

KENYA

# Institutional Reform in the New Constitution of Kenya

Dr. Migai Akech

October 2010



Cover: 'Kenyans celebrating the promulgation of the new Constitution at Uhuru Park, Nairobi, on August 27, 2010.'  
Picture courtesy of Felix Masi

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## About ICTJ

The International Center for Transitional Justice works to redress and prevent the most severe violations of human rights by confronting legacies of mass abuse. ICTJ seeks holistic solutions to promote accountability and create just and peaceful societies.

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## Forward

On August 4, 2010, Kenyans went to a referendum and voted to adopt a new Constitution to replace the previous one that had been negotiated at independence from the British in 1963. In the decades since independence, Kenya has experienced periods of human rights violations including land clashes, massacres, arbitrary arrest, extrajudicial executions, detention without trial, torture, electoral violence, grand corruption, and economic crimes. Most of these are directly or indirectly attributable to a constitutional order that concentrated power in the presidency and emasculated other arms of government and civil society.

While the Constitution was the result of a struggle that lasted for at least two decades, it was also part of Agenda Four of the National Dialogue and Reconciliation Mediation Process that former UN Secretary-General Kofi Annan chaired after Kenya's disputed 2007 presidential elections and the widespread violence that followed. As such, the new Constitution is an important pillar of Kenya's transitional justice process.

The new Constitution establishes the framework for the restoration of constitutional democracy in Kenya. It strengthens the likelihood of accountability for past human rights abuses, of guarantees that they will not reoccur, and of reparations for victims. However, although the adoption of the new Constitution is an important milestone, it is just a starting point in the long road to addressing the root causes of conflict in Kenya. Having crossed the hurdle of adopting the new Constitution, Kenya now faces the challenge of realizing its promise of more inclusive citizenship through the new devolved system of government; reduced presidential powers and better separation of powers between the three arms of the government; a restructured and vetted judiciary; an expanded, enforceable bill of rights that includes social, economic, and cultural rights; security sector and land reforms; environmental protection; and other key changes.

Debate about the specifics of implementing the new Constitution got under way even before it was formally promulgated, and discussions have gained considerable momentum since. A key challenge facing implementation is a political establishment that is distracted with positioning for the 2012 elections, at the expense of the hard work of passing the necessary legislation required by the new dispensation. There are also proponents of the status quo who are bent on interpreting provisions of the new Constitution as conservatively as possible. These challenges call for robust engagement by Kenyan civil society in using the new Constitution to consolidate democracy.

While the views contained in this report are the author's and not the International Center for Transition Justice's official position on the subject matter, ICTJ regards the emerging discussions on implementing the new Constitution as vital for Kenya's transition from autocratic rule to a stable democracy. It is therefore pleased to make available this report as an important, timely contribution to the overall discussions now taking place within Kenya on what the new Constitution means and its potential for delivering reforms and transitional justice.

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## Acronyms

CIPEV	Commission of Inquiry into Post-Election Violence
KNDR	Kenya National Dialogue and Reconciliation
LDP	Liberal Democratic Party
NAK	National Alliance (Party) of Kenya
NARC	National Rainbow Coalition
NLC	National Land Commission
ODM	Orange Democratic Movement
PNU	Party of National Unity
TJRC	Truth Justice and Reconciliation Commission

## Executive Summary

The passing of the Constitution of Kenya of 2010 and its promulgation on August 27, 2010, heralds the deep desire of Kenyans, as individuals and communities, to live in a society that respects and protects their liberties and livelihoods without discrimination.<sup>1</sup> With respect to transitional justice, it seeks to heal society, facilitate exit from authoritarianism, and establish a just society based on the rule of law.

The new Constitution establishes rules, values, and principles that if implemented will facilitate the realization of equality and inclusive citizenship. It promises to end the political manipulation of perceptions of marginalization and exclusion that has contributed to interethnic strife in Kenya. In this respect, the new Constitution seeks to address the root causes of interethnic conflicts, by:

- establishing national values and principles of governance that seek to diffuse ethnic tensions often fueled by perceptions of marginalization and exclusion;
- reforming the electoral system, which has been used as an instrument of inclusion and exclusion in sharing of national resources, with a view to ensuring that the voices of all segments of society are represented equitably in government and making elections less fractious;
- creating devolution mechanisms that seek to enhance fairness in the sharing national resources; and
- establishing mechanisms to ensure fairness in land administration and to address historical land injustices that have often reinforced perceptions of marginalization and exclusion and triggered ethnic conflicts, especially during elections.

Further, the new Constitution seeks to facilitate government accountability, by seeking to circumscribe the exercise of power in the three branches of government in general, and the security agencies in particular. In doing so, the new Constitution promises to prevent future violation of human rights and the commission of economic crimes.

Critically, however, the new Constitution fails to establish the principles that would provide much-needed direction in terms of how the country should address past human rights violations, including the post-election violence of 2007-'08 and provide redress for the victims of such violations. Since Kenya does not have a coherent policy on addressing the past, the new Constitution should have established timelines to ensure that prosecutions for post-election crimes take place within the shortest time possible to preclude the possibilities that the evidence required would be destroyed or lost. In this regard, the new Constitution should have mandated the government to establish the Special Tribunal envisaged by the Commission of Inquiry into Post-Election Violence (CIPEV). In addition, the new Constitution should have established principles for giving redress to victims of past human rights violations and economic crimes.

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<sup>1</sup> The 2010 Constitution replaces the first Constitution of Kenya, which came into force in 1963. The draft constitution was subjected to a referendum on August 4, 2010. It was promulgated at a ceremony in Nairobi on August 27, 2010

The new Constitution faces several challenges that are likely to confront its implementation. For example, some of the individuals suspected of perpetrating past human rights violations and economic crime continue to hold powerful positions in government. In addition, the Constitution will be implemented in a fairly polarized political environment, in which the positions of the antagonists will be defined by a desire to either capture or retain power in the new constitutional order. It can therefore be expected that proponents of the status quo will constitute a formidable obstacle to the implementation of the new Constitution. In this endeavor, they are likely to be aided by the statutory order, which invariably gives the president, ministers, and public officers wide-ranging powers and discretion in execution. And since much of the government's power resides in the statutory order, it can be expected that the proponents of the status quo will want to retain the bulk of such power. Therefore Kenya's human rights organizations should participate in and monitor the processes of interpreting and implementing the new Constitution to ensure that not only existing and proposed statutory laws, but also the regulations, codes of conduct, and practices of governmental institutions adhere to the values and principles of this new Constitution.

To facilitate the implementation of the new Constitution in general and the realization of a just society based on the rule of law in particular, the report makes the following recommendations:

### **To the government of Kenya**

- The government should establish the Special Tribunal of Kenya recommended by CIPEV to investigate and prosecute mid- and low-level perpetrators of post-election violence since the International Criminal Court has begun investigating those who bear the greatest responsibility for the violence.
- Parliament should consider passing legislation, in keeping with the right to dignity that the new Constitution guarantees, to:
  - establish principles for giving redress to victims of past human rights violations and economic crimes; and
  - establish a reparations fund.
- Parliament should enact a Governance of Counties Act that binds all counties. This law should have the following objectives: preventing oppression of minorities and marginalized groups within counties; and facilitating uniformity, democracy, and order in the governance of the counties.
- Parliament should ratify a law to facilitate the transition from the Kenya Anti-Corruption Commission to the Independent Ethics and Anti-Corruption Commission. It should also ensure that the new body acts as an effective watchdog against the economic crimes and grand corruption that were prevalent under the old system.
- Parliament should enact a law to regulate lobbying, conflicts of interest, misconduct, and abuse of power in the legislature and in county assemblies.

### **To Kenya's Civil Society**

Kenya's civil society should do the following:

- develop the ability to articulate and litigate the national values and principles of governance established under Article 10 of the new Constitution;
- monitor and contribute to the implementation of Sessional Paper No. 3 of 2009 on National Land Policy.
- monitor and contribute to the implementation of the recommendations of the National Task Force on Police Reforms, including the enactment of a law on civilian oversight of policing.
- monitor and participate in the work of the Commission on the Implementation of the Constitution with a view to ensuring that the laws this commission adheres to the principles and values of the Constitution.

- participate in designing the law that governs vetting judges to ensure that its effectiveness and adherence to mechanisms that safeguard fairness and due process.
- advocate for the enactment of a law or laws establishing suitable nomination and appointment criteria that would facilitate the realization of the new Constitution, especially its provisions on leadership and integrity.



## 1. Introduction

This report analyzes the Kenya's 2010 Constitution from the perspective of transitional justice, with special reference to institutional reform. The report sees the new Constitution as a framework for establishing inclusive citizenship and preventing the recurrence of human rights violations. From this premise, the report analyzes how the new Constitution proposes to enhance equality and inclusive citizenship, since perceptions of exclusion and unfair distribution of national resources such as land have created a volatile political environment that ignites easily, especially during elections. The report also analyzes the extent to which the new Constitution enhances accountability in the exercise of governmental power, the lack of which has led to a culture of impunity and numerous human rights violations.

The report examines the new Constitution against the background of the Kenya National Dialogue and Reconciliation (KNDR) initiative, which sought to mediate the dispute between the Orange Democratic Party (ODM) and the Party of National Unity (PNU), and resolve the immediate and historical causes of the national crisis that was generated by the disputed presidential election of December 2007. The KNDR constitutes a watershed in Kenya's quest for inclusive, accountable governance because it culminated in a number of political agreements; these helped restore order and tried to enhance accountability for past human rights abuses, national reconciliation and healing, and reform state institutions.

The parties to the KNDR agreed to submit four items to the mediation process: (1) immediate action to stop violence and restore fundamental rights and liberties; (2) immediate measures to address the humanitarian crisis, promote reconciliation, healing, and restoration; (3) measures to overcome then ongoing political crisis; and (4) long-term issues and solutions. The parties then reached an agreement for each one.

The parties concluded an "Agreement on the Principles of Partnership of the Coalition Government," which recognized the need to address the "deep-seated and longstanding divisions within Kenyan society [that] threaten the very existence of Kenya as a unified country." This called for a "coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all."

