

HUMAN RIGHTS, SEPARATION OF POWERS AND DEVOLUTION IN THE KENYAN CONSTITUTION, 2010: COMPARISON AND LESSONS FOR EAC MEMBER STATES

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Abstract

This paper is essentially a study of the new governance system in Kenya and an explanation why constitutional democracy holds the key to the promotion of human rights; entrenchment of the rule of law and the realisation of good governance. The paper suggests that the concept of constitutional democracy is not the same thing as constitutional government; accordingly, to achieve constitutional democracy, a government must be both constitutional and democratic.

Further, this paper focuses on the structures, powers and organizing principles of the devolved governance and explores the challenges that lie ahead to ensure that constitutional democracy endures and is strengthened.

The Constitution of Kenya, 2010 seeks to establish a society permeated by the spirit of liberty and democracy, the spirit of the laws and the habit of order. This paper proceeds from the assumption that although the constitutional models across the East Africa Community vary considerably, they share common themes that led to the demise of constitutional democracy, human rights violations and weaker institutions of government. The design and architecture of Kenya's new constitution may, therefore, herald the beginning of the return of the East Africa Community to constitutional democracy.

A. Introduction

A historical inquiry of the foundations of Kenya's political system, traceable to the colonial rule, underscores the very political basis of Kenya's Constitution. Lord Delamere, a pioneer European farmer in Kenya believed the extension of European civilisation was desirable¹. In 1927, he wrote, "The British race is superior to heterogeneous African races only now emerging from centuries of relative barbarism²." It appeared the post independence leaders did not want to disappoint this thinking and that in essence, the struggle for independence was in fact the struggle for co-option in the class of privilege. The manner in which the political leadership dismantled the constitutional framework and falsified the hope of a new dawn in the independent Kenya was a chilling reality that the political leadership hardly identified with the disenfranchised masses, and used every opportunity to disadvantage them further, rather than work towards their general improvement³.

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¹ See comments by Lord Delamere reproduced in *The Kenya Yearbook*, 2010, p. 23.

² *Ibid.*

³ See, Makumi, Mwangi, 'Elections and the constitutional and Legal regime in Kenya', in Chweya, Ludeki, ed., *Electoral Politics in Kenya*, Nairobi: Claripress, 2002.

The revolutionary evolution of Kenya's struggle for a new constitutional dispensation, in what became epitomised as "the struggle for the second liberation", was triggered by the need to have a "modern democratic nation" which balances democratic governance, respect for human rights and the entrenchment of the rule of law.

The dream of the revolutionary struggle for independence was the quest for self determination, freedom and dignity for all people, then referred to as natives, by the colonial administration. However, the spirit and object of our independence was vitiated at the advent of independence when those who took over the realm of political leadership sacrificed the ideals for personal aggrandizement⁴.

The sanctity of the independence Constitution was adulterated and its architecture and design so heavily mutilated that it lost its identity and form. Post-independence constitutional changes and legal amendments spanning over three decades undermined and weakened key institutions including the Judiciary, the Police, the Electoral System and Parliament while strengthening the Executive, particularly the presidency⁵. The changes resulted in the centralisation and monopolisation of power by the executive and minimised checks and balances on the executive by other institutions.

Without effective constrain on executive power and a limited Bill of rights punctuated with innumerable claw back clauses, Kenya was plunged into a state of poor governance demonstrated by widespread corruption, ethnic conflict, insecurity, political uncertainty and poverty among others.

⁴ See, Hassan Omar Hassan, "Why Central Province is no different", *The Standard Newspaper*, Nairobi, Wednesday, July 28, 2010, p. 34.

⁵ When Kenya adopted its first national constitution in 1963, executive power was shared amongst two posts: an executive prime minister and a governor-general (a British subject acting on behalf of the Queen of England, who still exercised executive powers). In addition, the constitution called for a multi-layered legislative structure in the form of a bicameral parliament. However, in 1964, after Kenya was officially declared an independent state, then Prime Minister Jomo Kenyatta, dissatisfied with a restrictive executive, lobbied parliament to amend the constitution to abolish both the governorship and the post of Prime Minister and replace them with a single presidency which concentrated executive power within the office of the president. This led to the establishment of an imperial presidency and a *de jure* one-party system as the presidential authority grew relentlessly, with each subsequent president seeking to tighten his control and increase his influence. Unfortunately, this occurred at the expense of the other branches of government, which instead of serving as a check upon executive power, served only to facilitate its abuse. In addition, Kenyatta also called for the elimination of the Senate leaving Parliament the sole legislative body. To further advance executive control, the constitution was amended again; this time to give the president powers to appoint federal judges without approval from any other governing body. Then in 1966, another constitutional amendment was passed, barring candidates and sitting Members of Parliament from legislative office, if they had been jailed for six months or more, regardless of the charge. This heightened fear amongst MPs of being arbitrarily arrested and detained without trial and subsequently losing their position for attempting to challenge the new order. Since then, the Constitution was on a free fall as key institutions of government collapsed to give way for a tyrannical leadership.

The Constitution of Kenya, 2010 has fundamentally altered this defective governance framework through various far reaching reforms. The most critical of these reforms are the introduction of a new normative framework; Devolution of power through the creation of two levels of government; Constraining of executive power through the introduction of various checks on the Executive; The creation of a bicameral legislature; and The introduction of an expansive Bill of Rights.

The Constitution of Kenya, 2010 has been celebrated by the people, human rights proponents, civil society organizations and the reformed political class as one the most transformative and progressive constitutions in a modern democracy.

However, the enactment of the new constitution introduces fresh challenges of effective implementation. The pace of the implementation process together with demonstrable commitment by the political leadership is what may inspire and restore confidence in the new institutions of government⁶.

This burden of responsibility for the fast and effective implementation of the Constitution was highlighted by His Excellency Hon. Mwai Kibaki the President of the Republic of Kenya on the Launch of the first-ever annual Kenya Yearbook. He described the process as follows:

“This Constitution will fundamentally transform our nation politically, economically and socially. Some of the changes will be immediate and we must be ready to support them. Other changes will take time. We must remain resilient and focused as we work towards their fulfilment. The changes envisaged in the new Constitution will present some challenges along the way. However, the new Constitution gives us better structures of governance to address the challenges more efficiently. Our resolve to complete the journey of our nation’s transformation must remain firm. As we embark on the journey of national renewal, I ask all of us to keep in mind the vision of the New Kenya.”

