

LIMITS ON STATE POWER: EXAMINING THE ROLE OF INDEPENDENT COMMISSIONS AND OFFICES UNDER CONSTITUTION OF KENYA, 2010¹

ABSTRACT

Kenya promulgated the new constitution on 27th August 2010. The constitution was a culmination of the efforts of the Kenyan people to bring about a more progressive governance set-up. Kenyans affirmed the new constitution as the supreme law of the Republic, which binds all persons and all state organs.

In view of the limits being imposed on the state powers and subsequently in line with the doctrine of separation of powers as enunciated by the former French philosopher Montesquieu, it is now evident that all powers to be exercised in public functions, must flow from the constitution. Additionally, national values and principles of governance, as set out in Article 10 of the Constitution, underpin the conduct of governance in every respect.

In limiting the state power, the constitution frees and empowers every citizen from the tyranny of the State; police brutality, arbitrary imprisonment, suppression of freedom of speech, unfair taxation among other past documented injustices.

The Constitution of Kenya 2010 has established eleven independent constitutional commissions which include the following; Kenya National Human Rights and Equality Commission; National Land Commission; Independent Electoral and Boundaries Commission; Parliamentary Service Commission, Judicial Service Commission; Commission on Revenue Allocation; Public Service Commission; Salaries and Remuneration Commission; Teachers Service Commission; Ethics and Anti Corruption Commission and the National Police Service Commission. The Constitution also establishes two independent offices which are the office of the Auditor General and Controller of Budget.

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It is worth noting that Article 249 of the Constitution of Kenya 2010 sets out the main objectives of the commissions and the independent offices as follows; to protect the sovereignty of the people; to secure the observance by all State organs of democratic values and principles; and to promote constitutionalism. The commissions and the holders of independent offices are independent and not subject to direction or control by any person or authority. They are only subject to the constitution and the law.

In this paper we shall focus on the role of these commissions, their constitutional mandates and whether they continue to perform and deliver as expected. We shall also analyse whether there are any overlapping mandates which hinder the effective operations of the commissions. However we shall also argue that there is no 'absolute' limits on state power despite clear provisions in the constitution in respect to the same and this continues to be part of the emerging challenges being experienced by these constitutional commissions and other independent offices.

1. INTRODUCTION

Kenya heralded a new era of governance with the promulgation of a new Constitution on 27 August 2010. The Constitution as the Supreme law binds all persons and organs of the state including independent commissions and offices.² In applying, enacting, interpreting and/or implementing the Constitution or any other law or public policy decisions, the Constitution obligates observance of national values and principles of governance which comprise of *inter alia*: the rule of law, democracy, sustainable development, integrity, transparency and accountability.³

In view of the above, the Constitution of Kenya, 2010 established independent Commissions and Offices that would execute various constitutional duties to enable the realization of its objectives and aspiration. The *modus operandi* of these constitutional Commissions and Offices is ingrained in their independence of operation from each other as well as from the three arms of the government as alluded by Montesquieu's theory of separation.⁴ To abide to each other's independence, the prerequisite requirement is the observance of the rule of law.

The rule of law in simple terms refers to the autonomy and superiority of law or legal order over other normative structures such as politics and religion.⁵ According to Bo Li, the rule of law as an autonomous legal order, performs the following three functions: act as a regulator of

² Article 2 of the Constitution of Kenya, 2010 asserts Supremacy of the Constitution over other laws of Kenya and binds all persons and state organs at both levels of government.

³ Article 10 of the Constitution of Kenya, 2010.

⁴ Montesquieu's separation of power theory advances that to prevent abuse of authority; power should be divided to different organs of the state. For more see, Montesquieu, *Spirits of Laws* (1748), available at <http://socserv.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf>, (accessed 20 August 2013).

⁵ See, Bo Li, What is Rule of Law? Perspectives, Vol. 1, No.5, available at http://www.oycf.org/Perspectives2/5_043000/what_is_rule_of_law.htm, (accessed 20 August 2013).

government power by limiting arbitrariness and power abuse; secondly, it mandates equality before the law; and lastly, it dictates fair procedure and formal justice.⁶

In being fideliou to the law, independent commissions and offices should abide to the Constitution to achieve their objectives as espoused in Article 249 of the Constitution. This is in the latter and spirit of the rule of the law.

From the foregoing, this paper seeks to evaluate the role of the constitutional independent commissions and offices from the perspective of whether they have adhered to the rule of law in their execution of their respective mandates and their delivery of services. The paper shall further analyze potential or actual overlapping mandates which might hinder the effective operations of these commissions and offices. The paper shall also advance the argument that there is no ‘absolute’ limits on state power despite clear provisions in the Constitution in respect to the same and this continues to be part of the emerging challenges being experienced by these constitutional commissions and independent offices.

