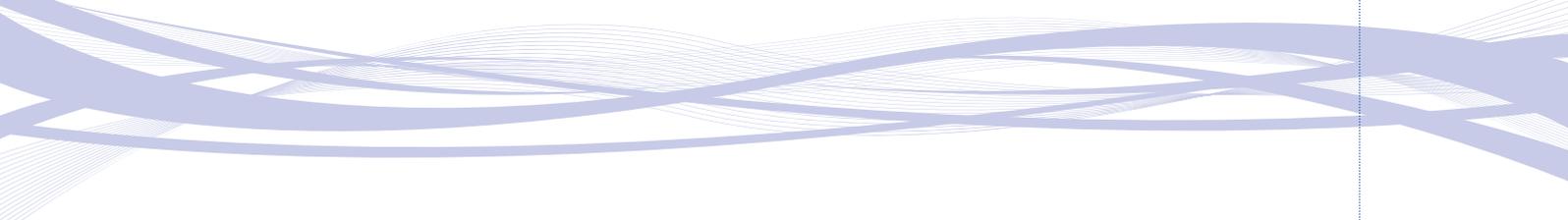


Restructuring the Kenyan State



SID

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Joshua M. Kivuva



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Abstract

Since the repeal of Section 2(A) and the return of multiparty politics in Kenya in 1991, Kenyans have, for over 20 years, been trying to redesign and restructure their government. Despite the rejection of the Wako Draft, the quest by Kenyans for a new constitution did not stop. The 2007 post election violence not only convinced Kenyans of the inevitability of a new constitution but also showed the urgency of it. Persistent efforts for a new constitution have resulted in the 2010 Constitution of Kenya, which has not only significantly restructured the government and redesigned how the people relate to it, but has also established new systems of governance. This paper examines two things: first, the extent to which the governing institutions have been redesigned and restructured; and second, the extent to which the redesigned and restructured institutions have addressed Kenyans' pressing social political and economic problems. The paper argues that the 2010 Constitution of Kenya has addressed many of the governance problems experienced in Kenya since independence, but more so has created new structures that will make the government more accountable and transparent, and which, together with the optimism of a new constitution, provide the country with a renewed sense of "rebirth" and a new beginning for the country.

Joshua Kivuva holds a PhD from the University of Pittsburg. He is a lecturer in the department of political science and public administration at the University of Nairobi.

The SID Constitution Working Paper Series

In 2010, on the cusp of Kenya's new constitutional dispensation, the Society for International Development (SID) embarked on a project called *'Thinking, Talking and Informing Kenya's Democratic Change Framework'*. Broadly stated, the objective of the project was both historical and contemporary: that is, to reflect on Kenyans struggles for a democratic order through a book project, and to examine the significance of a new constitutional order and its legal and policy imperatives, through a Working Paper Series.

Consequently, SID commissioned research on some of the chapters or aspects of the new constitution that require further policy and legislative intervention, culminating in ten Working Papers. These papers, mostly by Kenyan academics, are intended to help shape public discussions on the constitution and to build a stock of scholarly work on this subject.

These papers seek to contextualize some of the key changes brought about by the new constitutional order, if only to underscore the significance of the promulgation of the new constitution on August 27, 2010. The papers also seek to explore some policy, legislative and institutional reforms that may be necessary for Kenya's transition to a democratic order.

The Working Papers explore the extent to which the new constitution deconstructs the Kenyan post-colonial state: how it re-calibrates the balance of power amongst branches of government and reforms government's bureaucracy; redraws the nature of state-individual relations, state-economy relations, and state-society relations; and deconstructs the use of coercive arms of the government. Lastly, the papers examine some of the limitations of the new constitution and the challenges of constitutionalism.

In the first set of papers, **Dr Joshua Kivuva**, **Prof. Ben Sihanya** and **Dr. Obuya Bagaka**, separately examines how the new constitution has re-ordered nature of Kenya's post-colonial state, especially how it has deconstructed the logic of state power and rule, deconstructed the 'Imperial Presidency', and how it may re-constitute the notorious arm of post-independent Kenya's authoritarian rule: the provincial administration.

The next set of papers in this series, by **Dr. Othieno Nyanjom** and **Mr. Njeru Kirira**, separately looks at the administrative and fiscal consequences of Kenya's shift from a unitary-state to a quasi-federal state system. Whereas Dr. Nyanjom examines the anticipated administrative and development planning imperatives of devolving power; Mr. Kirira examines the anticipated revenue and expenditure concerns, which may arise in a state with two-tier levels of government. Both discussions take place within the context of a presidential system of government that the new constitution embraces.

The paper by **Dr. Musambayi Katumanga** examines the logic of security service provision in post-colonial Kenya. Dr. Katumanga argues that Kenya needs to shift the logic of security from regime-centred to citizen-centred security service provision. However, despite several attempts in the recent past, there are still several challenges and limitations which Kenya must redress. The new constitution offers some room for instituting a citizen-centric security reforms.

The paper by **Prof. Paul Syagga** examines the vexed question of public land and historical land injustices. It explores what public land is, its significance and how to redress the contention around its ownership or use. Similarly, the paper examines what constitutes historical land injustices and how to redress these injustices, drawing lessons from the experiences of

other states in Africa that have attempted to redress similar historical land and justice questions.

The papers by **Dr. Adams Oloo**, **Mr. Kipkemai arap Kirui** and **Mr. Kipchumba Murkomen**, separately examines how the new constitution has reconfigured representation and legislative processes. Whereas Dr. Oloo examines the nature of the Kenya's electoral systems, new provisions on representations and its limitations; arap Kirui and Murkomen look at the re-emergence of a bicameral house system and the challenges of legislation and superintending the executive.

If the other nine papers examine the structural changes wrought by the new constitution; the tenth paper, by **Mr. Steve Ouma**, examines the challenges and limitations of liberal constitutional order, especially the tensions between civic citizenship and cultural citizenship from an individual stand point. Perhaps Mr Ouma's paper underscores the possibility of a self-defined identity, the dangers of re-creating ethno-political identities based on old colonial border of the Native Reserves - the current 47 counties and the challenges of redressing social exclusion and the contemporary legacies of Kenya's ethno-centric politics.

The interpretation of the constitution is contested; so will be its implementation. We hope that this Working Paper Series will illuminate and inform

the public and academic discussions on Kenya's new social contract in a manner that secures the aspiration of the Kenyan people.

SID would like to sincerely thank all those who have made the publication of these papers possible, especially those who participated in the research conceptualization meeting and peer-reviewed the papers such as: **Dr. Godwin Murunga**, **Prof. Korwa Adar**, **Ms. Wanjiru Gikonyo**, **Dr. Joshua Kivuva**, **Dr. Richard Bosire**, **Dr. Tom Odhiambo**, **Ms. Miriam Omolo** and **Dr. Mutuma Ruteere**, for their invaluable input.

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Working Papers Series Coordinators

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Acronyms

AG	Attorney General
CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts
DPP	Director of Public Prosecutions
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
JSC	Judicial Service Commission
LGAs	Local Government Administrations
MP	Member of Parliament
PA	Provincial Administration
PEV	Post-Election Violence
PNC	Proposed New Constitution
PSC	Parliamentary Select Committee
SID	Society for International Development
SIDA	Swedish International Development Agency
USA	United States of America

1.0 Introduction

Since the repeal of Section 2(A)¹ of the old Constitution (1963) and the return of multiparty politics in Kenya in 1991, Kenyans have been engaged in a relentless search for a new constitutional dispensation that would redefine their relationship with the government. Angered by the previous governments that have ruled the country without regard to the wishes of the majority, and disappointed that multi-partyism did not bring with it the expected benefits of good, transparent, accountable and representative government, Kenyans have for two decades, been trying to redesign and restructure their government through various avenues: the Constitution of Kenya Review Commission (CKRC); the Kenya National Constitutional Conference (held at the Bomas of Kenya in Nairobi) and the Proposed New Constitution of Kenya 2005 (popularly known as the 'Wako' or 'Kilifi' draft) that was rejected in the 2005 constitutional referendum. However, persistent efforts for a new constitution resulted in the Constitution of Kenya (2010)², which has significantly restructured the government, redesigned how the people relate to the government and established new systems of governance.

