

**AN INTERPRETATION OF THE CONSTITUTIONAL FRAMEWORK  
FOR DEVOLUTION IN KENYA: A COMPARATIVE APPROACH**

by

**JOHN KANGU MUTAKHA**

**LLB (Hons) (Nairobi) Dip. (KSL) LLM (UNISA)**

**Student Number: 3269822**

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Promoter:

**PROFESSOR NICO STEYTLER**

South African Research Chair (SARChI) Multi-Level Government, Law and Policy

UNIVERSITY of the  
WESTERN CAPE

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**DECLARATION**

I, JOHN KANGU MUTAKHA, do hereby declare that *An Interpretation of the Constitutional Framework for Devolution in Kenya: A Comparative Approach* is my original work and has not been submitted for any degree or examination in any other university or institution of higher learning. While I have relied on numerous sources and materials to develop the main argument presented in this thesis, all the materials and sources used have been duly and properly acknowledged.

Signed.....

Date.....

Supervisor: Professor Nico Steytler

Signature.....



## ABSTRACT

Kenya adopted a new Constitution in 2010, with devolution of political power, responsibilities and resources to newly created counties as its centrepiece and most transformative aspect. Devolution was intended to address the many governance, economic and development problems of the country, which arose from the long history of a highly centralised, undemocratic and inequitable system. The main problem, however, is how to give effect to the stated intent of the Kenyan people and make devolution as envisaged, a reality. This is compounded by the fact that devolution's constitutional design has its provisions spread across and permeating the entire Constitution. Thus, the main aim of this thesis was to give a coherent and purposeful interpretation of the constitutional provisions on devolution in order to realise the objectives and intent of the Kenyan people. This study has advanced the argument that the central nature of devolution and its intended objectives can be realised through a purposive interpretation. This entails the practical realisation and application of the constitutional provisions by identifying the objects and purposes of devolution and giving effect to them. Such interpretation draws on textual, structural, contextual and historical elements. The Constitution is interpreted as a whole, taking into account both intra-textual and extra-textual context, including the social, economic, political and cultural context of the country in its historical and contemporary dimensions. Comparative law, especially the South African jurisprudence and scholarly commentaries, provided instructive lessons, given the significant textual similarities between the Kenyan and South African constitutional provisions on devolution.

A coherent and purposive interpretation has demonstrated that devolution was adopted to promote and advance democracy and accountability; development and service delivery; equity and inclusiveness; and limitation of centralised power. This is reflected in the values, objects and principles of devolution, which are not only aids for the interpretation of other provisions of the Constitution but also themselves operative provisions demarcating the limits of powers of the two levels of government. The interpretation demonstrates that the Constitution creates two distinct governments that must conduct their intergovernmental relations in a cooperative manner. The county governments are relatively autonomous; are represented in selected decision-making at the national level, through the Senate; and have both exclusive and concurrent powers. Although they have limited revenue-raising powers comprising property rates and entertainment taxes, they are entitled to a share of the revenue raised nationally as equitable shares and conditional or unconditional additional grants. The

national government, however, has some limited and circumscribed supervision powers. These conclusions have been arrived at by interpreting the devolution- and county-empowering provisions liberally, broadly and generously in favour of the counties and devolution, and the national government intervention and devolution limiting provisions narrowly and strictly against the national government. In this process, the South African case law has been very useful in giving content to the purposive interpretation.



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## LIST OF ABBREVIATIONS

CA	Chiefs' Act
CARA	County Allocation of Revenue Act
CGA	County Government Act
CIC	Commission for the Implementation of the Constitution
CKRC	Constitution of Kenya Review Commission
CRA	Commission on Revenue Allocation
CRAA	Commission on Revenue Allocation Act
CoE	Committee of Experts
DC	District Commissioner
DO	Divisional Officer
DORA	Division of Revenue Act
IBEACO	Imperial British East Africa Company
IEBC	Independent Electoral and Boundaries Commission
IRA	Intergovernmental Relations Act
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
MTEF	Medium Term Economic Framework
NGCA	National Government Co-ordination Act
NCOP	National Council of Provinces
OPA	Order of Precedence Act
PC	Provincial Commissioner
PSC	Parliamentary Select Committee
PFMA	Public Finance Management Act

SID	Society for International Development
TDGA	Transition to Devolved Government Act
TNA	The National Alliance Party
UACA	Urban Areas and Cities Act





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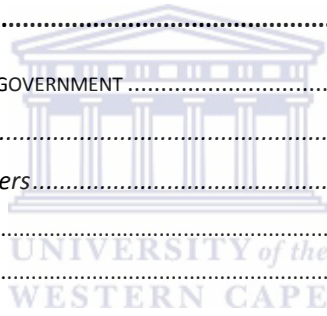
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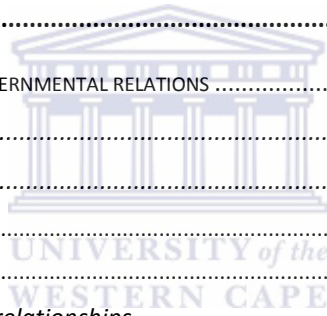
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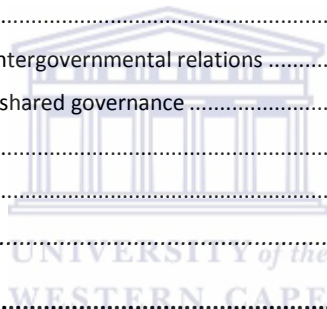
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# CHAPTER ONE

## Introduction

### 1 Problem statement

Kenya has a long history of centralised political and economic power, dating from colonial days. This history of centralisation engendered many governance and economic problems. Key among them were an illiberal and undemocratic governance system centred around an ‘imperial’ presidency, which controlled both political and economic power, and an economic and development system exhibiting regional, ethnic, gender and individual inequalities. The centralised system hindered democratic participation of the people and communities in their own governance and development as well as management of their own affairs. It also encouraged inequitable development, distribution of resources, opportunities, and access to services. These problems gave rise to a long struggle and search for a good governance system through constitutional review,<sup>1</sup> which culminated in the Constitution of 2010. The Constitution was approved in a referendum on 4 August 2010 and brought into operation through promulgation by the President on 27 August 2010.

These events have been described as revolutionary steps in the history of the country.<sup>2</sup> Many have observed that if properly implemented, the new Constitution should lead to revolutionary transformation of the country.<sup>3</sup> Devolution of political power, responsibilities and resources is perceived as the centre piece and the most transformative aspect of the new

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<sup>1</sup> Agitation for change started in the mid-1980s but a formal process of constitutional review started in 2000 when Parliament established a statutory Constitution of Kenya Review Commission. See The Final Report of the Constitution of Kenya Review Commission of 2005

<sup>2</sup> See Kirira N ‘Public finance under Kenya’s new constitution’ (2011) *Society for International Development (SID)* Constitution Working Paper No. 5 discussing transformation in the public finance area; Nyanjom O ‘Devolution in Kenya’s new constitution’ (2011) *Society for International Development (SID)* Constitution Working Paper No. 4 identifying some of the areas in which transformation is expected; Sihanya B ‘The presidency and public authority in Kenya’s new Constitutional Order’ (2011) *Society for International Development (SID)* Constitution Working Paper No. 2 discussing transformation in the executive and presidency; and World Bank *Devolution without Disruption: Pathways to a Successful New Kenya* (2012) v.

<sup>3</sup> Task Force on Devolved Government, Final Report on Devolved Government in Kenya: Developmental Devolved Government for Effective and Sustainable Counties (2011) 14-15. See also Ojwang JB *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (2013) 35.

Constitution<sup>4</sup> having been identified as the main solution of the problems of centralisation long before the formal process of constitutional review started.<sup>5</sup> While there are improvements in various other aspects of the Constitution such as recognition of the supremacy of the Constitution, separation of powers, the Bill of Rights and a more independent judiciary, these existed even in the repealed Constitution. However, devolution did not exist there and is viewed as the major change the new Constitution introduces that will have far-reaching implications for many aspects of government.<sup>6</sup> If the Constitution in general, and devolution in particular, are properly understood and implemented, Kenyan society should be fundamentally transformed, leading to positive change in the lives of the people.<sup>7</sup>

The main problem, however, is that devolution is the most complex and least understood aspect of the Constitution.<sup>8</sup> Contrary to popular belief, devolution permeates the entire Constitution. For instance, because Chapter Eleven of the Constitution is titled ‘devolved government’ many wrongly understand this chapter, which establishes counties, to be the only one that deals with devolution of power. This is far from the truth – reference to devolution and devolved government or governance is reference to a system comprising both the national and county levels of government,<sup>9</sup> and not just one level. As such, the system of

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<sup>4</sup> See World Bank (2012) v, which notes that ‘[d]evolution is at the heart of the new Constitution and a key vehicle for addressing spatial inequities’.

<sup>5</sup> See s 3 Constitution of Kenya Review Act, 2000.

<sup>6</sup> See Zutt J and Tooth G ‘Forward’ in World Bank (2012) iii, where they observe that ‘Kenya’s new Constitution envisages far-reaching changes to the way that government operates and relates to its citizens, with a view of making it more fair, efficient, transparent, and accountable. Devolution is a core dimension of this ambition, and one that will profoundly affect the daily lives of Kenyans from all walks of life.’

<sup>7</sup> World Bank (2012) 1.

<sup>8</sup> World Bank (2012) 1, where it is stated: ‘The centerpiece of the changes is the devolution of powers to a new tier of constitutionally entrenched county governments. In terms of achieving the promise of greater equity and participation, devolution lies at the heart of the new system of government. Devolution will be one of the most complex aspects of the new constitutional arrangement to implement, but it holds the promise of having the greatest impact on the lives of ordinary Kenyans, particularly those living in traditionally marginalized and peripheral regions of the country.’

<sup>9</sup> Ghai YP & Ghai JC, *Kenya’s Constitution: An Instrument for Change* (2011) 118.

devolved government informs the whole Constitution.<sup>10</sup> In terms of design, the rules governing devolution of power appear in almost all the chapters of the Constitution, which are intertwined. The chapters on public finance,<sup>11</sup> the legislature,<sup>12</sup> land and environment,<sup>13</sup> the bill of rights,<sup>14</sup> public service,<sup>15</sup> leadership and integrity,<sup>16</sup> and the judiciary, among others, all deal with matters of devolution. To understand and give effect to devolution in Kenya one must look beyond Chapter Eleven to the other chapters, bearing in mind their interconnections.<sup>17</sup>

Devolution, however, remains a contested subject in Kenya given its controversial history, central role in the constitutional design, and the impact it has on vested centralised interests. Moreover, national government may not fully accept the consequences of devolution as provided for in the Constitution. In addition, it is a novel concept in the Kenyan system, which many are yet to understand. Devolution is therefore potentially going to be a highly litigated area in the Kenyan system. Ojwang observes that

[d]evolution under the new Constitution will, in all probability, result in a major shift in the power configuration: as the various counties have urgent

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<sup>10</sup> Article 1(4) of the Constitution, which provides that ‘the sovereign power of the people is exercised at – (a) the national level; and (b) the county level,’ begins the Constitutional organization of governance in a devolved manner.

<sup>11</sup> Among other matters, the chapter deals with the sharing of taxation functions and powers between the national and county levels of government (art 209); the empowering of both the national and county governments to borrow money (arts 211, 212, 213 and 214); the equitable sharing of revenue raised nationally among the national and county levels of government (arts 201, 202, 203 and 204); and the budgetary processes of both the national and county levels of government (arts 217, 218, 219, 220, 221, 222, 223 and 224).

<sup>12</sup> The chapter establishes a bicameral parliament with the Senate representing the counties and serving to protect the interests of counties and their governments (arts 93 and 96).

<sup>13</sup> Arts 62 and 67.

<sup>14</sup> The obligations imposed upon the state by the Bill of Rights bind both the national and county governments.

<sup>15</sup> The chapter envisages the establishment of a public service for each of the two levels of government, and Article 232 provides for values and principles of public service which apply to public service at both levels of government.

<sup>16</sup> The chapter provides for leadership and integrity standards which bind leadership at both levels of government.

<sup>17</sup> See *Speaker of the Senate and another v Attorney General and others* [2013] eKLR (*Speaker of the Senate*) para 183.

developmental priorities, and with their elected leadership committed to local issues, they are unlikely to render themselves amenable to undue control by the central government. The county set-ups are destined to generate contentious matters for judicial determination, in view of the competing interests therein, and also in relation to possible conflicts with the national authorities.<sup>18</sup>

As any constitution providing for a framework for the distribution and limitation of state power must be interpreted, and because the language of constitutions is often open to more than one interpretation, the controversy and contention will be about the meaning of the devolution provisions in the Constitution. Disputes will abound about: the meaning, form and extent of the devolution adopted; the functional and responsibility distribution among the different levels of government; the resource sharing and entitlement by the different levels of government; the institutional arrangements and their roles; the intergovernmental relationships; and the balance of power among the levels of government. Indeed, if the central role of devolution and its intended objectives are to be realised, a comprehensive, coherent and consistent way of resolving some of these disputes is imperative.

Since Kenya has adopted devolution through a supreme Constitution,<sup>19</sup> constitutionalised and entrenched the system, the resolution of these issues will depend on interpretation of the relevant provisions. Yet there is no history of Kenyan constitutional jurisprudence on devolution. Furthermore, Kenya's jurisprudence on interpretation of a supreme constitution under the replaced Constitution was not consistent as it kept fluctuating between recognition of constitutional supremacy and occasional reversion to parliamentary sovereignty.

## **2 Research question**

Because of the problems raised above, the main question this study raises and seeks to answer is how to interpret the devolution provisions in order to give full effect to the objectives of devolution as the centrepiece of the new Constitution. The study seeks to examine how a purposive interpretation, which the Constitution provides for,<sup>20</sup> can be used to provide a comprehensive, coherent and consistent interpretation of the constitutional provisions on

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<sup>18</sup> Ojwang (2013) 54.

<sup>19</sup> Art 2.

<sup>20</sup> Arts 159(2)(e) and 259(1)(a).



devolution. It does so by asking the following sub-questions: given the supremacy of the Constitution and the prospect of constitutional review, how should the devolution provisions of the Constitution be interpreted? How can effect be given to devolution's transformative intent? Given the novelty of devolution, can foreign jurisprudence provide assistance in the interpretation of these provisions? In particular, given the scale of borrowing from the South African Constitution and the striking textual similarities in a number of provisions, can South African jurisprudence be useful? Since the adoption of the Constitution the Kenyan Courts have turned to and used South African case law especially in respect of the interpretation of the Bill of Rights, which has textual similarities to the South African Bill of Rights. Can South African jurisprudence also be used in the interpretation of the devolution provisions although the structures of government have some differences?

### **3 Argument**

This study makes the argument that the Kenyan people adopted devolution as the central and most transformative aspect of the Constitution not as an end in itself, but as a tool of achieving specific objectives.<sup>21</sup> First, by constitutionalising and entrenching devolution in the Constitution, they aimed to achieve real non-centralism and not mere decentralisation or delegation by national government. Secondly, devolution was intended to address the numerous problems of centralisation that were rooted in the previously highly centralised system. Devolution must ensure equitable development, and distribution of resources, opportunities and services,<sup>22</sup> in order to reduce the regional disparities that engender perceptions and feelings of ethnic discrimination and hatred.<sup>23</sup> It must give the Kenyan people and communities the benefits of democratic and accountable exercise of power,<sup>24</sup> enabling them to participate in and manage their own affairs of governance, and economic and social development.<sup>25</sup> It aims to provide proximate and easily accessible services.<sup>26</sup> It

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<sup>21</sup> Art 174.

<sup>22</sup> Arts 174(f) and (g), and 201(a) and (b).

<sup>23</sup> Arts 10(2)(b), 203(1) and 204(2).

<sup>24</sup> Art 174(a).

<sup>25</sup> Arts 174(c) and (d).