Lets have a discussion on the main roles of select commissions and independent offices established under the Constitution of Kenya, 2010.

1.1 Public Service Commission

The Public service Commission (PSC) is established by the Constitution of Kenya (2010) and by the Public Service Commission Act No. 13 of 2012 comprising of the chair, vice chair and seven other Members. It has the power to hire and fire senior personnel in the public service and structure it. The PSC will continuously set the terms of service of all national public officers and ensure the public service delivers quality services to the public. This noble role is undertaken by

⁶ See, Bo Li, What is Rule of Law? Perspectives, Vol. 1, No.5, available at http://www.oycf.org/Perspectives2/5_043000/what_is_rule_of_law.htm,(accessed 20 August 2013).

the PSC in meeting the threshold underpinning of the Constitution of Kenya in respect to adhering to the principles of public service delivery under article 232 (2).⁷ The functions and powers of the PSC are stipulated under Article 234 of the Constitution of Kenya 2010. They include inter alia:- development of human resources in the public service, ensuring efficient and effective public service, exercise of disciplinary control over its personnel and determination of appeals in respect of county governments' public service⁸.

1.2 Office of The Auditor-General

This is an independent office established by Article 229 of the Constitution of Kenya primarily to audit government bodies and report on their management.⁹ The roles of the Auditor –General under the Constitution of Kenya include¹⁰:

Auditing and reporting within six months of the end of each financial year the Accounts of:

- The National Assembly, the Senate and the County Assemblies;
- The National and County governments including the accounts of all funds and authorities of both national and county governments;
- All courts within the Republic of Kenya;
- Political parties that have been allocated funds by the government from public funds;

⁷ The values and principles of public service include—

- (a) high standards of professional ethics;
- (b) efficient, effective and economic use of resources;
- (c) responsive, prompt, effective, impartial and equitable provision of services;
- (d) involvement of the people in the process of policy making;
- (e) accountability for administrative acts;
- (f) transparency and provision to the public of timely, accurate information;
- (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
- (h) representation of Kenya's diverse communities; and
- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of men and women; the members of all ethnic groups; and persons with disabilities.

⁸ Article 260 of the Constitution of Kenya defines public service as a collectivity of all individuals other than state Officers performing a function within a state organ.

⁹ Available at www.en.wikipedia.org; www.kenao.go.ke. (accessed 15 August 2013)

¹⁰ Article 229 (4) of the Constitution of Kenya.

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- Every Commission and independent office established by the Constitution.
- The public debt; and
- Accounts of any other entity that legislation requires the Auditor-General to audit.¹¹

The Auditor-General may audit and report on the accounts of any entity that is funded from public funds. The Auditor-General holds office for a period of eight years and shall not be eligible for re-appointment.¹²

The Auditor-General is mandated to do the following through the audit report¹³

- An audit report shall confirm whether or not public money has been applied lawfully and in an effective way.
- Audit reports shall be submitted to Parliament or the relevant county assembly
- Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.

1.3 Commission on Revenue Allocation

Commission on Revenue Allocation (CRA) is a Constitutional Commission under the Constitution of Kenya.¹⁴

The CRA has a duty to play its role by ensuring that it involves all stakeholders in determining the formulae that will guide the sharing of revenue in the devolved system of governance. In this regard, CRA involve the National Assembly, the Senate as representatives of the wider public as well as the National Treasury in coming up with an acceptable formulae for sharing and division

¹¹ Article 229 (4) of the Constitution of Kenya.

¹² Article 229 (3) of the Constitution of Kenya.

¹³ Article 229 (6) (7) and (8) of the Constitution of Kenya

¹⁴ Article 215 as read with Article 248 (2) (f) of the Constitution of Kenya. See also the Commission on Revenue Allocation Act No. 16 of 2011.

of revenue amongst the county government. The need for public participation of members or the public either through themselves individually or through duly elected representatives is anchored in the Constitution of Kenya.¹⁵

1.4 National Police Service Commission

The National Police Service Commission (NPSC) is a newly created Constitutional Commission under Article 246 (1) as read with Article 248 (2) (j) of Constitution of Kenya whose main mandate is to oversee the recruitment¹⁶, confirm appointments, determine promotions and transfers of all officers serving under the National Police Service (Service). Similarly, the NPSC comprises of six (6) civilian commissioners and the inspector general and two deputy inspector-generals will also be in charge of discipline of all its officers.¹⁷ The Commission consist of nine (9) members, serving a six year term who are appointees of the President.¹⁸ Previously before the promulgation of the Constitution of Kenya, the Country's police force was two tiered comprising of the Kenya Police and the Administrative Police both having Independent reporting Units headed by the Commissioner of Police and Administration Police Commandant respectively. The two police units were under direct control of the Ministry of Internal Security (now Ministry of Interior and Co-ordination of National Government) that was under the office of the President.