It is this agreement that enabled the establishment of a coalition government between the PNU and the ODM. The coalition would then work toward resolving the identified long-term issues (the so-called Agenda 4 items), namely: undertaking constitutional, legal and institutional reform; tackling poverty and inequality; combating regional development imbalance; tackling unemployment among the youth; consolidating national cohesion and unity; undertaking land reform; and addressing transparency, accountability, and impunity. In these political agreements, the KNDR thus provides a much-needed transition agenda for Kenya. In this context, the new Constitution sets up a critical framework for the realization of the other Agenda 4 items.

The previous constitutional order contributed to the post-election crisis that befell Kenya in January 2008. As the Commission of Inquiry into Post-Election Violence noted, successive amendments of the Constitution increased the powers of the president exponentially, thus giving him control over governmental agencies and leading to the emasculation of institutions with countervailing power such as the legislature and the judiciary.<sup>2</sup> As a result, Kenyan citizens saw these agencies and institutions as lacking impartiality and integrity. They lacked faith in the ability of the Electoral Commission to conduct free, fair elections, thereby increasing their tendency to resort to violence after “unfair” electoral outcomes.

Further, the previous Constitution established a first-past-the-post electoral system and granted the president almost unfettered powers over the distribution of national resources, thus making the quest for the presidency a zero-sum game in which losing was not an option. Each ethnic community believed that capturing the presidency would guarantee almost exclusive access to national resources and public sector jobs since the president controlled their distribution. As a result, the stakes were extremely high in every presidential election, and many politicians resorted to violence to gain or retain political power.

Indeed, as multiparty democracy was being reintroduced in the early 1990s, local civil society and international actors acknowledged that the Constitution was a recipe for disaster and needed to be transformed if Kenya was to become a real constitutional democracy in which political power could be exchanged peacefully between ruling and opposition parties.<sup>3</sup> However, despite violence being a perennial feature of electoral processes in the multiparty era, the quest for a suitable constitutional framework remained elusive for a long time. Thus while President Daniel Arap Moi eventually bowed to pressure from local civil society actors and the donor community to initiate a process to review the Constitution in the late 1990s, his government sought to derail the process through various mechanisms. At first, it used highly draconian means, including the deployment of the state security apparatus and authoritarian public order laws, to frustrate regime opponents clamoring for a new constitutional order. When this tactic did not succeed, it resorted to manipulating the process of constitutional reform by ensuring the passage of a constitutional review law that allowed Moi to control the process. Thus the Constitution of Kenya Review Act of 2001 enabled his regime to control both the composition of the constitutional convention and the process of making the Constitution.<sup>4</sup> When President Mwai Kibaki succeeded President Moi in 2002, he equally sought to retain the existing Constitution. Like predecessors Jomo Kenyatta and Moi, Kibaki sought to inherit the existing power and seemed to have no intention of replacing it, despite much rhetoric to the contrary. Once he took office, he reneged on a power-sharing memorandum of understanding (MoU), under which his National Alliance of Kenya (NAK) had agreed to create a prime minister’s post for the leader of the other partner in the NARC coalition, the Liberal Democratic Party (LDP). This MoU had been shaped by the provisions of the draft constitution (also known as the Bomas Draft Constitution) produced by the Constitution of Kenya Review Commission established by the Review Act of 2001. In 2004, Parliament enacted the Constitution of Kenya Review (Amendment) Act of 2004, which empowered it to amend the Bomas Draft Constitution before submitting it to a referendum. The ensuing amendment of the draft was done largely to suit the interests of NAK, which then instructed Attorney General Amos Wako to prepare a draft to be submitted in a referendum. The public rejected this draft (known as the Wako Draft) in November 2005. President Kibaki reacted to this by sacking LDP ministers, thereby escalating ethnic polarization in the country.

Under these circumstances, the violence that accompanied the Electoral Commission’s controversial announcement that President Kibaki won the 2007 election was perhaps inevitable. ODM supporters could not countenance the prospects that once again they would be excluded from accessing

2 The Commission of Inquiry into Post-Election Violence (CIPEV) was one of the products of the Kenya National Dialogue Reconciliation Process. It was established on May 22, 2008, and presented its report to the government on October 15, 2008.

3 See David W. Throup and Charles Hornsby, *Multi-Party Politics in Kenya: The Kenyatta @ Moi states @ the triumph of the system in 1992 election* (Oxford: James Currey, 1998).

4 President Daniel Arap Moi ruled Kenya from 1978 to 2002.

public resources by virtue of what they perceived as their candidate being unfairly denied becoming president.

For these reasons, the parties to the KNDR thought that reviving the constitutional review process was vital to achieving sustainable peace, stability, and justice in Kenya. The new Constitution is an outcome of a process which was facilitated by the amendment of the old Constitution and the enactment of the Constitution of Kenya Review Act of 2008. The people endorsed the new Constitution at a referendum on August 4, 2010, thus bringing to a close a 20-year quest for a new constitution.<sup>5</sup>

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5 See Dave Opiyo, “‘Yes’ Retains Grip on Polls,” *Nation*, July 17, 2010.

## 2. Constitutions and Transitional Justice

Transitional justice has been defined as “justice associated with periods of political change” and is “characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”<sup>6</sup> Its aim is two-fold: to address the human rights violations committed by predecessor regimes (with a view to providing justice to victims of such violations and eradicating impunity) while building peace by reforming abusive state institutions and promoting reconciliation.<sup>7</sup> Thus transitional justice is not only concerned with retribution for past wrongs or providing justice to those who have suffered under repressive regimes; it also seeks to heal society, facilitate exit from authoritarianism, and establish a just society based on the rule of law.<sup>8</sup> Typically, the mechanisms for pursuing transitional justice include prosecution of the perpetrators of human rights violations, truth commissions that seek to reveal the truth about past wrongs, reparations for victims of human rights abuses, and institutional reform.

The envisaged institutional reform should be seen in two related contexts. First, there are reforms that establish rules for redressing past human rights violations. Second, there are reforms that seek to forestall the recurrence of such violations. The latter category of reforms seeks to establish better institutions for preventing or managing societal conflicts and enhancing accountability in the exercise of governmental power, since the abuse of power often leads to human rights violations. Ultimately, transitional justice aims to foster building peace by addressing the needs and grievances of victims of past human rights violations while establishing mechanisms that prevent the recurrence of such violations and facilitate reconciliation. Further, it should be emphasized that reconciliation will not occur unless the grievances of the victims of such violations are acknowledged and addressed.

There is an assumption that transitional justice will take place in a context in which democratic leaders *replace* authoritarian predecessors.<sup>9</sup> In practice, however, the process of transition is often murky, contested, and drawn out. Accordingly, there is a need to take into account the politics of transition in any given polity. In Kenya, for example, many of those now tasked with implementing the agreements of the KNDR process were either suspected perpetrators or abettors of the human rights violations and economic crimes that form the rationale for transitional justice. So long as these individuals continue to wield power, it may be assumed that they will do their very best to derail the redress of past wrongs and the establishment of accountability mechanisms.

In addition, transitional justice initiatives in Kenya are being designed and implemented in a polarized political environment in which the approaches the antagonists adopt are defined by a desire to either retain or capture political power in the next general elections to be held in 2012, . The inability

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6 Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 69.

7 Aeyal M. Gross, “The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel,” *Stanford Journal of International Law* 40 (2004).

8 Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly*, Volume 31, Number 2, May 2009 . 321-367

9 *Ibid.*, 12.

of the coalition government to adopt a unified approach on the issue of accountability for human rights violations during the post-election violence of 2008 is instructive here.<sup>10</sup> It is such circumstances that have perhaps led Eric A. Posner and Adrian Vermeule to observe that “transitional justice increases as the influence of the elites decreases.”<sup>11</sup>

There is also a need to pay close attention to the role that the legal or statutory order plays in regime maintenance. In this regard, it is worth noting that despite decades of democratization in Africa, a process that is invariably preceded by constitutional reforms, authoritarianism persists in the majority of cases. This may explain why careful observers of African politics such as H. Kwasi Prempeh are worried that the imperial presidency, which embodies authoritarianism, has survived, despite the “precedent-setting changes to Africa’s political and constitutional landscape.”<sup>12</sup> The term “imperial presidency” denotes presidential supremacy, which is created through the appropriation by the presidency of the powers reserved by the constitution to the other branches of government.<sup>13</sup> Prempeh laments that “Africa’s current presidents may be term-limited, but by all accounts they have not yet been tamed.”<sup>14</sup>

The failure to tame African presidents despite the adoption of seemingly democratic constitutions can be explained by the legacies of colonialism, including the authoritarian legal (that is, statutory) order. As H.W.O. Okoth-Ogendo observed, far from being constrained by any notions of constitutionalism, the colonial state was highly authoritarian and was defined by control and coercion.<sup>15</sup> The main agents of state power that enabled such control and coercion were the statutory (as distinguished from constitutional) laws and the bureaucracy.<sup>16</sup> For the most part, these statutory laws were characterized by “a degree of discretion that even courts sometimes found difficult to circumscribe.”<sup>17</sup> In Okoth-Ogendo’s view, “it was the rest of the legal order, not constitutional order, that offered African elites real power and the bureaucratic machinery with which to exercise it effectively.”<sup>18</sup> Accordingly, Africa’s political elite quickly embraced this familiar statutory order and in many ways reinforced it. This explains why the coercive statutory order largely remains intact in many African countries, despite the enactment of new constitutions. In Kenya’s case, a key challenge will therefore be to transform the statutory order so that it adheres to the values and principles of the new Constitution. That is, significant elements of authoritarianism are likely to persist unless the statutes and practices that give public officials unfettered powers are aligned with the new Constitution.

Thus while the promulgation of a constitution that upholds democracy is necessary if there is to be a meaningful transition to democracy, it is not sufficient. Nevertheless, a constitution can facilitate the attainment of a just society—especially in ethnically polarized polities—by establishing equality of membership and citizenship for all the ethnic groups and individuals that make up the polity. Secondly, a constitution can aid the attainment of a just society by outlining principles and mechanisms for establishing the truth in relation to past events, including violations of human rights and economic crimes, thereby advancing the interests of victims. Thirdly, a constitution can also establish a framework for the protection of property rights in a manner that does not entrench past inequalities, injustices, and fraud. This is especially important in a context in which prior to the adoption of the new constitution, law protected property rights even where, as in Kenya, they had been acquired illegally, and where existing land policies were exclusionary and discriminatory. Finally, a constitution can establish principles and mechanisms that enable the citizenry to hold government accountable daily. This would be particularly important in the context of the security sector, which often provides

10 See Godfrey M. Musila, “Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions,” *International Journal of Transitional Justice* 3 (2009): 445-64.