<sup>26</sup> Art 174(f).

must ensure affirmative action for and protection and promotion of the interests and rights of minorities and marginalized communities.<sup>27</sup>

Given these objectives, the thrust of the argument presented in this study is that the constitutional framework on devolution must be interpreted in a manner that seeks to give full effect to these objectives and purposes. A purposive approach to the interpretation of the devolution provisions, which the Constitution incorporates,<sup>28</sup> is pursued because constitutional interpretation is purposive in nature and draws on textual, structural, contextual, historical and comparative elements.<sup>29</sup> It is argued that the economic, social, political and cultural context of Kenyan society and the constitutional drafting history should play a role in the purposive interpretation of the devolution provisions.<sup>30</sup>

It is further argued that since there are significant textual similarities between the Kenyan and South African constitutional provisions on devolution, comparative South African jurisprudence and scholarly commentaries provide instructive lessons. In addition, jurisprudence from other countries such as Germany, Canada, United States of America and Nigeria, which have non-centralised systems, also provides lessons in some respects. It is concluded that, interpreted in this manner, a comprehensive and consistent constitutional framework on devolution which gives full effect to the objective and intent of the Kenyan people can be realised.

#### **4 Literature survey and significance of the study**

Much has been written with regard to interpretation,<sup>31</sup> particularly on the importance of the interpretation of works in the field of law and constitutional law.<sup>32</sup> According to JR de Ville,

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<sup>27</sup> Art 174(e).

<sup>28</sup> Arts 159(2)(e) and 259(1)(a).

<sup>29</sup> Davis D, Chaskalson M & De Waal J 'Democracy and constitutionalism: The role of constitutional interpretation' in Van Wyk D et al (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 1-130; Stevens J *The Interpretation of Fundamental Rights Provisions: International and Regional Standards in African and other Common Law Jurisdictions* (1998) 5-8; and Hogg PW 'Interpreting the Charter of Rights: Generosity and justification' (1990) 28 (4) *Osgoode Hall Law Journal* 818.

<sup>30</sup> Watts RL 'Federalism in fragmented and segmented societies' in Kramer J & Schneider (eds) *Federalism and Civil Society* (1999) 145-63.

<sup>31</sup> Du Plessis L & Corder H *Understanding South Africa's Transitional Bill of Rights* (1994) 61.

<sup>32</sup> De Ville JR *Constitutional and Statutory Interpretation* (2000) 2-3.

although similarities exist between interpretation in law and in other literary works, there is at least one important difference. Interpretation in law has concrete consequences in the real world and lives of human beings as legal words normally have profound effects on the concrete domain. It should therefore not be seen as an activity whose outcome does not matter or as simply a playing with words. This is even more important in the field of constitutional law.<sup>33</sup> Robert M Cover observes thus:

Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretative acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by those organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.<sup>34</sup>

These effects of pain and death have more impact and severe implications in the field of constitutional interpretation and much more in the field of devolution. Because of this the literature draws a distinction between, firstly, interpretation of a constitution and that of an ordinary statute; and secondly, interpretation in a constitutional system founded upon parliamentary sovereignty<sup>35</sup> and in that of constitutional supremacy.<sup>36</sup> The two systems are seen as different and having different implications in many fields, including that of interpretation. This literature establishes certain rules applicable to the interpretation of a supreme constitution and the Bill of Rights. In doing this the literature draws from

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<sup>33</sup> De Ville JR (2000) 1.

<sup>34</sup> Cover RM 'Violence and the world' (1986) *Yale Law Journal* 1601, 1601.

<sup>35</sup> Phillips H & Jackson P *Constitutional and Administrative Law* (1987) 25; Loveland I *Constitutional Law: A Critical Introduction* (1996) 26; Wade HWR and Forsyth *Administrative Law* (1994) 30; see also Sir William Wade, *The Hamlyn Lectures: Thirty Second Series – Constitutional Fundamentals* (1989) 27; and Brazier R *Constitutional Reform: Re-shaping the British Political System* (1991) 10-11.

<sup>36</sup> Rautenbach IM *General Provisions of the South African Bill of Rights* (1995) 56. See also Ge Devenish A *Commentary on the South African Bill of Rights* (1999) 585; and Steytler N *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) 7-10.

jurisprudence established by courts in various countries. It teases out a number of rules of constitutional interpretation including the recognition of the fact that a constitution is a document *sui generis*, requiring special rules of interpretation.<sup>37</sup>

This study focuses on devolution in the Kenyan Constitution and its purposive interpretation. Since the coming into force of the new Constitution, there has not been any literature written on this subject. Ghai and Ghai's commentary<sup>38</sup> provides a brief overview of the entire Constitution as an instrument for change. It has a brief section on devolution which does not address the question of a purposive interpretation of the devolution provisions. The World Bank's 'devolution without disruption,'<sup>39</sup> although providing a detailed analysis on the practical aspects and challenges of implementation of devolution, does not focus on the legal and constitutional purposive interpretation dimensions. Lumumba and Franceschi's introductory commentary also remains at this introductory level.<sup>40</sup> It briefly touches on the devolution provisions but does not move to the level of interpretation. Ojwang's book on the ascendant judiciary focuses on the judiciary and its elevated role under the new Constitution. It correctly sees the judiciary as destined to play a critical role in giving effect to devolution and settling the likely disputes on devolution matters especially among the levels of government.<sup>41</sup> Bosire's doctoral thesis on devolution for development, conflict resolution, and limiting central power, provides a detailed analysis of devolution in the Kenyan Constitution.<sup>42</sup> It concentrates on the design aspects and how these can be traded off in order to achieve the objectives of development, conflict resolution and centre-constraining. It seeks to evaluate the design to see whether or not it is appropriate for achieving these objectives. It does not, however, address the purposive interpretation dimensions of the devolution

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<sup>37</sup> Stevens J *The Interpretation of Fundamental Rights Provisions: International & Regional Standards in African and other Common Law Jurisdictions* (1998) International Centre Against Censorship, Report on article 19, 1-2; Steytler N (1998) 7; *Minister of Home Affairs and another v Fisher and another* (1980) AC 319, 329; *Thornhill v A-G of Trinidad and Tobago* (1981) AC 61 (PC) 69; *Nyamakazi v President of Bophuthatswana* (1994) (1) BCLR 92 (B)118; and *Dow v Attorney General* (1992) LRC (const) 623, 632-3.

<sup>38</sup> Ghai & Ghai (2011).

<sup>39</sup> World Bank (2012).

<sup>40</sup> Lumumba PLO & Franceschi L *The Constitution of Kenya, 2010: An Introductory Commentary* (2014).

<sup>41</sup> Ojwang (2013) 53-4.

<sup>42</sup> Bosire CM *Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010* (unpublished Phd thesis, University of Western Cape, 2013).

provisions. A few commissioned research papers<sup>43</sup> have also been published on the new Constitution but they are fairly general and do not address the interpretation aspects of the devolution provisions. It is thus clear that there is a dearth of literature on the issue of purposive interpretation of the devolution provisions, which this study seeks to provide.

A large body of literature by scholars of the South African system provides some insights that may be instructive in developing a purposive approach to the Kenyan devolution provisions.<sup>44</sup> Though this literature may provide useful insights for this study, it does not canvass specifically and comprehensively interpretation of constitutional provisions on devolution and is not focused on Kenyan devolution.

Drawing from this comparative literature and jurisprudence, this study provides a comprehensive interpretation of the Kenyan constitutional provisions on devolution. This is a significant contribution to be used by various arms of government such as the judiciary, legislative institutions at both levels of government, speakers of these legislative institutions, executive institutions at both levels, and commissions and independent offices, which have a constitutional interpretation mandate.<sup>45</sup> Even private individuals in the course of their interaction with each other and with the governments will find this work significant as they deal with interpretation questions.<sup>46</sup> The judiciary as the determinative interpreter of the law and forum before which the litigation will be undertaken may find this study particularly

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<sup>43</sup> Kirira N (2011); Nyanjom O (2011) and Sihanya B.

<sup>44</sup> See for example Steytler N & De Visser J *Local Government of South Africa* (2011); Bishop M 'Remedies' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 9; Du Plessis L 'Interpretation' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 32; Steytler N & Fessha YT 'Defining local government powers and functions' (2007) 124 *South African Law Journal* 320-38; Michelman FI 'The rule of law, legality and the supremacy of the Constitution' in Woolman S et al *Constitutional Law of South Africa* 2 ed ch 11 (2011); Bronstein V 'Legislative competence' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 15; Malherbe R 'The constitutional distribution of powers' in De Villiers B (ed) *Review of provinces and local governments in South Africa: Constitutional foundation and practice* (2008) 19; and Madlingozi T and Woolman S 'Provincial legislative authority' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 19.

<sup>45</sup> Murphy WF, Fleming JE & Harris WF *American Constitutional Interpretation* (1986) 184-6.

<sup>46</sup> Haberle P and Botha H 'Constitutional interpretation as a public process: An interview with Professor Peter Haberle' (2002) 17 *SAP L* 142-51.

useful as it will be called upon to render determinative meaning of the constitutional devolution provisions.<sup>47</sup>

Given the central role of devolution and its design, which spans most of the chapters of the Constitution, a comprehensive coverage of the issues raised in this study necessitated a lengthy document.

## **5 Research Methodology**

This research is based on a critical analysis and review of both primary and secondary literature relevant to the subject area. Most important among the primary sources has been the Constitution of Kenya. Besides this, at the comparative level, an analysis and review of constitutional provisions of other countries' constitutions relevant to devolution has been undertaken. Given the lengthy constitution-making process in Kenya, reliance has also been placed on reports of government commissions, committees and task forces which have been and continue to be involved in processes of constitution-making and implementation. Instances of Kenyan case law are examined to draw both positive and negative lessons.

In addition to primary sources, a critical analysis and review of secondary sources such as scholarly works in the form of textbooks and journal articles on the subject of devolution have been undertaken. The analysis of these scholarly works and comparative approaches and experiences of other countries have provided useful lessons in understanding the theoretical and conceptual foundations of some of the issues in the theory, architecture and design of devolution.

Since the framers of the Kenyan Constitution borrowed heavily from the South African Constitution, particularly in as far as the system of devolved government is concerned, the study has used South African jurisprudence in interpreting the Kenyan Constitution. Besides the South African experience, other appropriate comparative jurisdictions such as Germany, Canada and India, among other sources, have been used. The overall aim of this study is to provide a coherent, purposive interpretation of key devolution provisions of the Kenyan Constitution, using the usual techniques of constitutional interpretation, in a manner that gives effect to the envisaged centrality of devolution and its objectives and purposes.

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<sup>47</sup> Murphy, Fleming & Harris (1986) 186-9.

## **6 Chapter outline**

This study is organised and presented in a number of chapters. Chapter Two deals with the approach to interpretation to be followed in the interpretation of the devolution provisions. Chapter Three discusses the Kenyan political, economic, social and cultural history which led to the adoption of the devolved system of government, since it has been identified as one of the extra-textual sources of purposive interpretation. It aims at establishing the problems and challenges which led to the adoption of devolution. Chapter Four examines the provisions on the values, objects and principles of devolution, which form part of the basic structure of the Constitution. It examines the nature of the objects and principles within the constitutional framework and the status of these provisions and whether they are enforceable as law. Chapter Five interprets the provisions establishing the levels of governance and demarcation of county boundaries, and institutions and structures of governance at the county level. The focus of Chapter Six is the examination and interpretation of the constitutional provisions on the functions and powers of the two levels of government. In Chapter Seven the provisions dealing with financial resources for both levels of government are considered. Chapter Eight focuses attention on the provisions covering supervision and intervention by national government into the affairs of county governments. Chapter Nine undertakes an examination of the provisions on co-operative government and intergovernmental relations. In Chapter Ten the constitutional provisions on the Senate as an institution of shared rule are critically considered and examined. Consideration of the constitutional provisions dealing with the process of transition to devolved government is undertaken in Chapter Eleven. Chapter Twelve concludes the study by addressing the major questions that arose in previous chapters.

## **7 Defining devolution and related concepts**

Given that this study is about the interpretation of the devolution provisions in the Constitution, devolution and other related concepts call for working definitions. This is necessary in order to make it clear from the outset what the term ‘devolution’ or ‘devolved government’ and other related terms and forms of organising governance such as federalism, decentralisation, delegation and deconcentration will mean when used in this study.

### **7.1 Devolution**

There is no fixed definition of the term devolution, although it is a form of organising governance which is often used to mean different things in different circumstances. Countries

have used the term to describe systems that differ markedly from each other. For example, the United Kingdom's 'devolution' is completely different from the Ugandan 'devolution' and what Kenya has adopted as 'devolution'. Likewise, the devolution adopted by Zimbabwe in 2013 differs markedly from these others. Each country's devolution must thus be evaluated within its own constitutional or statutory context to determine its meaning, form and content, in order to distinguish or locate it within the conceptual framework of the other systems of organising governance such as federalism, decentralisation, delegation and deconcentration.

For the purposes of this study the legal meaning of Kenyan devolution must be drawn from what the Constitution presents it to be. It is presented as a system of multilevel government under which the Constitution creates two distinct and interdependent levels of government – the national and county – that are required to conduct their mutual relations in a consultative and cooperative manner. The Constitution assigns them powers and functions which include revenue raising and sharing powers, and grants the counties participation rights and representation in the national legislature through the Senate. Because of the distinct and interdependent nature of the levels of government and the manner of their functional assignment, the Constitution also provides for a system of intergovernmental relations, including dispute resolution among the governments it creates. Thus, the system creates counties that are fundamentally different from the local government that hitherto existed under the replaced constitutional dispensation. Their distinct nature renders them relatively autonomous and coordinate rather than subordinate to the national government. However, national government is granted limited powers of supervision and intervention in county affairs which are constitutionally circumscribed and constrained, and must be exercised within the framework of cooperative government.

## 7.2 Federalism

Federalism is one of the systems of organising governance which combines self-governance at the local level with shared governance at the national level.<sup>48</sup> As such, power is organised

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<sup>48</sup> Elazar DJ *Exploring Federalism* (1987); Watts RL *Comparing Federal Systems* 3 ed (2008) 1; Watts RL 'The federal idea and its contemporary relevance' in Courchene et al (eds) *The Federal Idea: Essays in Honor of Ronald L Watts* (2011) 15; and Kincaid J 'Editor's Introduction: Federalism as a mode of governance' in Kincaid J (ed) *Federalism* (2011) xxii



and administered vertically by two or more distinct levels of government.<sup>49</sup> Crucial to the normative definition of a non-centralised or federal system is the division of the country into mutually exclusive geographic territorial units.<sup>50</sup> The system then ‘grants partial autonomy to the geographically defined subdivisions of the polity’, making the system lie somewhere between a fully unitary state and an alliance of separate states working in a kind of confederation.<sup>51</sup> Elazar excludes hierarchy in his conception of a classical federal or non-centralised system; instead he conceives of co-ordinate tiers of government,<sup>52</sup> which he associates with the social contract theory of government and calls it contractual non-centralisation:

Contractual non-centralisation – the structured dispersion of power among many centers whose legitimate authority is constitutionally guaranteed – is the key to the widespread and entrenched diffusion of power that remains the principle characteristic of and argument for federal democracy.<sup>53</sup>

According to Watts, ‘federalism provides a technique of constitutional organization that permits action by a shared government for certain common purposes in a larger political unit, combined with autonomous action by smaller constituent units of government, directly and democratically responsible to their own electorates’.<sup>54</sup> Hogg identifies the most essential characteristic of a federal Constitution as the distribution of governmental power between coordinate central and regional authorities. He emphasises that this requires a constitution which defines the powers vested in the central and regional authorities, and which must be in writing because such a vital matter could not be left to unwritten understandings. The constitution must be supreme, binding on, and unalterable by each of the central and regional authorities. He observes that if either of the governments could unilaterally change the

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<sup>49</sup> Kommers DP & Thompson WJ ‘Fundamentals in the liberal constitutional tradition’ in Joachim Jens Hesse & Nevil Johnson (eds) *Constitutional Policy and Change in Europe* (1995) 34.

