverse discrimination.

19 Arts 78 & 180 of the Ugandan Constitution 1995, and art 9 of the Rwandan Constitution.

20 Examples of voluntary party quotas are in South Africa's African National Congress (ANC) and Mozambique's Front for the Liberation of Mozambique (FRELIMO) in Mozambique, where the minimum target of 30% female representation in Parliament has been met. Other voluntary quotas are in Norway, Sweden, Finland and Denmark where women make up more than half of the members of Parliament: Ballington (ed) (n 13 above) 22 - 23.

proposed by a party for re-election, or may take the form of reserved seats in the legislature.[21] The general effect of quotas is the fast-tracking of women's participation in the political sphere. In Rwanda, where the Constitution reserves 30 per cent of seats for women, women make up 53 per cent of the members of Parliament while in Tanzania they make up 35 per cent.[22]

Quota provisions may also be formulated on a gender-neutral basis, where the law provides for a prescribed maximum or minimum percentage representation of either sex. This type of formulation is important for conquering resistance to quotas, especially on the grounds that they are discriminatory against men. By framing the law in a gender-neutral way, the proponents try to overcome this argument.[23] An example of a gender-neutral quota is the two-thirds gender principle which prescribes that not more than two-thirds of the members of an electoral body shall be of the same gender.[24] The rationale for the two-thirds principle is to ensure a minimum of one-third representation of women. This is line with the target endorsed by the United Nations Economic and Social Council of 30 per cent women in decision-making positions by 1995.[25] The figure of 30 per cent is generally considered to be the minimum 'critical mass' for women's effective representation. Research has shown that in order to make a visible impact on the style and content of political decision-making they must attain critical mass representation in any institution.[26]

However, quotas and other affirmative action measures have been criticised on the argument that they are not based on merit and amount to unfair reverse discrimination. Further, it is argued that an increase in the number of women does not always translate into effective representation. Women may also be more loyal to their party affiliation and therefore fail to articulate women's issues.[27] Quotas can sometimes amount to mere window-dressing as they may not be enforced in practice.[28] Quotas often also result in 'glass ceilings' where the numbers of elected women do not exceed the minimum required by the quota as they are elected only for the special seats and no other.[29] Quotas may also reduce the chances of women being elected through the normal route, as women candidates tend

21 Ballington (ed) (n 13 above) 8.
22 UNDP (n 4 above) 2.
23 Ballington (ed) (note 13 above) 14.
24 In Latin America, many quota provisions provide for a maximum of 60% or a minimum of 40% representation of either sex.
25 See United Nations Office for Social Development and Humanitarian Affairs (Vienna) *Women in politics and decision-making in the late twentieth century* (1992). See also Strategic Objective G of the Beijing Platform for Action, UN Fourth World Conference on Women, 1995.
26 D Dahlerup 'From a small to a large minority: Women in Scandinavian politics' (1988) 11 *Scandinavian Political Studies* 275.
27 S Tamale 'Introducing quotas: discourse and legal reform in Uganda' in Ballington (ed) (n 13 above) 38, 40.
28 Ballington (ed) (n 13 above) 14.
29 Tamale (n 27 above) 101.

to rely on the reservation and may also result in a hierarchy between women, with directly elected members being held in higher regard than those who hold special seats.[30] Despite these concerns, the experience of most countries is that without such special measures women are unable to compete equally with men. It is therefore widely accepted that such measures as the two-thirds gender principle at least offer a starting point for the journey towards gender-balanced representation.

2.2 Historical background of the two-thirds gender principle in Kenya

Kenya has had a long history of struggle for women's empowerment and equitable representation in political and decision making processes. The former Constitution of Kenya contained no provisions for affirmative action to enhance women's representation in elective and appointive offices, the only exception being the provision for nomination of members of Parliament where political parties were urged, but not compelled, to bear in mind the principle of gender equality.[31] However, there have been several efforts, particularly by the women's movement in Kenya, to introduce the concept of affirmative action in public and political life. In 1993, the Task Force for the Review of Laws Relating to Women was established and it made wide-ranging recommendations. On the issue of political representation, the Task Force recommended reform of the electoral system to ensure equality in nominative and elective positions. It also recommended party-based quotas for women with the required percentages to be specified in a proposed Gender Equality Act. However, the recommendations on political representation were not implemented.

In 1997 Phoebe Asiyo, a Member of Parliament, introduced a motion in Parliament calling for legislation requiring at least one-third of nominated candidates of all registered political parties for presidential, national and local authority elections to be women. The motion also sought to introduce a constitutional amendment to provide for two parliamentary constituencies exclusively for women candidates. It also called for the introduction of appropriate legislation to provide funding for all registered political parties and for such public funding to be linked to the party's compliance with the quota for nominated women.[32] Asiyo cited Uganda and Tanzania as examples of countries that had adopted similar measures. However, the motion was defeated. The next attempt was made by another member of Parliament, Beth Mugo, in 2000 who introduced a motion for an Affirmative Action Bill in order to improve and increase representation for marginalised groups, particularly women, in policy making institutions. She reminded Parliamentarians that the Bill was a test

30 Ballington (ed) (n 13 above) 101.
31 Sec 33 of the 1969 Constitution (now repealed).
32 Kabira & Kimani (n 9 above) 843.

on their sincerity for the commitment to women's participation in leadership and international commitments under the Beijing Platform of Action. Pointing to countries in Africa which had implemented affirmative action, such as Uganda, Tanzania, Seychelles, Mozambique, Djibouti, Eritrea, and South Africa, she noted that Kenya stood out as 'a sore thumb' in the region by her refusal to accept affirmative action. In the end, the initiative was referred to the then Constitution of Kenya Review Commission to be dealt with as part of gender issues in the constitutional review.[33]

This decision was considered a triumph by the women's movement in Kenya who formed the Political Women's Caucus which ensured that women were represented at all levels of the negotiations during the constitutional review process in the early 2000s. As a result of their concerted efforts and agitation, the constitutional drafts contained provisions for affirmative action and the two-thirds gender principle. For instance, both the Bomas Draft of 2004 and the Wako Draft of 2005 provided in their respective Chapters on National Principles and Values that the state shall 'implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender'.[34] The two drafts also provided for reserved seats for women and other marginalised groups in the National Assembly and Senate as well as affirmative action for persons with disability.[35] The Naivasha Harmonised Draft which was approved by the National Assembly in April 2010 similarly contained provisions for affirmative action and the two-thirds gender principle.[36] These provisions were eventually included in the Constitution of 2010.[37]

Another significant attempt at entrenching affirmative action and the two-thirds gender principle was the Constitution of Kenya (Amendment) Bill of 2007 which sought a constitutional amendment to create 50 special seats for women in Parliament prior to the general elections of 2007. This was an affirmative action measure intended to put women's representation in Parliament at par with their population size. However, the bill was not passed. A further attempt was the Equal Opportunities Bill of 2007 which sought to give effect to a Presidential directive made in 2006 that 30 per cent of all public service appointments made up of women. However, the bill was not passed, and the directive therefore had no enforcement mechanism.

33 *Parliamentary Hansard,* 12 April 12, 2000, cited in Kabira & Kimani (n 9 above) 844.
34 Bomas Draft, art 12(2)(j); Wako Draft, art 13(1)(j).
35 The drafts provided that the state shall ensure that increasingly 'at least five per cent of the members of elective and appointive bodies shall be persons with disabilities'; Bomas Draft, art 12(2)(k); Wako Draft, art 13(1)(k).
36 Arts 26(5) and 49(5).
37 See discussion in sec 2.3 below.

It is also notable that in the period just before the 2007 general elections, the major political parties promised to ensure affirmative action for women up to and beyond 30 per cent. For example, the Party of National Unity (PNU), one of the two dominant parties, pledged in its manifesto to ensure that women are assured of more than 30 per cent of representation in all public appointments and elective positions.[38] Similarly the Orange Democratic Movement (ODM), the other dominant party, stated in its manifesto that it would ensure a minimum 30 per cent representation of women in parliament, local government, foreign service and other areas of government and decision-making situations.[39] However, neither of the political parties lived up to their pledges upon attaining power in 2008.

2.3 Constitutional provisions on the two-thirds gender principle

After a long and arduous process Kenya finally promulgated a new Constitution on 27 August 2010. The Constitution of 2010 contains a number of important provisions relevant to the issue of gender equality and women's representation. Article 10 sets out the National Values and Principles of Governance which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.[40] Further, the Constitution has a comprehensive Bill of Rights,[41] which imposes a duty on the the state and all its organs, as well as non-state entities, to promote observance of the rights and fundamental freedoms in the Bill of Rights.[42] In this regard, the courts are given a special role in the protection of constitutionally guaranteed rights and freedoms.[43] It should also be noted that under article 2(5) and (6) the general principles of international law and any treaty or convention ratified by Kenya now form part of the law of Kenya. This is significant in view of the international commitments to gender equality that Kenya has made through ratifying such instruments as the ICCPR and CEDAW amongst others. The immediate inference is that international law becomes directly applicable by Kenyan courts, regardless of whether Parliament has enacted specific implementing legislation to incorporate the international laws in question. However, there has been controversy on the precise meaning of the clause, with some commentators arguing that

38 Party of National Unity Manifesto, 2007.
39 Orange Democratic Movement Party of Kenya, Manifesto.
40 Art 10(2)(b).
41 Chap 4 of the Constitution.
42 Art 21(1).
43 See Arts 22 and 23.

'ratification' would entail domestication of treaties through legislation by Parliament.[44]

Of special importance is article 27 which provides for the right of men and women to equal treatment and equal opportunities in the political, economic, social and cultural spheres. There is prohibition of discrimination on a broad range of grounds, which include sex, pregnancy, marital status and dress, amongst others.[45] Further, the Constitution for the first time explicitly recognises the principle of affirmative action. Article 27(6) obliges the state 'to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination'. Under the Constitution, women are recognised as a disadvantaged category of people and hence the provisions relating to affirmative action apply to women.[46] Several affirmative action measures are provided to boost the representation of women in both elective and appointive positions. These include the reservation of special seats for women as well as persons representing special interests of the youth, persons with disabilities and workers.[47] Regarding appointive positions, there are specific provisions stipulating gender balance on specific constitutional bodies. Examples of such bodies include the Parliamentary Service Commission[48] and the Judicial Service Commission.[49] Under article 100, the Constitution directs Parliament to enact legislation for the special representation of certain groups, namely women, persons with disabilities, youth, ethnic and other minorities, and marginalised communities.

In addition to the above specific affirmative action measures, the Constitution also provides for the two-thirds gender principle, which stipulates that not more than two-thirds of members of elective or appointive bodies should be of the same gender. The principle finds specific expression in the following provisions:

44 For further discussion, see EO Asher 'Incorporating transnational norms in the Constitution of Kenya: The place of international law in the legal system of Kenya' (2013) 11 *International Journal of Humanities and Social Science* 266; EBN Abenga 'The place of international law in the hierarchy of valid norms under the 2010 Kenyan Constitution' ssrn.com/abstract=2101565 (accessed 22 May 2015).

45 Other prohibited grounds of discrimination under art 27(4) are: race, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language or birth.

46 See definition of 'marginalised group' in art 260 and of 'vulnerable groups' in art 21(3).

47 Under art 97(1)(b) 47 seats are reserved for women in the National Assembly while art 98(1)(b) reserves 16 seats for women in the Senate. Art 98(1) provides further room for gender balance in the filling of the seats set aside for youth, and for persons with disabilities whereby the two nominees representing each of these interests must consist of one man and one woman respectively. Under Art 90, party lists for nominated members should alternate between male and female candidates ('zebra lists').

48 Art 127 provides for at least four women out of a total of 11 members.

49 Art 171 requires that there should be two members, one man and one woman, representing the advocates' regulatory body and the public respectively.

> Article 27(8): In addition to the affirmative action measures contemplated in article 2(6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the membership of any elective or appointive body shall be of the same gender.
>
> Article 81: The electoral system shall comply with the following principles: … (b) not more than two-thirds of the members of elective public bodies shall be of the same gender.
>
> Article 175: County governments established under this Constitution shall reflect the following principles: … (c) no more than two-thirds of the members of representative bodies in each county shall be of the same gender.
>
> Article 177(1)(b): A county assembly consists of the number of special seat members to ensure that no more than two-thirds of the membership of the assembly are of the same gender.
>
> Article 197(1): Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender.

From article 177(1)(b), it is notable that the Constitution provides a mechanism for county assemblies to ensure compliance with the two-thirds principle through nomination of special seat members. This is given effect through the Elections Act.[50] Under section 36(1)(e) party lists submitted by political parties under article 177(1) of the Constitution are required to include a list of the number of candidates reflecting the number of wards in the County. Section 36(7) then requires the Independent Electoral and Boundaries Commission (IEBC) to draw from that list such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

Unfortunately, no mechanism is provided for implementation of the two-thirds gender principle in the case of the National Assembly and Senate or even appointive positions. Articles 97 and 98 of the Constitution which provide for the composition of the National Assembly and Senate respectively provide for a finite number of members[51] and, unlike article 177, leave no room for nomination of additional members to enable compliance with the rule. Similarly, no guidelines are provided for implementing the principle in the case of appointive offices. The absence of an enabling implementation mechanism has presented significant challenges in terms of realisation of the principle. The court decisions discussed in the next section of the paper are illustrative of these challenges.

50 Act 24 of 2011.
51 350 for the National Assembly and 68 for Senate.

3 Key court decisions on the two-thirds gender principle

By 2012 when the Supreme Court gave its Advisory Opinion, there had emerged two diametrically opposed approaches to the interpretation of the two-thirds gender principle. One approach was in support of progressive realisation of the principle and is exemplified by the High Court decision in *Federation of Women Lawyers Kenya* (*FIDA-K) & 5 Others v Attorney General & Another*[52] (*FIDA* case). The other approach favoured immediate realisation of the principle and was reflected in the High Court decisions in *Milka Adhiambo Otieno & Another v Attorney General & 2 Others*[53] (*Milka Adhiambo* case) and *Centre for Rights Education and Awareness & 8 Others v Attorney General & Another*[54] (*CREAW* case). The *Advisory Opinion of the Supreme Court in the Matter of the Principle of Gender Representation in the National Assembly and the Senate*[55] (*Majority Opinion*) handed down in 2012 categorically ruled in favour of progressive realisation. However, it is notable that the *Dissenting Opinion* of Chief Justice Dr Willy Mutunga supported immediate realisation.

In this section I will analyse the court decisions, in each case highlighting the approach to the two-thirds gender principle in terms of its juridical status and mode of realisation, as well as the rationales advanced for the approaches. The decisions will be presented in chronological order, starting with the High Court rulings and culminating in the Supreme Court's Advisory Opinion.

3.1 *FIDA* case:[56] Interpretation on appointive positions

This was the first High Court petition on the issue of the two-thirds gender principle and it concerned the gender composition of the newly established Supreme Court.[57] On 15 June 2011, the Judicial Service Commission (JSC) recommended to the President five persons as judges of the Supreme Court, one woman and four men. Earlier the JSC had recommended one man and one woman to the offices of Chief Justice and Deputy Chief Justice, respectively. This elicited a petition filed by FIDA-Kenya in the High Court, which alleged that the JSC did not meet the mandatory requirement and threshold set by the Constitution as the percentage composition of females was 28,57 per cent whereas that of males was 71,43 per cent, thereby breaching article 27 of the Constitution which provided

52 Nairobi High Court Petition No 102 of 2011 [2011] eKLR.
53 Kisumu High Court Petition No 44 of 2012 [2012] eKLR.
54 Nairobi High Court Petition Nos 207 & 208 of 2012 [2012] eKLR.
55 Supreme Court Application No 2 of 2012 [2012] eKLR.
56 Petition No 102 of 2011 [2011] eKLR.
57 The petition was heard by Justices Mwera, Warsame and Mwilu.

that not more than two thirds of the members of elective or appointive bodies shall be of the same gender. The Respondents, on the other hand, contended that the JSC had conducted the recruitment process in accordance with the accepted rules and guiding factors within the Constitution, and had taken into account all the criteria for qualification set out in the Constitution and the Judicial Service Act.[58]

On the concept of equal protection, the Court recognised the need for judicial appointments to be based on equal opportunity and non-discrimination and to reflect the diversity of the people of Kenya, but that equal protection did not exclude differentiation in the form of reasonable legislative classification.[59]

> A mere production of inequality is not enough to hold that equal protection has been denied … The law of equality permits many practical difficulties … A classification having some reasonable basis does not offend merely because it is not made with mathematical niceties or because in practice it results in some inequalities.

Regarding affirmative action, the Court stated that it was a concept designed to redress any disadvantage suffered by individuals or groups because of past discrimination, but emphasised that under articles 27(8), any such measures should adequately provide for any benefits to be on the basis of genuine need and that, affirmative action was not meant to secure special people for any group in society. Noting that historically various groups in Kenya had suffered historical injustices, the Court saw no reason why a woman judge from a historically advantaged region should get an advantage over a male judge from a historically marginalised region.

The Court's view was that article 27 did not give rise to a substantive right but operated only to create positive obligations upon the state to develop legislation, programmes and policies to deal with historical and other injustices or inequalities. Article 27(8) was seen to be derivative of the language used in international human rights instruments such as CEDAW, ICCPR and ICESR which provided for legislative and policy measures. Accordingly, such rights are progressive and aspirational in character and can only be attained over a period of time. In arriving at its finding on the progressive character of article 27 rights, the Court relied on *Government of the Republic of South Africa & Others v Grootboom & Others*[60] where the South African Constitutional Court held that the state had to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right to housing. In my view, this case is distinguishable as it dealt explicitly with the right to housing which is a socio-economic right clearly to be realised

58 Act 1 of 2011.
59 Judicial Service Act, 18.
60 2001 (1) SA 46 (CC).

progressively, both under the terms of section 26 of the South African Constitution, article 43 of the Kenyan Constitution as well as the ICESR.

The Court's ruling was that article 27 did not address or impose a duty upon the JSC in the performance of its functions and could only be sustained against the government with specific complaints and after it had failed to take legislative and other measures or after inadequate mechanisms within the time frame of five years. The petition was therefore held to be premature as the state had not failed to formulate legislation, policies and programmes within that time frame and was accordingly dismissed.

Following the *FIDA* decision, the President proceeded to appoint the five men and two women to the Supreme Court. This remains the gender composition of the Supreme Court to date.[61] However, while the High Court's decision in this case did not favour the petitioners, the JSC seems to have subsequently become more sensitive to gender balance.[62] This could perhaps be attributed to the JSC's awareness of the possibility of a legal challenge should they not adhere to constitutional requirements.

3.2 *Milka Adhiambo* case:[63] Interpretation on non-parliamentary elective positions

This was the second case in 2011 on the gender representation principle filed in the High Court.[64] The petitioners sought to have the elections of the Kenya Sugar Board, a statutory body, declared null and void on the ground that they contravened article 27 of the Constitution as there were no measures taken to include affirmative action programmes and policies designed to ensure that not more than two thirds of the elective public body were of the same gender. The respondents' argument was that article 27(8) was not mandatory but constituted directive principles of state policy which did not create a corresponding right, and were of a progressive and incremental nature. They further argued that the petition was prematurely brought before the Court as the time frame for achieving the provisions of article 27(8) through legislation was five years. In addition, there was still a window of opportunity to address any gender imbalance through nominations to the Board.

61 The two women were Justices Njoki Ndungu and Nancy Baraza. After Nancy Baraza's resignation as Deputy Chief Justice in October 2012, she was replaced by Justice Kalpana Rawal.

62 For instance, in their nominations to the High Court in August 2011, there were almost an equal number of women and men (13 women and 15 men). The current composition of the Court of Appeal is eight women and 18 men, and in the High Court it is 26 women and 32 men. Judiciary website http://www.judiciary.go.ke (accessed 13 May 2014).

63 Kisumu High Court Petition No 44 of 2011.

64 The case was presided over by Justices Ali-Aroni, Chitembwe and Chemitei.

The Court emphasised that its duty was to interpret the Constitution in such a manner as to give life to the letter and spirit of the Constitution as far as possible guided by article 259(1) of the Constitution which called for a broad and purposive interpretation.[65] From a purposive interpretation of articles 21(3), 27(6) and 27(8) it was clear that the state and public officers had a duty to deliberately bring into fruition the spirit and the letter of those constitutional provisions by taking such steps as to ensure that the aspirations of women and other vulnerable groups were well taken care of, and in particular that the gender principle rule was complied with. Regarding article 81(b) the Court disagreed with the respondents' argument that the article dealt only with legislative elections and categorically stated that it articulates broad principles governing all electoral systems, including those of the Kenya Sugar Board.

While agreeing that the time frame for legislation in support of article 27(8) was five years from the date of promulgation, the Court noted that the article stipulates other measures such as affirmative action and direct state policy, even prior to the enactment of legislation. The respondents therefore had a duty to undertake such legislative, affirmative action and policy measures to bring into force the letter and spirit of article 27(8). The implication was that the provisions of article 27(8) and 81(b) are for immediate implementation. However, the Court declined to hold the Board's composition unconstitutional as the Board was yet to be fully constituted. As such, the compliance or non-compliance with article 27(8) would only become obvious after the full Board of 13 members had been put in place. The Court therefore held that the petition was premature but emphasised that the Board, when finally constituted, had to adhere to the two thirds gender representation rule.

The decision in *Milka Adhiambo* is significant in that it applied the two-thirds gender principle in article 81(b) to other elective bodies besides the National Assembly, Senate and County Assemblies. It is, however, arguable that article 81(b) is limited to legislative elections and that therefore the Court went beyond the purview of the article. The decision is also important as it made clear that the state can take non-legislative measures to achieve the gender principle and need not wait until it has passed legislation. In departing from the judgment in the *FIDA* case the decision moved a step further towards ensuring gender equity in the composition of public bodies.

It is notable that the current composition of the Sugar Board does comply with the one-third gender representation rule. The Board currently has a total of twelve people, of whom four are women. Amongst the

65 Art 259(1) of the Constitution 2010 provides that the Constitution is to be interpreted in a manner that: '(a) Promotes its purposes, values and principles; (b) Advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights; (c) Permits the development of the law; and (d) Contributes to good governance.'

women are the Chief Executive Officer and three other women nominees who represent the Ministry of Agriculture and state corporations.[66] It may be surmised that the nominations of women were done as a direct response to the Court's decision.

3.3 *CREAW* case:[67] Interpretation on appointive positions

This was the third case on the gender representation principle filed in the High Court.[68] In May 2012 the President issued gazette notices by which he appointed or deployed 47 County Commissioners,[69] of whom 37 were male and ten were female. The petitioners questioned the constitutionality of the President's act, arguing that as the appointments resulted in 21,3 per cent of the appointees being female and 78,7 per cent of the appointees being male, this did not meet the principles of gender equity set out in article 27(8) and was also in violation of the principles of non-discrimination and protection of the marginalised set out under the National Values and Principles in article 10. The petitioners therefore sought to have the President's Act declared unconstitutional, null and void.

The respondents contended that the deployment was of senior officers within the Provincial Administration and that it was constitutional, and that the criteria used to identify suitable officers for deployment included gender as well as performance, seniority, regional balance. Further, that in view of the unique and stringent requirements for deployment, there were not enough women who qualified for the positions. They also argued that the principle set out in article 27(8) was within the framework of progressive realisation.

The Court noted that the petition came at a critical time when the implementation of the Constitution was at a nascent stage, and that the manner in which fidelity to the Constitution was upheld and protected was critical to the long-term establishment and survival of constitutionalism and the rule of law in Kenya. The Court then outlined the constitutional principles relating to the exercise of powers by the President. Under article 129, executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution. Article 131(2) provides that the President shall, amongst others respect, uphold and safeguard the Constitution and ensure the protection of human rights and fundamental

66 Kenya Sugar Board website http://www.kenyasugar.co.ke (accessed 13 May 2014).
67 Petition Nos 207 & 208 of 2012 [2012] eKLR.
68 The petition was heard and decided by Justice Mumbi Ngugi.
69 County Commissioners were to replace District Commissioners who were part of the provincial administration in the former regime. Art 17 of the Constitution of 2010 provides for the restructuring of the system of provincial administration within a period of five years to accord with and respect the system of devolved government established under the Constitution.

freedoms and the rule of law.[70] The Court emphasised that the President's actions must be undergirded by the principles of the Constitution and that he had to follow not only the letter but also the spirit of the Constitution. The Court noted that article 10(b) requires observance of the national values and principles of 'human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised' which are binding on all state organs, state officers, public officers and all persons in their application, interpretation or implementation of the Constitution, laws or public policy decisions. Article 27(8) more specifically requires that 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 Court rejected the explanation given by the respondents that there were not enough women qualified to be appointed County Commissioners as, by the respondents' own concession, there were at least 26 women who had the necessary paramilitary and leadership training for the position. In the Court's view, the primary obligation imposed by article 27(8) on the state is to do its utmost to meet the Constitutional requirement. The Court was not satisfied that any effort had been made to meet the requirements of the Constitution in ensuring gender equity, bearing in mind the historical disadvantage to which women have been subject.

On the respondents' argument that article 27(8) was subject to progressive realisation, the Court stated that article 21 was very clear on what rights are subject to the test of progressive realisation, namely *the social and economic rights to health care, education, water, housing, and sanitation provided under article 43.* Citing the South African case of *Soobramoney v Minister of Health (Kwa Zulu Natal),*[71] the Court noted that such rights require the allocation of resources and, as such, the state's obligation is made subject to the availability of resources. According to the Court, the only other rights subject to progressive realisation are the rights of persons with disability under article 54(2) which explicitly provides that 'the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities'. Had it been the intention to make the two-thirds gender principle subject to progressive realisation, nothing would have been easier than for the Constitution to explicitly provide as much. The Court stated that in matters of appointment or election to office in order to achieve gender equality and equity, there was no qualification of the state's obligation as there was no outlay of resources required which would limit or inhibit the realisation of this right.

70 The Court also cited art 2 which declares the supremacy of the Constitution, art 3 which obliges all persons to respect, uphold and defend the Constitution and art 10 which states the National Values and Principles of Governance.

71 1998 (1) SA 765 (CC).

The Court expressly differed with the decision in the *FIDA* case which ruled that the principle of gender equity was subject to progressive realisation. Instead, it identified with the decision in *Milka Adhiambo* which supported immediate realisation on the reasoning that the state had other measures apart from legislation to ensure that the requirements of article 27(8) were complied with. However, the Court took a step further than *Milka Adhiambo* by holding that the phrase 'progressive realisation' was applicable only to socio-economic rights, as clearly stipulated in article 21 of the Kenya Constitution.

The President's appointments or deployments were held to have violated articles 10 and 27 of the Constitution and therefore declared unconstitutional, null and void. The significance of this decision lies in its boldness and clarity, particularly in unequivocally declaring that only socio-economic rights are subject to progressive realisation. Following on the heels of the *Milka Adhiambo*, the decision represented a further victory for adherents of immediate implementation of the gender principle.

However, the impact of the decision was short-lived as it was challenged a few days later in the Court of Appeal.[72] The gist of the appeal was that the High Court judgment was based on a fundamental misconception of transitional provisions of the Constitution of 2010, which upholds the executive authority and powers of the President in terms of the former Constitution. The Court of Appeal noted that the appointments/deployments by the President were made during a transitional period when parts of the former Constitution[73] were still in force. In particular, articles 129 to 155 of Chapter Nine of the Constitution of 2010 on the Executive were suspended by virtue of section 2(1)(c) of the Sixth Schedule until the first general elections under the Constitution of 2010. This meant that the executive powers and authority of the President under sections 23 and 24 of the former Constitution which clearly gave him authority to establish offices in the Republic of Kenya and to appoint officers thereto were retained. The Court of Appeal ruled that the High Court had clearly overlooked the transitional provisions of section 2(1)(c) of the Sixth Schedule and had misapprehended the situation by ruling the President's acts unconstitutional as he clearly had those powers under the former Constitution. Further, that these were not new appointments and did not require the approval of the National Assembly or consultation with the Prime Minister. Further, that in view of the enactment and coming into force of the National Government Coordination Act, 2013[74] any outstanding issues regarding the appointment and deployment of commissioners should be resolved within the framework of that statute. Accordingly, the Court of Appeal upheld the presidential appointments.

72 *Minister for Internal Security and Provincial Administration v Centre for Rights Education & Awareness (CREAW) & 8 Others* [2013] eKLR.
73 Constitution of 1969 (now repealed).
74 Act 1 of 2013.

On the interpretation of the rule of gender representation in public offices, the Court of Appeal approved of the High Court judge's reasoning as progressive and without fault, and indeed ahead of her time, but only if the presidential appointments were done purely pursuant to the Constitution of 2010, which was not the case. In my view, the Court of Appeal was implicitly in agreement (albeit *per incuriam*) that the realisation of the two-thirds gender principle should be immediate. However, the Court of Appeal's reasoning may be criticised on the argument that the President was bound by the whole Bill of Rights even during the transitional period and therefore should have adhered to the two-thirds gender principle in making any appointments or deployments.

3.4 *Advisory Opinion*:[75] Interpretation on legislative elective positions

3.4.1 Background to the Advisory Opinion

As the General Elections of 4 March 2013 drew near, it became apparent that compliance with the two-thirds gender principle was going to be problematic. Under article 97 the number of members of the National Assembly was fixed at 350 while under article 98 the number of members of Senate was fixed at 68. This meant that in order to adhere to the two-thirds gender principle at least 117 women and 23 women had to be elected to the National Assembly and Senate respectively. However, as there was no way to guarantee that the requisite number of women would be elected, the question was how to ensure compliance with the constitutional threshold. Unfortunately, the Constitution had failed to provide a formula similar to the one for county assemblies under article 177 while the relevant statutes, namely the Elections Act and Political Parties Act, provided no guidance in the matter. If the elections failed to satisfy the two-thirds rule, it seemed the only way to comply would be through nominations, which would result in higher numbers in Parliament than those expressly stipulated in the Constitution. This would be unlawful and would result in a higher burden for the tax-payer. Yet, if more than two-thirds of the MPs in the next Parliament were men, then there was a danger of Parliament being declared unconstitutional for not being properly constituted.

The problem was highlighted by various constitutional commissions, including the Commission on the Implementation of the Constitution (CIC), the Commission on Revenue Allocation (CRC) and the National Gender and Equality Commission (NGEC), and the issue was regularly

75 Advisory Opinion No 2 of 2012 [2012] eKLR.

reported in the popular press.[76] There was thus a real fear in government and among the public of a looming constitutional crisis. Several solutions were proposed to deal with the issue. The first proposal was to amend the Constitution in order to remove the maximum number of members of the National Assembly and Senate in order to create room for whatever number of nominations was required. Thus the Constitution of Kenya (Amendment) Bill sought to amend articles 97 and 98 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'. The proposed amendment was supported by CIC which argued that the move might save the country from a repeat election in case the gender principle was not met in the next general elections: 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.'

However, those opposed to the move argued that Parliament should devise a workable mechanism instead of rushing to amend the Constitution. Another objection to the amendment was that this would result in a bloated Parliament with too many un-elected members. In addition, the CRC pointed to the heavy tax burden that would be levied on Kenyans to support such a Parliament. Eventually, the Bill failed to garner enough support in Parliament and had to be withdrawn.

The second proposal was for the increase of women representatives per county instead of two, bringing the total to 94. 'This is just to ensure that majority of the women MPs in the next Parliament are elected and not nominated as proposed in the Constitution of Kenya (Amendment) Bill,' said the then Minister for Justice and Constitutional Affairs. Some MPs suggested that the 80 new constituencies created by the Constitution be abolished to create room for nominations of women. Yet another suggestion was to remove the two-thirds gender rule through a constitutional amendment. This was very unpopular with women leaders and lobby groups as well as the National Gender and Equality Commission.

After discussions by the relevant agencies, in a bid to avert the crisis, it was ultimately decided that the Attorney General would move to the Supreme Court to request an Advisory Opinion on how the two-thirds principle should be implemented. They expressed hope that implementation could be done in a progressive manner by staggering the number of women required in Parliament over a period of time.

76 'Kenyans to pay Shs 4 billion as gender rule crisis looms' *Daily Nation* 23 September 2012; 'Gender rule still defies Kenya's top law brains' *Daily Nation* 25 September 2012.

3.4.2 Majority Opinion

The Attorney General's Reference to the Supreme Court for an advisory opinion[77] consisted of two questions, the relevant one for our purposes being:

> Whether article 81 (b) ... as read with article 27(4), 27(6), 27(8), 96, 97, 98, 177(1)(b) ... of the Constitution of the Republic of Kenya requires progressive realisation of the enforcement of the one-third gender rule or requires the same to be implemented during the March 4th 2013 General Elections.[78]

The discussion in this section focuses on the Majority Opinion (four out of five) of the Supreme Court.[79] The Dissenting Opinion of Chief Justice Mutunga will be discussed separately in 3.5 below.

The Attorney-General favoured an interpretation that supported progressive realisation of the two-thirds principle in elective representation for the National Assembly and Senate. On the other hand, most of the parties and *amici curiae* urged for immediate realisation of the principle. In particular, Katiba Institute, an *amicus curiae*, argued that the principle of non-discrimination running through the Bill of Rights demands *equal* sharing between men and women in the elective assemblies. The Court therefore ought to start from the foundation that the one-third reserved gender representation is only the minimum, and that the functioning of progressivity has to begin from that threshold. The CAJ through its chief officer, Otiende Amollo,[80] took a lone stand. Though he agreed that in principle the gender-equity rule should be given immediate effect, he pointed out that imprecision in the language of the Constitution occurred at the last stages of negotiating the provisions and therefore proposed that Parliament should, within certain phased-out time frames, take action to give meaning to the gender-equity principle. In support, he invoked article 100 of the Constitution which provides that: 'Parliament shall enact legislation to promote the representation in Parliament of (a) women;

77 The Advisory Opinion was sought under art 163(3) of the Constitution which gives the Supreme Court the jurisdiction to give an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government.

78 The second question, which is outside the scope of this paper, was whether an unsuccessful candidate in the first round of Presidential election under art 136 of the Constitution or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under art 140 or any other provision of the Constitution. If this is a quote, where does it begin?The Court ruled in the affirmative.

79 The majority opinion was held by four judges out of a total of five. These were Justice (Prof) JB Ojwang, Justice Philip Tunoi, Lady Justice Njoki Ndungu and Justice Smokin Wanjala.

80 Otiende Amollo was a member of the Committee of Experts that was charged with harmonising the various drafts of the proposed Constitution and making appropriate recommendations to Parliament.

(b) persons with disabilities; (c) youth; (d) ethnic and other minorities; and (e) marginalised communities.'

The Supreme Court recognised the historical background giving rise to the adoption of articles 27(8) and 81(b) of the Constitution, namely the discriminatory practices, or gender-indifferent laws, policies and regulations that led to under-representation of women in elective or other public bodies. This was a manifestation of historically unequal power relations between men and women in Kenyan society, aptly referred to by one of the counsel as 'the socialisation of patriarchy'. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of National Values and Principles of Governance.

The Court noted that a consideration of different Constitutions shows that they are often written in different styles and modes of expression:[81]

> Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions.

The Court thus made a distinction between a norm and a principle and was inclined in favour of an interpretation that contributed to the development of both the prescribed norm and the declared principle. In the Court's opinion,

> a norm ... should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.[82]

In my view, the distinction between a norm and a principle is not really that clear-cut. Article 81, which the Court terms a broad principle, contains provisions which could easily be said to be norms according to the Court's own understanding. For example, under article 81(a) the electoral system is required to comply with the principle of freedom of citizens to exercise their political rights under article 38, such as the right to form and participate in political parties and the rights to vote and to stand for public office. Similarly, article 81(d) requires compliance with the principle of

81 Para 54.
82 As above.

universal suffrage based on the aspiration for fair representation and equality of vote. These principles are as a matter of practice clearly exercised as concrete rights in Kenya.

The Court observed that the expression 'progressive realisation' is neither a stand-alone nor technical phrase but connotes a gradual or phased-out attainment of an identified goal. The term, as used in the Constitution drew inspiration from and adopts the language of the international human rights instruments, such as CEDAW, ICCPR, CESR and is a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the state. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment and may involve legislative, policy or programme initiatives including affirmative action.

The Court made a distinction between 'hard' and 'soft' gender quotas stipulated in the Constitution. For instance, article 171(2) which specified gender-equity provisions for the JSC as:

> one High Court judge and one magistrate, one a woman and one a man; two advocates, one a woman and one a man ...; one woman and one man to represent the public interest ...,

was an instance of a 'hard' quota where a gender rule is immediately realisable. According to the Court, such a normative prescription is readily enforceable as the required numbers of male and female members are specified clearly and the mechanism of bringing them to office clearly defined. By contrast, 'soft' gender quotas, as represented in article 81(b) with regard to the National Assembly and Senate, are for progressive realisation.

In response to the objection that the notion of progressivity has clear application only to social and economic rights under article 43 and to persons with disabilities under article 54, the Court stated that it was not the classification of a right as economic, social, cultural, civil or political but rather the inherent nature of the right that should determine its mode of realisation. In this regard, article 27(8) calls for 'legislative and other measures' to be taken by the state, for the realisation of the gender-equity rule. As such 'other measures' are generic, this underlined the draftsperson's perception that the categories of actions by the state, in the cause of gender-equity, were not closed. According to the Court, whether a right is to be realised progressively or immediately is not a self-evident question but is dependent on a number of factors, such as: the language used in the normative safeguard, or in the expression of principle; the mechanisms provided for attainment of gender-equity; the nature of the right in question; mode of constitution of the public body in question (for example, appointive or elective; if elective, the mode and control process

for the election); the identity and character of the players who introduce the candidates for appointment or election; and the manner of presenting candidature for election or nomination.

On the interpretation on the word 'shall' used in articles 27(8) and 81(b) the Court stated that there are two main usages of the word. One usage is where the word 'shall' translates to immediate command only where the task in question is a 'cut-and-dried' one, and where the subject is inherently disposable by action emanating from a single agency. The other usage of the word implies a *broad obligation* which is more institutionally spread-out, and which calls for a chain of actions involving a plurality of agencies. When used in the latter sense, it calls not for immediate action, but for the faithful and responsible discharge of a public obligation and incorporates the element of management discretion on the part of the responsible agencies. The word 'shall', in this latter dimension, has gained currency in current human rights treaties, such as CEDAW, ICCPR, CESCR, and by analogy, the word 'shall' serves to lay emphasis on the obligation to take appropriate action, in the course of the progressive realisation of a right conferred by the Constitution.

The Court made a distinction between a specific, accrued right on the one hand, and a broad, protective principle on the other hand. It construed article 81 to be a statement of general principles which is not confined to the National Assembly, the Senate, or County Assemblies but contemplates all public bodies which hold elections for their membership. Article 81(b) was a statement of aspiration, namely that wherever and whenever elections are held, the Kenyan people expect to see mixed gender.[83] According to the Court, article 81(b), which stands generally as a principle, would only transform into a specific, enforceable right after it is supported by a concrete normative provision, an example being article 177(1)(b), in relation to county assemblies, which provides that: 'A county assembly consists of the number of special seat members to ensure that no more than two-thirds of the membership of the assembly are of the same gender.'[84] By contrast, when article 81(b) was viewed in the context of articles 97 and 98, it has not been transformed into a full right, as regards the composition of the National Assembly and Senate, capable of direct enforcement. Thus, in that respect, article 81(b) is not capable of immediate realisation, without certain measures being taken by the state. For articles 97 and 98 to support the transformation of article 81(b) from principle to right, they would have to be amended to incorporate the element of a 'hard gender quota'. In the alternative, a legislative measure as contemplated in article 27(8) would have to be introduced to ensure compliance with the gender-equity rule, always taking into account the terms of articles 97 and 98 regarding numbers in the membership of the

83 Para 68.
84 Para 70.

National Assembly and Senate. In the Court's view, this did not fall within the competence of the judicial branch, but was for action lying squarely within the domains of the legislative and executive branches of government, supported by other proper organs such as the relevant constitutional commissions.

The majority of the Supreme Court bench held in favour of progressive realisation of the principle, to the effect that the two-thirds gender principle did not have to be implemented during the general elections of 4 March 2013. As article 81(b) of the Constitution standing as a general principle cannot replace the specific provisions of articles 97 and 98, not having ripened into a specific, enforceable right as far as the composition of the National Assembly and Senate are concerned, it followed that it could not be enforced immediately. If the measures contemplated to ensure its crystallisation into an enforceable right were not taken before the elections of 4 March 2013, then article 81(b) would not be applicable to those elections. Accordingly, article 81(b) was amenable only to progressive realisation, even though it was immediately applicable in the case of County Assemblies under article 177.

On the question of the time frame within which legislative measures for giving effect to the principle under article 81(b) in relation to the National Assembly and Senate must be taken, the Court's opinion was that, bearing in mind the terms of article 100 (on promotion of representation of marginalised groups) and of the Fifth Schedule (prescribing time-frames for the enactment of required legislation), such measures should be taken by 27 August 2015 (that is, by the end of the 5 year time frame provided in the Fifth Schedule). This would form the basis for an action in the High Court to issue appropriate orders and directions, in accordance with the terms of article 261(6), (7), (8) and (9) under the 'Transitional and Consequential Provisions' of the Constitution.[85]

3.5 Dissenting Opinion in the Matter of the Gender Representation Rule (Dissenting Opinion)

The Chief Justice began by emphasising that it is in interpreting the Constitution that a robust, patriotic, progressive and indigenous Kenyan jurisprudence would be nurtured, grown to maturity, exported and become a beacon to other progressive jurisprudence worldwide, as envisaged by

85 These provisions cover a situation where a petition has been made to the High Court over Parliament's failure to enact legislation as required by the Fifth Schedule of the Constitution. The High Court may make a declaratory order on the matter and direct Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, and to report progress to the Chief Justice. If Parliament fails to enact the legislation as ordered, the President dissolves Parliament on the advice of the Chief Justice. The new Parliament is then required to enact the legislation in accordance with the timelines specified in the Fifth Schedule.

Sections 3 of the Supreme Court Act which calls for development by the Supreme Court of 'a rich jurisprudence that respects Kenya's history and traditions, and facilitates its social, economic and political growth'. The obligation of the Supreme Court is to cultivate progressive indigenous jurisprudence grown out of Kenya's own needs, without unthinking deference to that of our other jurisdictions and courts, however distinguished.[86]

While acknowledging the variety of approaches to constitutional interpretation, he pointed out that the Kenya Constitution had its own prescriptions for its interpretation to be found in various articles of the Constitution (notably Articles 10, 259 and 20) from which the Supreme Court, as the exemplary guardian of the Constitution, finds its approach to interpretation of the Constitution. 'The approach is to be purposive, promoting the dreams and aspirations of the Kenya, yet not in such a manner as to stray from the letter of the Constitution.'[87] Thus in interpreting the Constitution and developing jurisprudence, the Judge explicitly espoused a purposive interpretation of the Constitution as guided by the Constitution itself, so as to breathe life into all its provisions, as espoused by the Supreme Court of Canada in *R v Big Drug Mart*:[88]

> The proper approach to the definition of the rights and freedoms guaranteed by the [Canadian] Charter was a purposive one. The meaning of a right or freedom ... was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect … the Charter was not made enacted in a vacuum, and must therefore … be placed in its proper, linguistic, philosophical and historical contexts.[89]

On the controversy surrounding the meaning of the word 'shall' in article 81(b), the Judge agreed with the Attorney General that the word 'shall' used in that article is not instructive on whether implementation of the obligation is immediate or progressive as the word had been interpreted on a case-by-case basis in Kenyan courts and other jurisdictions. He also noted that the word was not interpreted in article 260.[90] The Chief Justice stated that a broad approach to constitutional interpretation made it abundantly clear that it was unwise to tie in the interpretation of article 81(b) to a single word and that such a holistic approach would be helpful in determining whether immediate or progressive realisation of the right to the gender quota was envisioned.

86 Para 8.7.
87 Para 8.6.
88 [1985] 1 SCR 295.
89 Para 116. Also cited in the same vein were *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) and *S v Zuma* 1995 (2) SA 642 (CC) where the Privy Council and the Constitutional Court of South Africa respectively adopted a purposive approach to constitutional interpretation.
90 Art 260 is the interpretative art that gives definitions of words or phrases used in the Constitution.

The judge felt that the apparent ambiguities in meaning of articles 81(b), 27(4) and 27(8) only arose if a narrow interpretation of the Constitution was adopted. It was expected that the Constitution, being a negotiated document, would definitely present 'inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon,' reflective of contested terrains and vested interests. However, the broad approach decreed by the Constitution revealed that the interpretative framework of the Constitution was sufficient to unravel any problems.

The judge noted that the favourite and popular legal argument of Counsel was that if the framers of the Constitution intended implementation of the two-thirds gender rule to be progressive, it would have been easy for them to so provide. However, he felt that this argument was not conclusive but needed serious scrutiny and interrogation. Moreover, the High Court authorities in favour of such an interpretation were not binding on the Supreme Court.[91] His view was that in order to resolve the 'conundrum', one needed to look at the arguments around non-discrimination and national values as decreed by the Constitution.

The Chief Justice noted that from article 27 and from CEDAW, it was clear that disenfranchisement of Kenyan women in the political arena was a form of discrimination. These provisions call for immediate removal of this discrimination through the empowerment of women's representation in political office. Citing figures showing the paltry representation of women in the legislature since independence, he urged that the constitutional provisions must be read in light of the historical context of Kenyan women's struggles for equity and equality in the face of systemic discrimination. Accordingly, the argument that the two-thirds gender rule required progressive realisation flew into the face of the history of struggle by Kenyan women. He agreed with the argument by Katiba Institute, one of the petitioners, that the one-third is simply a minimum and that progressive realisation must be confined to developments that moved the country towards a 50/50 threshold in gender equity and equality.

The judge pointed to article 177(1)(b) which provides a formula for gender equality in county government) as clear proof of the submission for immediate realisation of the two-thirds gender principle. This, according to him, put to rest the argument of progressive realisation of the principle. He saw no reason that a Constitution that decreed non-discrimination would discriminate against women running for Parliament and the Senate. There was no constitutional basis for discrimination amongst women themselves as the consequence of the progressive realisation of the two-thirds gender principle would entail. 'A Constitution does not subvert itself.' A decision that women vying for county representation have rights under the Constitution while their counterparts vying for Parliament and

91 These were the decisions in *Milka Adhiambo* and *CREAW.*

the Senate are discriminated against would result in that unconstitutional position. Hence, article 177(1)(b) read together with articles 27(4) and (8) and 81(b) made it abundantly clear that the two-thirds gender principle had to be immediately realised.

Further, the immediate implementation of the two-thirds gender principle is reinforced by values of patriotism, equity, social justice, human rights, inclusiveness, equality and protection of the marginalised. Such values would be subverted by an interpretation of the provisions that accepts progressive realisation of this principle. This was reinforced by the fact that the state itself had been implementing the principle as a matter of clear policy, and that stakeholder convening and discussions on the principle had always been about implementation and not interpretation.

According to Justice Mutunga, the Constitution's view to equality is not the traditional view of formal equality before the law. Rather, equality is substantive and involves undertaking certain measures, including affirmative action, to reverse negative positions that have been taken by society. Citing the analogy of struggles for the right to universal suffrage, he was emphatic that where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive. The requirement for compliance fell on the key players in the electoral system, namely the state, the IEBC and political parties.

In the final analysis, the Chief Justice's answer to the Attorney General's first question was that the two-thirds gender principle be implemented during the General Election scheduled for 4 March 2013. He expressed confidence in the patriotism of the then current Parliament, which was fully aware of the constitutional consequences of refusing to legislate and categorically declared that in the event that (the then current) Parliament failed to do so, then any of the elected houses that violated the principle would be unconstitutional and the election of that house null and void in accordance with article 3(b) of the Constitution. In view of the implications of the fact that the five-year period would expire in the midterm of the incoming Parliament, his opinion was that the best option for avoiding unconstitutionality would be to legislate 'here and now'.

3.6 Implications of the Advisory Opinion

The Supreme Court's Advisory Opinion put to rest the controversy surrounding interpretation of the two-thirds gender principle, by ruling that the principle is to be realised progressively and not immediately. There were diverse responses to the Advisory Opinion. Some lauded it for averting a constitutional crisis and for bringing clarity to the issue of implementation of the principle. However others, especially in the women's movement, expressed disappointment with the decision, and felt that it merely postponed the problem rather than resolved it and were

apprehensive that the decision could be used as an excuse for non-action. One commentator criticised the decision for failing to ensure its directive was followed through by, for example, ordering that progress reports be submitted to the Court on the matter.[92]

In my view, the Supreme Court appears to have adopted a conservative 'half-way house' approach, which avoided the possibility of Parliament being declared unconstitutional for not being properly composed while still giving credence to the two-thirds gender principle. In view of the short period before the general elections, the possibility of agreement by all stakeholders on a common course of action seemed remote. Further, a constitutional amendment would have been an arduous undertaking.[93] Taking all these factors into consideration, the ruling by the Supreme Court was probably the most plausible in the circumstances. However, the postponement of action until August 2015 may have served to take away the sense of urgency in the matter and lulled the legislature into lethargy.

The Advisory Opinion had a major immediate impact on the gender composition of the current National Assembly and Senate. With the ruling that the two-thirds gender principle need not be implemented in the general elections of 4 March 2013, women candidates faced the ballot without the protection of constitutional guarantees. Out of 350 seats in the National Assembly, only 68 are currently held by women, translating to 19,47 per cent. While this is a higher percentage than the 16 per cent of the previous Parliament, it is notable that only 16 were elected to single member constituencies, while 5 were nominated to represent special interests and 47 elected to the seats reserved for women county representatives. This means that only 6 per cent of women were elected directly to single member constituencies. No single woman Senator was elected, while 16 women were nominated to the reserved seats for women and two women were nominated to represent the interests of youth and persons with disabilities. Similarly, no woman was elected as Governor. Only six women were elected Deputy-Governor out of 47, translating to 12,7 per cent women. These numbers fall way below the one-third envisioned by the Constitution.

This stands in contrast to the county assemblies where women had the benefit of the operation of the two-thirds gender principle. While only 82 women were directly elected out of a total of 1450 county assembly representatives, 680 women were nominated in accordance with article 177(1)(b). Women thus make up 34 per cent of the total in compliance with

92 'Groups keep issue of two-thirds gender rule on the front burner' *The Standard* 19 October 2014.

93 Under arts 256 and 257, a constitutional amendment of arts 97 and 98 require either a two-thirds majority of both the National Assembly and Senate or a popular initiative supported by at least one million signatures.

the two-thirds gender principle.[94] However, the enforcement of the constitutional provisions in the county assemblies was not without problems. Upon conclusion of the general elections, it transpired that the IEBC had accepted party lists for purposes of nomination to special seats in the National Assembly, Senate and county assemblies which were not compliant with the requirements of article 90 of the Constitution, which requires the lists to alternate between male and female candidates in the priority in which they are listed. This prompted a court petition by NGEC challenging IEBC's actions.[95] Even though the High Court ordered IEBC to publish the correct lists, the gazettement of the nominees was only carried out in July 2013, several months after the elected members of county assemblies had started sitting. By this time, speakers of these assemblies had been nominated and committees established which served to severely hamper women's participation in the county assemblies.

The upshot of the Supreme Court's decision is that differential treatment to members of the National Assembly and Senate on the one hand, and to members of county assemblies on the other hand, is permissible. This means that women who vie for representation in county assemblies are assured of gender equity while those who contest for National Assembly seats are not. Thus the former enjoy full protection of constitutional guarantees while the latter do not. This appears to be an untenable result, and one that was probably not envisaged by drafters of the Constitution.[96] The Supreme Court did not address itself to the possible rationale for this differential, apart from noting the CAJ's comment on the imprecision of language. One commentator blames the discrepancy on lack of comprehensive scenario-building, which would involve pre-testing the feasibility of a constitutional provision prior to promulgation.[97]

Regarding appointive positions, it appears that there is a significant level of commitment to comply with at least the minimum one-third threshold. This is evident from the composition of the current Executive as well as constitutional commissions.[98] Recent appointments to the Court of Appeal and the High Court also reflect a conscious effort at gender balance. It is arguable that dealing with appointive positions is easier as it

94 FIDA-Kenya 'Gender Audit of the 2013 Elections' (2013).

95 *National Gender and Equality Commission v Independent Electoral and Boundaries Commission* Petition No 147 of 2013[2013] eKLR.

96 DJ Ochiel 'Gender rights and wrongs: Critique of the Supreme Court Decision on the One Third Gender Principle' 11 November 2013 http://www.kenyalaw.org (accessed 13 May 2014).

97 L Musumba 'The case for comprehensive scenario building as a means for pre-testing the articles of a proposed constitution to ensure its viability post promulgation: A case study of Kenya' Paper presented at the Constitution-Making in Africa Conference , University of the Western Cape on 6 September 2013.

98 For instance, six out of 18 Cabinet Secretaries are women, several of who hold key portfolios such as defence, planning and devolution and foreign affairs. However, women make up only 23% of Principal Secretaries.

requires only the decision of the appointing authority, whereas elective positions are subject to the electorate whose wishes cannot be determined in advance.

An important implication of the Advisory Opinion is that any action for breach of the gender principle can only be done after expiry of the five year time frame, that is, after 27 August 2015. Failure to pass legislation within that time frame would be the trigger for court action. It should be noted that Parliament has its hands full with many bills that are required to be passed before constitutional deadline of 27 August 2015 under Schedule Five. Legislation on the two-thirds gender principle is only one of the many items to be considered. The Supreme Court did not address the issue of the constitutionality of the National Assembly and Senate should the requisite legislative measures not be taken by the constitutional deadline and left it to individual litigants to take up the issue through court action.

It should be noted that the terms of the Attorney General's Reference were specific to the General Elections of 4 March 2013. Thus the focus of the Advisory Opinion was on elective positions, specifically in the National Assembly and Senate. The Opinion did not directly address other elective positions or appointive offices. The question is whether we should fall back on the High Court decisions in *CREAW* and *Milka Atieno* particularly considering that the Court of Appeal's judgment in *CREAW* was not conclusive on the gender principle and indeed seemed (*per incuriam*) to support the High Court's reasoning in the matter. Further, the scope of the Advisory Opinion only encompassed 'legislative measures' yet article 27(8) the Constitution does not only refer to legislation but also to other measures, which would include policies and programmes to be put in place by the executive. This leaves unanswered the question of when 'the future' for non-legislative measures will be, when the state would be required to take action to put in place such measures. The Advisory Opinion did not deal with this issue. This appears to be a gap in the decision.

It is worrying that a few months before expiry of the five year time frame, Parliament has yet to table legislation for implementation of the two-thirds gender principle in relation to either elective or appointive bodies. The big question is what will happen should legislation not be in place by the end of that period. The dissenting opinion of the Chief Justice offers some hope. While a dissenting opinion has no precedent value, it can spur efforts for change of law.[99] Also encouraging are recent High Court decisions that have promoted the advancement of gender equality and protection of women's rights, such as *Rose Mambo & 3 Others v Limuru*

99 See Hon Ruth Bader Ginsburg 'The Role of Dissenting Opinions' Lecture presented to the Harvard Club of Washington, DC on 17 December 2009.