11 Posner and Vermeule, “Transitional Justice as Ordinary Justice,” *Harvard Law Review* 117 (2003-04): 770.

12 H. Kwasi Prempeh, “Presidents Untamed,” *Journal of Democracy* 19 (2008): 109-10.

13 See Arthur M. Schlesinger, *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

14 Prempeh, “Presidents Untamed,” 110.

15 H.W.O. Okoth-Ogendo, “Constitutions without Constitutionalism: Reflections on an African Political Paradox,” in *Constitutionalism and Democracy: Transitions in the Contemporary World*, Douglas Greenberg et al, eds., (New York: Oxford University Press, 1993), 69.

16 *Ibid.*

17 *Ibid.*, 77.

18 *Ibid.*, 71.

authoritarian regimes with the force and instruments of intimidation they require to silence dissenting voices. Here, the constitution should establish accountable civilian supremacy over the command of the security forces in order to preclude the prospects of organized force being used to oppress the citizenry or, even worse perhaps, threatening the democratic polity itself.<sup>19</sup>

Another crucial aspect of transitional justice relates to its scope. The dominant discourse on transitional justice has been criticized for engaging “mainly, if not exclusively, with civil and political rights violations that involve either physical integrity or personal freedom, and not with violations of economic and social rights.”<sup>20</sup> The critics maintain that transitional justice should embrace economic and social rights, especially because in many developing countries authoritarian regimes are “*both* brutal and corrupt.”<sup>21</sup> Indeed, the proceeds of corruption enhance the brutality and impunity of these regimes. From this perspective, it is not only argued that the protection of human rights is inextricably linked with the fight against corruption, but also that corruption often breeds or worsens poverty, social injustice, and conflict. More importantly, perhaps, it is suggested that “transitional justice can be strengthened and can confront impunity more effectively if it engages with accountability for corruption and economic crimes.”<sup>22</sup> Accordingly, if transitional justice is to deal with impunity effectively, it becomes necessary for institutional reforms to incorporate accountability for corruption and economic crimes. In addition, the constitutional protection of social and economic rights can contribute to efforts to redress past discrimination and abuse and enhance social justice.<sup>23</sup> Conflicts are often generated and fueled by social and economic grievances, and anchoring social and economic rights in the constitution contributes to their resolution.

It should be noted that unlike the South African interim constitution that addressed past human rights violations by stating clearly that there would be amnesty,<sup>24</sup> Kenya’s new Constitution does not establish rules for redressing past human rights violations. Accordingly, the work of the Truth Justice and Reconciliation Commission (TJRC), which was established in 2009, is not anchored in the new Constitution except in so far as it safeguards the rights to human dignity and freedom of information from which can be extrapolated the right to redress, reparations and truth. However, the new Constitution establishes rules, values, and principles that promise to facilitate the realization of equality and inclusive citizenship on the one hand and government accountability on the other hand. The following part discusses these weaknesses and strengths of the new Constitution.

19 Hans Born and Cecilia Lazzarini, “Civilian Command Authority Over the Armed Forces in their National and International Operations: A Preliminary Study,” Geneva Centre for the Democratic Control of the Armed Forces (DCAF) (2006), 3.

20 Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?” *International Journal of Transitional Justice* 2 (2008): 310.

21 *Ibid.*, 310.

22 *Ibid.*, 311.

23 Louise Arbour, “Economic and Social Justice for Societies in Transition,” *New York University Journal of International Law and Politics* 40 (2007): 8.

24 See South African Interim Constitution (Constitution Act 200, 1993).

## 3. Critique of the New Constitution

### The Reform Context

When violence broke out following the announcement of the presidential election results in December 2007, many people wondered how a country that for many years was considered to be a rare island of peace in a sea of turmoil could descend into anarchy so rapidly. Yet trouble had long been brewing in Kenya, and perceptions of marginalization, exclusion, and inequality concerning the allocation of national resources like land, as well as access to public goods and services, had solidified in the minds of many individuals and communities. As CIPEV noted in its report of 2008, these perceptions “created an underlying climate of tension and hate, and the potential for violence, waiting to be ignited and to explode.”<sup>25</sup>

These perceptions can be explained by the historical politicization of ethnicity and the accumulation of immense power in the presidency, which created an imperial president. Since independence, the state has always been identified with narrow ethnic interests, thereby engendering resentment among the ethnic communities that are excluded from government. Such exclusion occurs because the president invariably governs mainly through trusted members of his own ethnic community and co-opted members of other ethnic communities. In this arrangement characterized by political patronage, the primary beneficiaries of national resources, public goods, and services are the political elites and their cohorts. Over the years, this created the perception that only the community whose son happened to be president would receive these things.

Since the reintroduction of multiparty politics in 1991, it has therefore become vital for each ethnic community to capture the presidency, since the politicians and the public alike feel strongly that this is the only way to ensure access to public goods and services.<sup>26</sup> Quite literally, elections have become a matter of life and death, and politicians have politicized perceptions of exclusion, which have become effective tools for mobilizing members of their ethnic communities. Accordingly, the new Constitution needs to enhance perceptions of inclusion if it is to facilitate a real transition to democracy and peace.

The post-election violence and subsequent displacement of thousands of people from their homes, especially in Rift Valley Province, also gave prominence to long festering and explosive issues relating to the ownership and distribution of land, as well as land administration. In many cases, there are perceptions that “outsiders” have illegitimately acquired the ancestral land of “natives” and should therefore be evicted, by force if necessary. Many claim that these outsider ethnic communities have benefited from politically biased allocation of land. At the same time, “gross corruption in the acquisition, registration and administration of land matters has been a major problem.”<sup>27</sup> Land has been a major resource for political patronage and has been illegally and irregularly allocated to politically

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25 Republic of Kenya, *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)* (2008), 25.

26 *Ibid.*, 25.

27 *Ibid.*, 33.

connected individuals in total disregard of the public interest, including the potential of inequitable land distribution to foment unrest among the ethnic groups that do not benefit from such allocations. Indeed, politicians have exploited these sentiments of ethnic nationalism and have encouraged the members of their communities to evict outsiders, especially during elections. It is quite alarming that each general election since the return of multiparty politics has been accompanied by land clashes that have gotten worse over the years. As a result, Kenya now has a significant, growing population of internally displaced people.

The old Constitution also facilitated presidential control of the institutions of governance, such as the legislature, the judiciary, and state security bodies. The rationale for such control is found in the concept of regime maintenance, which refers to the efforts of political regimes to ensure their survival in the face of competition from rival political groups and populations that do not accept their claims to legitimacy. Under the old Constitution, presidential control of the institutions of governance was exercised through unregulated powers of appointment and dismissal; the president could appoint and dismiss public servants these institutions at will. Apart from giving the president significant patronage resources, these powers enabled him to ensure that these institutions would only do his bidding. As a result, while the public servants were accountable to the president, they did not think they were accountable to the public for the exercise of their powers. For example, CIPEV observed how “members of the provincial administration and the police . . . understood that it was sometimes in the interest of their personal survival to follow what they understood to be the directions or inclinations of either the President or [Members of Parliament] in their areas rather than to uphold the law.”<sup>28</sup>

The absence of public accountability in the exercise of power also creates an environment in which human rights violations, corruption, and impunity thrive.<sup>29</sup> In the past, presidential control of the criminal justice system has meant that institutions like the police, the attorney general, and the judiciary have not worked independently. Therefore state officials and politicians who disobeyed the law, committed human rights violations, or engaged in corruption were never punished so long as the president shielded them from facing the law. Politicians implicated by reports of inquiries into the land clashes of the 1990s were not punished for their crimes because the president did not support their prosecution. The lack of political will to punish the perpetrators of violence or to address the plight of their victims has contributed to the growth of a culture of impunity. In addition, this culture has developed because, contrary to the rule of law requirement that “government discretion must be bounded by standards that set effective limits on the exercise of that discretion,”<sup>30</sup> the exercise of governmental power in Kenya is not fettered by any such standards in many cases. As a result, the president, government ministers, and public officers act in any manner they deem fit, irrespective of existing statutory requirements. They do so largely because they think their actions will not be sanctioned, given the absence or weakness of public accountability mechanisms. They disregard established public procurement procedures and processes,<sup>31</sup> ignore court orders,<sup>32</sup> and apply the law selectively. In the fight against corruption, the public believes that investigations and prosecutions are “selective and discriminatory” since only minor players are charged and major players are seemingly untouchable.<sup>33</sup>

It has long been acknowledged that national reconciliation cannot occur in Kenya unless “the mistakes and atrocities of the past are properly, fairly, and comprehensively investigated, the perpetrators held accountable, and victims recognized and their dignity restored.”<sup>34</sup> Thus the 2003 Task Force on the Establishment of a Truth, Justice and Reconciliation Commission found overwhelming support

28 Ibid., 31.

29 See Migai Akech, “Ethics of the Rule of Law: Impunity, Public Perceptions of Justice and Governance in Kenya,” in *Governance and the Human Condition*, Elizabeth W. Gachenga et al, eds., (Nairobi: Law Africa, 2009), 81-119.

30 William C. Whitford, “The Rule of Law,” *Wisconsin Law Review* (2000): 723-4.

31 See Migai Akech, “Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid,” *New York University Journal of International Law and Politics* 37 (2005): 829.

32 See Winnie Mitullah et al, *Kenya's Democratization: Gains or Losses?* (Nairobi: Claripress, 2005), 52-53.

33 See “A Harvest of Corruption Scandals,” *East African Standard*, February 5, 2005.

34 Makau Mutua, “Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission,” *Buffalo Human Rights Law Review* 10 (2004): 15-16.

among Kenyans for the idea that reconciliation would only be possible after the truth about the past is known and justice is provided to the victims of past human rights violations and economic crimes.<sup>35</sup> Over the years, many citizens have been the victims of severe human rights violations such as political assassinations, torture, detention without trial, police brutality, massacres of communities, sexual abuse and violence, ethnic clashes, and economic crimes such as the looting of the public purse and land grabbing. The task force therefore recommended establishing an independent truth commission that would investigate gross human rights violations and economic crimes and recommend prosecutions.