The 2007 post-election violence not only convinced Kenyans of the inevitability of a new constitution but also gravely demonstrated the urgent need for sweeping political reforms. The Panel of Eminent African Personalities³ that helped resolve Kenya's post-election violence (PEV)⁴ made it clear that constitutional and institutional reforms in the country before the 2012 elections were not just urgent, but inevitable. Indeed, the events of the last two years had convinced the majority of Kenyans that unless constitutional reforms were undertaken, the 2012

elections would not only be more violent than in 2007, but they would also destroy the country. However, as reports by South Consulting Limited⁵ have shown the process of constitutional and institutional reforms has been slow, as anti-reform forces (both within and outside government) try to scuttle the process.

For the last 20 years, Kenyans have grappled with a number of constitutional and governance problems that those seeking for a new constitution have sought to address. Indeed, those clamouring for a new constitution did not just want to restructure the government and redefine their relationship to it, they also wanted to solve a number of governance problems associated with the country's previous governments. These included: rethinking the logic of state power vis-à-vis the citizenry; re-asserting the correct relationships between the three branches of government; reforming state institutions; re-defining the relationship between the central (or national) government and the sub-national (or regional) governance structures; and instituting a new culture of leadership oriented towards redressing social exclusion.

The Committee of Experts (CoE) established⁶ to finalise the constitutional review process and deliver on a new constitutional dispensation, addressed many of these problems in the new Constitution of Kenya (2010). In fact, many of these problems were addressed in the several previous proposed drafts of the constitution that the CoE was mandated to harmonize in the process of drafting the 2010 Constitution of Kenya.

1 The introduction of this provision through the Constitution of Kenya (Amendment) Act No 7 of 1982 had the effect of changing Kenya from a de facto to a de jure one party state. It was subsequently repealed through the Constitution of Kenya (Amendment) Act No 12 of 1991.

2 The Constitution of Kenya (2010) was promulgated on the 27th August 2010.

3 i.e. H.E. Kofi Annan, H.E. Benjamin W. Mkapa and Dame Graça Machel-Mandela.

4 Following the disputed presidential election of December 2007.

5 After the signing of the National Accord on February 28, 2010 which ended the PEV and saw a coalition government established to lead Kenya's government, South Consulting Ltd. was contracted to monitor the implementation of the National Accord under the Kenya National Dialogue and Reconciliation (KNDR) project. South Consulting Ltd has so far made eight quarterly reports on the progress of the implementation of the National Accord. South Consulting Ltd's quarterly reports can be found at www.dialoguekenya.org.

6 Under the Constitution of Kenya Review Act of 2008, Cap. 3A of the Laws of Kenya.

This paper addresses the extent to which the 2010 Constitution has redesigned Kenya's governance structures to address the above problems. It addresses a number of questions. First, to what extent does the 2010 Constitution deconstruct and redesign Kenya's post-colonial state? That is to say, to what extent does it provide for a clear separation of powers between the three branches of government and with what limitations? Secondly, how likely are these redesigned structures capable of solving Kenya's problems? Related to this, to what extent does the 2010 Constitution redress the abuse of office by the executive? Thirdly, to what extent has it redressed the power inequalities between the national government and other ethno-regional administrative units of the Kenyan state? To what extent has the constitution redressed the ethno-social exclusion from access to and use of state power? The sections that follow

discuss these issues in detail. First however, the paper begins with a look at the historical context to these changes. Before we can discuss the meaning of the state's restructuring however, and the redesign of key institutions and systems of government under the 2010 Constitution, we need to have an understanding of the 'African state'. We also need to appreciate the history behind Kenya's political developments. The constitutional and institutional redesign of the Kenyan state was not undertaken in a political vacuum. The redesign has been the result of the perceived nature of the African state in general and the Kenyan state in particular. Thereafter the paper provides a detailed discussion on how the 2010 Constitution has reconstructed and redesigned each of the three institutions of government and then makes some conclusions.

2.0 A Historical Context

According to Oyugi (1994) the state is the most important variable “to understanding politics” and the constitution. The debates on the state have centred on whether the state is neutral, and therefore acts in the interest of society, or whether it is an instrument in the service of the political elite. This debate has looked at the distinction between the “empirical” and the “juridical” concepts of the state. While the latter views the state from a legal perspective the former looks at it from a perspective of real politik, which sees the state as a corporate group with claims of monopoly of legitimate force over territories in its jurisdiction.

Most of the literature on the state in Africa written by western scholars or Western-trained Africanists, has portrayed the Africa state as being different from the Weberian ideal, and have used these differences to explain everything that is “wrong” in the continent. Most of these scholars would ascribe labels for the African state. This literature has been dominated by such high-sounding terms as the “patrimonial state” (Weber, 1978), the “neo-patrimonial state” (Medard, 1982; Clapham, 1985), the “developmental state” (Migdal, 1988) and the “personal” state (Jackson and Rosberg, 1982) that is suspended like a ‘balloon’ in mid-air (Hyden, 1983). One central theme common with these scholars is that the state in Africa is viewed as weak; soft; fragile; illegitimate; exploitative; preponderating; and without roots in the community (Bratton, 1989; Bayart, 1993). As a result, its citizens are said to have either sought to de-link themselves from it (Ayoade, 1988:115), or used it as an object of extraction (Hodder-Williams, 1984).

Discussing post-independence African states, the majority of these scholars have also described the institutions and organizations of such states as among the weakest in the world and less developed than almost anywhere else. The African state is said to have

lacked functional political institutions (Huntington, 1968); and is faced with political instability and that national governments only exercise tenuous control over states. Indeed, as Jackson and Rosberg (1982: 5) noted, judged in terms of power perspective, most African states would not qualify to be regarded as states.

Comparing the African state with those of western democracies, the former has been referred to as being different because it governs with a minimum degree of legitimacy. Unlike its western counterpart that is considered an impartial arbiter whose role is to promote national interest, efficiency, and social welfare (Sandbrook, 1980: 77), the African state has been viewed as an instrument of the “dominant classes”, and an exploitative one at that. Africa’s political systems are said to have been characterized by powerful central governments with equally powerful executives that have overshadowed, and in some cases, rendered irrelevant the judicial and legislative branches (Maxon, 1994).

This implies that the functional institutions of the state, especially the three arms of government—the legislature, executive and judiciary—have been undifferentiated. Secondly, although the African state is able to extract and redistribute resources (Hodder-Williams, 1984), very few of these resources are redistributed in accordance with generally recognized principles of bureaucratic rationality or accountability (Chweya, 2010). Instead, the extraction and redistribution of resources tend to be privatized (Braathen et al., 2000: 11) and personalized.

At Kenya’s independence in 1963, the government was modelled on the Westminster system with a dual executive. In this system, executive authority was exercised by two centres.

Looking at the case of Kenya, the country attained independence in 1963 and began with a quasi-federal system of government (popularly known as Majimbo government), which granted significant powers to elected ethno-regional leaders and assemblies. There were also three other institutional developments that occurred during the colonial period, which were bequeathed to the post-colonial Kenya state (Wallis, 1994: 109-110): first, was the bureaucratized provincial administration (PA) (of provincial and district commissioners, district officers, and chiefs⁷), which had been used as an important instrument for controlling anti-colonial movements and parties, although they also contributed to the administration of development;

second, was a “reasonably well established network of selected local government bodies which despite racial divisions, was also an important element within the government machinery; and third, was a network of informal local self-help associations and cooperatives doing a number of projects at the local level through the Harambee (or self-help) movement.

At Kenya’s independence in 1963, the government was modelled on the Westminster system with a dual

executive. In this system, executive authority was exercised by two centres. Kenya’s government lead by a governor general who exercised real executive authority on behalf of the Queen of England (who still retained executive power as the head of state), and a prime minister who was responsible for the day-to-day running of the government, assisted by the cabinet. This system did not last long. The then Prime Minister Jomo Kenyatta, and other leaders of former British colonies considered the inherited Westminster System with a dual executive ‘un-African’ and hence unsuitable for Kenya. As the late

7 Even these chiefs were bureaucrats, not traditional leaders (Wallis 1994: 109-110).

President Julius Nyerere of Tanzania eloquently said in numerous forums, the ideals and philosophies of a dual executive were a function of ‘class conflicts’ (Nyerere 1974: 6). Since the African society was devoid of classes, such a duality was unnecessary. This is to say that, traditional African societies, being classless and driven by a desire for consensus, were only familiar with a single, undivided executive authority. This thinking was shared by the then Prime Minister Jomo Kenyatta and Tom Mboya⁸, who argued that a divided executive was not tenable in ethnically divided or politically fragile societies such as Kenya. The dual executive only lasted from 1963 to 1964 and from December 1964, a frenzy of constitutional amendments began, that saw the consolidation and over-concentration of legitimate power and authority in the executive arm of the government, and the presidency in particular, at the expense of the other arms of government. Notably, the legislature and the judiciary aided and abetted this process either by passing the laws which gave the executive more power at the expense of the other two arms of government, or by incarcerating the regime’s opponents.