<sup>50</sup> Watts (1999) 150.

<sup>51</sup> Feeley MM & Rubin E *Federalism: Political Identity and Tragic Compromise* (2008) 22.

<sup>52</sup> Elazar (1971) 91-106.

<sup>53</sup> Elazar DJ ‘Federalism vs. decentralisation: The drift from authenticity’ in Kincaid J (ed) *Federalism* Volume 11 *Alternative Models, Constitutional Foundations, and Institutional Features of Federal Governance* (2011) 99. See also Kincaid (2011) xxii.

<sup>54</sup> Watts (2011) 14.

distribution of powers, then the authorities would not be coordinate since supreme power would lie with the authority having the power to change the Constitution.<sup>55</sup>

There are two types of federal systems: the dualist competitive system and the integrative cooperative system. Because of this, different countries adopt different forms depending on their particular circumstances. Some scholars even say that there are no two similar systems.<sup>56</sup> Watts points out that some are hybrids drawing from both centralised and non-centralised systems.<sup>57</sup>

### 7.3 Decentralisation

A federal system must be distinguished from a decentralised system, considered by some scholars as being essentially a centralised system which delegates some of its powers and functions to lower level units.<sup>58</sup> A decentralised system involves the transfer of powers by a central government to sub-national units which exercise those received powers under the control and supervision of the central government that is transferring the powers to them. The central defining feature here is that the lower units, their nature and form, are creatures of the central government, the powers and functions they exercise and perform, and the resources they use are assigned and allocated to them by the central government. The lower units are subordinate and not coordinate to the central government since they are not created and protected by the constitution and they can easily be abolished or their powers and functions recentralised or re-adjusted by the central government. According to Elazar:

Decentralization implies the existence of a central authority, a central government. The government that can decentralize can recentralize if it so desires. Hence, in decentralized systems the diffusion of power is actually a matter of grace, not right, and, as history reveals, in the long run it is usually treated as such.<sup>59</sup>

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<sup>55</sup> Hogg PW *Constitutional Law of Canada* (1992) 115.

<sup>56</sup> Kincaid (2011) xxi.

<sup>57</sup> Watts (2011) 16.

<sup>58</sup> See Rubin & Feeley (2008) 171. See also Fessha Y & Kirkby C 'A Critical survey of subnational autonomy in African states' (2008) 38 (2) *Publius: The Journal of Federalism* 249.

<sup>59</sup> Elazar DJ 'Community self-government and the crisis of American politics' (1971) 81 (2) *Ethics* 91-106. Also see De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 14.

Stauffer and Topperwien, on the other hand, define decentralisation from the perspective of the combination of self-rule and shared-rule,<sup>60</sup> as a system under which the sub-entities are granted a certain measure of self-rule but without shared-rule.<sup>61</sup>

This study adopts Elazar's definition as the working definition for decentralisation whenever this terminology is used. From this perspective, decentralisation can be used in both unitary and federal systems. For example, under the Kenyan Constitution the county governments have both original constitutional functions and powers, and decentralised functions and powers delegated by the national government. In addition, the counties are required to decentralise their functions and provision of services to lower units.

#### **7.4 Delegation**

Delegation, a form of decentralisation, involves the transfer of responsibilities for specifically defined functions to structures that exist outside of central government, which retains indirect control of them. The central government has discretion in deciding whether or not the power or function should be delegated.<sup>62</sup> It is also generally empowered to withdraw the delegation of powers and functions. The units to which the power is delegated are mere agents since they have their own employees, in contrast to a deconcentrated system. It is for this reason, among others, that delegation is said to be to bodies outside the central government.<sup>63</sup> According to De Visser, delegation takes place when a power that originally belonged to the central government is transferred to a sub-national government. Although the central government has discretion in deciding whether or not to delegate the power or function, and can circumscribe the delegated power and subsequently withdraw it, it is prevented from exercising the power once it is delegated.<sup>64</sup> The central government does not have direct control over the delegates but it has the discretion to determine whether or not to delegate, what to delegate and to whom. It also has discretion regarding when to end the delegation and withdraw the responsibility. Delegation focuses more on executive powers.

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<sup>60</sup> Stauffer T & Topperwien N 'Balancing self-rule and shared rule' in Fleiner LRB & Feiner T (eds) *Federalism and Multiethnic States: The case of Switzerland*, 2<sup>nd</sup> Revised Edition (2000) 41-74.

<sup>61</sup> Stauffer & Topperwien (2000) 43.

<sup>62</sup> De Visser (2005) 14.

<sup>63</sup> Ahmad J, Bird R & Litvack J *Rethinking Decentralisation in Developing Countries* (1998) World Bank 4-6.

<sup>64</sup> De Visser (2011) 14.

National government can assign some of its legislative and executive powers and functions to county governments. First, the assignment by national government of some of its powers and functions to county governments as envisaged by Article 186(3) is a typical example of decentralisation through delegation.<sup>65</sup> Where such assignment or delegation is of legislative powers, the county governments are given the discretion to determine the policy and legislation and to implement this legislation. They are not accountable to national government on what to put in the legislation and how to implement it, as long as they act within the parameters of their assigned powers. The powers can however be repealed by national government. Secondly, it is delegation of powers and functions when national government, in terms of Article 183(1)(b), requires a county executive committee to implement national legislation or aspects of it within the county.<sup>66</sup> In this case, the county government is accountable to national government regarding what it implements and the manner in which it implements the legislation. Thirdly, delegation of powers and functions arises when in terms of Article 187(1) the national government by agreement transfers some of its functions to county government. The county government is accountable to national government when exercising such transferred powers as it is bound by the agreement of transfer.<sup>67</sup> Fourthly, the decentralisation by county governments envisaged by Article 176(2) contemplates the delegation variant.<sup>68</sup>

## **7.5 Deconcentration**

According to De Visser, deconcentration involves ‘the distribution of powers and responsibilities among different units or levels within a central government’ in a manner that ensures that the units or levels are agents that are, ultimately, accountable to the central government. The main defining feature is the fact that the allocation of responsibilities occurs within the hierarchy of central government in the sense that the central authority is superior and can direct, instruct and supervise the local units, which are subordinate.<sup>69</sup> The local units are directly controlled and ultimately accountable to the central authority and not to the people. Deconcentration is administrative in nature in that it involves entities that are part of

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<sup>65</sup> See Chap 6 section 8.1.

<sup>66</sup> See Chap 6 section 8.2.

<sup>67</sup> See Chap 6 section 8.2.

<sup>68</sup> See Chap 6 section 6.2.

<sup>69</sup> De Visser (2005) 14.

the central authority on whose behalf they act. It involves the central authority opening its own departmental and ministerial administrative field offices in the sub-units. Effectively, deconcentration is not decentralisation as it does not involve any transfer of functions and powers, which are retained by the central authority as the employer of the field officers who implement its decisions. According to Stauffer and Topperwien, deconcentration is a system where the sub-entities are merely administrative units which have neither a right to self-rule nor shared-rule, and can be changed by the central authority since they have no autonomy.<sup>70</sup> The defining feature is the lack of both self-rule and shared-rule. In the course of the discharge of their functions, both the national and county governments may employ the deconcentration strategy, and may combine it with decentralisation.

The decentralisation by state organs from the capital of Kenya envisaged by Article 174(h) and the reasonable access to services envisaged by Article 6(3) take the form of deconcentration.<sup>71</sup>

## **7.6 Conclusion**

Although devolution in the Kenyan context need not be labelled a federation, what is clear is that it is not mere decentralisation. The system has quite a number of federal features which are entrenched in the Constitution and cannot be changed on a whim of the national government. These features are, however, complemented by some aspects of decentralisation as discussed above. The system closely resembles the South African one and may correctly be described as quasi-federal.

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<sup>70</sup> Stauffer & Topperwien (2000) 43.

<sup>71</sup> See Chap 4 section 3.2.5.

## CHAPTER TWO

### An approach to the interpretation of the devolution provisions in the Constitution

#### 1 Interpreting devolution provisions as part of a supreme constitution

The new Constitution is founded upon two major principles: the sovereignty of the people<sup>1</sup> and the supremacy of the Constitution.<sup>2</sup> The High Court of Kenya in two cases challenging the constitution-making process drew a distinction between the constituent power of the people as the sovereign and the supremacy of the Constitution as the will of the people.<sup>3</sup> As the supreme law of the land the Constitution binds and controls all persons and state organs at both levels of government.<sup>4</sup>

Based on the fact that constitutional supremacy<sup>5</sup> is different from a system founded upon parliamentary sovereignty,<sup>6</sup> courts and scholars across the world have developed an approach to the interpretation of a supreme constitution<sup>7</sup> that is different from the one used in a system

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<sup>1</sup> Article 1 and the preamble to the Constitution which declares that it is '[w]e the people of Kenya' who, when 'exercising our sovereign and inalienable right to determine the form of governance of our country' have adopted, enacted and given this Constitution to ourselves and our future generations.' See also *Commission for the Implementation of the Constitution v Parliament of Kenya and another* [2013] eKLR para 71, where the court observed that '[t]h golden thread running through the Constitution is one of sovereignty of the people of Kenya'.

<sup>2</sup> Art 2.

<sup>3</sup> *Timothy Njoya and others v Attorney General, and others* (2004) AHRLR 157 (KeHC 2004) (*Njoya* 1); and *Patrick Ouma Onyango and others v Attorney General and others* [2005] eKLR (*Onyango*).

<sup>4</sup> Art 2(1).

<sup>5</sup> Gardbaum S 'The new Commonwealth model of constitutionalism' (2001) 49 *American Journal of Comparative law* 707-60.

<sup>6</sup> See also Phillips H & Jackson P *Constitutional and Administrative Law* (1987), where in the context of the British Constitution they define the concept in terms of parliament being the highest institution in the land not subject to any concept of a higher norm. Loveland I *Constitutional Law: A Critical Introduction* (1996) 29-30.

<sup>7</sup> *Marbury v Madison* 5 US 137, 2 Led. 60 (1803), in which Justice John Marshall established the principle of judicial review, thereby enhancing the role of the courts in the policy and political processes in the country and subjecting the power of parliament to legislative limitations. See also Devenish G A *Commentary on the South African Bill of Rights* (1999) 2, where he notes that the ultimate word in constitutional matters in such a system is vested in the courts through judicial review.

based on parliamentary sovereignty.<sup>8</sup> From this, specific principles and rules for the interpretation of the Constitution have emerged. In addition, other principles and rules for the interpretation of bills of rights, which are entrenched in a supreme constitution, have also been developed.<sup>9</sup> This approach is generally referred to as a purposive interpretation.<sup>10</sup> In keeping with comparative jurisprudence and literature in this area, these principles and rules of constitutional interpretation have been incorporated into the Kenyan Constitution. Both Article 159, which provides for principles guiding the exercise of judicial authority,<sup>11</sup> and Article 259, which, provides for rules for construing the Constitution, prescribe a purposive and value-based approach to interpretation.<sup>12</sup> Article 20, when addressing the application of the Bill of Rights, also prescribes a value-based and purposive interpretation of rights.<sup>13</sup> Since devolution has been entrenched in the Constitution, the constitutional provisions on devolution must also be interpreted following this purposive approach.

### 1.1 The meaning of a supreme Constitution

Article 2 of the Constitution of Kenya establishes the doctrine of constitutional supremacy in the following terms:

- 1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- 2) No person may claim or exercise State authority except as authorised under this Constitution.

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<sup>8</sup> Hogg PW 'The Charter of Rights and American theories of interpretation' (1987) 25 *Osgoode Hall Law Journal* 87-113; Devenish G 'The theory and methodology for constitutional interpretation in South Africa' (2006) 69 *THRHR* 238-57; and Klug H 'South Africa: From constitutional promise to social transformation' in Goldsworthy J (ed) *Interpreting Constitutions: A Comparative Study* (2007) 266-319, 269.

<sup>9</sup> *ANC (Border Branch) & Another v Chairman, Council of State, Ciskei & Another* (1995) 4 BCLR 401 at 411; *R v Big M Drug Mart Ltd* (1985) 18 DLR (4<sup>th</sup>) 321, 395-6. See also *S v Zuma* 1995 (2) SA 642 (CC) para 14, in which the South African Constitutional Court approved of the following passage from the judgment of Lord Wilberforce in *Minister of Home Affairs v Fisher*: 'A supreme constitution requires a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.'

<sup>10</sup> Du Plessis L 'Interpretation' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 32, 36-7.

<sup>11</sup> Art 159(2).

<sup>12</sup> Art 259(1) and (3).

<sup>13</sup> Art 20(4).

3)....

- 4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

The explicit message is that the Constitution is the highest law as compared with all other laws and binds all state organs and persons. The High Court in *Martin Nyagah Wambora and others v The Speaker of the Senate and others* commented on the meaning of this supremacy clause thus:

This means that no person or state organ is above the law and above the Constitution. All organs created by the Constitution are subordinate to it. Further, Article 10(1) binds all state organs, state officers and public officers and all persons while applying and interpreting the Constitution. Therefore, when any of these organs steps outside its area of operation, this Court will not hesitate to intervene.<sup>14</sup>

This supremacy is best understood by distinguishing it from its polar opposite system of parliamentary sovereignty. While the system of parliamentary sovereignty rests upon the principle that parliament is a sovereign law-maker with unfettered power,<sup>15</sup> that of constitutional supremacy rests upon the principle that the people are sovereign and when they express their will through the Constitution, the Constitution becomes the supreme law which limits all governmental authority, including the power of parliament to legislate and perform all its other functions.<sup>16</sup> The supremacy of the Constitution therefore derives from the sovereignty of the people. Justice Kasango in the *Njoya* case observed that ‘[t]he Constitution of Kenya which is the supreme law of this country is the will of the people or the mandate they give to indicate the manner in which they ought to be governed’.<sup>17</sup> The High Court in *Onyango* clarified the hierarchical relationship between the sovereign people and the supreme constitution thus:

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<sup>14</sup> [2014] eKLR (*Martin Nyagah Wambora*) para 195.

<sup>15</sup> Currie I & De Waal J *The New Constitutional and Administrative Law* Volume 1 Constitutional Law (2001) 13-4.

<sup>16</sup> Tushnet MV ‘New forms of judicial review and the persistence of rights- and democracy-based worries’ (2003) 38 *Wake Forest Law Review* 813-14.

<sup>17</sup> *Njoya* 1 (2004) 26.



The reason for this is that constituent power cannot be fettered by an existing Constitution in that in the hierarchy of power, the people come first and it is the people who gave rise to a Constitution. They are the supreme law givers.

The Constitution though supreme is subordinate to the people.<sup>18</sup>

According to Justice Ringera, ‘the Constitution is not supreme because it says so: its supremacy is a attribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves’.<sup>19</sup>

Inherent in the supremacy of the Constitution (or the concept of constitutionalism) is the notion of limited governmental power. As Justice Ringera put it, ‘The concept of constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, none is supreme: the Constitution is supreme and they all bow to it.’<sup>20</sup> Accordingly, the legislature’s power to alter the Constitution is subjected to procedural and substantive limitations requiring completely different and difficult procedures compared with those for alteration of ordinary legislation. Similarly, its powers of law enactment and limitation of the rights of the citizens are themselves limited by the Constitution, both in substance and procedure.<sup>21</sup> This is contrasted with a constitution based on parliamentary sovereignty, such as the orthodox Westminster model, which is regarded as just another statute. Under such a system, all laws including statutes of a constitutional nature were equal, which meant that they could be made and unmade by Parliament at its own will and following the same procedures.<sup>22</sup> Because of this, there were no constitutionally entrenched fundamental rights.<sup>23</sup>

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<sup>18</sup> *Onyango* 52

<sup>19</sup> *Njoya* 1 para 29.

<sup>20</sup> *Njoya* 1 para 29.

<sup>21</sup> *Speaker of the Senate and another v Attorney General and others* [2013] eKLR (*Speaker of the Senate*) paras 54, 55, 61 and 62.