Unfortunately, the recommendations of the Task Force were not implemented due to a lack of consensus in the coalition government occasioned by the wrangles of the partners over sharing power and constitutional review. The idea of establishing a truth commission was only revived in 2008, when the post-election crisis not only occasioned further human rights violations but also served to remind Kenyans of the urgent need to redress some of the long-held grievances that may have helped fuel the national crisis. Pursuant to an agreement concluded under the auspices of the KNDR, Parliament thus enacted the Truth, Justice and Reconciliation Act of 2008 to establish “an accurate and complete record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December, 1963 and 28th February, 2008.”<sup>36</sup>

At the same time, CIPEV recommended that the government establish a Special Tribunal for Kenya to “seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections.”<sup>37</sup> Further, the commission recommended that if the government failed to do so, then the International Criminal Court (ICC) should consider prosecuting those suspected to bear the greatest responsibility for the post-election crimes. The government has so far failed to enact the required law, and the ICC has been conducting its own investigations. In part, the failure of the government to enact this law can be attributed to the fear of the main political parties that they will lose the support of their constituencies should they expose certain politicians to criminal prosecution.

At one point, the government even declared that the TJRC process presented the most appropriate mechanism for securing justice for post-election crimes. This declaration was interpreted as a bid to buy time with the aim of defeating the cause of justice, although the TJRC process is also being derailed by a lack of confidence in the chairman, due to allegations of bias and misconduct that came to light after he had been confirmed in this position.<sup>38</sup> The effect is that for the victims of past human rights violations, justice may be delayed unduly if not denied altogether.

In any case, the ICC can at best only punish a few individuals. Others found to bear the greatest responsibility for the post-election crimes, including police and other security officers who committed despicable crimes against the populace, would therefore need to be brought to justice under national law in a timely manner, lest the evidence against them be lost or destroyed. The question of establishing local legal mechanisms that complement the ICC process therefore needs to be addressed urgently. Further, the government needs to reconcile such criminal justice mechanisms with the TJRC process.

Let us now examine the extent to which the new Constitution addresses these challenges.

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35 Ibid., 17.

36 Truth, Justice and Reconciliation Act, Laws of Kenya, section 5(a).

37 CIPEV Report, 475.

38 See “Tutu leads world pressure on Kiplagat to give up Truth role.” Available at <http://www.ictj.org/en/news/coverage/article/3487.html>

## Absence of Principles for Dealing with Past Human Rights Violations

Given the absence of a coherent policy on addressing the past, the new Constitution should have established timelines to ensure that prosecutions for post-election crimes take place within the shortest time possible to preclude the possibilities that the evidence required would be destroyed or lost. The new Constitution should have mandated the government to establish the Special Tribunal envisaged by CIPEV. In addition, the new Constitution should have established principles for giving redress to the victims of past human rights violations and economic crimes. While redress for the victims of economic crimes could have been integrated with the principles of the new Constitution that seek to enhance equitable sharing of national resources (discussed below), the particular question of providing redress to victims of past human rights violations should have been addressed by establishing a constitutional reparations fund and delineating principles for its operation.

## Equality and Inclusive Citizenship

The new Constitution provides significant principles and mechanisms for preventing the recurrence of human rights violations and economic crimes. In this respect, the approach of the new Constitution is to address the root causes of interethnic conflicts. First, the new Constitution establishes national values and principles of governance that seek to diffuse, if not eliminate altogether, the ethnic tensions fueled by perceptions of marginalization and exclusion. Second, it seeks to reform the electoral system with a view to ensuring that the voices of all segments of society are represented equally in government. Third, it creates devolution mechanisms that seek to enhance fairness in sharing national resources. Fourth, it seeks to enhance fairness in land administration and to address the historical land injustices that have often reinforced perceptions of marginalization and exclusion and triggered ethnic conflicts, especially during elections.

### National Values and Principles of Governance

Various provisions of the new Constitution evince a desire to enhance equality, as well as the participation and inclusion of individual citizens and communities in governance. The preamble declares national pride in “ethnic, cultural and religious diversity,” and a determination of the citizenry “to live in peace and unity as one indivisible sovereign nation.” Further, the preamble recognizes “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”

The new Constitution contains provisions to ensure the realization of equality and inclusive citizenship. First, Article 10 establishes “national values and principles of governance,” which according to Article 258 are justiciable in the sense that the enactment, application, and interpretation of statutory law, and the formulation and implementation of public policy decisions all must adhere to Article 10; failure to do so would entitle affected people to seek judicial intervention. These values and principles include sharing and devolution of power, participation of the people, equity, social justice, inclusiveness, nondiscrimination, and protecting “the marginalized.”

Second, Article 19 says the purpose of recognizing and protecting human rights is “to preserve the dignity of individuals and communities and to promote social justice.” Third, Article 27 prohibits all forms of discrimination by the state or *private actors*,<sup>39</sup> including discrimination based on grounds of ethnicity or social origin. In this article, the new Constitution debunks the orthodox view in constitutional law, which is that a constitution imposes *direct* constitutional duties only on government and not on private actors.<sup>40</sup> This is an important provision because it would not make sense to outlaw discrimination in the public domain while leaving it unchallenged in the private domain. And to facilitate the realization of the rights of equality and freedom from discrimination by individuals and

39 New Constitution of Kenya, Article 27(5).

40 See S. Gardbaum, “The ‘Horizontal Effect’ of Constitutional Rights,” *Michigan Law Review* 102 (2003): 387.

groups that have suffered discrimination in the past, this article mandates the state to “take legislative and other measures, including affirmative action programs and policies.”

These articles are reinforced by Article 56, which mandates the state to establish affirmative action programs designed to ensure that “minorities” and “marginalized groups” participate and are represented in governance, receive “special opportunities” in education, the economy, and access to employment, and have reasonable access to public services like water, health care, and infrastructure. Even though determining who benefits from these provisions presents formidable administrative and legal challenges, they represent a marked departure from the past, which, as we have seen, has been defined by the treatment of public goods and services as discretionary items the president only grants to “loyal” communities.

Since government has often ignored the social and economic well-being of minorities and marginalized groups, the foregoing provisions should be read together with Article 43, which protects social and economic rights. This gives “every person” the right to health, housing, food, clean and safe water, social security, and education.

In these various provisions, the new Constitution seeks to ensure that all citizens are treated equally and fairly, thereby addressing the strong perceptions of some that they are second-class citizens by virtue of their ethnicity. As we have noted, these perceptions have made the marginalized and excluded citizens resent those they consider to be receiving better treatment from government. Politicians have exploited these perceptions especially during elections, which have consequently been characterized by intense conflicts and human rights violations.

By acknowledging that the government has often discriminated against segments of society, the new Constitution also lays a strong foundation for building peace. Indeed, people cannot reconcile if their grievances are not acknowledged and addressed. And in making the Article 10 principles and values justiciable, the new Constitution gives citizens an avenue to ventilate their grievances regarding issues such as exclusion. Arguably, this would preclude politicians from mobilizing members of their ethnic communities on the basis of exclusion, a process that has been facilitated by the absence of avenues for the hearing and determination of claims of exclusion and marginalization.

### **Reform of the Electoral System**

Article 82 establishes an Independent Electoral and Boundaries Commission that will oversee the delimitation of electoral units, a process which has been manipulated by successive political regimes to favor their parties or candidates. Further, Article 89 establishes principles to guide the process of boundary delimitation. It requires that each constituency should have the same number of inhabitants, although it permits variations (up to 40 percent for cities and urban areas, and 30 percent for other areas) based on factors such as geography, urbanization, community of interest, historical, economic and cultural ties, and means of communication. These provisions of the new Constitution would therefore preclude situations in which—as is presently the case—one constituency has 100,000 inhabitants, while another one has 5,000. In addition, the new Constitution seeks to make the process of boundary delimitation participatory and accountable. It requires the commission to consult all interested parties in reviewing the boundaries of electoral units. All decisions of the commission are subject to judicial review.

The new Constitution also introduces changes to the electoral system. Elections in Kenya are held under a first-past-the-post electoral system in which the person who gains the plurality of the vote (or was the first to cross the finish line) is declared the winner. The effect of this system is that, as the general elections of 1992 and 1997 illustrated, it is possible to have a majority of the electorate voting for losing candidates and the government that is ultimately elected being a minority government.

The new Constitution seeks to mitigate this problem in a number of ways. First, it provides for the election of 12 seats in the National Assembly, 20 seats in the Senate, and whatever number of seats in

the county assemblies is necessary to ensure gender equity and representation of marginalized groups on “the basis of proportional representation by use of party lists.”<sup>41</sup> It foresees that each political party taking part in a general election will submit to the Independent Electoral and Boundaries Commission a list of all the individuals who would stand elected if the party were to be entitled to all the proportional representation seats. The party lists should consist of alternates between male and female candidates “in the priority in which they are listed,” and except in the case of the county assembly seats, each party list should reflect the regional and ethnic diversity of the people of Kenya. After the general election, the commission’s task would then be to allocate these special seats to political parties “in proportion to the total number of seats won by the candidates of the political party.”

Second, Article 97 of the new Constitution reserves 47 special seats for women in the National Assembly. Here, it is envisaged that during a general election the voters of each county—acting as a single member constituency—will elect a woman to represent them in the National Assembly. The new Constitution therefore largely retains the first-past-the-post electoral system. It only introduces proportional representation in the very limited sense of promoting the representation of women and other special interest groups (such as the youth, disabled persons, and workers), which is to be achieved through party nominations. Arguably, the new Constitution may therefore aggravate disproportional representation since nominations will be made on the basis of the strength of the parties in the national and county assemblies. However, the principles established by Article 81—such as the requirement that the electoral system must ensure fair representation, universal suffrage, and equality of the vote—provide an avenue for mitigating the unfairness of the first-past-the-post electoral system.

The new Constitution also seeks to enhance the independent administration of elections and ensure fair resolution of electoral disputes. Article 86 requires the Independent Electoral and Boundaries Commission to ensure that voting during elections adheres to the principles of simplicity, accuracy, verifiability, security, accountability, and transparency. It also mandates the commission to ensure that votes are “counted, tabulated and the results announced promptly by the presiding officer at each polling station,” and that “the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.” Further, it requires the commission to establish “appropriate structures and mechanisms,” including keeping election materials safe, to eliminate electoral malpractices.