County Club & 17 Others[100] and the *160 Girls case*.[101] There is need for continued diligence to ensure that gains made in this area are not eroded.

4 Conclusion

In the aftermath of the Supreme Court's Advisory Opinion, uncertainty still lingers on how to implement the two-thirds gender principle. While the Court ruled that legislation must be put in place by 27 August 2015, it is not clear what type of provisions such legislation ought to have. In 2013, a Task Force for implementation of the two-thirds gender principle was set up. Pursuant to this, the National Gender Equality Commission made a call to the public for proposals on how to attain the principle.[102] Several proposals have been put forward. One is a proposal to amend the Political Parties Act and the Elections Act to provide a suitable formula for achieving the two-thirds principle. However, opponents of the principle have made counter-proposals designed to block its implementation. These have ranged from abolishing nominated seats to reducing the number of constituencies and counties, ostensibly to tame the huge wage bill currently being incurred for legislative bodies. As efforts continue to formulate legislation to implement the two-thirds gender principle, there is need to ensure that such legislation contains clear implementation mechanisms to avoid the kind of dilemma that has been experienced so far. In addition, it is crucial for such legislation to have stringent enforcement provisions with clear sanctions for breach of the principle. Sanctions could include linking funding of political parties to compliance with the principle.

However, legislation by itself is not sufficient and will need to be backed up by other strategies and measures. In this regard, political parties have a crucial role to play in the implementation of the principle. The manner in which political parties manage their nominations remains a key factor in getting more women into political office. For instance parties can put in place voluntary gender quotas backed by party manifestos with accountability mechanisms for enforcing the quotas. There is therefore need for women to engage more actively with political parties. This includes registering as members of parties, seeking leadership positions within parties and using their numerical strength towards ensuring fair play and accountability of political parties, particularly in the nomination

100 [2014] eKLR. In this case the High Court held that the rules of a private members' club barring women from voting and holding positions was unconstitutional.

101 *CK (A Child) & 11 Others v Commissioner of Police/Inspector-General of the National Police Service & 2 Others,* Petition No 8 of 2012, High Court of Meru [2012] eKLR. Here the High Court held that the failure by the state to effectively investigate and prosecute defilement cases was a breach of the constitutional rights of the girl petitioners.

102 'NGEC call for proposals on attainment of two-thirds gender principle' http://www.ngeckenya.org/news/6069/open-call-to-the-public-for-proposals-on-the-attainment-of-two-thirds-gender-principle (accessed 9 March 2015)

process. There is also need for a strong women's movement which is able to marshall support from across party platforms in order to unite women beyond party lines and rally them around a common agenda. Capacity building is also necessary for nominated and elected female candidates to equip them to effectively fulfil their roles. Gender focused civic and voter education is crucial to build awareness of the need for gender-balanced representation. Monitoring and evaluation should also be undertaken to ensure the effectiveness of affirmative action measures. Further, it may be necessary to review Kenya's electoral system with a view to adopting Proportional Representation (PR) as the current First-Past-The-Post (FPTP) system is not as conducive to increased women's representation.

Women in Kenya have struggled long and hard for more inclusive and gender balanced representation. It is crucial that implementation of the two-thirds gender principle be effected in order for women to achieve the critical mass required for effective representation and articulation of their interests. However, constitutional and legislative provisions in themselves are only a starting point and are not a panacea. There is need to move beyond mere numbers to more effective and meaningful participation by women. As Kenya seeks to put in place legislative and other mechanisms for implementation of the principle, goodwill and cooperation are needed amongst of all organs of government. Besides the legislature, the executive has a crucial role in implementing legislation and putting in place policies and measures to achieve gender equity. The judiciary also has a critical role in interpreting the Constitution and protecting rights. Other key actors including political parties, civil society and grassroots organisations all need to work together towards the realisation of gender equity in public and political life.

CHAPTER 8

THE CONSTITUTIONAL AND LEGAL FRAMEWORK OF DEVOLVED GOVERNMENT AND ITS RELEVANCE TO DEVELOPMENT IN KENYA

Conrad Bosire

1 Introduction

Within the broader constitutional review process that led to the adoption of the current Constitution was the search for an appropriate system of devolution. Indeed, devolution emerged as one of the most controversial issues in the entire review process. While there was universal consensus on the principle or idea of devolved government, there was no corresponding consensus on the type of devolution, the structure, or purpose that devolution was to serve. It was also clear that Kenya was, through the constitutional review process, in search of a devolution framework that could address the core challenges facing the country.

As a developing state, Kenya seeks ways to address the typical 'third world' economic and socio-political challenges such as, underdevelopment, rising poverty levels, regional and socio-economic disparities, and inequalities in access to basic services. These issues featured in the search for a new constitutional dispensation. During the review process, devolution of power was seen as one of the primary ways through which some of the developmental concerns could be addressed. This is reflected in the objectives of devolved government, which outlined development as one of the main purposes of such system of government.

The pursuit of development through devolution is, in turn, based on the hope that the process of devolution may tackle all or some of the challenges mentioned above. Devolution entails the transfer of powers and resources from the centre to devolved units, or to counties in the Kenyan case. With proper governance, local powers and resources have a potential to facilitate the pursuit of development and provision of basic services at the local level.

This chapter generally examines the constitutional and legal framework for devolved government and its relevance and effectiveness in

the pursuit of development. To this end, the chapter evaluates the relevance of the devolved structure of government to development. Specifically, the chapter examines the structures, institutions, powers, and fiscal powers of counties, and the relevance to development. The devolved system of government is assessed against features that are considered by other scholars and in practice, as important for development.

The argument presented in this chapter is that while the devolved system of government contains factors that are seen as essential to development through devolution, overall effectiveness is not automatically guaranteed. On the contrary, effectiveness will depend on the constitutional interpretation and implementation of the devolved government objectives and principles by the relevant agencies. Before delving into the main discussion, the chapter first defines terms and concepts that are relevant to the discussion. This is followed by a brief discussion which highlights features that are, in relevant literature, and practice, seen as essential for effective devolution for development. Lastly, the Kenyan constitutional and legal framework for devolved government is assessed against the features identified as essential for development through devolution, and then a conclusion is arrived at.

1.1 The meaning of devolution and development and the inter-linkages

The terms 'development' and 'devolution' will feature throughout the subsequent discussions. It is important to clarify their meaning before proceeding to the main discussion. While the usage of the terms is not clear, it is important to clarify the context in which they are used in this chapter.

1.1.1 The meaning of development

De Visser identifies three main features of the redefined concept of 'development': material element, choice and equity. Material element refers to the tangibles brought about by the process of development.[1]

Choice refers to the opportunity that people have to make decisions in order to satisfy their needs and this is recognition of the dignity inherent in a human being which entitles one to make decisions on matters that concern his or her personal and collective development.[2] The third element, equity, addresses collective wellbeing; development should

1 J de Visser *Developmental local government: A case study of South Africa* (2005)10 - 12.
2 As above.

enable everyone to benefit equally with a redistribution effect to the most vulnerable groups in the society, including future generations.[3]

From the definition above, it is clear that the concept of 'development' was thus expanded to include factors such as participatory and sustainable development. The expanded meaning of 'development' places people at the centre of the process, not only as beneficiaries but as active partakers who make real choices which in turn influence development.[4]

The refined concept and approach to development seeks to include the civil society as a partner in the process.[5] This is after state-led development, which was introduced in post-colonial African states after World War II, failed.[6] While state-led development was successful during the era of industrial revolution, the same approach in Africa and other developing countries failed largely due to a weak industrial base. Rising poverty levels, despite state-led growth in some developing states, made institutions, such as the World Bank, in the mid-1970s, to start focusing on poverty alleviation in the development discourse.[7]

It is during this period that financial and administrative decentralisation, urbanisation, and localisation were seen as some of the major global forces shaping the concept of development.[8] The World Bank's World Development Reports (WDRs) of the years 2004, 2006 and 2007 emphasised 'pro-poor, services-led, redistributive and participatory development'.[9] The concept of 'human development' promoted by the United Nations Development Programme's (UNDP) human development index (HDI),[10] and the notion of sustainable development, sought to place people at the centre of the development process. Thus, people were increasingly seen as involved in a participatory and transformative process which not only focuses on material growth but also the sustainable well-being of all human beings.[11]

3 De Visser (n 1 above) 12.
4 As above.
5 S Yusuf et al *Development economics through the decades: A critical look at 30 years of the world development report* (2009) 35.
6 J Pieterse *Development theory: Deconstructions/reconstructions* (2001) 67.
7 Yusuf et al (n 5 above) 21.
8 Yusuf et al (n 5 above) 35.
9 Yusuf et al (n 5 above) 36.
10 United Nations Development Programme (UNDP) *Decentralised governance for development: A combined practice note on decentralization, local governance and urban/ rural development* (2004) 5. It explains that 'the concept of human development is development that is pro-poor, pro-women, pro-environment and taking into consideration the long term'.
11 De Visser (n 1 above) 10.

1.1.2 The meaning of devolution

The terms 'devolution', 'decentralisation', 'deconcentration' and 'delegation' are used to generally refer to subnational government institutions but do not have clear and watertight meaning(s). States generally use different terminologies to define or describe their institutions and structures of devolved governance. In Kenya, the term 'devolution' is the political catchphrase.[12] The term was used consistently in the entire constitutional reform process, and is the phrase used in the 2010 Constitution. There is no policy articulation on the use of the term and its origin in Kenya's political discussions is not clear.

There is, however, a historical explanation. In Kenyan political discussions, the term 'federalism' is widely associated with the semi-federal structure in the independence Constitution. Also known as *majimbo*,[13] the regional system of government at independence was widely portrayed as promoting ethnic balkanisation. Thus any 'federal talk' in the review process was frowned upon. This may well be the reason why the politically neutral term 'devolution' was adopted. While Kenya may have the basic features of a federal system, the seemingly politically neutral term 'devolution' is preferred in describing regional or local governance structures.

Before defining 'devolution', it is important to first define the more common terms, such as, 'decentralisation', 'deconcentration' and 'delegation'. Elazar argues that the normative meaning of 'decentralisation' implies hierarchy and is thus a pyramid with 'gradations of power flowing from the top' to the local units.[14] De Visser adds that 'if there was no centre, there would be no decentralisation but rather two or more completely separate entities'.[15] Both De Visser and Elazar thus present decentralisation as a normative concept which involves the flow of power from the national level to a lower government or to another agency outside of the absolute control of central government.

Delegation is considered a form of decentralisation and generally refers to

> the transfer of responsibility for specifically defined functions to structures that exist outside central government ... delegation takes place if a power that

12 D Juma 'Devolution of power as constitutionalism: The constitutional debate and beyond' in Kenyan Section of the International Commission of Jurists *Ethnicity, human rights and constitutionalism in Africa* (2008) 37.

13 YP Ghai & JPWB McAuslan *Public law and political change in Kenya* (1970) 178, explain that 'Majimbo is a Swahili word which means an "administrative unit" or "region", and is generally used to refer to those provisions of the Constitution which established the [independence] regional structure'.

14 DJ Elazar 'Federalism vs decentralization: The drift from authenticity' in J Kincaid (ed) *Federalism* (2011) 83.

15 De Visser (n 1 above) 14.

originally resides with the central government is being transferred to a subnational government.[16]

However, delegation has also been defined as the transfer of specific functions to semi-autonomous agencies in order that they perform certain public functions on behalf of the central government.[17]

Using the standard proffered by Elazar and De Visser above, 'deconcentration' only means the presence of the 'centre' in the field as opposed to a flow of power from the centre. It is in this context that Oyugi cautions that the transfer of power, for instance to government parastatals, can hardly be described as decentralisation, especially where such parastatals are under direct central government management.[18]

De Visser explains that in devolution, a local or regional government power is a permanent power and 'original' as opposed to delegated where the same can be withdrawn by the national government. However, he adds that powers devolved need not be entrenched in the constitution because framework legislation can suffice.[19] Some scholars equate devolution with 'transfer of political power'[20] while others describe devolution as 'a more extensive form of decentralization'.[21] Oloo equates 'political decentralisation' with devolution.[22]

While a precise and universally agreed definition is neither possible nor useful, it appears that shared political powers with significant autonomy arrangements between the centre and local units is indeed the defining feature of devolution. The main threshold being that there is some substantive powers and resources at the regional or local level with some degree of control over the use of those powers and resources. However, the degree of control over powers and resources varies with country and context.

1.1.3 The Kenyan devolution structure: Blurring the federal-unitary dichotomy

Kenya uses the term 'devolution' to describe its devolved governance structure composed of the national and county levels. The above analysis shows that a devolved system of government implies 'heavier autonomy'

16 As above.
17 As above.
18 Oyugi WO *Decentralised development planning and management in Kenya: An assessment* (1990) 2 - 3.
19 De Visser (n 1 above) 15.
20 JW Nibbering & R Swart *Giving local government a more central place in development: An examination of donor support for decentralisation* (2010) 258.
21 J Litvack et al *Rethinking decentralisation in developing countries* (1998) 4 - 6.
22 A Oloo 'Devolution and democratic governance: Options for Kenya' in TN Kibua & G Mwambu (eds) *Decentralization and devolution in Kenya: New approaches* (2008) 109.

than a decentralised system. The mere description of a particular system as devolved does not necessarily qualify it as such. Rather, the real autonomy and powers exercised by the units will, in actuality, determine the nature of a particular system. In the Kenyan case, one has to go beyond terminology and examine the substance of county autonomy and its constitutional significance before reaching a conclusion.

Devolution emerged as a core constitutional principle in the Kenyan Constitution. Devolution is recognised in the national values and principles of the Constitution.[23] County governments powers are based on shared sovereignty (with the national government) which in turn emanates from the people.[24] County boundaries are recognised in the formal constitutional declaration of the republican status of the Kenyan state. Both levels of government are constitutionally recognised as distinct but inter-dependent and should operate on the basis of mutual consultation and cooperation.[25] County governments can also participate in constitutional amendment through the popular initiative.[26] Amendment of constitutional provisions that touch on the objects, principles and structure of a devolved government are subject to a national referendum vote.[27] The requirement for a referendum entrenches devolution and makes the people, from whom all constitutional power emanates the guardians of devolution.

In the past, local authorities operated as appendages of the centre.[28] By contrast, the treatment of counties in the Constitution invokes a different continuum altogether. County governments are seen as playing a fundamental part in constitutional governance and thus highlighting the relevance of devolution to the restructuring and transformation of the Kenyan state. The Kenyan approach stands in stark contrast with, for instance, the South African system which though considered a 'hybrid-federal system', does not explicitly elevate the provinces and local governments to the Kenyan extent.[29]

Does this approach make Kenya a federal system? Kenya has all the basic features of a federal system. Watts offers a 'federal checklist' of six essential elements that constitute a federal system. First, there must be at

23 Art 10(1) of the Constitution. See, Constitution of Kenya (promulgated on 27 August 2010) http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010 (accessed 3 May 2014).
24 Art 1(3).
25 Art 6(2).
26 Art 257(5) & (6).
27 Art 255(1).
28 WO Oyugi 'Local government in Kenya: A case of institutional decline' in P Mawhood (ed) *Local government in the Third World: The experience of tropical Africa* (1993) 126.
29 Secs 1 - 6 of the Constitution of the Republic of South Africa, 1996. Provinces and municipalities are mentioned in the founding provisions only in connection with use of languages but not in the context of formal recognition of the fundamental division of state power between the centre and other spheres.

least two orders of government, one for the entire federation, another for the constituent units, and all directly accountable to their respective citizenry. Second, autonomy is guaranteed through constitutional allocation of powers, functions and resources. Third, there must be formal structures for representation at the centre, normally through a second legislative chamber. Fourth, constitutional amendment, especially on issues affecting powers and functions of any of the orders, must involve a significant proportion of the units. Fifth, there must be a system for resolving disputes either by the judiciary or through the second legislative chamber. Finally, there must be institutions, principles and mechanisms to enhance collaboration between the federal government and the units, especially in respect of shared functions.[30]

Kenya's devolved structure is constitutionally based;[31] there is a senate (second chamber of the national legislature) composed of directly elected representatives of counties who represent county interests,[32] and the counties have some degree of political and functional autonomy. The Constitution generally delineates areas of exclusive and concurrent competence for each level, with principles of inter-governmental relations.[33] A constitutional amendment that affects the structure and powers of counties is subject to a national referendum,[34] and courts are empowered to adjudicate intergovernmental disputes.[35] All these features are an essential part of a federal form of government, yet Kenya is not formally or explicitly federal.[36] Furthermore, Kenya opted out of regional federal-type (large and few) units and this may as well be a further indication that the country did not want to take the federal route.

The uncertainty of Kenya's structure is not unique as many states have adopted varying structures which have blurred the traditional federal-unitary dichotomy. Indeed, states are not bound by the traditional classification of structures and can therefore adopt any structure that fits their particular circumstances. It is clear from the discussions above that there was an intention to move beyond a typical decentralised structure. Whether the kind of structure adopted crosses the 'unitary line' is not entirely clear. Indeed, and as mentioned above, the substantive power and resources controlled by counties will determine their actual significance. However, an approach which treats counties as mere decentralised units is clearly in conflict with the spirit, letter and intent of the Constitution with regard to devolved government.

30 RL Watts *Comparing federal systems* (2008) 8
31 Chap 11 of the Constitution.
32 Art 96(1).
33 Art 189.
34 Art 255(2).
35 Art 191(5).
36 The Constitution avoids use of the term federalism.

1.1.4 Development and devolved governance: The link and rationale

Developmental local government has been defined as

> a local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.[37]

This definition represents the refined concept of development and indicates the role that devolution or decentralisation can potentially play in the realisation of development.

Devolution is said to offer an institutional and practical avenue through which the vital components of development can be achieved. First, it is argued that devolution enhances the 'quality of representation' which enables people to participate more effectively in development.[38] In essence, decentralisation is said to strengthen democracy by enhancing the government's institutional ability to determine and respond to people's choices.[39] It is also argued that devolved institutions offer minorities and vulnerable members, who may otherwise have a weak or non-existent voice at the national level, effective local representation, thereby enhancing effective participation in development.[40] Kauzya adds that

> what determines whether governance is local or not is the extent to which the local population is involved in steering, that is, determining direction, according to their local needs, problems, and priorities.[41]

Second, devolution is said to improve institutional efficiency. It is argued that devolution relieves the centre of the burden of planning, hence reducing the central bureaucracy that often leads to inefficiency. Devolved units are seen as better able to respond to local needs than the centre.[42] Furthermore, it has been argued that competition between the devolved units enhances overall efficiency and contributes to overall development.[43] If well designed, decentralisation can address inequalities and ensure equitable devolution.[44] Devolution can thus be viewed as the institutional

37 Republic of South Africa, Department of Provincial and Local Government (PDLG) 'The white paper on local government' (1998) 22.
38 World Bank *World development report 1999/ 2000: Entering the 21st century* (1999) 111; De Visser (n 1 above) 19.
39 World Bank (n 38 above) 20.
40 UNDP *Marginalised minorities in development planning; A UNDP resource guide and toolkit* (2010) 52.
41 JM Kauzya 'Local governance, health and nutrition for all: Problem magnitude and challenges with examples from Uganda and Rwanda' A paper presented during the Global Forum on Local Governance and Social Services for All, Stockholm, 2 - 5 May 2000, 4.
42 JM Kauzya *Decentralization: Prospects for peace, democracy and development* DPADM Discussion Paper (2005) 3.
43 Litvack et al (n 21 above) 6 - 7.
44 World Bank (n 38 above) 110 - 111.

expression of the willingness of a state to work towards effective realisation of the refined concept of development. This is because devolution offers an avenue through which the concept of development can be institutionally pursued.

2 Essential features of devolution for development

Scholars, practitioners in states, and development institutions involved in devolved governance have, over time, identified features seen as important for development through devolution. The features revolve around the allocation of responsibilities between the centre and the local level.[45] The main elements of development through devolution include: expenditure responsibilities, assignment of revenue-raising functions, intergovernmental transfers, and borrowing of moneys by devolved units.[46]

If well designed, the literature and state practice shows that the devolved system of government may facilitate the pursuit of development and efficient service delivery at the local level.[47] This part highlights the specific features and elements of devolved governance which have emerged, from literature and practice, as important for the pursuit of development through devolution. These general features will then be subsequently used to assess Kenya's constitutional and legal framework.

2.1 Decentralised powers and functions

It is suggested that a function which is national in nature and cuts across devolved units is best performed by the national level.[48] This is because of the economies of scale attached to such an approach. However, despite the economic advantage of the national level of government providing services on a large scale, this is not absolute. A balance has to be struck between providing public goods and services uniformly and economically, on the one hand, and ignoring or responding to local preferences, on the other.[49] Accordingly, functions whose utility is national and subject to low variability should be handled by the national government while functions with variable local preferences should be decentralised.[50]

45 World Bank (n 38 above) 114.
46 World Bank (n 38 above) 115 - 121.
47 World Bank (n 38 above) 107.
48 World Bank (n 38 above) 115.
49 RC Crook 'Decentralisation and poverty reduction in Africa: The politics of local-central relations' (2003) 23 *Public Administration and Development* 77 79 - 82.
50 D Treisman *The architecture of government: Rethinking political decentralization* (2007) 77 75.

Functions that are, in practice, left to central government include 'national defense, external relations, monetary policy, or the preservation of a unified national market'.[51] Typical local functions include

> basic health and education, street lighting and cleaning, water, sewerage and power, public markets and refuse collection, major transport networks and land development for business and residential purposes.[52]

The latter category of functions is argued to have a potential to enhance local service delivery and development and thereby improve people's livelihood.[53] Additionally, the functions must be clearly defined for local effectiveness and accountability.[54]

2.1.1 Assignment of taxes and other revenue raising powers

While the ideal situation is for each level of government to raise its own revenue,[55] the prevailing context in many developing states may not be suited accordingly. A local government's revenue is only as good as that government's tax base;[56] disparities within decentralised units where many local governments have a 'thin' revenue base may require a differentiated approach which considers the existing disparities.[57] Indeed, devolved units are usually designed to be revenue deficient in order to enable the centre to effect redistribution and equity amongst other objectives.[58]

Second, it is proposed that services that have a local 'tax burden', such as taxes on immoveable property, should be allocated to decentralised units.[59] Indirect and personal taxes (moveable factors) should be left to national taxation.[60] However, at all times, the central government should be in control of major taxes for effective overall management of fiscal policy.[61] Local taxes also create an impetus for local communities to demand better services and accountability.[62]

51 World Bank (n 38 above) 115.
52 World Bank *World development report 1988* (1988) 157.
53 De Visser (n 1 above) 40.
54 World Bank (n 38 above) 115.
55 P Bardhan 'Decentralization of governance and development' (2002) 16 *Journal of Economic Perspectives* 185 187 - 188.
56 Bardhan (n 55 above) 189.
57 World Bank (n 38 above) 117.
58 Litvack et al (n 21 above) 12.
59 Litvack et al (n 21 above) 11 - 12.
60 Litvack et al (n 21 above) 11.
61 World Bank *World development report 1997: The state in changing world* (1997) 124; World Bank (n 38 above) 111.
62 World Bank (n 38 above) 117.

2.1.2 Intergovernmental transfers

Because devolved units are mostly designed to be dependent on central revenue,[63] intergovernmental transfers play a key role in determining the overall effectiveness.[64] Three factors are identified as essential in the design of transfers: the amount to be transferred, the criteria for sharing funds, and the type or nature of conditions imposed on the use of intergovernmental transfers.[65] First, intergovernmental transfers should not be too large to eliminate the need for local taxes since the latter are considered important for purposes of enhancing local accountability, a key factor in realising local development.[66]

Second, transfers are the main avenue for addressing equity concerns, and the design of central transfers should reflect this.[67] Inequalities are, generally, as much a reality as they are a perception. Accordingly, transparency and objectivity in the design of transfers is important.[68] This can be enhanced through pre-determined rules and by an independent body such as a Grants Commission dedicated to determining grants.[69] Furthermore, the transfers should be stable and predictable to allow stability in local planning and budgeting processes.[70]

2.2 Local borrowing

Due to generally inadequate funding and the ever increasing local needs, devolved units may seek loans from financial institutions. However, the possible impact of such a venture on the overall fiscal and macro-economic policy necessitates national regulation of subnational borrowing.[71] First, there must be 'a credible "no bailout" pledge by the central government'.[72] Secondly, central government should curb expenditure by local governments with what are called 'hard budget constraints' in order to avoid the identified consequences of uncontrolled spending.[73]

63 Litvack et al (n 21 above) 12.
64 J Linn & R Bahl 'Fiscal decentralization and intergovernmental transfers in less developed countries' (1994) 24 *Publius* 1 12 - 13.
65 World Bank (n 38 above) 117 - 118.
66 World Bank (n 38 above) 117.
67 As above.
68 Litvack et al (n 21 above) 12.
69 As above.
70 Linn & Bahl (n 64 above) 11.
71 World Bank (n 38 above) 118.
72 M Giugalo et al 'Subnational borrowing and debt management' in MM Giugalo & SB Vebb (eds) *Achievements and challenges of fiscal decentralization: Lessons from Mexico* (2000) 241 - 242.
73 World Bank (n 38 above) 124; Giugalo et al (n 72 above) 241 - 242.

2.3 Political and institutional design for decentralised development

Fiscal and financial functions are carried out in politically charged environments pitting national and local political and institutional actors against each other. This calls for a coherent set of rules to guide political and institutional relations.[74] The intergovernmental relations should complement efforts to improve institutional efficiency, accountability, local responsiveness, and competitiveness.[75] The main elements include: structures and institutions the electoral system and rules, powers and functions, and electoral rules.[76]

In determining the number of levels or decentralised units, the cost is considered as an overriding factor even in developed countries.[77] Decentralised units should be small enough to ensure effective participatory development[78] but should also not be too small to increase administrative costs.[79]

The powers and functions exercised by devolved units should be clearly defined and be relevant to the pursuit of development. Lack of clearly defined and relevant power can lead to inefficiency and lack of accountability.[80] De Visser aptly states that

> if local governments would be empowered only in areas that have little or no impact in development such as for example, dog licences or animal burial places, the developmental potential for local governments is negated.[81]

The powers granted to devolved units should take the prevailing context, such as the rural/urban divide, into account. Indeed, Prud'homme terms as 'absurd' a system that treats 'decentralization to cities just like decentralization to villages'.[82] This form of asymmetry of powers is, however, not aimed at depicting some devolved units as less important or less autonomous but taking into account differences in reality while building a coherent decentralised system.[83] In the exercise of these powers,

74 World Bank (n 38 above) 112.
75 BG Peters & J Pierre 'Developments in intergovernmental relations: Towards multi-level governance' (2001) 29 *Policy & Politics* 131 131 - 135.
76 World Bank (n 38 above) 112.
77 World Bank (n 38 above) 115.
78 As above. The Local Government of Midnapur in India, which, with a population of 8.3 million in 1999, was considered too large, is cited as an example.
79 As above. The Local Governments of Armenia, Czech Republic, Latvia and the Slovak Republic, which serve less than 4000 people and draw a huge part of their resources for administrative costs, are cited as examples.
80 As above.
81 De Visser (n 1 above) 40.
82 R Prud'homme 'The dangers of decentralization' (1995) 10 *World Bank Observer* 210 214.
83 Litvack et al (n 21 above) 23.

the devolved unit should have the final decision-making authority[84] through laws, resolutions and regulations.[85] The local communities should be in a position to hold their respective local political and administrative leadership to account through elections, and other avenues for local accountability. [86]

2. 4 Supervision and cooperation

Past experience has shown that while local autonomy is encouraged, effective development requires some level of national regulation of devolved units.[87] Devolved units are meant to effect important objectives like redistribution[88] and the central government can only ensure that this and other important national objectives are met locally by supervising the implementation.[89]

It is in the interest of both the devolved governments and the centre to cooperate for a harmonious pursuit of development.[90] It has been suggested that holding national and local elections jointly can facilitate cooperation[91] between the different levels. However, the 'local agenda' runs the risk of being swallowed into national political campaigns. [92] However, it has also been argued that a coherent set of rules can guide cooperation between the different levels of government.[93]

3 The constitutional and legal framework of devolution and its relevance to development

The development problem is a major concern and sits at the core of the challenges that face Kenya's effective statehood. Accordingly, devolution is but one of the many arrangements put in place to address underdevelopment. In the Kenyan case, the central government is allocated the major tax bases and other sources of revenue, and can constitutionally retain up to 85 per cent of revenue collected nationally, thus placing it in a vastly superior position to counties (which are entitled to a minimum of 15 per cent) to address development issues.[94] Indeed,

84 De Visser (n 1 above) 39.
85 As above.
86 Kauzya (n 41 above).
87 World Bank *World development report 1997: The state in a changing world* (1997) 128.
88 World Bank *World development report 2000/2001: Attacking poverty* (2000) 107.
89 World Bank (n 38 above) 120 - 121.
90 World Bank (n 38 above) 112 - 113.
91 World Bank (n 38 above) 114; D Powell 'Why a single election for all three spheres would be a bad move' (2011) 13 *Local Government Bulletin* 19, for a discussion on the importance of separate local and national elections.
92 World Bank (n 38 above) 114; Powell (n 91 above) 19 - 20.
93 De Visser (n 1 above) 211 - 212.
94 Art 203 (2) of the Constitution.

Prud'homme argues[95] that with political will, the central government is better able to address inequalities and implement redistribution through macroeconomic allocation at the national level. The effectiveness of national government arrangements for development, however, is beyond the scope of this chapter.

The objectives of devolved government provide a basis for understanding the purpose of devolution. Article 174 of the Constitution lists nine objectives of devolved government:

(a) to promote democratic and accountable exercise of power;

(b) to foster national unity by recognising diversity;

(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

(d) to recognise the right of communities to manage their own affairs and to further their development;

(e) to protect and promote interests and rights of minorities and marginalised communities;

(f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

(g) to ensure equitable sharing of national and local resources throughout Kenya;

(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and,

(i) to enhance checks and balances and the separation of powers.

The objectives above reveal developmental objectives of the devolved system of government. Through the devolved system of government, people at the local level can determine developmental priorities and pursue them. The overall objective is the developmental effectiveness that can ensure real change to the people at the county level.

3.1 The size and number of counties and relevance to development

The 47 counties, the only constitutionally entrenched subnational level of government, complicate the developmental role of devolution in two main ways. First, while the counties are not regions, they are not truly local units; the World Bank maintains that the 47 counties are 'not a substitute for local governments'.[96] Indeed, small units are important in order to enhance participation in development.[97] However, the 47 county

95 Prud'homme (n 82 above) 202.
96 World Bank *Devolution without disruption: Pathways to a successful new Kenya* (2012) 162.
97 World Bank (n 38 above) 115.

governments replaced 175 local authorities[98] and up to about 350 deconcentrated administrative districts[99] that were involved in service delivery in the previous order. Thus, even by Kenyan standards, reducing the local authorities to less than half the original number may affect local participation in development.

Indeed, during the constitutional review process, many people called for devolution of power to the local level,[100] and the creation of 47 counties seems instead to have concentrated powers in the 47 'non-local' points only. Furthermore, the 47 counties are essentially a symmetrical devolution of power, a system which Prud'homme says fails to recognise the context such as the rural/urban divide.[101] However, the Constitution contains provisions which have a potential to address this limitation(s). First, it is provided in the Constitution that '[n]ational legislation shall provide for the governance and management of urban areas and cities'.[102] Secondly, counties have the constitutional powers to decentralise services to levels below in rural areas.[103] It is also possible, with proper governance arrangements, to ensure that there is overall development in rural and urban areas even with the current county boundaries.

The differentiation of rural and urban governance has a strong basis in Kenya's past experience. A 1995 Kenyan government report observed that where urban and rural areas were combined under the same local authorities, agricultural taxes were redirected to the provision of urban services, thus 'draining' rural areas[104] and leading to neglect of rural services.[105] The World Bank notes that, with the exception of a few fully urbanised counties, most of the counties have predominant rural areas in which the majority of the population live.[106] However, contrary to the situation in the past, urban areas are, according to the World Bank, the 'losers' in the current structure because the composition of counties may create a 'strong rural bias'.[107] The Bank warns that this could result in county resources being drained into rural areas to the detriment of urban areas.[108] Regardless of the effect of combining rural and urban areas, the differentiation of rural and urban governance is important due to the varying nature of needs and preferences.

98 Institute of Economic Affairs (IEA) *Understanding the local government system in Kenya: A citizen's handbook* (2009) 12.
99 YP Ghai & JG Cottrell *Kenya's Constitution: An instrument for change* (2011) 350.
100 Ghai & Cottrell (n 99 above) 129.
101 Prud'homme (n 82 above) 214.
102 Art 184(1).
103 Art 176(2).
104 Republic of Kenya *Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya* (1995) 17.
105 As above.
106 Nairobi, Mombasa, Kiambu, Kisumu and Machakos counties.
107 World Bank *World development report 2011: Conflict, security and development* (2011) 39.
108 World Bank 'Navigating the storm, delivering the promise: With a special focus on Kenya's momentous devolution' (Kenya economic update) (2011) 41.

With regard to rural areas, the Taskforce on Devolved Government (TFDG) advised that the sub-county level is necessary given the expansive nature of counties, efficiency, effectiveness, equity, citizen participation and the principle of subsidiarity.[109] The TFDG proposed three levels of decentralisation below counties: sub-county, ward and village.[110] This recommendation was implemented through the County Governments Act, 2012 (CGA) which provides that decentralisation to levels below counties is to be composed of sub-counties (which are equivalent to parliamentary constituencies), wards, and village units as determined by the County Assembly.[111] However, the CGA acknowledges the overriding constitutional power of counties to alter the proposed decentralisation structure in the CGA.[112]

The weak constitutional framework for decentralisation of powers to levels below counties may hinder effective decentralisation to the local level. For instance, in the case of urban areas, powers that are typically performed by urban local governments are listed in the Constitution as county powers.[113] In essence, this means that typical local government functions and other county powers are functionally and institutionally fused in the county level. Counties in turn have constitutional protection of their powers and functions.[114] Thus, while the Constitution provides for a framework for urban local governments, it is up to county governments, and not national legislation, to decide the powers that urban local governments can exercise.[115] Counties have even greater latitude in the case of decentralisation to the rural sub-county levels as they have complete discretion to decide what to and how to decentralise.[116]

This complexity is mainly as a result of merging regional and local functions to the county level. In most systems of multilevel government (usually composed of the national, regional and local level), power over the local level is normally placed in the national or regional level or is a joint competency of the upper levels.[117] In Kenya, the difficulty arises from the fact that local government powers are primary constitutional powers of counties and can thus not be institutionally delinked from counties. If counties do not decentralise powers to lower levels, effective participation in development may not be guaranteed.

109 Republic of Kenya (Office of the Deputy Prime Minister and Ministry of Local Government) 'Final report of the Taskforce on Devolved Government: Developmental devolved government for effective and sustainable counties' (2011) 51.
110 As above.
111 Sec 48(1)(a) - (c) of the Constitution.
112 Sec 48(e) of the Constitution.
113 World Bank (n 96 above) 178 - 179.
114 Art 186(1) of the Constitution.
115 World Bank (n 96 above) 178 - 179.
116 Art 176(2) of the Constitution.
117 N Steytler 'Comparative conclusions' in N Steyler (ed) *Local government and metropolitan regions in federal systems* (2009) 427 - 428.

3.2 The institutional design of county governments and development

The county institutional design is important for purposes of facilitating local accountability, as development will be pursued by the institutions established at the county level.[118] For purposes of accountability,[119] the county governments are divided into executive and legislative structures. The structure generally replicates national government structures. It provides for a 'presidential system' headed by an elected county governor who appoints his 'cabinet' (the County Executive Committee (CEC)) subject to approval by the County Assembly (CA),[120] the legislative arm of the county government. Similarly, there are a number of institutional checks and balances put in place to limit the powers of the governor and enhance accountability in the county government generally.

While mayors were indirectly elected in the previous constitutional order,[121] the county governor is directly elected by voters through a first-past-the-post (FPTP) system, a factor which the World Bank argues is necessary for enhancing accountability at the subnational level.[122] Direct elections ideally offer voters a chance to vote for a person of their choice, and it is assumed that voters make a rational choice based on the ability to match resources with local preferences.[123] Direct elections also extend to county ward representatives, meaning that voters can use the electoral process to hold their representatives accountable.

The county governor is the head of the executive, and members of the CEC are accountable to him.[124] The county governor is thus able to effectively to make decisions and can be held accountable by the electorate. However, while the county governor has powers to make executive decisions, such decisions can only be ratified if there is effective support in the CA. In this regard, there is no requirement that a county governor must win with a specified proportion of county wards or margin of votes. It is thus possible for a county governor to be elected by a minority vote, courtesy of a split vote, in cases where there are more than two candidates. In such a situation, the minority governor may lack support in the CA and important matters such as the budget, expenditure approval and appointments may end up being derailed and consequently affect development.

118 World Bank (n 38 above) 112 - 118; KS Abraham 'Kenya at 50: Unrealized rights of minorities and indigenous peoples' (2012) 22 - 24.
119 Art 176(1) of the Constitution.
120 Article 175(a) of the Constitution.
121 R Southall & G Wood 'Local government and the return to multi-partyism in Kenya' (1996) 95 *African Affairs* 501 512.
122 World Bank (n 87 above) 112.
123 As above.
124 Art 174(6) of the Constitution.

Effective participatory development requires that all sectors of society are represented in democratic structures,[125] including the marginalised and minorities.[126] However, the FPTP system of electing representatives of county wards favours local majorities.[127] While special representation for minorities and marginalised groups and communities is provided for in the Constitution,[128] the special representatives are elected on the basis of party performance in the FPTP elections which still favours the majority political parties.[129] It is, however, an improvement from the previous dispensation where the minister in charge of local government could solely nominate councillors, a system that was prone to abuse.[130]

3.3 The powers and functions of county governments

The Constitution stipulates that sovereign power, which emanates from the people, is vested in parliament and the legislative assemblies of county governments, as well as in the national and county executive structures.[131] This provision reflects a fundamental change in approach to powers of subnational governments in Kenya. While the former local authorities derived their powers from national legislation and administrative fiat,[132] the powers of county governments are a product of the constitutional division of state power and shared sovereignty.

County government powers are, for purposes of enhancing accountability, divided into legislative and executive powers.[133] The Constitution empowers counties to make any laws in exercise of their powers; they can also pass laws on matters which, though not within their jurisdiction, are incidental to the effective exercise of county powers.[134] Counties can also be assigned more powers by national legislation.[135] Furthermore, governments at either level can transfer their respective functions to the other level, subject to the receiving government's consent and other conditions stipulated in the Constitution.[136] The counties thus have what can be termed original powers, along with the possibility of acquiring more powers through assignment or transfer.

125 World Bank (n 88 above) 106.
126 As above.
127 Independent Electoral and Boundaries Commission (IEBC) *The revised preliminary report of the proposed boundaries of constituencies and wards* volume 1, 9 February 2012, 27.
128 Art 90 of the Constitution.
129 Art 171(1)(c) of the Constitution.
130 Southall & Wood (n 121 above) 512.
131 Art 1(3)(a) & (b) of the Constitution.
132 WO Oyugi 'Local government in Kenya: A case of institutional decline' in P Mawhood (ed) *Local government in the Third World: The experience of tropical Africa* (1993) 127.
133 Art 175(a) of the Constitution.
134 Arts 185(2) & 186(1).
135 Art 186(3).
136 Art 187.

County powers are listed in the second part of the Fourth Schedule.[137] County powers cut across all the major public sectors including: agriculture, health, transport and communication, infrastructure and development, planning and trade, but the nature and extent of county powers vary with the sector. County powers are mainly concerned with implementation and delivery of basic county services which include: health services,[138] transport and infrastructure,[139] planning and development,[140] public works and services,[141] trade development and regulation,[142] amongst other functional areas.

The Fourth Schedule has been described as 'very high-level aggregated functions'; it has been observed, too, that 'additional decisions are required at a more detailed intra-sectoral level'.[143] A government report has also noted that many of the national and local functions were understated while others were totally omitted.[144] The county functions can be described as broad functional areas that require further clarity on the specific powers allocated to each level of government.

The constitutional entrenchment of county powers provides counties with 'original' or 'primary' powers. This will enable counties to make final decisions over functional areas that are relevant to development, a key element for effective development.[145] The symmetric devolution of powers to the 47 counties may also enable underdeveloped counties to improve access to services and development and thus enhance equitable development.[146] This may result in enhanced access to basic services and development to previously neglected areas.

However, a number of potential pitfalls in the design of county powers and functions may impede the realisation of development. The vaguely defined county powers may affect the developmental purpose of county government. First, while the objective is to devolve important powers from the centre to the counties, the vagueness of the functions may lead to negation of this intention as the central government may end up retaining powers that were meant to be devolved but are not clearly defined as county powers. Second, vaguely defined functions may lead to neglect of essential functions by both levels of government in the hope that the other level will shoulder the responsibility.[147] Furthermore, vaguely defined

137 Art 186(1).
138 Item 2, part 2 of the fourth schedule of the Constitution.
139 Item 5, part 2 of the fourth schedule.
140 Item 8, part 2 of the fourth schedule.
141 Item 11, part 2 of the fourth schedule.
142 Item 7, part 2 of the fourth schedule.
143 World Bank (n 107 above) 28.
144 Republic of Kenya, Ministry of State for Public Service *Report on devolved functions, strictures and staffing for county governments* (2012) 2.
145 World Bank (n 38 above) 115.
146 World Bank (n 107 above) 25.
147 World Bank (n 38 above) 115.

powers also lead to weak accountability as there is no clear actor whom the public can hold to account.[148]

Counties have also been denied some powers relevant to important local services and development and this may limit their developmental role. For instance, counties have powers over pre-primary education and childcare facilities only. Comparative decentralisation practice shows that powers over primary and secondary education are normally devolved to lower levels of government while national governments normally limit their roles to national policies.[149] Indeed, local authorities managed schools in Kenya before the functions were centralised in 1969.[150] The World Bank proposed that this function should be devolved to the county level.[151]

3.4 County finances

Fiscal autonomy enables devolved units to realise development by matching local preferences to available resources and thereby improving service delivery and development.[152] The effectiveness of the fiscal design is dependent on two issues. First, the nature and extent of county powers to raise revenue locally, and the extent to which such powers facilitate effective local service delivery and development. Second is the design of intergovernmental transfers to county governments and the extent to which the design facilitates local development and service delivery.

3.4.1 Own revenue

The ability of counties to raise their own revenue in order to fund their functions represents the highest form of autonomy. The constitutional power to levy property taxes is a fundamental shift from the previous regime where the Constitution did not mention any taxing power of local authorities.[153] However, county governments have still been denied major tax bases. Only two kinds of taxes are constitutionally protected sources of county revenue: property taxes and entertainment tax.[154] The national government, on the other hand, controls the major taxes, which include income tax, value-added tax, customs duties and other duties on import and export goods, and excise tax.[155] However, the county tax base can be expanded if additional taxes are provided through national legislation.[156]

148 As above.
149 World Bank (n 96 above) 17 and 33.
150 Republic of Kenya (n 104 above) 10.
151 World Bank (n 96 above) 17 and 33.
152 World Bank (n 38 above) 117.
153 World Bank (n 96 above) 62.
154 Art 209(3)(a) & (b) of the Constitution.
155 Art 209(1).
156 Art 209(2).

Even with the small tax base left to counties, there is the potential that own county revenue could only play a substantial role in financing county revenue. A World Bank report estimates that the local authorities in the former constitutional dispensation raised an average of 59 per cent of their expenditure from their own sources, while 41 per cent was met by central government transfers.[157] The Bank also estimates that own county government revenue may account for 17 per cent of the total county government revenue if central transfers are maintained at the minimum 15 per cent.[158] However, these estimates are based on the performance of the former local authorities. County powers to raise revenue have been expanded and new areas to raise revenue, such as gas and electricity reticulation, energy regulation and entertainment taxes, have been added. Inevitably, factors such as the level of funding to counties may fundamentally change the World Bank projections, given that a total of 41 counties may see their funds double from past allocations (local authorities in their areas), with some counties receiving more than 1000 per cent of previous decentralised funding.[159] However, local revenue is still likely to play a substantial role in county financing especially in counties with a substantial revenue base.

Apart from taxes, the Constitution provides that both national and county governments may impose fees and service charges.[160] The Constitution provides that 'the national and county governments may impose charges for services'.[161] Part II of the Fourth Schedule of the Constitution lists the main functional areas of counties from which counties can raise revenue. There are two main ways in which counties can raise fees. First, counties can raise fees by charging the public for individual services of which they (the public) are consumers. These include, inter alia, water and sanitation, electricity and energy reticulation, and health services. The second source is what can be termed 'regulation revenue'. Some of the powers of county governments listed in the Fourth Schedule of the Constitution may enable county governments to raise revenue from official charges such as licence fees. These include trade licensing, energy regulation, development planning and other regulatory powers.

One main challenge is that the bulk of the revenue-raising powers highlighted above are predominantly urban-based. These include powers such as property and entertainment taxing powers, water and sanitation services, and other typical urban services. In the past, local authorities in 28 out of the 47 counties used to receive over 50 per cent of their funding from central government transfers.[162] Only the former Nairobi City

157 World Bank (n 96 above) 65.
158 World Bank (n 96 above) 73.
159 World Bank (n 96 above) 91 - 92.
160 Art 209(4) of the Constitution.
161 As above.
162 World Bank (n 96 above) 74.

Council and local authorities in the three counties (Samburu, Isiolo and Narok) that host game reserves were able to finance over 70 per cent of their expenditure from locally-generated revenue.[163] It is thus likely that with the exception of business licenses – which appear to be an important source of revenue for both urban and rural areas[164] – most of the revenue sources may only end up benefiting counties with predominantly urban counties. This has the potential to diminish the overall significance of local revenue, given that the majority of county governments are predominantly rural.

3.4.2 Intergovernmental transfers

The Constitution provides for a system of intergovernmental transfers to county governments to enable them to perform their functions. In this regard, the most important of the intergovernmental transfers is the counties' equitable share of revenue raised nationally. However, the Constitution also recognises that further transfers, beyond the equitable share, can be made to county governments, either conditionally or unconditionally.[165]

There are two main and important stages in the determination of the equitable share. The first is the vertical division of revenue between the national government and the county governments. The second stage is the horizontal division of revenue amongst county governments. Both stages are provided for in the Constitution. The Commission on Revenue Allocation (CRA), an independent nationally-based commission, plays an important role in both stages by making recommendations on the vertical and horizontal division of revenue based on objective criteria recognised and provided for in the Constitution.[166] Bills which seek to divide revenue vertically and horizontally, when presented in parliament, should be accompanied by a summary of the deviations from the figures proposed by the CRA, along with an explanation for each deviation.[167]

The CRA makes recommendations concerning the basis of the vertical division of revenue,[168] with the county share not being less than 15 per cent of the revenue collected nationally.[169] In proposing the vertical division, the CRA is required to give effect to the criteria provided for in determining the equitable share.[170] The CRA should also, where appropriate, define and enhance the revenue sources of both levels of

163 As above.
164 As above.
165 Art 202(1) of the Constitution.
166 Art 203(1).
167 Art 218(2)(c).
168 Art 216(1)(b).
169 Art 203(2).
170 Art 216(3)(a).

government,[171] as well as encourage fiscal responsibility.[172] CRA proposals are incorporated into the Division of Revenue Bill (DRB), and the County Allocation of Revenue Bill (CARB) which divide revenue vertically and horizontally, respectively.[173] CRA and World Bank estimates show that counties will need more than the minimum share of the county equitable share if they are to effectively perform their functions.[174]

The county equitable share is, by definition, not part of national government revenue but a constitutionally protected entitlement of county governments.[175] Accordingly, the Constitution requires the national government to release the equitable share without undue delay and without deduction, except as allowed in the Constitution.[176] It has also been argued that the constitutional autonomy of county governments, the objectives of devolved government, and the limited regulatory role of county governments, all support the argument that the equitable share is unconditional.[177]

The discretion to use the county equitable share enables the counties to plan and budget thereby addressing local needs and preferences.[178] However, after identifying the priorities, counties are expected to comply with their pre-determined budget. In this regard, the office of the Controller of Budget (COB), an independent office, is established to monitor implementation of the budget.[179] The extent of the COB's authority in ensuring compliance with the budget is not clearly stated in the Constitution.[180] However, since the COB is to authorise every withdrawal from the County Revenue Fund,[181] the highest measure that can be taken is to reject any withdrawal that is not in compliance with the budget.[182] In the former dispensation, subnational expenditure was monitored solely by the National Treasury, but mistrust of the national executive led to this role being vested in an independent office.[183]

171 Art 216(3)(b).
172 Art 216(3)(c).
173 Art 218(1)(a).
174 World Bank (n 96 above) 55.
175 Art 202 of the Constitution.
176 Art 219.
177 Legal opinion by Christina Murray to the World Bank, cited in World Bank (n 96 above) 53.
178 Art 220(1) of the Constitution; sec 117(5) of the Public Finance Management Act 18 of 2012.
179 Art 228(1) of the Constitution.
180 World Bank (n 96 above) 155 - 156.
181 Art 207(3) of the Constitution.
182 Art 228(5).
183 World Bank (n 96 above) 132.

Given the anticipated deficit in county finances, the national government may have to provide additional funding through conditional or unconditional transfers.[184] Amongst the conditional transfers is the Equalisation Fund, which is an 'affirmative action fund'.[185] The Equalisation Fund is a 'national government fund' set aside from revenue collected nationally (0,5 per cent of national revenue) and used to enhance access to basic services including water, roads, health facilities and electricity in marginalised areas.[186]

Additional funding may be provided through conditional or unconditional funding. The manner in which additional funding is provided to counties will have implications in terms of discretion and, possibly, autonomy. Increasing the county equitable share is the most appropriate way of assuring complete discretion in the use of the additional funds. Conditional grants, however, can create an impetus for the central government to control counties through conditional funding. The World Bank argues that conditional funding can enable counties to implement national priorities,[187] but this also implies diminished discretion over use of funds devolved to counties.

3.5 Support for county governments

While the broader literature on decentralisation uses the term 'supervision' and control of devolved units, a conscious decision was made in Kenya to emphasise 'support' and 'capacity building' as opposed to overt supervision and central regulation of county governments.[188] This decision was informed by past experience that was characterised by the overbearing control that was exerted on local authorities by the ministry in charge of local government in the former dispensation.[189]

There are two main ways that the national government can intervene to ensure counties perform their functions as required by law. The Constitution provides for circumstances under which the national government can temporarily stop part of the funds due to a county government.[190] The cabinet secretary in charge of finance can stop funds due to a county government for serious material breach or persistent material breaches of financial guidelines.[191] However, only 50 per cent of

184 Art 202(2) of the Constitution.
185 Art 204(1).
186 Arts 204(2) & 187(1)(a).
187 World Bank (n 96 above) 94.
188 Committee of Experts (CoE) *Final report of the Committee of Experts on Constitutional Review* (2010) 92
189 As above.
190 Art 225(3) of the Constitution.
191 As above.

the funds due to a county government can be stopped,[192] and for 60 days only[193] and must be ratified by the Senate and the National Assembly.[194]

The national government may also intervene in a county government if fails to perform its functions,[195] or fails to keep a financial information system that complies with national legislation.[196] However, national government powers are generally limited as interventions in counties can be terminated at any time by the Senate.[197] Furthermore, the stoppage of funds is partial, temporary and subject to apparently strict conditions.

3.6 National and county government cooperation

Many structural and functional aspects of devolution will require vertical and horizontal cooperation for effective devolved development. While the Constitution generally delineates national and county functions, most of the functional areas are basically shared; the central government, for instance, has policy-making powers over virtually all county functions. As a result, the clarification of these functions is a continuous process of refinement[198] and many functions may end up shifting between the two levels of government. This process requires cooperation and consultation in order to have a mutual understanding of the boundaries with regard to powers and functions.[199] In turn, mutual cooperation and consultation will form a strong basis for effectiveness through a harmonious pursuit of development.

The 47 counties are too fragmented to effectively take up functions that are cross-county in nature. The World Bank observes that while counties can cooperate in performance of functions, 'the sheer number of counties will challenge effective decision-making'.[200] The Bank proposes stronger and more effective structures of horizontal cooperation that are capable of making decisions.[201] Accordingly, effective horizontal cooperation may cure the structural deficiency caused by the lack of bigger and 'regional-size' units or level.[202]

192 Art 225(4).
193 Art 225(5)(a).
194 Art 225(5)(b).
195 Art 190(3)(a).
196 Art 190(3)(b).
197 Art 190(5)(d).
198 World Bank (n 96 above) 118.
199 World Bank (n 96 above) 115.
200 World Bank (n 96 above) 113.
201 As above.
202 World Bank (n 96 above) 114.

4 Conclusion

This chapter has examined the role that devolution will play in enhancing development. To this end, it has examined the structures, institutions, powers, and finances of county governments against the features that are identified as essential for development. However, there are specific challenges within each of the aspects of devolution that may hinder the effective pursuit of development. The constitutional and legal framework that underpins the process of development in Kenya provides a basis for all development activities. Its effectiveness, however, will depend on how the entire framework is interpreted and applied.

Beyond the constitutional and legal framework, there is the uncertainty and lack of clear answers on the role of devolved governance in development. The general framework and approach to development (including the definition of substantive developmental roles) will determine the overall effectiveness. The Kenyan context under which the framework will operate will also determine the overall effectiveness. Development has always been programmed and implemented from a centralisation perspective. Accordingly, the effectiveness will depend on how the general features of devolved governance relevant to development is given space.

Part 4: The accountability and integrity conundrum

CHAPTER 9

TOWARDS A CORRUPTION FREE KENYA: DEMYSTIFYING THE CONCEPT OF CORRUPTION FOR THE POST-2010 ANTI-CORRUPTION AGENDA

Ken Obura

'When the state is in healthy condition, all things prosper; when it is corrupt, all things go to ruin.' Democritus

1 Introduction

The 2010 Constitution represents an invigorated desire by Kenyans to rid themselves of the vice of corruption. This desire permeates the entire framework of the Constitution and is evidenced in the express inclusion of provisions against corruption including: the values of good governance, integrity, transparency and accountability as national values and principles of governance;[1] a chapter on leadership and integrity;[2] an anti-corruption institution as a constitutional commission having the status and powers of chapter fifteen commissions of the Constitution;[3] and the recognition of corruption as a ground for limiting the enjoyment of human rights.[4] This need to entrench the fight against corruption in the Constitution was informed by the chequered history of the fight in Kenya, which had seen anti-corruption institutions being created and disbanded as soon as they

1 Art 10(2)(c) of the Constitution of Kenya (promulgated 27 August 2010) http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010 (accessed 3 May 2014).

2 Chap 6.

3 Art 79. According to the Constitution, chapter fifteen Commissions are independent institutions subject only to the Constitution and the rule of law. Art 249(2). This entrenchment was informed by the chequered history of anti-corruption agencies in Kenya whereby institutions were being created and disbanded at the whims of corrupt brokers.