The reassigning of the authority from the office of the President to an independent Commission, effectively freed the police from undue interference and manipulation from the executive consequently, strengthening its ability to carry out its mandate in addition, the establishment of the independent Commission has further reined in the excesses of the government in respect to recruitment of police officers in the Police Service by eliminating nepotism, bribery and favoritism that had plagued the police recruitment exercise prior to the promulgation of the

¹⁵ Article 217 and 216 of the Constitution of Kenya. See also Article 10, 118 and 232 (1) of the Constitution of Kenya on public participation .

¹⁶ Article 246 (3) of the Constitution of Kenya.

¹⁷ Article 246 (3) of the Constitution of Kenya. The role and functions of NPS are further specifically enshrined in the National Police Service Commission Act, No. 11A of 2011.

¹⁸ A person who is qualified to be appointed a High Court Judge; two retired senior police officers; three persons of integrity who have served the public with distinction; the Inspector-General of Police; both Deputy Inspector-General of the NPS-as per Article 246 (2) of the Constitution of Kenya

Constitution of Kenya 2010. Moreover, the splitting of the role and functions of the NPSC from the office of the Inspector-General has also placed a check on the functions of the Inspector-General and his two deputies as well as officers serving under him by eliminating irresponsible action(s) taken by police officers such as arbitrary arrests, extra-judicial killings, cover-ups as well as intimidation within the police service.

Consequently, the fundamental freedoms and liberties that are inalienable rights accruing to all human beings as enshrined in the Constitution have been secured.

1.5 Teachers Service Commission

The Teachers Service Commission (TSC) is a Constitutional independent Commission established by Article 237(1) and Article 248(2) of the Constitution of Kenya. The Commission comprises of nine (9) persons, one of whom is the chair while the remaining eight (8) persons commissioners.¹⁹ The selection and recruitment of members to the TSC are mainly provided under the TSC Act 2012 which provided that a select panel constituted by the President shall interview applicants for membership to TSC and forward their recommendations of successful applicants to the National assembly for further final vetting and approval prior to appointment by the President.

Recently, due to enactment of the TSC Act, a recruitment panel to interview applicants for the position of commissioner to the TSC was appointed by the President and an interview done and names of successful applicants forwarded to the National Assembly for approval. However, the process of recruitment was challenged in court by a petitioner on grounds that the selection and recruitment process was not done in accordance to the laid down procedure and law. The High Court pronounced itself on the same by ruling that the process of recruitment of the TSC

¹⁹ The TSC Act, No. 20 of 2012, does provide in detail the provisions in respect to qualification and appointment of the chair and Commissioner.

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Commissioners was flawed directing that a new recruitment be done afresh.²⁰ This ultimately shows some of the limits on the power of selection panels can be checked by the Judiciary to ensure that they act within the confines of law.

The role of TSC includes reviewing the standards of education and training of persons entering the teaching service, reviewing the demand for and the supply of teachers as well as advice the national government on matters relating to the teaching profession.²¹ Further, the TSC are responsible for:

- Registering trained teachers
- Exercising disciplinary control over teachers;
- Termination of the employment of teachers;
- Recruitment and employment of registered teachers;
- Assignment of teachers employed by the Commission for service in any public school or institution.²²

1.6 Salaries and Remuneration Commission

The Salaries and Remuneration Commission (SRC) is an independent Commission established by the Constitution of Kenya, 2010 with its primary mandate to set and regularly review the remuneration and benefits of all state officers.²³ The composition of the SRC ranks one amongst the largest independent Commissions as established by the Constitution of Kenya and comprise of a total of fourteen (14) members who serve for one term of six years.

²⁰ *Abdi Yatar vs AG and Others* Petition Number 8 of 2013, High Court -Nairobi (Unreported).

²¹ Article 237 (1) of the Constitution of Kenya.

²² Article 237 (2) of the Constitution of Kenya.

²³ Article 230(1) and 248(2) (h) of the Constitution of Kenya.

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The functions of the SRC are to advise the national and county government on the remuneration and benefit of all other public officers as well as to set and regularly review the remuneration and benefits of all state officers.²⁴

In performing its functions, the Commission is required to take the following principles into account:

- a) The need to ensure that the total public compensation bill is fiscally sustainable.
- b) The need to ensure that the public services are able to attract and retain the skills required to execute their functions.
- c) The need to recognize productivity and performance.
- d) Transparency and fairness.