This led to the creation of the institution of “imperial presidency” and a government that has since been characterized by power imbalances between the executive and the other two arms of government. While the concentration of powers in the executive might have been constitutional⁹ the exercise of these powers became anything but constitutional. The constitutional amendments removed almost every check on executive action and those institutions that were left with some oversight powers to exercise over the executive were either unwilling or too

8 A prominent politician during Kenyatta’s time and the minister of economic planning and development in Kenya’s government at the time of his death.

9 This does not overlook the other extra-constitutional methods that Kenyatta and later Moi, used to consolidate their powers. Of special reference here are assassinations, which the two regimes used with a great measure of success. As Kenyatta was undertaking constitutional amendments, a number of assassinations were carried out to eliminate some of his opponents. Key among them were the assassinations of Pio Gama Pinto in 1965, Tom Mboya in 1969 and J. M Kariuki in 1975. During the Moi era, the murder of Robert Ouko in 1990 topped the list.

The dual executive only lasted from 1963 to 1964 and from December 1964, a frenzy of constitutional amendments began, that saw the consolidation and over-concentration of legitimate power and authority in the executive arm of the government.

intimidated to exercise them. In order to consolidate their power, Kenyatta, and later Moi, weakened institutions that would have competed for influence in government. Executive powers vested in the president as the base of power and authority, and not the cabinet or parliament (Tamarkin, 1978: 302). During Kenyatta's regime, any consultations on key policy issues were undertaken with members of his "inner cabinet" which term referred to an inner circle of very close friends and technocrats composed of ministers, high-ranking civil servants, relatives and friends- all members of the Kikuyu community (Ibid.). Indeed, many of the important policies in the Kenyatta government were made by this small group known as "the family", without consulting either the legislature or the cabinet (Murunga, 2004; Murray, 1968: 46). It was not in the interest of past presidents to build strong institutions; lest they fell into the hands of others who could then use them for political domination (Odhiambo-Mbai, 2003: 60-1). There seemed to be a generally accepted perception among the political elite and the population in general, that parliament was an inferior institution to the executive and hence ought to play a supportive or subordinate role.

The process was exacerbated by the introduction of the single party rule, which enabled successive presidents to consolidate minority rule. Over the years, Kenyan presidents used their powers to engage in all sorts of illegalities and abuses of office, leading to the entrenchment of a system of government that was unaccountable to its people, and a country where nepotism and the unfair distribution of national resources thrived. The post-independent state pursued the same colonial divide-and rule-politics and perpetrated economic inequalities and arbitrariness in the exercise of executive power. The state under both Kenyatta and Moi pursued policies that mainly benefited the ethnic groups and regions that provided support to the respective regimes. The Kenyatta regime relied heavily on Kikuyu elites and when Daniel arap Moi came to power; his redistributive policies were informed by the desire to redistribute resources away from the ethnic

group and regions that had supported the Kenyatta regime.

One of the most important pillars of both Kenyatta's and Moi's governments was the PA and its bureaucracy, both of which were colonial in design and, to some degree, content (Murunga, 2004: 186). During both the Kenyatta and Moi regimes, civil servants were not politically impartial. While Kenyatta was more open about it—that Kenya's civil servants were "KANU's civil servants" (Tamarkin, 1978: 307; Murunga, 2004:187)—Moi used civil servants to campaign for "government candidates" during the single party rule and for KANU candidates during the 1992 and 1997 multiparty elections.

Though the previous constitution recognized parliament to be supreme, in reality the legislature hardly functioned as a check on the executive. The constitution accorded the president leverage over the legislature by allowing the president to dissolve, summon and prorogue Parliament (Ghai and McAuslan, 1970: 240). Over time, the president and the executive arm of government in general, acquired so much arbitrary powers over the legislature that the executive arm of government chose what it could be held accountable for, when and how. In most cases the executive refused to be held responsible for any of its actions (Tamarkin, 1978: 303). Over time the executive formed a habit of ignoring the parliament by introducing retrogressive legislations to legalize its actions (Ghai and McAuslan, 1970: 351).

The cost of challenging the executive might have forced a number of MPs to support the president to avoid unpleasant consequences. For example, following the 1974 elections, one MP was murdered, three were detained and three others imprisoned (Tamarkin, 1978: 305). All these MPs were critics of the government. The use of coercion to intimidate

The state under both Kenyatta and Moi pursued policies that mainly benefited the ethnic groups and regions that provided support to the respective regimes

MPs “imprisoned” their minds (The Weekly Review, 1977: 2). As a result, some parliamentarians “agreed to keep off any controversy and most importantly, [agreed] that there should be no criticism of the government” (Ibid: 11).

Following the Kenyatta regime, Moi’s regime continued tampering with the constitution. Section 2 (a), which was introduced under the Constitutional (Amendment) Act of 1982 made Kenya a de jure one-party system and led to the banning of all political parties except KANU. The ruling party and the party officials became increasingly powerful to the extent of dominating the legislature and the PA. KANU’s disciplinary committee, for example, could even summon and discipline MPs and cabinet members for what they said in Parliament, despite the parliamentary immunity that was due to MPs (Throup & Hornsby 1998: 26). Additionally, from 1983 individuals had to pass the “Nyayo loyalty test” to be allowed to contest any public office on a KANU ticket. This was the era of sycophancy and total loyalty to the president. Unlike Kenyatta who had established a free system whose election outcome was mainly a reflection of the candidates’ popularity and development record, Moi openly manipulated elections in favour of certain candidates. Indeed, manipulating legislative elections was the order of the day under the Moi single-party rule, resulting in single party authoritarian rule.

More constitutional amendments also followed. 1986 saw the removal of the security of tenure of the Attorney General and the Controller and Auditor General¹⁰. By the beginning of the 1990s, when the

clamour for multiparty democracy and constitutional reforms began in Kenya, the executive had become too powerful for any institution to check it, while Parliament had been reduced to a rubberstamp for executive decisions¹¹. The judiciary on the other had been cowed into silence, and the PA had become a wing of the ruling party. Many Kenyans were alienated from the government with the growth of a culture of sycophancy and fear (Barkan, 1994: 26).

The 2002 presidential election victory of Mwai Kibaki was therefore seen as a major success for the advocates of multi-partyism, constitutionalism and good government. As the new president, Mwai Kibaki promised to reform the government and to institute an accountable and transparent system of governance. He also promised to see through an enactment of a new constitution for Kenya. However, as he consolidated his regime, these promises became a mirage. By the end of his first term in 2007, the Bomas constitutional reform process had been sabotaged. After the 2007 post-election violence, re-crafting a new constitution became inevitable, and it led to the popular approval the 2010 Constitution.

10 These latter amendments allowed the President to manipulate almost any institution in the land. Later amendments removed the security of tenure of High Court and Court of Appeal Judges and allowed the police to detain suspects for up to 14 days before taking them to court. In the process of consolidating his power in the wake of the attempted coup, Moi took away the autonomy of almost all independent centers of power as well as banning all welfare associations. Moi not only reduced the power of the National Assembly to a mere rubber stamp, but also took away the autonomy of both public and private institutions. This reached its climax in 1988 when, through a constitutional amendment, the government removed the security of tenure of judges.

11 MP’s compliance was crucial in the systematic erosion of the powers of the legislature. There have been adequate built-in incentives for MPs to cooperate with the executive. Cooperation with the president accorded an MP both personal benefits as well as benefits for his constituents, benefits which improved chances of reelection. A cooperative MP stood a better chance of being elevated to the cabinet or another extra-parliamentary government appointment (Leys 1974: 244).

3.0 The Re-Design of Kenya's Government

The theory of separation of powers is best captured in Baron Montesquieu's formulation that is:

When the legislative and the executive powers are united in the same person or in the same body of magistrates, there can be no liberty if the judicial powers be not separated from the legislature and the executive. Were it combined with the legislature, the life and liberty of the subjects would be at the danger of being exposed to arbitrary control, for the judges might behave with violence and oppression. There would be an end to everything where [all the powers be in] the same man [or in] the same body [or it] be in the hands of the nobles or the [same] people... [to] exercise those three powers (Montesquieu, 1949) .