It is this vision for democratic governance, respect for rule of law and the preservation of the dignity and worth of the human person that forms the foundation of the new Constitution. The Constitution must therefore be deployed in a manner that inspires national renewal, encourages peaceful coexistence, provides equal opportunities for all, ensures uniform application of the law and promotes the advancement of the well being of the individual.

⁶ So far, there is little evidence that the general populace have been properly inducted into the “the culture of human rights” and respect for constitutional, legal and alternative dispute resolution mechanisms established under the Constitution. A case in point is the recent Tana River County clashes involving the Pokomo and the Orma communities in which the raging storm of violence claimed the lives of over 100 villagers. The violence thought to have been triggered by ethnic mobilisation by politicians and inter-ethnic competition for common resources, is a strong signal that Kenyans are yet to fully apply their minds to the need to show fidelity to the rule of law. The inter-ethnic conflicts have also exposed the government’s lackadaisical commitment to guarantee the safety of Kenyans and the reluctance by the political class to discourage violent responses whenever people’s rights are threatened with breach.

The Constitution of Kenya, 2010 has laid great emphasis on transparent, accountable and democratic governance⁷. The constitution has meticulously defined, distributed and constrained the use of state power along multiple lines. The organization of governance and state power requires that power be divided, distributed and dispersed so as to ensure that power is applied to the objectives for which it was invented and in the manner in which it was intended. It is this conceptual necessity that forms the foundation upon which the devolved systems and structures of government are premised. The Constitution identifies devolution and sharing of power as one value and principle that should guide our governance system⁸.

The Constitution describes the government at the two levels as being distinct and inter-dependent and which are required to conduct their mutual relations on the basis of consultation and cooperation. Kenya's system of devolution is therefore not one of absolute autonomy but rather, one based on inter-dependence and cooperation⁹. The end result of this combination is what may be called a Cooperative System of Devolved Government founded upon three relational principles namely: the principle of distinctness; the principle of inter-dependence and the principle of oversight.

Similarly, the Constitution provides the normative framework for the recognition, protection and promotion of fundamental, constitutional and human rights and freedoms. The provisions of the human rights are incorporated in Chapter Four of the Constitution of Kenya, 2010.

The articles of this chapter expressly set forth all categories of human rights that are ordinarily included in international human rights instruments. It contains first generation rights (which consist of the traditional civil and political rights); the second generation rights, consisting of economic, social and cultural rights; and third generation rights which include such entitlements as a clean environment and peace¹⁰.

In addition to the statement of rights, the Constitution provides mechanisms for the enforcement of protected rights¹¹. The Chief Justice of Kenya, Dr. Willy Mutunga, has already proposed to have the High Court established in every County, a move that will see the enforcement of the expanded Bill of rights "decentralised" to the Counties.

Further, the structural arrangement of the Constitution provides for clear separation of powers, checks and balances. Every legal system requires rules that specify the major institutions and officials of government, and determine which of them is to do

⁷ See, the Preamble of the Constitution of Kenya, 2010; See also, Article 10 thereof.

⁸ Article 10.

⁹ Article 6(2).

¹⁰ See generally, Chapter Four on the Bill of Rights.

¹¹ Article 22.

what and how they are to interact, and how their membership or succession is to be determined, and so forth.

The principle of separation of powers is a positive edit in the Constitution of Kenya, 2010 and is now recognised and respected as a permanent and indispensable feature of Kenya's constitutional system. The constitution promises to fundamentally alter the relationship between the Judiciary, the Legislature and the Executive by re-introducing the time honoured cornerstone principles of the Constitutional supremacy, parliamentary sovereignty and judicial independence.

The basis of Parliamentary sovereignty is founded on the political reality that Parliament has unlimited legislative competence in exercising that political sovereignty when positively legislating¹². It cannot therefore be bound by the courts or the executive.

The constitution has laid down elaborate mechanisms to guarantee judicial independence in the execution of its judicial and interpretive functions. Kenya now has a more reformed judiciary that is independent, robust and functional¹³.

These constitutional structural arrangements laid down by the drafters of the Kenyan Constitution intended to ensure the protection of human rights, recognition of the principle of separation of powers and the promotion of democratic, transparent, accountable and participatory governance which are examined in great detail in the subsequent sections¹⁴.

B. The Protection and Promotion of Human Rights

The extensive legal protection for human rights that currently exists in the Constitution of Kenya is the product of decades of struggle by individuals concerned with human justice and well-being. Human rights activists, scholars and a few enlightened politicians strenuously opposed to the operations of the ruling past regimes notorious for the various human rights abuses including the basic rights such as the freedom of association and the freedom of expression. These individuals began to organize non-governmental organizations devoted to a human rights issue, published articles and pamphlets, preached against human rights violations, and organized active campaigns of protest¹⁵. They were able to draw intellectual and moral strength from the general proclamations of human rights, specific international legal instruments and the Constitution itself, however limited.

¹² John Austin, *The Province of Jurisprudence Determined*, Wilfrid E. Rumble (ed.), 1995.

¹³ The vetting of Judges and Magistrates Act (Amendment), 2011 provides for the vetting of judges and magistrates pursuant to section 23 of the Sixth Schedule to the Constitution. The vetting is aimed at weeding out corrupt and inefficient judges and magistrates.

¹⁴ *Supra*, note 6.

¹⁵ In 1995 a constitutional caucus known as The Citizens' Coalition for Constitutional Change (or 4Cs), was formed by the middle class pressure group and together with many other movements sought to bring about Constitutional reforms in Kenya.