Previously before the promulgation of the Constitution of Kenya, 2010 the setting and reviewing of remuneration of state officers and public officers was done in a haphazard manner. For instance, the national assembly determined their own remuneration packages, a role they abused (even after the enactment of the Constituency Development Fund Act by the ninth Parliament) by handing themselves hefty pay packages and allowances²⁵ to the detriment of the heavily burdened tax payers and the Kenyan economy at large. It is this unwanted and indiscriminate self-awarding of hefty salary increments and allowances that buttressed and informed the need for the establishment of an independent Commission to set and regularly review the salary of state officers.²⁶

²⁴ Article 230(4) of the Constitution of Kenya

²⁵ In form of car grants, severance pay, house allowance, transport allowance, gratuity and off packages.

²⁶ Article 230 (4) of the Constitution of Kenya.

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In this regard, the setting up and establishment of the SRC has incredibly got rid of the an – uniform remuneration pay pattern for various categories of state officers²⁷ by providing a uniform remuneration pay schedule for various categories of job cadres commensurate with the skills, experience and nature of work handled. As a consequence, the Commission has brought to a check the excesses of previous government bodies and State actors in respect to a dis-harmonised and inequitable remuneration pay schedule by replacing it with a harmonized pay package structure that is fiscally sustainable. This has effectively brought some sense of sanity, equity and fiscal responsibility amongst different state organs albeit with much resistance and public onslaught to SRC.

1.7 Judicial Service Commission

The Judicial Service Commission (JSC) has its constitutional role spelt out in terms of recruitment and disciplining of judicial officers. It has crucial oversight functions over the Judiciary.²⁸ The Judicial Service Commission is established under Article 171 of the Constitution of Kenya and has been expanded to reflect representation from key stakeholders, namely, the public, the Law Society of Kenya and the Judiciary amongst the following eleven (11) members²⁹:

- The Chief Justice, who shall be the chairperson of the Commission.
- One Supreme Court judge elected by the judges of the Supreme Court.
- One Court of Appeal judge elected by the judges of the Court of Appeal.

²⁷ Office of the Attorney General, Chief Justice, Heads of Parastatals and State Corporations and Constitutional Commissions, Inspector-General of Police and Deputy Inspector-General of Police, Cabinet Secretaries, Principal Secretaries, Member of Parliaments, Senators, Speaker of National Assembly, Office of Governor and Deputy Governors, Member of County Assembly, Speaker of Senate, Speaker of County Assembly amongst other State officers.

²⁸ Speech on” Critical Reforms Taking Root in the Judiciary” by Dr Willy Mutunga, S.C., Chief Justice and President of the Supreme Court of Kenya. This speech was also published in The Daily Nation newspaper on August 21, 2011

²⁹ Available at www.judiciary.go.ke (accessed 17 August 2013).

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- One High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates; the Attorney-General.
- Two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates.
- One person nominated by the Public Service Commission; and
- One woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.

The Chief Registrar of the Judiciary is the Secretary to the Commission.

The functions of the Judicial Service Commission are to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.³⁰

In performing their functions the JSC :

- a) recommends to the President persons for appointment as judges.
- b) reviews and makes recommendations on the conditions of service of judges and judicial officers, other than their remuneration and the staff of the Judiciary.
- c) appoints, receives complaints against, investigates and removes from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament.
- d) prepare and implement programmes for the continuing education and training of judges and judicial officers.
- e) advises the national government on improving the efficiency of the administration of justice.³¹

³⁰ Article 172(1) of the Constitution of Kenya.

³¹ Article 172(1) of the Constitution of Kenya.

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In the performance of its functions, the Commission is guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality.³²

Members of The Judicial Service Commission apart from the Chief Justice and the Attorney General hold office (provided they remained qualified)³³ for a term of five (5) years.

The Judicial Service Commission (JSC) also watches over individual actions and competence of judges and other judicial officers. In this regard, the JSC has powers to conduct investigations on its own initiative or on a complaint by a member of the public.³⁴ Further, the JSC has powers to appoint, receive complaints against, investigate and remove from office, or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary for any professional misconduct.³⁵

The creation and establishment of the JSC as part of the revitalized efforts to reform the judiciary and make the judiciary the guardian of the rule of law has been quite significant in providing domestic accountability for the abuses of a non-democratic past. JSC plays a major role in the recruitment of judges including the Chief Justice and Deputy Chief Justice who recommends to the President persons for appointment as judges.³⁶

In terms of achievements made so far, the JSC has transformed the face of judiciary especially in its recruitment of judicial officers, an exercise that was previously bedeviled with nepotism, cronyism and favoritism by previous government regimes. Instead, it has injected transparency, integrity and competitiveness in the recruitment process of its judges. This has ended up

³² Article 172(1) of the Constitution of Kenya.