This doctrine is replicated in the constitutions of democratic countries all over the world. In the United States of America (U.S.A.) the separation of powers has been maintained through the continued existence of a balance of power between the president and Congress, each of which is functionally independent and competent. In the U.S.A. the most famous exposition of the same principle was drafted by John Adams for the Constitution of the Commonwealth of Massachusetts:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men (Massachusetts Constitution, 1780).¹²

The hallmark of Kenya's post-colonial state has without doubt been the 'imperial presidency' which has perpetrated the asymmetrical power relations among the three arms of government. It allowed the executive to dominate the two other arms of government. Indeed, owing to the executive's control of state power, and use of perks and patronage to reward the members of both the judiciary and the legislature, over the years these other institutions were compromised. Indeed, they almost abdicated their responsibilities of checking the executive completely.

In Kenya, it has been hard to attain an institutional balance of power because key oversight institutions have been unable or unwilling to perform their core mandates. The judiciary never fully recovered from President Moi's assault on the institution when in 1988 his regime removed the judges' security of tenure. Even though their security of tenure was restored, the message had already been passed and the judiciary kept away from matters pertaining to the executive.

In an attempt at resolving various governance problems and establishing a more accountable governance system that is transparent and responsive to the needs of the people, the 2010 Constitution has reconstructed and redesigned the post-colonial Kenyan state in a number of ways. It has also provided the country with optimism and a sense of being "reborn", in many important ways, offering the country a new beginning. More important is the fact that the document got overwhelming support; over two-thirds of those who participated in the constitutional referendum in August 2010, voted for its adoption.

The logic of the new constitution is therefore people-centred, and this reframing has implications for the three branches of government.

The major break with the old order, and indeed the

¹² Massachusetts Constitution, Part the First, art. XXX (1780)

central pillar of the 2010 Constitution, is contained in Article 1 of Chapter One, which affirms the sovereignty of the people of Kenya. This argument is complemented by Chapter Four which contains the Bill of Rights, and Chapter Six on Leadership and Integrity, which under Article 73, vests all authority in the people. Article 73 (1) (b) states that authority assigned to a State Officer “vests in the State Officer the responsibility to serve the people, rather than the power to rule over them”. Chapters Four and Six are the most revolutionary parts of the 2010 Constitution. Chapter Four affirms that rights and fundamental freedoms “belong to each individual and are not granted by the State;” and they are “subject only to the limitations contemplated in this

Constitution”. Chapter Six on the other hand stipulates not just how good leaders should be elected but also the qualities of these leaders. Article 73 (2)(c) of the 2010 Constitution demands that public servants serve the people “selflessly” and “honestly”, and that service be based “solely on

the public interest”, exercising “accountability”. These two references within the 2010 Constitution indicate the extent to which the new 2010 Constitution departs from the old Constitution (1963) which was top-heavy and vested enormous powers in the presidency. The logic of the new Constitution is therefore people-centred, and this reframing has implications for the three branches of government. While the three branches of government are important, it must be noted that they are subservient to the sovereignty of Kenyans.

To facilitate the attainment of this particular objective, a number of changes have been made to the design and structure of government and the processes thereof. First, the Kenyan state has been reconstructed to re-establish the original relationships that existed between the national government and regional authorities. At independence, Kenya had a quasi-federal system of government (popularly known as Majimbo), which granted significant powers to

elected ethno-regional leaders and assemblies. The Constitution (2010) has re-established this through Chapter Eleven on devolution, though with some variations.

Second, devolution and the sharing of powers between the national government and the regional governments, has necessitated representation at the two levels of government and hence the system of representation has also been redesigned to facilitate this through the introduction of a Senate to cater for representation of the devolved units. The Senate will represent special interests and those of the devolved units at the national level. Since the clamour for a new constitution began, the demand for a devolved government has been contentious, and the success or failure of devolution will be a major determinant on how people rate the 2010 Constitution.

Third, the three arms of government have been restructured and redesigned and their relations with one another re-established to enhance their individual functional capacities, as well as strengthening their constitutional mandates, of checking each other. The executive has been redesigned to make it more accountable to the other arms of government, thus ensuring that a functional separation of powers exists. This innovation effectively ends the reign of the “imperial president”. This has been achieved by abolishing the practice of appointing cabinet ministers from among parliamentarians under Article 152, and by introducing an institutional check on almost every presidential appointment. The number of ministers, renamed cabinet secretaries, has also been limited to between fourteen and twenty-two (under Article 152 (1) (d)), while the position of assistant ministers has been abolished.

Fourth, the functional capacities of the three arms of government have been enhanced to ensure a workable separation of powers, and to enable each arm of the government to check the excesses of the other two. Despite the desire to eliminate the “imperial president”, the constitutional powers of the executive in general and the president in

The judiciary has been the weakest, least trusted and the most dysfunctional of the three arms of government.

particular, have been left almost intact. However, a number of checks have been introduced to guard against presidential discretion and excesses in the exercise of these powers. In fact, by establishing a pure presidential system, the dominant role of the presidency in national affairs seems to have been enhanced. Other changes to the executive pertain to how the president is elected, and sworn in as president as well as the handling of any petitions against any president-elect (in Articles 136, 138, 140 and 141 of the 2010 Constitution).

In line with the devolution of powers, a further redesigning or reconstruction of government is anticipated within the executive - the restructuring of the PA in accordance with the system of devolved government. The completion of ongoing reforms within the police service will, if successful, take away a major source of power that the PA and the executive in general, have used to dominate other institutions of government. Although the nature of this reconstruction has not been mapped out yet, the 2010 Constitution under Article 17 of the Sixth Schedule provides that it will take place within five years after the 2010 Constitution becomes effective¹³.

The other two arms of government i.e. the judiciary and the legislature, have also been strengthened to increase their capacities, as well as exercise their mandate as checkers and balancers of executive powers. Parliament has been reconstructed through the establishment of a second chamber (the Senate) and enlarged (under Articles 93 and 97), while parliamentary committees have been revitalized (under Articles 124 and 125). Parliament's oversight role on the executive has also been enhanced through a mandate; Articles 95, 152, 166, 228 and 229 for example, provide that Parliament is to vet every important presidential appointment. By barring the president from appointing the cabinet from among members of parliament (MPs), Parliament's ability to impeach a rogue president is further enhanced.

¹³ See SID's Constitution Working Paper no.3

The judiciary has been the weakest, least trusted and the most dysfunctional of the three arms of government. To correct this, the structure of the judiciary has been changed with the establishment of a Supreme Court with original jurisdiction (Article 163). The Supreme Court will be able to hear any presidential petitions before the president-elect assumes office. The independence of the judiciary has been enhanced by being accorded financial independence under Article 160. The management of the judiciary has also been redesigned to ensure that each division of the court has a presiding officer, majority of them elected by their peers.

In a bid to restructure the government to facilitate better provision of services and better systems of accountability, the 2010 Constitution seems to have created a fourth arm of the government under Chapter fifteen—that of constitutional office holders and commissions which collectively have far reaching functions and mandates. The objectives of the commissions and independent offices are to: protect the sovereignty of the people; secure the observance by all state organs of democratic values and principles; and, promote constitutionalism. Under Articles 249 and 250, each of these commissions and independent offices will be budgeted for, under separate votes and funds allocated to each by Parliament, such funds to be charged to the Consolidated Fund.

Finally, the 2010 Constitution grants Kenyans enormous powers to demand good governance and accountability from their elected leaders. Citizens for example, have the power to recall their MPs under Article 104, and Chapter six contains a Bill of Rights that guarantees them certain rights and liberties.

The following is a more detailed look at the changes that relate to how the Kenyan state should be governed and the institutions of government.

The executive has been redesigned to make it more accountable to the other arms of government, thus ensuring that a functional separation of powers exists.

3.1 Deconstructing the imperial presidency

The 'imperial president' has been at the centre of almost every political problem the country has faced since independence. Under the 2010 Constitution however, certain powers have been withdrawn altogether. Under the previous constitution, the president who also represented a constituency, was allowed to sit and deliberate on parliamentary proceedings, had control over the parliamentary calendar, appointed MPs to the cabinet, and determined the size of the cabinet amongst other functions. Today, under Chapter nine of the 2010 Constitution the president cannot:

- a. Occupy both the presidency and another public office;
- b. Determine the size of the cabinet;
- c. Appoint an MP as a cabinet secretary; and,
- d. Decide when elections are to be held¹⁴ and/or when to dissolve Parliament.