4 See, for example, the right to property clause, which while guaranteeing the right to acquire, hold and dispose of property and the right against arbitrary deprivation and uncompensated compulsory acquisition, also makes it clear that: 'The rights under this Article do not extend to any property that has been found to have been *unlawfully acquired*'. Art 40(6) (emphasis added).

started having some meaningful impact.[5] It was also an expression of Kenyans frustration with corruption, which had stalked them since independence and consistently denied them the enjoyment of the fruits of their collective and individual labour.[6]

Yet, despite the entrenchment of the fight against corruption in the Constitution and the express desire to eradicate corruption, disagreement abounds on the meaning of corruption amongst Kenyans. The Kenya Anti-Corruption Commission (now Ethics and Anti-Corruption Commission) has, for example, found that Kenyans disagree not only on the criteria to be used in determining corrupt conduct but also on the actual meaning of corruption. The criteria debate has pitted those who see law as the best criteria for determining standards of behaviour against those who view morality as the better criteria. On the other hand, the debate on the meaning of corruption has seen a division emerging not only on whether the definition should cover both the public and private related corruption but also on whether the list of corrupt acts should be closed to specific acts or should be left open ended.[7] This confusion is not helped by the fact that both the Constitution and the prime anti-corruption law in Kenya, the Anti-Corruption and Economic Crimes Act (ACECA), have not come up with a unifying definition, with the latter instead merely outlawing corruption's various manifestations.[8]

This disagreement on the criteria and definition of corruption is, however, not unique to Kenya and can be attributed to the complex and multifaceted nature of corruption which makes it take on various forms and functions in different contexts.[9] As Marquette pointedly laments, 'no matter how many times it is prodded, poked at or pulled apart, more questions than answers seem to arise from the literature'.[10] Because of this difficulty in identifying the true nature of corruption some commentators, like Ulrich Von Alemann, have advised against a search for a universally true and correct definition arguing that such a definition is unattainable

5 See JT Gathii 'Kenya's long anti-corruption agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission under the 2010 Constitution' http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1401&context=facpubs (accessed 10 December 2014).

6 For further reading on the history of corruption in Kenya, see generally K Kibwana et al *The anatomy of corruption in Kenya: Legal, political and socio-economic perspectives* (1996); Parliamentary Anti-Corruption Select Committee *Report of the Parliamentary Anti-Corruption Select Committee* (2000); JP Mutonyi 'Fighting corruption: Is Kenya on the right track?' (2002) 3 *Police Practice and Research: An International Journal* 21.

7 See, for example, Kenya Anti-Corruption Commission 'National perception survey' 2006 eacc.go.ke (accessed 28 March 2014).

8 See Anti-Corruption and Economic Crimes Act 2 of 2003 (ACECA) secs 2 & 39 - 47.

9 On the complexity of corruption, see generally MK Khan 'A typology of corrupt transactions in developing countries' (1996) 27 *Institute of Development Studies Bulletin* 12; J Gardiner 'Defining corruption, coping with corruption in a borderless world' in M Punch et al (eds) *Proceedings of the Fifth International Anti-Corruption Conference* (1993) 26.

10 H Marquette 'Corruption eruption: Development and the international community' (1999) 20 *Third World Quarterly* 1215 1215.

and can only act as a guiding star.[11] Others, like Oskar Kurer, have contended that this disagreement on the definition of corruption is healthy as 'far from hampering the research effort, the lack of a unified definition has positively stimulated it'.[12]

It is this chapter's argument, however, that the disagreement on the concept of corruption if unresolved would result in a confusing state of affairs where varied definitions of corruption exist side by side in uneasy competition. Such a confusing state of affairs if allowed to persist could discourage or slow down the effort to eradicate corruption as there would be no agreement on which to fight corruption. To avoid such a result, it is imperative, therefore, that the different perspectives on corruption are examined and their commonalities exposed with a view to reconciling their differences. This chapter specifically seeks to do that. It discusses the various theoretical and practical perspectives on and dimensions of corruption with a view to unravelling the idea behind corruption and the element(s) that makes an act condemnable as corruption. The aim is to resolve the disagreement on the criteria and meaning of corruption and provide a clear understanding of the concept of corruption for purposes of post-2010 Constitution analysis of corruption problem in Kenya.

To facilitate the discussion, the chapter is divided into four sections. After this introductory section, the second section will delve into discussing the moral and legal criteria of standards of human behaviour and their implication to the understanding of corruption. The aim is to propose a well thought out criterion to be utilised in the post-2010 anti-corruption analysis. The third section will compare the conception of corruption in the international, regional and Kenya's anti-corruption instruments. The aim is to extract the essential elements of corruption that should guide the post-2010 determination of whether a behaviour is corrupt or not. The fourth section will conclude.

2 The illegality/immorality of corruption

In their effort to eradicate corruption, the anti-corruption agencies in Kenya have often sought partnership with a number of organisations. This effort has been supported by successive anti-corruption laws, which have consistently called upon the anti-corruption agencies to collaborate with public, private and civil society organisations in the fight against corruption.[13] One category of the organisations that the agencies have placed disproportionate reliance on has been the faith based organisations.

11 See U von Alemann 'The unknown depths of political theory: The case for a multidimensional concept of corruption' (2004) 42 *Crime, Law & Social Change* 25 26 ('Maybe such a definition is like the Holy Grail, i.e. something unattainable that can only be a kind of guiding star').

12 O Kurer 'Corruption: An alternative approach to its definition and measurement' (2005) 53 *Political Studies* 222 227.

As noted by the former director of the Kenya Anti-Corruption Commission, Justice Aaron Ringera:

> We continue to partner with many law enforcement agencies, other government departments, schools, private sector actors and civil society. However, we believe that this fight will benefit from a *much greater impetus if we use places of worship as the vanguard platform of advocacy* against corruption in Kenya.[14]

This emphasis on partnership with faith based organisations is informed by the understanding that 'Law of God provides the most enduring influence on our conduct as human beings' and that corruption is an act against the Law of God, which can only be successfully eradicated if Kenyans are guided to 'discover God's position on corruption and His direction on living a corrupt free life'.[15] These views compounded by the acknowledgement of the 'supremacy of the Almighty God of all creation' by the Constitution,[16] raises the question as to whether the criteria for corrupt conduct in Kenya should be morality or the hard law passed by the legislature. This question is not moot because despite the clear edict by the courts that the anti-corruption agencies' mandate is circumscribed by the law,[17] it is not uncommon to find Kenyans and anti-corruption officials judging the corruptness of conducts based on moral criterion. It is imperative, therefore, to analyse the meaning and implication of the two criteria to the understanding of corruption and propose a well thought out criterion for use in post-2010 anti-corruption analysis.

This section is aimed towards achieving these ends. In this regard, it is noteworthy that the debate on the place of law and morality in the regulation of human conduct is not new. It forms a central part of legal philosophy and has for a long time pitted the 'positivists' against the 'naturalists' with the 'historicists' coming late in the day to join in the fray.[18] The positivists, on the one hand, view law as being independent from morality and insist on law as the criteria for the standard of behaviour. The naturalists, on the other hand, view law and morality as being intertwined and insist on a universal morality as the criteria for the

13 See, for example, s 7 of ACECA and s 11(3) of the Ethics and Anti-Corruption Act 2012.

14 A Ringera 'Forward' in Kenya Anti-Corruption et al (eds) *A bible study guide for groups and individuals* (2008) vii (emphasis added).

15 n 14 above.

16 Constitution of Kenya 2010, preamble.

17 As noted by the Court of Appeal in *Kenya Anti-Corruption Commission v First Mercantile Securities Corporation* [2010] eKLR 21, 'The Appellant (KACC – the precursor to EACC) is a statutory body under Kenyan Law and it can only do that which its creating statute empowers it to do'. See also *Nicholas Muriuki Kangangi v Attorney General* [2011] eKLR para 13 ('As a creature of statute, it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void').

18 The positivists are the proponents of the positive law school of thought. The naturalists support the natural law school of thought. The historicists espouse the historical law theory.

standard of behaviour. The historicists, on their part, while agreeing with the naturalists on the connection between law and morality, insists that morality as a criteria must take into account the historical and cultural specificity of each society. But what do these criteria mean in practice and which criterion should one adopt when defining corruption?

2.1 The legal criterion

The legal criterion of standard of behaviour is usually attributed to the positive law school of thought. The positivists contend that the ultimate source of law is the will of the lawmaker as expressed in operational law and not some abstract morality as espoused by the naturalists. They argue that one must first establish what law is before it can legitimately be asked what the law ought to be or how it came to be what it is.[19] In other words, to the positivists the problem of norm setting is determined with reference to the legal rules provided by statutes and court decisions. Thus, to positivists, the standard of behaviour is what is formally enunciated as such by the lawmakers.[20]

To a legal positivist, therefore, corruption would be connected to any behaviour that violates some formal standard or rule of behaviour set down by a political system for its officials and citizens. This positivist perspective to corruption can be equated to what some commentators have called the legal approach to corruption.[21] This definition says if an act is prohibited by formal laws, it is corrupt; if it is not prohibited, it is not corrupt even if it is injurious or unethical. For example, behaviour was judged by James Bryce to be either permissible or corrupt depending on the criteria established by legislators and judges:

> Corruption may be taken to include those modes of employing money to attain private ends by political means which are *criminal* or at least *illegal*,

19 See J Austin *The province of jurisprudence determined* (1995) 157, explaining legal positivism thus:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation.

20 Some positivists have adopted an extreme conceptualism whereby a legal norm is only considered legal if a sovereign lawmaker is identified. For analysis of this school, of which Kelsen's theory is an example (H Kelsen *General theory of law and state* (1945)), see E Bodenheimer *Jurisprudence: The philosophy and method of law* (1974) 91 - 109. At the other extreme end of the positive theory are the adherents of the Critical Legal Studies movement who view legal rules as rationalisations of officials' behaviour, the source of which is found in economic, political, and other non-legal factors. For an exposition of this school, see JA Standen 'Note: Critical Legal Studies as an anti-positivist phenomenon' (1986) 72 *Virginia Law Review* 983.

21 Scott calls this approach, the legal approach. See JC Scott *Comparative political corruption* (1972) 3 - 5. See also AJ Heidenheimer *Political corruption: Readings in comparative analysis* (1970) 3 - 5 (calling this definition 'public office centred').

> because they induce persons charged with a public duty to transgress that duty and misuse the functions assigned to them.[22]

One advantage of using law as the criterion for corruption is that the resultant definition of corruption is clear and can easily be operationalised as government officials and ordinary citizens can be expected to access and understand the requirements and prohibitions spelled out in statutes.[23] A second advantage is that even if the legal definition is not perfect or if new corrupt issues arise in the future, the lawmaker can easily amend the laws to deal with these problems.

The legal criterion, however, suffers from a number of shortcomings. One flaw is that it assumes that all that is legal is not corrupt and that all that is illegal is corrupt. However, this is not necessarily true. As Jackson et al aptly point out:

> Worse still, using law as the standard of corruption supports the assertion that everything that is not legal is permitted. The legal foundation of political corruption is simultaneously too narrow and too broad, excluding too much (the unethical but legal) and including too much (the illegal but not unethical).[24]

The second defect is that the definition depends on the idea that legal frameworks are somewhat neutral, objective and non-political and that, therefore, what the lawmaker wills in the law should be taken as the true representation of the good of society. Research, however, shows that laws regulating political and bureaucratic conduct are not neutral and often depend on the prevailing assumptions and beliefs about the nature of politics and the character of public office.[25] In some cases these laws are actually a product of a trade-off amongst the politically powerful who can determine and declare a conduct to be improper or proper for reasons not necessarily in tandem with the interest of the general public.[26] James Scott captures this concern thus:

> Our conception of corruption does not cover political systems that are, in Aristotelian terms, 'corrupt' in that they systematically serve the interests of special groups or sectors. A given regime may be biased or repressive; it may

22 J Bryce *Modern democracies* (1921) 477 - 478 (emphasis added).

23 This is not always the case though as statutory drafting often lends itself to varied interpretations. Still the fact that it is written in statutory books makes it accessible for verification.

24 M Jackson et al 'Sovereign eyes: Legislators' perception of corruption' (1994) 32 *Journal of Commonwealth and Comparative Politics* 54 55 - 56.

25 See, for example, L Beck 'Senegal's enlarged presidential majority: Deepening democracy or detour?' in R Joseph (ed) *State, conflict, and democracy in Africa* (1999) 197. It discusses the public perception in the case of the LONASE scandal involving the skimming off of large sums of money from the Senegalese lottery and how the perceptions are influenced by the nature of politics at play.

26 For an exposition on the politics of law making, see, for example, D Kairys (ed) *The politics of law: A progressive critique* (1998).

> consistently favour the interests, say, of the aristocracy, big business, a single ethnic group, or a single region while it represses other demands ...[27]

Kenya's anti-corruption history is illustrative of this second shortcoming. For example, a cursory glance into the history shows that since the first anti-corruption legislation (the Prevention of Corruption Act) was enacted in 1956 there have been no less than five anti-corruption agencies established to spearhead the fight against corruption in Kenya.[28] The disbandment of successive anti-corruption agencies has mainly been occasioned by political machination, especially in instances where the holders of political power have felt threatened by the independence and effectiveness of the particular agency.[29]

A further shortcoming of the legal approach is that when the impugned conduct allegedly transgresses a legal norm or standard, such as customary law, which is not tied to a specific statute or court ruling, this definition of corruption becomes less useful in differentiating acceptable and unacceptable behaviour in society.[30]

2.2 The objective moral criterion

To overcome some of the shortcomings of the positivist approach, a second way of identifying the required standard of behaviour may be to resort to natural law. Natural law theory holds the view that man-made law, as well as individual choices, can and should be determined using objective moral standards.[31] As HLA Hart explains, the classical theory of natural law is the view 'that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid'.[32] In other words, to the naturalist, in order to determine what the standard of behaviour is, the inquiry must not stop at examining what the rules that have been accepted says but must go further

27 Scott (n 21 above) 5. See also Kurer (n 12 above) 222, pointing out that the definition 'fails to cover cases where legislation itself is corrupt (for example, 'legislative corruption' such as the indiscriminate enrichment of legislators), and it is inapplicable in pre-modern settings'.

28 The anti-corruption agencies in their order are: Anti-Corruption Police Squad, Kenya Anti-Corruption Authority (I) (KACA I), KACA II, Anti-Corruption Police Unit (ACPU), Kenya Anti-Corruption Commission (KACC), Ethics and Anti-Corruption Commission (EACC).

29 For further reading on the history of the Anti-corruption agencies in Kenya, see generally K Kibwana et al *The anatomy of corruption in Kenya: Legal, political and socio-economic perspectives* (1996); Parliamentary Anti-Corruption Select Committee *Report of the Parliamentary Anti-Corruption Select Committee* (2000); JP Mutonyi 'Fighting corruption: Is Kenya on the right track?' (2002) 3 *Police Practice and Research: An International Journal* 21.

30 See J Gardiner 'Defining corruption' in AJ Heidenheimer & M Johnston (eds) *Political corruption: Concepts and contexts* (2002) 25.

31 For a discussion on natural law theory, see, for example, R Dworkin 'The model of rules' (1967) 35 *University of Chicago Law Review* 14.

32 HLA Hart *The concept of law* (2012) 182.

and refer to the objective standards of morality.[33] It is only the rules that conform to this objective standard of morality that deserve to be accepted as law (standard of behaviour).

To a naturalist, therefore, corruption is viewed as an act that goes against human nature, and against human morality. This definition says: if an act is harmful to the general human good (morality), it is corrupt even if it is legal; if it is beneficial to the public good, it is not corrupt even if it violates the law. For example, Thomas Aquinas, one of the proponents of natural-law theory, argued that 'law is primarily an ordination for the general good, commands to do particular deeds are laws only when ordered to that general good'.[34] In his view, while actions 'are certainly individual … those individual actions have a relationship to the general good ...'[35] Thus, individual actions that go against this general good should be condemned and punished.[36] As Larry A Dimatteo concludes in his review of the history of natural law theory:

> As a member of such a community, one's actions, contractual or otherwise, must never be detrimental to that community. Taking advantage of another community member would be considered such a detriment. On strict theological grounds, this detriment would be considered a sin against God. Therefore, Aristotelian and Thomistic virtue held that the obtainment of wealth was not a good in itself. It was a means to self- sufficiency which was a precursor of happiness. However, one could only obtain happiness through wealth if it was obtained honourably.[37]

Proponents of this school emphasise the classical view of public good in which officials are unselfish and treat everyone equally and with fairness.[38] Thus, an act that is selfish, unequal in treatment and is unfair in process and result can be said to be corrupt.[39] These principles of natural law are usually fronted as universal, neutral and unbounded by time.[40]

However, to be sure, the naturalists are not unanimously agreed on how morality or public good is to be determined. To those of the Judeo-

33 See P Soper 'Some natural confusions about natural law' (1992) 90 *Michigan Law Review* 2393 2398, noting that a natural law theory is 'a theory of law that insists that one determine what law is, not just by a factual inquiry into the conventions that have been accepted, but also by reference to minimum standards of morality'.

34 See T Aquinas *Selected philosophical writings* (1993) 413, arguing that '[a]ctions are certainly individual, but those individual actions have a relationship to the general good'.

35 Aquinas (n 30 above) 413.

36 This position is supported by Lon Fuller. See, L Fuller *The morality of law* (1969) 5 - 6.

37 LA Dimatteo 'The history of natural law theory: Transforming embedded influences into a Fuller understanding of modern contract law' (1999) 60 *University of Pittsburgh Law Review* 839 848.

38 For a discussion, see J Rawls *A theory of justice* (1971) 11 - 18, 114 - 117.

39 See R Dworkin *Taking rights seriously* (1977), giving examples to illustrate how natural law principles aim at the fairness of the outcome.

40 See, for example, LL Wenreb *Natural law and justice* (1987) 1 - 2, discussing the connections between nature, law, and morality in classical natural law theory.

Christian legal tradition, such as St Augustine and St Aquinas, the arbiter of this moral law was to be the ecclesiastical authority.[41] To some, like Fuller and Finnis, the decision is to be made by skilful practitioners, basing their analysis on the facts of each instance of law-making.[42] To others, like John Locke, natural law is the 'decree of the divine will' rather than a mere 'dictate of reason' and can, therefore, only be revealed to a select few by God.[43] However, the dominant position within the natural law tradition appears to be that moral truths are to be derived from truths about human nature as viewed by the whole society (failing which, by the majority in the society).[44] The basis of this position is that since natural law is discoverable from the universe through human reason, and since all human beings are endowed with reason, it should only follow that these laws of nature are universal and discoverable to all human beings in whatever station of life they may be.[45] Thus, according to the dominant view, what is moral, or what is good, is what the people say it is, and since it is based on human nature, what is moral in New York, should be moral in Paris, Beijing, Sydney or Lagos.[46] Jean-Jacques Rousseau pointed out this universality of morality when he said:

> Thus there is, at the bottom of *all souls*, an innate principle of justice and of moral *truth* (which is) *prior* to *all national prejudices*, to *all maxims of education*. This principle is the involuntary rule by which, despite *our own maxims*, we judge our actions, and those of others, as good or bad; and it is to this principle that I give the name conscience.[47]

This natural-law school view of corruption as a breach of the general human good (as determined by public opinion) can be equated to what some authors have called 'public interest' or 'public opinion' criteria for

41 See JH Berman 'The religious foundations of western law' (1975) 24 *Catholic University Law Review* 490 498, pointing out that '[t]here was also a claim of moral superiority by the ecclesiastical authority, coupled with demands for changes in the secular law to conform to moral standards set by the clergy'. See also WW Bassett 'Canon law and the common law' (1978) 29 *Hastings Law Journal* 1383 1407, pointing out that '[b]y the middle of the fourteenth century the principles and the theories of the canonists virtually permeated society'.

42 See, for example, J Finnis *Natural law and natural rights* (1980) 33 - 36, responding to the 'is/ought' challenge.

43 See J Locke *Essays on the law of nature* (1958) 474 - 475, defining divine law as law that 'which God has set to the actions of men, and whether promulgated to them by the light of nature, or the voice of revelation'.

44 See RP George *In defence of natural law* (1999), summarising the dispute. See also J Locke *Two treatise of government* (1967) second treatise, sec 98, arguing, though in a political context, that unanimous consent is 'next impossible ever to be had' and that the only alternative is majoritarianism.

45 See, for example, YR Simon *The tradition of natural law: A philosopher's reflection* (1965) 41 - 66; Wenreb (n 40 above) 1 - 2, discussing the connections between nature, law and morality in classical natural law theory.

46 But see OW Holmes 'Natural law' (1919) 32 *Harvard Law Review* 40, arguing that one's reason is often tampered by one's earlier environment and experience, which is not uniform.

47 JJ Rousseau 'Lettres morales' in *JJ Rousseau Ouvres completes de Jean-Jacques Rousseau* vol 4 (1969) 1111 (emphasis added).

corrupt conduct.[48] The 'public interest' school views corruption as a violation of public interest.[49] The 'public opinion' school, on the other hand, tries to define corruption according to how people in a nation view it. According to this school, an act is said to be corrupt when the weight of public opinion perceives it so.[50] Thus, a natural-law theory perspective, in a way, combines these two perspectives in its approach to the conception of corruption.

One advantage of the natural-law perspective is that, because it is based on universal moral principles, it can be used as an acceptable framework for a cross-cultural study or analysis of corruption.[51] The second advantage is that since it represents the general understanding of corruption by the citizens in a country, it can provide a basis for effective anti-corruption strategy. This is because it is easier to enlist and foster public support in the fight against corruption when citizen values correspond to the statutory definition of corruption. Citizens are also more likely to police themselves when faced with compromising situations since the conception of corruption would be in line with their own internal beliefs. At the global level, such a universalistic approach to corruption provides a standardised and acceptable frame for engendering a global action against corruption.

Still, the natural-law theory approach is not without limitations. One major limitation is that a concept as broad as 'morality' or 'public good' upon which behaviour is to be based, while it might be innate in human nature, is not an easy concept to identify.[52] It is inevitably broad and ambiguous, and will rarely give one answer that everyone accepts.[53] A second challenge is that it is usually difficult to demarcate the boundary

48 Scott (n 21 above) 3.

49 A classic example of a public interest definition available in literature is that of Carl Friedrich, quoted in AJ Heidenheimer et al (eds) *Political corruption: A handbook* (1989) 10; and in M Philip 'Defining political corruption' (1997) XLV *Political Studies* 436 440, where he observes that:

> 'The pattern of corruption can be said to exist whenever a power holder who is charged with doing certain things i.e., who is a responsible functionary or officeholder, is by monetary or other rewards not legally provided for, induced to take actions which favour whoever provides the rewards and thereby *does damage to the public and its interest*' (emphasis added).

50 For a discussion, see Jackson (n 24 above) 54 - 67.

51 But see ML Liiv *The causes of administrative corruption: Hypothesis for Central and Eastern Europe* (2004) 9, arguing that '[t]he weakness of the moralistic approach derives from negative connotations – wrong judgments and cultural relativism that may accompany international comparisons'.

52 See, for example, S Anderson 'Corruption in Sweden: Exploring danger zones and change' (2004) 28 http://www.diva-portal.org/smash/get/diva2:142008/FULLTEXT01.pdf (accessed 20 October 2012), who claims that according to the public interest-centred definitions, illegal actions can be justified if they promote the common interest.

53 See, for example, R Williams *Political corruption in Africa* (1987) 11, pointing out the difficulty and arguing that corruption, like 'obscenity is more readily condemned than defined or explained'.

between the opinion of public and that of the political elite.[54] What is taken to be public opinion in many societies is oftentimes the opinion of the elites.[55] It is also not guaranteed that all citizens in a country have the capacity to reason and identify governing ethical norms.[56] And even if they all do, one's reason, as noted by Oliver W Holmes, is often tampered by one's earlier environment and experience, which is often not uniform.[57] Furthermore, research carried out on public opinions shows that attitudes and beliefs are not static and can and do change with time.[58] This possibility of fluctuation in opinion with time and environment raises doubt about the immutability and universality of morality as espoused by the naturalists.

2.3 The subjective moral criterion

To overcome the challenge occasioned by the possibility of fluctuation in opinion about the required standard of behaviour, one way would be to view corrupt conduct from a relativist perspective. The relative moral criterion is usually attributed to the historical law school of thought. The historical law theory sprung up as a response to the inability of the natural law theory to accept the relativity of morals and as an attempt to recognise customary law that had been left out by the positivists.[59] The theory advocates for a relativist approach to the conception of law, arguing that the ultimate source of law is the character, the culture, and the historical traditions of a society.[60] It holds that law is determined by the 'custom' and 'popular belief' of a specific people and not by 'the arbitrary will of the

54 See Heidenheimer (n 49 above). In his view the corruptness of political acts is determined by the interaction between the judgment of a particular act by the public and by political elites or public officials. He points to the existence of a scale or dimension of corruption that can be used to classify political behaviours according to their degree of corruptness from 'black' to 'gray' to 'white.'

55 See, for example, M Johnston *Political corruption and public policy in America* (1982) 7, pointing out that there are, after all, many publics and they rarely agree on anything of importance.

56 See, for example, J Locke 'The reasonableness of Christianity' in J Locke *The works of John Locke* vol 7 (1824) 140 142, arguing that 'human reason unassisted' can 'fail men in its great and proper business of morality'.

57 See Holmes (n 46 above) 41. He concludes that the 'jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbours as something that must be accepted by all men everywhere'.

58 See H Erskine 'Polls: corruption in government' (1973) 37 *Public Opinion Quarterly* 1.

59 The historical school of thought, just like its characteristic, was founded in response to a historical event – the 1814 drafting of a code of laws for the states that made up the German confederation (before Germany was established as a unified state). It is usually traced back to the writings of the German jurist, Friedrich Karl von Savigny who opposed the idea of such a cross-cutting code of laws, which did not take into account the historical peculiarities of the individual states making up the German confederation. See FV Savigny *Of the vocation of our age for legislation and jurisprudence* (1831). See also A Bickel *The morality of consent* (1975).

60 For an exposition and critique of the historical school of jurisprudence, see J Stone *The province and function of law: Law as logic, justice, and social control: A study in jurisprudence* (1950) 419 - 448.

legislature'.[61] Unlike the positive school, the historical law school concentrates more on the rules of customary law than the rules of statutory law. In addition, unlike the natural school, it is more concerned with those specific moral principles that correspond to the social life, the beliefs and the values of a given people or a given community rather than with universal moral principles. Thus to the historicists, the criteria for determining the standard of behaviour is the popular belief and custom of the society in which the law is to apply.[62]

Understood in this sense, therefore, from the historical law perspective, corruption may be viewed as a concept in comparative, historical research. This definition says: if an act is harmful to the good of a specific society, it is corrupt even if it is legal in the eye of another group of people; if it is beneficial to a people of a particular society, it is not corrupt even if it violates the good of another society or another generation within the same society.[63] In other words, from a historicist's perspective, corruption should be viewed as a relative concept and not as a universal one. In this regard, Michael Johnston has aptly pointed out that:

> We never will devise a definition of corruption as a category of behaviour that will travel well to all such places or times – or even, realistically, to most of them. Moreover, such approaches will often tell us little about the development or significance of corruption in real societies. I propose that in such instances we study, not a category of behaviour, but rather the issue or idea of corruption, and the social and political processes through which it acquires its meaning and significance. I regard corruption as a 'politically contested concept', and suggest that comparative analysis can fruitfully focus upon what I call role-defining conflicts.[64]

The need for a relativist approach to conceptualisation of corruption springs from a number of considerations. First, it is the recognition that the social, political and economic structures of countries differ. For example, some of the tasks that are performed by government officials in countries with socialist systems are performed by private individuals in the private sector of the capitalist societies, and in these two situations different

61 Law, wrote Savigny, 'is developed first by custom and by popular belief, then by juristic activity ?everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of a legislator'. Savigny (n 59 above) 30.

62 HJ Bermant 'Toward an integrative jurisprudence: Politics, morality, history' (1998) 76 *California Law Review* 779 788 - 794. See also OW Holmes *The common law* (1963) 1, pointing out that 'the life of the law has not been logic: it has been experience'.

63 An example of definition that fits this bill is that proposed by A Sajo 'From corruption to extortion: Conceptualization of post-communist corruption' (2003) 40 *Crime, law and social change* 171 176, noting that '[w]hile a concept of corruption may serve goals of intellectual clarity and categorisation, 'real corruption' is a *social construct* that results from official definitions … and anti-corruption practices'.

64 M Johnston 'Comparing corruption: Conflicts, standards and development' Paper presented at the XVI World Congress of the International Political Science Association, Berlin, 1994 http://www.nobribes.org/Documents/ipsaconf.doc (accessed 20 December 2012).

standards apply.[65] Second, it is the understanding that the attitude of a people to corruption is often influenced by their historical experience.[66] For instance, in former colonies where the European legal system was superimposed on the traditional system, the prevalent attitude is that practices that were customary in the traditional set up only became corrupt when colonial values were introduced.[67] Third, there is difference in opinion about what the scope of corruption should be. There are countries that believe that corruption should be limited to bribery, while others believe that the concept should be broadened to cover other acts such as embezzlement, fraud, favouritism, election dishonesty and bid rigging.[68] And even amongst those who accept that corruption should cover bribery, there are some who believe that customarily recognised acts such as 'gift giving' or 'grease payments' should be left out of the definition.[69]

Yet, despite its apparent usefulness in identifying the type of activities understood as immoral in a particular polity, the use of local norms and judgments as a basis for discussing moral concepts such as corruption poses a number of related problems. First, by endorsing conceptual relativism, the theory creates an obstacle to any attempt at cross-cultural analysis of moral concepts. Second, by limiting the discussion of moral concepts to time-bound sensitivities of individual polities, it impinges upon a search for a universal and immutable sense of morality and by extension corruption. Third, the idea of relative national ideals and community values, if unchecked, can be hijacked by crafty individuals to justify political arbitrariness or moral depravity. For example, in the context of Africa, it is sometimes said that the use of public position to assist members of one's family or next of kin is a valid expression of the extended family system that has existed in many African communities. Or that bribery is a harmless way of showing gratitude for deeds done, a practice that had

65 James Scott, for example, notes that a nation where almost everyone is a government employee can't easily be compared with one where most people work for private corporations. Scott (n 21 above) 5.

66 Ronald Wraith and Edgar Simpkins, for instance, point out that 'an act is presumably only corrupt if society condemns it as such, and if the doer is afflicted with a sense of guilt when he does it: *neither of these apply to a great deal of African nepotism*' (emphasis added). R Wraith & E Simpkins *Corruption in developing countries* (1963) 35.

67 As a senior official of a Pacific nation said at the Third International Anti-Corruption Conference in Hong Kong, 'we did not have corruption in my nation until the British legal system was brought in: The British introduced us to the concept of corruption!' See Independent Commission against Corruption 'Third International Anti-Corruption Conference' Hong Kong, 1987.

68 Compare the definition of corruption in South Africa's Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA) and Kenya's Anti-Corruption and Economic Crimes Act of 2003.

69 See, for example, the US Foreign Corrupt Practices Act of 1977, secs 78dd-1(b), 78dd-2(b) (exempting the payment of grease money from the ambit of foreign bribery).

existed in many African societies since time immemorial.[70] However, as the Economic Commission for Africa rightly points out, these explanations are but mere justifications of what are evidently corrupt conducts.[71]

2.4 Why legal criterion should be preferred

The three criteria discussed leave us with a set of contradictory descriptions of standard of behaviour and by extension the phenomenon of corruption, all of which, as highlighted, have major disadvantages. The option that remains is either to accept a state of affairs with multiple definitions or to try to pick up the strengths of each approach and cobble up a hybrid definition. The first option will leave us with different approaches in uneasy competition. For instance, historical law approaches, which rely on ascertaining locally what is perceived to be good or moral, will have the disadvantage of being relativistic, different in time and from society to society. Natural-law approaches that define concepts according to universal moral principles will meet the criticism of being culturally insensitive and of imposing a particular moral understanding of behaviour on the world.[72] On the other hand, in an increasingly globalising world, it is only a well-defined objective criterion of behaviour that can permit international comparisons and engender globalised action against harmful behaviour such as corruption.

Given these irreconcilable differences, the alternative approach would be to integrate the three classical schools of thought into a common functional focus.[73] This approach is not new and has been advocated by the integrative law theorists. The integrative law theory, which is usually traced to Jerome Hall,[74] is based on the understanding that each of the competing schools of law has identified some useful dimension of law, which would be lost if only one of the schools is used as a source of

70 For a discussion of the African perspective, see, for example, JPO de Sardan 'A moral economy of corruption in Africa?' (1999) 37 *Journal of Modern African Studies* 25; C Akani (ed) *Corruption in Nigeria: The Niger Delta experience* (2002); A Nwankwo 'Political economy of corruption in Nigeria' in C Akani (ed) *Corruption in Nigeria: The Niger Delta experience* (2002) 9; E Ekekwe *Class and state in Nigeria* (1986); T Falola & J Ihonvbere (eds) *Nigeria and the international capitalist system* (1988).

71 Economic Commission for Africa 'Assessing the efficiency and impact of national anti-corruption institutions in Africa' (2010), where it points out that a 'problem with cultural explanations for corruption is that they easily become justifications'.

72 For example, when examining why, according to British standards, colonial Burma was so 'corrupt' JS Furnivall concluded that in many cases the Burmese were simply following their customary norms of correct conduct. JS Furnivall *Colonial policy and practice: A comparative study of Burma and Netherlands India* (1948).

73 But see Kurer (n 12 above) 227, pointing out that 'far from hampering the research effort, the lack of a unified definition has positively stimulated it'.

74 The theory was first espoused by Hall in his 1947 article. See, J Hall 'Integrative jurisprudence' in P Sayre (ed) *Interpretations of modern legal philosophies: Essays in honour of Roscoe Pound* (1947) 313. He called this legal philosophy that combines the three classical schools (legal positivism, natural-law theory, and the historical school) integrative jurisprudence.

reference.[75] It thus advocates for the mutual reinforcement of the three schools of jurisprudence while recognising their separate individual importance.[76] It provides that for this mutual reinforcement to be made possible, a broader definition in law than that which is usually adopted by each of the schools and which captures the particular virtues of each school must be given.[77] A definition of corruption based on this approach would thus have to embrace the virtues of all the three legal schools of thought for it to meet the criteria of the integrationists. Such a definition would most probably capture the aspect of formal duties and norms from the positivist perspective and the violation of public good as viewed by both the naturalists and historicists.[78]

The chapter agrees with the integrationists that each of the three substantive legal schools of thoughts has isolated some important perspective of law that would be lost if one aligns itself exclusively with any one of the schools. It, however, contends that if lawmakers are truly representative of the people, then their conception of corruption as enacted in statutes would most probably also be in tandem with the predominant opinion of members of the society which they spring from.[79] As jurist Dicey correctly pointed out, a representative legislature, to ensure its own political survival, would not ordinarily legislate against the wishes of the people or against 'the sentiment prevailing among the distinct majority of the citizens of a given country'.[80] In other words, one can safely argue that a positivist approach to corruption does not really contradict a historicist or a naturalist understanding of corruption. Indeed, legal definitions in most, if not all countries, also usually contribute to the public good and breaking them is condemned by the public.[81] Thus, an act declared illegal by the formal laws would most probably also be immoral in the sense of

75 J Hall *Foundations of jurisprudence* (1973) chap 6; J Hall *Studies in jurisprudence and criminal theory* (1958) 37 - 47; J Hall 'From legal theory to integrative jurisprudence' (1964) 33 *University of Cincinnati Law Review* 153. See also E Bodenheimer 'Seventy-five years of evolution in legal philosophy' (1978) 23 *American Journal of Jurisprudence* 181 204 - 205 (writing of 'The Need for an Integrative Jurisprudence' and citing Jerome Hall).

76 See Bermant (n 62 above) 80.

77 See Hall *Foundation of jurisprudence* (n 75 above) 313, combining positivism and natural-law theory with sociological jurisprudence and defining law as a type of social action, a process in which rules and values and facts coalesce and are actualised.

78 See Bermant (n 62 above) 787.

79 See K Adrian 'Democracy and despotism: Bipolarism renewed? (the comparative survey of freedom: 1996)' (1996) 1 *Freedom Review* 27, noting that growing democratisation has meant the emergence of vibrant civil society and free press with the power to hold leaders accountable.

80 AV Dicey *Lecture on the relation between law and public opinion in England during the nineteenth century* (1905) 55 quoted in PP Craig 'Dicey: Unitary, self-correcting democracy and public law' (1990) 106 *Law Quarterly Review* 105 111.

81 See, for example, M Jackson 'The political consequences of corruption: a reassessment' (1986) 18 *Comparative Politics* 459 460, arguing that:

> 'A more stable and precise standard is the law or formal regulations. Laws change, but, unless we seek a single ultimate standard, this is an advantage, not a problem: contrasts or changes in laws allow us to compare the political processes and value conflicts involved in setting rules of behaviour'.

being injurious to public good/morality as understood by both the naturalists and historicists.

On the other hand, not all immoral acts usually find themselves into formal laws. There are many conducts, which, though considered immoral by popular belief or opinion, fail to meet the threshold of illegality and are, therefore, excluded from the province of law.[82] This could be because they are private and harmless to the common good or because their potential harm to the common good is considered to be at a tolerable level not warranting intervention of the law.[83] The latter acts of immorality that do not meet the threshold of illegality, it is contended, should not be included in the definition of corruption. The reason for this limitation as aptly explained by Thomas Hobbes is that:

> The desires and other passions of men are in themselves no sin. No more are the actions that proceed from those passions, *till they know a law that forbids them; which till laws be made they cannot know; nor can any law be made, till they (society) have agreed upon the person (sovereign) that shall make it*.[84]

Thus, to the extent that an immoral act is made corrupt by formal law, it should be recognised in a corruption definition. But to the extent that an immoral act does not meet the threshold of illegality, it should be excluded from the ambit of a corruption definition. It is in this light that the argument for the limitation of the concept of corruption to illegal and not merely immoral act is to be understood.

82 This point was ably demonstrated by Lord Devlin and Jurist Hart in their debate on the Wolfenden Committee's Report on homosexuality and prostitution (JPK Lovibond 'The report of the Departmental Committee on Homosexual Offences and Prostitution' (1957) 2 *British Medical Journal* 639). See generally P Devlin *The enforcement of morals* (1959), providing the guideline for the relationship of law and morality as: first, privacy should be respected; second, law should only intervene when society won't tolerate certain behaviour; third, law should be a minimum standard not a maximum standard; HLA Hart *Law, liberty and morality* (1963), while disagreeing with Devlin on the standard for determining morality, he argues that the standard should be 'best' not 'popular' opinion, however, similarly holds that law should not apply in all aspects of social life. See also G Dworkin 'Lord Devlin and the enforcement of morals' (1966) 75 *Yale Law Journal* 986, introducing the concept of liberty into the debate and arguing that if a behaviour is a basic liberty (such as sex) this should not be illegalised unless they cause harm to the public.

83 See the guidelines provided by Devlin in Devlin (n 82 above). See also T Aquinas *Summa Theologica* (Fathers of the English Dominican Province translation 1947) Q 96 Art 2 Obj 3 holding that:

> 'human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained.'

84 W Molesworth (ed) *The English works of Thomas Hobbes of Malmesbury* (1839 - 1845) 114 (emphasis added).

3 The illegal corruption

Having identified illegality as the standard for identifying corrupt conduct, the second question that arises is: which illegal acts are corrupt or put another way, which corrupt acts ought to be illegal. To answer the first form of the question would require one to take a positivist's review of the law to find out what the legal definition of corruption actually is. On the other hand, to answer the second form of the question would require one to engage in a naturalist's (universalist) or a historicist's (relativist) inquiry into the popular moral opinion or belief of what a legal definition of corruption ought to be. However, if one is to take the position, as this chapter does, that the lawmaker's will, as expressed in the formal laws, is usually not in conflict with the prevailing moral position in the society, then an inquiry into the legal definition provided in the formal laws would in most cases be enough to answer both the 'is' and the 'ought' in the two forms of the question. Indeed as the Kenyan Constitutional Court aptly noted in the case of *Republic v The Kenya National Commission on Human Rights Ex-parte William Ruto,*[85] legislatures and courts 'do not operate in a (social) vacuum' nor do they 'close their eyes and ears to what is happening in the society'; instead they 'always try to give life to the aspirations of the societies in which they live in'.[86]

Thus one can safely argue that definitional provisions in national formal laws are also representative of the prevailing moral position of the time. However, this assumption must also take into account the fact that there are political systems which are corrupt in that they serve the interests of special groups or sectors and not that of the public.[87] As a caution, therefore, in addition to reviewing national formal laws it is also important to review the prevailing popular opinion as expressed in research findings and in regional and international instruments to confirm whether the definition as 'is' complies with the definition as 'ought' to be.

An examination of the anti-corruption law in Kenya (The Anti-Corruption and Economic Crimes Act of 2003 of Kenya (ACECA)) reveals that there is no one-line definition of corruption. Instead the Act identifies the various manifestations of corruption and attempts to delineate their elements that make them offensive. The identified forms of corruption include bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust, and an offence involving dishonesty in connection with any tax, rate or impost levied under any Act

85 *Republic v The Kenya National Commission on Human Rights Ex-parte William Ruto* [2012] eKLR.

86 *William Ruto* (n 85 above) 10.

87 See I Currie & J de Waal *The Bill of Rights handbook* (5 ed, 2005) 3, giving the example of the racial South African Parliament, which under the 1909 Union Constitution 'could write and rewrite the law, alter the basic structure of the state and invade human rights without constraints'.

or even electoral offences.[88] The emerging thread from the definitions of these forms of corruption, however, is that they involve some form of misuse of authority or resources entrusted by the public for private gain. For example, section 39 describes bribery as occurring when one party gives to or receives from another party anything of value with the purpose of influencing them to abuse their power.[89] Similarly section 40 to 47 define the other offences of corruption as including the fraudulent/ unlawful acquisition, mortgage, charge or disposal of public property; failure to pay taxes, fees, levies and charges; fraudulent payments out of public revenue; breach of financial or procurement procedures and engaging in unplanned public projects.[90]

Indeed, while there is a difference in emphasis on the forms of corruption under ACECA, the common thread is that these forms involve the abuse of authority, office or resources entrusted by the public for private benefit. This understanding of the illegal corruption as abuse of public entrusted authority or resources for private benefit in ACECA mirrors its conception in other national anti-corruption laws and international and regional conventions. For example, the South African Prevention and Combating of Corrupt Activities Act of 2004, while singling out the bribery form of corruption, nevertheless defines it as occurring when one party gives to or receives from another party anything of value with the purpose of influencing them to abuse their power.[91] Similarly, the United States (US) Foreign Corrupt Practices Act of 1977 (FCPA), which is touted as the progenitor of the international legal understanding of corruption,[92] though focusing on the corrupt practice of foreign bribery, defines it as the 'paying, offering to pay, or promising to pay foreign government officials to influence any official act, induce officials to act or fail to act in violation of their lawful duty, or induce officials to use their influence with government to obtain business'.[93]

The United Nations Convention against Corruption (UNCAC), which is the global instrument against corruption, also conceptualises corruption broadly as including bribery, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment, concealment of illicit wealth and

88 ACECA, s 2.
89 ACECA, s 39
90 ACECA, s 39 - 47.
91 Prevention and Combating of Corrupt Activities Act 2004 (PCCAA), s 3.
92 Professor Peter Schroth, for example, notes that 'any discussion of international measures against corruption and bribery must begin with the United States.' PW Schroth 'National and international constitutional law aspects of African treaties and laws against corruption' (2003) 13 *Transnational Law & Contemporary Problems* 83 87.
93 FCPA, 78dd-l(a), 78dd-2(a) & 78dd-3(a). See also PA Glenn & JP Sanford 'The Foreign Corrupt Practices Act revisited: Attempting to regulate ethical bribes in global business' (1994) 30(2) *International Journal of Purchasing and Materials Management* 15, 15 - 20

obstruction of justice.[94] The definition holds to account both public and private sector actors and applies in both domestic and foreign context.[95] In this regard, it criminalises the bribery of not just foreign public officials, but also of national public officials and officials of public international organisations.[96]

Similarly, the African Union Convention on Preventing and Combating Corruption, which is the regional anti-corruption instrument for the African continent, conceptualises corruption broadly to cover active and passive bribery; influence peddling; illicit enrichment; diversion of public property for private use; concealment of proceeds derived from corrupt acts; and conspiracy to commit corruption.[97] Likewise, the Inter-American Convention against Corruption requires states parties to criminalise: solicitation, acceptance, offer, or delivery of improper payments; the illicit use of a position of public entrusted authority for the official's own benefit; the fraudulent use or concealment of property derived from that position of authority; and participation in any of these acts as accomplice, collaborator or conspirator.[98] The same conception of corruption as abuse of public entrusted authority is also evident in both the Criminal and Civil Conventions on Corruption of the Council of Europe[99] and the European Union's Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States.[100]

This illegal thread of corruption as abuse of public entrusted authority for private benefit is also evident in the writing of many scholars and in the opinion of practitioners in the field of corruption. For example, in his research amongst elites in emerging economies, Daniel Kaufman found empirical support for relying on this definition as a workable definition for corruption.[101] Similarly, in her literature review for the Asian Foundation, Amanda Morgan found many recent academic studies and international organisations opting for this definition in their analysis of corruption.[102]

94 UNCAC chap III.
95 UNCAC, arts 21 & 22.
96 UNCAC, arts 15 & 16.
97 AU Convention, art 4.
98 OAS Convention, art VI & VII.
99 See COE Criminal Convention arts 5, 6, 9, 11, 12 & 13, criminalising a list of specific forms of corruption, the majority of which are limited to active and passive bribery. Trading in influence and laundering the proceeds of crime are also covered, but extortion, embezzlement, insider trading and nepotism are not. Apart from domestic corruption, the Convention also deals with a range of transnational cases such as bribery of foreign public officials and members of foreign public assemblies. See also COE Civil Convention, art 2 (defining corruption as 'requesting, offering, giving or accepting directly or indirectly a bribe or any other undue advantage or the prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof').
100 EU Corruption Convention, art 2.
101 D Kaufmann *Perceptions about corruption among elites in emerging economies* (1997).
102 See AL Morgan *Corruption: Causes, consequences, and policy implications: A literature review* (1998) 9 - 10.

The World Bank too has carried a review of anti-corruption literature and found a preponderant conception of corruption as abuse of public entrusted authority for private gain.[103]

It is contended that this understanding of corruption as the abuse of authority, office or resources entrusted by the public for private benefit is broad and open ended enough to cover the limitless manifestations of corruption such as bribery, embezzlement, favouritism, bid rigging and fraud. The definition is also tenably integrative of the legal and moral criterion of behaviour as it embraces the aspect of formal duties and norms from the positivist perspective through the concept of public trust. In addition, it incorporates the aspect of violation of the public good as viewed by both the naturalists and historicists through the concept of abuse of public entrusted authority. Further, the definition embraces the essential conflict between public good and private interest in corruption as viewed by both the naturalists and historicists through the economic concept of private gain.[104] In this way, corruption becomes a multidimensional concept that has legal, social, political, economic and ethical connotations.[105] The definition can, thus, be said to capture the multifaceted nature of corruption and is advocated for corruption analysis purposes.[106]

3.1 Meaning of public entrusted authority

Conception of corruption as abuse of public entrusted authority for private benefit, though predominant, is, however, not universally supported. A major criticism that is usually levelled against a conception of corruption as abuse of public authority, office or resources for private gain is that it

103 World Bank *Helping countries combat corruption: The role of the World Bank* (1997). The World Bank, for example, defines corruption as 'the abuse of public office for private gain'. The African Development Bank, on the other hand, sees corruption as encompassing not only abuse of public office but also of private office and defines it as 'the abuse of public or private office for personal gain'. See African Development Bank 'Anticorruption policy: Harmonized definition of corrupt and fraudulent practices' http://www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf (accessed 4 February 2010). Transparency International eschews this public-private dichotomy and simply defines it as 'the abuse of entrusted power for personal gain'. Transparency International *Global corruption report* (2003). See also S Rose-Ackerman 'The political economy of corruption' in KA Elliot (ed) *Corruption and the global economy* (1997) 31 31, pointing out that corruption also occurs where public officials have a direct responsibility for the provision of a public service or application of specific regulations to the private sector.

104 Private gain here is viewed broadly as including gain to family members, close friends or close associates. The gain also need not be monetary in nature. It could include expensive gifts like jewellery to wife, training in exclusive sites and promotions.

105 Brinkerhoff, for example, sees corruption as 'subsuming a wide variety of illegal, illicit, irregular, and/or unprincipled activities and behaviours'. DW Brinkerhoff 'Assessing political will for anti-corruption efforts: An analytic framework' (2000) 20 *Public Administration and Development* 239 241.

106 On the complexity of corruption, see generally MK Khan 'A typology of corrupt transactions in developing countries' (1996) 27 *Institute of Development Studies Bulletin* 12.

leaves out private corruption, particularly corruption in the private sector. The argument goes that by restricting corruption to abuse of 'public office' or 'public authority' or 'public resources,' the definition ignores corruption that takes place in the private sector.[107]

Such criticism can, however, only be valid if by 'public' is meant 'government' so that the definition turns into abuse of 'government office' or 'government authority' or 'government resources'. Otherwise, if by 'public office', 'public authority' or 'public resources' is meant an office, authority or resources entrusted by the public then the criticism loses its sting. This is because most, if not all, of the offices, authority or resources in the private sector are also entrusted by the public or a section of the public and, therefore, their abuse falls within this broad definition of corruption.[108]

What the definition does not cover, and rightly so, is the abuse of private authority, which private individuals entrust to themselves, such as the case where a sole proprietor misuses the funds of his business for personal benefit. In this case, while there is abuse leading to loss of fund, there would be no wrongdoing warranting legal sanction because the capital was the sole proprietor's to begin with. The case would be different if the person, for private benefit, abuses the authority or resources formally entrusted to him or her by another person, a group of people, family members, customers, creditors, a partnership, a company or an association. In all these latter cases the public, or more accurately, a section of the public, is involved and going by the functional definition of corruption the person, even though a sole proprietor, would have abused authority or resources entrusted by the public for private benefit. The public here must, therefore, be construed broadly to include the whole public or a section of it.

This broad understanding of the 'public office/authority/resources' is necessary for three related reasons. Firstly, in many countries the private sector is increasingly overgrowing the government sector in size.[109] Secondly, the line between the government and private sectors is being

107 S Rose-Ackerman *Corruption and government: Causes, consequences, and reform* (1999) 187 - 188.

108 The private sector is made up of sole proprietorships, partnerships, companies, or associations whose shareholders are members of the public. Therefore people working in these private institutions are acting under entrusted authority by a section of the public. Any abuse of such authority would, tenably, fall within the definition of corruption.

109 See, for example, D MacGregor 'Jobs in the public and private sectors: Presenting data (updated to June 2000) on jobs in the public and private sectors' (2001) *Economic Trends, Working Paper No 571* http://www.statistics.gov.uk/cci/article.asp?id=88 (accessed 1 November 2011), pointing out that in the UK, 82 per cent of all workforce jobs were in the private sector in 2000; Y Yao 'The size of China's private sector' (1999) *China Update* 1 2, pointing out to an increasing influence of the private sector in China – for example the private sector accounted for 34,3 per cent of national industrial output by 1997, compared to 2 per cent in 1985.

blurred by privatisation of government functions, outsourcing, and public listing of private companies in the share market.[110] Third, the huge economic muscle of multinational corporations and the consequent impact they are having on the lives of members of the public means that they cannot be excluded from an international anticorruption strategy.[111] Another unrelated but equally important reason is that with the increasing devolution of government functions to local levels, government offices are increasingly affecting only a section of the public. This latter reality further justifies the need to broaden the definition of public office so as to capture offices formed by or affecting only a section of the public. Thus, viewed from this broad perspective, an office or authority that has been created by the public or a section of it, be it in the public or private sector, would fall within the definition of public office/authority and if a person entrusted with that office/authority abuses its functions for private benefit such abuse would amount to corruption.

3.2 The nature of abuse

The kinds of abuse that would amount to corruption, as seen from the discussed legal instruments, are varied and, therefore, difficult to circumscribe, and it is argued that they should not be. One common denominator of these forms of abuse, however, is that they involve the use of public entrusted authority for the purpose for which it was not intended. This common denominator derives from the ordinary dictionary meaning of abuse, which is, misuse or use for an unintended purpose.[112] Thus, abuse of public entrusted authority would entail the use of authority for the purpose for which it was not intended. This abuse can take many forms, including demanding bribes before offering an otherwise free public service, embezzlement, diverting public resources for personal use, nepotism or cronyism in recruitment to public offices, acting for one's own benefit in carrying out official functions, fraudulent dealings, or taking advantage of information that one only has access to as a public official. The World Bank, for example, has taken 'abuse of public office for private

110 Privatisation, apart from transferring public-oriented services to the private sector, also creates opportunities for corruption during the process of transfer and after. See P Heywood 'Political corruption: Problems and perspectives' (1997) 45 *Political Studies* 417 429, arguing that due to economic liberalisation and new political management reforms, the borderline between private and public spheres have blurred. See also Transparency International Press Release 'TI calls for the UN Anti-Corruption Convention to deter bribery of corporate officials and criminalize private sector corruption' 11 March 2003 http://www.transparency.org/pressreleases_archive/2003/2003.03.11.un_convention.html (accessed 1 January 2012).

111 On the economic muscle of multinational corporations, see United Nations Conference on Trade and Development *World investment report 2002* (2002) 90 http://r0.unctad.org/wir/pdfs/fullWIR02/pp85-114.pdf (accessed 30 October 2011).

112 See Oxford dictionaries http://oxforddictionaries.com/definition/english/abuse (accessed 3 September 2011) defining abuse as 'use (something) to bad effect or for a bad purpose; misuse'.

gain' as its minimal working definition and dissected it by identifying specific abuses:

> Public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues.[113]

The abuse is, however, not limited to those initiated by the holder of public office/authority but also include those initiated by private individuals. So that it also amounts to corruption if private individuals offer bribes to influence decisions of officials entrusted with public authority/office in their favour so as to, for example, pay lower taxes, win a contract, get employed or promoted, get something done quickly, or avoid a fine or penalty. As the World Bank rightly notes, public office 'is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit'.[114]

3.3 The intention of abuse is to benefit private not public interest

It is usually not easy to identify the reasons that motivate people to act in a certain way especially given the conflation and complexity of individual dispositions. Indeed countering corruption would be very easy if the motivations were easily identifiable and uncontroversial. As Espejo et al observe, it then 'would be enough to carry out structural diagnosis, detect inadequate relations and banish corruption'.[115] But such a task is not easy as one has to take into account a great diversity in human motivation and modes of action and move beyond approaches that embrace a 'single behavioural logic'.[116] Furthermore, one has to contend with the 'situational imperatives' and the 'social processes' that shape a person's inclination.[117] Still, despite this seemingly insurmountable challenge, the search for behavioural motivations has remained a perennial endeavour preoccupying the thoughts of scholars for many years.[118]

113 World Bank *Helping countries combat corruption: The role of the World Bank* (1997) 8 - 9.
114 World Bank (n 113 above) 8.
115 R Espejo et al 'Auditing as the dissolution of corruption' (2001) 14 *Systemic Practice and Action Research* 139 144.
116 JP Olsen 'Citizens, public administration and the search for theoretical foundations' (2004) 37 *Political Science & Politics* 69 75.
117 JQ Wilson *Bureaucracy: What government agencies do and why they do it* (1989) 34.
118 See for example, PE Crewson 'Public service motivation: Building empirical evidence of incidence and effect' (1997) 7 *Journal of Public Administration Research and Theory* 499; DD Wittmer 'Serving the people or serving for pay: Reward preferences among government, hybrid sector, and business managers' (1991) 14 *Public Productivity and Management Review* 369.