³³ Article 251 of the Constitution of Kenya.

³⁴ Article 252 of the Constitution of Kenya.

³⁵ Article 172 of the Constitution of Kenya.

³⁶ Article 166 (1) and 172(1) ; 170(2) of Constitution of Kenya.

insulating the judiciary (being an arm of government) from Political and other partisan pressures all in an effort to institutionalize the respect of the rule of law and constitutionalism.

1.8 Parliament

The Constitution of Kenya creates a two tier legislative house comprising of the National Assembly being the lower house and the Senate the Upper house.³⁷ The Constitution³⁸ establishes the Senate consisting of Forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency; sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90; two members, being one man and one woman, representing the youth; two members, being one man and one woman, representing persons with disabilities; and the Speaker, who is an ex officio member.³⁹

The roles of the Senate are highlighted under Article 96 of the Constitution of Kenya being:

- a) Representation of the counties, and protecting the interests of the Counties and their governments.
- b) Participating in the law-making function of Parliament by considering, debating and approving Bills concerning Counties, as provided in Articles 109 to 113 of the Constitution.
- c) Determining the allocation of national revenue among Counties, as provided in Article 217 of the Constitution, and exercises oversight over national revenue allocated to the county governments.
- d) Participating in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145 of the Constitution.

³⁷ Chapter eight and Article 93 of the Constitution of Kenya.

³⁸ Article 98 of the Constitution of Kenya.

³⁹ Available at <http://www.parliament.go.ke/plone/about-parliament/senate-constitution> (accessed 17 August 2013).

1.9 National Assembly

The National Assembly is established by Article 95 of the Constitution of Kenya and comprises of two hundred and ninety members, each elected by the registered voters of single member constituencies; forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency; twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and the Speaker, who is an ex officio member.⁴⁰

The roles of the National Assembly are provided in Article 95 of the Constitution which include:

- a) Representing the people of the constituencies and special interests in the National Assembly.
- b) Deliberating on and resolves issues of concern to the people.
- c) Enacting legislation in accordance with Part 4 of this Chapter.
- d) Determining the allocation of national revenue between the levels of government, and appropriates funds for expenditure by the national government and other national State organs; and exercising oversight over national revenue and its expenditure.
- e) Reviewing the conduct in office of the President, the Deputy President and other State officers as well as initiating the process of removing them from office; and exercising oversight of State organs.
- f) Approving declarations of war and extensions of states of emergency.

The Constitution obligates Parliament as a whole to protect the Constitution and promote the democratic governance of the Republic.⁴¹

⁴⁰ Available at <http://www.parliament.go.ke/plone/about-parliament/the-national-assembly-in-the-constitution> (accessed 17 August 2013).

⁴¹ Article 94 (4) of the Constitution of Kenya.

Parliament has played an important role in respect to recruitment of state officers by vetting the list of successful applicants forwarded to them by selection panels by injecting a sense of fairness while ensuring that public appointments meet the requirements of gender and regional diversity and are devoid of nepotism, bribery and favoritism.

Senate on the other hand, plays a critical role in protecting devolution by ensuring that resources are adequately devolved to the counties as required by law.⁴²

1.10 The Independent Electoral and Boundaries Commission (IEBC)

The Independent Electoral and Boundaries Commission (IEBC) is established under article 88 of the Constitution of Kenya with the mandate of conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament.⁴³

Other duties include delimitation of electoral units, registration of voters, regulation of political parties, voter education, settling of electoral disputes and modernization and reforming of Electoral processes and systems.

IEBC ensures that elections are credible, transparent, free and fair. It is committed to upholding national values and principles of good governance and democracy.

It comprises of a nine-member Commission responsible for conducting or supervising referenda and elections of any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for:-

- a) Continuous registration of voters.
- b) Regular revision of the voters roll.

⁴² Article 96 of the Constitution of Kenya.

⁴³ The operational functions of the Commission are provided under the Independent Electoral and Boundaries Act No. 9 of 2011.

- c) Delimitation of constituencies and wards.
- d) Regulation of the process by which parties nominate candidates for elections.
- e) Settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
- f) Registration of candidates for election.
- g) Voter education.
- h) Organising monitoring, observation and evaluation of elections.
- i) Regulation of the sums of money that may be spent by or on behalf of a candidate or party in respect of any election.
- j) Development of a code of conduct for candidates and parties contesting elections; and
- k) Monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

Since inception in 2009 (then known as the Interim Independent Electoral Commission, IIEC) to 2011 when its name changed to the Independent Electoral and Boundaries Commission, it has established a secretariat, set up regional and constituency coordinating offices and implemented a number of electoral reforms.⁴⁴

1.11 National Land Commission

Chapter five of the Constitution of Kenya, 2010 comprehensively covers issues in respect to Land Environment. Article 61(1) of the Constitution of Kenya provides that all land in Kenya belongs to the people of Kenya collectively as a Nation, as communities and as individuals.