The logic of the new constitution is therefore people-centred, and this reframing has implications for the three branches of government.

The president's powers over the judiciary have also been drastically reduced with the creation of an independent Judicial Service Commission. Furthermore, the PA, which has been an important source of the executive's coercive power, will have to be reconstituted in line with the new devolved government units, making them no longer at the disposal of the president. Most important, under Article 145 (1) (a) the president has to abide by the requirements of

the new constitution or risk being impeached by the Legislature for violating it.

The constitutional changes have also introduced a number of changes in the way the president is

¹⁴ The 2010 Constitution sets the second Tuesday in August of every fifth year as the date when Kenya's general elections will be held.

elected, enthroned and the way he can be removed from office. In a bid to end the days of minority government, Article 138(4) of the 2010 Constitution states that for a candidate to be declared president, he or she must receive more than half of the votes cast in the election, and at least 25 per cent of votes cast in at least half the counties¹⁵. Earlier, the leading presidential candidate was only required to garner at least 25 per cent of the votes cast in at least five of the eight provinces, and a simple majority.

The election of the president and the manner in which the president is enthroned has also been restructured to ensure that whoever is declared a winner has the majority's support, and that there is adequate time for any petition against the president-elect. Also under Article 141 the swearing in of the president-elect will now have to take place in public, at least 14 days after the winner is declared. Furthermore, Article 141 indicates that if an election petition will have been filed against the president-elect, such petition will be determined before the president-elect can take office.

As regards the election petition, the manner of serving a president-elect has also been made more convenient. A petitioner will be allowed to serve the petition papers to the president-elect through a newspaper advertisement. Previously, any petitioners challenging the election of the president had to serve the president personally, something that had proven to be a major hindrance to the petition process. Also, the old constitution did not provide for any timelines within which the presidential petition can be determined and any such petitions normally took place after the president whose election was in contention, had assumed office, making the process more daunting for the petitioner.

Certain things are clear from the changes to the way the president will be elected and assume office. First, there is an effort to bring fairness,

¹⁵ If no candidate fulfils this requirement there will be a run off between the two leading candidates in the number of votes.

transparency and accountability to the process of the presidential election. Second, there has been an attempt to address the surreptitious assumption of office by minority presidents. Thirdly, the constitutional changes have sought to assure an orderly transition. However, these efforts could be challenged in the event of a disputed election similar to the 2007 presidential elections, where there was clear evidence that the leading candidates engaged in massive election fraud and other illegalities. The situation was further complicated by the fact that certain electoral malpractices are committed by or in collaboration with officials of the agency charged with coordinating the elections (under article 88 of the 2010 Constitution this agency will be referred to as the Independent Election and Boundaries Commission). This situation calls for a very independent Supreme Court. Even then certain unexpected scenarios may arise. For example, should the two leading candidates be found to have engaged in electoral malpractices, can (and will) the Supreme Court disqualify them both from taking part in the re-run elections? And if so, will candidates who did not participate in the immediate past presidential election be eligible to contest in this re-run? What happens if the chairperson of the Independent Election and Boundaries Commission disappears or goes into hiding before the election results are announced? What happens if as happened with the 2007 presidential elections, the chairperson of the Independent Electoral Boundaries Commission declares they are truly unable to determine who the winner is? These questions call for clear regulations to be put in place, before the next presidential election, in order to avert any serious political and constitutional crises, especially coming from an acrimonious general election.

On other changes to the presidency, Article 135 of the 2010 Constitution has provided that the president's decisions shall be in writing and bear the seal of the office and their signature. It is hoped that this will end the habit of roadside presidential

pronouncements that have policy implications. The 2010 Constitution has also redressed these power imbalances between the arms of government by providing institutional checks on almost every presidential appointment¹⁶. The 2010 Constitution however, has tampered this potential dominance with adequate checks; in fact other institutions have been strengthened to check and balance any excesses by the presidency. Under the 2010 Constitution no one can serve as both a MP and a cabinet secretary. Moreover, key presidential appointments will be subjected to vetting and approval by Parliament and Parliament can also compel the president to dismiss a non-performing government official, including members of the cabinet. In certain instances, presidential appointments will be confined to a list provided by an independent professional body.

Parliament's vetting of executive appointments may however become one avenue for conflict between the executive and the legislature that might impact negatively on the functions of the government. There is a real danger that vetting processes and appointments might become overly political. Deliberations about potential appointees' ethnicities or the regions they represent may become the point of focus, rather than their character, qualifications and/or experience, and abilities to perform the duties of a given office. In cases where the president's party lacks a majority in parliament, the vetting process could degenerate into obstructionism and the "dictatorship of the majority" (Guinier, 1994). In such cases, parliament may either reject a qualified candidate to frustrate the appointing authority, or simply delay their vetting deliberations. Experience

The executive has been redesigned to make it more accountable to the other arms of government, thus ensuring that a functional separation of powers exists.

¹⁶ See SID Constitution Working Paper no.2

from the developed democracies such as the U.S.A. has shown this to be a real problem¹⁷. Still, the vetting process, even where it has been politicized, has enshrined transparency and accountability in public affairs. It has also ensured ethical behaviour among public servants and improved service delivery to the people.

There is also the danger that Parliament (or the House Committee responsible for vetting particular appointees) may not have the necessary expertise to appreciate the needs and requirements of the positions to be filled. This situation would call for the strengthening of parliamentary committees e.g. by

involving professional bodies in the vetting process. This has been addressed in part under the 2010 Constitution as regards judicial appointments, and is important in that the technical aspects of the position are thrashed out, before the names come up on the floor of Parliament.¹⁸

The judiciary has been the weakest, least trusted and the most dysfunctional of the three arms of government.

In the end the 2010 Constitution does however establish a pure presidential system of government, and therefore retained many of the presidential powers. Indeed, the legitimate power and authority of the president both as the head of state and government, was re-affirmed¹⁹, making the executive potentially too powerful owing to the president's dominance over state and government affairs.

¹⁷ In certain cases, the names of nominees to key positions are not brought to the floor of the House for vetting by the relevant House committee. This has left a number of positions unfilled for months while qualified candidates are forced to withdraw their candidature to avoid the grueling process of confirmation.

¹⁸ In appointing members of the judiciary, the president can only choose from a list of qualified candidates recommended by the Judicial Service Commission (JSC) that has been reconstituted in the to guarantee its independence.

¹⁹ The previous Harmonized Draft Constitution of Kenya, as well as the Parliamentary Select Committee's (PSC) draft had restructured the executive in a manner that allows for the office of a Prime Minister, who would be the head of government. This office was seen as an important check within the executive.

3.2 Restructuring the Cabinet

In assessing the changes that have been introduced under the 2010 Constitution, the cabinet requires a special mention as one institution of the executive that has undergone significant restructuring. Previously, the determination of the size of the cabinet and who is appointed to it were the prerogative of the president who could appoint any number of cabinet ministers. Previously also, cabinet members had to be either an elected or nominated MP, thus allowing the president perks and powers of patronage, and seriously eroded the principle of checks and balances between the organs of government. Under the present coalition government for example, almost half the members of the legislative branch are part of the executive, either as ministers or assistant ministers and this bloated cabinet is better known for its wastefulness, turf wars and duplication of roles and responsibilities than for service delivery.

This has now changed under the 2010 Constitution. Firstly, the title of cabinet members has been changed from that of "minister" to cabinet secretary, while the position of assistant ministers has been abolished entirely. Secondly, under Article 152 (3) no sitting member of the legislature will be allowed to serve as a cabinet secretary, to ensure that parliament's oversight role over the executive is not compromised. Thirdly, the size of the cabinet has been restricted to between 14 and 22 persons and the president's cabinet nominees will be subject to parliamentary approval. Also, parliamentary oversight over the executive has been enhanced by granting MPs the authority to demand the dismissal of a non-performing cabinet secretary. The fact that an MP can compel the president to dismiss a cabinet secretary further reduces the president's abilities to influence the cabinet in the performance of its duties. It will likely end the culture of non-performers who are retained due to nepotism and patronage-based appointments, and will likely see more professionals go into government service.