<sup>22</sup> Wade HWR and Forsyth *Administrative Law* (1994) 30; See also Wade W *The Hamlyn Lectures: Thirty Second Series: Constitutional Fundamentals* (1989) 27.

<sup>23</sup> Brazier R *Constitutional Reform: Re-shaping the British Political System* (1991) 10-11.

## 1.2 The role of the courts

One consequence of constitutional supremacy is that the judiciary has the power of constitutional interpretation and judicial review which it must use to strike down legislation or any other action if found to be inconsistent with the supreme Constitution. Constitutional interpretation is a process that employs generally applicable principles, procedures and strategies to read and apply the Constitution, starting with and centred on the written constitutional document.<sup>24</sup> It is a process of seeking to discover the content of the norms and apply them.<sup>25</sup> More importantly, it is a process of the practical realisation of the constitutional provisions by giving them content, shape and direction.<sup>26</sup> While Article 2(4) makes it clear that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, in terms of Article 165(3)(d)(i), the High Court has jurisdiction to interpret the Constitution and determine ‘whether any law is inconsistent with or in contravention of [the] Constitution’ and make the necessary declaration. This draws on what Justice John Marshall of the US Supreme Court found many years ago.<sup>27</sup> He pointed out that it is the role of the judiciary to weigh Acts of the legislature and acts of any other body against the Constitution for constitutional consistency and, where there is inconsistency, declare them unconstitutional and invalid.<sup>28</sup> The Kenyan High Court in *Trusted Society of Human Rights and others v Attorney-General and others* has already acknowledged this authority of the courts under the new Constitution, noting that ‘the Courts have an interpretative role – including the last word in determining the constitutionality of all governmental action’.<sup>29</sup> This power, the Court added, includes the responsibility to determine whether the other constitutional organs have interpreted their mandates under the Constitution correctly.<sup>30</sup> Furthermore, the Supreme Court in *Speaker of the Senate and another v Attorney General and others* asserted that a time comes when the prosecution of mandates by other organs of state raises conflicts touching on the integrity of the Constitution itself, calling for the court as the ultimate judge

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<sup>24</sup> Du Plessis (2011) 19.

<sup>25</sup> Komers DP *The Constitutional jurisprudence of the Federal Republic of Germany* (1989) 50.

<sup>26</sup> Du Plessis (2011) 19.

<sup>27</sup> *Marbury v Madison* 5 US 137, 2 Led 60 (1803) (*Marbury*).

<sup>28</sup> *Marbury*

<sup>29</sup> [2012] eKLR (*Trusted Society*) para 64.

<sup>30</sup> *Trusted Society* para 69. See also *Federation of Women Lawyers and others v Attorney-General and others*, where the High Court notes that the court has power to supervise the exercise of constitutional mandates.

of right or wrong.<sup>31</sup> Ojwang notes that the ‘new Constitution cannot propel itself’,<sup>32</sup> and as such, the judiciary is assigned a central and special role as ‘the primary and ultimate arbiter, when the operations of the several public bodies run into conflict’.<sup>33</sup> It is the dominant interpreter of the totality of the Constitution, and has the power to ‘pronounce upon legality with a final voice’.<sup>34</sup>

Contrary to what happens under parliamentary sovereignty, courts do not avoid and abstain from legal issues that have political and policy implications.<sup>35</sup> In *Speaker of the Senate*, Rawal DCJ adopted the view of the South African Constitutional Court in *Doctors for Life* where it was asserted that the court bears the ‘responsibility of being the ultimate guardian of the Constitution and its values’, has jurisdiction in ‘crucial political areas’ and bears the duty ‘to adjudicate finally in respect of issues which would inevitably have important political consequences’.<sup>36</sup> In both *Judicial Service Commission v Speaker of the National Assembly and another*,<sup>37</sup> and *International Legal Consultancy Group v The Senate and Another*,<sup>38</sup> the High Court went further and made various policy recommendations regarding what should be legislated. Constitutional supremacy gives the courts a special and wide responsibility for the enforcement of rights under the Constitution.<sup>39</sup> Ojwang explains that the elaboration of this

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<sup>31</sup> *Speaker of the Senate* para 64.

<sup>32</sup> Ojwang JB *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (2013) 39.

<sup>33</sup> Ojwang (2013) 26.

<sup>34</sup> Ojwang (2013) 26.

<sup>35</sup> Du Plessis LM & Corder H *Understanding South Africa’s Transitional Bill of Rights* (1994) 69, where they point out: ‘In the heyday of apartheid, judges most often preferred to understand (what were called) “policy issues” or “policy considerations” rather extensively, and they professed abstention from them lest the courts and the legal system became entangled in and “tainted” by politics. This point of view prevailed as regards interpretation of legislation in particular. In some cases where “policy considerations” were given weight the judicial frame of mind was one of either covert support for or acquiescence in policies of the government of the day.’

<sup>36</sup> *Speaker of the Senate* para 201. See also Du Plessis (2011) 47, where the Court observes that ‘generally speaking, constitutional interpretation in South Africa since 1994 seems to have been accompanied by an awareness of the judiciary’s unavoidable political involvement in the broad sense of the word’.

<sup>37</sup> [2014] eKLR (*Judicial Service Commission*) para 268.

<sup>38</sup> [2014] eKLR *International legal consultancy group (judgment)* para 63.

<sup>39</sup> *Jasbir Singh Rai v Tarlochan Singh Rai and others* [2013] eKLR (*Jasbir Singh Rai*). para 96. See also Ojwang (2013) 37.

mandate to protect human rights, ‘necessarily extends the judicial mode of work beyond technical legalism, to perceptions in the social and political context’.<sup>40</sup> A German judge, Dieter Grimm, once observed that ‘constitutional courts inevitably cross the line between law and politics’ because ‘the constitution does not offer an unambiguous and complete standard for [reviewing the validity of legislation]’.<sup>41</sup> This is contrasted with the system of parliamentary sovereignty under which the judiciary plays a very limited role and is made subservient to both the legislature and the executive,<sup>42</sup> with its role reduced to enforcing and not questioning what the legislature has said or done.<sup>43</sup>

Although the courts have a more important role, and interpretation requires more than just a literal reading of the text, they do not have unfettered discretion as they, like other organs of state, are subject to constitutionalism. Dominique Rousseau considers the judge the master of the Constitution, who, however, is not free to produce whatever interpretation of the Constitution he or she chooses. Objectivity through the control of interpretation rules is called for, making the constitutional judge the ‘unfree master’ of the constitution.<sup>44</sup> For Motala, limiting and disciplining rules are necessary to avoid abuse of unfettered discretion of the judges.<sup>45</sup> Breyer calls for limitation of the courts’ judicial power through constitutional interpretation rules and judicial restraint.<sup>46</sup> Ringera J points out that to affirm that a Constitution must be interpreted differently:

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<sup>40</sup> Ojwang (2013) 27.

<sup>41</sup> See Komers (1989) 51.

<sup>42</sup> Wade HWR & Forsyth (1994) 29, where in a chapter titled ‘Constitutional Foundations of the Powers of the Court’ they observe that: ‘The sovereignty of parliament is a peculiar feature of the British constitution which extends a constant and powerful influence. In particular, it is an ever-present threat to the position of the courts; and it naturally inclines the judges towards caution in their attitude to the executive, since parliament is effectively under the executive’s control.’ See also *City of London v Wood* 12 Mod. 669, 88 Eng. Rep. 1592 (1702) in which Chief Justice Lord Holt opined that: ‘An Act of Parliament can do no wrong, though it may do several things that look pretty odd.’

<sup>43</sup> Wade & Forsyth (1994) 34.

<sup>44</sup> Rousseau D ‘The constitutional judge: master or slave of the constitution’ in Rosenfeld M (ed) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994) 263.

<sup>45</sup> Motala Z ‘The constitution is not anything the court wants it to be: The *Mhlungu* decision and the need for disciplining Rules’ (1998) 115 *South African Law Journal* 145.

<sup>46</sup> Breyer S *Active Liberty: Interpreting our Democratic Constitution* (2005)17-18.

is not to deny that words even in a Constitutional text have certain ordinary and natural meanings in the English or other language employed in the Constitution and that it is the duty of the court to give effect to such meaning. It is to hold that the court should not be obsessed with the ordinary and natural meaning of words if to do so would either lead to an absurdity or plainly dilute, transgress or vitiate constitutional values and principles.<sup>47</sup>

Similarly, Mutunga CJ in a dissenting advisory opinion in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* correctly observed that '[t]he approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution'.<sup>48</sup> In *Federation of Women Lawyers (FIDA-K) and others v Attorney General and others*, the High Court endorsed the view that the courts' express constitutional duty to interpret the Constitution is not an unlimited power.<sup>49</sup>

This study avers that the purposive interpretation and its rules and principles have been developed and incorporated in the Kenya Constitution to provide guidance and restraint in this regard, with the constitutional text being the starting point.

### **1.3 Rationale for interpreting a supreme Constitution differently**

Kenya's adoption of constitutional supremacy entails a clear jurisprudential choice of a different approach to interpretation.<sup>50</sup> As was observed by the Botswana Court of Appeal, 'it was once thought that there should be no difference in approach to constitutional construction than any other statutory interpretation'.<sup>51</sup> Not so anymore, as it is now established that a supreme constitution is interpreted differently for a number of reasons. First, the Constitution is a statute *sui generis*, different from ordinary statutes as it is the expression of the will of the people, establishing a framework of government which grants and constrains governmental

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<sup>47</sup> *Njoya* 1 para 29.

<sup>48</sup> [2012] eKLR (*Gender Representation*) para 8.6.

<sup>49</sup> [2011] 2KLR 4 (*FIDA-K*).

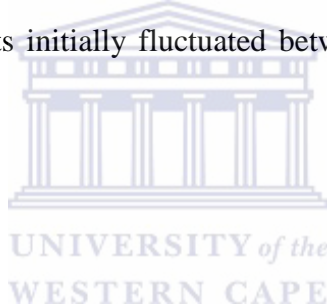
<sup>50</sup> Okpaluba C 'Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (part 1)' (2003) 18 *SAPR/PL* 331-48.

<sup>51</sup> *State v Petrus and Another* (1985) LRC (Const) 699, 719 ('*Petrus*').

power.<sup>52</sup> Justice Ringera asserted that ‘a supreme Constitution is not an Act of Parliament and is not interpreted as one’.<sup>53</sup> Secondly, it establishes a society’s core values and principles which identify the ideals and aspirations of the nation. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial review,<sup>54</sup> which is not a search for the intention of the legislature but an enforcement of constitutional values.<sup>55</sup> Thirdly, it is drafted in broad language with room for growth and development to serve present and future generations.<sup>56</sup> In *Muhozya v The Attorney General*, the Tanzanian High Court declared: ‘A Constitution is a living instrument which must be construed in the light of present day conditions.’<sup>57</sup> As such, the judiciary is entrusted with the task of its development through its purposive and generous interpretation.<sup>58</sup>

#### 1.4 Pre-2010 Constitutional interpretation

The idea of a different approach was already evident even before the 2010 Constitution came into operation since the replaced Constitution was also founded upon constitutional supremacy.<sup>59</sup> However, the courts initially fluctuated between recognition of constitutional




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<sup>52</sup> *Minister of Home Affairs v Fisher* (1980) AC 319(PC) 1, 6 and *State v Petrus and Another* (1985) LRC (Cont), 719.

<sup>53</sup> *Njoya* 1, 29.

<sup>54</sup> *S v Acheson* (1991) (2) SA 805 (Nm HC).

<sup>55</sup> De Ville JR *Constitutional and Statutory Interpretation* (2000) 59-60. See also *Matiso and others v The commanding Officer, Port Elizabeth Prison and others* 1994 (4) SA 592 (SE) 597.

<sup>56</sup> See the case of *Thornhill v A-G of Trinidad & Tobago* (1981) AC 61 (PC) 69 in which Lord Diplock of the Privy Council, while interpreting the Constitution of Trinidad and Tobago, emphasised these matters as distinguishing a supreme constitution from ordinary legislation. See also *Fisher* (1980) AC 319, 328. See also *Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR para 89, where the Court noted that while observing the importance of certainty of the law, it must nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach.

<sup>57</sup> *Muhozya v The Attorney General* High Court of Tanzania (DSM) Civil Case No. 206 of 1993 (unreported).

<sup>58</sup> *Pharmaceutical Manufacturers Association of SA and others; In re: Ex parte Application of President of the RSA and others* 200 (3) BCLR 241 (CC) para 44. See also *Nafiu Rabiu v The State* (1981) 2 NCLR 293, 326 where Sir Udo Udoma explained that a supreme constitution is a written organic instrument meant to serve not only the present generation, but also several generations yet unborn.

<sup>59</sup> Section 3 of the Repealed Constitution of Kenya.

supremacy and occasional reversion to parliamentary sovereignty.<sup>60</sup> On the parliamentary sovereignty side, the following statement by Chief Justice Kitili Mwendwa was often quoted:

We do not deny that in certain context a liberal interpretation may be called for; but in one cardinal respect, we are satisfied that a constitution is to be construed in the same way as any other legislative enactment, and that is where words are precise and unambiguous, they are to be construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words.<sup>61</sup>

This was as a result of the fact that until 1969, according to Ghai and McAuslan, the Kenyan Constitution was formally a ‘British’ document whose interpretation was governed by the English Interpretation Act, 1889, as it applied for the purpose of interpretation and in relation to the Acts of the Parliament of the United Kingdom.<sup>62</sup> Indeed, it was enacted as a British subsidiary legislation.<sup>63</sup> The Statute was based on parliamentary sovereignty under which the English common law had evolved an approach to the interpretation of statutes which required the courts to simply look for the intention of the legislature and enforce it, however absurd the results or consequences may be.<sup>64</sup> It was only when the statute was ambiguous that the courts could look at other sources to give meaning to the statute.<sup>65</sup> Often this approach took a

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<sup>60</sup> Kichana P (ed) *Constitutional law case digest*, Volume 11 (2005) ICJ – Kenya section at ix, where it is observed that ‘the trend appears to be intermixed. The Constitutional Court in Kenya is at crossroads torn between numerous schools of thought, thus creating anarchy and contradiction over the proper canons of interpreting the Constitution.’ See also Thiankolu M ‘Landmarks for El Mann to the Saitoti Ruling: Searching a philosophy of constitutional interpretation in Kenya’ [2007] *Kenya Law Review* Vol 1 188-213, 189, where it is stated thus: ‘The issue of the proper approach to constitutional interpretation has haunted Kenyan Courts for as long as we have been independent. Prior to the Constitutional Review Cases, and save for a few isolated judgements like the celebrated Ruling in *Githunguri v Republic*, the Courts adopted an unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation.’

<sup>61</sup> *Republic v El Man* (1969) EA 359.

<sup>62</sup> Ghai YP & McAuslan JPWB *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (1970) 215.

<sup>63</sup> See Kenya Subsidiary Legislation, 1963.

<sup>64</sup> Subsequent cases however moderated this approach.

<sup>65</sup> Allan TRS ‘Legislative supremacy and legislative intention: interpretation, meaning, and authority’ (2004) Vol. 63 No. 3 *Cambridge Law Journal* 685-711, 685.

literal view without paying any attention to context, whether historical or contemporary.<sup>66</sup> The approach was informed by the golden rule of statutory interpretation, which required that the literal meaning of the words be adhered to, leading to its being appropriately described as the literalist-cum-intentionalist approach.

However, in *Cripus Karanja Njogu v Attorney General*,<sup>67</sup> in which it had been sought to rely on Mwendwa's words, the Court rejected this approach and stated that a supreme constitution must be interpreted in a manner different from how ordinary statutes are interpreted. It emphasised that when an Act of Parliament is in any way inconsistent with the constitution, such an Act is void to the extent of that inconsistency and must give way to the constitution. Since the Constitution embodies the values and aspirations of the people, it must be interpreted broadly and liberally and not in a pedantic way.<sup>68</sup> This decision informed the reasoning of the court in *Njoya 1*<sup>69</sup> which similarly rejected the *El Man* approach. Justice Ringera outlined some of the reasons for a different approach:

[i]t is a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution is called into question, the court must seek to find whether those provisions meet the values and principles embodied in the Constitution.<sup>70</sup>

Despite this fluctuation, it is clear that by the time of the adoption of the new Constitution, the Kenyan Courts had solidly embarked on a different approach to interpretation.