In light of the above, the protection and regulation of all matters touching on land within the Republic of Kenya are ostensibly within the purview of National Land Commission (NLC)

⁴⁴ Available at <http://softkenya.com/constitution/independent-electoral-and-boundaries-commission-iebc/> (accessed on 15 August 2013).

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which is an independent Commission established under the Constitution.⁴⁵The NLC is thus the custodian of justice and arbitrator in so far as matters concerning land use and ownership in Kenya is concerned in Kenya.⁴⁶Its Primary function or role is to:

- a) initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress
- b) to manage public land on behalf of the national and county governments;
- c) to recommend a national land policy to the national government;
- d) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
- e) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
- f) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- g) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
- h) to assess tax on land and premiums on immovable property in any area designated by law; and
- i) to monitor and have oversight responsibilities over land use planning throughout the country.⁴⁷

Land has been an emotive issue in Kenya since independence and has been characterized with piecemeal allocations of public land to private developers including improper or inappropriate administration of land to Kenyan citizens. This has left a large group of Kenyans landless or internally displaced, a problem that the new Constitution sought to address.

By and large, the establishment of the NLC is seen as a panacea to the myriad of problems afflicting Kenyans who suffered from improper land administration caused due to historical land

⁴⁵ Article 67 as read with Article 248 (2) (b) of the Constitution of Kenya. The operational functions and mandate of the Commission are clearly spelt out in the National Land Commission Act, Number 5 of 2012.

⁴⁶ Available at www.ustawi.info.co.ke. (accessed 15 August 2013).

⁴⁷ Article 67 (2) of the Constitution of Kenya.

injustices during the colonial period. The Commission was gazetted on 20th February 2013 and is in the process of implementing and discharging its role in accordance with the National Land Commission Act No. 5 of 2012 and the Constitution of Kenya. Having been gazetted a few months ago, it may not be feasible to audit its operations with a view of establishing whether it has achieved its mandate.

1.12 National Gender and Equality Commission

The National Gender and Equality Commission (NGEC) is a creature of the Constitution of Kenya, 2010⁴⁸ that inherited the powers and functions of its predecessor the Kenya National Human Rights and Equality Commission (KNHREC). It comprises of five Commissioners appointed by the President for a term of 6 years pursuant to the National Gender & Equality Act, No. 15 2011.

1.13 Commission on Administrative Justice

The establishment of the Commission on Administrative Justice is provided for under Article 59 sub article 4 of the Constitution of Kenya which states that Parliament shall enact legislation to restructure the Kenya National Human Rights Commission into two or more separate commissions. The commission is mandated to inquire into allegations of maladministration, delay, injustice among other ills in all public offices which includes both national and county governments.

48 Article 59(1)(b) of the Constitution of Kenya. The operational mandate and detailed functions of the NGEC are clearly spelt out in National Gender and Equality Commission Act No. 15 of 2011.

1.14 Constitutional Implementation Commission (CIC)

In August 2010, Kenya promulgated the new Constitution following the important document's approval at a National Referendum.

In compliance with Section 5 (1) of the Sixth Schedule to the Constitution, Parliament enacted the Commission for Implementation of the Constitution Act, No. 9 of 2010 (CIC Act). Subsequently, there was established the Commission for Implementation of the Constitution (CIC) whose mandate is described in Section 4 of the CIC Act being to monitor, facilitate and oversee the development of legislation and administrative procedures for the implementation of the Constitution. This role is to be undertaken in collaboration with The Attorney-General and The Kenya Law Reform Commission.⁴⁹ It is a role in which the Constitution envisages the cooperation of all including line Ministries and the Cabinet. It is also a role that is not confined to the Executive, and CIC, but also the two other arms of Government.

By Section 5(6) (c) of The Sixth Schedule to The Constitution, read together with Section 25 of The Commission for the Implementation of the Constitution Act, 2010, CIC is required to report, inter alia to The People of Kenya, on progress made in the implementation of the Constitution as well as any impediments to the implementation of the Constitution.

Despite having such specific mandate, CIC has not been devoid of challenges in implementing the Constitution of Kenya. According to Mr. Kathurima M'Inoti⁵⁰, Professor Yash Pal Ghai observed the following in respect to the implementation of the Constitution of Kenya, 2010:

“The mechanism for implementation is somewhat complicated, involving several bodies, a mix of political, administrative, and independent commissions. There seems to be considerable overlap between their functions. The word co-ordination occurs several times, but no indication of how co-ordination would be organised. There are risks of conflicts between the various institutions, as the required legislation touches on important

⁴⁹ Article 261(4) and Schedule 6 (5) Constitution of Kenya, 2010.