The progressive convergence of human rights norms in the international plane had a significant impact in the development of human rights protection in Kenya. The global culture of human rights advancement is attributable to positive efforts by various nation states to promote respect for human rights. Virtually, the rights contained in the Constitutions of modern democratic nations reflect the human rights norms set forth in the Universal Declaration of Human Rights (UDHR) and other global human rights declarations and conventions, in particular the Charter of the United Nations, the United Nations Covenants on Civil and Political Rights (CCPR) and Economic, Social and Cultural Rights (CESCR), thus providing a measure of uniformity in the fundamental guarantees and a reinforcement of the universal character of the human rights.

In Kenya, the Constitution of Kenya, 2010 is said to be among the more progressive Constitutions in modern democratic nations. This is because it contains all categories of human rights that are ordinarily included in international human rights instruments. The recognition, protection and promotion of human rights and fundamental freedoms has been given major emphasis under the Constitution.

The Constitution seeks to ensure liberty, justice, equality and fraternity to all citizens. Further, it provides guarantees of economic, social and cultural rights. The Constitution expresses the Bill of Rights as an integral part of Kenya's democratic state and the framework for social, economic and cultural policies. The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings¹⁶.

The rights and fundamental freedoms in the Bill of Rights, belong to each individual and are not granted by the State, do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law and are subject only to the limitations contemplated in the Constitution¹⁷.

The Constitution provides that every human being has the inherent right to life¹⁸. This right is protected by law and must not be arbitrarily deprived except to the extent authorised by the Constitution or other written law. However, the Constitution further provides that no right or fundamental freedom may be so limited as to derogate from its core or essential content¹⁹. The natural consequence and wholesome effect of this provision is to override '*any other law*' or section of the Constitution that may permit deprivation of life.

The Constitution recognises that every person has inherent dignity and imposes the obligation to have that dignity respected and protected by all, including especially

¹⁶ Article 19.

¹⁷ Article 19(3).

¹⁸ Article 26.

¹⁹ Article 24(2)c

the state²⁰. In this regard, the Constitution prohibits the holding of any person in slavery, servitude or being required to perform forced or compulsory labour²¹.

The Constitution guarantees every person equal protection before the law and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms; Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The Constitution prohibits State discrimination, either directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth²².

The application of the Bill of rights as provided for in the Constitution are qualified to the extent necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance²³. This is a positive edit in the Kenyan context as it permits the adaptation of human rights to meet the specific needs of persons who profess the Muslim religion based on the country's historical past.

The Constitution guarantees the right to liberty and security of the person. This includes the right not to be deprived of freedom arbitrarily or without just cause; detained without trial, except during a state of emergency; subjected to any form of violence from either public or private sources; subjected to torture in any manner, whether physical or psychological; subjected to corporal punishment; or treated or punished in a cruel, inhuman or degrading manner²⁴.

An arrested person has the right to be informed promptly, in language that the person understands, of the reason for the arrest; the right to remain silent; and the consequences of not remaining silent; to communicate with an advocate, and other persons whose assistance is necessary; not to be compelled to make any confession or admission that could be used in evidence against the person²⁵. An arrested person must be brought before a court not later than twenty-four hours after being arrested and to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released²⁶. Further, the Constitution preserves the right of every accused person to a fair and public hearing including the right to be presumed innocent until the contrary is proved and the right to have adequate time and facilities necessary to procure a fair trial²⁷.

²⁰ Article 28.

²¹ Article 30.

²² Article 27.

²³ Article 21(4).

²⁴ Article 29.

²⁵ Article 49.

²⁶ *Ibid.*

²⁷ Article 50.

Other bundle of rights recognised and protected by the Constitution include the freedom and security of the person²⁸; the right to privacy²⁹; freedom of conscience, religion, belief and opinion³⁰, freedom of expression³¹; freedom of the media³²; the right of access to important information affecting the nation held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom³³; freedom of association³⁴; the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities; the right to form and participate in political party activities³⁵; freedom of movement and residence; protection of right to property³⁶.

The Constitution of Kenya recognises that human rights are interdependent and indivisible. The enjoyment of civil and political rights is inextricably attached to the satisfaction of economic, social and cultural rights. Every person has an inalienable right to pursue happiness and to live a peaceful and free life³⁷. Socio economic rights create entitlements to material conditions for human welfare. The Bill of Rights contains a number of socio economic rights, including the right to fair labour practices, the right of every worker to fair remuneration and reasonable working conditions; the right to form, join or participate in the activities and programmes of a trade union; and to go on strike³⁸. These rights are primarily set out to direct the relationship between employers and employees.

The Constitution protects the right of every person, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. The State shall not deprive a person of his property or interest therein unless the deprivation is for a public purpose or in the public interest and the owner is promptly compensated in full.

The Constitution celebrates Kenya's ethnic, cultural and religious diversity³⁹ and upholds the right of every person to use the language, and to participate in the cultural life, of the person's choice⁴⁰. Every person has a right to enjoy his culture *nec vi, nec clam, nec precario*, (freely, openly and without fear). A person belonging to a cultural or linguistic community has the right, with other members of that community to enjoy the person's culture and use the person's language without compelling another person to perform, observe or undergo any cultural practice or rite.

²⁸ Article 29.

²⁹ Article 31.

³⁰ Article 32.

³¹ Article 33.

³² Article 34.

³³ Article 35.

³⁴ Article 36.

³⁵ Article 37.

³⁶ Article 38.

³⁷ *Supra*, note 22.

³⁸ Article 41.

³⁹ See, Preamble.

⁴⁰ Article 44.

The Constitution guarantees the right of every person to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education⁴¹. Further, the Constitution provides that no person shall be denied emergency medical treatment. The State is also required to provide appropriate social security to persons who are unable to support themselves and their dependants.

The Bill of Rights applies to and binds all State organs and all persons⁴². The State must therefore endeavour to procure these rights to all persons. Where national or county government is required to ensure the enjoyment of a specific right especially the socio economic rights and it claims that it does not have the necessary resources to implement the right, it is its responsibility to show that the resources are not available or that in allocating resources, the government has given priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals⁴³.

What the courts or other authority cannot do is to interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion⁴⁴.

The Constitution provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures. The Constitution requires the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits⁴⁵. If a person alleges that a right to a clean and healthy has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter⁴⁶.

The Constitution binds the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. This may be achieved though legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under the Constitution, including especially, social and economic rights⁴⁷. This is a

⁴¹ Article 43.