With respect to resolving electoral disputes, the Constitution requires Parliament to enact a law that establishes mechanisms for timely dispute settlement. In the case of presidential elections, Article 140 provides that petitions challenging the election of a president-elect may be filed in the Supreme Court within seven days after the commission has declared the results. The Supreme Court is then required to hear and determine the petition within 14 days. Following such a petition, Article 141 provides that a president-elect can only be sworn in on the seventh day following the court’s decision. In the case of parliamentary and other elections, Article 87 provides that petitions are to be filed within 28 days after the commission has declared the results, while Article 105 requires the high court to hear and determine such petitions within six months.

In general, these provisions of the new Constitution promise to enhance the integrity of national elections, thereby enhancing the prospects that future elections in Kenya will genuinely be free and fair and making the unprecedented violence that accompanied the 2007 general election a thing of the past. The provisions seek to ensure that the electoral system produces governments that represent the interests of all segments of society. The new Constitution therefore promises to diffuse the ethnic tensions that have become a perennial feature of national elections, since the existing winner-takes-all system has meant that political actors cannot contemplate losing an election and will even violate the human rights of fellow citizens to win elections. The electoral system has been used as an instrument of inclusion and exclusion in the sharing of national resources, and its reform—as envisioned in the new Constitution—is therefore likely to make elections less fractious.

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41 New Constitution of Kenya, Articles 90, 97, 98, and 177.

## Devolution

The new Constitution also endeavors to decentralize governance. One of the consequences of the centralization of power in the presidency has been a widespread perception of alienation among citizens, many of whom have felt marginalized, neglected, and discriminated against on the basis of their ethnicity. Accordingly, they have asked for the devolution of governance so that they can participate meaningfully in governmental decision-making at the local level.

The new Constitution establishes a system of devolved government that may begin to address these concerns. Article 174 requires this system to achieve a number of objectives, including promoting participation and accountability in the exercise of governmental power, fostering national unity by recognizing diversity, giving powers of self-governance to the people, ensuring equitable sharing of national and local resources, protecting the rights of minorities and marginalized communities, and promoting social and economic development and access to public services throughout Kenya.

The new Constitution establishes three main institutions to facilitate the realization of these objectives: county governments, a Senate, and a Commission on Revenue Allocation. Article 176 establishes a county government for each of the 47 counties that consists of a County Assembly (or legislative branch) and a County Executive (or executive branch).

The Senate is established by Article 93 as one of the two houses of Parliament, the other house being the National Assembly. Its role is to represent and protect the interest of the counties and their governments. It also initiates, debates, and approves legislative proposals (or bills) concerning counties (Article 96). Another critical Senate function is to determine the allocation of national revenue among the counties and maintain oversight over such revenue. It also plays a role in governmental accountability: the Senate participates in the consideration and determination of resolutions to remove the president or deputy president from office (Article 145).

Article 215 establishes the Commission on Revenue Allocation. It consists of 9 presidential appointees who “have extensive professional experience in financial and economic matters”: a chairperson approved by the National Assembly, two people nominated by the political parties represented in the National Assembly, five people nominated by the political parties represented in the Senate, and the principal secretary in the ministry responsible for finance. The commission’s main function is to recommend to Parliament the bases and mechanisms for the equitable sharing of the revenue raised by the government between the national and county governments, and among the county governments (Article 216). These recommendations should be guided by a number of principles or criteria established by Article 203, including the national interest, the need to remedy economic disparities within and among counties, and affirmative action in respect of “disadvantaged areas and groups.” This provision of the new Constitution guarantees each county at least 15 percent of all the revenue collected, irrespective of how these criteria are applied in any financial year.

The Commission on Revenue Allocation is also to be consulted by Parliament when it is determining how to appropriate money out of the Equalization Fund (established under Article 204). The new Constitution requires the government to pay 1.5 percent of national revenue into this fund every year and to use it to provide public services to marginalized areas “to the extent necessary to bring the equality of services in those areas to the level generally enjoyed by the rest of the nation.” The new Constitution envisages that the fund will lapse 20 years following its promulgation, although Parliament may vote to extend the its operation.

In general, the new Constitution provides a more secure framework for county government, unlike its counterpart in the Independence (or *majimbo*) Constitution, which was quickly subverted following the attainment of independence. The then party in power, the Kenya African National Union, which held the view that the Independence Constitution unduly curtailed majority power, undermined the regional (or *majimbo*) governments by withholding funds and enacting legislation to circumvent the powers of the regional governments.<sup>42</sup>

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42 Stephen N. Ndegwa, “Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics,” *American Political Science Review* 91 (1997): 599-606.

To preclude the national government from undermining county governments, various provisions of the new Constitution endeavor to ensure the sustainability of the latter. First, the new Constitution establishes institutionalized mechanisms for sharing national revenue. These are buttressed by Article 190, which imposes a *duty* on Parliament to enact a law to “ensure that county governments have adequate support to enable them to perform their functions.” Second, Article 188 provides that the boundaries of counties may only be altered by a resolution of each house of Parliament supported by at least two-thirds of the members of each. Such a resolution must be based on the recommendations of an independent commission that presumably is the Independent Electoral and Boundaries Commission.

Third, although Articles 190 and 192 grant the national government and the president power to intervene in the running of county governments, the exercise of this power is regulated. Article 190 empowers the national government to intervene if a county government is unable to perform its functions or does not operate a financial management system that adheres to the requirements set by national legislation. When the national government seeks to intervene in the affairs of a county government on any of these grounds, the new Constitution requires Parliament to enact a law that orders the national government to give the affected county government notice of any measures it intends to take. Even more significantly, perhaps, the new Constitution requires that such a law should mandate the national government to take measures that assist the county government in resuming full responsibility for its functions. The new Constitution also requires that the envisaged law should establish procedures and processes through which the Senate will bring the intervention of the national government to an end. Article 192 gives the president power to suspend a county government during an “emergency arising out of internal conflict or war” or “other exceptional circumstances.” While the president has unlimited powers with respect to emergencies, a county government can only be suspended on the basis of “exceptional circumstances” following an investigation by an independent commission of inquiry and authorization of the Senate, which is also given the power to terminate the suspension. The suspension in any case cannot exceed 90 days.

Above all, the new Constitution shields its provisions on county government from being amended easily. Article 255 categorizes “the objects, principles and structure of devolved government” as one of the fundamental norms of the constitution, whose amendment requires the approval of the people in a referendum that is to be preceded by a process of parliamentary debate and public discussion.

All in all, the provisions of the new Constitution on devolution promise to enhance perceptions of national (as opposed to ethnic) citizenship, since they aim to ensure equitable sharing of national resources. By doing so, they arguably enhance the stakes of communities that have hitherto felt or been marginalized in sustaining the entity called Kenya. Should they be implemented, these provisions would enhance the livelihoods of all ethnic communities, thereby making it more arduous for political actors to divide the citizenry along ethnic lines.

It should be noted, however, that the oppression of minorities and marginalized groups that has been prevalent at the national level could be reproduced in the counties. The drafters of the new Constitution were aware of this potential problem. Article 197 requires Parliament to enact legislation to ensure that the community and cultural diversity of a county is reflected in its assembly and executive committee; and prescribe mechanisms to protect minorities within counties. Further, Article 200 requires Parliament to enact legislation that will, among other things, provide for the manner of election or appointment of people to and their removal from offices in county governments, including the qualifications of voters and candidates. This is an essential law that should be enacted as soon as possible, because it could prevent the oppression of minorities and marginalized groups within counties and facilitate uniformity, democracy, and order in their governance. Parliament has two options here. Either it can enact a “Governance of Counties Act” that all counties have to comply with; or it can enact a framework law containing essential governance principles that all county constitutions have to comply with. In the latter scenario, each county would be left to produce its own constitution through a democratic process. Given the urgency of the need for such a law, it is arguable that the former approach is more appropriate.

### Land Reform

The reform of policies and laws addressing land and its administration is also critical to any initiatives that seek to facilitate the attainment of transitional justice. The administrative framework that oversees Kenya's complex land law regime is poorly coordinated and gives excessive power to administrators without establishing mechanisms to ensure that they not only perform their duties but also do not abuse their powers. This explains why corruption is rampant in the government agencies that administer land. Indeed, the shortcomings of the land redistribution and willing seller-willing buyer programs initiated in the post-independence period can largely be attributed to this factor. In either case, there were simply no institutional mechanisms for ensuring fairness among the potential beneficiaries. Whether or not one could be a beneficiary therefore tended to depend on their access to political power. This situation was made worse when the previous Constitution was amended to give the president power to treat public land like his personal property. For those without access to political power, politically driven exclusions from owning land has bred deep resentment, especially where the political patrons and administrators who control access to land are perceived to favor members of their own ethnic communities.

It should also be noted that the constitutional guarantee of private property is imposed on a political and cultural context in which territory is synonymous with ethnic citizenship. In practice, this has meant that one is only free to own private property anywhere in the country so long as the "native" owners of the land permit. The perception here is that individual ownership of "community" land by "outsiders" reduces the territory of the ethnic community, thereby undermining its continued existence. This circumstance is a legacy of the colonial experience, which created 'dual citizenship' under which one is first and foremost a citizen of his or her ethnic community, and then a citizen of Kenya.<sup>43</sup> By the logic of this bifurcated citizenship, there *must* be a territory that each native can call home. In a context in which the constitution protects even private property that has been acquired illegally or illegitimately, the foregoing considerations of ethnic citizenship complicate and politicize land matters even further.

How does the new Constitution propose to resolve these complex land issues? First, Article 67 establishes a National Land Commission (NLC) that will, among other things, conduct investigations into "historical land injustices" and recommend appropriate redress. Historical land injustices are "grievances which stretch back to colonial land administration and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date."<sup>44</sup> Second, Article 68 requires Parliament to enact a law that will "enable the review of all grants or dispositions of public land to establish their propriety or legality." Finally, Article 40 provides that while the state has a duty to pay prompt and just compensation to the owner of private property it has acquired compulsorily, it is under no such duty when the property in question "has been found to have been *unlawfully* acquired." Unlike the previous situation in which private rights to land were sacrosanct irrespective of the lawfulness of their acquisition, the new Constitution therefore only extends constitutional protection to legally acquired land rights.

It should be noted that Sessional Paper No. 3 of 2009 on National Land Policy constitutes a framework for the realization of the provisions of the new Constitution dealing with land. Civil society actors should therefore monitor and contribute to the implementation of this important policy. In particular they should monitor and contribute to the investigation and resolution of historical land injustices.