Furthermore, under Article 155 of the Constitution (2010) permanent secretaries will now be referred to as principal secretaries and unlike the case previously; the president will now only be able to nominate a person for appointment as Principal Secretary from a list of recommended candidates from the Public Service Commission, which has itself been reconstructed to limit presidential influence. Additionally, unlike the previous constitution where the cabinet and the state appointees take their oath of office by swearing their allegiance to the president, each state appointee will now swear or affirm their allegiance to the peoples and the Republic of Kenya and their obedience to the 2010 Constitution.

Article 157 of the 2010 Constitution also establishes an independent office of Director of Public Prosecutions (DPP), a position that had existed within the Attorney General's (AG) office. The establishment of the DPP has the potential to improve the delivery of justice in the country. The DPP will have powers to direct the Inspector General of the National Police Service to investigate any case, and the latter must comply. This is also a major departure from the previous situation where the AG- a presidential surrogate, heads public prosecutions. It has led to a number of politically motivated selective prosecutions and acquittals.

3.3 The Provincial Administration

Cottrell and Ghai (2007) have described the PA as "a colonial creation, designated to ensure top-down control of the native population, and manipulated from the president's office with the assistance from a police force also controlled (from the same) office". During the Kenyatta regime, Kanyinga (2003) states that Kenyatta transformed the PA into an institution to mobilize public support and create channels of information in which chiefs, district officers and

district commissioners came to play the roles that political parties would ordinarily play in political processes. The PA was strengthened while the local government as an institution declined (Oyugi, 1983: 107-140) and was underutilized (Maxon, 1994: 59) following the abolishment of the Majimbo system. The PA became a tool for political mobilization and indeed ideological indoctrination and political parties became subservient to the PA. The PA's role, linking the centre (especially the president) to the local level, eclipsed that of the elected representatives, leading to a rivalry between the two, and an outright dislike of the PA by the peoples' representatives that have never subsided to date.

The PA established itself as an important mechanism for maintaining law and order and for reconciling political factions, especially in the rural areas. It represented the executive in the field including playing a ceremonial role especially on national public holidays. The PA was also an effective tool of executive coercion, particularly with regard to elements and institutions perceived to be opposed to the government of the day. This led to conflict with the politicians (Oyugi, 1994: 180), giving rise to calls for the abolition of the PA.

A number of scholars have however pointed out that the PA did not play as dominant a role as pundits have portrayed. Those who argue this say the PA was weak, frequently requiring external support to function. The argument is that although the PA has been (dis)credited and castigated as one of the major bases of executive power, institutionally, it has on its own remained relatively weak. Indeed, the PA did not work independently; it worked in consort with the disciplined and military forces. The real power of the executive (and to a great extent the PA itself) has resided with the military, the police and the para-

The size of the cabinet has been restricted to between 14 and 22 persons and the president's cabinet nominees will be subject to parliamentary approval.

military force. Without the accompanying threat of, or actual use of the police and para-military forces, the executive, even with the assistance of the PA would have remained weak. According to Tamarkin (1978) the enduring power of Kenyatta and Moi and the stability that seemed to characterize Kenyan state until the post-election violence, did not rest in the power of the PA. For Tamarkin (1978), Kenya's stability resulted from "a balance within the military system; on centralization of power within the state structure and on neutralization of potential foci of organized opposition". By checking, neutralizing and deploying the police forces, both Kenyatta and Moi were able to maintain a semblance of legitimacy during their rule.

By proposing that the national government restructure the PA within five years in accordance with the

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system of devolved government, the 2010 Constitution displays an element of shrewdness, and more importantly, realism on this matter. On the one hand, there is recognition of the important role the PA has played and continues to play in maintaining law and order and in the reconciliation process. On the other hand, it recognizes the potential dangers of the institution as it is currently constituted, to the system of devolved government.

In recommending a restructuring, rather than a complete elimination of the PA, the Constitution (2010) tries to strike a balance between the interests of the national government (and the apprehension of the PAs) on the one hand, and the fears of the devolved governments on the other. It is imperative that the right balance be struck. If the PA can be restructured in a manner that serves the needs of both the national government and the devolved governments while at the same time allaying the fears of the latter, the PA can play an important coordinative role between the national and the devolved governments.

3.4 Changes in representation and the legislature

Significant changes have been made to the legislature as an institution of representation and law making. The most visible change comes under Article 93 that has seen Parliament move from a one-chamber House to a two-chamber House. The 2010 Constitution has retained and expanded the National Assembly (the number of representative districts (constituencies) has gone up to 349, from 210 under Article 97), and established a second chamber i.e. the Senate to not only represent the counties but also to protect the interests of counties and that of the devolved governments. While the National Assembly has retained its national role of legislation, law making and oversight over executive decisions, the Senate has offered the people an opportunity to exercise their power by participating directly in governance at the local (county) level; in law making and in determining the allocation of resources, under Article 96. The Senate will also be an avenue through which the devolved governments interact with the national government.

The creation of these two institutions of representation (the National Assembly and the Senate), has also taken into consideration concerns about good governance, equality and gender parity. For example, under Article 97 at least 47 seats in the National Assembly have been reserved for women while the 12 nominated seats have also been set aside to represent special interests such as the youth, the marginalized and persons with disabilities. In fact, under Article 100, Parliament is mandated to enact legislation to promote the representation in the parliament, of women, persons with disability, the youth, ethnic and other minorities and marginalized communities.

The Senate can also be viewed as a House of special interests. Article 98 of the 2010 Constitution provides that the Senate will consist of 47 members

—each to be elected by the registered voters of each county; 16 women nominated by political parties; two members (a man and a woman) to represent the youth and another two members (a man and a woman) to represent persons with disabilities.²⁰ Through the Senate, the interests of minorities and the marginalized will be addressed at the national level. Also, when properly constituted it will represent important social-regional and ethno-political interests, as a representation of the interests and concerns of the counties, to the national government.

To be able to protect the rights of minorities, and other special groups, the Senate has powers to originate and make laws pertaining to county governance. The Senate will also strengthen the ability of Parliament to check executive powers, including the impeachment of the president, should the need arise (under Article 145). In most democracies, the chamber of the House that impeaches the president is not the one that conducts the trials (Government of Kenya/Committee of Experts, 2010). In the United States of America (USA), for example, the House of Representatives impeaches while the Senate conducts the trials. Under the 2010 Constitution the president can be impeached on the grounds of a gross violation of a provision of the 2010 Constitution or any other law; where there are serious reasons for believing the president has committed a crime under national or international law; and/or for gross misconduct (under Article 145 (1)).

The existence of these two Houses and the expansion of the National Assembly will no doubt enhance the system of representation, and also bring services closer to the people. The two Houses will also form an important check and balance not just for the executive, but also for one another. In addition, the presence of the two Houses facilitates an extra check and balance on the powers of the executive.

²⁰ Each county will have at least 18 women—16 nominated by political parties, one to represent the youth and one to represent persons with disabilities.

The existence of the two chambers of parliament with shared jurisdiction has the potential to cause deadlocks between the National Assembly and the Senate on legislative matters over which both Houses have jurisdiction. The 2010 Constitution has however provided a mechanism for resolving any such deadlocks by providing for amendments to Bills; re-voting; or referring the contentious bill to a mediation committee (under Article 113), which upon successful mediation is supposed to take the revised version of the bill to Parliament for approval by both Houses. Should either House reject it a bill stands defeated. Deliberate efforts should however be made to ensure that such deadlocks are avoided.

3.5 Reconstructing the Judiciary

Since independence, the judiciary has remained the weakest of the three arms of government and also the least functional. The judiciary has lacked independence (both operational and financial) and has totally failed in its core mandate to dispense justice in adjudicating disputes or determining cases in a timely fashion. Indeed, the 2007 election-related disputes degenerated into violence mainly because those who felt aggrieved by the announced results did not have faith that the judiciary with its history of bias and open support for the executive, and the regime in power, could offer justice and redress.

The 2010 Constitution makes very significant changes in the structure and design of the judiciary. The structure of the judiciary has been reconstructed to include the establishment of the Supreme Court under Article 163

Recognizing the above concerns, the 2010 Constitution went out to make very significant changes in the structure and design of the

judiciary. The structure of the judiciary has been reconstructed to include the establishment of the Supreme Court under article 163, which among other things, will hear and determine (within a specified period) disputes relating to the election of the president. Owing to the state of rot within the judiciary, the Supreme Court has been granted with powers of original jurisdiction to determine its own jurisprudence. The assumption and expectation of this change is that the Supreme Court as a new institution with fresh and untainted judges will spearhead the rejuvenation of the judiciary. The expectation is that the Supreme Court will also steer the country away from the bad laws and rulings made by the lower courts.