Within the context of corruption, it is generally recognised that corruption is not a crime of passion, or an accidental happenstance, but a crime of calculated gain.[119] This calculation involves a conscious or sub-conscious weighing of the expected benefits of engaging in corruption and the expected costs in the form of the consequences of being detected.[120] Corruption is predicted to occur if the gain from corruption outweighs the cost of being caught. As Van Klaveren aptly noted:

> A corrupt civil servant regards his public office as a business, the income of which he will seek to maximise. The office then becomes a 'maximising unit'. The size of his income depends upon the market situation and his talents for funding the point of maximal gain on the public's demand curve.[121]

A person, thus, engages in the abuse of public entrusted authority because of the personal gain that he calculates to reap from it.[122] Because of this reason, private gain is generally considered an integral part in the conception of corruption. But should all abuses of public entrusted authority for private gain be regarded as corruption? The answer to this question requires one to appreciate the factors that motivate individuals to resort to corruption as a means of achieving private gain.

Studies reveal that, while the motivational factors for human behaviour are many,[123] those that drive the calculation in corruption can, however, be distilled into two: the internal factor of greed and the external

119 See R Klitgaard et al *Corrupt cities: A practical guide to cure and prevention* (2000) 28, noting that 'Corruption is a crime of calculation, not passion'.

120 R Klitgaard *Tropical gangsters* (1990) 90, where he observes that 'it is reasonable to posit that an official undertakes a corrupt action when in his judgments, its likely benefits outweigh its likely costs'. Compare with the tax evasion model where the same calculations take place. See M Allingham & A Sandmo 'Income tax evasion: A theoretical analysis' (1972) 1 *Journal of Public Economics* 323.

121 See J Van Klaveren 'The concept of corruption' in AJ Heidenheimer (ed) *Political corruption: Readings in comparative analysis* (1978) 26 38 - 40. See also M Qizilbash 'Corruption and human development: A conceptual discussion' (2001) 29 *Oxford Development Studies* 265 267 - 268, noting that the civil servant is 'an income-maximizing monopolist, who uses his monopoly position to exploit the public'. Viewed from a principal-agent perspective, the agent or civil servant is said to be corrupt when he sacrifices the interest of the principal or public to his or her own pecuniary advantage. According to Klitgaard '[t]his approach defines corruption in terms of the divergence between the principal's or public's interests and those of the agent or civil servant: corruption occurs when an agent betrays the principal's interest in pursuit of her (sic) own'. R Klitgaard *Controlling corruption* (1988) 24.

122 See further GS Becker 'Crime and punishment: An economic approach' (1968) 76 *Journal of Political Economy* 169.

123 For example, when asked to rank what is most important to them, 60% of public employees surveyed by Houston chose 'meaningful work,' 18% chose 'chances for promotion,' 12% chose 'job security,' and 11% put 'high income' at the top of their list. DJ Houston 'Public service motivation: A multi-variate test (2000) 10 *Journal of Public Administration Research and Theory* 713.

factor of need.[124] Legal philosophers have similarly identified these two as the main drivers of corrupt conduct. On his account of human psychology, Thomas Hobbes, for example, points out that man's action is motivated by self-preservation. In chapter two of *The Citizen,* he urges that the whole breach of the laws of nature 'consists in the false reasoning or rather folly of those who see not those duties they are necessarily to perform towards others in order to *their own conservation*'.[125] John Locke, on his part, is more nuanced, arguing that man has the capacity for reason and good judgement and that he is always motivated to do what is right.[126] At the same time, he acknowledges man's perennial temptations to take advantage of others and to develop 'disproportionate desires' for worldly goods and power, to the neglect of virtue.[127] Jean-Jacques Rousseau's own view is that humans are motivated by both self-preservation and by natural concern for others, dispositions that can manifest themselves in a variety of ways.[128]

124 For the causes of corruption in Africa, see Economic Commission for Africa (n 71 above) 30 - 32, concluding that '[i]n the end, the most sensible explanations are selfish and without redemption, the desire of the individual to better himself financially or politically at the expense of the commonwealth'. See also V Tanzi *Corruption around the world ? Causes, consequences, scope, and cures* (1998), concluding that '[o]ne can speculate that there may be corruption due to greed and corruption due to need'. Holmes also cites human weakness as another human motivation for corruption. He gives the example of those who, because of human weakness, find it difficult to reject offers from a person of a 'generous' nature or those who accepts gifts because they know they have been particularly helpful to someone (that is, they feel that a reward is not inappropriate), or those who genuinely do not want to offend or embarrass a grateful supplicant. Fear is also mentioned as a motivation for corruption. It is argued that in a hierarchical situation, for example, a subordinate may fear the consequences of not acting in a similar way to his corrupt superior. See L Holmes *The end of communist power: Anti-corruption campaign and legitimation crisis* (1993) 170. However, all these examples given by Holmes point to human weakness and fear as more of a justification for engaging in corruption than a motivation for the same. In any case, these external factors that 'force' people to be weak can safely fall under the need factor.

125 T Hobbes *De Cive (The Citizen)* (1949) 32n (emphasis added). See also L Stephen *Hobbes* (1904) 208 - 209, concluding that Hobbes' real theory is that '[m]en act for their own preservation as stones fall by gravitation'; JW Gough *The social contract: A critical study of its development* (1957) 111, pointing out that the reasons why men obey the sovereign is for self-preservation. He observes that '[T]heir ruling motive is desire for protection – for the preservation of their lives'. But see M Oakeshott *Leviathan* (1957) Lviii–Lxi, pointing out that while selfishness is common in Hobbes, Hobbes is making a more fundamental point not exclusively related to self-preservation.

126 J Locke *Second treatise of government* (1980) 9.

127 Locke (n 126 above) chap 4.

128 For Rousseau, 'the human race would have perished long ago if its preservation had depended only on the reasoning of its members'. In his view, our disposition to do what is good for oneself without harming others is a 'natural sentiment,' and 'it is in this natural sentiment, rather than in subtle arguments, that we must seek the cause of the repugnance every man would feel in doing evil, even independently of the maxims of education'. JJ Rousseau *The social contract* (1786) 108.

Indeed greed, which John Locke calls 'disproportionate desires', has been recognised as a predominant factor in the motivation for corruption.[129] This is because it makes people selfish and insatiably hungry for status and comfort which their lawful income cannot match.[130] Because of greed, people become blind to the misery their corruption causes others and justifies it simply because they gain from it.[131] It makes people trade their personal integrity and virtues in exchange for the trappings of wealth. In the case of public officials, greed comes in to motivate them to abuse their authority, embezzle or misappropriate entrusted public funds, or demand bribes from members of the public so as to finance their 'disproportionate desires' for lavish lifestyles and worldly power.[132] For the private citizens, greed leads them to offer bribes so as to avoid or jump to the front of a bureaucratic queue, or avoid lawful obligation or penalty, or get a benefit that they are otherwise not entitled to.[133] And since greed feeds on itself, the more benefit these people gain, the greedier they become for more. As Hobbes aptly noted:

> So that in the first place, I put for a general inclination of all mankind, a perpetual and restless desire of power after power that ceaseth only in death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power; *but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.*[134]

While greed 'pushes' an individual to selfishly seek beyond their basic requirement, the need-factor, what Hobbes and Rousseau calls self-preservation, forces an individual to satisfy basic requirements for survival.

129 See, for example, R Wraith & E Simpkins *Corruption in developing countries* (1963) 40, pointing out that love for ostentation is a major contributor of corruption in African societies; J Thornton 'Confiscating criminal assets: The new deterrent' (1990) 2 *Current Issues Criminal Justice* 72, concluding that 'the motivation for such crime is greed and the aim is profit'; TM Ocran *Law in aid of development: Issues in legal theory, institution building, and economic development in Africa* (1978) 119, fn 10 (listing greed as a cause of corruption in West Africa); D Treisman 'The causes of corruption: a cross-national study' (2000) 76 *Journal of Public Economics* 399 399–457; E Colombatto 'Why is corruption tolerated?' (2003) 16 *Review of Austrian Economics* 363 363 - 79.

130 See JS Nye 'Corruption and political development: A cost-benefit analysis' (1967) *American Political Science Review* 61 416, identifying corruption as behaviour that 'deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains'.

131 See SH Alatas *The sociology of corruption: The nature, function, causes, and prevention of corruption* (1980) 77, quoting the 14th century writing of Abdul Rahman Ibn Khaldun that 'the root cause of corruption' was 'the passion for luxurious living with the ruling group. It was to meet the expenditure on luxury that the ruling group resorted to corrupt dealing'.

132 See RC Tilman 'Emergence of black-market bureaucracy: Administration, development, and corruption in the new states' in MU Ekpo (ed) *Bureaucratic corruption in Sub-Saharan Africa: Toward a search for causes and consequences* (1979) 352, quoting Brahman Prime Minister of Chandragupta list of 'at least forty ways' of embezzling money from government.

133 See, for example, Alatas (n 131 above) 9, giving examples of bribery in ancient China.

134 Molesworth (n 84 above) 85 (emphasis added). See also Plato *Republic* (2000) VI, 1, where he observes that 'our lusts are set over our thoughts like cruel mistresses, ordering and compelling us to do outlandish things'.

It is caused mainly by the systemic deficiencies in a society's institutions, laws, economics, culture and politics.[135] For example, where institutions have ceased, or take long to function, citizens may be 'forced' to resort to bribes because it is the fastest way, or actually the only way by which they can access the service that they are otherwise freely entitled to.[136] Similarly, where a country's politics is unregulated or is unstable, politicians may find that they have to resort to bribery and cheating to get elected or to maintain their political positions.[137] The same logic applies where the economy cannot afford workers' basic needs, or where poverty is pervasive to the point that people cannot make ends meet. In these instances, individuals may be tempted to resort to corrupt ways of earning money or accessing resources in order to cushion themselves or their families from the debilitating effects of a non-functioning economy.[138] Likewise, where one's culture requires, for example, dependence and loyalty to one's group, individuals may be 'forced' to misuse their position in favour of the group so as to secure their sense of belonging.[139]

Some might argue that because need based corruption is externally driven, it should be considered a lesser corruption than greed based corruption. However, this argument should not be allowed to hold sway. This is because there is enough evidence showing that there are many people who would be in similar dire situations caused by external need but still remain honest, hardworking, impartial and trustworthy.[140] Indeed,

135 For a discussion see C Van Rijckeghem & B Weder 'Corruption and the rate of temptation: Do low wages in the civil service cause corruption?' (1997) *International Monetary Fund Working Paper No 97/73* papers.ssrn.com/sol3/papers.cfm?abstract_id=882353 (accessed 20 November 2011).

136 See MU Ekpo 'Gift-giving and bureaucratic corruption in Nigeria' in Ekpo (n 132 above).

137 The concept of 'status strain' introduced by Lipset and Raab can explain how people behave when they fear losing their status. This fear of status decline is caused when those who are socially well-established feel threatened. In politically unstable countries, the anxiety and fear from the 'status strain' will put pressure on the people to do anything possible in order to protect their social status and property, including engaging in corrupt conduct. SM Lipset & E Raab *The politics of unreason: The right-wing extremism in America* (1970).

138 See Rijckeghem & Weder (n 135 above).

139 As Carvajal aptly notes, close relationships have corruption-engendering effects as 'networks need friends in influential positions in order to manoeuvre payoffs, to attain suitable regulations in accordance with one's interests, and to buy protection'. R Carvajal 'Large scale corruption: Definition, causes, and cures' (1999) 12 *Systemic Practice and Action Research* 335 343. According to Holmes (n 124 above) 165: 'The power of both peer pressure and peer-comparison can be great, for instance in the words of one artist "when the best of people take bribes, isn't it the fool who doesn't?" In other words if individuals see others around them benefiting from corruption, they may well choose to indulge too'.

140 See, for example, Rijckeghem & Weder (n 135 above). According to their empirical study based on public sector wage data of 31 developing countries, the raising of the level of salary would not lead to lower corruption in the short run, though an active wage policy is still necessary in the fight against corruption. See also K Abbink 'Fair salaries and moral cost of corruption' (2000) *University of Bonn Economic Discussion Papers No 1*, concluding that high relative salaries do not lead to less corruption; Compare with RK Goel & MA Nelson 'Corruption and government size: A disaggregated analysis (1998) 97 *Public Choice* 107.

these deficiencies in societal structures that force people to resort to underhand tactics are not aimed at specific individuals but affect the public in common. Those who react to them by taking unlawful advantage of the opportunities granted by their public positions for private benefit should not, therefore, escape culpability on the basis of need.[141] When the social conditions are dire men must learn to live honestly within those conditions as they seek ways to improve or rectify the situation for all. Otherwise, necessity can become a pretence under which 'every enormity is attempted to be justified'.[142] As Rousseau correctly pointed out in *Emile,*

> it is the fewness of his needs, the narrow limits within which he can compare himself with others that makes a man really good; *what makes him really bad is a multiplicity of needs and dependence on the opinions of others.*[143]

Thus, both greed and need based corruption are equally culpable. They both elevate private interest over public good. This elevation of private interest over public interest is what makes corruption condemnable in many societies, and accounts for why private gain is considered an essential element in the definition of corruption.[144] It must, therefore, be shown to exist for an abuse of public entrusted authority to amount to corruption. Mere abuse of public entrusted authority would not suffice. This is because there are circumstances where an abuse of public entrusted authority would be justified for serving the common good and not private interest. For example, in cases of an emergency, a public official may be forced to divert funds or public property from its intended purpose in order to save public lives. In these kinds of cases, the element of private gain would be lacking to make the act corrupt.

This requirement for proof of private benefit in a corruption offence has received support from the Courts in Kenya. For example, in the case of *Republic v Director of Public Prosecutions & Another Ex-parte Henry Kiprono Kosgey & Another,*[145] the Court in dismissing a charge of abuse of office against the accused, noted, inter alia, that no single prosecution witness had testified that the accused used his office to confer a benefit to himself or to various beneficiaries.[146]

Still, one has to be careful before setting a fast and rigid rule that all acts that seem not to serve private benefit or that serve public good are non-

141 See JJ Rousseau 'Lettres morales' in H Gouhier *Ouvres completes de Jean Jacques Rousseau* vol 4 (1969) 1106, noting that 'the whole morality of human life is the intention of man'.
142 See W Paley *The principles of moral and political philosophy* (1786) 121, where he observes that 'necessity is pretended; the name under which every enormity is attempted to be justified'.
143 Rousseau *Emile: Or, on education* (1762) 209 (emphasis added).
144 See Tanzi (n 124 above).
145 *Republic v Director of Public Prosecutions & Another Ex-parte Henry Kiprono Kosgey & Another* [2012] eKLR.
146 As above.

corrupt. This is because private interest comes in various shades and shapes and is not limited to monetary gain, or to the individual interest of the public official, but extends to other non-monetary benefits and to benefits accruing to the family, friends and close associates of the suspected official.[147] Indeed, the benefit to the public could well be incidental to the main objective of benefitting private interests. For example, a holder of public office may opt for single sourcing in procuring public goods and services instead of the more rigorous process of open tendering, ostensibly to save the public money and time while the real reason is to rig the process in favour of a specific supplier who is his close associate or friend. Each case should, therefore, be determined on its own facts. The point that needs to be stressed, though, is that the intention to benefit private interest is an essential element in the conception of corruption.

4 Why private benefit at the expense of public good is at the core of corruption definition: A social contract theory explanation

As understood in the above description, corruption, in a sense, is the elevation of self-interest over public good. It is rooted in the selfish idea that the goal of holding public entrusted office or authority is to channel as much of the public cake as possible to one's self, family, tribe or friends, with little regard to the need of the trustees (the public). This essence of corruption goes to the very root of why corruption is condemned in many societies.[148] It breaches the very premise of the social contract, which requires persons entrusted with public authority, resources, or office to utilise the authority, resources, or office for the benefit of the public and not to convert public goods, services, benefits and advantages to private hands, without lawful or moral justification.[149] As one commentator aptly observed:

> Under any theory of government, the wealth of a nation is traditionally placed under the guardianship of its elected and appointed officials. Implicit in the acceptance of a public appointment is a commitment by the political leadership to hold and manage the nation's wealth and resources in trust for the people. In their role as a trustee, the public servant is subject to the constraints imposed by the fiduciary relationship he enjoys with the public he serves. A fiduciary is under a duty to refrain from administering the trust in a

147 Private gain here is viewed broadly as including gain to family members, close friends or close associates. The gain also need not be monetary in nature. It could include expensive gifts like jewellery to wife, training in exclusive sites and promotions.

148 See Tanzi (n 124 above).

149 See, for example, E Burke 'Reflections on the revolution in France' in E Burke *The work of the right honorable Edmund Burke* (1871) 359, pointing out that 'society is, indeed, a contract'. But see JS Mill *On liberty* (1975) 70, stating that '[s]ociety is not founded on a contract, and … no good purpose is answered by inventing a contract in order to deduce social obligations from it'.

> manner that advances his personal interests at the expense of the beneficiaries and to use reasonable care and skill to preserve the trust property. Officials who engage in illicit enrichment (a form of corruption) violate this public trust.[150]

The idea of the social contract has been used since the 17th century to explain the legitimacy of human authorities and still remains a popular doctrine today.[151] It is usually traced back to the classical writings of Thomas Hobbes,[152] John Locke[153] and Jean-Jacques Rousseau,[154] though Sophists[155] and earlier philosophers like Plato[156] and Aristotle[157] had also touched on it.[158] The theory views human authorities as established by convention with their subjects for specific tasks and that their legitimacy depends upon fulfilment of these tasks.[159] The theory begins by unravelling the condition of man in the hypothetical 'state of nature', that is, the natural state of man before creation of civil society. In this state, life is described as 'solitary, poor, nasty, short and brutish'[160] as men are forced to compete for limited resources in an environment full of

150 N Kofele-Kale 'Presumed guilty: Balancing competing rights and interests in combating economic crimes' (2006) 40 *International Lawyer* 909 942.

151 See, for example, P Riley *Will and political legitimacy: A critical exposition of social contract theory in Hobbes, Locke, Rousseau, Kant and Hegel* (1982) 1, pointing out that 'political legitimacy, political authority and political obligations are derived from the consent of those who create a government and who operate it'.

152 T Hobbes *Leviathan* (1994).

153 Locke (n 126 above).

154 JJ Rousseau *The social contract and the first and second discourses* (2002).

155 Sophists were travelling teachers in ancient Greece who specialised in the use of philosophy to teach virtues and excellence to their students, who were mainly made up of the nobility. On details of Sophist thoughts, see J de Romilly *The great sophists in periclean Athens* (1992), pointing out that sophists in fifth-century (BC) Athens had inferred from the difference in lifestyle and custom amongst the communities living in the Mediterranean world that social arrangements were not products of nature, but of convention or contract.

156 For example, in earlier Platonic dialogue, Crito, Socrates adopts a social contract argument to tell Crito why he must remain in prison and accept the death penalty. He argues that because the laws of Athens have served him during his life out of prison, he is consequently obligated to obey the laws. See Plato *Five dialogues* (1981).

157 See Aristotle *On generation and corruption* (2004).

158 For a historical account of social contract theory see DG Ritchie 'Contribution to the history of the social contract theory' in DG Ritchie (ed) *Darwin and Hegel: And other philosophical essays* (1893) 196.

159 While there is controversy on how voluntarism and contract theory arose, what is certain is that ideas of the 'good' state espoused by the early Christian leaning theorists eventually gave way to ideas of the 'legitimate' state, which was taken to rest on will of the people. Today, social contract theory is understood to hold that social arrangements are products of agreements not of nature. For a discussion of the origin of legitimate state and social contract theory, see, for example, A Black 'The juristic origins of social contract theory' (1993) 14 *History of Political Thought* 57.

160 Hobbes (n 152 above) 100.

distrust and lacking in an externally enforceable rule of competition.[161] Life is uncertain and insecure in this environment because survival is dependent on the strength and fitness of each individual and the goodwill of the adversary.[162] Yet this individual strength is not a guarantee for survival as even the strongest man can be killed 'in their sleep' or by a combined force of the weaker members.[163] Nor can the goodwill of the adversary be relied on as it is always subject to the self-interest of its holder.[164]

It is this unpredictability of life in the state of nature that motivates natural men to make deals with one another and create a sovereign with powers to oversee the peaceful enjoyment of their individual rights.[165] To ensure their escape from the unpredictable state of nature, social contract theories hold that rational individuals will agree to let go of their unregulated freedom in the state of nature in exchange for the predictability and security of a civil society governed by enforceable common law.[166] As Michael Keeley aptly notes,

> [b]ut, since some persons may not always act with good will, and since even those who do may be biased toward their own cause in judging violations of the moral law, people may derive additional benefit by agreeing to positive laws and responsible judges to enforce them.[167]

The social contract is made up of two parts: first, natural men 'collectively and reciprocally' agree to waive the rights they had against one another in the state of nature;[168] and second, they agree to endow some one person

161 Even though, as John Locke points out, nature has provided enough for everybody and despite the fact that natural man is controlled in his actions by natural morality discoverable to human reason, given that this morality is not externally enforced, the self-interest of man can and often does take over thereby creating a state of anxiety in the state of nature. For a fuller reading of Locke's argument, see T Pogge *World poverty and human rights* (2008) chap 4. See also Hobbes (n 146 above), characterising the natural condition of humankind as a mutually unprofitable state of war of every person against every other person.

162 Locke (n 126 above) para 5.

163 C Friend 'Social contract theory' *Internet Encyclopaedia of Philosophy* http://www.iep.utm.edu/soc-cont/ (accessed 12 January 2012).

164 Locke (n 126 above) chaps II and III.

165 But see generally Riley (n 151 above), arguing that the bedrock of social contract is voluntary consent and not on any other basis such as necessity, custom, convenience, theocracy, divine right, the natural superiority of one's betters, or psychological compulsion.

166 Two of the rights forfeited upon entering society are the right to do whatever is required for self-preservation and the right to punish violators of crimes committed in the state of nature. See Hobbes (n 152 above) 158 - 159; see also Burke (n 149 above) 309, observing that a fundamental rule of civilised society is 'that no man should be judge in his own cause'. But see Montesquieu's story of the Troglodytes to the import that savage men make no compacts or agreements and do not attach importance to promises. CLB de Montesquieu 'The parable of the Troglodytes' in CLB de Montesquieu *Persian letters* (1721).

167 M Keeley 'Continuing the social contract tradition' (1995) 5 *Business Ethics Quarterly* 241 243.

168 Hobbes defines contract as '[t]he mutual transferring of Right'. Hobbes (n 152 above) 68.

or assembly of persons with the authority and power to ensure that the waiver in the first contract is not breached (is enforced).[169] In other words, the social contract requires that natural men must not only agree to live in community with each other under shared laws, but also to create an authority (sovereign) to enforce the social contract and the laws that constitute it.[170] In this way society becomes possible because, whereas in the state of nature there was no authority to control the actions of individuals, now there is a conventionally created civil sovereign that can overawe men to cooperate.[171]

To ensure that the sovereign is able to function, the individuals voluntarily surrender to the sovereign person or assembly of persons the authority necessary to enforce the first contract.[172] These include the power to make laws, judge and mete out punishment for breaches of the contract.[173] The individuals also agree to give the sovereign control over communal resources to protect and use in the execution of its functions.[174] In addition, the individuals agree to abide by the decisions of the sovereign and where necessary to assist in effecting the same.[175] On its part, the sovereign must ensure that it protects and secures the individual members of the society and their common interest in an impartial and just manner and that the resources entrusted in its care are used for the common good.[176]

169 See Hobbes (n 152 above) 89. He states that '[b]efore the names of just and unjust can have place there must be some coercive power to compel men equally to the performance of their covenants'. For criticism of Hobbes, see C Pateman *The problem of political obligation: A critical analysis of liberal theory* (1979) 53, arguing that for Hobbes the 'bonds of civil life rest on the sword, not on the individual's social capacities'.

170 For Locke, there must be no question about asserting the 'right to punish' those who violate moral standards of conduct ? principally property rights ? but this right is given to a 'commonwealth' rather than to a 'Leviathan.' Locke (n 126 above) 65 - 66.

171 See Hobbes (n 152 above) 82, noting that the motive for a contract, a mutual transference of rights to a sovereign, is 'the security of man's person, in his life and in the means of so preserving his life as not to be weary of it'.

172 Hobbes formulates the covenant by which the sovereign is instituted in these words: 'I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.' Hobbes (n 152 above) 87.

173 According to Locke, men gain three things in the civil society which they lacked in the state of nature: laws, judges to adjudicate laws, and the executive power necessary to enforce these laws. Locke (n 126 above) para 97.

174 For Locke, protection of property, including their property in their own bodies, is the primary motivation of the social contract. Locke (n 126 above) para 124.

175 Although Hobbes insists that 'all men equally, are by Nature Free', yet he treats authorisation as limiting that freedom. Hobbes (n 152 above) 111. He distinguishes two ways in which such a limitation might arise, either 'from the expresse words, I Authorise all his Actions' by which the subject places himself under the sovereign, or 'from the Intention of him [the subject] that submitteth himself to his [the sovereign's] Power, (which Intention is to be understood by the End for which he so submitteth ...)'. And this end, Hobbes goes on to say, is 'the Peace of the Subjects within themselves, and their Defence against a common Enemy.'.

176 As Rousseau urges, it is only on the 'basis of this common interest that society must be governed'. JJ Rousseau *The social contract and the first and second discourses* (2002) 25. According to Hobbes, the motive for a contract is 'the security of man's person, in his life and in the means of so preserving his life as not to be weary of it'. Hobbes (n 152 above) chap 14, 82. See also Locke (n 126 above) para 97.

The social contract does not, however, divest the individuals of all their rights nor does it give the sovereign power to control all aspects of the individual life. There remains with the individuals a residual right that allows them to pursue their natural self-interests – interests that do not breach the common interest – without the interference of the sovereign.[177] For example, with regard to property, Locke argued that the system of natural liberty leaves the fruits of nature to man in common, but the fruits of labour to the individual worker:

> [T]hough the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself … Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property.[178]

In this way, Man comes 'to have a property in several parts of which God gave to Mankind in common, and that without any express Compact of all the Commoners'.[179] Thus, under the social contract, only those private acts that affect other individuals' or the communal well-being are to be subjected to common law and to the sovereign's supervision.[180] Otherwise, the individual retains the freedom to pursue his individual interests unfettered by the sovereign will. As Rousseau aptly pointed out:

> It is apparent from this that the sovereign power, albeit entirely sacred, and entirely inviolable, does not and cannot exceed the limits of the general conventions, *and that every man can fully dispose of the part of his goods and freedom that has been left to him by these conventions.*[181]

This traditional notion of social contract was meant to explain the creation of civil societies and the legitimacy of government authority.[182] However, since Immanuel Kant used the term as an idea for social formation,[183] the theory has also been used to explain the formation of social entities at both

177 For a discussion of the place of individual right in civil society, see, for example, AS Brett *Liberty, right and nature: Individual rights in later scholastic thought* (2003).
178 Locke (n 126 above) 328.
179 Locke (n 126 above) 327 - 328.
180 But see J Tully *A discourse on property: John Locke and his adversaries* (1980). He attributes to Locke the remarkable conclusion that property in political society is a creation of that society and that when man enters into the political society, '[a]ll the possessions a man has in the state of nature … become the possessions of the community' so that 'the distribution of property is now conventional'. Thus according to Tully's interpretation of Locke, a man in civil society has no other property entitlements than those which are given to him by the communal laws. Trully (this note) 98, 164 and 165.
181 Rousseau (n 176 above) 63 (emphasis added).
182 See generally Riley (n 151 above).
183 For a full translation of Kant's entire work, see I Kant *The conflict of the faculties* (1979). Kant talks of the idea of the social contract, that 'the act through which a people constitutes itself a state, or to speak more properly the *Idea of such an act,* in terms of which alone its legitimacy can be conceived, is the original contract by which all the people surrender their outward freedom in order to resume it at once as *members of a common entity* …' (emphasis added). Kant (this note) 186.

macro and micro state levels.[184] Understood in this sense, therefore, whenever two or more people or groups of people come together and voluntarily agree amongst themselves to share the burdens of life and the side-benefit that emerges from the collective synergy, the basis of a social contract is formed.[185] When this grouping anoints, appoints or elects a representative person or an assembly of persons to look after their collective interest, such a person or persons is or are expected to act impartially and in the common interest of the group.

However, when the representative(s) breaches this public trust for their own private benefit or when individual members of the society bribe the representative(s) in order to get preferential treatment then the social system becomes corrupted.[186] As Rousseau aptly noted 'if you would have the general will (common interest) accomplished, bring all particular wills (private interests) into conformity with it'; in other words, 'as virtue is nothing more than the conformity of the particular wills with the general will, establish the reign of virtue'.[187] The corollary is that where the pursuit of common interest is replaced by the glory of selfish interest, the reign of virtue loses to that of corruption.[188] Indeed, the orthodox understanding of corruption since Aristotle's writing in *On generation and corruption*,[189] the one put forth in particular by Machiavelli in his *Il Principe*,[190] is that of corruption as a decline or decay of the capacity of the citizens and officials of a state (and it may now be added, of any other social formation) to subordinate the pursuit of private interests to the demands of the common good.[191] It is in this sense that the explanation of corruption as an abuse of public entrusted authority for private benefit is (or ought to be) understood.

184 For this approach, see, for example, T Donaldson & TW Dunfee, 'Integrative social contracts theory: A communitarian conception of economic ethics' (1995) 11 *Economics and Philosophy* 85. See also M Rosenfeld 'Contract and justice: The relation between classical contract law and social contract theory' (1985) 70 *Iowa Law Review* 769 863, pointing to 'the *twofold nature of the Social Contract as Contract of Association and Contract of Government*' (emphasis added).

185 See generally IR MacNeil *The new social contract: An inquiry into modern contractual relations* (1980).

186 R Braibanti 'Reflection on bureaucratic corruption' (1962) 40 *Public Administration* 357 365, pointing out that bureaucratic norms are meant to ensure, after all, precisely this – that 'decisions be made without regard to personal interest and group pressure'.

187 JJ Rousseau 'Economie politique' in JJ Rousseau *The social contract and discourses* (1950) 302 - 310.

188 See, for example, DH Lowenstein 'Political bribery and the intermediate theory of politics' (1985) 32 *UCLA Law Review* 784 786 and 833, pointing out that a related conception of corruption arises from political philosophy and trusteeship theory: the idea that public officials must privilege the public interest rather than either political considerations or private gain.

189 Aristotle (n 157 above).

190 N Machiavelli *The prince (Italian: Il Principe)* (1532).

191 For a discussion on Aristotle's views, see J Barnes *The complete works of Aristotle: Volume one* (1984). In a passage in Politics, Aristotle, for example, says:

> 'There are three kinds of constitution, or an equal number of deviations, or, as it were, corruptions of these three kinds ... The deviation or corruption of kingship is tyranny. Both kingship and tyranny are forms of government by a single person, but the tyrant studies his own advantage … the king looks to that of his subjects.' Quoted in Heidenheimer (n 49 above) 3.

6 Conclusion

This chapter has demarcated the contours of corruption. It concludes that while the legal criteria for determining standard of behaviour has certain limitations, it is a better criteria than both the universal and relative moral criteria for determining acts that amount to corruption. The reason for this is three-fold. First, moral criteria are usually too wide and ambiguous on concepts as they depend on public opinions which are never uniform or static. Second, popular opinions on concepts are usually just that: opinions and would not ordinary have any force on the behaviour of people until they are backed by the law. Third, legal standards of behaviour are often also a reflection of the prevailing morals in the society as the lawmakers who enact them do spring from the same society. Thus, while the moral debate on the standard of behaviour is important in determining the kind of standards that should guide the behaviour in any society, only those morals or conducts that have been distilled into law, it is contended, should determine the standard of corruption.

The chapter also concludes that the standard of corrupt behaviour should not be overly circumscribed given the multifaceted nature of corruption. Indeed, there are many identified acts of corruption, which if a rigid definition of corruption is adopted would most probably be left out. In this connection, it is concluded that the best definition that captures the various manifestations of corruption is that of abuse of public entrusted authority for private gain. This definition is not novel and seems to be the popular standard accepted in the various laws and scholarly writings. The public nature of the definition derives from the fact that the purpose of law as evincible from the contractual basis of society is not to restrict the freedoms of individual members of the society, but to create an atmosphere where everybody can realise their full potential, by regulating only conduct that affects the common good of society. Those individual acts that have no bearing on this common good are accordingly excluded from the ambit of the law. Thus, the public related definition of corruption is more in tandem with the social contract regime than one that tries to also capture private corruption, which does not affect the common good.

The chapter further concludes that an essential component of corruption is its elevation of private interest over public good. This elevation of private interest over public good is what makes corruption condemnable in many societies. Mere abuse of public entrusted authority without private gain or intention to benefit private interest would, therefore, not suffice to make an act corrupt. This might sound like a contradiction since an abuse by its very nature is a bad thing. However, there are instances when a trustee of public authority might be forced, by unforeseen circumstance to, for example, relocate resources from their intended purpose or use less competitive procurement procedures so as to serve an emergent public need. While these acts might amount to an

'abuse' (in the sense of going against the intended purpose or laid down procedure respectively), they would not amount to corruption as the element of private gain would be missing. Private gain should, therefore, be shown to exist for an abuse of public entrusted authority to amount to corruption. Indeed most anti-corruption legal instruments, including Kenya's ACECA, do capture this essential thread in their conception of corruption.

CHAPTER 10

THE LEADERSHIP AND INTEGRITY CHAPTER OF THE 2010 CONSTITUTION OF KENYA: THE ELUSIVE THRESHOLD

Juliet Okoth

1 Introduction

The promulgation of the 2010 Constitution marked a new beginning in governance of the people of Kenya.[1] Amongst its revolutionary chapters is the one on leadership and integrity.[2] The chapter is predicated upon the assumption that state officers are the nerve centre of the Republic and carry the highest level of responsibility in the management of state affairs and, therefore, their conduct should be beyond reproach. A state officer is required to exercise authority in a manner that is consistent with the purposes and objects of the Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office.[3] The inclusion of this chapter was informed by Kenya's history where state officers have mainly abused their offices to enrich themselves, their friends and family. The chapter on leadership and integrity would ensure that state officers are people of integrity, hence uproot the culture of impunity and bad governance that has been the burden of Kenya.[4]

The question that then comes to mind is what exactly are the integrity standards set by the Constitution? This question has informed the many cases that have been filed before the Kenyan courts challenging the suitability of certain individuals to hold state office. The High Court in *Trusted Society of Human Rights Alliance v The Attorney General and Others,*[5]

1 The new Constitution was promulgated on 27 August 2010. For further details on its provisions, see: Constitution of Kenya (promulgated 27 August 2010) http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010 (accessed 3 May 2014).
2 Chap Six.
3 Art 73(1)(a).
4 *International Centre for Policy and Conflict and 5 Others v The Hon Attorney General and 4 Others* Petition No 552 of 2012 para 4.
5 *Trusted Society of Human Rights Alliance v The Attorney General and Others* Petition No 229 of 2012.

while disqualifying Mr Mumo Matemu from heading the Ethics and Anti-Corruption Commission, established that the constitutional standards of integrity did not need to rise to the level of criminality, and unresolved questions of a candidate's character would suffice to make them fail the integrity test.

The judge's verdict that the principles of leadership and integrity – espoused in article 73 of the Constitution – override the 'presumption of innocence until proven guilty' principle, relied more on the spirit of chapter six by stating in the ruling that Kenyans were very clear in their intentions when they entrenched chapter six in the Constitution. They were singularly aware the Constitution has other values such as the presumption of innocence until proven guilty.

The High Court asserted that there is no requirement that an officer's behaviour, attribute or conduct in question has to rise to the threshold of criminality. That is, the test of integrity is more than having or not having a criminal case pending in court. The court operationalised integrity thus,

> to my mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to national values enumerated in the Constitution.[6]

The High court further asserted that vetting and appointing authorities have a duty to exercise judicious rigour and thoroughness in vetting of public officers. That is, upholding the principles enshrined in chapter six is an obligation for those appointing or vetting them.

Matemu's case raised important rules of the thumb on interpreting or applying Chapter Six of the Constitution.

(1) First, *do not appoint if* the person is facing allegations that are 'serious enough to prejudice any reasonable person's thinking regarding his integrity and suitability' to be in that office.

(2) Second, before one can be *cleared* for a public office there should be evidence that adequate investigations had been done on the person's integrity allegations and that a candidate's qualifications and attributes 'must be weighed against the constitutional test as contained in Chapter Six'.

(3) Vetting institutions and agencies have a duty to discharge their constitutional obligations of ensuring that public officers meet the criteria set.

(4) Where/when allegations are made to the effect that vetting organs did not do their work, courts are obligated to investigate whether the process of recruitment met the constitutional requirement.

6 *Trusted Society of Human Rights Alliance* (n 5 above) para 107.

The Court of Appeal overturned this decision and Mr Mumo Matemu's appointment was confirmed.[7] Perhaps the most intriguing of the integrity threshold cases was the one that challenged the eligibility of the current President and his Deputy to run for the 2013 presidential elections, the *International Centre for Policy and Conflict and 5 Others v The Hon Attorney General and 4 Others* case.[8] The Court was faced with the difficulty of interpreting whether the constitutional criteria for integrity allowed individuals charged in the International Criminal Court (ICC) to run for the highest office in the land. The petition was eventually dismissed, raising the question of what standards have been established by the courts when interpreting the constitutional threshold of integrity.

The court in dismissing the petition, ruled it has no jurisdiction to hear matters on qualification or disqualification of presidential candidates.[9] It stated that any matter relating to the qualification or disqualification of a person who has been duly nominated to contest the position of President of the Republic of Kenya can only be determined by the Supreme Court including the determination of the question whether such a person meets the test of integrity under chapter six of the Constitution in relation to presidential elections.

The court further ruled that the Independent Electoral and Boundaries Commission (IEBC) and the Ethics and Anti-Corruption Commission (EACC) have the necessary powers to inquire into the integrity of persons seeking elective office. Like the previous court decision the court was of the opinion that even if it was found that the third, fourth and fifth respondents did not meet the integrity and leadership test, the institution with the constitutional and statutory mandate to consider this would be the IEBC.

In the *Benson Riitho Mureithi vs JW Wakhungu and 2 Others*,[10] the petitioner filed a petition challenging the constitutionality of the appointment of Ferdinand Waititu, the interested party as the chairman of the Athi Water Services Board by the first respondent, a Cabinet Secretary. He argued that the respondent failed to take into consideration the provisions of article 73 in chapter six of the Constitution of Kenya, 2010 when making said appointment. The petitioner enumerated incidents in which the interested party was involved and which questioned his integrity.

It was the respondent's case that matters of integrity fall for determination under the provisions of the Leadership and Integrity Act and The Ethics and the Anti-Corruption Commission Act. The court in

7 *Mumo Matemu v Trusted Society of Human Rights Alliance and Others* Court of Appeal at Nairobi, No 290 of 2012.
8 *International Centre for Policy and Conflict* (n 4 above).
9 *International Centre for Policy and Conflict* (n 4 above) 89.
10 Petition No 19 of 2014.

relying on the aforesaid Acts quoted by the respondents vindicated its jurisdiction by explaining that what was provided in the Leadership and Integrity Act and The Ethics and the Anti-Corruption Commission Act is a system for ensuring observance of the Code of Ethics for public and state officers who are in office and that there were no mechanisms to examine the suitability of a person proposed for appointment to public office.[11] For the elective posts where we have the IEBC with a very clear constitutional and legislative mandate with regard to determining the eligibility of a person intending to vie for elective office, the court stated that there were no such mechanisms for those seeking appointive positions.[12] In this regard the court was persuaded to conduct an inquiry into the issue regarding the propriety of the appointment of Ferdinand Waititu as the Chairman of the Athi Water Services Board.

Having established its jurisdiction, the next question which the court was called to answer was whether a Cabinet Secretary in considering a person for an appointive public office should consider the provisions of chapter six of the Constitution. The court bore into its mind that the petitioner's case in the matter was not that the Court should find the interested party unsuitable to serve as the Chairman of the Athi Water Services Board. Rather, the petitioner's claim was directed at the Cabinet Secretary that in exercise of her powers she failed to consider the provisions of the Constitution and therefore appointed a person who fell short of the constitutional criteria. In this regard the Court pointed out that it was not making any decision on the character, integrity or suitability of the interested party but was concerned with whether the Cabinet Secretary, in appointing him Chairman, took into consideration the provisions of the Constitution. The Court went on to find that the Cabinet Secretary failed to act in accordance with the Constitution, and her appointment of the interested party as Chairman of the Athi Water Services Board fell below the standard set by the Constitution. The court in quashing the appointment stated that the Cabinet Secretary failed to conduct an inquiry with regard to the suitability of the interested party under the Constitution, a responsibility that fell on her.[13] That there were serious unresolved questions with regard to the integrity of the interested party which she failed to consider. It was hence her duty to make a determination of the suitability of the interested party in light of chapter six of the Constitution.

The Judiciary has the final authority on the interpretation of the Constitution. This makes it key to the effective implementation of the integrity provisions in the Constitution. This chapter is, therefore, confined to a critical analysis of the courts' interpretation of the integrity threshold in the Constitution, including other key issues that arise in the integrity cases, such as *locus standi* and jurisdiction.

11 *Benson Riitho Mureithi* (n 10 above)para 54.
12 *Benson Riitho Mureithi* (n 10 above) para 55.
13 *Benson Riitho* (n 10 above) para 92.

1.1 *Locus standi*

The question of who has the right to bring a claim before the courts was a great hurdle for public interest litigation for a long time. One had to have suffered some personal or direct injury to warrant a standing to institute a claim.[14] This issue has also greatly featured in the integrity cases before the courts. In *Mumo Matemu v Trusted Society of Human Rights Alliance and Others*[15] the appellant questioned the first respondent's standing to bring a petition challenging his suitability for appointment to the Office of the Chairperson of the Ethics and Anti-Corruption Commission. The first respondent had petitioned the High Court and asserted that the appellant had engaged in issues of impropriety while he was a senior officer in a Government institution (Agricultural Finance Corporation). Amongst the allegations of the appellant's misconduct were that he approved loans without security, that he fraudulently paid loans to unknown bank accounts and that the appellant swore an affidavit with false information. The petition in the High Court was allowed leading to the appeal. At the appeal, the appellant submitted that the first respondent, a non-governmental organisation (NGO), had no *locus standi* to lodge the petition at the High Court as the allegations complained were in bad faith and had emanated from a private dispute between directors of a private company. This argument failed.

The Court of Appeal stated that the issue of leadership and institutional integrity of the Ethics and Anti-Corruption Commission was an important one and of public interest. The Court found that in the absence of bad faith, the first respondent, an NGO whose mandate included pursuit of constitutionalism, had the locus to file the petition. The Court of Appeal agreed with the High Court that the standard guide for locus must remain article 258 of the Constitution. The article gives every person a right to institute court proceedings where the Constitution has been contravened or is threatened to be contravened.[16] Apart from acting in one's own interest, court proceedings in such circumstances may also be instituted by a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members.[17]

The standard adopted by the Court of Appeal on *locus standi* is one that has been applied by other courts when petitions raising integrity questions

14 *Wangari Maathai v Kenya Times Media* HCCC No 72 of 1994; *Paul Nderitu v Pashito* Holdings HCCC No 3063 of 1997.
15 *Mumo Matemu* (n 7 above).
16 Art 258(1).
17 Art 258(2).

are challenged on account of the right of standing.[18] The courts generally have a tendency to decline to any objection on the right of standing unless it can be shown that the petition is an abuse of judicial process. The following statement by the Court of Appeal clearly illustrates the point when it asserted that:

> … the person who moves the Court for judicial redress in cases of this kind must be acting *bona fide* with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold.[19]

The new Constitution of Kenya, enacted in 2010, fundamentally changed the law on *locus standi*. An assertion that a private citizen seeking to enforce a public right would have to demonstrate some special interest can no longer be sustained under the new Constitution. The Constitution, by virtue of articles 3, 22 and 258, gives everyone the right to defend it.[20] The Constitution has broadened the application of *locus standi* to facilitate access to justice by the people. By liberalising the rule on the right of standing, the Constitution has made it possible to effectively question the constitutionality of actions of those who hold public office and prevent violations of the law. Matters of the integrity of individuals seeking to hold public or state offices are by their very nature of public interest. The standard thus adopted by the courts on *locus standi* in the integrity cases is the correct position and conforms to the letter and spirit of the Constitution.

1.2 Jurisdiction

The issue of jurisdiction is one of the most fundamental questions that a court needs to establish before proceeding to adjudicate on a matter.[21] This issue has been raised in all cases on the constitutional integrity threshold. A review of the cases shows that the objection often raised is that the High Court cannot exercise jurisdiction on integrity questions when the Constitution and other laws give such authority to other organs. The contention is that the High Court's intervention violates the doctrine of separation of powers.

18 See *Luka Lubwayo and Another v Gerald Otieno Kajwang and Another* Petition 120 of 2013, High Court of Kenya (HCK) Nairobi, para 28; *Benson Riitho Mureithi v JW Wakhungu, Cabinet Secretary Ministry of Environment, Water and Natural Resources and the Attorney General* Petition 19 of 2014, HCK Nairobi, paras 59, 60.

19 *Mumo Matemu* (n 7 above) para 31.

20 Art 3(1) states that '[e]very person has an obligation to respect, uphold and defend' the Constitution.

21 *Mumo Matemu* (n 7 above) para 33; see also *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1.

In *International Centre for Policy and Conflict,*[22] the issue of jurisdiction proved to be the most crucial question that eventually determined the outcome of the case. The respondents and interested parties in the case argued that under article 165 of the Constitution, the High Court did not have jurisdiction to deal with a question that essentially challenges the qualification of a candidate seeking to be elected as President of Kenya. They submitted that the court with jurisdiction to hear matters relating to the election of the President was the Supreme Court. The High Court agreed with the respondents. It held that a holistic reading of the Constitution leads to the conclusion that the Supreme Court has the exclusive jurisdiction to deal with any question relating to the election of the President, including whether one is qualified or disqualified to contest the position of President.[23]

The High Court in *Luka Lubwayo*[24] was also faced with the question of jurisdiction. The petitioners in the suit were contesting the integrity or suitability of the first respondent to run for and hold office of Senator. The basis of this petition was that the first respondent, while practicing as an advocate, had misappropriated client funds, and upon due process before the Advocates Disciplinary Committee, was found liable and struck off the Roll of Advocates between 1999 and 2006. In July 2012, upon the respondent's application, he was reinstated into the Roll of Advocates with certain conditions. The petitioners contested that this reinstatement did not overrule the previous findings on the respondent's misconduct.

The petitioners further claimed that the second respondent, the IEBC, had failed to give consideration to the question of the first respondent's integrity or suitability as mandated by article 88(5) of the Constitution, which obligates the second respondent to exercise its powers and perform its functions in accordance with the Constitution and national legislation. Indeed the second respondent's Dispute Resolution Committee had an opportunity to determine the issues raised on the first respondent's integrity or suitability, but it failed to, citing that it did not have jurisdiction and that only the High Court was competent to decide the matter. The petitioners thus asserted that under such circumstances, the High Court had an obligation to step in and investigate whether the first respondent met the constitutional and other legislative requirements to run for Senate.

The respondents, when opposing the petition, argued that the only institution with the mandate to decide on issues relating to integrity and leadership in this circumstance was the IEBC, as provided for under article 88(4)(e) of the Constitution and section 74(1) of the Elections Act. They submitted that the High Court then only had the power for judicial review. The High Court observed that it could not indeed invoke its unlimited

22 *International Centre for Policy and Conflict* (n 4 above).
23 *International Centre for Policy and Conflict* (n 4 above) paras 85 - 89.
24 *Luka Lubwayo* (n 18 above).

jurisdiction as provided in article 165 of the Constitution, 'where Parliament has specifically and expressly prescribed procedures for handling grievances raised by a petitioner'.[25] The Court found that while the IEBC was the organ constitutionally mandated to deal with the question of the first respondent's integrity, it failed and or refused to do so, instead referring the matter to the courts. The Court held that in circumstances such as the one in the case at hand, where the IEBC failed to carry out its constitutional mandate, the High Court then had the mandate to determine the questions on the first respondent's integrity.[26]

In *Mumo Matemu v Trusted Society of Human Rights Alliance and Others,*[27] the appellant challenged the High Court's decision to exercise its jurisdiction to adjudicate the petition that challenged his suitability for appointment to the office of the Chairperson of the Ethics and Anti-Corruption Commission. The main contention by the appellant was that since his appointment had already been gazetted, the High Court could no longer exercise jurisdiction, and the only manner in which he could be removed from office would be through the procedures set out in article 251 of the Constitution and section 42 of the Leadership and Integrity Act. The appellant asserted that the High Court had misapprehended the doctrine of separation of powers which divests the court of jurisdiction to review some decisions and actions of the other branches of Government.

The Court of Appeal, when looking into the issue of jurisdiction, disagreed with the appellant. It found that the petition before the High Court had challenged the constitutionality of the manner and process of the appellant's appointment and was not a removal procedure or a complaint against the appellant in his capacity as a state officer. The Court of Appeal stated that the nature of litigation is not determined by its outcome, but by 'its substance at the time of seizure and proceedings'.[28] In the circumstances, the Court found that an order setting aside the appellant's appointment would flow from a judicial finding that the process and manner of his appointment was unconstitutional and as such, the High Court had rightly exercised jurisdiction.

It is evident from the above cases that the question of jurisdiction is a key issue in cases relating to leadership and integrity. The courts acknowledge that generally, under article 165 of the Constitution, the High Court's jurisdiction is broad enough to review the constitutionality or

25 *Luka Lubwayo* (n 18 above) para 23. See also *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425.
26 This position was also recognised in *International Centre for Policy and Conflict* (n 4 above) para 107.
27 *Mumo Matemu* (n 7 above).
28 *Mumo Matemu* (n 7 above) para 38.

legality of any act carried out by other organs of Government.[29] Nonetheless, the High Court is required to exercise caution before exercising this jurisdiction. The High Court thus has jurisdiction to inquire into matters of integrity relating to elective and appointive public office, but it must first give an opportunity to the relevant constitutional bodies or state organs to deal with any dispute on the same. This formula lends credence to the doctrine of separation of powers in the Constitution, allowing the courts to only intervene when the constitutionally designated organ fails to carry out its constitutional mandate, or carries out the mandate in a manner that contravenes the Constitution.

2 The constitutional standards of integrity

2.1 The decisions

The question that this section seeks to answer is whether the courts have established the standards of the integrity requirement under chapter six of the Constitution. In other words, what is the constitutional threshold of integrity?

This question was put to test in *International Centre for Policy and Conflict,*[30] where the petitioners contended that the trial process of the third and fourth respondents before the ICC, up to confirmation of charges, met the necessary legal threshold required by law in Kenya to bar a person from being nominated to contest or assume state office. The third and fourth respondents, the current President of Kenya and his Deputy, are facing

29 Art 165 of the Constitution partly provides:
(1) There is established the High Court, which?
(3) Subject to clause (5), the High Court shall have?
(a) unlimited original jurisdiction in criminal and civil matters;
(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of?
(i) the question whether any law is inconsistent with or in contravention of this Constitution;
(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
(iv) a question relating to conflict of laws under Article191**;** and
(e) any other jurisdiction, original or appellate, conferred on it by legislation.

30 *International Centre for Policy and Conflict* (n 4 above).

charges of crimes against humanity before the ICC.[31] Although the High Court had declared that it had no jurisdiction to decide on the third and fourth respondents' qualification to participate in the presidential elections, it still established its jurisdiction to interpret the constitutional threshold of integrity in light of the dispute before it. One wonders why the High Court decided to proceed to look into the merits of the substantive issues when it had found that in light of the dispute, the Supreme Court was the right forum. By carrying on with the analysis of the substantive issues, the High Court did usurp the power of the Supreme Court, which in this circumstance also has the power to interpret the Constitution.

The High Court observed that to interpret chapter six of the Constitution, it would adopt a holistic and purposive interpretation that enhanced good governance, observance of the rule of law and human rights.[32] The Court acknowledged that the purpose of chapter six is to set higher standards of integrity for persons seeking to serve as state officers. It defined integrity as the firm adherence to moral and ethical values in one's behaviour. It further stated that:

> Integrity is therefore not only about an individual's own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to State office be like Caesar's wife: they must be beyond reproach.[33]

To buttress its position, the court agreed with the integrity standard that was set out in *Trusted Society of Human Rights Alliance v The Attorney General and Others,*[34] where the High Court observed that:

> … a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not … it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity.[35]

31 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11; *Prosecutor v Uhuru Muigai Kenyatta,* ICC-01/09-02/11. The case against the President has since been withdrawn, see *Prosecutor v Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr Kenyatta, 13 March 2015.
32 *International Centre for Policy and Conflict* (n 4 above) para 130.
33 *International Centre for Policy and Conflict* (n 4 above) para 131.
34 *Trusted Society of Human Rights Alliance* (n 5 above).
35 *Trusted Society of Human Rights Alliance* (n 5 above) para 107.

The High Court in this case thus established that the integrity standard required of a person seeking to hold public office is that the individual should be beyond reproach, and should not have unresolved questions about his character and commitment to the national values in the Constitution.

Having adopted this standard of integrity, the Court further observed that the standard established by chapter six must be weighed against the Bill of Rights in the Constitution. In this aspect, the Court was of the view that the Bill of Rights is a cornerstone of the Constitution and as a result, the rights that it protects 'in particular articles 38 and 50 in the unique circumstances of this case' must prevail over the demands of chapter six. The Court asserted that although the charges that the third and fourth respondents were facing before the ICC were serious, they had not yet been convicted, and until then, they had a right to be presumed innocent until proven otherwise. Recognising that the presumption of innocence ensures a fair trial for anyone before court, the Court reiterated that the right to fair trial could not be limited by virtue of article 25 of the Constitution. In limiting the application of the integrity chapter, the High Court also took into account the political rights of the interested party, The National Alliance Party (TNA), which had nominated the third respondent (Uhuru Kenyatta) as a presidential candidate. The Court held that if the third and fourth respondents were disqualified, the right of TNA to field its candidate for the presidential elections would be prejudiced and by extension, the Court considered that this would also violate the right of the citizens to exercise their democratic right to elect representatives in a free and fair election. The Court found that limiting the interested party's political rights would be inimical to the exercise of democratic rights and freedoms of its members and would disenfranchise the electorate.[36]

Interestingly, the Court, when looking into the effect of the ICC cases on the integrity of third and fourth respondents, came to the conclusion that by virtue of the principle of complementarity under the ICC Statute (also Rome Statute), the ICC and Kenyan courts cannot simultaneously adjudicate over the same matter. As a consequence, the High Court reasoned that only the ICC could bar the third and fourth respondents from participating in the presidential elections, and since there was no such provision in the ICC Statute, the respective respondents could not be barred.[37] The High Court, to rebut its position, stated that there was no evidence that the third and fourth respondents had been subjected to any trial by the local courts or the ICC that resulted in imprisonment for more than six months, and thus, the respective respondents could not be barred from participating in the elections.