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<sup>66</sup> As noted, Du Plessis & Corder (1994) 62 point out that modern hermeneutics recognise both the context in which the text was written (historical context) and the hermeneut's own perspective determined by his or her own context or situation (contemporary context).

<sup>67</sup> *Cripus Karanja Njogu v Attorney General* HC Criminal Application No 39 of 2000 (unreported).

<sup>68</sup> *Cripus Karanja Njogu*.

<sup>69</sup> *Njoya 1* para 29.

<sup>70</sup> *Njoya 1* para 29.



## 2 Purposive interpretation under the Constitution of 2010

Constitutional provisions for a purposive approach, its meaning and application are examined in the next sections.

### 2.1 Constitutional incorporation of purposive interpretation

The purposive approach to the interpretation of the Constitution has been explicitly incorporated in the Constitution itself. Mutunga CJ in the *Gender Representation* case underscored this fact when he noted that it was not necessary for the court to come up with other prescriptions on interpretation ‘other than those that are within the Constitution itself’.<sup>71</sup> Article 259(1) provides that:

- (1) This Constitution shall be interpreted in a manner that –
- (a) promotes its purposes, values and principles;
  - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - (c) permits the development of the law; and
  - (d) contributes to good governance.

The use of the term ‘promotes’ in sub-article (1)(a) requires that the Constitution be interpreted in a manner that helps, encourages or furthers its purposes, values and principles. It must be interpreted in a manner that enables these purposes, values and principles to flourish. Likewise, the use of the term ‘advances’ in sub-article (1)(b) requires the Constitution to be interpreted in a manner that furthers or improves the rule of law, and the human rights and fundamental freedoms in the Bill of Rights. ‘Permits’ requires it to be interpreted in a manner that allows or affords opportunity for the law to develop; the courts must through interpretation develop the law. In addition, it must be interpreted in a manner that assists and supports good governance.

Article 159(2)(e) explicitly requires the courts to exercise judicial authority in a purposive manner that protects and promotes the purpose and principles of the Constitution. The essence of this is that the Constitution must be interpreted in a manner that defends, encourages, assists and helps the flourishing of the purposes, values and principles of the Constitution. It is to do so in a manner that furthers or encourages the progress or existence of

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<sup>71</sup> *Gender Representation* para 8.2.

those purposes, values and principles. In addition, Article 20(4), which provides for the application of the Bill of Rights, prescribes a purposive approach to interpretation thus:

- (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote –
- (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
  - (b) the spirit, purport and objects of the Bill of Rights.

Read together, these three provisions indicate that the Constitution and all the powers it confers on various state organs and state officers are not ends in themselves, but a means to an end. Thus, the Constitution must be interpreted and the powers must be exercised so as to achieve these ends. Consequently, the provisions limit the exercise of all the powers it confers by requiring that they be exercised to protect and promote the identified ends.

After examining these provisions as well as Article 10 dealing with the values and principles of governance, Mutunga CJ concluded that they set out a purposive approach to interpretation which must be followed by the Supreme Court and the other courts.<sup>72</sup> In *Jasbir Singh Rai* Mutunga CJ, in a concurring ruling, reiterated this purposive approach.<sup>73</sup> Although the Constitution prescribes a purposive approach to interpretation, the meaning of such an approach and a clear methodology and guiding rules must be detailed.

## 2.2 The meaning of a purposive interpretation

A purposive approach is geared towards identifying the purposes, the core values and principles which the Constitution seeks to achieve and give effect to them or protect and promote them.<sup>74</sup> The process is aimed at discovering the purpose of the provision and not merely the meaning of the words used to communicate the purpose.<sup>75</sup> It is the process of attributing meaning to a provision in a manner that is mindful of its intended objectives, and the fulfilment of its aspirational values.<sup>76</sup> The approach makes reference to ‘grammatical,

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<sup>72</sup> *Gender Representation* paras 8.6 and 8.8

<sup>73</sup> *Jasbir Singh Rai* para 89.

<sup>74</sup> Breyer (2006) 17-8.

<sup>75</sup> Steytler N *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) 8.

<sup>76</sup> Du Plessis (2011) ch 32, 168.

systematic, teleological, and historical methods of analysis<sup>77</sup> of the constitutional text as a main focus. The grammatical method, which is often the starting point, ‘relies on a verbal analysis of words and phrases in a constitutional provision’.<sup>78</sup> The systematic method interprets particular provisions of the Constitution as part of a constitutional totality.<sup>79</sup> The teleological method is a form of structural reasoning which looks for the purposes, goals, and aspirations behind the language of the Constitution.<sup>80</sup> Finally, the historical method elucidates the text with reference to the original intent of the framers, or the values they constitutionalised.<sup>81</sup>

A purpose-conscious interpretation is necessary in order to honour the aspirational intent of the Constitution, and begins with the assumption that the provision and the Constitution in general have a purpose that must emerge in the course of interpretation and eventually be realised.<sup>82</sup> The High Court in the *Trusted Society* case emphasised the importance of discovering the purpose of the Constitution and effectuating it.<sup>83</sup> Similarly, Mutunga CJ in two Supreme Court cases emphasised that a purposive interpretation of the Constitution must seek to promote ‘the dreams and aspirations of the Kenyan people’.<sup>84</sup> In *Dorothy N Muchungu v Speaker of the County Government of Embu and others*, the High Court observed that the duty of the courts ‘is to interpret the Constitution in a manner that does not defeat its evident purpose, values and principles’.<sup>85</sup>

The aim of interpreting a constitution is to further its objectives and purposes. If a court is interpreting a rights provision in the Bill of Rights, it should seek to identify the purpose of the right and give effect to it as far as possible.<sup>86</sup> On the other hand, where a devolution provision is in question, the objectives and purposes of devolution in general and the

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<sup>77</sup> Komers (1989) 48.

<sup>78</sup> Komers (1989) 49.

<sup>79</sup> Komers (1989) 49.

<sup>80</sup> Komers (1989) 49.

<sup>81</sup> Komers (1989) 49.

<sup>82</sup> Du Plessis (2011) ch 32, 168.

<sup>83</sup> *Trusted Society* para 88.

<sup>84</sup> *Gender Representation* paras 8.6 and *Jasbir Singh Rai* paras 89 and 94.

<sup>85</sup> [2014] eKLR (*Dorothy N Muchungu*) para 47.

<sup>86</sup> Klug H ‘South Africa: From constitutional promise to social transformation’ in Goldsworthy J (ed) *Interpreting Constitutions: A Comparative Study* (2007) 266-319, 293.

devolution provision in particular should be ascertained and given effect. Where there are two possible meanings and the interpreter has to make a choice, a purposive interpretation would settle for that meaning which, more than the other, furthers the objectives and purposes of the provision being interpreted.<sup>87</sup>

Sometimes this may involve a very delicate balancing of and choosing between two competing constitutional values.<sup>88</sup> The interpreter reads the text as the revelation of the great objectives and purposes which the Constitution intended to achieve.<sup>89</sup> The value judgment must not, however, be made in a subjective manner based on the interpreter's personal values. Instead, it should be objectively informed by the broad values of the wider society. Justice Mohamed in the Namibian case of *Ex parte Attorney General, Namibia: In re Corporal Punishment by the Organs of State*, stated that: '[I]t is ... a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities' of the people.<sup>90</sup> In *Trusted Society*, the Court recognised the need to balance the competing value of an individual's protection arising out of the presumption of innocence against that of leadership and integrity provided for in Chapter Six of the Constitution, and concluded that values of leadership and integrity serve more important objectives and purposes of the Constitution. The Court concluded that for purposes of the integrity test, the Constitution does not require that the behaviour, attribute or conduct complained about must rise to the threshold of criminality. The consequence is that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry about lack of integrity.<sup>91</sup>

Although purposive interpretation aims at giving effect to the purposes and values of the Constitution and the aspirations of the people, sometimes those purposes, values and

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<sup>87</sup> Barak A 'Hermeneutics and constitutional interpretation' in Rosenfeld M (ed) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994) 255-6; Du Plessis & Corder (1994) 85.

<sup>88</sup> See Devenish G (2006) 240; De Waal J, Currie I & Erasmus G *The Bill of Rights Handbook* 3 ed (2000) 120; and Cockrell A 'Rainbow jurisprudence' (1996) 12 *South African Journal on Human Rights* 1-39, 4; See also Hogg PW 'Interpreting the Charter of Rights: Generosity and justification' (1990) *Osgoode Hall Law Journal* 818-37, 820.

<sup>89</sup> Breyer S (2006) 18.

<sup>90</sup> *Ex parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) 91D-F.

<sup>91</sup> *Trusted Society* para 102.

aspirations may not be very clear and may contradict each other. In *Speaker of the Senate* the Supreme Court held that the courts have a responsibility to clarify them and resolve the contradictions. The Supreme Court urges the courts to resolve ‘constitution-making contradictions; clarify draftsmanship-gaps; and settle constitutional disputes’ that may have arisen from constitution-making compromises that often attend the constitution-making process.<sup>92</sup> The Court emphasised that ‘constitution-making does not end with its promulgation; it continues with its interpretation’ and the courts must ‘illuminate legal penumbras that constitutions borne out of long drawn compromises’ tend to create.<sup>93</sup> In doing this, the Court noted that, where the ‘constitutional text and letter may not properly mine the aspirations of the people’, such ‘limitations of mind and hand should not defeat the aspirations of the people’. Instead, it is in such a ‘context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras’.<sup>94</sup> In *Dorothy N Muchungu* the Court noted that the spirit of the Constitution ‘embodies the ideals, aspirations and values of the people of Kenya’<sup>95</sup> and that the values ‘illustrate the spirit of the Constitution’.<sup>96</sup> However, it warned that the spirit of the Constitution must be gathered from the language of the various provisions of the Constitution which must be read together as an integrated whole.<sup>97</sup>

The process of interpretation begins at the textual level with the language and structure of the text; though this may not be the conclusive determinant of the meaning and purpose of the provision.<sup>98</sup> The object and purpose of the provision may in many cases only be discovered from reading the provision within its context, such as the other provisions of the Constitution, the values and principles of the Constitution, the preparatory drafting material, the historical

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<sup>92</sup> *Speaker of the Senate* para 156. See also Du Plessis (2011) Chap 32, 39 where he states that: ‘Modern free theorists contend that determining the intention of the legislature necessarily entails the filling in of gaps in the enactment, making sense of an open-ended provision. A ‘wait and see’ attitude with regard to legislative reform is deemed inappropriate. The judiciary, with the help of the common law, must intervene in order to remedy defects in statute law, since legislative processes are not sufficiently expeditious and streamlined to cope with deficiencies that show up in day-to-day practice.’

<sup>93</sup> *Speaker of the Senate* para 156.

<sup>94</sup> *Speaker of the Senate* para 156.

<sup>95</sup> *Dorothy N Muchungu* para 40.

<sup>96</sup> *Dorothy N Muchungu* para 75.

<sup>97</sup> *Dorothy N Muchungu* para 41.

<sup>98</sup> *S v Zuma* 1995 (4) BCLR 401 (CC); and *S v Mhlungu* 1995 (7) BCLR 793 (CC).

background of the provision, the economic, social and cultural context, and comparative foreign jurisprudence and scholarly literature.<sup>99</sup> But the language of the text must constantly play the limiting and disciplining role.<sup>100</sup> Accordingly, the interpretation process first seeks to determine what the words of the provision say and whether they reveal the purpose of the provision; it then also asks what the internal constitutional context says and whether it yields the meaning and purpose; and finally, the extra-constitutional context is considered to determine the purpose. Context is thus critical and dichotomised into two distinct typologies: the intra-textual and the extra-textual.<sup>101</sup> Both types of context have past or historical, present or contemporary, and future aspirational dimensions. They both focus on the language of the text. Intra-textual interpretation looks at the provision in the context of other provisions of the Constitution as a whole, while extra-textual interpretation goes beyond the Constitution and takes into account other sources. In essence, constitutional interpretation is not confined to legal sources – it also relies on non-legal sources and phenomena.<sup>102</sup>

### 3 Intra-textual context

When a court uses the intra-textual context of the constitution, it restricts itself to getting meaning from the words of the Constitution itself by reading the relevant provision together with other provisions of the Constitution. This leads to what is often referred to as interpreting a constitution as ‘a structural whole’. The interpreter looks beyond the relevant provisions into other provisions of the Constitution but does not go beyond the Constitution itself.

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<sup>99</sup> Devenish G ‘*Department of Land Affairs v Goedgelegen Tropical Fruits - A triumph for teleological interpretation, an unqualified contextual methodology and the jurisprudence of Ubuntu*’ (2008) 125 *South African Law Journal* 231-40, 236.

<sup>100</sup> Steytler (1998) 8.

<sup>101</sup> Currie and De Waal (2005) 150-8.

<sup>102</sup> See *Gatirau Peter Munya v Dickson Mwenda Munya and 2 others* [2014] eKLR (*Gatirau Peter Munya*) para 233. See also *Communications Commission of Kenya and others v Royal Media Services and others* [2014] eKLR (*Communications Commission of Kenya*) para 357. See also *Judges and Magistrates Vetting Board and others v The Centre for Human Rights and Democracy and others (Judges and Magistrates Vetting Board)* Supreme Court Petitions No.s 13A, 14 and 15 of 2013 para 209.

### 3.1 The literal words of the provision

The establishment of the meaning of a constitutional provision begins with the literal words of the provision. This approach holds that the meaning of the constitutional provision can and must be deduced from the very words in which the provision is couched.<sup>103</sup> The provision must be taken to mean what the ordinary meaning of the words used discloses and which is assumed to be clear. Such ordinary meaning would be the standard grammatical dictionary meaning of the words. Grammatical interpretation focuses on the natural language and meaning of the words used in the constitutional provision in the hope of avoiding the proliferation of meanings that could be attached to the provision.<sup>104</sup>

The problem, however, is that the ordinary or natural meaning of words is often not clear. Constitutions are often expansive and indefinite since rights and values which they provide for can hardly be expressed categorically or conclusively. Moreover, the Constitution is meant to be a long-lasting document and its expansively and open-textured formulated provisions must be able to accommodate a number of unpredictable situations.<sup>105</sup> This naturally puts in question the assumption that the constitutional provisions are presented in clear and unambiguous language. Thus, getting even the literal and ordinary meaning of the words used requires that they be read within the context of other provisions of the Constitution. The South African Constitutional Court correctly warned that in interpreting constitutional provisions it is not sufficient to focus only on the ordinary or textual meaning of the provisions.<sup>106</sup> The Kenyan Court of Appeal in *Rotich Samuel Kimutai v Ezekiel Lenyongopeta and 2 others*<sup>107</sup> had equally long before the adoption of the new Constitution rejected the exclusivity of the literal interpretation noting thus:

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<sup>103</sup> Du Plessis (2011) ch 32, 29.

<sup>104</sup> Du Plessis (2011) ch 32, 160.

<sup>105</sup> Du Plessis (2011) ch 32, 161.

<sup>106</sup> In *Matatiele Municipality and others v President of the Republic of South Africa & others* 2007 (1) BCLR 47 (CC) (*Matatiele*) para 37, Ngcobo J stated that: ‘The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed.’

<sup>107</sup> *Rotich Samuel Kimutai v Ezekiel Lenyongopeta and 2 others* [2005] eKLR.