“In this regard, the judiciary has been accorded financial independence and the powers of the president over the institution-exercised through appointments of judges and the financing of the judiciary, has been curtailed”

A number of changes have also been made in the administration of the court system. Firstly, similarly to the executive and the legislature, the 2010 Constitution makes it clear that judicial authority derives from the people of Kenya, who have a right to be treated justly, reasonably, and without bias; and to have their cases determined in a timely manner. Explicit within the 2010 Constitution is the understanding that all courts and/or dispute resolution mechanisms will be subject to the 2010 Constitution

and the Bill of Rights (under Article 159).

Realizing that the judiciary’s dysfunctionality emanated in part from poor governance and bad administrative systems, and how this together with executive interference, had contributed to the judiciary’s lack of independence and the erosion of citizens’ faith and trust in the institution, the 2010 Constitution made important changes to the running of the institution. The Supreme Court will have the Chief Justice and the Deputy Chief Justice as president and vice president, respectively. Below that there will be the Court of Appeal

which will be headed by an elected president (elected by fellow judges of the Court of Appeal), and still below there will be a High Court will be headed by an elected principal judge (also elected by fellow judges of the High Court) (Articles 164-165).

The independence of the judiciary has been a challenge since independence and the design of the new 2010 Constitution recognizes the necessity of such independence, if the institution is to fulfil its constitutional mandate of dispensing justice and checking the executive. In this regard, the judiciary has been accorded financial independence (under Article 160)²¹, and the powers of the president over the institution-exercised through appointments of judges and the financing of the judiciary, has been curtailed under Articles 166-168. Though the president will continue to appoint the Chief Justice and their deputy and other judges, these appointments will be in accordance with the recommendations of the JSC. In addition, the Chief Justice and their deputy shall be vetted by Parliament.

To further ensure the independence of the judiciary and to shield it from executive interference, an independent JSC has been created by removing the president’s role in the selection of its members. Of the twelve or so members of this commission, only two members representing the public will be appointed by the president, and even these will require the approval of the National Assembly.²²

21 This has been done through the establishment of the Judiciary Fund, which will be administered by the Chief Registrar of the Judiciary. The expenditures of the judiciary will be prepared by the Chief Registrar who will submit them to the National Assembly and once approved, the expenditures will be charged to the Consolidated Fund and paid directly to the Judiciary Fund (under Article 173 (1), (3), and (4)).

22 Under Article 171 the other members will be elected by the Supreme Court and Court of Appeal judges (one each); two members will be elected by the members of the association of judges and magistrates (one man and one woman), and two shall be elected by the statutory body responsible for the professional regulation of advocates (one man and one woman). One person will be nominated by the Public Service Commission and finally the Chief Justice (who shall chair the commission), AG and the Chief Registrar (as secretary to the commission) will also be members of the commission.

3.6 Devolution

The question of whether Kenya should have a system where state power and functions are concentrated and centralized in the national government, or whether power should be shared between the national government and local or regional governments, is older than Kenya's post-colonial state. The original divisions between the Kenya African National Union (KANU) which favoured a centralized system of government, and the Kenya African Democratic Union (KADU) which favoured devolution or federalism, were based on this question. A number of minority ethnic groups were afraid that if they were grouped together with the more populous ethnic groups at independence, they would be dominated.

These minority groups, especially those that were nomadic, formed KADU principally to protect both their cultures and their ethnic territories. Ironically, they were backed by the minority settler community with an interest in preserving their lands against any nationalist distributive agenda as they pushed for the establishment of a federal Kenyan state that would ensure they controlled their own affairs. KADU's position carried the day at the Lancaster House deliberations on Kenya's independence and hence (as has been stated previously), Kenya attained her independence with a federal (Majimbo) constitution. However (as has also been stated earlier), this devolved system was very short-lived when the ruling party-KANU changed the independence Constitution (1963) in favour of a centralized unitary system.

The dissolution of the devolved system of government and the adoption of a centralized system of government was therefore not based on a legitimate process, informed by citizens' preference of one system over another. Rather, the shift to a centralized system was an imposition of the unitarist KANU government which, unwilling to support majimbo, resorted to fraud and political nefariousness to subtly but effectively abrogate the independence constitution. This meant that the brief

experimentation with devolution at independence; the question of sharing power within a devolved system, was not fully addressed and has remained contentious for the entire independence period, only appearing during election campaign cycles as political manoeuvres to achieve a kind of ethnic consensus-by-grievance.

Since independence, some Kenyans including a number of scholars have argued that the executive and the president's excesses cannot be checked as long as governmental powers are concentrated in the national government and in one chief executive. Indeed, every attempt at constitutional remaking in Kenya i.e. the CKRC draft (2003)²³, the National Constitution Conference draft (Bomas Draft) (2004)²⁴ as well as the Proposed New Constitution (PNC) Draft (Wako Draft) (2005)²⁵ all provided for a system of power-sharing between the national government and devolved governments²⁶ as a mechanism for taming the executive.

The 2010 Constitution has now restructured the government to allow for full devolution in which the national government shares executive powers with 47 county governments, which have full executive, financial and legislative powers and independence to run their affairs. Through county assemblies the peoples in these counties will not only get an opportunity to participate in governing themselves, but also play an important role in ensuring equity and inclusion in government while respecting diversity. Devolution and the establishment of the Senate ensure that Kenya's multi-ethnic, multi-cultural and multi-religious character is respected and represented in the county government.

23 The CKRC draft constitution of 2002, provided for power to be shared between the national government and four other levels of government (region, district, location and the village). See chapter 10 of the same.

24 The people's delegates at the National Constitution Conference held at Bomas Centre (otherwise referred to as the Bomas Conference), which came up with the Bomas draft (2004) provided for power to be shared at four levels (national, regional, district and location levels). See chapter 14 of the same.

25 The Wako Draft (2005) which was rejected during the 2005 referendum had provided for two levels of government—national and district.

26 The Preliminary Report of the CoE on Constitutional Review, Issued on the Publication of the Harmonized Draft Constitution, 17 November, 2009

This constituted a major change in the structure of government and the systems of governance. The former Constitution (1963) provided for a centralized unitary government where government departments and services were either de-concentrated or decentralized (Cheema and Rondinelli, 2007: 3) to a number of units at the lower level, within an otherwise very centralized system.²⁷ From the beginning of the clamour for a new constitution, the demand for a devolved government was voluble. The success or failure of devolution will be a major determining factor as to how the public rates the 2010 Constitution. Indeed, people's expectations of the devolved governments are very high.

The shift to a centralized system was an imposition of the unitarist KANU government which, unwilling to support majimbo, resorted to fraud and political nefariousness to subtly but effectively abrogate the independence constitution.

Devolution seeks to strengthen local governments by granting them the authority, responsibility, and resources to provide services and infrastructure, protect public health and safety, and formulate and implement local policies (Ibid.). However, for devolution to work, the independence and autonomy of local units needs to be guaranteed by law and units must have the financial control including the power to raise their funds. More importantly, the levels

of devolution must be legitimate in two fundamental ways: first, the people must identify with them, and, second, the people must perceive that they own, control and influence them (Oloo, 2006).

Devolution can be seen as the act by which the national government confers power and authority upon the various local government units to perform specific functions and responsibilities (Carino, 2007: 105). According to Rondinelli (1981), devolution provides four benefits. Firstly, devolution institutionalizes citizen participation in development planning and management. Secondly, it allows for

²⁷ In the last almost 10 years a number of funds, such as Constituencies Development Fund and Local Authorities Transfer Fund, have been devolved to constituencies and local authorities, respectively.

greater representation of "non-dominants" for greater equity in the allocation of government resources and investments. Thirdly, it increases political stability and unity by giving more groups a greater stake in the political system. Fourthly, it overcomes the control of local elites who are insensitive to the needs of the poor. Devolution increases the opportunities for political participation, which enhances democratic political culture (Ndulo, 2006), and empowers local communities to demand for accountability while enhancing their sense of ownership (Oloo, 2006; Carino, 2007: 108).