36 *International Centre for Policy and Conflict* (n 4 above) paras 139 - 147.
37 *International Centre for Policy and Conflict* (n 4 above) para 152.

The court in *International Centre for Policy and Conflict* also looked into the question of the integrity of the fifth respondent, James Gesami, who was seeking to be Member of Parliament of West Mugirango Constituency. The contention of the fourth petitioner, a civic leader in West Mugirango Constituency, was that the fifth respondent, while serving as the Member of Parliament of West Mugirango Constituency, had engaged in corrupt activities and misuse of public office where he transferred Kshs 1 050 000 to his personal account from the Constituency Development Fund (CDF). The fifth respondent was compelled, by an order of the High Court through the writ of mandamus, to refund the monies. The fourth petitioner asserted that the conduct of the fifth respondent constituted a breach of trust and was contrary to the national values and principles of governance and integrity as stipulated in the Constitution, making the fifth respondent ineligible for elective or being appointed to state office. It is also important to note that the fifth respondent was arrested and faced criminal charges in regards to the same conduct of which he was acquitted after full trial. Consequently, the fifth respondent filed a suit to recover the monies he was compelled to pay to the CDF. Upon reviewing the matter, the High Court found that it would be unreasonable to limit the political rights of the fifth respondent to contest any public office since he had been acquitted of criminal charges.[38]

The threshold applied by the Court in *International Centre for Policy* in respect to the fifth respondent was also applied in *Luka Lubwayo and Another v Gerald Otieno Kajwang and Another.*[39] The High Court in this case also adopted the 'unresolved issues of character' as the threshold on integrity. The High Court made a finding that the first respondent, who was seeking an elective post as the Senator of the county of Homabay, had indeed been struck off the Roll of Advocates for misuse of clients' funds while practicing as an advocate. At the time of the petition, the first respondent had already been reinstated to the Roll of Advocates and given some conditions to fulfill. The Court held that discipline by the Disciplinary Committee *per se* was not a ground for disqualification, once the disciplinary measures have been discharged and the first respondent reinstated to the Roll of Advocates.[40] The Court, to support its finding, relied on the logic that flows from a reading of article 99(2) of the Constitution, which provides that only a person subject to a sentence of at least six months does not qualify to run for a state or public office, which therefore implies that conviction as such is not a basis for disqualifying anyone from running for office.[41]

In addition, the High Court made a distinction between appointive and elective positions. It noted that the only criteria set out for elective

38 *International Centre for Policy and Conflict* (n 4 above) paras 157 - 167.
39 *Luka Lubwayo* (n 18 above).
40 *Luka Lubwayo* (n 18 above) para 38.
41 *Luka Lubwayo* (n 12 above) paras 35 - 38.

positions under article 73(2)(a)(ii) of the Constitution was that the elections should be fair. The Court observed that, 'in elective positions, it is the electors who determine those to elect based on their assessment of the candidates including on their honesty, rectitude, uprightness and scrupulousness'.[42]

2.2 Analysis

2.2.1 The delicate balance

Establishing the constitutional threshold of integrity has been a difficult task for the courts. At face value, it would seem that the constitutional standard of integrity that our courts recognise was set out in *Trusted Society of Human Rights Alliance v The Attorney General and Others*, where the High Court declared that where there are too many unresolved questions about one's honesty, financial probity, reputation, scrupulousness or commitment to the national values enshrined in the Constitution, amongst others, the person will be said to lack integrity. The High Court in this case was of the view that the standard of integrity in the Constitution did not require that the conduct in question rise to the level of criminality, observing that 'it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity'.[43] This is clearly a high threshold for the integrity test.

Article 10 of the Constitution sets out the national values and principles that bind all state organs, state and public officers and amongst these values is that of 'good governance, integrity, transparency and accountability'.[44] Under article 73 of the Constitution, a state officer is required to exercise authority in a manner that is consistent with the purposes and objects of the Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. Such state officer should also conduct himself in a manner that avoids, 'any conflict between personal interests and public or official duties; compromising any public or official interest in favour of a personal interest; or demeaning the office the officer holds'.[45] This indicates that the question of integrity must always inform all decisions relating to the governance of the people of Kenya, and is one of the key ideals that we as a nation aspire for. In fact, it has been argued that since the main problem with Kenya's public affairs is poor leadership and corruption, which led to the adoption of a new Constitution to remedy this situation, chapter six on leadership and integrity can be

42 *Luka Lubwayo* (n 12 above) para 40.
43 *Trusted Society of Human Rights Alliance* (n 5 above) para 107.
44 Art 10(2)(c).
45 Art 75.

considered as the soul of the Constitution.[46] An ideal is the conception of perfection and would require the adoption of a high standard of integrity that ensures that only the best persons are entrusted with management of public affairs. In the circumstances, the integrity standard that was adopted by the court in *Trusted Society of Human Rights Alliance v The Attorney General and Others*[47]on unresolved issues of integrity, is the more persuasive and best possible standard that can describe the constitutional integrity threshold. This standard was indeed approved in other High Court decisions, with the court in *International Centre for Policy and Conflict*[48] further observing that a person of integrity must be beyond reproach.

Despite the high integrity threshold that the High Court set out, there has been a great dilemma in its application, in particular, where the integrity standards in the Constitution seem to be in conflict with individual rights guaranteed under the same Constitution. The presumption of innocence has especially been the main counter argument against the question of integrity. In *International Centre for Policy and Conflict,*[49] the court held that political rights under article 38 of the Constitution and the right to a fair hearing, under article 50, which includes the right to be presumed innocent, must prevail over the integrity standards in chapter six. It is curious that the Court came to this conclusion because in effect, it made the integrity standards set out in chapter six of the Constitution redundant.[50] Under the rule of harmony which the Court purportedly used to interpret the Constitution, '[t]he entire Constitution has [to] be read as an integrated whole with no one particular provision destroying the other but each sustaining the other'.[51] The Court, in its decision, destroyed the effect of chapter six, and went against the principle of harmony that it set out to follow.

Whereas the Bill of Rights forms an integral part of the Constitution, it must be read within the context of the constitutional requirements for integrity, and its application should also adhere to the national values and principles in the Constitution. The high standards of integrity in chapter six could not have been included in the Constitution in vain. Their inclusion was informed by the desire to clean up the politics and institutions of governance, thus the need that the provisions in chapter six should have substantive power.[52] An interpretation which in effect makes the chapter

46 S Kimeu *Integrity: The ultimate standard for leadership* (2012) 1.
47 *Trusted Society of Human Rights Alliance* (n 5 above).
48 *International Centre for Policy and Conflict* (n 4 above).
49 As above.
50 Also see L Musumba 'The case for comprehensive scenario building as a means for pre-testing the articles of a proposed constitution to ensure its viability post promulgation: A case study of Kenya' A paper presented at the Constitution-Making in Africa Conference, University of the Western Cape, 13 September 2013, arguing that this decision effectively negated the very essence of chapter six.
51 *International Centre for Policy and Conflict* (n 4 above) para 79.
52 *Trusted Society of Human Rights Alliance* (n 5 above) para 102.

on integrity redundant is repugnant to the letter and spirit of the Constitution.

Although the presumption of innocence is a fundamental right within the right to a fair trial, its overriding value should specifically apply in the particular case where there is the probability of the individual being declared guilty and punished. A distinction needs to be drawn between the process that determines the guilt or innocence of a person for purposes of punishment, and the process where the individual is being vetted for purposes of being rewarded a leadership position.[53] In the latter process, where the person is being vetted for purposes of entrusting him with the management of public affairs, the more persuasive interpretation would be that national values should override individual rights, as observed by the Court in *Trusted Society of Human Rights Alliance v The Attorney General and Others*:

> Kenyans were very clear in their intentions when they entrenched Chapter six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up the State's politics and governance structures by insisting on high standards of personal integrity among those seeking to govern or hold public office.[54]

Furthermore, a declaration that one does not meet the constitutional standards of integrity does not equate one to being guilty. It only requires that an individual's desire to hold public office is put on hold until all outstanding questions on his probity are settled.

The High Court in *International Centre for Policy and Conflict,*[55] when looking into the effect of ICC case on the integrity of the third and fourth respondent, concluded that under the principle of complementarity, it was the ICC that should have determined the respective respondents' suitability to contest. This reasoning is incomprehensible and misguided. The principle of complementarity under the ICC Statute only arises where courts within a national jurisdiction are looking into the same issues in respect of the cases before the ICC.[56] A case looking into the question of integrity of an individual is not similar to a case looking into the same individual's criminal responsibility for international crimes. The cases of the third and fourth respondents before the ICC should have been considered to fall within the category of the unresolved questions on their character. Such a consideration would not make them guilty of the crimes

53 S Kimeu *Integrity: The ultimate standard for leadership* Adili Transparency International 2012, 2.
54 *Trusted Society of Human Rights Alliance* (n 5 above) para 102.
55 *International Centre for Policy and Conflict* (n 4 above).
56 See para 10 of the preamble, and arts 17, 18, 19, 20 and 53 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 90.

they are accused of before the ICC, but would only require that they put aside their ambitions until their names are cleared. Several reasons lend credence to such a conclusion. First, the Constitution itself contemplates the impeachment of a President suspected of having committed a crime under national or international law.[57] By analogy, this provision would also demand that a person seeking to hold the office of the President should not be facing charges of a serious nature like international crimes. Second, the question of integrity also looks into the integrity of the institution in question, and where the working of the institution is likely to suffer because of the personal integrity of the individual seeking to head it, such an individual should not hold such an office.[58] Where a president and his deputy are both required to attend trials before the ICC, discharging their constitutional duties becomes a challenge.[59] There is also the risk of a country suffering in its diplomatic and trade relations with other countries who, as a matter of policy, refrain to deal with suspects of international crimes.

The unresolved question of character standard implies that once all the issues on a person's integrity are cleared, the individual may pursue their desire to hold public office. Thus, in *Luka Lubwayo,*[60] the Court found that although the first respondent, who was seeking to be Senator of Homabay County, had been found guilty for misappropriating client funds and thus struck off the roll, the first respondent had no outstanding issues on his integrity because he had since been reinstated onto the Roll of Advocates. The Court in this respect observed that

> the mere fact that the 1st respondent was *"convicted"* by the Disciplinary Committee of the Law Society of Kenya is *per se* not a ground for disqualification once the *"conviction"* was *"served"* and the 1st Respondent reinstated to the Roll of Advocates.[61]

The same standard was also used by the Court in *International Centre for Policy and Conflict* when it cleared the first respondent to run for Member of Parliament for South Mugirango constituency, upon finding that he had been acquitted of criminal charges in relation to the alleged misappropriated funds of the Constituency Development Fund. An objective evaluation of the two cases shows that the courts came to the right conclusion, as the two respective respondents had no cases pending

57 Art 145(1)(b) of the Constitution.
58 *Centre for PIL and Another v Union of India and Another* Writ Petition No 348 of 2010, cited in *International Centre for Policy and Conflict and 5 Others v The Hon Attorney General and 4 Others* Petition No 552 of 2012, para 134.
59 The difficulty of the President and his Deputy attending trial and carrying out their constitutional duties greatly informed Kenya's failed attempt to defer the cases before the ICC. See African Union Assembly 'Decision on Africa's relationship with the International Criminal Court (ICC)' Ext/Assembly/AU/Dec. 1 October 2013; United Nations Security Council 'Peace and security in Africa' 7060th Meeting, S/PV.7060 (15 November 2013).
60 *Luka Lubwayo* (n 18 above).
61 *Luka Lubwayo* (n 18 above) para 38.

against them and as such, no longer had any outstanding questions on their probity.

The unresolved probity questions declared by the High Court in *Trusted Society of Human Rights Alliance* set out a high integrity threshold, perhaps in keeping with the desires of Kenyans as reflected in the Constitution. This standard has, however, been watered down by giving other rights guaranteed in the Constitution priority over the integrity standards. It seems that a pending criminal case would not disqualify one under the integrity test until a conviction is established, and even in the case of a conviction, it would have to result into a sentence of more than six months to fail the integrity threshold. The later interpretations have made the integrity chapter redundant. This could not have been the intention of the drafters and the people of Kenya. A more progressive interpretation would be one that gives meaning and purpose to the integrity provisions in the Constitution. Thus, in the instance where one still has pending criminal cases or civil cases that touch on issues of their integrity, it would be more prudent to declare that they do not satisfy the integrity standards in the Constitution until those cases are cleared. The question of integrity is a matter of public interest, and in such instances, it is more persuasive to adopt a decision that upholds national values and principles over individual rights. Integrity does not only focus on the individual but also the institution. Subsequently, the courts, when looking into the integrity question, should also satisfy themselves that the institution in question will not suffer should the proposed individual take over its management.

2.2.2 Elective versus appointive positions

The decisions of the courts have approved the argument that different standards apply in elective offices as opposed to appointive offices. The High Court in *Luka Lubwayo*,[62] while approving this division, observed that article 73(2)(a) of the Constitution establishes this distinction where it demands personal integrity only for appointive positions. The Court noted that the only criterion thearticle sets for elective positions was that the individuals be elected in a free and fair election. The High Court observed that the distinction was important because 'in elective positions, it is the electors who determine those to elect based on their assessment of the candidates including on their honesty, rectitude, uprightness and scrupulousness'.[63]

The above distinction was also adopted by the Court in *International Centre for Policy and Conflict*[64] when it held that political rights must prevail

62 *Luka Lubwayo* (n 18 above).
63 *Luka Lubwayo* (n 18 above) para 40.
64 *International Centre for Policy and Conflict* (n 4 above).

over the chapter on integrity. Although the Court had agreed with the petitioners that an inquiry into the integrity of a candidate for state office, whether appointed or elected, is an essential requirement for the enforcement of chapter six of the Constitution, its eventual decision came to a different conclusion. The Court observed that not allowing the third and fourth respondent to run for the presidential elections would violate the citizens' right to exercise their democratic right to elect representatives in a free and fair election by universal suffrage.

The effect of these decisions is that politicians have been insulated from the integrity provisions in the Constitution. The question that follows is whether this distinction does not then make a mockery of the integrity chapter. If politicians are excluded from the demands in the integrity chapter, and the same Constitution requires their participation in the selection and vetting of individuals appointed to state offices, how can they uphold integrity standards that they are themselves not subject to? Would the same politicians have the moral authority to question the integrity standards of proposed state officers? The exclusion of politicians from the requirements in the leadership and integrity chapter of the Constitution defeats not only the purpose of the chapter, but also its implementation. The need for good governance is a theme that runs throughout the Constitution, and integrity is one of the principles that underpin it. This dictates that the integrity requirements in chapter six of the Constitution should apply to all institutions established in the Constitution and to all individuals seeking to hold public office whether elective or appointive.

3 A step back?

Although the integrity standard recognised by the High Court in *Trusted Society of Human Rights Alliance* was heralded as a step in the right direction, the appellate court decision on the same matter in *Mumo Matemu* seems to have set this standard aside.[65] The High Court had set aside the appellant's appointment as the Chairman of the Ethics and Anti-Corruption Commission upon a finding that on available evidence, the appellant had too many unresolved questions about his integrity. The Court of Appeal, although acknowledging the High Court's powers to conduct review of appointments to public offices on procedural soundness as well as on the legality of the appointment to determine if it satisfies the constitutional threshold, held that in the instance where the appointing authority had applied its mind to constitutional requirements and arrived at a rational conclusion, the courts should not interfere.[66] The Court of Appeal stated that in such cases, the High Court's role is not to sit on appeal over the opinion of the appointing authority, but to check if the appointing

65 *Mumo Matemu* (n 7 above).
66 *Mumo Matemu* (n 7 above) para 52.

authority took into account material and vital aspects that had a bearing to the constitutional and legislative purpose of integrity.[67]

The Court of Appeal observed that in light of the doctrine of separation of powers, the High Court should have used the rationality test, which in the Court's opinion would have led to a different conclusion. The Court articulated that in light of the principles in article 73 of the Constitution, a fact-dependent objective test was the best standard of review of constitutionality of appointments on grounds of integrity. It found that there was no evidence to show that there was no proper inquiry on the suitability of the appellant in the cumulative process of his appointment. On the unsuitability of the appellant, the Court of Appeal, relying on the 'intensely fact based inquiry test', found that there was no conclusive proof on evidence of the allegations against the appellant's integrity.

Of particular interest is the Court of Appeal's view of the constitutional integrity standard. It observed that:

> We wish to reiterate, having disposed of the issue of separation of powers, that leadership and integrity are broad and majestic normative ideas. They are the genius of our constitutional fabric. However, their open-textured nature reveals that they were purposefully left to accrue meaning from concrete experience. Restated, whereas these concepts germinate from the ground of normativity, they grow in the milieu of the facticity of real experience. Their life blood will therefore be our experience, not merely the abstract philosophy or ideology that may underlie them.[68]

It further added that:

> … although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under our constitutional design.[69]

In other words, the Court of Appeal dismissed the unresolved issues of integrity standard set out by the High Court, and declared that the constitutional integrity threshold can only be dictated by the daily experiences and practices of the people of Kenya and is not a standard that the courts can set. The Court of Appeal also seems to declare that all other institutions with the mandate to implement chapter six could implement it according to their own interpretation without looking to the courts for guidelines. The impact of the Court of Appeal's decision is that there is now no clear standard on the constitutional threshold of integrity.

67 *Mumo Matemu* (n 7 above) para 54.
68 *Mumo Matemu* (n 7 above) para 59.
69 *Mumo Matemu* (n 7 above) para 60.

By stating that the courts do not have the power to set out clear and predictable guidelines on the constitutional standard of integrity, the decision by the Court of Appeal has reduced courts to mere bystanders in the integrity debate. While acknowledging the centrality of the doctrine of the separation of powers in the Constitution, the Court of Appeal, in a bid to give deference to other constitutional organs with power to implement the leadership and integrity chapter, fettered the courts mandate as the final authority in the interpretation of the Constitution. Although other arms of Government, such as Parliament and the Executive, and other public authorities, also have the mandate to interpret the Constitution, where a problem of interpretation arises they still need to seek the courts intervention for guidance.[70] Perhaps recognising the Judiciary's central role in interpreting the Constitution, it emerged in *Luka Lubwayo*[71] that the IEBC was hesitant to decide whether the first respondent met the constitutional integrity threshold and instead holding that only the High Court could decide on this issue. The Judiciary's significant role in implementing the Constitution is entrenched in the Constitution and an interpretation that declares otherwise goes against the letter and spirit of the Constitution.[72]

An outstanding aspect of the Court of Appeal's decision was its holding that the 'fact-dependent objective test' was the best standard of review of constitutionality of appointments on grounds of integrity.[73] The Court observed that since a determination of unsuitability to hold office is a drastic form of judicial review, the Court's finding must be based on cogent and conclusive evidence. It reiterated that any such conclusion by the Court must be based on findings premised on applicable evidentiary standards, which in cases involving 'intensely fact-based inquiry', the Court established that the evidentiary standard was higher than the standard of balance of probability required in other constitutional based cases.[74] The approach by the Court of Appeal ensures that an individual's integrity cannot be challenged based on mere frivolous allegations, but must be supported by satisfactory evidence.

The decision by the Court of Appeal in *Mumo Matemu* case set aside the only constitutional threshold of integrity that had so far been identified by the High Court, albeit with some variations, and failed to establish an alternative threshold. The effect of this is that there is now no proper guideline upon which the chapter on leadership and integrity may be implemented, at least in our courts.

70 B Sihanya 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects' (2011) *FES Kenya Occasional Paper No 5*, 23.
71 *Mumo Matemu* (n 7 above).
72 Chapter ten.
73 *Mumo Matemu* (n 7 above) para 60.
74 *Mumo Matemu* (n 7 above) paras 62 - 66.

3.1 Other setbacks experienced in implementing sound leadership and integrity standards

3.1.1 Slow pace of institutional reforms

Apart from judicial reforms, other governmental institutions are lagging behind in the reforms mandated by the 2010 Constitution. The public service ought to carry out restructuring in light of 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 rationalised 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 intendment or spirit of the 2010 Constitution especially as regards competence and integrity of persons before being appointed to the public service.[75]

3.1.2 Low level of awareness

A major obstacle to implementation of chapter six of the Constitution is a lack of awareness on the implications of the Constitution. In order for the Constitution to function properly and deliver visible results, the citizens must have a full understanding of the Constitution. The most effective way to ensure that citizens understand the Constitution is through civic education. Citizen participation in governance is another feature that runs through the whole Constitution. All of these mechanisms are useful in ensuring the provisions of the Constitution in relation to leadership and integrity are adhered to.

3.1.3 Passive citizenry

A major challenge to transition is the inaction of citizens in the affairs of governance. The Constitution requires full participation of the citizens on all aspects of governance processes. However, not all citizens can organise themselves to participate effectively. Minimal participation by citizens means less vigilance in preventing those opposed to the Constitution from undermining its full implementation.

75 'Constitutional implementation in Kenya, 2010-2015: Challenges and Prospects Prof Ben Sihanya' A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, FES Kenya Occassional Paper No 5.

3.1.4 The lacuna of the law

The legal framework on leadership and integrity as presently constituted is very weak and cannot sustain the quest for a leadership that eschews the provisions of the Constitution.

The Leadership and Integrity Act and other statutes do not have sufficient enforcement mechanisms to make sure that the provisions of the Constitution on leadership and integrity are enforced. The agency tasked with the enforcement of chapter six is not vested with sufficient powers to enforce the laws on leadership and integrity. The laws are more observed in breach than compliance as a consequence of this weak enforcement structure.

4 Recommendations

4.1 Performance Contracting

Some recently introduced practices in the public service are yet to be institutionalised in Kenya, including performance contracting. Although this has been seen to work well where officers have set targets to achieve within agreed upon timelines, it is yet to be cascaded to the lowest levels of public service.

It is expected that cascading the idea to the lowest cadre of the public service will substantially improve public service delivery and in the process institutionalise transparency and accountability ideals.

4.2 Empowering the legislature

In order to improve Parliament's oversight capacity, there is a need to train and support MPs to ensure they acquire knowledge on budgets and budgetary processes. In addition, the Legislature should be more open to the media and civil society to ensure effective parliamentary oversight. In addition, parliamentary committees should have adequate resources to deliver on their mandate. A strong and independent media is necessary to support committees in their oversight work on executive actions. In addition, a strong civil society can also ensure that weaknesses are identified and pressure brought to bear on the government to implement recommendations.

The leadership of the crucial parliamentary committees should possess the relevant competence that enables them to understand complex matters. They should be supported by well-trained staff, including researchers.

4.3 The judiciary's role in implementing leadership and integrity provisions

The judiciary should interpret the Constitution faithfully considering its letter and structure. 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. The judiciary should enforce the provisions of the Constitution on leadership and integrity through decisions or orders in instances where there has been blatant disregard or neglect in enforcing the Constitution in this respect.

4.4 Independent constitutional commissions in constitutional implementation

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. These commissions should take lead in setting standards and ensuring that the leadership and integrity principles in the Constitution are adhered to.

4.5 Civil Society Organisations

Article 1 of the Constitution, 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. 'The people' in the 2010 Constitution is largely embodied in civil society. Civil Society Organisations should take the front line in making the voice of the people heard in matters of leadership and integrity. This is because the citizens by themselves may not have the necessary financial muscle to make the Government account when it violates salient provisions with regards to leadership and integrity of state and public officers. This will go a long way in ensuring a system of checks and balances with regards to public appointments is observed.

4.6 Media

The media plays a crucial role in shaping a healthy democracy. A vibrant media is the backbone of a democracy. The media makes the public aware of various social, political and economic activities happening within the state and also outside. Many consider the media as a mirror, which shows the public or strives to show the state the bare truth and harsh realities of life. The media has undoubtedly evolved and become more active over the years. With regard to elections, the media assists the public, especially the illiterate, in making choices, for example, in the elections. The media have made a significant achievement in improving the awareness of people on all socio-political and economic issues. Coverage of exploitative malpractices of leaders has helped in providing bases for prosecuting or taking stringent actions against them through public censorship or through other means. The media also exposes loopholes in the democratic system, which ultimately helps government in filling the gaps identified and making the system of governance more accountable, responsive and citizen-friendly. Information technology has enhanced information flow to people in all walks and spheres. The perfect blend of technology and media has opened the state to public scrutiny especially on issues of corruption in politics and society.[76]

The Constitution of Kenya 2010 has provided for a comprehensive Bill of Rights that anchors freedom of expression and freedom of the media.[77] Every person has the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. Thus the media should take an active role in ensuring the leadership and integrity standards are upheld.

4 Conclusion

It was hoped that under the new Constitution, a new set of standards would be entrenched for people seeking to hold leadership positions. Chapter six of the Constitution, on leadership and integrity, was to ensure that state officers are people of high integrity, therefore ending the culture of impunity and bad governance. Attempts to implement chapter six have proved to be futile, with the courts failing to set out clear standards on the constitutional integrity threshold. The courts approach has ensured that the lowest possible standard has been maintained for the integrity

76 'Kenya, Democracy and Political Participation' A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi, Karuti Kanyinga March 2014 http://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf (accessed 28 May 2015).

77 Art 34, 2010 Constitution.

threshold. While the leadership and integrity chapter was intended to entrench a complete metamorphosis in our leadership, its interpretation and application has instead resulted into business as usual. This in effect has made chapter six redundant, rolling back the gains made in an attempt to establish good governance. The results of the last election and decisions by the courts show that perhaps the people of Kenya were not ready to embrace the principles enunciated under the leadership and integrity chapter in the Constitution.

CHAPTER 11

KENYA'S FISCAL ACCOUNTABILITY REVISITED: A REVIEW OF THE HISTORICAL EROSION OF THE COUNTRY'S FISCAL CONSTITUTION FROM 1962 TO 2010

Attiya Waris

1 Introduction

Through history it is the frequency of wars in Europe that resulted in the recognition of the value of taxation as states looked for ways to finance both the threats to their security as well as their attacks of other neighbouring states.[1] Between the 13 and 14 centuries, there was the complete transformation of finance in the English state.[2] Direct taxation was maintained for emergencies but the sheer scale of the wars led to the acceptance by parliament of the distinction between ordinary and extraordinary revenue and the possibility of a move towards a tax state. However, the end of the Hundred Years' War in 1453 showed the constitutional restrictions on the right to tax by the crown and the state went back to the domain based system with a feudal type system and little or no tax.[3] This movement back and forth of the decision to tax or not to tax is a constitutional issue and the ability to build it or erase it was as a result of interactions between the state or crown and the society.

Schumpeter, a fiscal sociologist and economist, argued that modern taxation (or taxation as we know it today) was first developed in the 15th century, in the Italian city republics. In the ensuing tug of war, as he terms it, in relation to the decision making process of the state on what to tax and what not to, the issue of the right to tax and justice in taxation, including its constitutionality, arose.[4] This part of the development of taxation is key. He also saw the link between the prince or ruler at city-state level and the services that should be accorded to the populace in return. He was of the view that the link between the revenue to the state from the people, and the use of the revenue, was linked through justice, and that the power or right

1 WM Ormrod, M Bonney et al *Crises, revolutions and self-sustained growth: Essays in European fiscal history, 1130 - 1830* (1999) chap 1.
2 JA Schumpeter *History of economic analysis* (1954) 32 - 33.
3 As above.
4 As above.

to tax was subject to the control of the population.[5] This development further strengthened the linkages between taxation the people and the purposes of taxation by requiring that the constitution protect the right and the exercise of its right.[6]

In the developing world, most states were former colonies of European states. At independence, the ex-colonised states fell immediately into the category of developing countries. Economically, the post-colonial states responded with an initial boom. The government no longer limited the newly discovered economic power racially as it had been during the colonial period. This boom economy was, however, led politically by leaders most of whom were freedom fighters, and who were making a transition into peacetime politics. This combination of a euphoric citizenry with new access to economic power, and a government unprepared to create and deal with economic policy, did not initially impact the economy. The infrastructure remained capable of meeting the needs of the developing economy. In addition, most states, in order to smoothly transit from colonialism to independence, agreed with the imperial states to adopt a constitution and almost all the legislation that had been put in place during colonisation without major amendment. For British colonies, the decolonisation process involved the adoption, upon independence, of a Westminster Model of a Constitution, all legislation passed during the period of colonisation by the British, and the honouring of all international agreements undertaken on behalf of the colony by the imperial government.[7] Tax treaties were all also adopted without question by African states except for Kenya who 're-negotiated' all the tax treaties however there are no recorded changes in the text of these treaties.

The inherited fiscal state was thus based on the general principles of the constitution and the legislation on taxation. However, the result of this wholesale adoption of legislation without referencing it back to the people, and at times taken under the pressure of independence, led to compromised legislation that failed to make reference to certain principles and fundamental issues that had developed naturally through the evolution of the fiscal state in Europe. These concepts and issues were implemented without the people ever having a say and may be one of the factors that has led to the current crisis of the fiscal state in the developing world. These include the transfer of the power to tax to the ruler in constitutional law; the application of taxation principles and fairness and finally the application of the social welfare state. Over the years, constitutions would inevitably last for decades. However, it is becoming increasingly common especially in developing countries for constitutions to be extensively amended or overhauled over time. As a result, there is a

5 As above.
6 A Waris 'Tax and development: Solving Kenya's fiscal crisis using human rights' (2013) chap 2.
7 As above.

lack of clarity as to what constitutional options a state has in the provisions that will be placed in its constitution with regard to the fiscal social contract. Consequently, there is need to examine the constitutional changes that Kenya has gone through with respect to the fiscal social contract in order to determine the appropriateness of the current structure and to help inform future amendments.[8]

The key terms found in this include the fiscal contract, fiscal constitution, taxation and fiscal policy and these concepts need to be clearly understood before one can delve into the issues. The fiscal contract is the bargained exchange between government and taxpayers as argued by Moore, a political scientist, and that it includes representation, goods and services as well as societal-state pressure.[9] The fiscal constitution by extension includes not just the fiscal provisions found in a constitution as some would assume but also the overall set of rules by which the nation's commitments to taxing and spending are to be arranged,[10] and has also been defined by a political scientist.

Taxation has many diverse definitions, however, for the purposes of this paper will refer to the process whereby charges are imposed on individual's institutions or property by the legislative branch of the federal government and by many state governments to raise funds for public purposes, while tax and fiscal policy is the tax to collect, amounts to pay and by whom coupled with the use of the government budget to affect an economy.[11]

As a result this chapter will in part two utilise a historical approach on the theoretical analysis of constitutions and the power or right of a state to levy taxes. In part three it will analyse and chart out the fiscal provisions in the development of Kenya's constitutional history from independence to date. This section will analyse the 1964 independence Constitution and the amendments that were made as well as the discussions in the draft constitutions that were debated at the Kenyan constitutional conferences and finally the provisions that came into force with the 2010 Constitution of the Republic of Kenya. It will also discuss where the difficulties lie in the clarification of the constitutional provisions. Part four will thus make recommendations, while part five will be the conclusion.

8 Waris, Delineating a Rights-based Constitutional Fiscal Social Contract through African Fiscal Constitutions EALJ (forthcoming 2015).

9 M Moore 'Between coercion and contract: competing narratives on taxation and governance' in Deborah Brautigam et al (eds) *Taxation and state-building in developing countries: Capacity and consent* (2008).

10 Brennan, G. and J. M. Buchanan (1980). The power to tax : analytical foundations of a fiscal constitution. Cambridge, Cambridge University Press.

11 DN Weil 'Fiscal policy' *The Concise Encyclopaedia of Economics* http://www.econlib.org/library/Enc1/FiscalPolicy.html (accessed 29 May 2015).

2 The theories of constitutional law in the context of taxation

On-going scholarship on taxation and democracy,[12] taxation and constitutionalism,[13] and taxpayers' rights, acknowledge that economic considerations that have hitherto informed tax policy and the design of frameworks for taxation do not address the governance context of taxation adequately, although there is growing literature on diverse aspects of this issue.[14] In consideration of the constitutional law, there are different motivations that influence the passing of tax regulations through legislation. The literature on the determinants of tax policy and tax structure does not offer one unified model but many competing approaches. The ability to collect revenue affects the capacity of the state. The success in securing revenue depends on the relationship between states and their subjects. However, these constitutional texts only make passing reference to the 'right to tax' of government, which is not further elaborated upon or defined and is seemingly assumed. There is, however, sometimes reference to the need for consent, trust and legitimacy between the state and its subjects as well as the assumption of the willingness of citizens to pay tax for public purposes rather than retain it.

The political space that citizens and societies have to play in taxation brings with it the constitution or the fiscal social contract. This paper limits itself to the constitutional provisions and the role of society within it. Participation of society in other facets of tax legislation and policy are outside the scope of this paper. Although some argue that tax is the area of the expert there is a growing movement that the problems facing taxation have been created by the so-called experts and there is a need to remind the experts of the reality of taxation which is money taken from members of society be they individual or institutional in order to finance government activity. Corruption in developing countries has become a challenge and will continue to be an obstacle to development if the expertise argument is allowed to hold sway. This sub-section will now analyse the debates on the tax provisions found in a constitution and will discuss the debates in order

12 See generally S Steinmo *Taxation and democracy: Swedish, British and American approaches to financing the modern state* (1993) and W Hettich & S Winer *Democratic choice and taxation: A theoretical and empirical analysis* (2005).

13 G Brennan & JM Buchanan *The power to tax: Analytical foundations of a fiscal constitution* (1980). JG Head *Public goods and public welfare* (1975); J Prebble 'Should tax legislation be written from a "principles and purpose" point of view or a "precise and detailed" point of view?' (1998) *British Tax Review* 112.

14 O Therkildsen 'Public sector reform in a poor, aid-dependent country, Tanzania' (2000) 20 *Public Administration and Development* 61; OH Fjeldstad 'Local Government tax enforcement in Tanzania' (2001) 39 *Journal of Modern African Studies* 289; F Luoga 'The viability of developing democratic legal frameworks for taxation in developing countries: Some lessons from Tanzanian tax reform experiences' (2003) 2 *Law, Social Justice and Global Development Journal*.

to provide a framework within which to understand the constitution of Kenya.

2.1 Constitutional law and the power to tax

A tax system is based on the constitution of a country. Principles of constitutional law like equality, the protection of marriage and family, and the guarantee of welfare, are particularly important features of tax systems. These principles are human rights principles in addition to being constitutional and are enshrined in article 19(1) of the current Kenyan Constitution.[15] In addition, a constitution builds the framework of all governmental activities, including the tax policy; for example, the German Constitutional Court has developed jurisprudence remarkable for its judicial activism in the tax area.[16]

Oliver Wendell Holmes (1927) stated that 'taxation is the price we pay for civilization'.[17] A surface reading of the statement might suggest that we should acquiesce to whatever taxes are imposed on us, because the alternative would be even more painful than the taxes we pay. A deeper reflection on Holmes' statement, however, reveals the ambiguity about taxation. That some taxation may strengthen society does not mean that any and all taxation will do so. It presumes infallibility in a created tax system that can only ever be a sub-optimal compromise. If the alternative to taxation is the absence of government and civil order, some taxation is necessary to provide a basic framework for it and therefore maintain security. In this respect taxation is truly a price we pay for civilisation. That some taxation works to our common benefit does not, however, mean that any and all taxation does so. Thus, taxation is seen by Holmes to be a way of stimulating political participation as a result of people questioning the manner in which their money is spent. Besides, it is most likely that 'rates of government spending will always be higher than the revenue from the taxes legislatures are willing to impose on their constituents'.[18]

Detailed discussion on the constitutionality of the power to tax in recent debates centres on the issue of unitary and federal power sharing.[19]

15 It is now a central feature of our Constitution, is an integral part of Kenya's democratic state and the framework for all governmental policies – economic, social and cultural.

16 V Thuronyi *Comparative tax law* (2003) 83.

17 *Compania General De Tabacos De Filipinas v Collector of Internal Revenue* 275 US 87, 100, dissenting opinion (21 November 1927).

18 JM Buchanan 'Restoring the spirit of classical liberalism' Notes from Foundation of Economic Education (FEE), 2 July 2005 www.fee.org (accessed 2 May 2014).

19 GVL Forest 'The allocation of taxing power under the Canadian Constitution' *Toronto, Canadian Tax Foundation* (1981); O Akanle 'The power to tax and federalism in Nigeria Lagos' *Centre for Business and Investment Studies* (1988). State action can be rested upon the three legs of the power to police (maintain law and order).

In the United States,[20] scholars like Beale, an economist, never made any reference to whether the founding fathers of the United States (US) Constitution inferred into the provisions the right of government to levy tax.[21] Dividing tax power between different levels of government in a federation is shown to arguably lead not only to over-taxation, but also distorts the composition of state and federal public spending.[22] In federal states however, constitutional law discussions are on the division of tax power in between the constituent states within the federal state. This includes countries such as Canada, US and Nigeria. They are concerned with the share of taxation that is remitted back to the federal authority *vis-à-vis* the amount retained by the state and the issue of maintaining the balance on the basis of population and productivity.[23]

Brennan and Buchanan, political scientists, argue that the power to tax does not carry with it the obligation to use tax revenue in a particular way. It is simply a power to take. As a result, all constitutional rules may be seen as possibly limiting the power to tax.[24] They thus state, that there is no commensurate right of the citizenry for the money they remit to government. It could as a result, be argued that no one may be deprived of property arbitrarily and thus there is an entitlement for that deprivation. However, the power to tax debate does not make room for this argument. This chapter recognises and takes into account the debate on the power versus the right to tax, and then proceeds to examine the constitutionality of the taxation and finance provisions found in the various Kenyan constitutions, past and present. It takes the argument of the right to tax one step forward to include in it a reflection of the human rights approach in order to better centre it as a holistic part not only of the constitution but also human rights and their financing or realisation

The major motives of government taxation policy can be derived from the classical economist views of Musgrave on the functions of public finance,[25] which are essentially financing and steering. If we take the financing requirements as articulated, then the public deficit can be seen as an indicator for the demand of tax policy and tax reforms or just as evidence of overspending.[26] Imposing taxes can thus also be a key factor in determining the amount of savings and investment in an economy, as

20 WS Moore 'The constitution and the budget: Are constitutional limits on tax, spending, and budget powers desirable at the federal level' in WS Moore & RG Penner (eds) *Procedural and quantitative constitutional constraints on fiscal authority* (1980).
21 JH Beale 'Jurisdiction to tax' (1919) 32 *Harvard Law Review* 587; AA Reed 'Our forgotten Constitution – A bicentennial comment' (1987) 97 *Yale Law Journal* 281.
22 BU Wigger & U Wartha 'Vertical tax externalities and the composition of public spending in a federation' (2004) 84 *Economics Letters* 357.
23 RM Bird 'Institutions and economic development: Growth and governance in less-developed and post-socialist countries' *Tax policy and economic development* (1992).
24 G Brennan & JM Buchanan *The power to tax: Analytical foundations of a fiscal constitution* (1980) 8 - 9.
25 RA Musgrave & PB Musgrave *Public finance in theory and practice* (1980).
26 GB Koester 'The political economy of tax reforms – Evidence from the German case 1964 - 2004' Humbolt University, Berlin (2005) 6.

well as how much people work, when and on what they spend their income, and on the structure of business. A higher tax rate translates directly into a lower amount of disposable income, which means less money available for saving and investment. It also results in people working to obtain a certain disposable income and nothing more (thus not working harder for more money but to maintain a standard of living) and finally businesses are structured in order to avoid as much tax as possible. As a result, theoretically, the distribution of the tax burden might stimulate taxpayers' behaviour by encouraging remission of taxes if they are geared towards a common welfare goal.[27]

Constitutional theorists of taxation, as a result are predominantly economists or political scientists, however jurists or legal scholars are conspicuously missing. Thus, there seems to be an approach to the economics of the issue from a distance and the legislative issues reflect the perspective of other fields. These scholars argue that since government has the power to tax, the only limitations that can be placed on it must be constitutionally and legislatively imposed and hence that state-society relations are moot (debatable but not of any actual relevance). This translates into limited interaction by society in constitution making as well as in upholding fiscally inclined provisions.

2.2 Enshrining into the Constitution taxation principles and policies

While most constitutions tend to have very basic tax and finance provisions, the Kenyan 2010 Constitution is a departure from this as it sets out principles that should guide not only all its articles but some are specifically targeting fiscal provisions. The result of this is a need to not only discuss the constitution and legislation but also principles and policies that normally form part of government policy and discretion but have been shifted and constitutionally enshrined. As a result it is of importance to understand the principles and policies that generally guide taxation before one can see its application and elaboration in the development of Kenya's fiscal constitution.

Beginning with Adam Smith, writers have been attempting to establish criteria by which revenue and expenditure policies should be evaluated. The principles laid down by Adam Smith in the *Wealth of Nations* are still followed today in taxation policy. Smith argued that people pay according to their abilities, and in accordance with the proportion of revenue they enjoy under the protection of the state.[28] He thus covers both the ability to pay and the benefit theories of taxation. Musgrave then goes a step forward

27 DP Racheter & RE Wagner (eds) *Politics, taxation, and the rule of law: The power to tax in constitutional perspective* (2002).
28 A Smith *The wealth of nations* (1977) book v, chap ii.

and states that no one questions the fact that the budget should be designed to maximise welfare but that the fundamental question that remains unanswered is how benefit is valued and how the valuation then depends on the manner in which the tax bill is distributed. [29]

There has always been a debate on taxation and fairness. Rousseau argues on the basis of the impulse to help that seems to be one of the more pleasant sides of human nature. Rousseau[30] classed it amongst the 'natural' feelings and Adam Smith thought it was inherent to human nature. In addition, Henry George argued for the idea that the strong and the rich have a moral obligation to assist the weak and those in need and that it is normative in all major world religions.[31] Assistance could also take the form of charity and voluntary activities. Keynes stated that in framing tax principles and state finance, political and social aims must be considered together with the equitable and economic aims.[32] However within today's context of the difficulty in maintaining the welfare state in a fiscal crisis the use of fairness in the collection and distribution of taxation may be a better policy approach.

Arguments that dispose of the fairness concept usually argue for security and defence. Defence is seen as being more important than opulence[33] and many allow the imposition of tariffs to prevent dependence on imports.[34] Malthus also supported the concept of high tariffs based on the argument of future wars agreeing with Adam Smith.[35] Ricardo, however, disagreed with this analysis and felt that no matter what sanctions were imposed food would always be allowed through.[36]

That these principles may be found in a constitution would be a big step forward in moving policy to law and may have both negative and positive repercussions as will be discussed in the Kenyan context. These theories of Smith and Rousseau will be used in addressing the question as to whether the pathway of constitutional amendments to the fiscal provisions that have been taken since independence have actually improved in them or whether these provisions have been undermined resulting in a weakened fiscal system.

29 RA Musgrave & AT Peacock *Classics in the theory of public finance* (1962) xi.
30 JJ Rousseau *Discourse on the origin and the foundations of inequality among men* (1754).
31 M Friedman *Capitalism and freedom* (1962).
32 JN Keynes *The scope and method of political economy* (1917) 81.
33 A Smith *The wealth of nations* (1977) 429.
34 M Olson *The economics of the wartime shortage: A history of British food supplies in the Napoleonic War and in World Wars I and II* (1963) 3 - 4
35 TR Malthus 'Observations on the effects of the corn laws, and of a rise or fall in the price of corn on the agriculture and general wealth of the country' (1814) http://socserv.mcmaster.ca/econ/ugcm/3ll3/malthus/cornlaws (accessed 1 May 2007).
36 D Ricardo & P Sraffa *The works and correspondence* (1962) 176 - 178.

3 The Kenyan fiscal contract

Kenya's fiscal provisions have gone through several stages of change and amendment. This section will analyse the provisions before independence, the independence Constitution, the Amendments phase just post independence, the draft constitutions that went to referendum and finally the current 2010 Constitution. All constitutions have standard fiscal provisions: firstly, those allowing for the collection of money from state residents. Secondly, the mechanisms and budget processes. Thirdly, the oversight and audit functions. Finally, the distribution functions and share of expenditure usually within a division of responsibilities. However these are not always clearly separated and thus the picture is a mesh of who, what, when, where, why and how the financing of the state and its peoples takes place.

3.1 The creation of the fiscal contract

British colonial tax policy developed before its rule in East Africa on several grounds. Firstly, it was to prop up the economy of Britain by creating foreign markets and sources of raw materials for its industries. Secondly, it was to locate and secure the source of the Nile. Thirdly, it was to conquer Africa from the Cape to Cairo as a jewel in the crown of the British to show the world their might. Fourthly, it was motivated by the desire of securing the spices route to Asia and to maintain the link with the Indian colony in the wake of the Suez Canal crisis. Fifthly, it was a deliberate policy to slowly colonise African states by moving gradually from co-existence to control. Finally, Britain intended to spearhead the abolition of slavery and this was undertaken in the background of the need to evangelise the world.[37] None of these were a fiscal policy nor was there an intention to create an independent fiscal state.

In 1962, before independence in Kenya, a constitutional conference, which was participatory, was held in the UK and included members of the colonial office as well as the leaders who had been fighting for independence and the conclusions were set out in a report.[38] In the section on public service it stated that the Constitution would ensure the independence of the public service from political control at both central government and at regional level. While the section on finance stated that the federal regions should have adequate sources of revenue that were constitutionally secured. An expert commission was also to be appointed to study the powers required to implement this principle and the basis of

37 A Waris 'Taxation without principles: A historical analysis of the Kenyan taxation system' (2007) 1 *Kenya Law Review* 272 273.

38 Report of the Kenya Constitutional Conference, 1962 presented to Parliament by the Secretary of State for the Colonies by command of Her Majesty, April 1962 (Ref 31 Coe and Ref 30 Coe).

financial assistance to the regions in addition to central government. These provisions showed clearly that there needed to be unbroken financing of regional as well as central government staffing with the central government's finances being used to support this. As a result, at independence Kenya adopted a federal state, as reflected in these provisions practising fiscal federalism. This was without doubt a step forward towards a more democratic fiscal process.

The independence Constitution, which had been drafted in a conference, was amended almost immediately after the country was declared a republic in 1964. After independence, the provisions of the 1963 independence Constitution went through 24 constitutional amendments,[39] with the effect of completely changed fiscal provisions within the constitution. Although these were done using the mechanisms in place in the independence Constitution, changes such as moving the state into a one party state resulted in almost no opposition to the amendment in a period of oppression and extra-judicial killings and increased centralised controls.

In 2000 after huge pressure from both within and outside Kenya, the state began to engage in a process of participatory constitutional reform. The decision was to pass a new constitution through a national referendum. There have been several draft constitutions as well as two referendums leading up to the adoption of the current Kenyan Constitution. These are commonly referred to as the Constitution of Kenya Review Commission (CKRC) Draft,[40] the Bomas Draft[41] and the Wako Draft.[42] The Bomas Draft, which was the result of a constitutional conference on the CKRC draft, is the most critical as it was the text that was intended to be presented to the nation in a referendum. However, this did not take place and instead the Attorney-General presented an

39 The Constitution of Kenya (Amendment) Act 28 of 1964; The Constitution of Kenya (Amendment) (No 2) Act 38 of 1964; The Constitution of Kenya (Amendment) Act 14 of 1965; The Constitution of Kenya (Amendment) Act 16 of 1966; The Constitution of Kenya (Amendment) (No 2) Act 17 of 1966/Turn Coat Rule; The Constitution of Kenya (Amendment) (No 3) Act 18 of 1966; The Constitution of Kenya (Amendment) (No 4) Act 19 of 1966; The Constitution of Kenya (Amendment) Act 4 of 1967; The Constitution of Kenya (Amendment) Act 16 of 1968; The Constitution of Kenya (Amendment) (No 2) Act 16 of 1968; The Constitution of Kenya (Amendment) Act 5 of 1969; The Constitution of Kenya (Amendment) Act 10 of 1974; The Constitution of Kenya (Amendment) Act 5 of 1974; The Constitution of Kenya (Amendment) Act 1 of 1975; The Constitution of Kenya (Amendment) Act 13 of 1977; The Constitution of Kenya (Amendment) Act 1 of 1979; The Constitution of Kenya (Amendment) Act 5 of 1979; The Constitution of Kenya (Amendment) Act 7 of 1982; The Constitution of Kenya (Amendment) Act 6 of 1986; The Constitution of Kenya (Amendment) Act 14 of 1986; The Constitution of Kenya (Amendment) Act 20 of 1987; The Constitution of Kenya (Amendment) Act 8 of 1988; The Constitution of Kenya (Amendment) Act 1990, The Constitution of Kenya (Amendment) Act 12 of 1991.

40 The First Draft was prepared by the Constitutional Review Commission. It was then presented to the national conference for discussion and amendment.

41 The Draft that emerged after the Constitutional Conference.

42 The Draft prepared by the then Attorney-General of Kenya that was rejected by the nation in a national referendum as it seemed to be an attempt to overturn the mandate of the National Constitutional Conference.

alternative draft that is referred to as the Wako Draft that was subjected to a referendum in 2005 and rejected. Following the contested presidential elections in 2007 - 2008 and the accompanying post election violence, the antagonistic parties agreed to restart and complete the constitutional review process.[43] The process culminated in the adoption of the Constitution of Kenya, 2010. The Committee of Experts, the body appointed to lead the process had prepared a Harmonised Draft Constitution, building on two earlier drafts (Bomas Draft and Wako Draft). On public finance, the provisions in the Constitution of Kenya 2010 are substantially the same as those in the Bomas Draft, which were adopted without any changes by the Committee of Experts.

3.2 The Central Government's power to tax

To date the United Kingdom (UK) does not have a written constitution,[44] thus the fiscal contract before independence was based on article 4 of the Bill of Rights Act of 1689, which vested the sole authority to tax in the UK Parliament but uses language that reflects a right and responsibility based collection system.[45] This is the fiscal contract that the peoples of the East African protectorate and later colony were guided by legislatively and constitutionally, however since the responsibility in the UK law was to its citizens in the UK and not to the colonised peoples this became one of the reasons for independence.[46]

The independence Kenyan Constitution was no exception to the norm.[47]Firstly, all revenues were to be paid into a Consolidated Fund from which withdrawal could only be done through provision within the Constitution itself or by an Act of Parliament or by a vote on account passed by the National Assembly under section 101.[48] Money could then be withdrawn from the consolidated fund for state and constitutionally sanctioned expenditure. Other permitted withdrawals were in accordance with the Appropriation Act, expenses approved by the House of Representatives and those approved by the Controller and Auditor-General.[49]

Despite the criticisms raised regarding the Wako Draft, it reproduced verbatim the provisions on finance in the Bomas Draft were maintained in

43 K Kindiki 'The Emerging Jurisprudence on Kenya's Constitutional Review Law' (2007) *Kenya Law Review* 153 - 187.
44 P Baker 'The equality principle in united kingdom taxation law' http://www.taxbar.com/documents/Equality_Principle_Philip_Baker_000.pdf (accessed 6 April 2013).
45 M Daunton 'Equality and incentive: Fiscal politics from Gladstone to Brown by 2002' http://www.historyandpolicy.org/papers/policy-paper-06.html (accessed 6 April 2013).
46 Waris *Tax and development* (2013) chap 7.
47 See chap 8, Constitution of the Republic of Kenya (1963).
48 Sec 99(1) and 121.
49 Sec 122.

verbatim. As a result, it was made very clear that tax in Kenya was a power of the state and not a right with responsibilities. According to article 24(1)(g) of both drafts, one of the responsibilities of a good citizen is payment of all due taxes.

3.3 The Regional Governments' power to tax

Each Regional Assembly was empowered to make laws in respect of taxes. The 1963 Constitution considered making provisions for local government. The regional assemblies then had fairly powerful provisions including: regulating the scale, determining the principles of assessment and prescribing the manner of collection of tax, rate, contribution, rates or royalty was levied by any council.

However the amendments that came about almost within a year of independence completely undermined the fiscal federation in place. The fiscal provisions were amended through increasing centralisation. First, in the Constitution of Kenya (Amendment) Act 28 of 1964, the executive authority of the majimbos (federal regions) was highly watered down and provisions for citizenship and local authorities were modified. Secondly, the Constitution of Kenya (Amendment) (No 2) Act 38 of 1964 transferred to Parliament powers to alter regional boundaries. Originally, the power of the regions and independent sources of revenue to regions rendered them not entirely dependent on Central Government. Thirdly, in the Constitution of Kenya (Amendment) Act 14 of 1965, the Constitution amendment reduced the voting threshold from 90 per cent to 65 per cent in senate and from 75 per cent to 65 per cent in the lower house, while the executive power of regions disappeared completely.

Fourthly, in the Constitution of Kenya (Amendment) Act 16 of 1966, executive powers were increased to rule by decree. The Constitution of Kenya (Amendment) Act 16 of 1968 abolished provincial councils and deleted from the constitution any references to the provincial and district boundaries and alterations thereof. In the Constitution of Kenya (Amendment) Act 5 of 1969, all previous amendments as at February 1969 were consolidated, thereby resulting in a revised Constitution for Kenya in one document which was declared to be the authentic document.

The federal state provisions that were in the 1963 Constitution before amendment were partially re-introduced during the constitutional conference and expressed in both the Bomas and Wako drafts. However the extent of the delineation was not set out in these two drafts that are a reflection of the 2010 Constitution. Today these provisions have been relegated to the provisions in the County Government Act.

Article 239 of both the Boma and Wako draft Constitutions was also maintained verbatim on devolved governments' shares of national funds.

It stated that the government shall promote financial equalisation amongst all levels of government. Each devolved government was entitled to an equitable share of revenue raised nationally.[50]

3.4 The principles of taxation

The idea of having fiscal principles in a constitution is fairly novel. The norm has always been that this remains the ambit of government power and discretion and part of its policy. As a result there were no provisions on fiscal principles inserted in past constitutions in Kenya. However section 218 of the Bomas Draft[51] set out the primary object of the public finance management system of the Republic as being to ensure:

(a) efficient and effective generation of revenue;

(b) adherence to the principles of transparency and accountability and observance of law, including appropriate controls and oversight over borrowing and expenditure;

(c) equitable raising of revenue, and the sharing of national and local resources and revenue throughout the Republic, taking into account the special needs of marginalized communities;[52]

(d) the application of the principles of universality, of equality of tax treatment and of taxation according to economic capacity;

(e) that imposition of tax shall take into account the burden of direct taxes on the devolved governments and the people;

(f) that the benefits and burdens of public borrowing and spending are shared equitably between present and future generations;

(g) that the budgets and budgetary processes promote transparency, accountability and the effective financial management of the economy, debt and public sector; and

(h) that public accounts are audited and reported on regularly.