The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the ‘purposive approach’. In all cases now in the interpretation of Statutes such a construction as will ‘promote the general legislative purpose’ underlying the provision to be adopted. It is no longer necessary for the judges to wring their hands and say, ‘There is nothing I can do about it’. Whenever the strict interpretation of a Statute give rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.<sup>108</sup>

The process is not always a linear one which looks at other sources only when the text of the provision cannot yield a meaning. There is no order of priority among these methods of interpretive analysis.<sup>109</sup> The text of the provision may be grammatically clear, yet read alone, not yield a purposive meaning. A search for the purpose, objects and values the provision was meant to serve may disclose that the provision cannot be read in isolation. Where a provision has various subsections the interpreter begins with the relevant subsection, but may only get the full purposive meaning by looking at the other subsections and provisions of the Constitution.

### 3.2 Interpreting the Constitution as a whole

The essence of intra-textual interpretation requires that the Constitution must be interpreted as a whole, including the preamble, the national values and principles and the schedules to the Constitution.<sup>110</sup> It must be interpreted holistically in order for the individual provisions to reveal their purposive meaning.<sup>111</sup> The Supreme Court has defined a holistic interpretation of the Constitution as interpreting it in context:

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<sup>108</sup> *Rotich Samuel Kimutai* page 6. These words of the Court of Appeal have been adopted as the law by the High Court in both *Republic v Transitional Authority and another Ex parte Medical Practitioners, Pharmacists and Dentists Union (KMPDU) and 2 other* [2013] eKLR para 65, and *Okiya Omtatah Okoiti and another v Attorney General and 6 others* [2014] eKLR para 78.

<sup>109</sup> Komers (1989) 50.

<sup>110</sup> Du Plessis (2011) ch 32, 163.

<sup>111</sup> Du Plessis (2011) ch 32, 165.



It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.<sup>112</sup>

In order to achieve full benefits of a purposive interpretation, the South African Constitutional Court warned against an interpretation which is founded upon ‘technical rigidity’<sup>113</sup> and urged for a holistic<sup>114</sup> interpretation which avoids interpreting specific provisions in isolation from each other and leads to a conflict among the different provisions.<sup>115</sup>

Conflicting provisions of the Constitution must be interpreted in such a manner as to harmonise them. The essence and foundation of this rule is the fact that the Constitution is perceived as a logical whole, with each provision forming an integral part of the whole, and none destroying the other but each sustaining the other.<sup>116</sup> When emphasising this approach, the Supreme Court of Kenya correctly asserted that ‘a Constitution does not subvert itself’.<sup>117</sup> As the Court of Appeal in *Center for Rights Education and Awareness and another v John Harun Mwau and others* noted, ‘all the provisions should be regarded as cogs of the same wheel’.<sup>118</sup> As such, it is imperative that one part be construed in the light of the provisions of the other parts.<sup>119</sup> In *FIDA-K* the High Court emphasised that ‘it is important that the

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<sup>112</sup> *In the Matter of the Kenya National Human Rights Commission* [2014] eKLR paras 136, 137 and 138.

<sup>113</sup> *First Certification* (1996) para 36.

<sup>114</sup> *First Certification* (1996) para 37.

<sup>115</sup> *First Certification* (1996) para 38.

<sup>116</sup> See the judgment of Manyindo DCJ in the Ugandan case of *Major General David Tinyefuza v Attorney General* (SC) Const Appeal No. 1 of 1997. See also Majanja J in *U.S.I.U v Attorney-General & Another* (2012) eKLR in which he adopted the statements in the Uganda case of *Olum v The Attorney-General of Uganda* (2012) E.A. 508.

<sup>117</sup> *Speaker of the Senate* para 185.

<sup>118</sup> *Center for Rights Education and Awareness and another v John Harun Mwau and others* [2012] eKLR para 43.

<sup>119</sup> See the words of Kania CJ of the Supreme Court of India in the case of *Gopalan v State of Madras* (1950) SCR 88, 109 cited in Stevens J *The Interpretation of Fundamental Rights Provisions: International and*

Constitution be treated as a whole and all provisions having a bearing on the subject matter be considered together as an integral whole'.<sup>120</sup> This is because sometimes the true meaning and purpose of the words may not be easily ascertained unless read and considered within the context of the whole document.<sup>121</sup>

In the interpretation of the devolution provisions of the Kenyan Constitution this rule is important because devolution as a system runs through the entire Constitution in an interlocking manner. This design was underscored by the Supreme Court in *Speaker of the Senate* when it stated:

Thus, a 'Chapter 11-Only' approach would wrongly obscure the *interlocking nature of devolution with other aspects and institutions of the Constitution*, an element which is critical to its success. These other elements include *Treasury*, which plays a significant role in public finance matters; *Parliament*, which requires a functional Senate to provide sufficient protection to the devolved governments, and ensure that there is no gridlock in the budgetary or legislative processes; *Judiciary, particularly the Supreme Court*, whose mandate under Article 163(6) is to give 'advisory opinion ... on any matter concerning county government', and which is an arena for arbitrating conflicts between the National Government and County Government; *Independent Commissions and Offices, such as Controller of Budget and Auditor General*, which are crucial in ensuring probity and accountability.<sup>122</sup>

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*Regional Standards in African and other Common Law Jurisdictions* (International Centre Against Censorship) Report on Article 19, 8.

<sup>120</sup> FIDA-K 21.

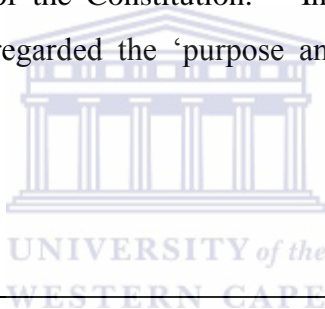
<sup>121</sup> See the Nigerian case of *Archbishop Okogie v Attorney General of Lagos State* [1981] 2 NCLR 337, 348 where Mamman Nasir PCA explained that: 'The true meaning of the words used and the intention of the legislature in any statute and particularly in a written Constitution, can best be properly understood if the statute is considered as a whole. It is a single document and every part of it must be considered as far as relevant in order to get the true meaning and intent of any particular portion of the enactment.'

<sup>122</sup> *Speaker of the Senate* para 183 (emphasis in the original). See also *Matatiele*, para 36 where Ngcobo J explained the need and significance for such systematic or contextual constitutional interpretation thus: 'Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it 'has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken

A fuller and purposive understanding of the constitutional provisions on devolution must thus be informed by a contextual interpretation that considers the many other aspects of the Constitution which touch on devolution. Provisions of the Constitution must not be interpreted in isolation but in unity with each other.

### **3.2.1 The Preamble**

The preamble often states how and why the Constitution was made, the source of authority for it, and the values on which it is based.<sup>123</sup> Although it does not form part of the operative provisions of the Constitution, it is relevant to the interpretation of the rest of the Constitution.<sup>124</sup> It must play a recognisable role in the interpretation of the individual provisions because a systematic reading of the individual provisions, in the context of the Constitution, requires the broadest possible spectrum of textual elements to be taken into account.<sup>125</sup> But more important is the fact that the Preamble and text, like the long title, are also statements of the purpose of the Constitution.<sup>126</sup> In *Rose Wangui Mambo v Limuru Country Club*, the High Court regarded the ‘purpose and principles of the Constitution’




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as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.’ Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.’

<sup>123</sup> Saunders C ‘The Constitutional Preamble’ *FCRC Research Papers* – vol. 2, 261 at 264.

<sup>124</sup> Saunders 260. See also Stevens, Report on Article 19 at p 10; *Kesavananda Bharati v State of Kerala* [1973] SCR 1 Suppl. at 712; *Monju v Minister of Economy and Finance*, Suit No. HCB/37/95 of 1995 (unreported) in which Justice Moma of the High Court of Cameroon held that taxes previously exempted under earlier legislation were not to be retrospectively imposed as this would be contrary to the spirit of the Constitution as reflected in the preamble which prohibited retrospective laws; *Australian Capital Television v Commonwealth*, cited in Saunders C at 261 where the principle of popular sovereignty derived from the preamble was used to support the conclusion that an implied right to freedom of political communication was protected by the Constitution as an attribute of representative government. See also Roux T ‘Democracy’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 10, 22.

<sup>125</sup> Du Plessis (2011) ch 32, 164.

<sup>126</sup> Du Plessis (2011) ch 32, 164.

mentioned by Article 159(1)(a), which must inform interpretation, as including ‘those values recognised by the Preamble to the Constitution’.<sup>127</sup>

The Constitution of Kenya has a Preamble which is central to the establishment of the core values of governance. Relevant to devolution is, first, the recognition of the fact that it is the Kenyan people who, in exercise of ‘our sovereign and inalienable right to determine the form of governance of our country’ have settled on the devolved system as the form of governance.<sup>128</sup> Secondly, is the recognition of unity in diversity and the determination to live in peace as one indivisible sovereign nation balancing the two concepts of unity in diversity.<sup>129</sup> Thirdly, is the commitment to nurture and protect ‘the well-being of the individual, the family, communities and the nation’.<sup>130</sup> Fourthly, the Preamble recognises the essential values of governance which include social justice that forms the core of devolution solidarity, equity and financial equalisation.<sup>131</sup> All these provisions lay a basis for a number of the objectives of devolution set out in Article 174.

Although the conventional approach has been to turn to preambles as tools of interpretation only where the substantive provisions are ambiguous and uncertain, in constitutional law the approach must be different.<sup>132</sup> As statements of the purpose of the Constitution, the preamble should not be employed as an interpretive tool only when the individual operative provisions of the Constitution are ambiguous or uncertain due to deficient formulation. The meaning of the substantive provisions should always be arrived at after the provisions have been read together with the preamble as part of the integrated whole. In the South African case of *S v Mhlungu and others*, Sachs J eloquently explained the value of the Preamble and why it must be taken seriously in constitutional interpretation:

The Preamble in particular should not be dismissed as a mere aspirational and throat clearing exercise of little interpretative value. It connects up,

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<sup>127</sup> *Rose Wangui Mambo v Limuru Country Club* Nairobi High Court Constitutional Petition No 160 of 2013 para 56.

<sup>128</sup> Para 7, preamble.

<sup>129</sup> Para 3, preamble.

<sup>130</sup> Para 5, Preamble.

<sup>131</sup> Para 6, Preamble.

<sup>132</sup> Du Plessis (2011) ch 32, 118.

reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.<sup>133</sup>

Although it was not an issue whether or not the preamble could be referred to in the interpretation of the Constitution, the High Court in *FIDA-K* referred to the preamble noting that '[i]n its preamble the Constitution starts off with recognition of inherent dignity of all members of the human family and expresses the desire to promote amongst all the dignity of individuals'.<sup>134</sup> In *Jasbir Singh Rai Mutunga* CJ held that 'in interpreting the Constitution, the aspirations captured in [the] preambular paragraphs are relevant'.<sup>135</sup> The preamble must therefore be a constant point of reference whenever the constitutional provisions on devolution are interpreted.

### **3.2.2 National values and principles**

Article 10 provides for national values and principles of governance which bind all state organs, state officers, public officers and all persons. The provision requires all the listed persons and institutions to take the values into account whenever any of them 'applies or interprets [the] Constitution';<sup>136</sup> enacts, applies or interprets any law;<sup>137</sup> or makes or implements public policy decisions'.<sup>138</sup> In addition, both Articles 159 and 259 expressly provide that the Constitution must be interpreted in a manner that promotes and protects the values, purposes and principles embodied in the Constitution.<sup>139</sup>

Values are defined as states of social affairs which a community is committed to and seeks to achieve. A Constitution may combine value- and principle-setting provisions and specific normative prescriptions which produce rule-setting provisions. Since the Kenyan Constitution has settled for this combination, it can correctly be described as a value-laden Constitution as it embodies an objective, normative value system. Its design has foundational provisions

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<sup>133</sup> *S v Mhlungu and others* 1995 (7) BCLR 793 (CC) para 112.

<sup>134</sup> *FIDA-K* p 12.

<sup>135</sup> *Jasbir Singh Rai* para 94.

<sup>136</sup> Art 10(1)(a).

<sup>137</sup> Art 10(1)(b).

<sup>138</sup> Art 10(1)(c). See further Chap 4 section 2.2.2

<sup>139</sup> Arts 159(2)(e) and 259(1)(a).

which set out the values, objects and principles of the Constitution,<sup>140</sup> and other provisions which provide for concrete and specific matters. Most chapters begin with a principle-setting article, followed by articles providing for specific matters. The chapter on devolved government has both Articles 174 and 175, which set out the objects and principles of devolution. Being value-laden, the Constitution has been described by the Supreme Court as transformative in nature because it is aimed at engineering society in a particular desired direction. In *Speaker of the Senate*, the Court observed that '[u]nlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.'<sup>141</sup> Through this transformative approach, the values are intended to achieve 'desirable goals of governance consistent with dominant perceptions of legitimacy'.<sup>142</sup> The Court observed that although these values are set out in the Preamble to the Constitution which describes them as essential, they are fleshed out in Article 10, Chapter Four on the Bill of rights, and Chapter Eleven on devolved government.<sup>143</sup> Quoting Klare, the Court viewed the values as part of transformative constitutionalism, which is defined as:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.<sup>144</sup>

In *Speaker of the Senate* the Supreme Court thus concluded that in interpreting the Constitution, the court 'must take into account the context, design and purpose of the

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<sup>140</sup> For instance, the Preamble to the Constitution provides for the essential values of governance which the Kenyan people aspired to: Article 1 for the value of the sovereignty of the people; Article 2 for that of the supremacy of the Constitution; and Article 10 for the values and principles of governance, including sharing and devolution of power.

<sup>141</sup> *Speaker of the Senate* para 51.

<sup>142</sup> *Speaker of the Senate* para 52.

<sup>143</sup> *Speaker of the Senate* para 51.

<sup>144</sup> Klare K 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 147.

Constitution; the values and principles enshrined in the Constitution; [and] the vision and ideals reflected in the Constitution'.<sup>145</sup> In *Communications Commission of Kenya* the Supreme Court regarded the Kenyan Constitution as one of the '[t]ransformative constitutions [which] are new social contracts that are committed to fundamental transformations in societies'.<sup>146</sup> Such a constitution provides 'a legal framework required for the fundamental transformation required that expects a solid commitment from the society's ruling classes'.<sup>147</sup> Under such a Constitution the 'judiciary becomes pivotal in midwifing transformative constitutionalism and the new rule of law'.<sup>148</sup> A transformative 'constitution cannot be interpreted as a legal-centric letter and text'; rather, its interpretation must consider other sources that are 'not solely reflective of *jural phenomena*'.<sup>149</sup>

### **3.2.3 Schedules to the Constitution**

Schedules form part of the Constitution and must be read together with the parent provision as part of interpreting the constitution as a whole.<sup>150</sup> The Constitution creates territorial county units,<sup>151</sup> assigns functions,<sup>152</sup> and provides for transition by reference to schedules to the Constitution.<sup>153</sup> In *Dennis Mogambi Monga're v Attorney General*, the High Court asserted that '[t]he transitional provisions are as much a part of the Constitution and as much an expression of the sovereign will of the people as the main body of the Constitution'.<sup>154</sup> In a similar manner, the Court of Appeal in *Center for Rights Education* emphasised this wholeness by stating that 'the sixth schedule is an integral part of the current Constitution and

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<sup>145</sup> *Speaker of the Senate* para 49. See also *Community Advocacy and Awareness Trust and others v Attorney General and others* Petition 243 of 2011(unreported) para 78, where the High Court stated that the values 'provide a foundation upon which Kenyans have determined that our democratic state shall be build; they are the intestinal fluid which nourishes the bill of rights and the Constitution'.

<sup>146</sup> *Communications Commission of Kenya* para 377.

<sup>147</sup> *Communications Commission of Kenya* para 377.

<sup>148</sup> *Communications Commission of Kenya* para 377.

<sup>149</sup> *Gatirau Peter Munya* para 232 (emphasis in original).

<sup>150</sup> See *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) (*Executive Council of the Western Cape Legislature*) paras 33 and 34.

<sup>151</sup> Art 6(1) of the Constitution makes reference to the First Schedule.

<sup>152</sup> Art 186(1) of the Constitution makes reference to the Fourth Schedule.

<sup>153</sup> Art 261(1) makes reference to the Fifth Schedule while Articles 262 and 264 make reference to the Sixth Schedule.