The new Constitution thus establishes principles and mechanisms for resolving the claims of dispossession that have so often been used by political actors to mobilize their constituents along ethnic lines. Its principles and mechanisms on the resolution of historical land injustices and on state acquisition of unlawfully acquired private property so that it can be used to benefit the public should

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43 Ibid.

44 Republic of Kenya, Ministry of Lands, Sessional Paper No. 3 of 2009 on National Land Policy, August 2009, para. 178.

be analyzed from this perspective. Further, Article 66 seeks to ensure that investments in property, such as land, benefit local communities. This provision would, for example, address the grievances of the residents of Coast Province, who claim that they have been excluded from sharing the revenues generated from tourism and other coastal resources.

As we have seen, the new Constitution also provides for affirmative action and legislation that may promote ethnic diversity in Kenyan society in the public and private sectors. Such programs and legislation can create economic opportunities for the individuals and communities that have been marginalized. By laying a framework for the creation of such opportunities, the new Constitution may ease the political tensions created around land, which now constitutes a vital resource that marginalized or minority communities often see as their only way out of poverty. Furthermore, the new Constitution seeks to enhance national citizenship through devolution and equitable sharing of national resources. If implemented, it would decrease the salience of ethnic citizenship, which has contributed to making land issues emotive.

### **Government Accountability in the New Constitution**

Whether or not the new Constitution enhances government accountability depends on the extent to which it deals with the problem of arbitrary power. A key question here is whether it establishes principles and mechanisms that will circumscribe the exercise of power in the three branches of government in general and the security agencies in particular. In this respect, it is also important to bear in mind that human rights violations and economic crimes are often facilitated by the abuse of power; those who engage in corruption often violate the human rights of others in a bid to keep power and ensure they are not held accountable for their deeds. Accordingly, enhancing accountability in the exercise of power is one way of preventing the violation of human rights and the commission of economic crimes.

#### **The Presidency**

As we have seen, human rights violations of the past can partly be attributed to the grant of unfettered powers to the president, who under the old Constitution controlled the criminal justice system and wielded unregulated powers of appointment and dismissal. In addition, Section 14 protected a sitting president from criminal liability while he held office.

The new Constitution seeks to end presidential hegemony through a number of mechanisms. First, Article 143(4) limits presidential immunity in criminal cases; the protection of the president from criminal proceedings does not extend to crimes for which he or she may be prosecuted under a treaty that prohibits such immunity. This means that the president is not immune from criminal prosecution under the Rome Statute establishing the ICC. Second, the president's powers to appoint and dismiss public officers (including judicial officers) require the approval of the legislature. Third, Article 152 caps the number of cabinet secretaries (or ministers under the old Constitution) at 22, thereby curtailing a power that previous presidents have used as a resource to dispense political patronage and subvert the democratic process by depleting the ranks of the opposition. Fourth, Article 152 requires the president to dismiss a cabinet secretary when a majority of National Assembly members adopts a resolution—based on the recommendations of a select committee—that requires the president to do so. In particular, this article would seal a loophole in the existing legal framework that has allowed ministers who have lost the confidence of the legislature (for example, because they have engaged in corruption or participated in ethnic clashes) to stay in the government.

Fifth, Article 135 seeks to facilitate accountability by requiring that all the president's decisions "shall be in writing and shall bear the seal and signature of the President." Because the old Constitution did not have similar restrictions on the exercise of presidential powers, it was exceedingly difficult to hold the president accountable for human rights violations since his decisions were invariably

verbal and therefore difficult to attribute to him. Finally, Article 145 provides that the president can be impeached for a “gross violation” of the Constitution or other law, or committing a crime under national or international law, or “gross misconduct” as determined by the National Assembly.

The foregoing provisions therefore promise to end presidential supremacy. By subjecting the powers of the president (including the powers of appointment and dismissal) to the approval of the legislature and entrusting the governance of national resources to institutions such as the NLC, the new Constitution promises to tame the practices of political patronage and clientelism, which have contributed to the creation and consolidation of perceptions of exclusion and marginalization. And by dispersing the powers of the president, the new Constitution may also make the presidency less salient, meaning that its capture would no longer be as vital as it has been throughout the history of the republic. In addition, it enhances the accountability of the presidency to the people, thereby deterring the kind of executive impunity that has facilitated the commission of human rights violations and economic crimes.

### The Public Service

Under the old Constitution, the public service was totally subservient to the president, who had power to constitute and abolish offices in the public service, to make appointments to any such office, and terminate any such appointment. Further, the terms of office for those who held such jobs were at “the pleasure of the President.” Thus he could— and often did—terminate their services at will.<sup>45</sup> In these circumstances, public officers did what they were told by the president or ministers, even when the instructions were illegal. As a result, they were often accomplices in human rights violations and economic crimes. The courts even sanctioned the transfer of public officers from one position to another without due process.<sup>46</sup> In addition, public officers seeking to safeguard the public interest were easily intimidated into implementing illegal instructions, which were invariably verbal.

In a bid to protect public officers from intimidation and to give them job security, Article 236 of the new Constitution provides that public officers will not be victimized or discriminated against for carrying out their duties in accordance with the law, or “dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.” Therefore, public officers no longer serve at “the pleasure of the President,” as Section 25 of the old Constitution proclaims. Accordingly, the new Constitution may enable public officers to resist the illegal instructions of their seniors, ministers, or the president. Further, the new Constitution provides that the decisions of the cabinet and the president must be in writing (Articles 135 and 153). These provisions may empower public officers to require the production of written instructions before taking any action.

Another significant innovation of the new Constitution is the introduction of principles on leadership and integrity, which bind *all* holders of public office (Article 73). In particular, the new Constitution establishes the principle that the authority assigned to a “state officer” is a “public trust” that must be exercised in a manner that is consistent with the purposes and objects of the Constitution and promotes public confidence in the integrity of the office. The new Constitution therefore sees public officers as holders of a public trust, who are accountable for the exercise of the powers delegated to them.

The new Constitution also introduces strict rules on conflicts of interest that, if implemented, would prevent the abuse of power that so often leads to human rights violations and economic crimes. Article 75 imposes a duty on state officers to “behave, whether in public and official life, in private life, or in association with other persons in a manner that avoids any conflict between personal interests and public or official duties.” Further, Article 79 requires Parliament to enact a law to establish an Independent Ethics and Anti-Corruption Commission whose main function is to ensure compliance

45 J.B. Ojwang, *Constitutional Development in Kenya* (Nairobi: ACTS Press, 1990), 91.

46 See *Republic v. The Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of the President and the Permanent Secretary, Ministry of Gender, Culture and Social Services ex parte Stanley Kamanga and the Kenya National Library Services Board*, Nairobi High Court, Misc. Civ. Appl. 612 of 2004, [2006] eKLR.

with and enforce the provisions of the Constitution on leadership and integrity, including conflicts of interest. Among other things, these provisions may prevent state officers from abusing their power in the process of trying to acquire private property or pursuing other private interests. These provisions may therefore seal a regulatory gap that was created when the Duncan Ndegwa Commission of 1970 recommended that public servants be allowed to own private property and run businesses.<sup>47</sup> While the Ndegwa Commission suggested that public servants would only be permitted to do so under strict conditions, and even recommended establishing the office of an ombudsman to investigate and monitor the performance of public servants, the government did not implement these recommendations. As a result, the decision to permit public servants to own private property and run businesses led to widespread abuses of office and corruption.

One notable shortcoming of the new Constitution is that it fails to regulate the process of transforming the Kenya Anti-Corruption Commission into the Independent Ethics and Anti-Corruption Commission. It is therefore unclear how the two institutions will function together in light of their overlapping mandates. Parliament should therefore enact a law to facilitate the process of transition in order to prevent confusion and potential conflicts between the two bodies.

### Criminal Justice

In the area of criminal justice, the new Constitution seeks to enhance objectivity and accountability in investigations and prosecutions. Section 26 of the old Constitution gave the attorney general the power to decide if and when an individual should be prosecuted for a criminal offense. Further, it gave the attorney general the power to take over and continue criminal proceedings that had been instituted or undertaken by persons or authorities, and to terminate any prosecution. This power was often abused and led to prosecutions that got dropped along the way. The failure to regulate this power resulted in the law being used to persecute innocent citizens, to the detriment of the legitimacy of the criminal justice system. In the context of human rights violations and economic crimes, this power was often applied selectively; the perpetrators of the crimes were hardly ever prosecuted.<sup>48</sup>

In the new Constitution, the task of exercising the state's powers of prosecution will now be exercised by the office of an independent Director of Public Prosecutions (DPP) (Article 157). The primary functions of the attorney general will be to give legal advice to the government and represent it in legal proceedings (Article 156). It is worth noting that the new Constitution requires the current attorney general to leave office not later than 12 months after it takes effect. This should be seen as a vetting exercise, given that the attorney general is considered to be "not just complicit in, but absolutely indispensable to, a system which has institutionalized impunity in Kenya."<sup>49</sup>

The DPP can only take over a criminal suit with the permission of the person or authority who instituted it. In addition, the DPP can only discontinue a prosecution with the permission of the court. And to preclude the abuse of the power to prosecute, the new Constitution requires that its exercise "shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

### The Legislature

The business of the legislature is primarily conducted in, or through, committees. The committee system enables the legislature to organize its affairs and to shadow the operations of government ministries, departments, and agencies.<sup>50</sup> However, in the absence of effective accountability mechanisms, the legislature may abuse its powers (of policy making, legislating, and exercising oversight of

47 See C. Odhiambo-Mbai, "Civil Service Accountability and Governance in Kenya Since Independence," *African Journal of Political Science* 8 (2003): 113.

48 CIPEV Report, 455.

49 United Nations Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Kenya, May 26, 2009, 15-16.

50 Joel Barkan and Fred Matiangi, "Kenya's Tortuous Path to Successful Legislative Development," in *Legislative Power in Emerging African Democracies*, Joel Barkan, ed. (Boulder, CO: Lynn Rienner, 2009), 48-49.

the executive branch), and it may be vulnerable to the undue influence of special interest groups. And while different interest groups are entitled to lobby the legislature to make favorable verdicts, policies, and laws, there should be mechanisms to ensure that interest groups seeking favorable legislative outcomes do not subvert the public interest. Such mechanisms include those that regulate lobbying, conflicts of interest, misconduct, and abuse of power. Furthermore, the absence of proper regulation in Kenya has meant that legislators can serve on committees even though their membership would entail a conflict of interest—either because they face allegations of corruption, are allegedly allied to corruption cartels, or have commercial interests that are overseen by these committees.<sup>51</sup> There are also allegations that legislators have taken bribes from fellow legislators and other wealthy individuals to influence the deliberations of the legislature.<sup>52</sup> Such corruption facilitates impunity and hinders efforts to hold human rights violators and those who commit economic crimes accountable for their abuse of power.