⁴² Article 20(1)

⁴³ Article 20(5).

⁴⁴ *Ibid.*

⁴⁵ Article 69.

⁴⁶ Article 70

⁴⁷ Article 21.

fundamental duty that the State must discharge conscientiously, diligently and uniformly.

The Constitution confers upon every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Such a cause of action may be brought by a person acting in their own interest; on behalf of another person who cannot act in their own name; as a member of, or in the interest of, a group or class of persons; in the public interest; or an association acting in the interest of one or more of its members⁴⁸.

The Constitution recognises that the enforcement of human rights is to be matched by accommodations in favour of the reasonable needs of the State to perform its public duties for the common good. In this regard, the fundamental rights and freedoms are in general not absolute and are subjected to certain limitations to the extent necessary to secure the rights of others and the legitimate needs of the society. However, a right or fundamental freedom in the Bill of Rights may not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose⁴⁹.

The Constitution further provides that no right or fundamental freedom may be so limited as to derogate from its core or essential content⁵⁰. In fact, the State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of the Constitution have been satisfied⁵¹.

The Constitution holds that the design of the limitation of human and constitutional rights may not be compatible with certain fundamental rights. To this extent, and despite any other provision in the Constitution, there are rights and fundamental freedoms that must not be limited. These bundle of rights include; freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*⁵².

⁴⁸ Article 22(2)

⁴⁹ Article 21(1).

⁵⁰ *Ibid.*

⁵¹ Article 24(3)

⁵² Article 25.

The Constitution identifies and makes special recognition and provision for special categories of persons who, justifiably, are entitled to special protection. The Constitution mentions and directs specific application of rights to children, youth, persons with disabilities and elderly persons. The Constitution declares the right of every child to a name and nationality from birth; to free and compulsory basic education; to basic nutrition, shelter and health care; to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. But the major highlight of these rights is the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not⁵³.

Secondly, the right of persons with disabilities to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning and the requirement for the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities⁵⁴.

Thirdly, the constitutional requirements that the youth be given opportunities to associate, to be represented and to participate in political, social, economic and other spheres of life⁵⁵.

Fourthly, the protection of minorities and marginalised groups through affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life, the requirement for special opportunities in educational and economic fields, special opportunities for access to employment, develop their cultural values, languages and practices and reasonable access to water, health services and infrastructure⁵⁶.

Lastly, the protection of the older members of society through measures that ensure the rights of older persons to fully participate in the affairs of society, to pursue their personal development, to live in dignity and respect and be free from abuse, and to receive reasonable care and assistance from their family and the State⁵⁷.

C. The Design of Separation of Powers

The Constitution may be defined in terms of governance as the law that seeks to define, distribute and constrain the use of state power so that power is applied to the objectives for which it was invented and in the manner in which it was intended⁵⁸. It is this dispersal of power that is ordinarily referred to as separation of powers⁵⁹.

⁵³ Article 53.

⁵⁴ Article 54.

⁵⁵ Article 55.

⁵⁶ Article 56.

⁵⁷ Article 57.

⁵⁸ See, John Mutakha Kangu, "The Social Contractarian Conceptualisation of the Theory and Institution of Governance", 1 *Moi University Law Journal*, p. 21.

⁵⁹ Scot Buchanan, *So Reason Can Rule: The Constitution Revisited*.

Indeed throughout human history, the structuring and design of governance has always had to contend with the problem of a concentration of power in one centre of power with the attendant temptation for abuse of power.

The challenge, therefore, for both constitutional theory and constitutional architecture and design is to come up with mechanisms for control of the representatives to ensure they do not deploy state power in a manner that does not effectively serve the welfare of the people.

The Constitution of Kenya, 2010 gives the concept of separation of powers a two pronged approach. State power has been separated and dispersed both vertically and horizontally. Vertically, this power has been divided, separated and dispersed in terms of the different levels of governance; namely, the National government and the County government⁶⁰. The different governments control each other; at the same time that each is controlled within itself. In addition, power at the national level of governance is further divided, separated and dispersed horizontally into different departments of government in terms of the traditional three organs of state; namely, the legislature, executive and judiciary. This is aimed at securing the rights of the people and fostering their active participation in governance issues.

Horizontally, each of the three branches has a corresponding identifiable function of government and each must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the composition of these three branches of government must be kept separate and distinct with no individual being allowed to be a member of more than one branch at the same time. The Constitution provides that the composition of the Cabinet shall consist of the President, the Deputy President, the Attorney-General and not more than twenty-two Cabinet Secretaries, none of whom shall be an elected member of Parliament⁶¹.

In this way each of the branches shall be a check to the others and no single group of people will be able to control the machinery of the state⁶². In addition to the above three perspectives of the horizontal separation of powers, the architecture and design of the Constitution take a plural approach to the organisation of the legislature in the form of a bicameral institution thus creating a further dispersal of power.

At the vertical level, separation of powers starts with the creation of different and distinct levels of government. These different levels of government have clearly defined geographical areas of jurisdiction and distribution of governance functions to each. The county governments are required to further decentralise their functions

⁶⁰ Supra, note 64.

⁶¹ Article 152(1).

⁶² M.J.C Vile, "Constitutionalism and the Separation of Powers", in: Francois Venter (ed.), *Constitutional Comparison: Japan, Germany, Canada & South Africa as Constitutional States*, Cape Town: Juta & Co., Ltd, 2000, p. 212.

to the extent that it necessary. Each level of government is then expected to have both institutional and functional distinctiveness with a constitutional guarantee of non-encroachment by one on the jurisdiction of the other.

Closely related to the concept of Separation of Powers is the doctrine of the Rule of Law which is one of the most important political ideals of all time⁶³. It is one of a cluster of ideals constitutive of modern political morality. The rule of law is a fragile but crucial ideal, one that is appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in a country's laws and the Constitution. Interfering with the courts, jailing someone without legal justification, detaining people without any safeguards of due process, manipulating the Constitution for partisan advantage, are just but a few examples of abuses of the rule of law.