This novel and very interesting approach coupled with the additional principles added in by the Wako Draft of the Constitution which includes

50 A provision similar to this was contemplated by the 1963 Constitution in sec 137(2)(b).

51 This was sec 236 in the CKRC Draft and was maintained verbatim in the Wako Draft. The CKRC Draft part II was titled taxation powers and revenue sharing. Its sub-title was 'Imposition of Power' and it stated as follows:

> '237(1) No person or authority may –
> (a) impose a tax, fee or charge on behalf of either the Government or a devolved level of government, except under the authority of legislation; or
> (b) waive or vary any tax, fee or charge imposed by law except as expressly provided by legislation.
> (2) Legislation that provides for any waiver of any tax, charge or fee shall provide that a record of such waivers and the reason for them is kept and reported to the Auditor-General.'
> In the Wako Draft, article 30 stated that it 'provides that the legislative *power* of the Republic shall vest in the Parliament.' (emphasis added)

52 This provision was also the aim set out in the 1962 Report of the Kenya Constitutional Conference.

a section on *National Values, Principles and Goals* to ensure open and transparent government and accountability of state officers, public officers, state organs and public authorities; eradication of corruption as well as affirmative action principles squarely shifts policy guidance away from the states power to guidance by the society and its principles in theory.

3.4 The fund and collection structure

The 1963 Constitution provided only for a consolidated fund as well as a regional fund. Under section 99 of the post-independence Constitution, amendments led to sub-section (2), which provided that a public fund could also be established for a specific purpose.

Part 2 of the independent Constitution set out regional assemblies with a fund for each region which was to retain all revenues collected as long as they were not listed in section 181.[53] Money was also deposited into a regional contingency fund from which withdrawals could be made in cases of urgent and unforeseen needs for expenditure.[54] No money could be removed from either fund unless authorised by the regional assembly or authorised by the Auditor and Controller General or his representative.[55] A Finance and Establishments Committee was created to ensure the preparation and tabling before the Regional Assembly the estimates of the revenues and expenditures of the Region.[56]

The Constitution of Kenya, 2010 creates a consolidated fund[57] and mandates Parliament to establish the Contingencies Fund[58] and the Equalisation Fund.[59] The 2010 Constitution also mandates the establishment of a Revenue Fund for each County Government.[60] These additional funds are not necessarily a reflection of a better set of fiscal provisions but a reflection of the lack of trust the society has developed with the state where specific funds are required to be set up in order to ensure that past errors are resolved. It instead adds to the complication and expense of a developing country's fiscal system.

53 Sec 129.
54 Sec 134.
55 Sec 130.
56 Sec 132.
57 Art 206.
58 Art 208.
59 Art 204. The Equalisation Fund is a time-bound Affirmative Action measure constitutionally sanctioned mechanism that seeks to address the legacy of marginalisation to benefit of marginalised counties (as identified by the Commission on Revenue Allocation) by providing support in the provision of basic services such a s water, roads, health facilities and electricity.
60 Art 207.

3.5 The budget process

At independence, the Minister of Finance was responsible for the preparation and presentation of the draft budget for the following year before the National Assembly,[61] through an appropriation bill,[62] with a statement of excess or a supplementary estimate showing the sums required or spent if necessary. A Contingencies Fund was required from which the Minister of Finance, where he was satisfied that there was an urgent or an unforeseen need for expenditure, made advances from.[63] Section 126 provided for the payment of salaries and allowances to the holder of the office to which the section applied. Section 127 charged all debts to the consolidated fund.

Under the amended 1964 Constitution, article 100 provided that the Minister of Finance had to prepare annual estimates of revenue and expenditure and lay them before Parliament. Expenditures had to be placed in separate votes but the source of revenue need not be specified. However article 100 authorised the minister to make alterations after Parliamentary approval. This article was used together with section 5(2) of the Exchequer and Audit Act, which made parliamentary authority on resource allocation almost superfluous. The Finance Minister could actually suspend the government budget under this provision without reference to anyone. Thus under this provision government could spend more money than allocated, introduce budget items, and spend money before informing Parliament provided it subsequently submits supplementary estimates. This offended the principle of predictability at the most basic level. Article 102 set out the role of the Civil Contingencies Fund (CCF) and its purpose was to finance unexpected and unforeseen emergencies. However, this was not respected. Ministerial allowances that were not catered for were very often used to withdraw from the fund.

Today, one can argue that the budgetary process has been 'democratised' and perhaps rendered more transparent and the executive required to be more accountable for example to the Senate as set out in article 218 in division of revenue. The executive is also required to introduce proposals (on division of revenue between national and county governments and on sharing among counties) in parliament TWO months before the end of the financial year. This allows for meaningful debate and exchanges that allow the legislature to make its input and influence the process. In addition the Commission on Revenue Allocation, which is a creature of the new Constitution at article 215 also further democratises, professionalises and renders the process more transparent and accountable. This two months' time requirement also applies to the tabling

61 Sec 100(1) and (2).
62 Sec 123.
63 Sec 125.

of budget estimates in the National Assembly as set out in article 221. The constitution mandates scrutiny of the estimates by a Parliamentary Committee, which is obliged to facilitate public participation, which then approves the estimates before preparing an Appropriation Bill. In terms of capacity, the role of the Parliamentary Budgetary Office has been enhanced.

3.6 The audit and oversight function

At independence, section 128 defined the Office of the Controller and Auditor-General (A&CG) and outlined his duties and functions. The Harmonised Draft Constitution that was eventually adopted in 2010 introduced a new provision: the controller of budget had to approve any withdrawal from the fund. This would then justify the splitting of the roles of the Controller and Auditor-General into the Controller of Budget and the Auditor-General.[64]

In the past administrative functions have resulted in tax and debt management issues being conducted by the executive, with the role of parliament being relegated to post action audit reports that are traditionally subjected to long administrative delays.[65] This is further blamed on the lack of technical capacity to quickly scrutinise financial data, conduct analysis and make pertinent conclusions. Hence upon passing of a tax law, the only check or balance on its effectiveness, efficiency or pertinence in the country is assessed, on average, three years later when an audit report is filed. However, in light of the fact that the offices of the Controller and the Auditor-General have been split, the work should now be done in a timely manner. However the qualifications of these two positions and the manner in which they will be held responsible for failure to comply with their constitutionally mandated offices remains unclear.

In light of the current world fiscal crisis, debts may also lead to further problems, as there is also no limit on how much the cabinet secretary can borrow locally. The relevant Cabinet Secretary has *carte blanche* on how much to borrow, at what terms and for what purpose. On external borrowing, there are two soft conditions. First, there is a ceiling on borrowing which is a flat amount. Second, external funds can only be used for approved expenditures. However, there is no provision to ensure that these are productive investments or cost effective activities. In fact, a minister can borrow and spend as he pleases before seeking parliamentary approval as long as he submits supplementary estimates later. As a result with borrowing uncapped the ability to put the people into unlimited debt

64 For the withdrawal of money from the Consolidated Fund, the approval of the Controller of Budget is required. This had not been provided for in either the 1963 however it is set out in 204(9) of the 2010 Constitution.

65 Kenya currently has published audited reports up to the 2000 - 2001 fiscal years only.

and the only inevitable end is the need to increase tax collection to pay off the debt in the future.

Customs duties exemptions had previously been delegated, but the exemption from customs has moved to the East Africa Community (EAC) thus there is a clash between state powers and those of the Community and this needs to be addressed. Exemptions were for the purposes of public interest. However, how can exemption of a luxury car be for public interest? In addition, the state may vary value added tax, for example, to up to 30 per cent, without going back to parliament or consulting the people in a participatory system. These powers undermine the stability of the Kenyan tax system and need to be controlled carefully. Such a variation rule also makes Kenyan taxes fundamentally unpredictable and discouraged private investments particularly if done quietly outside the public view.

The supervisory role of the finances of the state are conducted through the offices of the Controller and Auditor-General and the Auditor-General of State Corporations. Deliberations of the Parliamentary Audit Committee and the Parliamentary Investigations Committee (PAC and PIC) this is limited to linking parliamentary approval to the release of funds. It does not refer to the quality of expenditure or the realisation of results. Audits thus simply answer the question whether the money was actually spent or not as approved. Spending more than the economic value of an item should not be scrutinised. Commissions of this nature were noted as far back as 1997 when the Public Expenditure Review Report noted that 'Government investments may not generate a commensurate level of GDP growth because the cost of acquiring capital is far greater than the value of the capital created'.[66]

Unfortunately, there are also no on-going audits on the basis of value for money. Normally these audits would be conducted at implementation, monitoring or post execution stage in the procurement process.

The Bill of Rights in both the drafts as well as the 2010 Constitution also recognised the right of every person to administrative action that is expeditious, lawful, reasonable and fair (article 70(1)).

3.7 The sharing of revenue

Part 3 of the independence Constitution dealt with financial relations between the Centre and Regions. Tax on the importation into Kenya of motor spirit or diesel oil was to be re-distributed by the Government of

66 Njeru Kirira, 'Function of legislature – public finance/financial mechanisms' Submission to the Constitution of Kenya Review Commission, 22 - 23 March 2002 http://www.commonlii.org/ke/other/KECKRC/2001/34.html (accessed 2 May 2014).

Kenya to the Regions as: (20 per cent) one-fifth to the Eastern Region; (40 per cent) two-fifths to the Centra1 Region; (10 per cent) one-tenth to the Rift Valley Region; and of the remaining (30 per cent) three-tenths, (29,4 per cent) 98 per cent to the Coast Region and the rest (0,6 per cent) to the North-Eastern Region.[67]

For all other taxes collected, apart from tax on motor spirit or diesel fuel[68] or agricultural produce, the Regions in respect of each financial year should receive a sum equal to 32 per cent of the proceeds of that duty for that financial year and the sum was to be divided amongst the Regions in shares proportionate to the respective numbers of the inhabitants of each Region.[69] The proceeds of any tax, duty or fee relating to a regionally issued licence fall under regional revenue.[70]

Royalties for minerals up to 100 000 Kenya shillings as well as one-third (33,3 per cent) of any excess would be retained by central government. For royalties over 100 000 Kenya Shillings two-thirds (66,6 per cent) of the amount over this amount (the excess) would be divided regionally as follows: one-sixth (11,1 per cent) to the region where the mineral was found; and remaining half between all other five regions equally (approximately 11,1 per cent each). However any royalty collected from Lake Magadi soda ash mining was to be given to the Rift Valley region and royalty from forest produce after expenses was regarded as revenue fully belonging to the region from where the produce originates.

In addition, the regional Assembly was authorised to make laws with respect to: firstly, taxes on the incomes of resident Region; secondly, rates on land or buildings within the Region; thirdly, poll taxes in the Region; fourthly, taxes in respect of regional entertainment to which persons are admitted for payment; and finally royalties in respect of common minerals extracted in the Region.

However the Regional Assemblies were not allowed to tax bodies corporate, partnerships or persons under the age of eighteen years. It also limited the total amount of tax to a maximum level of 600 Kenya Shillings. Poll tax was limited to 100 Kenya Shillings. In addition, taxation of the residents of Nairobi fell under central government as set out in section 144(1).

67 Sec 137.
68 Sec 152 states that 'motor spirit' includes gasoline and other light oils suitable for use as fuel in internal-combustion engines and other products suitable for such use but does not include aviation spirit or other fuels suitable for use in aircraft engines; and 'diesel oil' means light amber mineral oil suitable for use as fuel in high-speed internal-combustion engines.
69 Sec 138.
70 Sec 139.

Both the Wako and Bomas drafts in the fourth schedule stated that the Government may raise revenue by way of taxes, levies, fees and charges including income tax; value added tax; corporation tax; customs duties and other duties on import and export of goods; excise tax; general sales tax; national stamp duties; taxes from the national lottery and schemes of a similar nature; taxes on transport by road, air, rail and water; rents from houses and other property owned by the Government; fees for licences issued by the Government; court fees, fines and forfeitures; exchange receipts; motor vehicle registration fees and driving licence fees; natural resource royalties tax; fees for Government goods and services; and any other taxes authorised by national legislation. This is similarly found in schedule five of the 2010 Constitution.

3.8 The re-distribution of revenue

Articles 100 to 104 of the Constitution allowed Parliament to authorise public spending to meet public purposes. Upon independence, half of the Regional Contingent of the Police Force for the Region was paid by the central government.[71] Today redistribution has been relegated to a legislative function and the battle continues between regional and central government constantly on the share of re-distribution while a revenue allocation commission makes decision on allocation, however the shares of resource allocation are no longer demarcated within the constitution.

4 Recommendations

There were many issues that were extensively discussed during the constitutional conferences and in diverse debates before and even after the 2005 and 2010 referendums on the Kenyan Constitution. However tax was not one of these issues.[72]

As a result, there are several issues that remain unclear, and it is crucial that the state moves forward in enacting some constitutional amendments

71 Sec 141.

72 Adapted from the contested issues as identified by the Law Society of Kenya's (LSK) Standing Committee's Final Report to the LSK Council, dated August 2006, and was commissioned by the UNDP Kenya. See LSK (2006) 'Standing Committee's Final Report to the LSK Council' http://www.ke.undp.org/constitutionalreview.pdf (accessed 2 May 2015). They included the Kadhis' court/Christian courts, presidential powers, executive authority, powers of prime minister, presidential/parliamentary system of government, external ministers – non-elected, women representation in parliament, presidential impeachment threshold, threshold for amending the new Constitution, place of culture in the Constitution, bill of rights (including issues relating to Muslims, land tenure and land commission, gay and lesbian marriages, citizenship, child rights and death sentence), administrative justice, Teachers Service Commission, provincial administration, post Constitution legislative enactments, devolution, presidential elections, entrenchment of the Kenya Anti-Corruption Commission in the Constitution, the place of the East African Community and its organs in the Constitution and Treaty Making Procedures.

or at minimum, legislative changes, as we settle into the implementation of the new Constitution. Firstly, article 210 of the Constitution which deals with the imposition of tax should be elaborated on to ensure that: one, that the Finance Bill is submitted to Parliament on the basis of agreed fiscal strategy, with resources allocated based on a minimum of five of the principles of taxation consistently throughout the Bill, in addition to using national objectives and needs to guide it. Two, there is a need for the use of economic stability and equity as the measure for the disbursement of resources. Three, expenditure should be sustainable especially in regard to preventing the accumulation of excessive debt. Finally, intergenerational equity should be maintained in the case of public debt and investment. Ideally parliament should be the custodian of public interest with the authority to protect and preserve public property. All other institutions and individuals authorised to collect or spend should do so under specifically delegated authority. In addition, parliament should reserve the right to take corrective action, especially on collection and mobilisation of resources, to ensure that fiscal assets are not used indiscriminately and ensure their efficient utilisation.

Secondly, there is a lack of specificity in the Constitution on the interaction within parliament as well as between parliament and government on the way forward for the government in fiscal decision-making. This includes but is not limited to: an absence of specific and written down institutional arrangements between the three branches of government in the context of taxation and fiscal policy; no clear demarcation of responsibilities and functions between the three arms of government; there is an absence of clarity on the capacity of each of the institutions to act as checks and balances on each other; and no clearly delineated provisions within the constitution as concerns parliament to enforce accountability and responsibility and demand transparency.

Thirdly, exemptions, variations and abandonment of taxes have been placed in the hands of the Cabinet Secretaries concerned. When parliament delegates any duty, it must retain the capacity to follow up on implementation, and demand accountability and transparency together with value for money. In addition, it must retain the power to demand reports on the delegated functions.

Fourthly, there needs to be a budget law. There is the option of placing many of these provisions in a piece of legislation but with the background of the reluctance to apply budgetary controls in the Kenyan context, the Constitution may be the only option. This includes provisions setting out that: annual budget estimates be accompanied by a budget policy indicating immediate, short-term, medium-term and long-term Government objectives; a budget detailing proposal of departments, comments and recommendations of the Cabinet Secretary of Finance and their submission of these to Parliament two months before presentation of budget; parliamentary scrutiny of departmental proposals before the

debates commences on the consolidated estimates; annual estimated be submitted with economic data to justify them; departmental budgets should indicate clear objectives and targets. The two month timeline provided for, is not enough; and changes to the budget, without parliamentary approval, should be limited if they are over 3 per cent of the budget.

Fifthly, the President currently appoints both the Controller of Budgets and the Auditor-General. This requires to be addressed as follows: There is a need for the basic minimum qualifications for the appointees to be revised. The appointment should be ratified by a majority of legislators in Parliament and any queries must be brought forward in parliament. Matters of finance should not be delegated to a committee but must be dealt with by the full parliament and even if the committee remains necessary the sessions must be open and regional representation must be ensured for both members of the legislature as well as public participants.

Sixthly, article 228 of the Constitution should be clarified to enhance accountability of the Controller of Budgets and government to provide that: one, any withdrawals must be presented to parliament within 21 days for approval. Two, details of the emergency must be provided including its nature, the responsible department, the extent and duration of the emergency. Finally, misuse will be termed a crime and the minister will be required to reimburse the amount personally.

Seventhly, in article 214, debts must be pegged to either GDP or revenue performance. Total debts and the economic capacity to service them must be pegged to each other. Public officers who commit funds are to be held personally responsible. Officers are requested to make good any loss from unauthorised expenditures. There must be disciplinary action or criminal charges for misuse of funds. All public debts and contingent liabilities must be reported at least twice a year. A Budget outcome/ performance report must be released within four months of the end of the fiscal year, include achievements and must be gazetted for public scrutiny.

Eighthly, there is no obvious list in order of priorities and thus commensurate spending and sourcing to address particular policies. Policies could address particular ethnic groups or marginalised groups like the disabled, or the girl child, thus justifying increased expenditure for schools for girls. It is for these reasons that the canon of efficiency, equity, stability, neutrality and predictability seem tantamount to the success of developing states taxation and public expenditure. This includes compliance with international treaties and standards such as the Millennium Development Goals as well as treaties that Kenya is party to.

Ninthly, there is a need to limit taxation. The more taxes the government takes, the less money individuals have to spend. The less they have to spend, the lower the standard of living. The higher the tax, the less

people save and invest. This limit to tax would include ensuring that there is always a balanced budget, that line item vetoes are allowed, that there be a super majority requirement as well as a referendum before large scale spending or constitutional amendments. Other potential recommendations to consider include the use of sunset provisions to put time limits on certain types of fiscal provisions so that they do not go on unchecked.

5 Conclusion

Emerging democracies have a unique opportunity. Unlike western democracies, which have long established and entrenched systems, there is currently the freedom in Kenya to construct the fiscal contract practically from scratch. Emerging democracies can adopt a system that meets the goal of raising revenue without the burden of excessive complexity and administrative costs, not to mention coercion and inequity. Constitutional provisions should reflect re-distribution. Taxes must be kept as low as possible, with low administrative costs. Taxes must be simple, visible and partially earmarked for specific purposes. This tax collection and re-distribution must be clear and easily understood. Although they should not be changed frequently, they should have a definite life span in order to allow for development indicators as well as inflation and economic changes to be re-assessed in order to also reassess the law in place.

Kenya's fiscal constitution has gone through numerous changes, most of which were a result of the change from a decentralised federal to a centralised unitary government with the amendment of the Westminster style independence Constitution. It subsequently was further centralised as was the case of all other laws in the country over the years, especially due to changes in the political and administration structures. However, these changes were not motivated by, or did not reflect any fiscal ideal. The current Kenyan Constitution can be placed in between the 1969 Constitution and the 1963 one, as it reflects some aspects of a federal system. However, the independence Constitution is more preferable as it established a more progressive fiscal contract since it had less uncertainty and was more delineated in terms of the sharing of revenue and resources.

These successive amendments not only eroded the fiscal contract but also completely replaced it with a power-centric and controlling government with no reference to responsibilities of the state. The Constitution also institutionalised an unchecked power to collect taxes whenever and wherever the state required finances. The result was a very centralised and controlling state. It may have been one of the many reasons that resulted in the overwhelming demand by the people to have a new constitution. The perception that many hold is that the fiscal laws were not a direct reason but the need to devolve finances stemmed from the fiscal provisions and the weakening of the system as a result. The fact that 40 years later we are back to a Constitution that has similar devolved

government principles is a reflection of the importance of finance and a recognition that perhaps the independence Constitution before it was amended was a better document than we gave it credit. As a result, the sharing provisions that were set out in the independence Constitution were completely removed through successive constitutional amendments that de-constructed not only the federal system but also the fiscal contract that had been agreed upon through the constitutional conference. These changes were not rationalised in terms of reducing tax burdens, or creating a more efficient taxation framework: they constituted victory for centralising forces and the effect was that taxes that were devolved and collected regionally such as those on soda ash in Magadi were as a result shifted to central government.

If the history of fiscal amendments is to be reflected upon, it is apparent that making any amendment, however small, to a constitution, can de-construct the fabric of a state and completely change its character. Despite such important lessons on the likelihood of negative implications, especially in speedy and rushed amendments to the Constitution, there have already been calls for amendments to diverse provisions of the new Constitution since 2012. Although this chapter adds its voice in calling for a reconsideration of the Kenyan fiscal structures, it also recognises that some issues may be addressed through mere legislation and policy rather than actual amendments to the current Constitution.

From the discussion in this chapter, despite the novel elements in the 2010 Constitution: including national values and principles with are overarching (art 10); detailed principles of public finance (art 201); revamped institutional framework that enhances accountability, transparency; a more democratic public finance system with an enhanced role for the legislature; and mandatory public participation it is apparent that the 1963 independence Constitution established a much better and clearer fiscal contract than the current 2010 Constitution. Although, the current 2010 fiscal Constitution is still much better than that which was in place just before the country began debating the social and fiscal contract that citizens hold with the state. The progress achieved in the 2010 Constitution requires to be adequately safeguarded from any regression, while at the same time, effort is made to improve the fiscal contract to a level that equals or is better than the progressive contract established under the 1963 Constitution. It is this failure to debate and discuss the fiscal provisions in the new constitution, in order to address their appropriateness, which has resulted in the creation of a very fiscally heavy and idealistic Constitution.

Part 5: Unravelling judicial reforms and the state of justice

CHAPTER 12 UNCLOGGING THE WHEELS OF JUSTICE: A REVIEW OF JUDICIAL TRANSFORMATION IN THE POST-2007 PERIOD

Morris Kiwinda Mbondenyi

1 Introduction

In Kenya, the judiciary is the main institution empowered to provide remedies and sanctions for a breach of the Constitution or ordinary law. The 2010 Constitution is categorical that 'judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals' established under the Constitution.[1] It is needless to emphasise that a firmly rooted democracy requires a vibrant judiciary that is fully committed to due process and the enhancement of liberal principles and thinking. It is rather unfortunate, however, that successive political regimes in Kenya generally neglected the important role of the judiciary. At best, the judiciary was interfered with. Thus, the country almost succumbed to the 2007 post-elections anarchy because its judiciary could not be relied on to mediate on the political crisis that culminated from the botched elections.

Prior to the enactment of the new Constitution in 2010, the judiciary was faced with the difficult task of maintaining the intricate balance between socio-political transformation and interpretation of law. When called upon to determine matters of a political nature, the judiciary was on most occasions seen to favour the reigning political class to the detriment of other litigants. Undoubtedly, therefore, the judiciary was one of the government's handmaidens for undemocratic and mundane practices such as ethnic polarisation, electoral malpractices and uneven access to public resources.[2] Judicial independence was largely a byword because the legal system was plagued with a number of handicaps, which shall be discussed

1 Constitution of Kenya 2010, art 159.

2 See in this regard M Mbondenyi 'The right to participate in the government of one's country: An analysis of Article 13(1) of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 elections crisis' (2009) 9 *African Human Rights Law Journal* 199.

in detail in part two of this chapter.[3] This partly explains why, when Kenya was engulfed in post-elections anarchy in 2007, the international community, rather than the country's judiciary, was found to be a more suitable mediator in the conflict. Primarily, the country's judiciary had recurrently been criticised for continuing to identify with questionable judicial pronouncements that bordered on partisanship. Thus, the endemic failures in governance, coupled with executive interference with the judiciary, undermined the role the judiciary would potentially have played in redressing the 2007 electoral dispute.[4] This scenario made it imperative for necessary legislative and institutional reforms to be undertaken to guarantee a transformed judiciary that, in the very least, would be the bridge to the country's socio-political and economic transformation.

The promulgation of a new Constitution in 2010 therefore signalled the dawn of a new beginning in so far as judicial transformation in Kenya is concerned. The Constitution contains provisions that are indicative of the fact that judicial transformation in Kenya is in the offing. The realisation of such transformation, however, will be tenable only if these provisions are fully implemented. It is important to point out that the mere promulgation of a robust Constitution does not necessarily guarantee judicial transformation. What really matters is how seriously the Constitution is implemented to ensure such transformation. This chapter therefore critiques the process of judicial transformation in the country in the post-2007 period.

2 The state of Kenya's judiciary in the pre-2007 period

The emergence and evolution of Kenya's judiciary can be traced to the East African Order in Council of 1897.[5] Under this regime, the judiciary was not only based on a tripartite division of subordinate courts into Native courts, Muslim courts and those staffed by administrative officers and magistrates, but also established a dual system of superior courts – one for Europeans and the other for Africans.[6] Notwithstanding this formal structure, it is believed that the need to have a network of dispute resolution mechanisms throughout the country prompted the colonial administration to empower village elders, headmen and chiefs to settle disputes within their vicinity. These traditional dispute resolution mechanisms gradually evolved into tribunals and were therefore accorded

3 See 'Rehabilitating Kenya's Judicial System' http://www.idrc.ca/en/ev-104828-201-1-DO_TOPIC.html (accessed 21 July 2013).
4 Human Rights Watch 'Ballot to bullet: Organised political violence and Kenya's crisis of governance' (2008) 20/1 (A) 3.
5 See the Judiciary of Kenya website http://www.judiciary.go.ke/judiciary/index.php?option=com_content&view=article&id=261&Itemid=295 (accessed 21 July 2013).
6 As above.

official recognition in 1907, upon the promulgation of the Native Courts Ordinance.[7]

It is noteworthy that prior to Kenya being declared Britain's protectorate, during the reign of the Imperial British East African Company (IBEAC), administration of justice was haphazard.[8] This indeed impaired the development of the country's judicial system.[9] During this period, administration of justice was neither consistent nor continuous, as the IBEAC handled different regions of the country differently. For example, coastal Kenya had Islamic courts administering justice, while a totally different system was applied in other parts of the country.[10]

The 1907 Native Courts Ordinance therefore sought to reorganise the country's justice system by authorising the Chief Native Commissioner to set up, control and administer the existing tribunals.[11] Consequently, tribunals were established at the divisional level of each district and a *Liwali* was appointed at the Coast to adjudicate disputes arising in the Muslim community. This essentially meant that one could appeal against the decisions of these tribunals to the District Officer (DO), District Commissioner (DC) and finally to the Provincial Commissioner (PC). The Supreme Court was the highest court of appeal in the land.[12]

In 1930, the Native Appeals Tribunal's Ordinance[13] was promulgated. This legislation, amongst other things, limited the number of elders sitting on a tribunal. It also made it a prerequisite for the person recording the tribunal's proceedings to be literate.[14] The progress registered by these tribunals was very significant, leading to their replacement with courts similar to those that served non-Africans. In 1950, the colonial administration therefore enacted the African Courts Ordinance, which abolished the tribunals.[15] This period also marked the beginning of restructuring of the country's court system. The Chief Justice headed the new system, while the Registrar of the Supreme Court carried out the administrative duties.[16] Experienced judges and magistrates were also appointed to administer justice in these courts. On the other hand, Muslim courts, which were classified as subordinate courts, were headed by a Chief Kadhi. In spite of this restructuring, however, the African courts remained

7 As above.
8 J Gitau 'Kenya's constitutional reform: The Kadhi's court debate' (2010) *Judiciary Watch Report* 180.
9 YP Ghai & JP McAuslan *Public Law and political change in Kenya: A study of the legal framework of government from colonial times to present* (2001) 125.
10 Gitau (n 8 above).
11 See the Judiciary of Kenya website (n 5 above).
12 As above.
13 As above.
14 As above.
15 As above.
16 As above.

part of the Provincial Administration and not the judiciary.[17] This was perhaps motivated by ethnic and racial considerations perpetuated by the colonial policies of segregation. It was not until 1962 when these courts were eventually transferred to the judiciary.[18]

When Kenya attained her independence in 1963, the judiciary was further reoriented to accommodate the socio-political changes the country was experiencing. In the main, there was the pressing need to balance the racial composition in key governmental institutions. In the case of the judiciary, this necessitated the establishment of the Judicial Service Commission (JSC) that would ensure unbiased appointments of judicial officers. These developments also saw the establishment of the Court of Appeal, and in 1964, the renaming of the Supreme Court as the High Court.[19] To aid the process of reorientation and restructuring of the judiciary, several legislations were enacted in the early years of the country's independence. For instance, in 1967, the Judicature Act,[20] Magistrates' Courts Act[21] and the Kadhis Courts Act[22] were enacted.

As pointed out elsewhere above, the country's judiciary has encountered numerous handicaps over the period of its subsistence. Such handicaps include inadequate legislative and institutional frameworks for appointment of competent judicial officers; the apparent appointment of judicial officers on the basis of tribalism, cronyism and personal loyalties; allegations of corruption and related malpractices; and political interference.

Grand corruption was the hallmark of the country's justice system in the period prior to the 2007 elections.[23] Amongst the host of corrupt activities reported include judges ruling in favour of litigants without regard to merit, misinformed litigants missing their court appearances, and lack of court reporting leading to decisions that ignored precedents.[24] This state of affairs would have gone unattended had it not been for the intervention of government in 2003, which set up a committee to review the integrity of the judiciary. In a report presented to then Chief Justice, Evans Gicheru, the committee alleged that a total of 105 judicial officers, including 87 magistrates and 23 judges, acted corruptly.[25] Judges implicated in the report were given the option to either resign or be investigated by independent tribunals.[26] The refusal of five judges to resign

17 As above.
18 As above.
19 As above.
20 Chap 8, Laws of Kenya.
21 Chap 10, Laws of Kenya.
22 Chap 11, Laws of Kenya.
23 See 'Rehabilitating Kenya's Judicial System' http://www.idrc.ca/en/ev-104828-201-1-DO_TOPIC.html (accessed 21 July 2014). See also 'Report of the Task Force on Judicial Reforms in Kenya' Government Printer, Nairobi, August 2009.
24 As above.

prompted the President to set up two tribunals to investigate the corruption allegations.[27]

At another level, the inadequacies of the then subsisting legal and institutional frameworks were a clog to judicial transformation in the country. For slightly more than four decades, Kenya prided itself in a Constitution and a legal system aped from its former British coloniser.[28] The now repealed Constitution granted judges untrammeled security of tenure, meaning they could only be removed from office upon proof of inability to dispense their functions, or for misbehaviour, or upon attaining the age of 74 years.[29] Where there was need to remove a judge from office, the President could appoint a tribunal to investigate the judge's conduct and suspend the judge from exercising the functions of his/her office pending the decision of the tribunal.[30] Although security of tenure is ideally meant to strengthen the independence of judicial officers, using it as a shield, judicial officers successfully evaded accountability measures, leading to corruption, incompetence and indolence.

Again, the repealed Constitution did not adequately guarantee judicial independence in so far as it vested upon the President enormous powers and overwhelming influence over the executive, judicial and legislative functions of government. For instance, it mandated the President to appoint the Attorney-General,[31] Chief Justice and other judges.[32] As already mentioned above, the question of determining the removal of these judicial officers was also vested in the President who by law was required to appoint a tribunal in this regard. Democracy, strictly so-called, was therefore not tenable in Kenya, mostly due to an 'authoritarian Constitution' that vested enormous powers in the presidency. Disquiet with the overly amended Constitution, coupled with detest for the abuse of executive powers by incumbents, led to the agitation for constitutional reforms. It was strongly believed that only comprehensive constitutional reforms could guarantee a positive transformation of the judiciary by,

25 In September 2003, the Hon Justice Aaron Ringera and his committee prepared and presented a report on corruption and integrity in the judiciary to the Chief Justice Evans Gicheru. See 'ICJ Kenya's judicial reform newsletter' Issue 1, December 2003 http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.icj-kenya.org%2Findex.php%2Fresources%2Fnewsletters-bulletins%3Fdownload%3D65%3Aicj-kenyas-judicial-reform-newsletter-issue-1-dec-2003&ei=OAv-UsCBGbDe7AbI9oDIAg&usg=AFQjCNHJ4tMA-VNkc9l2EWfaEVyaoH612w&bvm=bv.61190604,d.bGQ (accessed 21 July 2014).

26 As above.

27 As above.

28 See the Constitution of the Republic of Kenya, adopted in 1963. This Constitution was subsequently repealed on 27 August 2010 following a successful referendum that led to the Promulgation of a new Constitution.

29 Sec 62(1) & (2).

30 Sec 62(4).

31 Sec 109.

32 Sec 61.

amongst other things, ensuring separation of powers and bringing to an end the abuse of executive powers.

Although the agitation for constitutional reforms begun in the early 1990s, initial attempts at comprehensive reforms were given legal effect in 1998, when the Constitution of Kenya Review Act was enacted.[33] These attempts, however, were not immediately fruitful because the then Kenya African National Union (KANU) government was not comfortable with the scope of the potential reforms. Most contentious were proposals on the devolution of powers through a federal system of government and the limiting of the powers of the President through the creation of the office of a Prime Minister with 'executive powers'.[34]

The wrangles between the government and opposition parties saw the country go into the 2002 elections without effecting substantial legislative reforms. Principally, the constitutional review process was hampered by divisive politics, animated by high levels of political posturing and discord. More often than not, national interests were traded off against the sectarian interests of politicians and other decision-makers. Without constitutional reforms, there were no judicial reforms.

Consequently, when the country was engulfed in post-elections anarchy in 2007, the international community, rather than the country's judiciary, was found to be a more suitable mediator.[35] This was somewhat a 'wake up call' to the country as a whole. A lasting solution needed to be found very urgently to restore peoples' confidence in the country's key institutions – the legislature, judiciary and executive. In a way, the anarchy witnessed in the aftermath of the 2007 elections became the country's turning point in so far as legislative and institutional reforms in the country were concerned. Judicial transformation was identified as one of the key institutional reforms the country desperately needed.

3 An overview of the approaches to judicial transformation in Kenya

After the 2007 post-elections violence, it was obvious that the country was in desperate need of a 'watertight' judicial system that would ensure greater citizens' participation and promote accountability and

33 See the Constitution of Kenya Review Act 13 of 1997. According to sec 2A(c) of the Act, the purpose the Constitution review process was to secure provisions in the Constitution 'recognising and demarcating divisions of responsibility among the state organs of the executive, the legislature, and the judiciary so as to create checks and balances between them and ensure accountability of the government and its officers to the people of Kenya'.

34 See Kituo Cha Katiba 'Key historical and constitutional developments' http://www.kituochakatiba.co.ug/constkenya.htm (accessed 1 September 2012).

35 Human Rights Watch (n 4 above).

transparency in the conduct of public affairs. Characteristically, such a judicial system should be able to provide equal opportunities to all litigants without regard to status, age, gender, ethnicity, race or political affiliation. Secondly, it should be an empowered judiciary that would determine, without undue interference, the question of transfer of political power and periodic renewal of political leadership. Thirdly, without compromising its deserved independence, the judiciary should have a good working relationship with other state organs, such as the legislature, the executive, National Human Rights Institutions, as well as Non-Governmental entities. Lastly, it should uphold the rule of law in a manner that would protect human rights and democracy and ensure equal access to justice for all.

With these characteristics in mind, the search for a transformed judiciary in Kenya begun in earnest after the Grand Coalition government was sworn in on 28 February 2008. In 2009, a taskforce was set up by the government to propose ways in which the judiciary could be reformed.[36] Amongst other things, the Task Force identified several challenges that impaired the judiciary from performing its functions effectively. These challenges included:[37]

(i) Complex rules of procedure that undermine[d] access to justice and expeditious disposal of cases;

(ii) Backlog and delays in the disposal of cases thereby eroding public confidence in the Judiciary;

(iii) Manual and mechanical systems of operations that affect[ed] efficiency in service delivery;

(iv) Inadequate financial and human resources that contribute[d] to case backlog;

(v) Inability to absorb donor funds due to complex procurement and other financial procedures;

(vi) Unethical conduct on the part of some judicial officers and staff that impede[d] the fair and impartial dispensation of justice;

(vii) Weak administrative structures that undermine[d] the effective administration of courts;

(viii) Lack of operational autonomy and independence;

(ix) Poor terms and conditions of service that [made] it difficult for the Judiciary to attract and retain highly qualified professionals amongst its ranks;

(x) Less than transparent procedures for the appointment and promotion of judicial officers particularly Judges; and

36 See 'Report of the Task Force on Judicial Reforms in Kenya' Government Printer, Nairobi, August 2009.

37 Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 1 - 2.

(xi) Lack of effective complaints and disciplinary mechanisms to deal with misbehaviour by Judges.

The Task Force made numerous recommendations for judicial reforms as well as the implementation strategies for those recommendations.[38] However, it was not until a new Constitution was promulgated on 27 August 2010, when the dawn of true judicial transformation became apparent. The Constitution of 2010 envisages characteristics of a progressive judiciary and provides a framework through which the country's judiciary could be transformed. What follows is an analysis of the approaches undertaken to realise judicial transformation in Kenya following the promulgation of the Constitution of 2010.

3.1 Constitutionalisation of the doctrine of judicial independence

Judicial independence is an important concept that has classically been taken to mean that judges should be free from Executive interference. However, in modern times, the doctrine has correctly been understood to require judges to be free from both outside and inside pressure, notwithstanding its source. This essentially means the definition of judicial independence can no longer be restricted to the prohibition of state interference with the judiciary. This is because non-state actors, such as the media and multinational corporations could also pose a threat to judicial independence. Internal pressure could also compromise on judicial independence.

An independent judiciary is unquestionably crucial to the thriving of democracy and to the successful negotiation of political transitions. This independence may be secured by, for example, the charging of judges' salaries on the Consolidated Fund, separation of the judiciary from parliament, security of tenure of office and judicial immunity. It should be noted, however, that complete independence would be extremely difficult because the operation of the judiciary is a government responsibility, hence the reason it is considered to be one of its three arms. This fact notwithstanding, there are certain elements in the 2010 Constitution that guarantee the judiciary a greater degree of independence than was ever experienced before. Three of these elements are discussed below.

3.1.1 Mode of appointment of judges

In the previous constitutional dispensation, judicial independence was compromised at the point judges were appointed. Frequently, the process was politicised or dominated by the executive. Qualifications for

38 Report of the Task Force on Judicial Reforms in Kenya (n 36 above) chap 12.

appointment of judges were also skewed to favour a small fraction of legal professionals. As was correctly pointed out by the Task Force on Judicial Reforms:

> [O]ne of the causes of loss of public confidence in the Judiciary has been the use of non-transparent procedures in the appointment of Judges … The process through which candidates for appointment are currently identified and vetted by the JSC is neither transparent, nor based on any publicly known or measurable criteria.[39]

On the qualifications for appointment of judges, sections 61(3) of the repealed Constitution only regarded a restricted category of persons to have been duly qualified. Accordingly:

> A person shall not be qualified to be appointed a Judge of the Court of Appeal and the High Court unless:
>
> (a) he is, or has been, a Judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or a court having jurisdiction in appeals from such a court; or
>
> (b) he is an advocate of the High Court of Kenya of not less than seven years standing; or
>
> (c) he holds, and has held for a period of, or for periods amounting in the aggregate to, not less than seven years, one or other of the qualifications specified in paragraphs (a), (b), (c) and (d) of section 12(1) of the Advocates Act as in force on 12th December, 1963.[40]

These qualifications were clearly not sufficient to ensure the appointment of appropriately qualified and experienced persons. As a result of the insufficiency of the qualifications, many 'would be qualified' persons could not be appointed as judges. Apart from that, the President was mandated to unilaterally appoint judges. Judges, apart from the Chief Justice, were appointed by the President on the advice of the Judicial Service Commission (JSC) which by no means could be said to be independent.[41] In the case of the Chief Justice, the advice of the JSC was not necessary as the Constitution mandated the President to appoint the office bearer unilaterally.[42]

It is equally important to point out that the process of appointment of judges, in sharp contrast with that of appointment of magistrates, was not transparent and competitive in the sense that it was not preceded by advertisement, vetting and interview of suitably qualified candidates.[43]

39 See Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 23 - 24.
40 See sec 61(3) of the Constitution of Kenya 2008 Revised Edition.
41 As above, sec 61(2).
42 As above, sec 61(1).
43 See Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 26.

The approach therefore denied many interested and qualified Kenyans the opportunity to serve as judges.[44]

Under the 2010 Constitution, however, the mode of appointment of judges has been couched in such a way as to ensure greater independence of the judiciary. Firstly, the President can no longer unilaterally appoint judges. The Constitution is categorical that the Chief Justice and the Deputy Chief Justice can only be appointed by the President in accordance with the recommendation of the JSC and subject to the approval of the National Assembly.[45] A similar process applies with respect to other judges except that in their case, the approval of the National Assembly is not necessary.[46] As will be shown elsewhere below, the process of appointment of judges is now more transparent since the current JSC is more independent than its predecessor.

Secondly, to ensure the appointment of appropriately qualified and experienced persons, the Constitution has expanded the scope of qualifications for appointment of judges. Thus, the Chief Justice, the Deputy Chief Justice and other judges of the Supreme Court are appointed from amongst persons who have at least fifteen years of experience, either as judges of superior courts, or as distinguished academics, judicial officers, legal practitioners or have such experience in other relevant legal fields.[47] The same qualifications apply to judges of the Court of Appeal, the High Court and judges of the Industrial Court and the Land and Environment Courts except that these courts require persons with lesser experience of at least ten years.[48] Judges of the Industrial Court are expected to be more specialised in the law and practice of employment and labour relations[49] just as the Environment and Land Court calls for expertise in the law of real property and environment.[50] In addition, a person qualifies for appointment as judge if s/he holds a recognised degree in law[51] and has a high moral character, integrity and impartiality.[52]

Thirdly, the new constitutional dispensation has necessitated the formulation of a new process of appointment of judges. For transparency, the Judicial Service Commission Act requires the JSC to constitute a selection panel to consider applications for recommendation for appointment to judgeship.[53] Procedurally, where a vacancy occurs or exists in the office of a judge, the Chief Justice shall within 14 days

44 As above.
45 Constitution of Kenya 2010, art 166(1)(a).
46 Art 166(1)(b).
47 Art 166(3).
48 Art 166.
49 The Industrial Court Act 20 of 2011, sec 6(b).
50 The Environmental and Land Court Act 19 of 2011, sec 7(1)(b).
51 Constitution of Kenya 2010, art 166(2)(a).
52 Art 166(2)(c). Section 7(1)(d) of the Environment and Land Court Act specifically provides that judges must meet the requirements of chapter six of the Constitution.
53 See Judicial Service Commission Act 11 of 2011, sec 30(1) & (2).

advertise such a vacancy.[54] In response to such an advertisement, persons interested in seeking consideration for nomination and recommendation for appointment will thereafter complete and file a prescribed application form and comply with all requirements described therein.[55] The applications shall thereafter be reviewed by the JSC and background investigations conducted on the suitability of the applicants.[56] At the close of the application period, the JSC is by law required to publish the names of all the applicants.[57] Once all this is done, interviews shall be conducted and the names of successful applicants forwarded to the President for appointment.[58]

The above stipulated procedure clearly provides equal employment opportunities in the judiciary to all qualified persons without regard to one's status, age, sex, ethnicity, race or political affiliation. It can therefore be argued that the mode of appointing judicial officers, more particularly judges, is more objective and transparent in the current constitutional dispensation, as opposed to that of the former.

3.1.2 Security of tenure

Security of tenure means that a judge cannot be removed from his or her position during a term of office, except for good cause. Such removal would demand formal proceedings with clearly stipulated procedural protections afforded to the affected judicial officer. It is universally accepted that when judges can be easily or arbitrarily removed, they are much more vulnerable to internal or external pressures in consideration of cases.[59] Security of tenure therefore means that, only in exceptional circumstances that are prescribed by the law, may a judge be removed from office.

It is rather unfortunate that although it provided for security of tenure, the repealed Constitution had glaring gaps in matters concerning the removal of judges from office. Such gaps made it exceptionally difficult for the judiciary to operate as an independent entity. The first gap related to the procedure for removal of judges. The Constitution provided for only one method of initiating such removal, that is: 'If the Chief Justice represents to the President that the question of removing a puisne judge … ought to be investigated.'[60] This simply meant that no one but the CJ had the power to initiate the process of removal of judges from office. This

54 See First Schedule to the Judicial Service Commission Act, sec 3(1).
55 As above, sec 4(2)
56 As above, sec 6.
57 As above, sec 9(1)(a).
58 As above, sec 10.
59 US Agency for International Development *Guidance for promoting judicial independence and impartiality* (2002) 39.
60 Sec 62(5) of the Repealed Constitution.

partly explains why the JSC lacked any institutionalised mechanism to receive and process complaints that could initiate the removal process.[61]

Another glaring gap related to the grounds for removal of a judge. The Constitution provided for only two grounds, namely, 'inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour …'[62] A judge's incompetence therefore did not form the basis of his or her removal from office. This explains why gross incompetence was countenanced, entertained and largely went unpunished.

In order to safeguard the independence of the judiciary, the Constitution of 2010 has attempted, in numerous ways, to secure the tenure of judges. In the main, the Constitution expressly states that a judge may vacate office by reason of retirement, death, resignation or removal.[63] Unlike its predecessor that gave Parliament the responsibility to determine judges' retirement age,[64] the Constitution of 2010 expressly provides for the retirement age of judges.[65] In the case of the office of Chief Justice, it gives one the choice either to hold office for a maximum period of ten years or until attaining the retirement age of seventy, whichever is earlier.[66] Thus, one can only be the Chief Justice for a maximum period of ten years, a marked departure from what obtained in the previous constitutional dispensation.

The 2010 Constitution also expands the grounds for removal of a judge from office beyond what obtained in the repealed Constitution. Accordingly, a judge may be removed from office on grounds of inability to perform their functions due to mental or physical incapacity; breach of a code of conduct prescribed for judges by an Act of Parliament; bankruptcy; incompetence; or gross misconduct or misbehaviour.[67]

The procedure for removal of a judge has also been firmed up to prevent any possible abuse by an individual. Thus, the removal of a judge may be initiated only by the JSC acting on its own motion, or on the petition of any person.[68] The CJ can no longer unilaterally initiate the process of removal of a judge.

61 Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 28.
62 Sec 62(3) of the repealed Constitution.
63 Constitution of Kenya 2010, art 167.
64 See sec 62(1) of the repealed Constitution.
65 Constitution of Kenya 2010, art 167(1).
66 Art 167(2).
67 Art 168(1)(a) - (e).
68 Art 168(2).

3.1.3 Financial security and independence

Another important element of judicial independence is financial security and independence. Like fear of dismissal, financial fear is a great threat to judicial independence. First, a judge may compromise justice for fear of reduction of his or her salary. Secondly, the judiciary may not be able to pursue justice effectively if its finances are controlled by another entity. The fact that another arm of government is controlling the funds needed by the judiciary in its operations may be sufficient incentive to make the judiciary bow to its whims or directions.

The 2010 Constitution secures financial independence of the judiciary in two main ways. First, it guarantees that

> the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.[69]

Secondly, it provides for the establishment of a Judiciary Fund to be used for administrative expenses of the judiciary and 'such other purposes as may be necessary for the discharge of the functions of the Judiciary'.[70] Upon approval of judicial financial estimates by the National Assembly, the expenditure of the judiciary becomes a charge on the Consolidated Fund and the funds are paid directly into the Judiciary Fund.[71] This way, the judiciary cannot be arm-twisted by the other arms of government when requesting for funds to execute its mandate.

3.2 Constitutional entrenchment of ethics and integrity in the judiciary

As correctly pointed out by the Task Force on Judicial Reforms in Kenya:

> Ethics and integrity are fundamental pillars of an independent, efficient, and accountable judicial system. Judicial officers and staff are expected to conform to high moral and ethical standards of behaviour befitting persons mandated to safeguard the law and administer justice. They are also expected to be above reproach, scrupulously impartial and fair in their judicial functions as well as in their public and private lives.[72]

Notwithstanding this assertion, corruption remained one of the greatest challenges to the judiciary in the period prior to the enactment of the 2010 Constitution. In fact the Task Force conceded that, whereas there were

69 Art 160(4).
70 Art 173(2).
71 Art 173(4).
72 Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 73.

measures to address corruption within the judiciary, the vice was still rampant, leading to low public confidence in the judicial process.[73]

With the inception of the 2010 Constitution, however, there is a glimmer of hope that corruption in the judiciary will soon be a thing of the past. Pursuant to schedule six of the Constitution, mechanisms and procedures for vetting the suitability of all judges and magistrates who were in office under the old dispensation was established.[74] Parliament passed the Vetting of Judges and Magistrates Act, 2011.[75] By virtue of this Act, the Vetting of Judges and Magistrates Board was constituted to determine the suitability of all the then serving judges.[76] The Board delivered its initial decision that saw four Court of Appeal judges relieved from office. These judges included Riaga Omollo, Samuel Bosire, Emmanuel Okubasu and Joseph Nyamu.[77] Thereafter, more judges were declared unsuitable to hold office due to their past corruption records.[78] Generally, the vetting process is intended to ensure that all judicial officers measure up to the functions they have been employed to perform by conforming to the ethics and integrity of the offices they hold.

In addition to requiring the vetting of judicial officers, the Constitution also has numerous provisions on ethics and leadership integrity. Chapter six of the Constitution, for example, deals with leadership and integrity. Article 73(2) lists the guiding principles of leadership and integrity to include:

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by –

(i) honesty in the execution of public duties;

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

73 As above.
74 Constitution of Kenya 2010, schedule six, art 23(1). See also art 24(1) of the Constitution which required the then Chief Justice to vacate office within sixth months from the effective date of the Constitution to pave way for the appointment of a new Chief Justice.
75 The Vetting of Judges and Magistrates Act 2 of 2011.
76 Sec 23(2).
77 See T Maliti 'Four Kenyan Appeal Court Judges declared unfit for office' http://www.icckenya.org/2012/04/four-kenyan-appeals-court-judges-declared-unfit-for-office/ (accessed 15 May 2012).
78 For more information on the current status on the vetting of Magistrates and Judges visit the Vetting of Judges and Magistrates Board website http://www.jmvb.or.ke/ (accessed 14 May 2014).

(e) discipline and commitment in service to the people.

These principles bind all public and state officers, including judicial officers. If strictly enforced, these principles have the potential to enhance standards of integrity and eliminate potential conflicts of interest in the judiciary.

3.3 A restructured court system

In his maiden progress report on the Transformation of the judiciary, Chief Justice Willy Mutunga described the state of the judiciary as he found it when he took office as follows:

> We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic … The institutional structure was such that the Office of the Chief Justice operated as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralised. Accountability mechanisms were weak and reporting requirements absent … That is the old order.[79]

As a way of facilitating the emergence of a new, transformed judicial order, the 2010 Constitution lays the foundation that permits the judiciary to effectively address its internal matters of governance, administrative systems and processes. In the main, the Constitution provides that the 'judiciary shall not be subject to the control or direction of any person or authority' when performing its functions.[80] On this basis, the judiciary can come up with administrative systems and processes that will guarantee its smooth operation.

For ease of management, the 2010 Constitution expressly acknowledges two tiers of courts: superior and subordinate courts. Superior courts comprise the Supreme Court, Court of Appeal, High Court and other courts with the status of the High Court with competence to hear and determine disputes relating to employment and labour relations and the environment and land.[81] Subordinate courts include the Magistrates courts, Kadhis courts, Courts Martial and any other court or local tribunal as may be established by an Act of Parliament.[82] Each of the superior courts has a designated head who is elected by other judges to serve as the 'overseer'. Accordingly, the Supreme Court is headed by a president, who

79 See the 'Judiciary transformation framework 2012-2016' 8 http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary%27s%20Tranformation%20Framework-fv.pdf (accessed 14 May 2014).
80 See Constitution of Kenya 2010, art 160(1).
81 Art 162(1) & (2).
82 Art 162(4).

is the Chief Justice;[83] the Court of Appeal by the President of the Court of Appeal;[84] and the High Court by the Principal Judge.[85]

The Constitution also establishes two new offices in the judiciary: the office of the Chief Registrar of the judiciary,[86] to be the chief administrator and accounting officer of the judiciary; and the office of the Deputy Chief Justice to act as the deputy head of the judiciary.[87] This arrangement is plausible as it enhances clarity in organisational and reporting lines amongst senior judicial officials. The judiciary can use this arrangement to build up operational structures that will eventually facilitate effective steering, designing and implementation of its programmes.

3.4 A more empowered Judicial Service Commission

The Judicial Service Commission (JSC) is the body bestowed with the responsibility of promoting and facilitating 'the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice'.[88] Amongst its many tasks the JSC is expected to:[89]

- Recommend to the President persons for appointment as judges;
- Review and make recommendations on the conditions of service of – (i) judges and judicial officers, other than their remuneration; and (ii) the staff of the Judiciary;
- Appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;
- Prepare and implement programmes for the continuing education and training of judges and judicial officers; and
- Advise the national government on improving the efficiency of the administration of justice.

Arguably, the establishment of the JSC was intended to be the optimum solution in ensuring a fair and transparent process of appointing judicial officials, whilst safeguarding against excessive 'tribalisation' and politicisation of the judiciary. Under the repealed Constitution, the JSC was not an independent body. Rather, it was composed of five members who were considered 'insiders' for they all owed their positions directly to the President. These included the Chief Justice (chairperson), the Attorney-General, a judge of the Court of Appeal, a judge of the High

83 Art 163(1)(a).
84 Art 164(2).
85 Art 165(2).
86 Art 161(2)(c).
87 Art 161(2)(b).
88 Art 172(1).
89 Art 172(1)(a) - (e).

Court, and chairperson of the Public Service Commission (PSC).[90] Because of the skewed composition, judicial appointments were widely criticised as a form of patronage and a source of influence that was used to serve short-term political interests.

Under the new constitutional dispensation, however, the JSC is more representative in composition and less susceptible to executive and political interference. Each cadre of the courts is entitled to elect one representative to the JSC. This translates into a Supreme Court judge elected by the judges of the Supreme Court, a Court of Appeal judge elected by appellate judges, a High Court judge elected by judges of the High Court and a magistrate elected by magistrates.[91] The Law Society of Kenya, being the statutory organisation representing the legal profession is, for the first time, entitled to elect two representatives, a man and a woman,[92] while one person nominated to represents the Public Service Commission (PSC).[93] The general public has also not been left out as it has two representatives in the Commission, appointed by the President.[94] The Attorney-General, as the chief legal advisor of the state, is also a member of the Commission.[95] The Chief Justice chairs the JSC while the Chief Registrar of the judiciary serves as its Secretary.[96]

The current set-up of the JSC is expected to enhance the position of the judiciary as an independent arm of government and at the same time create a stronger guarantee of scrutiny of possible candidates for judicial office. It also guarantees greater public protection against political or capricious appointments. Above all, it is consistent with international best practices and standards.