<sup>154</sup> [2011] eKLR (*Dennis Mogambi Monga're*) para 54.

has the same status as the provisions of the other Articles although it is of a limited duration'.<sup>155</sup> Schedules that are linked to the permanent provisions of the Constitution are permanent parts of the Constitution, while those that are linked to the transition provisions last for the transition period only.

### ***3.2.4 Harmonising conflicting provisions***

Interpreting the constitution as a whole may create the misleading impression that the constitution is one coherent and harmonious document that can easily be interpreted in this manner. Since constitutions embody a multiplicity of values and issues, two or more provisions may conflict with each other or at least appear to conflict. The rule is that the Court should seek to harmonise the conflicting provisions and to construe them in a manner that can reasonably reconcile them and give full effect to each of them.<sup>156</sup> If this fails, then the Court must prefer the interpretation that gives effect to the fundamental rights and freedoms as well as constitutional values to any other interpretation.<sup>157</sup> In cases of conflict between a general and a specific provision, the South African Constitutional Court held that the general provisions must ordinarily yield to the specific provision – general provisions would not normally prevail over the specific and unambiguous provisions.<sup>158</sup>

Drawing from comparative experience and jurisprudence, the Kenyan Constitution requires the conflict to be resolved in favour of fundamental rights and freedoms as well as the values and purposes embodied in the Constitution. In this regard, Article 20 provides that when applying a provision of the Bill of Rights, a court must 'adopt the interpretation that most

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<sup>155</sup> *Center for Rights Education* para 32.

<sup>156</sup> *Du Plessis* (2011) ch 32, 167. See also *Doctors for Life v Speaker of the National Assembly and others* 2006 (12) BCLR 1399 (CC) para 48.

<sup>157</sup> Art 20(3) (b).

<sup>158</sup> *Ex Parte Speaker of KwaZulu Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu Natal, 1996* 1996 (11) BCLR 1419 (CC) para 28. See also *Doctors for Life* para 49 where the Constitutional Court stated thus: 'The specific provision must be construed as limiting the scope of the application of the more general provision. Therefore, if a general provision is capable of more than one interpretation and one of the interpretations results in that provision applying to a special field which is dealt with by a special provision, in the absence of clear language to the contrary, the special provision must prevail should there be a conflict.'



favours the enforcement of a right or fundamental freedom'.<sup>159</sup> Furthermore, Article 259 requires the Constitution to be interpreted in a manner that 'promotes its purposes, values and principles';<sup>160</sup> advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;<sup>161</sup> permits the development of the law;<sup>162</sup> and contributes to good governance'.<sup>163</sup> In addition, Article 20 provides that when interpreting the Bill of Rights, a court, tribunal or other authority must promote 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom';<sup>164</sup> and the spirit, purport and objects of the Bill of Rights'.<sup>165</sup> It follows that if the interpreter clearly understands the values, principles and purposes of the Constitution, it should be possible to resolve conflicts among the provisions by interpreting the provisions in favour of such values and purposes.

But when the conflict is between the values or the purposes of the Constitution the interpreter will be required to make very difficult value choices and judgments, and must decide in favour of the core values and purposes. As will be argued in Chapter Four, the Constitution provides for a hierarchy of values with some – such as sharing and devolution of power, democracy and rule of law articulated in Article 10, the sovereignty of the people in Article 1, and the supremacy of the Constitution in Article 2 – being more important than others. In a value-laden Constitution, neutrality for the interpreter is a fiction, since he or she must take sides with the core values and purposes which the people intended to give effect to and for which they enacted the Constitution.<sup>166</sup> In *Speaker of the Senate* the Supreme Court quoted with approval<sup>167</sup> the words of Archibald Cox when he stated that '[t]he Court can seldom be

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<sup>159</sup> Article 20(3)(b). See also the Tanzanian case of *Mtikila v The Attorney General* Civil Case No 5 of 1993 (Unreported) in which the court chose an interpretation that favoured the realisation of rights as opposed to their restriction.

<sup>160</sup> Art 259(1) (a).

<sup>161</sup> Art 259(1)(b).

<sup>162</sup> Art 259(1)(c).

<sup>163</sup> Art 259(1)(d).

<sup>164</sup> Art 20(4)(a).

<sup>165</sup> Art 20(4)(b).

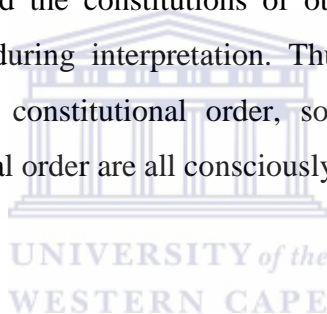
<sup>166</sup> See Komers (1989) 39, where he states that 'the Constitutional Court itself rejects the notion of a value-neutral state' and 'instead ... speaks of a constitutional polity deeply committed to an "objective order of values"'.<sup>167</sup>

<sup>167</sup> *Speaker of the Senate* paras 134 and 135.

wholly neutral upon the social, political, or philosophical questions underlying constitutional litigation. Its opinions shape as well as express our national ideals.’<sup>168</sup> It is for this reason that the Supreme Court in the concurring opinion of Mutunga CJ went into a detailed exposition of the Kenyan historical background of regional disparities that informed the very protected system of devolution, especially as regards revenue-sharing under which the Senate must protect the interests of the counties.<sup>169</sup>

#### 4 Extra-textual context

When the interpreter uses extra-textual context he or she uses other sources such as the preparatory drafting material, international law instruments, constitutions of other countries, foreign court precedents, and even academic and scholarly works.<sup>170</sup> Modern constitution-making has been reduced to what Juliane Kokott<sup>171</sup> calls constitutional reception and transplantation as well as convergence of constitutional models, with borrowing from international law instruments and the constitutions of other countries, which necessitates consideration of other sources during interpretation. Thus, in extra-textual constitutional interpretation, the political and constitutional order, society and its legally recognised interests and the international legal order are all consciously taken into account.<sup>172</sup>




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<sup>168</sup> Archibald Cox *Constitutional Decision as an Instrument of Reform* (1968) 118.

<sup>169</sup> In the *Trusted Society* para 102, the High Court dealt with an apparent conflict between the constitutional value of the presumption of innocence and Chapter Six establishing leadership and integrity. The court settled the conflict between the two values in favour of leadership and integrity, emphasizing that the ‘Kenyans were very aware in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of integrity among those seeking to govern us or hold public office.’ Implicitly, the court viewed the values of leadership and integrity as more important.

<sup>170</sup> Du Plessis & Corder (1994) 94, where they say the following: ‘Context determines the meaning from “within” the text as a structural whole (intra-textually) and by reference to its “environment” (extra-textually). From this it follows that the interpretation of text requires both its intra- and extra-textual contextualization.’

<sup>171</sup> Kokott J ‘From reception and transplantation to convergence of constitutional models in the age of globalization – with special reference to the German Basic Law’ in Starck C (ed) *Constitutionalism, Universalism and Democracy – a Comparative Analysis: The German Contributions to the Fifth World Congress of the International Association of Constitutional Law* (1999) 71-134.

<sup>172</sup> Du Plessis (2011) ch 32, 166.

#### 4.1 Preparatory drafting material

One of the most important extra-textual sources is the historical drafting materials generated in the course of the constitution-making process. A clear distinction must, however, be drawn between the materials and records compiled during the constitution-making process, which have value and can be referred to during interpretation; and the statements made by individual players, which are of no value in interpretation. Currie and De Waal observe that ‘statements by politicians made during the negotiations and drafting process, sometimes called the “ipse dixit” of the political players, are of little value in the interpretation of the constitution’.<sup>173</sup> They draw a distinction between the ipse dixit of the negotiators and the background material compiled during the drafting or constitution-making process. They note that in international law, similar material is referred to as the ‘travaux préparatoires’ or ‘preparatory work’ of a treaty and can be used in the interpretation of the treaty.<sup>174</sup>

In *S v Makwanyane* the South African Constitutional Court made significant use of drafting preparatory materials when interpreting the South African Constitution. However, drawing from the wisdom of the Canadian Supreme Court, the Court counselled caution when using such material in order to maintain the distinction between statements of the individual participants and the background drafting material. It quoted the Canadian Supreme Court where it said that:

[T]he Charter [of Rights and Freedoms] is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with confidence that within this enormous multiplicity of actors ... the comments of a few federal civil servants can in any way be determinative?<sup>175</sup>

As such, preparatory drafting material must be used with care and circumspection.

The Kenyan constitution-making process was quite consultative and lasted for over ten years, with Kenyans voting in a referendum twice. It left behind numerous draft constitutions and other documents that form part of the constitution-making history of the country. These

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<sup>173</sup> Currie & De Waal (2005) 154.

<sup>174</sup> Currie & De Waal (2005) 155.

<sup>175</sup> 1995 (6) BCLR 665 para 18.

preparatory materials form part of the extra-textual sources. Read together with the historical context of the country, they provide useful background material that defines where the Kenyans were coming from and where they wanted to go through devolution. Indeed, in the *Center for Rights Education* the Kenyan Court of Appeal recognised this kind of extra-textual source when it relied on the Final Report of the Committee of Experts in its interpretation of the constitutional provisions.<sup>176</sup> And in *Speaker of the Senate* the Supreme Court extensively quoted with approval from the Final Report of the Constitution of the Kenya Review Commission.<sup>177</sup>

## 4.2 International law and ratified treaties

There are two major reasons why purposive constitutional interpretation must take into account international law as one of the extra-textual context. First, adherence to international law forms part of a country's international law obligations, arising out of either the general principles of public international law or the treaties which a country has signed, thereby agreeing to be bound by them. Secondly, it has already been noted that modern constitution-making draws heavily from international law instruments which must thus, be considered in the interpretation of the constitutional provisions. Such inclusion of provisions from international law instruments into a country's constitution has been said to be the most direct and powerful way of incorporating international law into the country's municipal law.<sup>178</sup> As such, the provisions of the Constitution must be interpreted in harmony with the country's international law obligations and in a manner that does not conflict with principles of international law.

## 4.3 Foreign law and decisions

Foreign law and decisions also play some role as extra-textual sources in the effort to establish the purpose of a constitutional provision. These are relevant because most modern constitutions cannot be described as unique pieces of work since they have borrowed, adopted and adapted provisions from constitutions of other countries.<sup>179</sup> Kriegler J observed that 'where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that

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<sup>176</sup> *Center for Rights Education* para 45.

<sup>177</sup> *Speaker of the Senate* para 173.

<sup>178</sup> Du Plessis (2011) ch 32, 175.

<sup>179</sup> Devenish (1999) 609-10.

country have interpreted their precedential provision.’<sup>180</sup> The Kenyan Constitution, like many others written in the past few decades, extensively borrowed from the experiences of other countries. Thus its interpretation will benefit from comparative foreign decisions on related matters or on *in pari materia* provisions, ‘particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us’.<sup>181</sup> In *Jasbir Singh Rai*, Mutunga CJ underscored the pivotal role that Commonwealth and international jurisprudence will continue to play in the development of Kenyan jurisprudence.<sup>182</sup>

However, such foreign decisions must be used with circumspection, aimed at ‘finding principles rather than extracting rigid formulae,’ seeking ‘rationales rather than rules.’<sup>183</sup> Use of such comparative methods requires knowledge not only of foreign law, but also of its social and above all its political context, as it can become an abuse if it is legalistic and ignores context.<sup>184</sup> When one is borrowing and transplanting, care must be taken so as to anchor comparative borrowing, both within the context of the texts from which the authority emanates and the context of the nature and purpose of the text of the borrowing country. To uncritically borrow from foreign sources without considering the appropriate context is a dangerous exercise. It would appear that it was with this kind of counsel in mind that the Chief Justice in *Jasbir Singh Rai* warned against ‘mechanistic approaches to precedent’ that rely on foreign decisions without an inquiry into their respective contexts. He concluded that ‘[w]hile our jurisprudence should benefit from the strengths of foreign jurisprudence, it must at the same time obviate the weaknesses of such jurisprudence, so that ours is suitably

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<sup>180</sup> *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute intervening 2001 (5) BCLR 449 (CC) (‘Mamabolo’)* para 133.

<sup>181</sup> *Mamabolo* para 133.

<sup>182</sup> *Jasbir Singh Rai* para 100.

<sup>183</sup> *Coetze v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 57.

<sup>184</sup> Kahn-Freud ‘On uses and misuses of comparative law’ (1974) *Modern Law Review* 1, 27. See also Steytler (1998) 13 where he succinctly states this rule thus: ‘First, the text and the context of the comparative system should be examined. Textual and structural differences may render the comparison either relevant or irrelevant. In particular, the value of a foreign judicial decision should be examined with the context of that judicial system. Second, and most importantly, the underlying rationale of a comparable concept or doctrine should be identified. The transportability of doctrines or concepts does not depend on the similarity of language in which they are expressed; it is the compatibility of underlying rationales which determines whether a foreign doctrine or concept can be fruitfully used. Finally, regard should also be had to practical and institutional consequences of adopting a foreign doctrine in the South African context.’

enriched'.<sup>185</sup> Likewise, in *Communications Commission of Kenya*, the Supreme Court warned of the danger of 'unthinking deference to canons of interpreting rules of common law, statutes and foreign cases [which] can subvert the theory of interpreting the Constitution'.<sup>186</sup> The interpreter must always bear in mind that it is the Kenyan Constitution being interpreted and not a constitution of the other country being used as a comparative source. As Chaskalson in the South African case of *S v Makwanyane* cautioned, '[i]n dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution'.<sup>187</sup> Having adopted devolution, blindly borrowing from decisions of countries that do not have devolved systems may be misleading and dangerous.<sup>188</sup> Furthermore, the Kenyan devolution as defined in Chapter One<sup>189</sup> appears to have burst the boundaries of mere decentralisation and decisions from countries whose devolution is mere decentralisation must be relied upon with caution.

As noted in Chapter One, this study pays specific attention to South African jurisprudence, because the drafters of the Kenyan Constitution used many provisions from the South African Constitution, particularly in the area of devolution. Bearing in mind the caution articulated above about the differences in the contexts, there are also similar contexts between the two countries.<sup>190</sup> Although there are differences in the structure of devolution in the sense that South Africa has three spheres of government, while Kenya has only two, the general context in which both adopted devolution has similarities. Whereas South Africa was coming from an autocratic apartheid system with a skewed approach to the development of the country and

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<sup>185</sup> *Jasbir Singh Rai* para 101.

<sup>186</sup> *Communications Commission of Kenya* para 358. Also see *Judges and Magistrates Vetting Board and others v The Centre for Human Rights and Democracy and others (Judges and Magistrates Vetting Board)* Supreme Court Petitions Nos 13A, 14 and 15 of 2013 para 206 where the Court observed that 'a stereotyped recourse to the interpretive rules of the common law, statutes or foreign cases, can subvert requisite approaches to the interpretation of the Constitution'.

<sup>187</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 39.

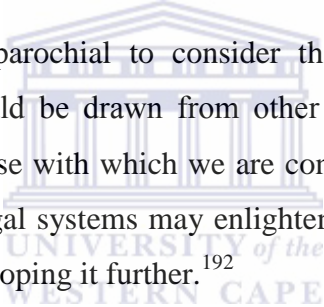
<sup>188</sup> See *Judges and Magistrates Vetting Board* (para 218) emphasising the importance of identifying the textual, conceptual and structural differences between the Kenyan Constitution and those of the countries whose decisions are being relied upon.

<sup>189</sup> See Chap 1 section 7.

<sup>190</sup> See Chap 12 section 3.

distribution of resources, services and opportunities, Kenya was coming from an autocratic system of an ‘imperial’ presidency with a skewed approach to the development of the country and distribution of resources, services and opportunities.