Devolution is thus said to improve service provision through efficient resource allocation because people with better knowledge of local conditions and local preferences are put in charge of development (Musgrave 1959; Oats 1972). It is assumed that local governments, serving local communities, will be more responsive to the needs of the locals than the central government (Ndulo, 2006; Oloo, 2006). One strong assumption is that the problems associated with the national government, such as corruption, inefficient service provision and bureaucratic excesses will be reduced, if not eliminated.

Devolution has also been viewed by its advocates as a catalyst for economic and social development. Citizens are more likely to participate in local political processes and engage with their local governments- who are perceived to have the capacity to make political and financial decisions affecting their economic and social welfare (Cheema and Rondinelli, 2007: 12). The competition created between the various units has also been perceived to promote efficiency and effectiveness, reducing opportunities for corruption and other rent-seeking behaviour (Barret et al., 2007).

Yet, Griffin (1981) does provide an important warning on what can go wrong when devolution is not properly undertaken. He states that devolution can lead to more concentration of power among a small elite and a corresponding increased

oppression of the poor. He asserts that:

It is conceivable, even likely in many countries, that power at the local level is more concentrated, more elitist and applied more ruthlessly against the poor than at the centre. Thus, greater (devolution) does not necessarily imply greater democracy, let alone, "power to the people" (1981:225).

Devolution can therefore translate into increased human rights violations, corruption and other abuses of public office (Carino, 2007: 99). Cheema and Rondinelli (2007) also say with respect to devolution. Firstly, they state that there is a tendency for leaders in devolved governments to reduce participation of the common man or woman to tokenism. Secondly, some of the devolved units created can prove either too large or too small to accomplish their tasks. Thirdly, a weak, fragile and illegitimate state can re-invent itself at the devolved level and continue exploiting the masses (Bayart, 1993).

In fact, devolution can end up being a mechanism through which local elites gain power, to manipulate the masses because of less central government oversight. Indeed, as Carino (2007: 109) points out, even the power to recall can be misused. Rather than being used as a means of exacting accountability from politicians, the people's power of recall can be used against political rivals or as a ploy to reverse gains from previous elections.

In Kenya's, it might be naïve to assume that politicians who have seen or used political positions as a means for personal enrichment will change overnight and become agents of good governance. Such change will require the involvement of the civil society organizations in the affairs of the devolved governments, which has been shown to be beneficial (Carino, 2007: 100).

Caution is therefore needed, especially in light of the fact that the contentious and emotive issues that have informed the debate on devolution still

remain unresolved. As the CoE correctly noted in its Report to the PSC, while the overwhelming majority of Kenyans have been in agreement on the need to share power between a national government and regional/local governments, they are still to agree on three things:

- a. The levels of devolution;
- b. The powers of each level of devolution; and
- c. How much supervisory power the national government should exercise over the devolved units (Government of Kenya, 2010).

Other than agreeing to have two levels of devolution (national and county governments), the CoE, the PSC and the National Assembly deliberations did not generate agreement on a mechanism for determining the number of counties or even the system of delineating county boundaries and in the end a determination was made to settle for the 47 colonial-era districts and made them counties. However, these colonial-era districts were not delineated on the basis of any of the problems that the devolution system was meant to solve or the aspirations of the people at the grassroots, namely: fair representation; a need to serve the people better; a need to preserve Kenya's social-ethnic and cultural diversities; and ensuring access to government services. Indeed, the logic of demarcating the original 47 districts was to meet the oppressive demands and desires of the colonial rulers. Consequently, the 2010 Constitution may be said to have exacerbated the contentions surrounding devolution in general, and counties, in particular²⁸.

In undertaking the devolution process it is therefore important to remember that the demand for power sharing and a devolved system of government

For devolution to work, the independence and autonomy of local units needs to be guaranteed by law and units must have the financial control including the power to raise their funds.

²⁸ See SID's Constitution Working Paper no. 10

in Kenya has been informed by Kenya's social-cultural, ethno-regional diversities and regional economic (resource) inequalities. Power-sharing between a national government and devolved units has also been viewed as a mechanism in which Kenya's diversities can be respected, communal identities preserved and individual and community rights protected while still maintaining national unity. There has also been a general agreement that Kenya's ethno-regional inequalities and disparities in the distribution of national resources, and the management of local resources, cannot be dealt with fairly in the absence of devolution or other power-sharing mechanisms.

There are certain basic principles that govern devolution. First, the devolved units need to be viable both demographically and on the basis of resources. Second, the devolved units need to be large enough for effective governance and efficient service delivery. Third, the devolved units need to be small enough to facilitate effective participation of the people. Fourth, the delineation of boundaries of the units of devolution needs to accommodate diversities and to provide a basis for representation of local interests at the national level²⁹. Finally, but more importantly, the delineation of boundaries and the determination of the number of the devolved units should take into account the cost of governing these units.

Unfortunately the CoE and the PSC deliberations that informed the 2010 Constitution did not factor any of these principles in their determination of the number, size of the counties or the delineation of county boundaries. There are great disparities in the size of those counties while the ethnic composition of some of the counties could have been altered to be

more inclusive. Since the publication of the proposed 2010 Constitution of Kenya, a number of legitimate concerns have been raised that could have been addressed by increasing the number of counties.

Great care and much consideration must therefore be taken before the issue of constituting these counties is determined to avoid the problems and confusion experienced in Nigeria. In 1976 the Nigeria military government created 301 local government administrations (LGAs), which were arbitrarily decided. Due to complaints by the Nigerian people however, the number of LGAs was reviewed and increased to 716 within a year when a civilian government was put in place in 1979. However, this proved to be too much of a financial burden on the people and when a new military junta came to power, the LGAs were reduced to 301 again in 1984 only for the number to be increased to 774 in 1996 following pressure from the people.³⁰ The Nigerian example illustrates how problematic any attempt to renegotiate the number of counties can be. Indeed, there is a real danger that if the number of counties is renegotiated, it might open up a Pandora's box that might hinder the implementation of devolution.

The Sixth Schedule of the 2010 Constitution unfortunately also leaves the local authorities intact during the transition³¹ and does not say what will happen to the current administrative units, particularly the districts which have been an important unit of public administration and service delivery. The parallel existence of local governments and counties might pose a number of problems. At the same time, the PA is to be restructured within five years in accordance with the new devolved structures (Sixth schedule, Article 17). Thus, the success or failure of devolution is dependent on how the PA will be restructured.

At a conceptual level, the 2010 Constitution seems to address two apparently contradictory issues i.e. regional economic inequalities which requires

Devolution can lead to more concentration of power among a small elite and a corresponding increased oppression of the poor

²⁹ See SID's Constitution Working Paper no.7

³⁰ See for example Almond, G. et al (2008) *Comparative Politics Today: A World View*. New York: Pearson. Pp. 686. Available at: <http://www.ifpri.org/sites/default/files/publications/nssp04.pdf>

³¹ Sixth Schedule, Part 4 on Devolved Government, section 18.

a strong government to equalize resources; and devolution, which calls for more control of resources at the local level. However, a demand by locals to control more of their resources might increase regional inequalities as more prosperous counties might reduce their contribution to the national government and therefore the resources available to poor counties. The 15 per cent of all revenue collected by the national government which is to be directed to the counties as per Article 203 (2), may just go towards paying salaries and other recurrent expenditure³².

Finally, care needs to be taken to ensure that the pathologies currently experienced by the national government (that have necessitated devolution) are not transferred to the counties. For example, it is likely that the weak, fragile illegitimate state (Bayart, 1993) will re-invent itself at the devolved levels and continue exploiting the masses with less control from the national government. Similarly, the bad leadership and the high corruption experienced at the national level might also be replicated at the county level. Worse still, the political rejects at the national level could be recycled at the devolved units.

If these proposed changes are fully implemented, they could bring the much needed reforms to the governance of the country.

4.0 Conclusion

The CoE-driven constitutional review has laid the basis for the deconstruction the Kenyan state in a number of ways. If these proposed changes are fully implemented, they could bring the much needed reforms to the governance of the country. However, the anti-reform groups in the country will try to prevent the implementation of these reforms, which, owing to the enormous costs of implementation involved, may very well frustrate the implementation of the new constitution. Owing to the goodwill from the donor community, the government should not have a problem getting technical and financial assistance to help in funding the implementation of the new Constitution.

³² See SID's Constitution Working Paper no. 5

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