⁵⁰ In his paper titled “Beyond the Politics” Published on 17/12/2010. Mr M'Inoti is the chairman of the Kenya Law Reform Commission

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policy issues. The effectiveness of the mechanism depends on good communication and co-operation”.

CIC for instance has had numerous spats and differences over its role in the implementation of the Constitution with the Office of the Attorney-General wherein the Attorney –General in his address, stated, inter alia:

- ‘(i) That CIC has no role in the implementation of administrative procedures required to implement The Constitution of Kenya, 2010;
- (ii) That CIC’s mandate is limited to giving advisory opinions to the Attorney-General, which opinions the Attorney-General may choose to ignore or reject;
- (iii) That CIC has no veto power; and
- (iv) The advise given by The Attorney-General to his Client • is confidential and cannot be the subject of public inquiry or comment.’⁵¹

In a quick rejoinder appearing as a paid up public notice in the Local Daily Newspaper⁵², CIC sought to correct what it termed as an apparent distortion and possible misdirection that the A.G’s comments would have cost the constitutional implementation process by restating as follows:

‘Your response is such that the people of Kenya should be even more concerned. That the Attorney General can purport to casually dismiss a constitutional body and trivialize its constitutional mandate, obscures an even more worrying concern: does the Attorney General truly appreciate the fundamental re-orientation of the Constitution of Kenya 2010, and specifically its respect for the role of Chapter 15 Commissions as oversight institutions? Clearly, if the Attorney General can trash one institution, he can trash others, to the detriment and possible derailment of the entire reform program.’⁵³

⁵¹ Available at <http://www.cickenya.org/> (accessed 17 August 2013).

⁵² Available at <http://www.cickenya.org/> (accessed 17 August 2013).

⁵³ Available at <http://www.cickenya.org/> (accessed 17 August 2013).

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CIC further stated as follows:

‘...We wish to state unequivocally that CIC respects the roles of all the organs and institutions established by the Constitution of Kenya 2010, including The Office of The Attorney-General, and will continue to endeavour to work with all of them, as we undertake our responsibilities. We have not and will not do anything to undermine the role of any institution as this would be contrary to the very Constitution whose implementation we are required to oversee, and would negate our mandate. In the discharge of its mandate, CIC claims no veto power. It claims its constitutional mandate to co-ordinate, facilitate, monitor and oversee the implementation of the Constitution. To do this, CIC seeks to work in harmony with its implementation partners in terms of the letter and spirit of the Constitution. This requires that the constitutional implementation partners in turn accord respect to CIC.’⁵⁴

Three years into the implementation process, CIC has been able to report progress and co-operation from the Executive, in the discharge of its mandate to monitor, facilitate and oversee the development of administrative procedures for the implementation of the Constitution. CIC has actively engaged in the review of such procedures, with a wide cross section of implementers including Government Ministries, Departments and Agencies. Executive offices that have co-operated with CIC in the discharge of this aspect of its mandate include the Cabinet Office and the immediate former office of the Prime Minister and State Corporations amongst other public bodies and agencies.

Besides these challenges, CIC endeavors to work together with other institutions and agencies such as The State Law Office and the KLRC in translating the policies and proposals from ministries into draft legislation for its consideration before approval by the Cabinet and introduction to the National Assembly for debate and subsequent passage into law.⁵⁵

⁵⁴ Available at <http://www.cickenya.org/> (accessed 17 August 2013).

⁵⁵ Line ministries, state corporations and state agencies are required by CIC to review their laws and regulations and align them with the Constitution of Kenya, 2010 to avoid a situation where the courts will be called upon to determine the constitutionality of certain laws with the apparent danger that they may be declared null and void by being inconsistent with the new Constitution.

1.15 Kenya National Commission on Human Rights

The Kenya National Commission on Human Rights (KNCHR or the Commission) existed under the old Constitution of Kenya as KNHREC. Upon the promulgation of the Constitution of Kenya, 2010 the old Commission (KNHREC) ceased operating and was succeeded by KNCHR which inherited all the powers and status of the previous Commission.⁵⁶

The main role of the KNCHR under the Constitution of Kenya, 2010; is to promote respect for human rights and develop a culture of human rights in the Republic of Kenya.⁵⁷ Further, the Commission is by law expected to⁵⁸:

- a) to promote respect for human rights and develop a culture of human rights in the Republic;
- b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;
- c) to promote the protection, and observance of human rights in public and private institutions;
- d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;
- e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;
- f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs;
- g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;
- h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;

⁵⁶ Article 59(5) (b) (c) of the Constitution of Kenya.