The rule of law is multi-faceted but most conceptions give central place to a requirement that people in positions of authority should exercise their powers within a constraining framework of public norms rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.

A procedural understanding of the rule of law does not just require that officials apply the rules as they are set out; it requires that they apply them with all the care and attention to fairness that is anchored on such ideals as natural justice, and procedural due process. The rule of law is violated when the institutions that are supposed to embody these procedural safeguards are undermined or interfered with. It is in this way that the rule of law has become associated with political ideals such as the separation of powers and the independence of the judiciary.

For the most part, these two currents of thought sit comfortably together. They complement each other. It is of no good having clear general public norms if they are not properly administered; and it is of no good having fair procedures if the rules whose application is in question keep changing or if eventually they are ignored.

Many conceptions of the rule of law place great emphasis on legal certainty, predictability, and settlement on the determinacy of the norms that are upheld in society, and on the reliable character of their administration by the state. Citizens need predictability in the conduct of their lives and businesses⁶⁴. Knowing in advance how the law will operate enables one to plan around its requirements and how they have to act if they are to avoid its adverse impact on their affairs⁶⁵.

However, the rule of law is not just about general rules; but is also about their impartial administration. For example, one of the great nineteenth century theorists

⁶³Liam Murphy, 'The Political Question of the Concept of Law,' in: (Jules Coleman ed.), *Hart's Postscript: Essays on the Postscript To The Concept of Law*, 371(2001).

⁶⁴ Lon L. Fuller, *The Morality of Law*, 1969, 46-91.

⁶⁵ F.A. Hayek, *The Constitution of Liberty*, 1960, 156-7.

of the Rule of Law, Albert Venn Dicey, placed at least as much emphasis on the normal operation of the ordinary courts as he did on the characteristics of the norms they administered⁶⁶. The law inevitably creates a great danger of arbitrary power. The rule of law is designed to minimize the danger created by the law itself. Thus the rule of law is a negative virtue; the evil which is avoided is evil which could only have been caused by the law itself⁶⁷.

The doctrine of the rule of law and the concept of separation of powers are further buttressed by the doctrine of judicial review which allows the Courts to review the exercise of executive authority as well as the decisions of Parliament in the form of legislations⁶⁸. It is the postulation of the rule of law that in the first instance, that not only is that no man is above the law, but that every man is subject to the ordinary laws of the realm and amenable to the jurisdiction of the courts (equality before the law); secondly, no man can be made to suffer either in body or goods except for a distinct breach of the law established in the ordinary process of the courts; and thirdly, is the principle of legality which requires that those exercising state power or political authority must be able to justify their actions as authorised by the law.

It is this third aspect of the rule of law that courts seek to enforce. In the exercise of its executive authority, the government must not infringe the limits which Parliament has ordained. The courts will invalidate any order if the government has gone beyond the province of its executive competence. The doctrine of judicial review was invented to control governmental power and to limit the application of the principle "*quod principi placuit legis habit vigorem*" (the sovereign's will has the force of law) that gave the government unrestricted discretionary powers so that everything they did was within the law.

It is this missionary spirit of the quest for administrative justice and the need for improvement of the technique of government that is the connecting thread that runs throughout the doctrine of judicial review in pursuit of a harmonious whole.

Similarly, the basis of Parliamentary sovereignty is the constitutional authority of Parliament to positively legislate. In exercising that political sovereignty when positively legislating, Parliament is not so bound. Parliament is sovereign not by statutory device or grant, but through political reality and, in essence, the common law. However, the rule of law dictates that there is need for balancing the coercive authority of Parliament in terms of positive legislative competence against the need

⁶⁶ A.V. Dicey, *Introduction to the Study of the Law of The Constitution*, Liberty Classics edition, 1982, p. 110-21.

⁶⁷ Joseph Raz, 'The Rule of Law and its Virtue', in: Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 1979, p. 223-4.

⁶⁸ The concept of judicial review of parliamentary legislation is premised on the common law principle that common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it, and adjudge such Act to be void.

for that authority to be limited and justified⁶⁹. Therefore, if Parliament acted without reason, the courts have the power to review Parliament's decision and declare it null. The judicial reforms as espoused in the Constitution of Kenya, 2012 have transformed the judiciary into a robust, independent and functional institution. The foundations of the new separation of powers under the Kenyan constitutional dispensation can be seen more clearly through the application of judicial review reasoning.

The case most commonly associated with the origin of the power to striking legitimately and properly enacted legislation under judicial review is *Marbury v. Madison*⁷⁰. Marshall, J. examined the constitutional structural arrangement created by the Founding Fathers of the American Constitution and reasoned from three premises that in America, under the Constitution, the judiciary has the power to refuse to apply legislation: the Constitution is the "superior paramount law" over "ordinary legislative acts," and when in a conflict, with any other law the Constitution must prevail. The judiciary in its role of applying and interpreting the law must be the organ charged with the final determination of the law against the Constitution.

This principle is a positive edit in the Constitution of Kenya, 2010 and is now recognised and respected as a permanent and indispensable feature of Kenya's constitutional system. Even as the reformed judiciary counter checks the executive and the legislature, there is need to check the judiciary itself against encroachment into the provinces of executive competence and Parliamentary sovereignty. To prevent the judiciary from overreaching its constitutional mandate, the doctrine of *stare decisis* has been used to limit the courts. If the court rules that a law is unconstitutional in a particular case and then different parties petition the court with another challenge on the same legislation, a court bound by *stare decisis* must again rule that the law is unconstitutional. If the court lacked the command of *stare decisis*, perhaps the court might feel more inclined to rethink its decision, but a court limited in its discretion does not have the luxury. Therefore judicial review is claimed as a right of the court to limit the legislature and executive, and *stare decisis* is imposed as a political product of the common law limiting the court.

The jurisdictional competence of the courts to review the decisions of the executive and the legislation of Parliament can be seen as the limitation of *stare decisis* on the court being extended by structural necessity to the co-equal branches. If all the three branches are co-equal and co-sovereign, and yet one branch is bound by precedent, by necessity that constraint must also limit the co-equal branches to the extent that the court will review the other branches actions.