4 Conclusion

The 2010 Constitution has made notable inclusions which can be the basis of judicial transformation in Kenya. These include, amongst others, the constitutionalisation of the doctrine of judicial independence, entrenchment of ethics and integrity in the judiciary, restructuring of the court system and the establishment of a more empowered JSC. These constitutional developments are indicative of the fact that judicial transformation in Kenya is in the offing. Hopefully, Kenya will soon have a vibrant judiciary that will ably determine the socio-political transformation of the nation in unprecedented ways. This, however, will be possible only if the judiciary is bold enough to sever its traditional and

90 See sec 68(1) of the repealed Constitution.
91 Constitution of Kenya 2010, art 1721(2)(b) - (d).
92 Constitution of Kenya 2010, art 171(2)(f)
93 Constitution of Kenya 2010, art 171(2)(g).
94 Constitution of Kenya 2010, art 171(2)(h).
95 Constitution of Kenya 2010, art 171(2)(e).
96 Constitution of Kenya 2010, art 171(3).

unhealthy bond with the executive. As stated above, the mere promulgation of a robust Constitution does not in itself guarantee judicial transformation. What really matters is the holistic transformation of individuals, systems and structures, including personal attitudes, value systems, and the nature and the composition of the bench and administrators in the judiciary.

The experiences and approaches of the judiciary in Kenya can provide many useful lessons to other African countries, including, principally, that a transformative judiciary in any country should have, as its ultimate purpose, the desire to foster strong, accountable and efficient institutions. In this regard, the judiciary should take the necessary initiatives to ensure that it operates independently, asserts its impartiality and commits itself to a raft of reforms aimed at influencing the political transformation of the nation. Indeed, the 2010 Constitution provides the platform for the realisation of all these values because it envisages the establishment of inclusive, accountable, participatory, decentralised and transparent institutions of governance. The Constitution also espouses multiculturalism, diversity and the promotion of gender equity as well as the rights for vulnerable and victimised groups. All these are necessary ingredients of a transformed, efficient judiciary.

CHAPTER 13 PROSECUTING THE 2007 POST ELECTION VIOLENCE-RELATED INTERNATIONAL CRIMES IN KENYAN COURTS: EXPOSING THE REAL CHALLENGES

Evelyne Owiye Asaala

1 Introduction and background

On 27 December 2007 Kenya held its ninth general election since independence.[1] The outcome of the presidential elections was however contested on several fronts. Rigging allegations marred by scores of violence lead to the commission of international and other serious crimes in several parts of the country.[2] These events prompted the need to establish mechanisms to help Kenya address its past and forge a way forward on a path of peace, justice and prosperity. The Kenya National Dialogue and Reconciliation Committee (KNDRC) was established to spearhead the process.[3] It is this committee that laid a foundation for the subsequent transitional justice mechanisms. The committee agreed on several initiatives, including: the establishment of a truth justice and reconciliation commission;[4] the adoption of a comprehensive constitutional, legal and institutional reform processes;[5] and the establishment of a commission of inquiry to investigate the violence and

1 A general election combines the presidential election, parliamentary and civic elections.

2 European Union Election Observation Mission *Final report on Kenya: General elections 27 December 2007* (3 April 2008) 36; Internal Displacement Monitoring Centre (IDMC) 'Speedy reforms needed to deal with past injustices and prevent future displacement' (10 June 2010) http://www.internal- displacement.org/countries/Kenya (accessed 26 October 2011); Commission of Inquiry into the Post Election Violence (CIPEV) *Final report* (15 October 2008) 472 - 475 http://www.dialoguekenya.org/index.php/reports/commission-reports.html (accessed 1 May 2012).

3 This was an *ad hoc* committee established during the Post Election Violence (PEV). It comprised of members drawn from the then ruling Party of National Unity, the then opposition party Orange Democratic Party and a panel of eminent African personalities: Benjamin Mkapa, Graca Machel and Jakaya Kikwete. The former United Nations Secretary Genera, Kofi Anan, chaired the committee.

4 KNDRC *Agreement on agenda item three: How to resolve the political crisis* (14 February 2008) 3 http://www.dialoguekenya.org/index.php/agreements.html (accessed 1 May 2012).

5 As above.

make recommendations on any probable legal redress.[6] This agreement was deemed to be the most comprehensive way of addressing the salient objectives of the transitional justice process.[7] While some of these initiatives are still ongoing, others have completed their work with varying degrees of success.[8] Yet, others have come to a pre-mature end having hardly achieved their objectives.[9]

Kenya is therefore grappling with questions regarding its social, legal, economic and political transition. The theme on prosecuting alleged perpetrators of past crimes has taken centre stage. The understanding that prosecution is critical to the success of any transition resonates with various legal-philosophical thinking that underlies a transitional justice process.[10] Although this contribution acknowledges that some scholars emphasise the prioritisation of alternative accountability mechanisms like truth-telling, healing and peace building during transition,[11] it adopts a holistic approach that underscores the importance of accountability through prosecution for transitional societies.[12] The study also takes note of an international duty to prosecute for countries like Kenya who are

6 KNDRC *Agreement: Commission of Inquiry into Post-Election Violence* (2008).

7 TO Hansen 'Kenya's power-sharing arrangement and its implications for transitional justice' (2013) 17 *The International Journal of Human Rights* 307.

8 CIPEV concluded its mandate in 2008. Its investigations and findings have been hailed to be most comprehensive. In fact, the ICC prosecution has often times relied on these findings in the ongoing trials. The TJRC equally concluded its mandate in 2013 and its final report handed over to the President on 23 May 2013 for implementation. The report was subsequently tabled before Parliament on 24 July 2013 exceeding the deadline stipulated under section 48(4) of the TJR Act which requires that the final report be tabled in Parliament within 21 days after its publication. Since then, nothing has been done towards implementation the TJRC's report. On the other hand local prosecution of international crimes seems to have become submerged under the ongoing ICC trials. There is hardly any reporting of these cases if not public knowledge at least as a form of justice to the victims. On constitutional reforms, a commendable job was done leading to the promulgation of a new constitution on 27 August 2010. This Constitution embodies principles on numerous institutional reforms. Related institutional reforms include reforms of the electoral body, police reforms, judicial reforms which called upon the legislators to enact legislation providing for vetting of judicial officers. This process is still ongoing. Even then, a general lax amongst the implementers on living the new Constitution is notable.

9 As above. With a specific focus on local prosecution of international crimes.

10 R Teitel *Transitional justice* (2000). Teitel acknowledges that trials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule. See also D Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 25. See also M Osiel *Mass Atrocity, collective memory and the law* 15 - 22 as cited by J Rowen 'Social realities and philosophical ideals in transitional justice' (2008) 7 *Cardozo Public Law Policy & Ethics Journal* 98. L Huyse 'Justice after transition: On the choices successor elites make in dealing with the past' (1995) 20 *Law and Social Inquiry* 55. Huyse points out the importance of prosecutions for a young democracy in transition to be not only a tool that legitimises the new government, but also fosters respect for new democratic institutions.

11 L Keller 'Achieving peace without justice: The International Criminal Court and Ugandan alternative justice mechanisms' (2008) 23 *Connecticut Journal of International Law* 261.

12 Teitel (n 10 above); Orentlicher (n 10 above); Osiel (n 10 above).

party to the Rome Statute.[13] It is argued that for states like Kenya, any transitional justice measures must therefore address the issue of impunity for past atrocities through prosecution. Indeed, there exists both local and international consensus on the importance of prosecuting international and other serious crimes in Kenya following their commission in the Post Election Violence (PEV) of 2007. Furthermore, the Commission of Inquiry into the PEV[14] (CIPEV) underscored the need for a prosecution mechanism to eradicate impunity.[15]

While the ICC is only exercising jurisdiction over those who bear the highest responsibility for PEV,[16] municipal courts are expected to hold to account the actual perpetrators or those who bear less responsibility. This is because the ICC only acts in complimentarity to local courts.[17] In fact some scholars have argued that the ICC only exists as a reinforcement of the efforts of national systems in combating the culture of impunity and bringing defaulters to justice; it therefore relies principally on states to investigate and prosecute persons accused of ICC crimes under its domestic criminal justice system.[18] Thus, the ICC and state parties to the Statute have a mutual responsibility to bring to justice perpetrators of the worst crimes, neither party having exclusive jurisdiction.

This study critically analyses the challenges facing effective prosecutions of international crimes in Kenyan courts. In light of the numerous countries undertaking transitional justice processes – both in Africa and throughout the world – a study of this nature becomes a fundamental contribution in guiding municipal adjudication of these offences. How should local courts effectively prosecute the actual perpetrators of international crimes who may not necessarily bear the

13 Para 5, preamble to the Rome Statute of the international criminal court, underscores that the philosophy underlying the Rome Statute is to put an end to impunity for the perpetrators of crimes of concern to the international community thus contributing to their prevention; Art 5, of the Rome Statute further enlists these crimes to include genocide, war crimes and crimes against humanity; K Obura 'Duty to prosecute international crimes under international law' in C Murugu & J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 11.

14 The Kenya National Dialogue and Reconciliation Committee Agreement: Commission of Inquiry of Post-Election Violence (2008) 1.

15 CIPEV Report (n 2 above) 472.

16 Initially, ICC investigations were launched against six individuals: William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Husein Ali. After confirmation hearings, proceedings were confirmed against three: William Samoei Ruto, Joshua Arap Sang and Uhuru Muigai Kenyatta. While Ruto and Sang continue to face trial before the ICC today, the case against Uhuru Kenyatta was withdrawn due to insufficient evidence. ICC-01/09-02/11, Trial Chamber V(B), Situation in the Republic of Kenya in the case of *The Prosecutor v Uhuru Muigai Kenyatta,* Decision on withdrawal of charges against Kenyatta, 13 March 2015.

17 Art 17(1)(a), Rome Statute.

18 H Steiner & P Alston *International human rights in context: Law, politics, morals* (2007) 1299; EO Asaala 'The International Criminal Court factor on transitional justice in Kenya' in K Ambos & O Maunganidze (eds) *Power and prosecution: Challenges and opportunities for international criminal justice in Sub-Saharan Africa* (2012)124.

greatest responsibility? In other words, how should local criminal law systems and legislations effectively respond to international crimes? To this end, this chapter seeks to inform better criminal law processes that set out to achieve their objectives effectively over international crimes in national courts.

This chapter is divided into three main parts. After a brief introduction, the second part examines the key challenges towards effective local prosecutions as well as the impact of these local prosecutions on transitional justice in Kenya. The essence of this section is to discuss Kenya's experience in prosecuting international crimes. In its analysis, this part considers the jurisprudence put forth by the Kenyan courts regarding prosecution of PEV-related crimes. However, because of the limited scope of this contribution only a selected number of the PEV-related cases are reviewed. The Kenyan cases that were confirmed by the ICC and the geographical coverage of their charges are the criterion that this chapter has used in selecting the cases under discussion. A discussion on the challenges also adopts a thematic approach, which highlights the following aspects: jurisdiction, dubious investigations, local ownership and legitimacy and lack of political will. Finally, the study draws various conclusions and suggests the way forward.

2 Challenges to effective prosecution of international crimes in local courts

Local prosecutions of crimes against humanity in Kenya have faced a vast range of challenges. Key amongst them includes the jurisdictional question, inadequate investigations by police (inadequate competencies and human and technical resources), lack of legitimacy and local ownership, lack of political will and the influence of international politics informed by the ICC-related cases. This has deeply compromised the significance expected of these local prosecutions.

2.1 The jurisdiction question

Kenya is not only a member state to the Rome Statute;[19] the International Crimes Act (ICA) further domesticates the Rome Statute while adopting its definition of crimes against humanity.[20] This law however came into force long after the alleged PEV crimes were committed. Similarly, although the Kenyan Constitution makes a mandatory requirement of general rules of international law and any treaties ratified by Kenya to form part of the laws of Kenya,[21] it was promulgated way after PEV. Until the

19 Kenya ratified the Rome Statute on 15 March 2005.
20 Art 6(4), ICA.
21 Art 2(5) & (6), 2010 Constitution of Kenya.

promulgation of the 2010 Constitution, Kenya traditionally ascribed to the dualist philosophy of applying international law in domestic courts.[22] Prosecuting PEV related international crimes under Kenyan laws was therefore not possible, as it would have amounted to an infringement of the established international law principle of *nullum crimen sine lege.*[23] This deficiency in the legal framework then explains why local mechanisms chose to prosecute ordinary municipal crimes instead of international crimes such as crimes against humanity for those not singled out by the ICC. Local prosecution of PEV related crimes therefore involved crimes ranging from petty crimes to capital offences: murder,[24] handling stolen goods,[25] burglary,[26] rape and defilement,[27] which offences essentially comprise the ingredients of crimes against humanity.[28]

Given this scenario, there has been no instance when local courts have bothered to conceptualise the notion of crimes against humanity. This option of prosecuting alleged perpetrators under ordinary crimes in domestic courts has meant that it is only those prosecuted at the ICC that face the charges of international crimes. Interestingly, while Kenyan courts did not prosecute alleged perpetrators with crimes against humanity, the punishment for capital conduct attracts a death sentence unlike for crimes against humanity whose maximum punishment is life sentence.[29] This is despite the fact that the ICC requires a much more higher and stringent threshold in proving crimes against humanity. The end results is that those with highest responsibility are treated more leniently by international law as opposed to those who did not bear the highest responsibility and facing prosecution before municipal courts. Nevertheless, there has been no

22 JO Ambani 'Navigating past the "Dualist Doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 25 30. The doctrine of dualism implies that upon ratifying an international treaty, the principles of this treaty do not apply in the domestic legal set up of a country until such a time that this country transforms these principles into its own domestic law.

23 Art 22, Rome Statute; this implies that no person can be held criminally responsible unless such conduct constitutes a crime under the law.

24 *R v Stephen Kiprotich Leting & Others* Nakuru High Court Criminal Case No 34 of 2008. This was one of the stunning cases where the acussed persons, jointly with others not before the court were charged of murder of about 35 people who were all burnt in a church at Kiambaa, Uasin Gishu District, Rift valley Province; see also *R v John Kimita Mwaniki* Nakuru High Court Criminal Case No 116 of 2007; see also *R v Eric Akeyo Otieno* Criminal Appeal No 10 of 2008. See also *R v Peter Kipkemboi Rutto alias Saitoti* Nakuru High Court Criminal Case No 118 of 2008.

25 *R v James Wafula Khamala,* Bungoma High Court Criminal Appeal No 9 of 2010.

26 *R v Paul Khamala*, Kakamega High Court criminal Appeal No 115 of 2008.

27 R v *Philemon Kipsang Kirui*, Kericho High Court Criminal Appeal No 59 of 2009.

28 Art 7(1), The Rome Statute of the ICC, document A/CONF.183/9 of 17 July 1998 as amended up to 16 January 2002. Crimes against humanity has been defined as acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, enforced disappearance of persons, apartheid and other inhuman acts committed as part of a widespread or systematic attack directed against civilian population, with knowledge of the attack.

29 Art 77, Rome Statute; secs 204 & 296(2), Penal Code of Kenya (Cap 63 Laws of Kenya) the punishments for murder and robbery with violence respectively attract death sentence.

discomfort or complaints as to why PEV crimes were not prosecuted as international crimes but ordinary crime in Kenyan courts.

The ICC Pre-Trial Chamber's authorisation of the Prosecutor to launch investigations of the Kenyan cases[30] triggered a local case challenging the ICC's involvement in Kenyan PEV–related cases. In the case of *Joseph Kimani Gathungu v The Attorney General & Others*,[31] the applicant sought *inter alia* court oders declaring ICC's involvement in Kenyan PEV cases unconstitutional and therefore a nullity. It was the applicant's further submission that the ICC was not provided for under the constitution as an organ capable of investigating crimes committed in Kenya. The respondents, however, lodged a preliminary objection questioning, *inter alia,* whether the High Court of Kenya had jurisdiction in respect of the jurisdiction of the ICC and whether the ICC was amenable to judicial proceedings before the High Court of Kenya.

This application paved the way for Kenyan courts to canvass the salient issues on the role played by international criminal justice systems *viz-a-viz* municipal systems in the prosecution of international crimes. The fact that Kenya had not domesticated the ICC Statute as a dualist state then posed a real challenge necessitating the courts intervention. In this case, the court observed that:

> … international tribunal such as the ICC is well recognized to have *compétence de la compétence* – an initial capacity to determine whether or not it has the jurisdiction to hear and determine a case coming up before it … the ICC, acting within the terms of the Rome Statute, has already determined that it indeed has jurisdiction. The ICC has gone further to determine the second jurisdictional question: whether the special facts of post-election violence in Kenya (2007 - 2008) render the matter justiciable before that Court. The ICC has determined that, on the facts, it has jurisdiction to investigate, hear and determine the cases arising from the post-election violence.[32]

According to the court, the ICC has inherent capacity emanating from the Rome Statute to determine whether or not it has got jurisdiction to hear and determine a matter. It is through the exercise of this power that the court determined its jurisdiction over the Kenyan cases. More so, 'Kenya was a member of the community of nations and subject to the governing law bearing upon states as members of that community'.[33] Obligations arising from this governing law are embodied in treaties and conventions to which states were parties and the Rome Statute was one such

30 ICC-01/09, Pre-Trial Chamber II, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the Situation in the Republic of Kenya (31 March 2010).
31 Constitutional Reference Number 12 of 2010, High Court of Kenya at Mombasa, 23rd November 2010; (2010) eKLR http://kenyalaw.org/caselaw/cases/view/72570/ (accessed 15 May 2014).
32 Constitutional Reference Number 12 of 2010, para h.
33 As above.

convention. The act of ratifying international treaties by a state therefore allows limitations on its sovereignty regarding the stipulated legal obligations. It cannot therefore be argued that the ICC in any way infringes on Kenya's constitutional sovereignty when Kenya voluntarily ratified the Rome Statute binding itself to its provisions. The applicant's reliance on Kenya's new constitution as excluding the ICC's operations in Kenya was therefore not convincing since:

> … the Constitution of 2010 is not to be regarded as rejecting the role of international institutions such as the ICC. Indeed, from the express provisions of the Constitution, 'the general rules of international law shall form part of the law of Kenya'; and Kenya remains party to a large number of multilateral international legal instruments: and so, by law, Kenya has obligations to give effect to these. One of such Conventions is the Rome Statute which establishes the International Criminal Court.[34]

To this end, the court dismissed the application on grounds that it neither had such jurisdiction nor were the orders being sought justiciable.

2.2 Dubious investigations and laxity by police officers

The quality of local investigation conducted in PEV-related cases has also raised concern. Poor investigations have allowed many perpetrators of serious crimes to evade accountability,[35] resulting in very few prosecutions, and even fewer convictions.[36] According to a report from the Office of the Director of Public Prosecutions (ODPP), a total of 6081 PEV-related cases were reported to the local authorities for investigations.[37] Out of all these cases, only 366 had been taken to Court by the year 2012. Of these, 23 cases were still pending in court, 78 cases had resulted to acquittals, 77 cases had been withdrawn and only 138 convictions achieved.[38] A study by Human Rights Watch however confirms that only a paltry number of these convictions were for serious crimes directly related to the post election violence.[39] These included two murder cases, three cases of robberies with violence, one for assault and another for assault causing grievous harm.[40] In fact, the ODPPs report has been criticised for lacking precision. For example, four of the alleged 49 convictions in Sexual and Gender Based Violence (SGBV) were actually acquittals and two of these cases had nothing to do with PEV as they involved men having carnal knowledge with sheep.[41] Only one of all these

34 As above.
35 Human Rights Watch *Turning pebbles: Evading accountability for post-election violence in Kenya* (2011) 4.
36 Human Rights Watch (n 35 above) 3.
37 The Multi-Agency Task Force on the 2007/2008 PEV 'Report on the 2007/2008 PEV Related cases' (2012) 1.
38 The Multi-Agency Task Force on the 2007/2008 PEV (n 37 above) 2.
39 Human Rights Watch (n 35 above).
40 Human Rights Watch (n 35 above) 4.
41 Human Rights Watch (n 35 above) 25

cases was a clear SGBV case related to PEV and the same had resulted to an acquittal on the charges of sexual offences, but a conviction on robbery with violence.[42]

It is also alarming that some of the 'hot spot' areas with high casualties for PEV victims recorded no subsequent convictions. In Uasin Gishu for example, there was no single conviction despite the killing of 230 people. Similarly, no single police officer was convicted despite an estimated 962 cases of police shootings, which resulted in 405 deaths.[43] The laxity displayed by police officers in the investigations of sexual offences related to post election violence is equally appalling.[44] Despite recommending a list of 66 complaints to the DPP for prosecution, the police subsequently endorsed a closure of almost all these cases due to lack of evidence.[45] According to the DPP, the majority of these files contained nothing more than complainants' statements.[46] Although the DPP sent the files back for further investigations, they were never returned.[47] The dismal performance in prosecution can therefore be closely associated to poor investigations by the police officers.

Having ascribed to the adversarial system of dispute resolution, it has become increasingly difficult, and almost impossible for Kenyan courts to make any meaningful engagement with PEV cases where investigations are conducted dismally. For example, most of the occurrences upon which those facing trial before the ICC were charged for crimes against humanity attracted a charge of murder for the alleged actual perpetrators in the municipal courts.[48] Yet, the outcome of local prosecutions remains questionable over allegations of poor investigations. A critical review of some of these cases is worth considering.

42 As above.
43 CIPEV report (n 2 above); Human Rights Watch (n 35 above).
44 CIPEV report (n 2 above) 399 - 404; Human Rights Watch (n 35 above) 20. This report condemns the failure of police to investigate sexual offences committed during the post-election violence. Following these criticism, the police established a Police Task Force to investigate rape cases during the post-election violence. This Task Force was however criticised by FIDA, one of the major stakeholders who later withdrew its membership citing lack of credibility on the part of the Task Force.
45 Human Rights Watch (n 35 above) 21.
46 As above.
47 As above.
48 Situation in the Republic of Kenya, in the case of *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11, Pre-Trial Chamber II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute 10 - 11 http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf (accessed 13 May 2014); Situation in the Republic of Kenya, in the case of *Prosecutor v Francis Karimi Muthaura, Uhuru Muigai and Mohammed Hussein Ali,* ICC-01/09-02/11, Pre-Trial Chamber II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute 11 - 13 http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf (accessed 13 May 2014).

Firstly, was the case of *R v Stephen Kiprotich Leting and 3 Others.*[49] The facts of this case were as follows: On 30 December 2008, following eruption of PEV, some Kikuyu families in Uasin Ngishu District within Rift Valley Province were apprehended with fear and sought refuge at Kenya Assemblies of God Church Kiambaa. The number of those seeking refuge at the church increased the following day with an additional 160 people whose houses had been torched joining those already at the church. On the night of 1 January 2008, a gang of about 4000 people armed with bows and arrows attacked the church. While those seeking refuge scattered, some locked themselves inside the church. The gang then surrounded the church and set it ablaze killing about 35 people.

Whereas the High Court in this case condemned the crimes committed, it underlined the importance of the state proving PEV cases 'beyond reasonable doubt' in order to secure convictions. According to the court, the state failed to prove three cardinal components essential to proving the crime of murder: '(a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.' It was the courts observation that the prosecution failed to call some crucial witnesses and as a result failed to establish that some of the deceased persons were actually dead or that it was the accused persons who actually murdered them. The first, second and fourth accused persons in this case raised the defence of *alibi*. In so far as the third accused person admitted being at the scene of crime, it was his submission that he had only rushed there to rescue the victims. The police were unable to produce evidence to dismiss these claims beyond reasonable doubt.

The court further observed that the prosecutor ought to have called into action the doctrine of 'common intention'[50] in order to secure the conviction of the accused persons. In the court's wisdom, the doctrine of common intention was very essential given the manner in which the attack was orchestrated. For instance, all the attackers had painted their faces, were chanting war dirges, were armed with crude weapons including machetes, pangas, spears, clubs, arrows and bows, were systematic in the manner in which they launched their attacks against Kimuli, Rehema and Kiambaa farms, were systematic in the manner they followed their victims slashing and hacking them to death then finally setting the church ablaze. These factors were adequate proof for common intention. According to the

49 High Court Criminal case no 34 of 2008 at Nakuru http://kenyalaw.org/caselaw/cases/view/55195 (accesed 30 January 2015)

50 This simply means a premeditated plan to act in concert. In order to secure a conviction under common intention, the prosecution must prove that the accused had (a) a criminal intention to commit the offence charged jointly with others, (b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and (c) the accused was aware of this when he or she agreed to participate in that joint criminal act.

Court, all this evidence narrows down to proof of a preconceived plan to commit these atrocities. The court however decried the level of evidence produced by the police:

> One would have expected the police to place before court evidence of the Accused having been part of the gang that pre-arranged to commit this offence. That, however, was not the case. The evidence on record does not show, leave alone suggest, the involvement of the Accused in any pre-arranged plan to execute any or any unlawful act … I know that it is an undoubtedly difficult thing to prove even the intention of an individual and therefore more difficult to prove the common intention of a group of people. But however difficult the task is, like any other element of crime, the prosecution must lead evidence of facts, circumstances and conduct of accused persons from which their common intention can be gathered. In this case there is absolutely no evidence of the raiders and/or any of the accused having met to arrange the execution of any or any unlawful purpose. There is absolutely no evidence to show that the Accused and/or others had a pre-arranged plan to attack Kimuli, Rehema and/or Kiambaa farms and kill their residents… In this case, without placing any evidence on record, the prosecution wants me to find that the Accused had a common intent with the murderers of the deceased and were part of that joint enterprise. That cannot be … I have to point out the shoddy police investigations in this case so that blame is placed where it belongs … The judiciary is being accused of acquitting criminals and unleashing them to society ... I do not want to dismiss those complaints off hand. But what I know is that courts acquit accused persons if there is no evidence against them. In our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. Because of that our law requires that for a conviction to result the prosecution must prove beyond reasonable doubt the case against an accused person.[51]

Having expressed his frustration over the quality of investigations and prosecutions in this case, the court proceeded to acquit all the accused persons on the basis that the prosecution had failed to prove their case.

Secondly, is the case of *Republic v Edward Kirui*[52] which portrays the direct role of the then Kenyan government in PEV. Aggrieved by the declaration of Mwai Kibaki as the elected president of the 2007 general elections, the Orange Democratic Party (ODM) party, the then official opposition, contested the elections and gave notice of their intention to hold peaceful demonstrations to express their displeasure. The police responded to this notice by ODM by declaring the planned demonstrations illegal. Consequently, the government intensified police presence all over the country especially in ODM's strongholds. Despite declaring the meetings illegal, ODM supporters however went on as planned. It was at Kondele, in Nyanza where displeased crowds continued with the demonstrations despite warnings to disperse. It was in this context that the

51 n 49 above.
52 Nairobi High Court Criminal Case No 9 of 2008; (2010) eKLR http://kenyalaw.org/caselaw/cases/view/68555/ (accessed 15 May 2014).

two persons in this case were shot dead by the accused police officer. These events were captured on a video camera and displayed during trial.

While the court found that the offence of murder had been committed, the major issue for determination remained the question whether it was the accused person who shot the deceased. One of the issues central to this case was identification of the accused person. This was shrouded in uncertainty as a result of contradicting evidence from some of the witnesses. The court did not however fault the police for failing to hold an identification parade since the identifying witnesses were well known to the accused person even before the incident. The other key issue that arose was whether the accused fired the shot that killed the deceased persons. The sergeant in charge of armoury testified that on that material day he issued the accused with an AK47 serial number 23008378. The Firearms Examiner and the then Acting Senior Superintendent however testified that the firearm he examined and established was the rifle whose shot killed the accused was one which bore the serial number 3008378. Casting doubt on whether it was the accused's rifle that actually killed the deceased. According to the court, the prosecution had not only failed to produce before the court rifle serial number 3008378 but also failed to make any attempts to link the firearm to the accused. As a result the accused was acquitted. The Civil Society of Kenya has however argued that the police tampered with this evidence.[53] That local prosecution totally failed to prove their cases to required standards leading to mass acquittals is a notable trend in most of these cases. Thus, corruption within the police investigating agencies, incompetence and the unwillingness of police officers to hold their colleagues accountable are some of the factors that largely contributed to massive premature dismissal of these cases.

Relatedly, some of the cases reviewed by a Task Force[54] revealed that some victims hardly knew their perpetrators and only identified them as 'neighbours' or 'members of a particular ethnic group'.[55] This contributed to several acquittals especially in sexual and gender-based crimes.[56] Interestingly, despite numerous efforts by victims of SGB crimes identifying the police as their perpetrators no single police officer was charged with sexual offences.[57]

53 Human Rights Watch (n 35 above) 33.

54 In 2012, through Gazette Notice No 5417 of 20 April 2012, the Director of Public Prosecutions established a Multi-Agency Task Force to undertake a national review, re-evaluation, and re-examination of all cases arising out to the 2007 - 2008 PEV.

55 The Multi-Agency Task Force on the 2007/2008 PEV (n 37 above) 3. CIPEV report (n 2 above) 400.

56 *Republic v Julius Cheruiyot Kogo*; *Republic v Erick Kibet Towett and Simion Kipyegon Chepkwony.* In both these cases, although the victims could identify the perpetrators, they failed to identify their names. This made the court to declare unclear the identification process leading to acquittals.

57 Human Rights Watch (n 35 above) 38.

2.3 Lack of legitimacy and local ownership

Like any other transitional justice mechanism, local prosecution must be relevant to the local communities. As such, they must take into account the priorities of the local communities in the identification and prosecution of alleged perpetrators. Thus, not only should the elites declare such a process legitimate, but also the local population.[58]

Local prosecution of PEV cases has suffered lack of legitimacy and local ownership at two levels. Firstly, the distrust between investigating police officers and the general public. Secondly, the distrust between the judicial arm of government and the general public.

One major reason contributing to poor investigations by the police officers is their perceived lack of legitimacy by the locals who are a crucial component of the process. The Kenyan public lacks trust of police officers.[59] During and after the PEV period, this was exacerbated by the tribal tension then reigning in the country. For example, the public wanted nothing to do with the police in areas where they were perceived to be the government.[60] A police officer has previously observed that '… in Western [province] and Nyanza [province], people don't give information about crime. People are used to being in the opposition, and they receive government officials negatively'.[61] In some exceptional cases, the police have been accused of being partial in their investigations especially where they had ethnic solidarity with accused persons.[62] This was particularly the challenge in the PEV investigations in Rift Valley where police officers have confessed that some of their colleagues were in synch with some suspected local perpetrators.[63] With this state of affairs it becomes a challenge for the police to carry out effective investigations given that those who possess such knowledge may not be willing to freely pass it to the authorities.

Public perception of Kenya's judiciary further distances the local population from local prosecution of PEV related cases. Historically, the Kenyan judiciary has had a reputation of lacking independence,[64]

58 This is the position favoured by both scholars and human rights organisations. See for instance, Human Rights Watch (n 35 above) 4; E Lutz 'Transitional justice: Lessons learned and the road ahead' in N Roht-Arriaza & J Mariezcurrena (eds) *Transitional justice in the twenty-first century: Beyond truth versus justice* (2006) 325 - 342.
59 Human Rights Watch (n 35 above) 47.
60 As above.
61 As above.
62 As above.
63 As above.
64 CIPEV report (n 2 above) 460.

untrusted to dispense any form of justice[65] and extremely corrupt.[66] It is this mistrust of the local judicial system that informed the excitement amongst Kenyans upon learning the possibility of alleged perpetrators being prosecuted at the ICC.[67] Notably however, the judiciary has undergone some fundamental reform processes. This was significantly achieved through the adoption of stringent measures of appointing judicial officers and the vetting of current judges and magistrates.[68] Unfortunately, despite all these reforms, a similar attitude is slowly and steadily pervading the public regarding prosecution of the actual perpetrators of PEV. This attitude has been informed by what some commentators perceive to be erroneous jurisprudence on key judicial decisions revolving around the 'real power wielders'.[69] As a result, there has not been much focus on the few cases that have been successfully prosecuted locally.

2.4 Lack of political will

Government's commitment to the entire process of transitional justice, including prosecution, is fundamental to the success of any transitional justice process. To the contrary, a lack of political will has largely characterised domestic efforts towards holding alleged perpetrators of international crimes accountable for past atrocities. A report by Human Rights Watch, for instance, labels domestic prosecution efforts as a 'half-hearted' effort at accountability – as such, 'hundreds of ... perpetrators of serious crimes continue to evade accountability'.[70] This deficiency, according to Asaala and Dicker, can be attributed to a host of challenges including a distinct lack of political will at two levels.[71] Firstly at the local

65 Africa Policy Institute 'Breaking Kenya's impasse: Chaos or courts?' Africa policy brief 3 as cited in B Ongaro & O Ambani 'Constitutionalism as a panacea to ethnic divisions in Kenya: A post 2007 election crisis perspective' in JM Wachira (ed) *Ethnicity, human rights and constitutionalism in Africa* (2008) 29. This prompted the then ODM presidential candidate, Raila Odinga, to publicly decline having the disputed elections of 2007 resolved by local courts.

66 Report of the Task Force on Judicial Reforms (2009) 74 - 77.

67 'It's the Hague, Kenyans tell violence suspects' *Daily Nation* 19 July 2009 8 and 9. See also 'Hopes for justice high among Kenyans as Ocampo arrives' *Daily Nation* 6 November 2009 4. Pursuant to 'MPs vow to defy Kibaki and Raila' *The Standard* 7 July 2009 http://www.standardmedia.co.ke/?incl=comments&id=1144018708&cid=&articleID=1144018708 (accessed 3 July 2012), the Members of Parliament vowed to block the Bill seeking to try post-poll offenders locally for fear of manipulation from the executive.

68 Vetting of Judges and Magistrates Act of 2011.

69 See generally, E Asaala & N Dicker 'Transitional justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from here?' (2013) 13 *Africa Human Rights Law Journal* 351. See also *International Centre for Policy and Conflict & 5 Others v the AG & 4 Others* Constitutional and Human Rights Division Petition 552 of 2012 (2013) eKLR http://kenyalaw.org/CaseSearch/view_preview1.php?link=119030658917561929345 59 (accessed 4 April 2014). See, generally, Supreme Court of Kenya Petitions 3, 4 & 5 of 2013; Reports on re-tally of 22 polling stations in Petition 5 of 2013 and Report of the scrutiny of 33 400 polling stations. These reports are as a result of the Supreme Court's own *suo moto* motion.

70 Human Rights Watch (n 35 above) 4.

71 Asaala & Dicker (n 69 above).

level, a study has confirmed that the police, the Attorney-General and all state prosecutors succumbed to negative local political pressure against prosecution.[72] In several instances, local politicians as well as the then police commissioner, Mohammed Ali, telephoned his officers instructing them to release suspected perpetrators of PEV.[73] Consequently, despite overwhelming evidence that the police may have gathered against suspected perpetrators, they had no option but to discard it and release the suspect without further prosecution. Besides, despite several claims made by the CIPEV report implicating several local leaders for having funded and facilitated the violence, the police never bothered to follow-up and investigate such claims.[74] It is therefore not surprising that the government has displayed a lot of laxity towards effective local prosecution of some of the crucial cases it dubbed 'priority cases'.[75] In most of these cases, the authorities closed their investigations without any arrest claiming that there were no identifiable suspects.[76] As a result, in the majority of the cases that were prosecuted, none involved suspected local politicians despite allegations of their involvement in organising, financing and directing the local violence.[77] Although this contribution is aware of the fact that prosecuting PEV under national laws would not cover all the elements of crimes against humanity like deportation, acts like organising and financing would sufficiently be covered under the notion of 'accessories before the fact'[78] that essentially apportions criminal liability.

72 Human Rights Watch (n 35 above) 53.
73 Human Rights Watch (n 35 above) 54.
74 CIPEV (n 2 above) 225. For example the report implicates a member of Parliament from the Coast province in funding the youth to burn all businesses belonging to ODM supporters.
75 These included the burning of a house in Naivasha that killed 9 people.
76 *Republic v Jackson Kibor*, Nakuru Magistrate's Court CR 96/08. Mr Kibor, an ODM politician was arrested and charged with inciting violence. According to an interview with BBC on 31 January 2007, Kibor had declared war against Kikuyus and advocated for their eviction from the Rift Valley as follows: 'People had to fight Kikuyus because Kibaki is a Kikuyu ... We will not sit down and say one tribe lead Kenya. We will fight. This is a war. We will start the war. One tribe cannot lead the other 41 tribes. This is a war. Now we're fighting for power ... We will not let [Kikuyus] come back again, because they are thieves. We will never let them come back ... We will divide Kenya.' A Kalenjin youth interviewed in the same broadcast, who confessed to have participated in the Kiambaa church burning, told the journalist that perpetrators of violence were taking cues from the elders: 'We as young men, our culture, we don't go over what somebody ... an elder tells us. If the elder say no, we step down, but if our elders say yes, we will proceed ... I do it because it is something that has been permitted from our elders.' Human Rights Watch (n 35 above) 29, citing Pascale Harter, 'Assignment' BBC World Service, 31 January 2008. This prosecution never proceeded to the end as the then Attorney-General withdrew the charges by entering a *nolle prosequi*.
77 Human Rights Watch (n 35 above) 29.
78 Under Kenyan practice, an accessory before the fact has been used interchangeably with aiders, abettors and procurers. This is covered under section 20 of the Penal Code and it includes aiders, abettors and those who counselled or procured (assisted or encouraged) the principle offender into this category. In terms of responsibility and punishment, aiders, abettors, counsellors or procurers are all held responsible in the same manner as though they were the actual perpetrators.

Secondly, at the international level, the Kenyan government has displayed general reluctance to effectively cooperate with the ICC regarding the Kenyan cases.[79] For example, despite the government's reluctance to establish a tribunal to prosecute those who bare the highest responsibility for international crimes,[80] on several occasions, the Kenyan Parliament unanimously resolved to have Kenya withdraw from the Rome Statute.[81] Subsequently, in January 2011 the government announced its intention to establish a special division within the High Court to deal with all PEV cases.[82] This was a laudable step, since such local initiatives are likely to assuage related fears in future.[83] In fact, while recommending for the establishment of an International Crimes Division (ICD) modelled against the ICC within the Kenyan High Court, a Task Force has highlighted that ICD should be conferred jurisdiction over PEV cases in order to try international crimes under ICA.[84]

The timing of this announcement by the Kenyan government however raised questions about its real motive. This is especially so given that on 26 November 2009, the ICC had authorised the prosecutor of the court to investigate the Kenyan situation. The intention of establishing a special division within the High Court was therefore largely confused by government officials who suggested it as a way of reverting the ICC cases back to the local mechanisms and not as complimenting the ICC processes.[85] It is thus feared that the ultimate objective of these effort maybe to undermine the ICC process.[86] Immediately after the said announcement, the Kenyan government made an application on 31 March 2011 to the Pre-Trial Chamber of the ICC challenging the admissibility of the cases against the six claiming that there were ongoing local investigations, which failed. While confirming the admissibility of the Kenyan cases, the ICC dismissed claims by the Kenyan government that there were ongoing investigations as being hypothetical promises and not

79 Asaala & Dicker (n 69 above) 346.
80 CIPEV called upon government to establish a Special Tribunal comprising both national and international judges and prosecutors to prosecute international crimes committed during PEV.
81 Motion 144 in Kenya National Assembly, Motions 2010 (22 December 2010).
82 See generally, ICTJ 'Prosecuting international and other serious crimes in Kenya' (2013) 2 https://ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf (accessed 6 March 2013).
83 Judicial Service Commission 'Report of the Committee of the Judicial Service Commission on the Establishment of an International Crimes Division in the High Court of Kenya' (2012).
84 The Multi-Agency Task Force on the 2007/2008 PEV (n 37 above) 4 - 5.
85 KPTJ & KHRC 'Securing justice: Establishing a domestic mechanism for the 2007/08 post-election violence in Kenya' (2013).
86 KPTJ & KHRC (n 85 above) 14.

investigations within the context of article 17(1)(a).[87] According to the Court,

> the failure to specifically mention the suspects before the ICC as some of the people under the government's investigation, rendered the information given by the Kenyan government inadequate to sustain the application.[88]

The Court was emphatic that an investigation within the meaning of section 17(1) *must* encompass the same *conduct* in respect of the same *persons* as at the time of the proceedings concerning the admissibility challenge.[89] It is indeed very doubtful as to whether any local prosecutions would seek to prosecute the same individuals before the ICC.

The Kenyan government fight against admissibility of its cases before the ICC happened after several failed attempts to have a special tribunal, coupled with absurd requests by the East African Court and the African Court on Human and Peoples' Rights to undertake the prosecutions.[90] The declaration by the Kenyan government that no further prosecutions of PEV-related cases was tenable due to lack of sufficient evidence[91] came as an icing to the numerous failed attempts to get rid of the ICC process. While this statement may be true in principle, it depicts the discomfort of the Kenyan government regarding the ongoing ICC cases. It is submitted that the essence of this statement was to convey a message to the international community that there were no crimes against humanity committed in Kenya's PEV after all. This is informed by firstly, the persistence by the Kenyan government in collaboration with regional and sub-regional institutions that the ICC cases against the Kenyan president

87 ICC-01/09-02/11-96, ICC Pre-Trial Chamber, *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to article (19)(2)(b) of the Statute (30 May 2011) 6. See also ICC-01/09-01/11-101, ICC Pre-Trial Chamber II, *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to article 19(2)(b) of the Statute (30 May 2011) 19.

88 ICC Pre-Trial Chamber II, *Muthaura, Kenyatta, Ali* (n 87 above) 25. See also ICC Pre-Trial Chamber II, *Ruto, Kosgey, Sang* (n 87 above). See a detailed discussion of this decision in EO Asaala 'The International Criminal Court factor on transitional justice in Kenya' in O Maunganidze & K Ambos (eds) *Power and prosecutions: Challenges and opportunities for international criminal justice in Sub-Saharan Africa* (2012) 133 - 134.

89 ICC Pre-Trial Chamber II *Muthaura, Kenyatta, Hussein Ali* (n 87 above) 21 & 26.

90 On 12 February 2009, a 'Constitution of Kenya (Amendment Bill) 2009' allowing the creation of a local tribunal was shot down by the Kenyan Parliament. See also ICTJ 'Prosecuting international and other serious crimes in Kenya' (2013) 2 https://ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf (accessed 6 March 2013).

91 'CID report says no charge can hold for PEV perpetrators' *The Standard* 15 February 2014 http://www.standardmedia.co.ke/mobile/?articleID=2000104723&story_title=cid-report-says-no-charge-can-hold-for-pev-perpetrators (accessed 7 April 2014).

and his deputy must be withdrawn.[92] Again, in a bid to undermine the ICC, the Kenyan government refused to arrest Omar Al-Bashir when he visited the country on 27 August 2010 despite a Kenyan High Court decision calling upon it to do so.[93] Secondly, is the reluctance by the ODPP's office to initiate investigations and or prosecute a total of 255 alleged perpetrators of PEV as recommended by the Truth Justice and Reconciliation Commission (TJRC) of Kenya.[94] Instead, Parliament has enacted legislation to allow its members to make amendments (which would effectively translate to re-writing) to the TJRC report.[95]

The tension between the government's relationship and the ICC can thus be cited as a central factor informing the political unwillingness at ensuring effective local prosecution of those who do not bear the highest responsibility for PEV crimes. These, coupled with the general elections of 2013, shifted much focus from local accountability measures through prosecution.

3 Conclusions and recommendations

This chapter set out to discuss the real challenges that compromised effective prosecution of international crime in Kenya's PEV-related cases and how these influenced the entire transitional justice process in Kenya. It has established that a majority of the cases reported to the authority during the PEV period were hardly investigated and/or prosecuted. For example out of the 6081 cases that were reported, the police prosecuted only 366 cases. For the few cases the police prosecuted, a majority of them ended up in acquittals with only six successful convictions. Although the police blame this on a lack of resources, lack of forensic laboratory with trained personnel and adequate equipment, this study has established the following as the main contributing factors: poor investigations, corruption and incompetence within the police officers, lack of legitimacy and local ownership and lack of political will.

92 Ext/Assembly/AU/Dec 1, Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia (12 October 2013) 2 - 3, Decision on Africa's relationship with the International Criminal Court http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf (accessed 4 April 2014).

93 *The Kenya Section of the International Commission of Jurists v the Attorney General, The Minister of State for Provincial Administration and Internal Security* Final Judgment, eKLR; 28 November 2011.

94 See generally chap IV of Vol 4 of the TJRC Kenya Report.

95 Sec 49 of the Truth Justice and Reconciliation Act provided that upon the publication of the TJRC's report, the Minister of Justice and Constitutional Affairs was required to 'operationalise' the implementation mechanism as would have been proposed by the TJRC within six months. The Truth Justice and Reconciliation (Amendment) Act 44 of 2013, Kenya Gazette Supplement No 178, however introduces an interesting twist. It provides that 'The Minister shall, *upon consideration of the report of the Commission by the National Assembly,* set in motion a mechanism to monitor the implementation of the report in accordance with the recommendations of the National Assembly'.

As such, subsequent prosecution of PEV cases can seldom be said to have any positive impact on Kenya's general objectives on transitional justice. In fact, it cannot be said that local prosecution of PEV cases guarantee any non-reoccurrence of similar crimes in the future. Related senseless tribal clashes continue to silently ravage the country without any respect for human life.[96] Yet, the perpetrators are hardly held to account. This continued impunity is evidence that the rule of law remains elusive in Kenya. The general lack of political will coupled with the lack of local ownership and inept investigations have denied local prosecution of international crimes in Kenya's PEV the much required local legitimacy thus compromising its ability to positively influence Kenya's transitional justice process. Consequently, the most important positive contributions of effective prosecutions in the ongoing transitional process in Kenya remain a mirage. Regardless of the initial misunderstandings, this chapter calls upon the judiciary to re-visit the discourse on establishing the International Crimes Division within the High Court as a specialised prosecutorial unit to deal with this kind of crimes. This will not only enhance Kenya's complimentarity to the ICC in future but will also guarantee special attention to international crimes. The central government should facilitate this initiative by providing the necessary financial resources, the training of all personnel and relevant stakeholders including the police, as well as the establishment of a forensic laboratory with trained personnel and adequate equipment.

Notably also, are the inequalities depicted by the penal sanctions between municipal courts and the ICC. How can it be justified that those who do not bear the highest responsibility are sentenced to death when convicted, while those who bear the highest responsibility can only be punished to a maximum life sentence? This study calls upon the Kenyan lawmakers to amend this law accordingly in order to reflect the set international standards.

96 D Miriri & H Malalo 'Second Kenyan minister charged with inciting violence' *Reuters* (online) 27 September 2012. See also J Gondi 'Bridging the impunity gap in Kenya requires a holistic approach to transitional justice' International Centre for Transitional Justice 19 July 2012 http://www.ictj.org/news/bridging-impunity-gap-kenya-requires-holistic-approach-transitional-justice#.UAgiyuOS0HM. (accessed 20 October 2013).

CHAPTER 14

JUDICIAL RESPONSES TO WOMEN'S RIGHTS VIOLATIONS IN KENYA IN THE POST-2007 CONTEXT

Ruth Aura-Odhiambo

1 Introduction

Throughout Kenyan history, defective and subjective cultural beliefs allowed women only limited roles in society as a result of their subordination.[1] Many people, in preservation of patriarchy,[2] believed that women's natural roles were being mothers and wives. Women were considered to be better suited for childbearing and household work than for involvement in the public life. The women's movement in Kenya has faced many challenges to gain equality in political, social and economic aspects of society due to the patriarchal nature of the Kenyan society. Until 2010, the Kenyan society formally denied women some significant rights and freedoms accorded to men.[3]

Since the promulgation of a new constitutional dispensation in 2010, women's efforts to fight against violation of their rights have been an important part of the women's rights movement. Notable are the express provisions of the Constitution which seek to improve the legal, socio-economic and political status of women in the country. Article 10(2)(b) for instance integrates issues of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalised as part of national values and principles of governance which were conspicuously absent in the repealed Constitution. Broadly interpreted, this article outlaws all forms of discrimination against women and sets the tone for the protection of women's rights as embodied

1 T Kanogo *African womanhood in colonial Kenya 1900-50* (2005) 3-5.

2 Patriarchy is a social and ideological construct, which considers men (who are the patriarchs) as superior to women. S Ray 'Understanding patriarchy' (undated) *Human Rights, Gender and Environment* 1.

3 See, for instance, sec 82(4)(b) and (c) of the repealed 1964 Kenyan Constitution, which allowed for discrimination with respect to 'marriage, divorce, burial, devolution of property on death or other matters of personal law' and customary law, respectively. These are areas where women face serious subjugation, subordination and threat to their fundamental rights and freedoms.

in the constitutional framework. This is an indication that culture cannot be invoked by anyone to derogate from these constitutionally-guaranteed rights.

Another milestone for Kenyan women is the equality clause encapsulated under article 27 which guarantees equality, equal protection, and equal benefits before the law. The clause is categorical that both men and women have the right to equal treatment and opportunities in all spheres of life.[4] The Constitution further guarantees, through the enactment of legislation and other measures, including affirmative action programmes and policies designed to redress any disadvantages suffered by individuals or groups because of past discrimination, the realisation of the rights under the equality clause.[5] Through affirmative action, the Constitution mandates the state to implement a two-thirds gender principle where no more than two-thirds of members of either in elective or appointive bodies are of the same gender.[6] This will be revisited later in depth in the chapter.

At the international level, Kenya has ratified, in addition to other important human rights instruments, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[7] in 1984 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in 2010.[8] These instruments have further vitalised the human rights issues. Despite the ratifications and subsequent integration of these instruments into the constitution and legal framework, the same has not been fully translated into legal niceties for the benefit of Kenyan women as shall be illustrated in later analysis.

Despite the fact that women form a majority of the population in Kenya[9] and play an active role in the development of the society, the government relatively remains a very patriarchal society, and the status of women remains relatively low with inequalities and inequities prevailing in many aspects of life. Women continue to be marginalised and discriminated against in almost all aspects of their lives, a situation which

4 Art 27(3) of the Constitution.
5 Art 27(6) of the Constitution.
6 Art 27(8) of the Constitution.
7 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13.
8 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted on 11 July 2003, entry into force 25 November 2005) (2003/2005).
9 The 2009 Kenya Population and Housing Census places the number of females at 19 192 498 as opposed to the males which are placed at 19 192 458 representing 50,3% and 49,7% respectively. Kenya National Bureau of Statistics 'The 2009 Kenya Population and Housing Census' August 2010 Vol 1C. See also FIDA-K 'At risk: Rights violations of HIV-positive women in Kenyan health facilities' (2008) http://reproductiverights.org/sites/default/files/documents/At%20Risk.pdf (accessed 19 December 2014).

is reinforced by the existing laws and policies, as well as the socio-cultural factors. Defined in its literal sense, patriarchy means the rule of the father in a male-dominated family.[10] Walby calls it 'a system of social structures and practices in which men dominate, oppress and exploit women'.[11]

During the colonisation period in Kenya, the British maintained this form of structure, life patterns as well as the culture of the community as it existed at the time.[12] This reinforced the system which was based on patriarchy in the colonial and post-colonial social, political, and economic structures.[13] These practices have continued to influence the day-to-day activities of the Government in all its institutions and agencies, including the judiciary.

Women representation in the judiciary has been skewed for a long time, with the majority occupying the bottom tiers of the institution.[14] As a result, the judiciary has, in most instances, been inconsistent in protecting women from the claws of patriarchy. This can be attributed to a male-dominated judiciary which has over the years reflected patriarchal tendencies in its decisions and therefore denied women equal access to justice.[15] The securing of equal and effective access to justice entails gender-sensitive engineering of the entire chain of justice in a way that guarantees not only formal but also substantive equality.[16] The limited appreciation of women's rights and an inadequate appreciation of gender roles by a patriarchal male-dominated judiciary negatively affect women's equal access to justice.

10 S Walby *Theorising patriarchy* (1990).

11 As above.

12 M Mathangani 'Thetriple battle: Gender, class, and democracy in Kenya' (1995) 39 *Howard Law Journal* 287.

13 Mathangani further argues that the situation did not change when the country became a republic in post-independent Kenya. Rather, the patriarchal system was absorbed into governmental structures and institutions, and was further reinforced by law and social practices that conditioned women to be inferiors, promoted gender stereotypes, and labeled female politicians as 'abnormal women'. As above.

14 It is notable that after the judicial purge in 2003, there was no woman as a Court of Appeal Judge, which previously had only one woman out of ten men. In spite of a credible report indicating that women formed about 35% of the total number of lawyers in the country and that 36% of the magistrates were women, the female gender still made up only 22% of High Court judges. 'The 7th Periodic Report of the Government of the Republic of Kenya on Implementation of the International Convention on the Elimination of All Forms of Discrimination against Women' February 2006 to April 2009. Since the promulgation of the 2010 Constitution of Kenya and subsequent reforms, there have been modest changes in the Kenyan judiciary. For instance, there are currently eight female Court of Appeal judges as opposed to 16 male judges, which is progressive compared to the pre-2010 constitutional framework. See, Republic of Kenya, the Judiciary 'List of judges' http://www.judiciary.go.ke/portal/judges-of-the-judiciary.html (accessed 6 May 2014).

15 It should be noted however that there have been instances, though few, when female judges have played into the hands of patriarchy and ignored the promotion of women's rights. See for instance the case of *Rono vs Rono* Eldoret High Court Probate and Administration Cause No 40 of 1988, discussed below.

16 F Raday 'Access to justice' (undated) http://www.ohchr.org/documents/issues/women/wg/presentationwomenacessjustice.doc (accessed 18 December 2014).

Under international law, it is recognised that access to justice is paramount in the realisation and enforcement of human rights. Kenya has signed and ratified various international legal instruments. Therefore, access to courts is necessary in order to enforce rights enshrined in the Constitution, in legislation and/or in the case law. CEDAW mandates states 'to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination'.[17] Similarly, the equality of all persons before courts and tribunals is stipulated in article 14 of the International Covenant on Civil and Political Rights (ICCPR).[18] The right to a legal remedy for human rights violations is also protected by article 14 of the ICCPR[19] and article 7 of the African Charter on Human Peoples' Rights.[20] These provisions have been replicated in the 2010 Constitution of Kenya under article 48 on access to justice, article 22(1) on enforcement of rights, and article 23(1) on the authority of courts to uphold and enforce the Bill of Rights. In essence, these provisions, guarantee persons whose rights have been violated access to courts for redress.[21]

However, access to courts for women, especially those in rural areas, is still severely limited.[22] Women's access to courts may be hindered by discriminatory family law norms, social barriers, institutional and procedural obstacles, practical and economic challenges.[23] There is however a general trend to repeal these norms, barriers and challenges especially in the post-2010 period.The premise of this chapter is that at the national level, the judicial branch of government is the first line of defense for protecting women's individual rights and freedoms, which is why its effectiveness in responding to human rights violations is so vital. An adequate judicial response is essential if women victims of violence are to have a remedy against human rights violations and if those violations are not to go without redress.