Various provisions of the new Constitution seek to enhance the accountability of the legislature. Article 118 imposes a duty on Parliament to facilitate public participation and involvement in the business of Parliament and its committees, while Article 119 gives every person the right to petition Parliament “to consider any matter within its authority.” Article 104 also gives the electorate the right to recall the member of Parliament representing their constituency and imposes a duty on Parliament to enact legislation that will establish the grounds and procedures according to which an MP may be recalled.

It should be noted that although these provisions may constitute useful mechanisms for holding the legislature and legislators to account, they would need to be accompanied by legislative mechanisms to regulate lobbying, conflicts of interest, misconduct, and abuse of power in the legislature. In this context, the provisions of new Constitution dealing with leadership and integrity, including those governing conflicts of interest, provide a much-needed framework for regulating the conduct of legislators.

### The Judiciary

In the case of the judiciary, the failure to regulate the president’s and the chief justice’s powers of appointment and dismissal, as well as the administrative powers of the latter, often aided human rights violations and economic crimes and undermined the legitimacy of the judiciary as a forum for dispute resolution. These powers have been exercised in ways that, respectively, undermine the institutional autonomy and authority of the judiciary and the independence of judicial officers. As a result, judicial officers are not only insecure in their positions, but may also become enablers of human rights violations and corruption.

The system for appointing judges has been open to abuse since it establishes no standards or criteria for vetting candidates. Thus a recent task force established to examine the question of judicial reform noted that “The process through which candidates for appointment are currently identified and vetted by the Judicial Service Commission is neither transparent, nor based on any publicly known or measurable criteria and is certainly not competitive.”<sup>53</sup> Accordingly, the individuals who become judicial officers are not necessarily the most deserving. Arguably, such judicial officers are likely to perceive it to be in their best interest to protect the interests, and even misdeeds, of the appointing authority. Further, Section 61 of the old Constitution gave the president power to appoint judges in an acting capacity. This power was inimical to judicial independence since an acting judge awaiting confirmation would be vulnerable to executive pressure. For the most part, therefore, judges have not been insulated from external influences.

51 World Bank, *Understanding the Evolving Role of the Kenya National Assembly in Economic Governance in Kenya: An Assessment of Opportunities for Building Capacity of the Tenth Parliament and Beyond*, Report No. 45924-KE, May 2008, 24.

52 Njeri Rugene, “Bribery Rampant in Kenya’s Parliament,” *Sunday Nation*, May 17, 2009.

53 Republic of Kenya, Report of the Task Force on Judicial Reforms 2009, 32.

With respect to the removal of judges, Section 62 of the old Constitution provided that the chief justice and other judges could be dismissed by the president for inability to perform the functions of their office or for misbehavior if an impartial tribunal recommended their removal. Unfortunately, the old Constitution failed to establish due process mechanisms to ensure that the process of removal—including the exercise of the power to recommend the establishment of a tribunal—was transparent, impartial, and fair. So the threat of removal then served to operate as the proverbial sword of Damocles, in the sense that judicial officers never knew when it might strike.<sup>54</sup>

In addition, it should be noted that the chief justice wielded immense powers that may have threatened the independence of judges. For a long time, the judiciary was treated as a branch of the public service. This status changed in the early 1990s when it was placed under the charge of the chief justice, whose powers were thereby enhanced. As the head of the judiciary, the chief justice wielded wide-ranging but unregulated powers, including the power to determine which judges hear what cases, where litigants can file their cases and how, supervising and disciplining judges and other judicial officers, allocation of office space, housing, and cars for judicial officers, transferring judicial officers from one geographic station to another, and initiating the process of removal of judges.<sup>55</sup> Because the exercise of these powers was not circumscribed, they could be abused to the detriment of judicial independence and accountability. Thus, judges confronted with these powers might have been inclined to do the chief justice's bidding.

How does the new Constitution propose to enhance the independence and accountability of the judiciary? In the first place, the new Constitution disperses judicial authority. Although the chief justice is still the head of the judiciary, the new Constitution establishes three superior (in addition to subordinate) courts. These are the Supreme Court, the Court of Appeal, and the High Court.<sup>56</sup> It also establishes the offices of Deputy Chief Justice (as the Deputy Head of the Judiciary) and Chief Registrar of the Judiciary, who is the judiciary's chief administrator and accounting officer (Article 161) and shall administer the Judiciary Fund established by Article 173 to enhance the financial autonomy of the judiciary. The new Constitution distributes power within the judiciary by providing that the chief justice will preside over the Supreme Court, while the Court of Appeal and the High Court will each be presided over by a judge elected by the judges of these courts from among themselves (Article 164).

Article 166 of the new Constitution seeks to give the judiciary autonomy from the executive. It states that the president will now appoint the chief justice and judges of the superior courts, subject to the recommendations of the Judicial Service Commission and the approval of the National Assembly. The membership of the Judicial Service Commission has been expanded. Thus Article 171 empowers the president to appoint one man and one woman who are not lawyers to "represent the public" in the commission. The subordinate courts, practicing lawyers, and the legal academy will also be represented in the commission.

Article 168 of the new Constitution circumscribes the power to dismiss judges. Unlike before, the process of removing the chief justice and judges will now be initiated by the Judicial Service Commission. Acting on its own motion, or on the petition of "any person," this commission is required to give a hearing to the affected judge and to send the petition to the president only when it is satisfied that there are grounds for removal. Upon receiving the petition, the president is then required to appoint a tribunal to inquire into the matter. In the case of the chief justice, this tribunal consists of the Speaker of the National Assembly (as chair), three "superior court judges" from common law jurisdictions, one advocate of 15 years standing, and two other people with experience in public affairs. In the case of other judges, the composition of the tribunal remains the same, except that the three

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54 Thus the Kenya Section of the International Commission of Jurists, *Judicial Independence, Corruption and Reform* (2005) on 20, observes "The possibility that they could be next in line to be publicly castigated and removed from office without due process has lowered the general esprit de corps of the judiciary as a whole."

55 See, e.g., Republic of Kenya, Report of the Task Force on Judicial Reforms(2009), 54.

56 New Constitution of Kenya, Articles 163-65.

judges need not be sourced from other common law jurisdictions. Although the affected judge has a right to appeal to the courts, the president is empowered to “act in accordance with the recommendations of the tribunal.” Save for the fact that the power of the president to appoint members of the tribunals is unregulated, the new Constitution introduces due process and certainty in the exercise of the power to dismiss judges; this may enhance security of tenure and independence of judges.

Another notable feature of the new Constitution is that it provides a framework for the vetting the judiciary. It requires the current chief justice to leave office within six months after it takes effect (Clause 24, Sixth Schedule). It requires Parliament to enact a law within one year after it takes effect that establishes mechanisms and procedures for vetting the suitability of all judges and magistrates to continue to serve in accordance with the values and principles established in Articles 10 and 159.

While these provisions are commendable, care should be taken to ensure that they do not facilitate witch hunting, a scenario that is plausible given the vagueness of some of the principles established in these articles. For example, a principle such as “patriotism” can be interpreted in different ways, and it would fly in the face of fairness to dismiss judges on the grounds that they have not been patriotic. The need for fairness and due process in the implementation of these provisions is made even more urgent by the fact that the removal, or the process leading to the removal, of judges under these provisions “shall not be subject to question in, or review by, any court” (Clause 23(2), Sixth Schedule). In this regard, we can learn from the experience of other countries, in which the performance or competence of judges is assessed by reference to criteria that facilitate objective analysis such as “willful misconduct” in office, integrity, and conduct prejudicial to the administration of justice, or conduct that brings the judicial office (or judiciary) into disrepute.<sup>57</sup>

By regulating the president’s powers to appoint and dismiss judges, and by dispersing the chief justice’s administrative powers, the new Constitution promises to enhance the independence of the judiciary. It expands the membership of the Judicial Service Commission so that it includes ordinary members of the public for the first time. In this way, the new Constitution is likely to facilitate accountability in the exercise of judicial power, thereby enhancing the legitimacy of the judiciary, a lack of which has contributed to the violation of human rights.

## Security Sector Reform

The existing security apparatus is deficient in a number of respects. First, policing under the old Constitution was executive-dependent, undemocratic, and inequitable. The existing legal framework ensured that the security agencies only serve the interests of the political regime in power, to the detriment of crime control and protecting citizens’ human rights.<sup>58</sup> For example, the Akiwumi Commission, which inquired into the tribal clashes of the 1990s, unequivocally concluded that the police and the Provincial Administration “connived” in the perpetration of the clashes.<sup>59</sup> Second, public security provision is characterized by wide discretionary powers, which are prone to abuse because they are largely unregulated. Third, the police are often heavy-handed, insensitive, and use excessive force in dealing with citizens, who therefore have little faith in them. As a result, public trust—a prerequisite for effective policing—has been nonexistent. Fourth, security governance is not participatory, and the citizens are not consulted in making security decisions. Finally, there are no mechanisms to ensure the accountability of joint police/military operations, which therefore operate in a regulatory vacuum.

The new Constitution embraces the principles of democratic governance of security in a number of respects. Article 238 establishes principles that would guide the provision of national security,

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57 See, e.g., Jean E. Dubofsky, “Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability,” *Fordham Urban Law Journal* 34 (2007): 315.

58 See Migai Akech, “Public Law Values and the Politics of Criminal (In)Justice: Creating a Democratic Framework for Policing in Kenya,” *Oxford University Commonwealth Law Journal* 5(2) (2005): 225.