⁵⁷ Article 59(2) (a) of the Constitution of Kenya.

⁵⁸ Article 59 (2) (a)-(g) of the Constitution of Kenya.

- i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;
- j) to report on complaints investigated under paragraphs (h) and(i) and take remedial action; and
- k) to perform any other functions prescribed by legislation.

In achieving its primary role, the Commission must focus on continuously implementing of its policy towards reporting, castigating taking action against human right abuses including eradicating and sensitizing the public on the extent of their rights and privileges under the Constitution. This effectively will make the public informed of their rights and effectively eliminate gross abuse of human rights arising out of low literacy levels and ignorance amongst the public. In addition, it will also enable the Commission meets its objective under Article 249 of the Constitution.

2. EMERGING CHALLENGES

Since the establishment of the Consitutional Commissions, the country has continued to experience some emergings challenges as Commissions continue to discharge there mandates, this challenges although minimal, have not greatly affected operations of any of the Commissions.

2.1 Constitutional Implementation

Kenya marked its 3rd Birthday after the promulgation of the Constitution a few days ago⁵⁹ noting how progressive and proactive it has been in implementing the new Constitution⁶⁰ although not devoid of challenges. Some of the challenges experienced so far precede the establishment of most of the Commissions, most notably, delays in the establishment and operationalisation of the Commissions. These delays set the implementation process of most of the Commissions back by

⁵⁹ On 27 August 2013

⁶⁰ The New Constitution or the Constitution as used in this article refers to the Constitution of Kenya, 2010.

a few months. However, since their establishment most of the Commissions have put in place a fast tracking mechanism and made up for the lost time.

Delay in operationalising Constitutional Commissions established under Chapter Fifteen of the new Constitution has affected implementation of the Constitution. For example, the delay in appointment of members of the Independent Policing Oversight Authority⁶¹ has affected progress in police reforms. The delay in appointment of members of the Ethics and Anti-Corruption Commission has been also affected the Ethics Commission's operations. The challenges in the appointments range from failure to attain the Constitutional requirement of gender balance, to lack of consultation between the appointing authorities and stakeholders, to challenging the appointment of some candidates in court.

2.2 Institutional, behavioral, political and operational challenges

Other challenges to the implementation process can be loosely classified as behavioural, institutional, political and operational.

These are discussed herein below.

2.2.1 Knowledge and understanding of the Constitution

A majority of Kenyans display insufficient knowledge of the Constitution. Provisions of the Constitution of Kenya, 2010 are not well understood and Kenyans are yet to internalise the Constitution. These calls for targeted civic education to ensure that public officers, the private sector and other non state actors and individuals are well educated on the Constitution and their respective roles in upholding its supremacy.

⁶¹ This is a body charged with undertaking overall civilian oversight of the work of the Police.

2.2.2 Attitude Change

Owing to long standing governance structures and public service practices propped by the previous Constitution, many individuals both in government and amongst the citizenry continue to hold a certain conservative mindset towards reform. Some administrative regulations are still undergoing review and their existence consigns the respective implementers to an old order of doing things. It is anticipated that objective and intensive education of public servants on the Constitution will help infuse the right attitude towards reform. For a smooth progression to the full implementation of the Constitution there is a greater need development of a change management strategy to ensure that the whole nation moves forth as one.

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

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

‘The continued delay is obviously prejudicial to the implementation process, and jeopardises consequential imperatives such as establishment of the Commission and preparation for the General Election.’

Further, CIC blamed the A-G for allegedly forwarding two Bills to the Cabinet for review and approval without consultations.

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

In order to optimize the opportunities and address the challenges to constitutional implementation, there is need to further clarify the mandates, roles and strategies of key actors. Of course some of these are becoming and will become clearer in the context of the struggle and process of constitutional implementation.

3. CONCLUSION

It is critical to note that despite the challenges alluded to herein, the new Constitution has consolidated gains from the reform process that began in the 1960s (and in earnest in the late 1980s) by laying the cornerstone of a transformative state that respects the rule of law through employing and practicing good governance in all spheres of the life. In addition, the Constitution heralds such profound milestones that have broadened and streamlined the governance structures through introduction of new structural, normative, institutional, policy and administrative standards that have provided opportunities for fundamental reform, albeit with numerous challenges.

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

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subject to the checks and balances that have been developed for constitutional government over the years.

It therefore follows that Kenyans must confront the challenges and seize the opportunities for optimal constitutional implementation whilst noting to remain vigilant in safeguarding the Constitution and its implementation in a manner that not only brings honour and dignity to the nation but also accords respect from fellow nations.

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