17 Art 2 of CEDAW.
18 International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.
19 As above.
20 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3/Rev.5.
21 The issue will be discussed in greater detail later in this chapter.
22 Food and Agriculture Organization (FAO) 'Rural women and access to justice' (2013) FAO's contribution to a Committee on the Elimination of Discrimination against Women (CEDAW) half-day general discussion on access to justice.
23 'Access to justice – Concept notefor half day general discussion' Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session http://www.ohchr.org/Documents/HRBodies/CEDAW/AccesstoJustice/ConceptNoteAccessToJustice.pdf (accessed 19 December 2014).

2 Pre-2010 judiciary in Kenya and its response to women human rights violations

The repealed Constitution provided for only the first generation rights, which are civil and political rights.[24] These rights were general in nature and did not specifically include women's cluster of rights. They included the right to life and personal liberty, freedom from slavery and forced labour, inhuman treatment, deprivation of property, arbitrary search or entry, and freedom of conscience, expression, assembly, association, and movement.[25] The repealed Constitution was extremely limited in scope in terms of protection of women's rights. In that regard, the courts could offer little or no protection to women.

During the pre-2010 judicial epoch, the attitude of the courts towards women and violation of women's rights was at its lowest. The High Court in the case of *Beatrice Wanjiru Kimani v Evanson Kimani Njoroge*[26] best illustrates this position. In this case Kuloba, J reprimanded women for travelling to Beijing to 'look for ideology'. The Court consequently declined to award the respondent her share of matrimonial property by considering extraneous matters that were purely based on sexism. The Court in exhibiting a biased attitude against women observed that:

> Many a married woman goes out to work. She has a profession. She has a high career. She is in big business. She travels to Beijing in search of ideologies and a basis for rebellion against her own culture. Like anyone else, she owns her own property separately, jointly or in common with anyone. Her business interest, her property and whatever is hers is everywhere in Kenya and abroad, in the rural, urban and outlying districts. In Nairobi alone her property and businesses, swell through Lavington, Muthaiga, Kileleshwa, Kenyatta Avenue, swirls in Eastlands, with confluents from everywhere. Perhaps apart from procreation and occasional cooking, a number of important wifely duties obligations and responsibilities are increasingly being placed on the shoulders of the servants, machines, kindergartens and other paid minders. Often the husband pays for all these and more …

Even in criminal matters the courts have shown bias in the administration of justice which has subsequently impeded women's access to justice. The Court of Appeal in the case of *Dzitu v Republic*[27] best illustrates this position. The appellant had been charged with, amongst other things, rape, with the alternative charge of indecent assault on a female. The second count related to attempted rape. At the court of first instance, the appellant was convicted and sentenced to serve four years in prison in addition to

24 See chap V (from secs 70 to 86) of the Repealed Constitution.
25 These rights were, however, undermined, for example, through the 6th Constitutional Amendment Act 18 of 1966, which was published on 7 June 1966.
26 HCCC No 1610 of 1999.
27 *Dzitu v Republic* Malindi HCCA No 73 of 2002.

being condemned to three strokes of the cane with hard labour, but he appealed. The appeal was allowed and the accused person acquitted on the ground that a prosecutor below the rank of acting inspector had prosecuted the case. This was a case where an accused is acquitted on the basis of a technicality instead of considering the substance of the law. This was a miscarriage of justice for the woman who was raped and the court did not consider the pain and trauma suffered by the woman to allow the case to proceed on merit.

In other cases, judicial officers were reluctant to mete out the desired punishment. This was demonstrated in the case *Matheka v Republic*[28] in which the appellant had been convicted of defilement of a girl under the age of 14 years in contravention of section 145(1) of the Penal Code by the court of first instance. He was consequently sentenced to 14 years' imprisonment in addition to eight strokes of the cane. On appeal, the Court, although appreciating the gravity of the nature of the offence, allowed the appeal against the lower court's sentence. The Court of Appeal observed that:

> The evidence against the appellant was overwhelming … The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. In this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed.

The repealed constitution imported culture and patriarchy in most of its provisions. Sections 90 and 91, on citizenship for instance, only allowed men to confer citizenship to children born outside Kenya and non-Kenyan spouses respectively while Kenyan women were denied this privilege.[29] The courts also perpetuated the culture of patriarchy and subjugation of women. In the case of *Shaka Zulu Assegai v The Attorney General of Kenya*[30] in dismissing the suit argued that conferment of citizenship by Kenyan women on non-Kenyan citizens, even after marriage, went against the grain and spirit of constitution observing that Kenya was a patrilineal

28 *Matheka v Republic* High Court at Mombasa, Case No 126/00.

29 Section 90 of the repealed Constitution provided that 'a person born outside Kenya after 11 December 1963 shall become a citizen of Kenya at the date of his birth if at that date his father is a citizen of Kenya' while sec 91 provided that 'a woman who has been married to a citizen of Kenya shall be entitled upon making an application in such a manner as may be prescribed by and/or any Act prescribed by parliament to be registered as a citizen of Kenya'. See also RA Odhiambo 'The perception and application of international law within the domestic arena – The paradigm shift in the Kenyan scenario' (2005) Masters Programme in Women's Law, SEARCWL, 2005/2006 5.

30 *Shaka Zulu Assegai vs The Attorney General of Kenya* (1990) Unreported. In this case, the petitioner was a black American who married a Kenyan. He filed a constitutional reference against the Attorney-General seeking Kenyan citizenship by virtue of the fact that he was married to a Kenyan woman.

society and as such children and wives would naturally take up the nationality of their fathers.[31]

The famous case of *Virginia Edith Wambui v Joash Ochieng Ougo and Omolo Siranga*[32] commonly referred to as the *SM Otieno* case further illustrates the bias of pre-2010 judiciary against women in interpreting the repealed constitution. The case involved a prominent Nairobi lawyer named SM Otieno who passed away without leaving a will. Immediately upon his death, his widow Wambui Otieno embarked on making burial arrangements to inter her husband in Ngong near Nairobi and far away from Otieno's rural home. However, the husband's clan, *Umira Kager* wanted to bury his body in Nyalgunga Nyanza, which was his ancestral home, in accordance with the Luo community customs. In court, the widow prayed for a declaration that she was entitled to claim her husband's body and bury it on their farm near Nairobi. Justice Frank Shields issued an injunction restraining the brother of the deceased and the *Umira Kager* clan elders from burying the deceased at the ancestral lands of the clan. The clan immediately appealed against the ruling and the Court of Appeal set aside the ruling and orders of the lower court. The case was then taken for a full trial at the High Court where a three-judge all-male bench decided that the deceased was to be buried in Nyanza. The widow unsuccessfully appealed against this decision.

The Court in this case upheld the Luo customs and traditions, stating that the wife had no duty to bury the deceased, and that in the absence of customary law, the duty could only lie with the personal representative of his estate. The Court stated that:

> [T]here is no way an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. It is thus clear that Mr Otieno having been born and bred a Luo remained a member of the Luo tribe and subject to the customary law of the Luo people.

With respect to division of matrimonial property, women suffered a backlash in 2007 when the Court of Appeal altered the norm of the 50/50 share of matrimonial property upon divorce in the case of *Echaria v Echaria*.[33] In this case, the court stated that the wife must show financial contribution in a case of division of matrimonial property and

31 It should be noted that at the time the decision was made, the Constitution was silent on the issue of discrimination on the basis of sex. Such decision was against the principle of equality and contravened art 9 of CEDAW which Kenya had ratified without reservation. The said art provided that: 'That state parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband …'

32 *Virginia Edith Wambui v Joash Ochieng Ougo and Omolo Siranga* (1982 - 88) 1 KAR.

33 [2007] eKLR. See also *Kamore v Kamore* [2000] 1 EA 80 and *Kimani v Kimani* HCCC No 1610 of 1999, which espoused a similar principle.

subsequently awarded the wife only 30 per cent of the matrimonial property. This decision ignored the non-financial contributions a woman brings to a family and went against the equality principle as espoused under article 16 of CEDAW. This provision provides for equality between men and women in a marriage at the time of its dissolution or separation or upon the death of a spouse. Prior to this decision, a woman only needed to show that she was a wife and that the matrimonial property for division was acquired during coverture.[34]

These cases demonstrate the incessant fight for women's rights to be liberated, which efforts in the above cases have been thwarted on grounds that indicated gaps in the law as well as a laxity by the judicial officers in implementing the law. These kinds of situations have brought about instances where, in Kenya, women confront manifold violations of their human rights that attack their progress in the public life and those that hamper their private lives as well.

3 The Constitution of Kenya 2010 as the launch pad for a paradigm shift in the protection of women's rights

Kenya has a very ambitious and progressive Constitution, which seeks to restore public faith and confidence in the country's institutions. The aim of the Constitution is that the legislative arm of Government will truly act as the representatives of the people and the supervisors of the executive; that the executive will put the interests of the nation first, above ethnic, individual and class interests; and that the curse of impunity will be ended when the rule of law prevails. The role of the judiciary in the realisation of this vision is critical.

The 2010 Constitution of Kenya aims at creating a human rights state, having set out an elaborate Bill of Rights with 33 articles, and declaring these to be an integral part of the democratic state and framework for social, economic and cultural policies.[35] Courts are expressly mandated to protect, uphold and enforce these rights. Having allocated these responsibilities to the courts, the Constitution then proclaims that judicial authority comes from the people of Kenya and is exercised by courts and tribunals on their behalf. Although judicial authority is vested in the judiciary, it is derived from the people of Kenya and should be exercised for their benefit.[36]

34 See for instance *Kivuitu v Kivuitu* [1991] 2 KAR 241.
35 See chap 4 of the 2010 Constitution of Kenya generally.
36 Art 159 of the 2010 Constitution of Kenya.

The 2010 Constitution establishes a framework through which non-discrimination and gender parity is advanced. It asserts rights of women and men to equal treatment and equal opportunities in political, economic, cultural and social spheres and requires state organs and public offices to take measures, including affirmative action to address past systemic discrimination suffered by vulnerable groups including women.[37] Equal citizenship rights are guaranteed and women can now transfer citizenship to their children whether born in foreign countries or born to foreign fathers.[38]

In composition of the National Assembly, 47 seats are reserved for women. A further 16 seats are reserved for nomination of women by political parties to the Senate. Women are also given opportunity to participate in leadership through county elections. The Constitution further limits membership of any gender in elective and appointive public bodies by capping membership at two thirds.[39] It further guarantees representation of women in public bodies by ensuring equal access by women and men to opportunities of appointment, training and advancement at all levels of public service.[40] These provisions are meant to ensure women also occupy positions of leadership in public offices which give them an opportunity to bring their perspectives and influence decision-making processes. It is important to note that Kenyan political environment has been a hostile environment for women to wade through. The reserved seats and the two-thirds gender rule have given women a lease of life in politics by increasing and ensuring their participation in decision-making processes in politics through these formulae.

Since the adoption of the 2010 Constitution, various legislation to compliment support for the rights of women has been adopted as law. This includes the Prohibition of Female Genital Mutilation Act,[41] which prohibits the practice of female genital mutilation, in order to safeguard against the violation of a women's mental or physical integrity through such practice. The Matrimonial Property Act,[42] which provides for the rights and responsibilities of spouses in relation to matrimonial property, has also effectively been passed into law. This is in addition to the Land Act[43] and the Land Registration Act,[44] which require that spousal consent

37 Art 27 of the 2010 Constitution of Kenya.
38 Art 14(1) of the 2010 Constitution of Kenya.
39 Art 81(b) of the 2010 Constitution of Kenya.
40 Art 232 of the 2010 Constitution of Kenya.
41 32 of 2011.
42 49 of 2013.
43 6 of 2012.
44 3 of 2012.

must be obtained before dealing in any way with matrimonial property.[45] There is also the Political Parties' Act,[46] which requires that for any political party to be registered it has to provide proof of equitable gender representation.[47] In addition, there is the Protection against Domestic Violence Bill of 2013, which, however, is yet to be passed into law.

4 General constitutional provisions relating to women's rights

Women's rights are an integral part of Kenya's democratic state, and their constitutionally entrenched rights are a framework for social, economic and cultural policies. Generally, as previously mentioned, article 10 provides for national values and guiding principles and imports issues of human dignity, non-discrimination, equality, among other rights. Read together with article 2(4), the Constitution outlaws use of biased customs and cultural norms as grounds for discrimination against women. Article 14(1) of the 2010 Constitution ensures that women are able to pass on citizenship to their children regardless of whether or not they are married to Kenyans. This was a right which was only guaranteed to men.[48] The wording of the clause in this particular article has imported the meaning of citizenship as enunciated in article 9 of CEDAW and article 6 of the Maputo Protocol on issues of nationality.

Article 26 of Constitution generally outlaws abortion. However, a woman is allowed to abort under certain circumstances including where in the opinion of a trained health professional there is need for emergency treatment, or the life of or the health of the mother is in danger, or where there is a written law permitting it.[49] Liberal interpretation of article 26(4) on 'permitted by any other written law' indicates that abortion is permitted in Kenya on demand for reasons other than those specified in the provision. Provisions of international law such as article 12 of CEDAW allowing abortion can be invoked as being 'any other written law'.

Article 27 can be considered as the 'equality clause' when the main principle of equality is discussed. The provision in addition to outlawing discrimination in whichever form, guarantees equal rights between men

45 Previously, Land Control Boards were required to first approve transactions affecting agricultural land, on the basis of sec 6 of Land Control Act, Chap 302 of the Laws of Kenya. However, spousal consent was not required for such transactions. Thus, one spouse could sell the matrimonial home without the other's knowledge, much less consent. See, for instance, the case of *Kamau v Kamau* (2006) 59 KLR 9, where the Court of Appeal upheld a husband's sale of matrimonial land without his wife's consent.

46 11 of 2012.

47 Sec 7(2)(b) of the Political Parties' Act.

48 See secs 90 and 91 of the Repealed Constitution and the interpretation of the court in *Shaka Zulu's* case.

49 Art 26(4) of the Constitution.

and women in all spheres. To operationalise this clause, article 27(6) and (8) mandates the government to undertake certain measures which include enactment of legislation and flagging affirmative action programmes and policies to redress the injustices caused by past discrimination. There is a specific requirement that mandates the government to ensure that not more than two-thirds of members of elective or appointive bodies are of the same gender. This principle has been partially employed by government in the appointment of public and judicial officers. While the article has not been fully implemented, there is an effort at compliance which has helped increase the number of women in decision-making processes.

Under article 45(3), the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the period of its subsistence and at its dissolution. The protection of women has been bolstered by this provision as it cushions women, in particular those in customary marriages, from being evicted from their matrimonial homes empty handed as was the case under the old constitutional order. Article 53(1)(e) further assures that parental responsibility shall be shared between parents regardless of marital status. In the past, children born out of wedlock were the primary responsibility of the mothers. This consequently overburdened women in providing for such children. This provision has thus made it possible for both parents to cater for the child equally and therefore sanitising the situation.

Article 60(1)(f) eliminates gender discrimination in relation to land and property, and gives everyone, including women, the right to inheritance and unbiased access to land. This provision is also bolstered in the National Land Policy.[50] These provisions are aimed at safeguarding women's land and property rights which hitherto had been ignored by statute. Additionally, article 68(c)(iii) provides that Parliament shall enact legislation for the protection of matrimonial property, with special interest on the matrimonial home during, and upon the termination of the marriage. Since independence, matrimonial property in Kenya has not had a specific legislation addressing the issue. Instead the Married Women Matrimonial Property Act of 1882 has been in use by virtue of the Reception Clause of 1897.[51] To operationalise article 68(c)(iii), Parliament has enacted the Matrimonial Property Act to specifically address these issues in the Kenyan context. On the general principles of the electoral system and process, article 81(b) of the Constitution provides for a one-third requirement for either gender in elective bodies. This provides the women of Kenya with the opportunity to constitute at least one-third of persons elected to public bodies. This has the same principle on the two-thirds rule which has already been discussed previously in this chapter

50 See para 220 - 225 of the Policy.
51 This means the provision by which English Law became part of Kenyan Law.

under article 27. The Supreme Court of Kenya has held that this particular right for women is progressive in nature.[52]

Article 91(f) of the Constitution requires gender equality to be maintained in political parties. It provides a basic requirement for political parties to respect and promote gender equality. Under article 27(3), the Constitution ensures that women and men will have the right to equal treatment and opportunities in political, economic, cultural and social spheres without discrimination. The Constitution further accords the right to health, including reproductive health to all.[53]

5 Specific responses by courts to women's rights violations

5.1 Political representation and engagement in decision-making processes

Whereas women continue to play an important role in party politics, women's participation in the often alpha-male led political parties, with strong ethno-regional appeals, has been confined to 'entertaining' power and voting, not representation. Indeed, it is this dilemma on women's representation that made the women's caucus, arguably the most organised and representative of the caucuses in Kenya's protracted constitutional making process, to advocate for several provisions that would remedy the historical legacies of women's exclusion and marginalisation in decision making processes.[54] The history of the struggle for affirmative action[55] bore fruit after the promulgation of the 2010 Constitution of Kenya. It provides a legal framework for gender equality and women's empowerment.

The Constitution of Kenya recognises women and ethnic minorities as special groups deserving of constitutional protection. The principles of devolution under the Constitution also seek to foster and promote affirmative action. Two approaches have been provided for under the Constitution. First, affirmative action is made a key principle of

52 See, *Supreme Court Advisory Opinion on the Applicability of Two-Third Gender Rule*, Reference No 2 of 2012.The case will be discussed in more detail later in the chapter.

53 Art 43(a) of the Constitution.

54 A Aketch 'Gender equity Kenya crossroads' (undated) http://www.awid.org/News-Analysis/Women-s-Rights-in-the-News2/Gender-Equity-Kenya-Crossroads (accessed on 5 February 2014).

55 According to the Stanford Encyclopaedia of Philosophy, 'affirmative action' means positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture, from which they have been historically excluded. When those steps involve preferential selection ? selection on the basis of race, gender, or ethnicity ? affirmative action generates intense controversy. Stanford Encyclopaedia of Philosophy http://plato.stanford.edu/entries/affirmative-action/ (accessed 5 February 2014).

governance.[56] Secondly, there are specific constitutional provisions on affirmative action.[57] The provisions on affirmative action require the Government to take positive steps to ensure historical injustices are redressed and minorities empowered. Affirmative action by and large can be termed as a normative type of restraint.

As noted earlier, the Supreme Court of Kenya, by a vote of four to one, held that gender equity as an affirmative action right for women in political participation regarding the two-thirds rule is progressive in nature and not for immediate realisation. The Chief Justice, however dissenting from the majority decision,[58] stated that the two-thirds gender principle should be implemented during the General Elections held on 4 March 2013.[59] The majority decision of court made provisions for legislative framework to be in place by August 2015to help in the implementation of the two-thirds principle. Politically and socially, this decision will continue to have negative effects on women's participation in public service, and their shaping of public policies and legislation, considering that there are few women who take part in active politics and activism as long as a framework is not devised to implement this principle. Male-dominated institutions often view issues through a patriarchal lens and therefore lack the proper and necessary insight to appreciate issues affecting women and this impedes women's socio-economic and political progress. Affirmative action is bound to bring equality and freedom from discrimination for both men and women, as they have the constitutional right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[60]

Post-2010 courts have effectively made an attempt at redressing the situation as pre-existed before the ratification of a novel constitutional dispensation. The case of *Centre for Rights Education and Awareness (CREAW) and 8 Others v Attorney General and Another* for instance is a prime example where Court positively made a decision on the issue of women representation.[61] The case involved a petition and a judicial review application on the question of the constitutionality of the appointment or deployment by the President of 47 County Commissioners with only ten out of the 47 persons 'appointed' or 'assigned' as County Commissioners being women. The petitioners impugned the acts of the President in making the 'appointment' or 'deployment' as being unconstitutional and in violation of articles 10, 27, and 132 of the Constitution. The petitioners

56 Art 174 on electoral system, and art 81(b)(c) and 100 of the Constitution on representation.
57 See arts 10(2)(b), 53, 54, 55, 56, 57, 59, 91(e), 97(b), 98(c) - (e), 127(c) & (d), 171(1)(d) & (f), 174, 175 and 232 of the Constitution.
58 *Dissenting Advisory Opinion* http://www.judiciary.go.ke/portal/assets/files/one-third-rule/Dissenting%20Opinion-One%20Third%20Rule.pdf (accessed 14 February 2014).
59 *Dissenting Advisory Opinion* (n 58 above) para 11.12.
60 Art 27(1) and (3) of the Constitution.
61 *Centre for Rights Education and Awareness (CREAW) and 8 Others v Attorney General and Another* [2012] eKLR.

submitted that under articles 27(6) and (7), the Constitution had made a salient promise to the different genders in Kenya.

The petitioners consequently prayed that the Court considers the provisions of article 27(6) of the Constitution, which requires that the Court, in the context of gender, to always ask itself which gender has been disadvantaged in the past so that where an opportunity arises to give a gender more than the mere average, that gender is given priority in order to bridge the gap created by historical disadvantage. The Court made a finding that the president was indeed in violation of articles 10 and 27 of the Constitution since the issue of gender balance was never considered in the appointments. The duty, the Court stated, was on the state to show that it could not get the one-third of County Commissioners out of the women population, which comprises of a majority of the total population.

Similarly, the High Court in *Centre for Rights Education and Awareness (CREAW) and 7 Others v Attorney General and Another*[62] where the Petitioners went to court to challenge the presidential nomination of the Chief Justice, Attorney-General, Director of Public Prosecutions and the Controller of Budget as being unconstitutional. In upholding the Petitioner's assertions, the Court held that the nominations were unconstitutional for violating article 27 of the Constitution for discriminating against women, amongst other grounds. Those who were appointed then were all men as opposed to the requirement for the two-thirds principle stipulated under article 27(8).

This case followed the decision of the High Court rendered in *Milka Adhiambo Otieno and Another v The Attorney General and Another*[63] where the court observed that public bodies should apply the principle contained in article 27(8) of the Constitution. The Court of Appeal buttressed this position when it held in *Commission for the Implementation of the Constitution v The Attorney General and Others* that:

> Article 90 of the Constitution decrees that the party lists must comply with ... the requirement for gender equity in that the qualified candidates must be listed in order of priority but that order must alternate between men and women.[64]

Another symbolic ruling was delivered in the case of *FIDA-Kenya and 5 Others v The Attorney General and the Judicial Service Commission.*[65] This petition challenged the constitutionality of the nominations of applicants

62 [2011] eKLR.
63 Kisumu HC Petition No 33 of 2011.
64 Civil Appeal No 351 of 2012. See also the decision of the Court in *National Gender and Equality Commission (NGEC) v Independent Electoral and Boundaries Commission and 5 Others* Petition No 147 of 2013.
65 Petition No 102 of 2011. The Court recognised that persons to be appointed to any judicial office have to be learned persons who have gone through vigorous learning and experience. The criteria for appointment of the judicial officers were clearly

to the positions of Judges of the Supreme Court. The applicants were of the view that the nominations list was in contravention of the rule requiring that not more than a third of persons appointed to any public office be from the same gender. The Court eventually dismissed the petition but not without first emphasising that judicial appointment should be based on the concept of equal opportunity and non-discrimination. The Court held that:

> We do not hold you in contempt. In fact and indeed we do not regard the women who were not considered for the Supreme Court as less deserving than those who were recommended and appointed. It is not their failure but because [the Judicial Service Commission] JSC exercised a legitimate discretion within the parameters of the law in favour of those who performed better than them. We realize from your submissions and conduct that you will find this decision disappointing but your disappointment should not be exaggerated by the thought that this rejection reflects in any way on your legal and human worth. You have our sympathy in the sense that it is too bad that you did not succeed.

The Court concluded that to grant the orders sought would undoubtedly be encroaching upon policy and legislation undertakings, which were not reserved for the judiciary. According to the bench, the charge of constitutional impropriety levelled against the Judicial Service Commission (JSC) was without any evidential basis and, therefore, misconceived and unfounded. The Court pronounced that it was unable to uphold such allegations and assertions because it was not the Court's role to pronounce policy or to legislate. The Court, however, commended the petitioners for their great passion and fervour with which they pursued the petition before the Court. Due to the public interest and furore created by the petition, they were urged to remain vigilant and to keep the state and the legislature on their toes until all women of Kenya are accorded full recognition and their capabilities appreciated.

The position adopted by the courts in these cases underscores the importance of the two-thirds gender rule. The Constitution promotes the participation of women and men at all levels of governance and makes provisions for proportional representation. It provides for women occupying at least one-third of the seats in County Assemblies as well at least one-third of the seats in the Senate. However, these analyses indicate total disharmony and confusion in the way to implement the two-thirds gender rule. It really puts a halt towards the high-end achievement of affirmative action now advocated for in all countries of the world. It has surely slowed down the efforts to bring the issue on affirmative action to

spelled out in the Constitution and the provisions of the Judicial Service Act. The Court took the view that art 27 of the Constitution as a whole or in part did not address or impose a duty upon the Judicial Service Commission in the performance of its constitutional, statutory and administrative functions. It opined that art 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.

play in all sectors of government, a situation that will derail the representation of women in key dockets to have their issues dealt with succinctly.

5.2 The rights of women in labour relations

Gender equality is a fundamental right and is essential to development. Lack of gender equality results in a large unutilised economic potential, which means that both women and men should be given the same opportunities to deploy their resources. It is, therefore, critical that women and men have the same chances of access to political, economic, healthcare, education, and employment opportunities. Such should be the fundamentals upon which the courts arrive at their decisions to ensure that no woman is discriminated against on the basis of gender in relation to employment. In this regard, the 2010 Constitution of Kenya provides that *every* worker has the right to fair labour practices. The 'every' in this provision connotes both men and women and does not discriminate against any particular sex.

International human rights standards governing the rights of women have also established the consideration of sexual harassment against women as amounting to discrimination against women, which is proscribed at international law.[66] CEDAW prohibits all forms of discrimination against women and calls upon state parties to take relevant measures to prevent such actions.[67] Discrimination against women is also addressed in other international treaties, to varying degrees, including the Universal Declaration on Human Rights (UDHR),[68] the International Covenant on Civil and Political Rights,[69] and the International Covenant on Economic, Social and Cultural Rights (CESCR).[70] Under article 2 of the ICCPR, each state party undertakes to respect and ensure the enjoyment, by all individuals within its territory and subject to its jurisdiction, the rights recognised in the Covenant, without distinction of any kind such as race, sex, language, religion, political opinion and national or social origin.[71]

The Courts ought to uphold the rights of women, in cases of their violation by employers, on the basis of the treaty obligations of the state to

66 Art 1 of the Convention on the Elimination of All Forms of Discrimination against Women (n 7 above).
67 As above.
68 Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948).
69 International Covenant on Civil and Political Rights (n 18 above).
70 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3.
71 W Maina 'Using international human rights to confront discrimination: The case of Nigeria, Tanzania, Kenya and South Africa' in International Commission of Jurists (ed) *Human rights litigation and the domestication of international human rights standards in Sub Saharan Africa* (2007) 1 39, 43.

uphold the standards set out in the international instruments, which have also been codified into Kenyan law through the 2010 Constitution of Kenya. More importantly, employment discrimination on the basis of gender, in the form of sexual harassment, is an affront on the dignity of the person and is inconsistent with human rights norms as enshrined in international instruments such as the Universal Declaration of Human Rights.

With regard to recent jurisprudence from the courts on employment issues, the case of *VMK v CUEA,*[72] which involved a young female adult who suffered blatant discrimination at the work place for a period of seven years for reasons of sex, pregnancy and HIV/AIDS status, is instructive. The Court, in acknowledging the existence of discriminatory practises against the woman, held that:

> [T]he conduct of the Respondent grossly violated Article 27 of the Constitution and in particular her right to equal benefit of the law and equal enjoyment of all rights was grossly violated by the discriminative conduct of the respondent in spite of specific provisions of the labour laws that guaranteed the claimant specific rights and equality at the workplace.

The Principal Judge, Mathews Nduma, in awarding her damages amounting to Kenya Shillings 6 971 346 stated that the blatant confrontation by the Human Resource Office who told her that people with HIV status could not be employed permanently, the testing of HIV status without her consent, and the disclosure of her status to third parties without her authority, demonstrated the seriousness of the violations and the need to compensate the claimant for the hurt feelings and eventual loss of employment due to her HIV status.

In the case of *Jane Wairimu Macharia v Mugo Waweru and Associates* the court addressed the question of the right to maternity leave for female employees.[73] The claimant's allegations were based on unfair termination of her employment and failure to be paid terminal benefits. According to the claimant, she served the respondent with diligence and loyalty but the respondent terminated her services when she applied for maternity leave. In her evidence in chief, the claimant stated that when she pursued the issue of her maternity leave, he ejected her out of his office. Subsequently, she was admitted to the Nairobi Women's Hospital on 18 July 2011 and delivered her baby on 19 July 2011. She also stated that at no time was a review of her performance ever undertaken nor did she agree to extension of her probation.

72 *VMK v CUEA* [2013] eKLR.
73 *Jane Wairimu Macharia v Mugo Waweru and Associates* Industrial Court Cause No 621 of 2012.

The Court found that the employer's conduct was discriminatory under section 46 of the Employment Act.[74] In addition, the Court affirmed that every female employee has a right to a three-month maternity leave, besides the annual leave enjoyed by all other employees. Failure of an employer to comply with this statutory period amounts to a direct discrimination against female employees.[75] The Court further held that:[76]

> A credible performance appraisal process must be evidently participatory. A comment made by a supervisor without the participation of an employee cannot pass for a performance appraisal. Even where there may be disagreement between an employee and their supervisor on the verdict of a performance appraisal, the disagreement must be documented to show that an appraisal did indeed take place.

These cases indicate the devotion of the courts in the enforcement of the rules against discrimination on the grounds of sex or health status that is biased against women. They affirm the commitment by the judiciary to stamp its authority in order to institutionalise gender values in the employment sector through progressive jurisprudence that protects women.

5.3 Property ownership

The government has demonstrated its laudable commitment to gender equality by ratifying international human rights conventions, such as CEDAW and Maputo Protocol, and in adopting a National Gender and Development Policy. However, women in Kenya still suffer the degrading and even life-threatening consequences of their lack of property rights and the resulting absence of economic security. This denial of equal property rights places most women in Kenya at greater risk of poverty, disease, violence, and homelessness.[77]

This situation is a direct consequence of discriminatory laws and practices concerning women's access to and control of land and matrimonial property. Being a patriarchal society, Kenya has laws such as the Succession Act[78] that discriminate against women when, for instance, it comes to inheritance of property. The Act provides that when someone dies intestate, the property shall devolve on the surviving child or equally

74 Employment Act 11 of 2007.
75 Sec 29 of the Employment Act 2007 provides that a female employee is entitled to maternity leave on full pay provided she gives her employer at least seven-day notice. Sec 5(3) of the Act similarly provides that no employer may discriminate either directly or indirectly against an employee or prospective employee on the grounds of pregnancy.
76 n 73 above.
77 Government of Kenya 'The 7th Periodic Report of the Government of the Republic of Kenya on Implementation of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)'.
78 Chap 160 of the Laws of Kenya.

be divided amongst the surviving children without making any distinction as regards to the sex of the children.[79] There has however been inconsistent and skewed interpretation of the legislation by the courts as to whether daughters can inherit from their deceased parents' estate. In practice the courts have in many instances ruled that married or unmarried daughters have no right to inherit and they are customarily excluded or given less share of the net estate than sons.[80] For instance, in *Rono*[81] where the court acknowledged that the deceased treated his children equally, but refused to take cognisance of the equal rights of women to own property when it held that:

> The situation prevailing here is rather peculiar though not uncommon in that one house has sons while another has only daughters. Statute law recognizes both sexes to be legible for inheritance. I also note that it is on record that the deceased treated his children equally. It follows that all daughters will get equal shares and all the sons will get equal shares. However due to the fact that daughters have an option to marry, the daughters will not get equal shares to boys. As for the widows if they were to get equal shares then the second widow will be disadvantaged, as she does not have sons. Her share should be slightly more than that of the first widow whose sons will have bigger shares than the daughters of the second house.

Fortunately, on appeal,[82] the Court of Appeal addressed itself to the international legal framework, particularly CEDAW, the Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights and the African Charter, which Kenya had at the time ratified to resolve the dispute. The court observed that ratification of an international instrument is a clear indication that Kenya had the intention of being bound by those provisions within the global context even if it has not domesticated them. In that regard, the court stated that:[83]

> Is international law relevant for consideration in this matter? As a member of the international community, Kenya subscribes to international customary laws and has ratified various international treaties and covenants … In 1984 it also ratified, without reservation, the Convention on the Elimination of all forms of Discrimination Against Women and also the Banjul Charter (1992) without reservations … It is in the context of these international laws that the 1997 amendment to section 82 of the constitution to outlaw discrimination on the basis of sex becomes understandable. The country was moving in tandem with the emerging global culture, particularly on gender issues I have referred at some length to international law provisions to underscore the view I take in this matter that the central issue relating to the discrimination which this appeal raises cannot be fully addressed by reference to domestic legislation

79 Sec 35(5) of the Succession Act.
80 Odhiambo (n 29 above) 4.
81 Eldoret High Court Probate and Administration Cause No 40 of 1988.
82 Civil Appeal No 66 of 2002 (Eldoret).
83 As above.

> alone. The relevant international laws, which Kenya has ratified, will also inform my decision.

The Court of Appeal decision was a step in the right direction for most women in terms of protection of women's rights to property since many women are left destitute following the death of their husbands and fathers or after a divorce. Many of them succumb to threats and hostility from their in-laws, and move away from their homes to live in abject poverty. Kenya's land laws were developed against a customary law system in which women had no rights to own land and only limited rights to access or use land.[84] Then, the process of land adjudication, consolidation, and registration crystallised men's absolute ownership and control of land. As a result, women in modern day Kenya rarely own land titles either individually or jointly with their husbands.

However, the recent passing of the Matrimonial Property Act 2013 offers reprieve to women.[85] Section 8 of the Act makes clear provision on how matrimonial property is divided in polygamous marriages. For instance, property acquired by a man and his wife is owned exclusively by them if that property was acquired before the man married another wife. Any subsequent property bought after the man has married another wife the property is considered as that of the man and his wives. This section is important as it brings the principle of equity in distribution of matrimonial property. It also prevents issues of unfair advantage taken by women who come late in marriage when resources have been accumulated through the hard work of the man and the first wife and want to claim a share without material contribution.

While the women in Kenya face numerous obstacles during marriage, the burden becomes insurmountable in the case of divorce or dissolution of the marriage. At separation or divorce, women are often unable to take away an adequate share of their matrimonial property, and are usually forced to leave the matrimonial home with little more than personal effects. The lack of equal property rights upon divorce and the fact that many women become the sole caretakers of their children often drives them into poverty. The precarious economic position of women renders

84 This position has significantly changed as was illustrated by the court in *Re Estate of Mburugu Nkaabu (Deceased)* , where the surrounding issues involved inheritance the distribution of property, the court held that the Constitution, through art 27 and 60(f), gave a woman the right to inherit property. The court intervened to protect the rights of a daughter who was disinherited by her brothers for being a woman.

85 Until the passage of this Act in December 2013, women in Kenya were at the mercy of a legal system that did not provide clear and equal access to the use, management, and control of matrimonial property. The Married Women's Property Act of 1882, an antiquated British law, contained the sole technical clause available for courts to regulate property distribution between spouses, often depriving wives of any share, much less equal share to matrimonial property. For instance, polygamy forced women to share hard-earned matrimonial property with multiple co-wives and children all bound to receive an ever smaller share of resources. Some husbands use property earned by the first wife to acquire additional wives.

them more vulnerable to, for instance, domestic violence, and undermines their ability to leave abusive relationships or to negotiate safe sex. As a result, women and their children face serious physical and psychological health harms, including increased risk of contracting HIV/AIDS.

Women are unable to effectively assert their rights to property because of gender bias in customary law and the lack of procedural safeguards for land disputes. They are excluded from the decision-making process as men hold the vast majority of seats in institutions that adjudicate land rights.[86] The decisions emanating from those bodies are often based on discriminatory and degrading notions about women's inability to manage or own land, some of which are enshrined in customary law. As a result, women are subjugated to the status of second-class citizens who must rely on men as the sources of their rights.

As has already been discussed, there exist gaps in the Kenyan legislative framework with respect to matrimonial property which has consequently resulted in skewed and dressed in patriarchal undertones that belittle and dismiss the vast contribution of women in the society.[87] The fact that a marriage is formalised under statute or custom makes no difference in determining women's rights and such rights, if at all they exist, do so at the will of the husband. Married women therefore rarely enjoy equal rights to control, alienate, or transfer matrimonial property.[88]

The Constitution has effectively changed the landscape on division of matrimonial property, while paving way for progressive legislation such as the Matrimonial Property Act, the Land Act and the Land Registration Act. The new constitutional dispensation requires matrimonial property to be divided equally after divorce. In that regard, article 45(3) of the Constitution provides that '[p]arties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage'. Further, by virtue of article 2(5) and (6) of the 2010 Constitution, general rules of international law and treaties ratified by Kenya become part of Kenyan law. To this end, international conventions such as CEDAW, Beijing Platform for Action (BPFA),[89] African Charter on Human and Peoples' Rights,[90] and the Maputo Protocol (the Charter's

86 The bodies that govern land lack adequate procedural safeguards to protect the rights of women because, first, women are nearly absent from land adjudication bodies; second, the land disputes procedures are biased against women, and third, husbands may sell matrimonial land without their wives' consent. Ministry of Gender, Sports, Culture and Social Services 'National gender and development policy' (2000) 20 http://www.culture.go.ke/images/stories/pdf/genderpolicy (accessed 14 February 2014).

87 See for instance the cases already discussed, including *Kimani vs Kimani*, where Kuloba, J sarcastically dismissed efforts by women to address inequality.

88 See generally, Kenya Land Alliance 'The national land policy in Kenya: Critical gender issues and policy statements' (2004) *KLA Issues Paper* 1.

89 Beijing Declaration and Platform for Action, UN Doc A/Conf. 177/20(17 October 1995).

90 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5.

Protocol on rights of women) amongst others, which point to equality of both men and women, can be directly applied in the national jurisdiction by Kenyan courts.

The courts have now moved and sidestepped the unfortunate bad law made in the then male-dominated Court of Appeal in *Echaria's* case and *Muthembwa*,[91] which engendered oppression of women on the basis of the requirement of proof of contribution with regard to matrimonial property. The attitude of the Court in *Echaria's case* was, however, positive only in lamenting that the law was rigid and could only be applied as it was. The Court stated as follows:[92]

> We would like to add our observations, that is to say, that until such time as some law is enacted, as indeed it was enacted in England as a result of the decision of Pettit Vs Pettit and Gissing Vs Gissing to give proprietary rights to spouses as distinct from registered title rights Section 17 of the Act must be given the same interpretation as the law Lords did in the said two cases. Such law should be enacted to cater for the conditions and circumstances in Kenya. In England the Matrimonial Homes Act of 1967 was enacted which was later replaced by the Matrimonial Proceedings and Property Act 1970. The Matrimonial Causes Act of 1973 also made a difference

The period after 2010 has been characterised by a series of court decisions that have upheld the concept of equality of parties in marriage. One of the most recent decisions was delivered in *CMN v AWM*[93] where the husband had singularly financed the matrimonial house but upon divorce, the Court decreed that the house had to be divided equally between the parties. In rendering a deadly blow to past inequality, the learned judge had this to say:

> The legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of the property which matters … the legal provision in force now requires this court to apply the principle of equality instead. This court is duty bound to share the Suit Property [matrimonial house] equally between the Plaintiff [husband] and the Defendant [wife].

91 *Muthembwa v Muthembwa* Civil Appeal No 74 of 2001. In this case, it was held that a spouse who has contributed to the increase in value to property that is inherited by or gifted to the other spouse before the marriage will be entitled to a share of the increased value under sec 17 of the Married Women Property Act of 1889. The wife claimed that one of the properties she was claiming was a property that the man had inherited from the father before they got married. The wife claimed she had increased the value of that land by improving it and it was held that she was entitled to 50% of the value of the improvement of that property.

92 See *Echaria* (n 33 above).

93 *CMN v AWM* [2013] eKLR.

Similarly, in the case *ZWN v PNN*[94] the Court was pro-active in making a finding that property distribution between the spouses was to be pegged on a 50-50 basis. The Court opined as follows:

> [T]he principle of equality currently enshrined in Article 45(3) of the current Kenyan constitution and as derived from the afore assessed human rights instruments that Kenya was party to as a member of the international community and which principle this court is enjoined to apply enjoins this court to rule and order that the plaintiff is entitled to a half share of all matrimonial properties adjudged to be matrimonial properties herein.

The same rationale was applied in the case of *JAO v NA*[95] where the court had the following to say:

> There is no doubt that the way to go is towards the principle that matrimonial property should be shared on 50:50 basis. This will be in furtherance of the principles of the Kenyan Constitution and the International treaties and conventions which have been ratified in Kenya. We do not have to wait until the matrimonial property bill is enacted into law to start applying what is contained therein. The constitution, international conventions and treaties which have been ratified by Kenya have shown the way.

5.4 Violence against women

Domestic violence has international recognition as a violation of women's rights. The modern criminal justice system has failed to respond adequately to crime generally, and to domestic violence in particular.[96] Muli argues that current trends in the battle against domestic violence weigh heavily in favour of greater criminalisation of domestic violence through aggressive prosecution and legislation of punitive laws against barterers.[97] However, the dominance of patriarchy in the society has also led to acceptance of gender based and sexual violence as normal behaviour. Traditionally, women in some communities even expect to be beaten by their husbands as a sign of love.[98]

The Sexual Offences Act of 2006 introduced stiffer penalties for sexual offenders in Kenya, but implementation and enforcement of the Act are still not mainstreamed despite the rise in gender-based violence and sexual violence. Marital rape, which is also rampant has however, not yet been

94 [2012] eKLR.
95 [2013] eKLR.
96 M Elizabeth 'Rethinking access to justice: Enforcing women's rights in cases of domestic violence in Kenya' (2004) 2 *East African Journal of Human Rights and Democracy* 222.
97 As above.
98 RA Odhiambo 'Intimate terror: A case study of the laws versus lived realities of battered wives among the Luo Community living in Nakuru, Kenya' PGD Thesis, University of Zimbabwe, 2000 16.

criminalised as an offence punishable by law.[99] For victims of violence, where the state fails to act to protect them from perpetrators, it causes them and their families to live in fear of a repeat occurrence of the violence, especially where the victims and their families know the perpetrators. The idea that justice should not only be done but 'should be seen to be done' has the objective of according victims a sense of closure, peace of mind and a sense of dignity.

In the case of *CK and 11 Others v The Commissioner of Police/Inspector General of the National Police Service and 2 Others*[100] the Court cited with approval the famous decision of the South African Constitutional Court in *Carmichele v Minister Safety and Security and Another*[101] where the Court stated that 'the courts are under a duty to send a clear message to the accused, and to other potential rapists and to the community'. The Court subsequently made a finding that there was both a statutory and a constitutional duty of the respondents to positively act in protecting the petitioners, the breach of which infringed the petitioners' right to equal protection and benefit of the law, contrary to article 27 of the Constitution. As a result, the failure to enforce the existing defilement laws had contributed to the development of a culture of tolerance for pervasive sexual violence against children and impunity. Sexual violence had caused some of the victims to flee their homes in fear bereft of support of their friends and family. The Court further noted that it was the role of judicial officers, therefore, to protect the victims and their families and ensure that perpetrators are held accountable to reduce the cases of gender-based violence. The Court stated thus:

> Whereas the perpetrators are directly responsible for the harms to the petitioners, the respondents herein cannot escape blame and responsibility. The respondents' ongoing failure to ensure criminal consequence through proper and effective investigation and prosecution of these crimes has created a 'climate of impunity' for commission of sexual offences and in particular defilement … this to me makes the respondents responsible for physical and psychological harms inflicted by perpetrators … the State's duty to protect is heightened in the case of vulnerable groups such as girl-children and the State's failure to protect need not be intentional for it to constitute a breach of its obligations.

The due diligence principle goes hand in hand with the principle of non-discrimination. What this means is that states are under an obligation to act on cases of violence against women in the same manner as other forms of violence. It requires states to use the same level of commitment in

99 In Kenya marital rape is not recognised as a crime in the Sexual Offences Act, which addresses offences of a sexual nature. Women have to put up with the vice within their marital homes. CW Kung'u 'Criminalization of marital rape in Kenya' PGD Thesis, University of Toronto, 2011.

100 *CK and 11 Others vs The Commissioner of Police/Inspector General of the National Police Service and 2 Others* High Court Petition No 10 of 2012.

101 *Carmichele vs Minister Safety and Security and Another* 2001 (4) SA 938 (CC).

relation to preventing, investigating, punishing and providing remedies for gender-based violence against women as they do with other forms of violence.[102]

5.5 Reproductive health rights

Socio-economic rights embodied within the Constitution of Kenya of 2010 include rights to labour relations, education, health care, food, water, social security and housing.[103] These rights are guaranteed to all Kenyans irrespective of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth of an individual. Women in Kenya are not an exception and are, therefore, also entitled to these rights. In this regard, article 11(1) of the CESCR mandates state parties to 'recognize the right of everyone to an adequate standard of living....'[104] The deprivation of women's equal enjoyment of economic, social and cultural rights because of biased laws and custom divest them of economic resources, subjecting women to greater risk of domestic violence and HIV/AIDS. Kenyan women, who are at greater risk of HIV infection or who are already living with the virus are denied the highest attainable standard of health guaranteed under article 12 of the CESCR.[105]

The right to health care services is explicitly guaranteed, providing content to the right to health and placing clear obligations upon the Government to provide health care services.[106] Reproductive health care is included in the definition of the right to health and health care services, affirming that reproductive health care is essential to the right to health and forms part of the health care services to which people are entitled. Although reproductive health is not defined in the Constitution, Kenya however is in the process of enacting the Reproductive Health Care Bill, 2014[107] which defines reproductive health as

> a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.

102 Special Rapporteur on Violence against Women 'The due diligence standard as a tool for the elimination of violence against women' UN Doc E/CN.4/2006/61 (2006) 35.
103 Arts 41, 44 and 45 of the Constitution of Kenya.
104 International Covenant on Economic, Social and Cultural Rights (n 70 above).
105 As above.
106 Art 43(1)(a) of the Constitution.
107 The first reading of the Bill took place on 12 June 2014 and is currently pending before Senate http://kenyalaw.org/kl/index.php?id=4248 (accessed 20 December 2014).

This definition borrows from the definition adopted at the 1994 International Conference on Population and Development which provides that:[108]

> Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy ...

For decades, women seeking reproductive health services in Kenya have been suffering serious human rights violations, including physical and verbal abuse and detention in health facilities for inability to pay hospital fees. Shortage of funds, medical staff and equipment plague the health care system, particularly the public health institutions, dramatically interfering with the ability of health care staff to provide adequate and quality care efficiently. These systemic problems have persisted, in part, because of a dismal lack of accountability within the health care system, which in turn stems from a lack of basic awareness about patients' rights and the absence of transparent and effective oversight mechanisms.

Under the 2010 Constitution, women have the right to access safe and legal abortion where the pregnancy presents a danger to their mental or physical health.[109] Access to safe abortion in cases of pregnancy resulting from sexual violence should also be – and, in Kenya, has been – understood as central to preserving a woman's life and health.[110]

In the case of *PAO and 2 Others v Attorney General*, the Court acknowledged that the case raised critical issues pertaining to the constitutional right of citizens to the highest attainable standard of

108 Programme of Action of the International Conference on Population and Development, Cairo, 5 - 13 September 1994, UN Doc A/CONF.171/13/Rev.1 (1995) 7.2.

109 Art 26(4) of the Constitution.

110 See the English decisions of *R v Bourne* [1939] 1 KB 687, [1938] 3 All ER 615; *Mehar Singh Bansel v R,* 1959 E Afr L Rep 813 (Kenya) (affirming *R v Bourne* in the East African Court of Appeal); and the National Guidelines on Management of Sexual Violence in Kenya, which states that: 'If they [survivors of sexual violence] present with a pregnancy, which they feel is as a consequence of the rape, they should be informed that in Kenya, termination of pregnancy may be allowed after rape (Sexual Offences Act, 2006). If the woman decides to opt for termination, she should be treated with compassion, and referred appropriately.' Ministry of Public Health and Sanitation, and Ministry of Medical Services 'National guidelines on management of sexual violence in Kenya' 2nd edition 2009 13 http://www.svri.org/national guidelines.pdf (accessed 10 May 2014).

health.[111] In a move to fight counterfeit drugs, Kenya enacted the Anti-Counterfeit Act to prohibit trade in counterfeit goods, including drugs.[112] The High Court in this matter declared the Anti-Counterfeit Act a violation of the right to the highest attainable standard of health in as far as it limited access to generic medicines and drugs. This was highly progressive considering that there exists a high HIV/AIDS prevalence rate among women than in men in Kenya.[113]

5.6 Harmful cultural practices

Harmful cultural norms include female circumcision and genital mutilation, facial scarring, early or forced marriage, cultural practices associated with childbirth, dowry-related crimes, honour crimes, and the consequences of son preference.[114] These practices adversely affect the health of women and children. Through controlling women's bodies for men's benefit and through ensuring the political and economic subordination of women, harmful cultural practices perpetuate the inferior status of women. Despite their harmful nature and their violation of international human rights laws, such practices persisted because they were never questioned.

These practices are harmful to women and children as they inflict both immediate and long-term mental and physical pain on their victims. They more so violate a number of rights protected in international and regional instruments. These rights include the right to life, right to health, right to non-discrimination on the basis of sex and the right to liberty. They also include the right to the security of the person, which incorporates the right not to be subjected to violence and recognises the need for children to receive special protection. Further, international and regional instruments safeguard the right not to be subjected to inhuman or degrading treatment.

111 *PAO and 2 Others v Attorney General* [2012] eKLR.

112 Anti-Counterfeit Act No 13 of 2008. The three petitioners in the *PAO* case were adults living with HIV/AIDS, and had been taking medication since generic antiretroviral (ARV) drugs became widely available. The petitioners averred that section 2 of the Act did not differentiate between counterfeits and generic drugs, and thus, were afraid that in its enforcement, the very drugs on which their lives depended would be criminalised and thus liable to seizure. Further, they were concerned that the cost of their treatment was likely to increase considerably as they would have to rely on branded drugs that are more expensive. The Court asked the state to reconsider the provisions of sec 2 of the Act alongside its constitutional obligation to ensure that citizens have the highest attainable standards of health and make the appropriate amendments to the Act.

113 In Kenya, the HIV prevalence rate for adult women is almost double that for men. This represents a female-to-male ratio of 1.9 to 1.0, the highest in Africa. Kenya National Bureau of Statistics et al 'Kenya demographic and health survey 2008-2009' (June 2010).

114 Paras 39, 93, 107(a) and 114(a) of BPFA (n 89 above); See also HE Warzazi 'Third report of the Special Rapporteur on Traditional Practices affecting the Health of Women and the Girl Child' Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 9 July 1999, E/CN.4/Sub.2/1999/14, para 20.

Some of the relevant clauses of international instruments that are relevant in the protection of the stated rights include article 5 of CEDAW, which provides that state parties must undertake:

> [A]ll appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Similarly, articles 2(2) and 5(d) of the Maputo Protocol and articles 2, 6, 12, 19, 24, 27 and 28 of the Convention on the Rights of the Child (CRC)[115] as well as article 7 of the ICCPR echo the same principle stipulated in article 5 of CEDAW. In Kenya, the case of *MNN v Attorney General of Kenya*, brought on behalf of a woman who was mistreated, abused, and whose genitals were mutilated without her knowledge or consent in a private Kenyan hospital,[116] brings to light the continuing severity of the harm suffered by women in Kenyan health facilities. The *MNN* case also reveals the weaknesses of the accountability mechanisms that are meant to protect women from such abuse as well as provide remedies when rights violations occur.

The *MNN* case is one of the first reproductive rights cases to be brought before the Kenyan High Court that highlights the state's failure to live up to its legal obligations under both domestic law and international human rights standards. With this case, the High Court has an opportunity to demand stronger legal standards on female genital mutilation, to address the systemic accountability issues that permit rights violations in healthcare facilities, and to affirm Kenya's obligation to implement international human rights law.

6 Conclusion

In exercising judicial functions, judicial officers take an oath to, at all times, protect, administer and defend the Constitution with a view to upholding the dignity and the respect of the judiciary and the judicial system of Kenya while promoting, amongst other constitutional values, fairness. Article 10 of the Constitution of Kenya, mandates the judiciary to enforce and implement rights in accordance with the set out national values and guiding principles. This means that the judiciary must consider such principles as equality, equity, human rights, non-discrimination and social justice in carrying out its functions. In light of the fact that women are still considered second-class citizens in the country, which is still a

115 Convention on the Rights of the Child (adopted 20 November 1989) 1577 UNTS 3.
116 Undecided and unreported.

largely patriarchal society, the courts must safeguard against the derailment of women's rights.

The 2010 Constitution, unlike the repealed Constitution, is progressive and more explicit in its protection of women's rights. The Constitution entrenches an equality clause under article 27 which states, unequivocally, that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Additionally, the Constitution, through a substantive approach, ensures women are adequately represented in the legal, socio-economic and political spheres through the requirement of implementation of the two-thirds principle. This is a major step forward, and women for women, as the provision departs from the non-gender specific provisions of the repealed Constitution which went as far as limiting women's rights with respect to inheritance, burial and personal law.

The Constitution recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people, and also affirms the right of the people to practise their culture. However, retrogressive cultural practices and patriarchy still greatly influence judicial decisions in the country. As a way of safeguarding Kenyan women from retrogressive cultural practices, the 2010 Constitution in article 2(4) also stipulates that any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency. This means that courts have an obligation to proscribe and penalise cultural practices that are biased against women, and those that violate their rights, in addition to ensuring that women are not treated subjectively using such practices. The role of the court is to ensure that human rights violations do not go unpunished. This is because public confidence in the judiciary is restored where perpetrators are brought to book. Conversely, where perpetrators are not held to account, citizens lose their confidence in the ability of the state to protect their rights and this may result in anarchy.

Parliament has since enacted several laws granting the courts greater mandate in the interpretation and application of the laws in the advancement of women's rights. Since the advent of the new constitutional dispensation, the judiciary has issued decisions that have appeared to support the advancement and protection of women's rights. Through formulation of a legal framework that is responsive, the government has attempted to comply with international obligations to respect, protect and fulfil fundamental rights and freedoms of individuals, women included. The judiciary is now able to invoke and interpret this novel legal framework to confer rights to women whenever there is a violation.

This chapter sought to interrogate whether the judiciary has made positive or negative progress towards enforcing women's rights since the promulgation of the 2010 Constitution. Available case law which has been analysed in the chapter indicates that although much still needs to be done

before women fully realise their fundamentally guaranteed rights as espoused in both the Constitution and international legal instruments applicable in the country, the courts have attempted to reduce the gap between men and women in terms of equality.

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