While the courts should be reluctant to overrule previous decisions because of the legitimacy derived from the rule of law, the court should not be totally unresponsive

⁶⁹H.L.A. Hart, *The Concept of Law*, (Revised edition), 1994, p. 207-12.

⁷⁰ *Marbury v. Madison*-5 U.S (1Cranch) 137 (1803).

to changes in society which might deflate all need for mindless *stare decisis* for its own sake. Either position in the extreme subverts the court.

In *Baker v. Carr*⁷¹, the U.S Supreme Court set forth a number of issues, which, if present, can remove a question from judicial scrutiny. These are:-

- A textually demonstrable constitutional commitment of the issue to a coordinate political department.
- Lack of judicially discoverable and manageable standards of resolving the issue.
- The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.
- The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.
- An unusual need for unquestioned adherence to a political decision already made.

The effect of the guidelines of the U.S Supreme Court is to avert the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

D. Devolution of Power

Devolution of power has long been advanced as a means of managing Kenya's ethnic diversity and the failures of the centralized State. Devolution was thought to be a credible means for searching for democratic constitutionalism and the panacea to Kenya's governance problems characterized by concentration of power in the presidency and centralized institutions without appropriate checks on those powers⁷².

A cardinal principle underpinning devolution is the need to decentralize administrative, financial and political power to the local level in order to enhance the efficiency and effectiveness of government. A decentralized government allows greater citizen participation in local development and permits the government to respond quickly to local needs⁷³.

The transfer of powers to sub-national governments increases public sector efficiency, thus promoting economic development. Especially in the case of a nation with heterogeneous regions, decentralization officials are in a better position to meet local demands, Decentralization authorities are much better informed regarding local needs, and can provide the economically-efficient quantity and quality of public goods. Decentralization brings the government closer to the people so that local officials are better informed on the local needs, and are thus more capable to

⁷¹ *Baker v. Carr*, 369 U.S. 186,217 (1962).

⁷² *Supra*, note 3.

⁷³ See, world bank report

provide the optimal mix of local policies. This increase in efficiency contributes to economic growth⁷⁴.

The highlight for the constitutional framework for devolution is set out in the in the preamble of the Constitution which outlines the aspirations of all Kenyans to form a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law⁷⁵. The Constitution moves to declare the sovereign and inalienable right of the people of Kenya to determine the form of governance desirable and acceptable to the people of Kenya⁷⁶.

The objectives of devolution emphasize recognition of the fact that state power belongs to the people and is exercised on their behalf by elected representatives acting through formal institutions. It is intended that devolved governments augment people's participation in governance and self-development and shall be based on democratic principles and separation of powers. The objects of the devolution of government, as provided for in the Constitution, seeks to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and to enhance checks and balances and the separation of powers⁷⁷.

The Constitutional structures for devolution seek to promote transparent, efficient, accountable and democratic governance. The realisation of the welfare of the people is its ultimate end. The Constitution recognises that all sovereign power belongs to the people of Kenya and is exercisable only in accordance with the constitutional provisions⁷⁸. This power may be exercised either directly by the people or through their democratically elected representatives⁷⁹. To this extent, the sovereign power of the people is delegated to and exercised by, horizontally, the three State organs namely; Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. Vertically, this power is divided, separated, dispersed and exercised at the national and the county levels⁸⁰.

⁷⁴ *Supra*, note 75.

⁷⁵ See, The Preamble of the Constitution of Kenya, 2010.

⁷⁶ *Ibid*.

⁷⁷ Article 174.

⁷⁸ See, Article 1.

⁷⁹ *Ibid*.

⁸⁰ Article 1(4).

The governments at the national and county levels are distinct and inter-dependent. This interdependency, then calls for consultation and cooperation between the National and County governments in the conduct of their mutual relations⁸¹. The cooperation extends to national state organs which must ensure reasonable access to their services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

The Constitution binds all State organs, State officers, public officers and all persons to observe the national values and principles of governance outlined in the Constitution whenever any of them makes or implements public policy decisions. In the execution of their offices, state officers must ensure they uphold the principles of good governance, integrity, transparency and accountability; and sustainable development⁸².

The guiding principles for county governments are that they must be founded in and based on democratic principles governance and the separation of powers. To boost their capacity, the county governments shall be entitled to reliable sources of revenue to enable them govern and deliver services effectively⁸³. The Constitution promotes the emancipation of women for their effective participation in the county governments. The constitutional threshold for effective representation of women in the county government is that of not less than one-third of the members of representative bodies in each county government⁸⁴.

The county assembly consists of members elected for a term of five years by the registered voters of the wards, each ward constituting a single member constituency; the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender; the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and the Speaker, who is an *ex officio* member⁸⁵. The county assembly is vested with legislative authority and may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the county government⁸⁶.

The executive authority of the county, on the other hand, is vested in, and exercised by, a county executive committee. This committee consists of the county governor and the deputy county governor; and members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly. The county governor is directly elected by the voters registered in the county⁸⁷. The county governor and the deputy county governor are the chief

⁸¹ Article 6.

⁸² Article 10.

⁸³ Article 190.

⁸⁴ Article 175.

⁸⁵ Article 177.

⁸⁶ Article 185.

⁸⁷ Article 180.

executive and deputy chief executive of the county, respectively⁸⁸. Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers⁸⁹.

The equivalent of a presidential system has been adopted for the County government, whereby the Governor is the chief political Executive of the County is directly elected by the populace and possesses the sole power to appoint members of the Executive Committee. This implies that the local citizens shall be given an opportunity determine or influence their policy preferences about local issues through a lower level government that is closer to the people and more responsive to local needs. The rationale here is that through lower or sub-national levels of government, there shall be increased opportunities for public participation and greater political representation of diverse political, ethnic, religious, and cultural groups in structures and processes of decision making.

The county executive committees are tasked with implementing county legislation; implementing, within the county, national legislation to the extent that the legislation so requires; managing and coordinating the functions of the county administration and its departments; and performing any other functions conferred on it by this Constitution or national legislation⁹⁰.

The functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule to the Constitution⁹¹. The fourth schedule distributes the functions between the national government and the county governments. The National Government reserves the authority in all matters of national importance including especially, foreign affairs, foreign policy and international trade; the use of international waters and water resources; immigration and citizenship; police services; national economic policy and planning; monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations. The functions of the county governments, on the other hand, include promoting agriculture, provision of County health services, preservation of cultural heritage, trade development and regulation.

Any function or power not assigned by the Constitution or national legislation to a county is reserved for the national government. However, a function or power of government at one level may be transferred to a government at the other level by agreement between the governments if the function or power would be more effectively performed or exercised by the receiving government⁹². The Constitution further, calls for cooperation between national and county governments for the purpose of exchanging information, coordinating policies and administration and

⁸⁸ Article 179.

⁸⁹ Ibid.

⁹⁰ Article 183.

⁹¹ Article 186.

⁹² Article 187.

enhancing capacity⁹³. The county governments are also entitled to adequate financial support from the national government to enable them to perform their functions⁹⁴.

The successful implementation of the Constitution including especially devolution of power will eventually transform the country and promote faster economic growth and development. However, devolved governance has its own attendant challenges that must be effectively addressed if the objects and purposes of devolution are to be realised. These challenges will include; coordination problems, excessive regulation, administrative costs, and local capture. For instance there is a potential threat of the local government providing excessive services to the local elite or the dominant ethnic group at the expense of the general public resulting into rampant corruption and increased cronyism at the local level.

From a political economy perspective, devolution may create more opportunities for corruption at the local level because local politicians and bureaucrats are more likely to be subjects to the pressing demands of local interest groups. In addition, local decision makers usually possess more discretionary powers than national officials, increasing the possible negative effects of devolution. Local officials live closer to the citizens, and this contiguity leads to a higher impact by local interest groups on local policy outcomes.

The quality of bureaucrats is also an important factor for the relationship between economic growth and decentralization. The national government bureaucracies are likely to attract more qualified people because they offer better career opportunities and higher salaries. If qualified individuals are abundant, as in most industrialised countries, county governments may have a human resource that may transform these counties. However, in most developing countries, this may not necessarily be the case due to low educational standards. Therefore, officials entrusted with governance in the devolved structures may be less qualified for this task than national bureaucrats.

E. Comparative analysis of the Constitutional framework of the E.A.C Member States and the lessons they can learn from Kenya

The central tenets of a constitutional democracy are the value of constitutionalism captured through democratic governance, respect for human rights and the entrenchment of the rule of law.

- **Sovereignty of the People and the Rule of Law**

The Constitution of Kenya, 2010 contains entrenched articles that cannot be amended unless approved by the people in a referendum. These articles include articles on the Bill of Rights, the independence of the Judiciary and the objects, principles and structure of devolved government. This is meant to uphold the sovereignty of the people of Kenya and shield some of the key pillars of the

⁹³ Article 189.

⁹⁴ *Supra*, note 86.

Constitution from arbitrary alterations by any person or any authority without full participation and endorsement of the people of Kenya.

In Tanzania and Uganda, the Constitution authorises Parliament to alter any provision of the Constitution provided such amendment is supported by the votes of not less than two thirds of all the Members of Parliament⁹⁵. The Constitution does not provide for entrenched clauses that would require ratification of the people in a referendum which leaves it susceptible to arbitrary amendments by a small group of political elite for their own gain at the expense of the majority of the people. For instance, the recent amendments that removed constitutional term limits for the presidency in Uganda that was fronted by the political elite appear to roll back the democratic gains that the country had made.

In Rwanda, constitutional amendments on the term of the President of the Republic or the system of democratic government, the republican form of the government or national sovereignty must be passed by referendum, after adoption by each Chamber of Parliament⁹⁶.

- **Human Rights**

The Constitution of Kenya provides for a progressive Bill of Rights enshrining human rights in its entire gamut and provides for immediate and progressive realisation of these rights. It also provides for rights that may not be limited and where such limitations are necessary, it provides that such limitation must not be to the extent that derogates from the core or its essential content.

In addition, the Constitutional safeguards on land and environmental rights as enshrined in the Kenya Constitution 2010 are positive for the people of Kenya, the EAC and all other investors in terms of economic development.

The elimination of gender discrimination in land and property rights and the provision for equal opportunity for both men and women in all spheres is of paramount importance considering the important role that women play in modern society.

The Constitution of the Republic of Uganda of 1995 commits the people of Uganda to building a better future by establishing a socio-economic and political order⁹⁷. However, other than recognising the right of persons to work⁹⁸, its Bill of Rights remains silent on the obligation of the State to secure socio economic rights of the people including especially the right to health care, housing and food. In the United Republic of Tanzania, the right of every person to work is provided for⁹⁹ but the Constitution fails to make provision for the recognition of socio economic rights. The

⁹⁵Section 98.

⁹⁶ Article 193.

⁹⁷ See the Preamble.

⁹⁸ Section 40.

⁹⁹ Section 22.

entitlement to socio economic rights is also lacking in the Constitution of the Republic of Rwanda. Consequently, the recognition, promotion and enjoyment of these rights remain uncertain in the region.

The Constitution of Uganda recognises the rights of women to be accorded full and equal dignity of the person with men¹⁰⁰. The Constitution requires the State to provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement. Unfortunately, the Constitution does not specifically provide for a specific number of women representations in public offices. The Constitutions of Tanzania¹⁰¹ and Rwanda¹⁰² however, require that women be granted at least thirty per cent of posts in decision making organs.

The Constitution of Uganda prohibits derogation from enjoyment of specific human rights and freedoms, namely; freedom from torture, cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to fair hearing; the right to an order of *habeas corpus*¹⁰³. Curiously, the provisions on limitation of rights overlook the preservation of the right to life¹⁰⁴. The Constitution of Tanzania prohibits the deprivation of a person's right to live save only for such derogation permitted by law¹⁰⁵. Similarly, the Constitution of Rwanda protects the right of every person to life and provides that no person shall be arbitrarily deprived of life¹⁰⁶. The common theme in these Constitutions is that the reality of the limitation of the right to life may lead to the derogation from the core of that right.