59 Republic of Kenya, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya (1999), 284.

including “utmost respect for the rule of law,” democracy, human rights, and fundamental freedoms. It requires the national security organs (which now consist of the Kenya Defence Forces, the National Intelligence Service, and the National Police Service) to respect the diverse cultures of all communities in performing their functions. It also imposes a duty on state organs to ensure that their personnel “reflect the diversity of the Kenyan people in equitable proportions.” This is an important principle whose implementation would enhance the legitimacy of the security apparatus by preventing a situation in which the heads of all the main security agencies are from the same ethnic community. Article 239 also prohibits national security organs from acting in a partisan manner, or furthering the interests of political parties or causes, or prejudicing a “legitimate political interest or cause.” This Article subordinates the national security organs to civilian authority, thereby laying a basis for democratic governance of security.

Article 240 establishes a National Security Council, which consists of the president, deputy president, three cabinet secretaries (responsible for defense, foreign affairs, and internal security), the attorney general, the chief of Kenya Defence Forces, the director general of the National Intelligence Service, and the inspector general of the National Police Service. Its main function is to supervise the national security organs. The council will report to Parliament annually on the state of national security. The new Constitution therefore seeks to facilitate parliamentary oversight and control over the implementation of security policy by the executive and national security organs. However, much will depend on the effectiveness of Parliament in evaluating the functions and reports of the National Security Council.

It is perhaps inevitable that there will be national security crises that overwhelm the capacities of policing authorities, thereby necessitating the intervention of the armed forces. The Armed Forces Act contemplates such a situation and provides that the armed forces may support “the civil power in the maintenance of order.”<sup>60</sup> However, joint police/military operations have sometimes been characterized by gross human rights violations. Unfortunately, there are no mechanisms for ensuring the accountability of such operations in the existing legal framework. Article 241 of the new Constitution seeks to facilitate the accountability of the conduct of such operations to the approval of the National Assembly.

Curiously, the new Constitution is silent on who appoints the chief of the Kenya Defence Forces and the director general of the National Intelligence Service, and the processes and procedures governing their appointment and tenure. It is thus unclear how these officers will assume or leave office. While these seemingly deliberate omissions may be informed by a concern that these offices should not be unduly politicized, they may perpetuate the practice of regime maintenance, which has contributed to the lack of democracy in security governance. Presumably, the drafters of the new Constitution envisaged that the president would appoint these officers in execution of his/her capacity as the commander in chief of the Kenya Defence Forces. However, for as long as the president retains unregulated powers to appoint these officers, it is arguable that the operations of the Defence Forces and the National Intelligence Service will be dominated by the imperatives of regime maintenance. In particular, there is a need to ensure public accountability in the collection and use of information relating to national security and intelligence.

Article 243 of the new Constitution places the Kenya Police Service and the Administration Police Service under a single command: the It requires the service to adhere to a number of principles, including professionalism and discipline, transparency and accountability, compliance with human rights and fundamental freedoms. It also requires the service to prevent corruption and to foster and promote relationships with the broader society. The service is headed by an inspector general appointed by the president with the approval of Parliament. The inspector general serves for a single four-year term, although the president may dismiss him or her without any reference to Parliament

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60 Armed Forces Act, Chapter 199, Laws of Kenya, Section 3(1).

for “serious violation” of the Constitution, gross misconduct, physical or mental incapacity, incompetence, bankruptcy, or any other just cause.

These provisions of the new Constitution fall short of establishing a single police agency, as CIPEV recommended. However, it is arguable that the objective of integrating the two policing agencies can still be realized by enacting a law (as envisaged by Article 243) that introduces uniformity in the practices of the two agencies and shields them from political manipulation. Such legislation would then need to be accompanied by uniform force standing orders, guidelines, and operational arrangements on the rationale that only such reforms would enable the inspector general to exercise effective command over the National Police Service.

It should be noted that the new Constitution does not establish an explicit framework for civilian oversight of policing; that is, it does not establish a body whose exclusive mandate is to investigate complaints against the police and hold them accountable for the use of their powers. Nevertheless, Article 59 establishes a Kenya National Human Rights and Equality Commission, whose functions include monitoring, investigating, and reporting on the observation of human rights by national security organs. But the experience of the Kenya National Commission of Human Rights, which has found the task of holding the police to account exceedingly difficult, suggests that the country now needs a body with an exclusive focus on the police. In this regard, it should be noted that the National Task Force on Police Reforms is currently developing a law on civilian oversight of policing, which may ensure police accountability despite the absence of an enabling framework in the new Constitution.

The new Constitution also *retains* the Provincial Administration and orders the national government to “restructure [it] to accord with and respect the system of devolved government” (Clause 17, Sixth Schedule). While the retention of the Provincial Administration may be influenced by the role that it plays as a symbol of the authority or presence of government throughout the republic,<sup>61</sup> the envisaged reorganization should also enhance public accountability in its deployment in national security and intelligence affairs.

A major shortcoming of the new Constitution is that it does not provide for vetting police officers who bear responsibility for human rights violations and economic crimes. Commissions of inquiry and task forces dealing with police reforms have all suggested that vetting police officers is a prerequisite to transforming the police. In particular, implanting the recommendations of the National Task Force on Police Reforms should form part and parcel of the implementation of the provisions of the new Constitution dealing with policing. Among other things, this task force recommended that all officers be subjected to a review against criteria such as professionalism, integrity, track record, and psychological fitness. There is a need to implement these recommendations to the extent that they promote the values of the new Constitution.

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61 See Salim P. Ndemo, *Epitome of State Power: The Provincial Administration in Kenya* (Nairobi: Regional Institute for Cooperatives, 2007).

## 4. The Challenges: Realizing the New Constitution

The new Constitution establishes rules, principles, and mechanisms that, if implemented, will strengthen the ability of the country to redress past wrongs and end impunity by ensuring accountability in the exercise of governmental power. Even if it takes effect, however, its gains may be derailed unless the statutory order is transformed so that it can conform to the values and principles of this Constitution. As we have seen, the arbitrary powers of government are largely derived from the statutory order. Democratization initiatives in Africa have tended to concentrate on enhancing ballot-box democracy and enacting new constitutions. These reforms have failed to grasp the fact that much of the power of government is exercised by the president through bureaucrats who regulate the daily lives of citizens and therefore exercise broad delegated powers. So that bureaucrats do not simply implement laws and regulations in the course of executing their duties they often interpret such laws and regulations. For example, such laws and regulations often give bureaucrats the power to decide “as they think fit.” In practice, the breadth and lack of effective regulation of such discretionary powers means that, for the most part, the bureaucrats do as they wish, irrespective of constitutional prescriptions. In addition, judicial review is not an adequate tool for regulating such routine powers since only a few cases will come to the attention of the courts. A need therefore arises to address the abuse of power by public officers at the most basic level of public administration, such as police sergeants, clerks at the lands office, municipal clerks, and tax assessors.<sup>62</sup> Thus while new constitutional prescriptions may be necessary, they will typically be insufficient to ensure government accountability.

In terms of making these low-level public officers accountable, a key challenge relates to how the laws and regulations that give the statutory order its imperial or authoritarian character can be transformed so that they can conform to the demands of constitutionalism. How, then does the new Constitution address this problem? It provides that “All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution” (Clause 7[1], Sixth Schedule). The new Constitution gives public administrators and other government officers considerable latitude in deciding how they will interpret existing statutory laws. Given the limitations of judicial review, such latitude may have the effect that public administrators will continue to be “the real source of the laws governing society’s routine social and economic activity.”<sup>63</sup> In other words, the law will continue to be what the public administrator or police officer declares it to be.

The new Constitution also requires the development of legislation and administrative procedures required to implement it, with the effect that some of the repressive statutory laws may or may not be repealed. Article 262 establishes a Commission for the Implementation of the Constitution, which

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62 H. Kwasi Prempeh, “Africa’s ‘Constitutionalism Revival’: False Start or New Dawn?” *International Journal of Constitutional Law* 5 (2007): 469-74.

63 *Ibid.*

will work together with the attorney general and the Constitutional Implementation Oversight Committee (a select committee of Parliament) to enact the laws that need to be passed, which are set out in the Fifth Schedule. Without a doubt, the enactment of these laws will enhance the accountability of the statutory order. However, since much of the power of government resides in the statutory order—and political regimes will want to retain such power—it can be expected that the process of enacting the laws that facilitate the realization of the principles and mechanisms of the new Constitution will be highly contentious. For this reason, the work of the Commission for the Implementation of the Constitution needs to be participatory and accountable.

In the context of transitional justice, civil society organizations should monitor the work of this commission to ensure that it enacts statutes that adhere to the principles and values of the Constitution. Second, they should monitor how public officers and courts interpret existing statutes, with a view to ensuring that they uphold the principles and values of the new Constitution. Third, they should develop the capacity to undertake public interest litigation, which can contribute to the realization of the principles and values of the new Constitution. And fourth, they should also review existing bylaws, regulations, codes of conduct, and governance practices with a view to suggesting how they can be made compatible with the new Constitution.

Another area of concern relates to appointments. If the right people are not appointed to the offices created by the new Constitution, no meaningful change can take place. The problem is that in many instances, the new Constitution requires the president to nominate officeholders (like the attorney general, director of public prosecutions, cabinet secretaries, principal secretaries, the chief justice, and other judges) for approval by Parliament without establishing clear criteria for determining the suitability of individuals for these offices. The new Constitution assumes that members of Parliament will actually play their roles and rigorously vet nominees for public office. But the absence of nomination criteria encourages horse-trading among the key political parties. Should this happen, it would greatly undermine the objective of the new Constitution of giving Kenya public servants who pass the integrity test. Civil society should therefore advocate for the enactment of a law or laws establishing suitable nomination and appointment criteria that would facilitate the realization of the new Constitution, especially its provisions on leadership and integrity.

## 5. Conclusion

Ultimately, the new Constitution establishes rules, values, and principles that, if realized through strong enforcement and legislative measures, can contribute significantly to attaining justice and a just society based on the rule of law. It removes the bulk of the president's powers that have facilitated violations of human rights and contributed to the growth of a culture of impunity. It enhances the accountability of the public service, legislature, judiciary, and security agencies. In addition, the Constitution addresses issues of inequality and seeks to ensure inclusive citizenship. In doing so, it gives the country much-needed mechanisms for resolving perennial problems. But while it establishes a governance framework that can ensure the realization of a just society, much will depend on the extent to which its rules, values, and principles are realized day to day. And to ensure the achievement of the limited and accountable government promised in the new Constitution, Kenyans in general and civil society organizations in particular need to put pressure on government to repeal extant repressive statutes and institutional practices in a timely manner and bring them in line with the values and principles of the new Constitution.



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