A peculiar edit in the Rwandan Constitution is the recognition of civil marriages only. While the Constitution of Rwanda prohibits discrimination of whatever kind including on the basis of culture¹⁰⁷, this right is clawed back by Article 26 which provides that only civil monogamous marriage between a man and a woman is recognized¹⁰⁸. This is a fundamental defect incompatible with the people's rights to enjoy their culture openly, freely and without fear including the right to celebrate marriage under customary laws.

- **Separation of Powers and the Independence of the Judiciary**

The Constitution of Kenya, 2010 provides for strengthened, independent and functional institutions, including especially the Police, the Judiciary and the Legislature. These critical institutions are no longer susceptible to executive manipulation.

¹⁰⁰ Section 33.

¹⁰¹ Section 66.

¹⁰² Article 9.

¹⁰³ Section 23.

¹⁰⁴ Section 44.

¹⁰⁵ Section 31.

¹⁰⁶ Article 12.

¹⁰⁷ Article 11.

¹⁰⁸ See Article 26.

Further, the Constitution expressly safeguards judicial independence and provides a more reformed judiciary to foster independent, impartial and expeditious access to justice and rule of law for all.

The Constitution also provides for two pronged approach to the concept of separation of powers where State power has been separated and dispersed both vertically and horizontally thereby creating a double security to the rights of the people in which the different governments control each other, at the same time that each is controlled by itself.

The Ugandan Constitution does not offer any constitutional guarantee of the independence of the judiciary as a separate and distinct arm of the government. Although the Constitution of Tanzania endeavours to secure the independence of the judiciary in the exercise of its powers¹⁰⁹, the appointment of judges by the President undermines the integrity of the process and may compromise their independence. This is especially because the Judicial Service Commission whose mandate is to advise the President on such appointments is itself constituted by the President¹¹⁰. As such, the risk of executive interference with the independence of the judiciary cannot be gainsaid. Further, the Constitution allows the President to unilaterally extend the tenure of the judges upon attaining the age of retirement¹¹¹.

The Constitution of Rwanda, on the other hand, provides for a process of competitive selection of judges free from executive manipulation. The Constitution provides that the President and Vice-President of the Supreme Court are to be elected by the Senate for a single term of eight years by simple majority vote of members from two candidates in respect of each post proposed by the President of the Republic after consultation with the Cabinet and the Supreme Council of the Judiciary¹¹².

- **Democratic Governance**

The Constitution of Kenya, 2012 provides for elaborate checks and balances mechanisms that will ensure efficient, accountable and equitable governance of the political and economic affairs of the state at all levels. The creation of Constitutional Commissions such as the National Land Commission, Kenya National Human Rights and Equality Commission, Judicial Service Commission, Commission on Revenue Allocation, Kenya Anti-Corruption and Ethics and Anti-corruption Commission, Police Service Commission are important institutions in this respect.

It recognises good governance as an important national value and principle necessary for the accountable management of public affairs and the promotion of national renewal. It further sets out high standards on leadership, integrity and public service to ensure good management of national and regional resources.

¹⁰⁹ Section 107B

¹¹⁰ Section 110

¹¹¹ *Ibid.*

¹¹² Article 147.

The Constitution of Uganda requires all persons placed in positions of leadership and responsibility to be accountable to the people¹¹³. However, there is no specific requirement that persons holding public offices meet a pre-determined threshold of personal integrity, credibility and suitability for appointment to the high public offices. This may inadvertently complicate and slow down lawful measures to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices would seem reactive.

The Uganda Constitution recognises the sovereign and inalienable right of the people to determine the form of governance¹¹⁴. However it does not articulate how the participation of the people in this process is to be achieved. It also fails to outline the guiding principles of governance thus making the exercise of state power susceptible to executive abuse. The Constitution of Uganda does not make provisions for the dispersal of state power. Similarly, the Constitution of Rwanda attempts to “decentralise” public administration to organs under the Ministry Local Government which however only amounts to transfer of responsibilities¹¹⁵.

The Constitution of Tanzania, on the other hand, adopts a more elaborate approach to decentralise governance. The authority of the Government of the United Republic of Tanzania is decentralised to a lower level known as the Zanzibar Revolutionary Council. The President of the United Republic exercises all the authority of the Government of the United Republic over all Union Matters in the United Republic and also over all other matters concerning mainland Tanzania¹¹⁶. The Zanzibar Revolutionary Council also known as “the Revolutionary Government of Zanzibar” exercises authority in Zanzibar over all matters which are not Union matters in accordance with the provisions of the Constitution¹¹⁷. However, the architecture and design of the Tanzanian model of decentralisation does not fully capture the devolution of power lower levels of government. In both Uganda and Tanzania, the amalgamation of the executive and the legislature undermines the independence of the Legislature.

The Constitution of Rwanda creates a bicameral legislature with effective checks and balances¹¹⁸. The Constitution establishes a Parliament consisting of two chambers, namely; the Chamber of Deputies and the Senate. While the Chamber of Deputies enjoys legislative competence on ordinary matters¹¹⁹, the Senate enjoys powers to impeach the President, vote on the laws relating to the amendment of the Constitution and the authority to approve the appointment of public officials¹²⁰.

¹¹³ Part XXVI.

¹¹⁴ Supra, note 1.

¹¹⁵ Article 167.

¹¹⁶ section 34.

¹¹⁷ section 102.

¹¹⁸ Article 62.

¹¹⁹ Article 79.

¹²⁰ Article 88.

F. Conclusion

There is a growing international recognition of the interdependence between the promotion of human rights and the realisation good governance. The East Africa Community as a sub set of international community of nations must move in tandem with the emerging global culture of human rights protection and best governance practices.

In order to achieve the convergence of human rights and democratic governance, the Constitution of Kenya has provided for an implementation framework that requires Parliament to enact enabling legislations within the specified timelines. Further, the Constitution has established the Commission for the Implementation of the Constitution, an independent body charged with the responsibility of monitoring, facilitating and overseeing the effective implementation of the Constitution.

If fully implemented, the Constitution of Kenya, 2010 has the potential to transform the social, legal, political and economic development of the country in particular and the East African Community in general to greater heights that have never been witnessed before in this part of the world. The devil lies in the implementation process.

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