The Kenyan approach in this respect is consistent with comparative jurisprudence which is in favour of consideration of foreign decisions on *in pari materia* provisions. In *S v Juvenile* the Zimbabwean Supreme Court was of the view that where provisions are couched in similar terms to the provisions of international or regional bills and bills of rights in other countries, consideration must be given to the interpretation placed upon these provisions by courts in those other countries. In the South African case of *K v Minister of Safety and Security*, O’Regan J was emphatic that ‘[t]here can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own’.<sup>191</sup> The Court explained the justification for reliance on foreign jurisprudence as an effort to avoid a parochial view of the problems facing the modern world.


 It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems’ grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further.<sup>192</sup>

Justice Ginsburg<sup>193</sup> holds the view that in this age of supreme constitutions along the lines of the American one having been adopted in many countries, even the American system stands to benefit from decisions of courts of other countries when interpreting provisions in their constitutions which are similar to those in the US Constitution.

#### **4.4 Political, economic, social and cultural context**

Constitutions are enacted and expected to operate and serve the interests of a people within a political, economic, social and cultural context. Contextual interpretation therefore seeks to look at the political, social, economic and cultural context that informs the circumstances under which the Constitution was adopted and operates as an extra-textual source. This kind

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<sup>191</sup> 2005 (9) BCLR 835 (CC) (*Minister of Safety and Security*) para 34.

<sup>192</sup> *Minister of Safety and Security* para 35.

<sup>193</sup> Ginsburg RB ‘A decent respect to the opinions of [human]kind: The value of a comparative perspective in constitutional adjudication’ (2005) *Cambridge Law Journal* 575.

of context has three dimensions – the historical, contemporary and future dimensions. The Supreme Court has asserted that ‘historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory and interpretation’.<sup>194</sup>

#### **4.4.1 Historical dimension of context**

The historical dimension investigates the political, social, economic and cultural conditions which impelled the framers to make the constitution in the manner they did and which they were responding to. A look into the history enables the interpreter to determine the mischief which the provision was intended to remedy – it enables him or her to identify the purpose the provision was meant to serve.<sup>195</sup> The provision to be interpreted is regarded as a response to a mischief that existed as a historical fact. That historical fact or situation, as well as the law as it stood at the time, must be understood in order to fully appreciate the effects of the provision as a measure of redressing the mischief.<sup>196</sup> The Kenyan Constitution of 2010 was meant to address and redress a legacy of a multiplicity of governance problems revolving around centralised power, which had been abused and used to marginalise the majority of the people, as individuals, communities and regions. This legacy goes back to the colonial days and devolution should be understood as having been intended as a remedy to this marginalisation. In *Jasbir Singh Rai*, Mutunga CJ appreciated the role of history in constitutional interpretation from this perspective in the following terms:

There is no doubt that the Constitution is a radical document, that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a *status quo* that was unacceptable, through: provisions on the democratization and decentralization of the executive; devolution; the strengthening of institutions; the creation of institutions that provide checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya which they delegate to institutions that must

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<sup>194</sup> *Communications Commission of Kenya* para 356.

<sup>195</sup> Du Plessis (2011) ch 32, 170. See also *Communications Commission of Kenya* para 152.

<sup>196</sup> Du Plessis (2011) ch 32, 170. See also *Communications Commission of Kenya* para 156.



serve them, and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the *status quo* and signal the creation of a human-rights State in Kenya; mitigating the *status quo* in land that has been the country's Achilles heel in its economic and democratic development. These instances, among others, reflect the will and deep commitment of Kenyans, reflected in fundamental and radical changes, through the implementation of the Constitution.<sup>197</sup>

A major aspect of this historical legacy was the highly centralised system in which the allocation of resources, opportunities and development of the country was skewed. The system fused political and economic power into one centre, personified by the imperial presidency, leading to the 'country's developmental imbalances', which necessitated the adoption of the devolved system of government.<sup>198</sup>

Historical context must inform contemporary decisions in order to move the country into the desired future. Reference to the past ensures that mistakes of the past are not continued<sup>199</sup> or repeated and that the past unacceptable ways of doing things are abandoned. According to the High Court in *Dennis Mogambi Monga're*, '[w]hen the people of Kenya voted in favour of the Constitution, they made a decision to make a break with the past and bring in a new constitutional dispensation on the basis of the values and principles set out in the Constitution'.<sup>200</sup> This position is consistent with the view of Mohamed J in the South African case of *S v Mhlungu*, that the main desire of the South African people in adopting the new Constitution was that there was going to be 'a ringing and decisive break with the past'.<sup>201</sup>

From these premises, a purposive and contextual interpretation focuses on the negative history aiming at fulfilling the desire that it must be departed from, redressed and never repeated. The South African Constitutional Court similarly declared that 'the Constitution is not simply some codification of an acceptable or legitimate past. It retains from the past only

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<sup>197</sup> *Jasbir Singh Rai* para 89.

<sup>198</sup> *Speaker of the Senate* paras 167-8.

<sup>199</sup> See *Communications Commission of Kenya* para 157.

<sup>200</sup> *Dennis Mogambi Monga're* para 53. See also *Community Advocacy* para 73.

<sup>201</sup> *S v Mhlungu* 1995 (3) SA 3991 (CC) para 8.

what is defensible and represents a radical and decisive break from that part of the past which is unacceptable.<sup>202</sup> In a similar manner, the determination of the purpose and objective of devolution in Kenya must benefit from a clear appreciation of the political, economic, social and cultural context of the country in its historical dimension, so as to inform the present application of the constitutional provisions and shape the future. In the context of interpreting the right to equality and equal protection of the law, the High Court in *FIDA-K* noted that the interpreter must look at not only the language chosen to articulate specific rights and freedoms, but also ‘the historical origins of the concept enshrined’.<sup>203</sup> It emphasised that ‘[t]he equal protection and non-discrimination principles are not abstract propositions. They are expressions of policy arising out of specific difficulties and historical injustices to be addressed so that specific goals and remedies are achieved.’<sup>204</sup> The Supreme Court has asserted that the Supreme Court Act grants it ‘a near-limitless, and substantially elastic interpretative power’ [that] ‘allows the court to explore interpretative space in the country’s history and memory that ... goes beyond the minds of the framers whose product, and appreciation of the history and circumstances of the people of Kenya, may have been constrained by the politics of the moment’.<sup>205</sup>

In respect of devolution, Mutunga CJ in *Speaker of the Senate* went into a detailed examination of Kenya’s colonial and post-independence history of skewed economic development and regional disparities to illustrate why the Constitution has sought to zealously protect devolution and the system of revenue-sharing from unilateral discretion of the national government.<sup>206</sup> The Court examined past attempts to decentralise power and came to the conclusion that the design of the current devolution is meant to be a transformative device for Kenyan society. It is meant to redress past problems of marginalisation and exclusion. ‘Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the

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<sup>202</sup> *Shabalala v Attorney General of the Transvaal* 1996 (1) SA 725 (CC) para 26. See also *Brink v Kitshoff N* 1996 (4) SA 197 (CC) para 40.

<sup>203</sup> *FIDA-K* p 21-2.

<sup>204</sup> *FIDA-K* p 18.

<sup>205</sup> *Speaker of the Senate* paras 157.

<sup>206</sup> *Speaker of the Senate* paras 165-96.

Kenyan state.<sup>207</sup> Thus contextual interpretation of devolution informed by Kenyan history must induce large-scale social change through non-violent political processes grounded in law.<sup>208</sup>

#### **4.4.2 Contemporary dimension of context**

The contemporary dimension investigates the current and prevailing political, economic, social and cultural circumstances within which the Constitution is operating. Interpretation is therefore a contemporary function of the application of the constitutional provisions to the present problems of society. Contextual interpretation draws from the historical facts to inform the formulation of solutions to contemporary problems. Breyer argues for an interpretation that serves the concerns of the people at their specific times of existence in the different time dimensions and thereby sees the people as including future generations. A judge must interpret the Constitution in a manner that ‘reconstructs the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for decisions’.<sup>209</sup> The court in *FIDA-K* underscored the need for the judges to strive to capture within their decisions the purpose of each individual right, but hastened to clarify that ‘by purpose we do not mean what some framers may have intended to mean in the past, rather we mean the best modern theory that can be devised to justify the existence of the right in question and how it addresses a particular injustice’.<sup>210</sup>

#### **4.4.3 Future dimension of context**

The future dimension looks at the aspirational aspects and seeks to interpret the Constitution in a living manner to respond to the dynamism of society in order to serve not only the promised future, but also new challenges that may not have been envisioned or properly captured by the framers. In this sense, purposive interpretation is said to be ‘forward-looking interpretation based on what can be learnt from past experience’.<sup>211</sup> Thus, the Constitution must be construed in a manner that is heedful of the continuing time-frame within which it

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<sup>207</sup> *Speaker of the Senate* para 183.

<sup>208</sup> Klare (1998) 150.

<sup>209</sup> Breyer S (2005) 18. See also Komers (1989) 51, who notes that a ‘judge perceives the meaning of constitutional language as he reflects on the present in the light of constitutional language drafted within a given historical context’.

<sup>210</sup> *FIDA-K* 39.

<sup>211</sup> Du Plessis (2011) ch 32, 169.

obtains and operates.<sup>212</sup> Purposive contextual interpretation must link the past to the promised future by constantly reflecting on the reality of the past in order to create new ideas and values for the present and the future.<sup>213</sup> Against this background, the Preamble to the Constitution makes it clear that the Constitution is adopted for not only the current generation of ‘we the people of Kenya’ but also for our future generations. Consequently, Article 259(3) instructs that the Constitution be contextually interpreted in a dynamic manner as a living instrument, a law that ‘is always speaking’. The High Court in *FIDA-K* referred to ‘what is known as always speaking approach’.<sup>214</sup>

## **5 Additional principles relating to interpretation of Bills of Rights**

The Bill of Rights forms part of the Constitution and as such, all the rules of interpretation discussed apply to the interpretation of the Bill of Rights. However, because of the special significance of rights, additional rules have been developed for their interpretation, which may be relevant to the interpretation of devolution provisions. While the content of a right has to be interpreted broadly, liberally and generously, restrictions to a right must be construed narrowly and restrictively. The rationale for this is the fact that a limitation in respect of a right is to be regarded as an exception to the general rule, which must therefore be construed narrowly.<sup>215</sup> This is because in the relationship between the state and the individual, the individual is in a weaker position and requires protection against the state whose power to limit the rights must be subjected to interpretative restraints.

### **5.1 Interpretation of rights and limitations**

Rights must be interpreted generously in order to allow the full benefit of the rights, while avoiding a strict and legalistic approach that may impede the realisation of the objectives of the rights’ provisions.<sup>216</sup> In *FIDA-K* the High Court adopted this approach, stating the rule thus:

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<sup>212</sup> Du Plessis (2011) ch 32, 169.

<sup>213</sup> Du Plessis (2011) ch 32, 79-80.

<sup>214</sup> *FIDA-K* 11.

<sup>215</sup> *ANC (Border Branch) and another v Chairman, Council of State, Ciskei and Another* 1995 (4) BCLR 401 (Ck), 411.

<sup>216</sup> *First Certification* case (1996) para 35.

Provisions relating to fundamental rights and freedoms must be given purposive and generous interpretation in such a way as to secure maximum enjoyment by all of the rights and freedoms guaranteed. In our view when a State organ seeks to do an act which derogates on the enjoyment of fundamental rights and freedoms guaranteed under Chapter 4 of our Constitution, the burden is on that person or authority seeking the derogation to show that the act or omission is acceptable within the derogation permitted under the Constitution.<sup>217</sup>

Currie and De Waal define it as an interpretation which is in favour of rights and against their restriction: 'It entails drawing the boundaries of rights as widely as the language in which they have been drafted and the context in which they are used makes possible.'<sup>218</sup> In relational terms the court stands between the state and the individual to ensure that the state, as the stronger party in the relationship, is restrained in order to give the individual adequate space to exercise his rights.

In contrast, limitations to rights must be interpreted narrowly because although it has been recognised that rights are not absolute but subject to limitations, the power of the state to limit rights is itself limited.<sup>219</sup> Limitations to rights must be interpreted strictly against the state or person limiting the right to justify the limitation.

## 5.2 Application to interpretation of devolution provisions

Drawing from these rules, devolution provisions which seek to empower the county governments must be interpreted generously. This is more so in the key areas of political, functional, administrative and financial autonomy. For instance, in the functional area,<sup>220</sup>

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<sup>217</sup> *FIDA-K* p 21.

<sup>218</sup> Currie & De Waal (2005) 150. See also *S v Zuma* (1995)(2) SA 642 (CC) para 14, in which the South African Constitutional Court approved of the following passage from the judgment of Lord Wilberforce in *Minister of Home Affairs v Fisher*: 'A supreme constitution requires a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.' See also *S v Mhlungu* (1995) (3) SA 391 (CC).

<sup>219</sup> Mutakha JK 'The theory and design of limitation of fundamental rights and freedoms' (2008) 4 (1) *The Law Society of Kenya Journal* 1-34, 3.

<sup>220</sup> Whereas Article 186 and the fourth schedule of the Constitution assign functions to the two levels of government, Article 187, among others, envisage the transfer of functions from one level of government to another.

taking into account the subsidiarity principle, the devolution provisions should be interpreted generously in favour of the counties to ensure that where certain functions are most efficiently and effectively performed by county governments, they are left to those authorities to decide.<sup>221</sup> Similarly, in the administrative area, a generous interpretation in favour of the counties should ensure that the administrative functionaries of the county government are truly answerable to the county government.

Given the history of exclusion, regional inequalities and a deficit of development as well as marginalisation, the financial provisions on devolution must be interpreted generously in favour of county governments, and financial equalisation for marginalised regions, areas and communities.<sup>222</sup> In *Speaker of the Senate* the Supreme Court laid ground for this approach by noting that ‘[t]he “constitutional commitment to protect”, and its signal of the search for a more perfect devolution, implies that, in interpreting the devolution provisions, where contestations regarding power and resources arise, the Supreme Court should take a generous approach’.<sup>223</sup> It added that ‘[t]he Supreme Court will not hesitate to pronounce itself with final authority, by laying down the proper juridical structures consolidating the devolution-concept where they are required, and stabilizing our Constitution, as is expected’.<sup>224</sup>

Similarly, provisions on intergovernmental processes for the management and sharing of finances must be interpreted generously in favour of the participation in the processes by the county governments and the Senate as their representative and protector.<sup>225</sup> In the historical context of Kenya set out in Chapter Three, the Court as the determinative interpreter and guardian of the Constitution must view its role as standing between national government and county governments to ensure that national government ensures that county governments are enabled to have adequate capacity and space within which to operate. Indeed, the Court must interpret the cooperative government provisions generously in favour of the counties to

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<sup>221</sup> De Visser J ‘Institutional subsidiarity in the South African Constitution’ (2010) 21 (1) *Stell LR* 90-115. See also Kuhnhardt L ‘Federalism and subsidiarity: Reflections on a German and European question’ in Thesing J (ed) *The Example of Federalism in the Federal Republic of Germany* (1994) 21-30.

<sup>222</sup> Arts 201, 202, 203 and 204.

<sup>223</sup> *Speaker of the Senate* para 187.

<sup>224</sup> *Speaker of the Senate* para 187.

<sup>225</sup> Arts 215, 216, 217 and 218.

ensure participation on the basis of mutual respect.<sup>226</sup> The Supreme Court in *Speaker of the Senate* has in this regard asserted the following:

Article 96 of the Constitution represents the *raison d'être* of the Senate as “to protect” devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163(6) of the Constitution, the Court has a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular.<sup>227</sup>

On the other hand, given the historical context in which Kenya adopted devolution, there will be temptation on the part of the national government, especially during the transition period, to want to use the intervention provisions to claw back power and recentralise. For this reason, it is argued that while interpreting the county-empowering provisions generously in favour of the counties, the national government supervision- and devolution-limiting provisions ought to be interpreted narrowly and restrictively against the national government. The provisions on monitoring and evaluation, intervention both in functional<sup>228</sup> and financial matters,<sup>229</sup> the suspension of county government,<sup>230</sup> and the residual functions of the national government must all be interpreted restrictively.<sup>231</sup> They must be interpreted narrowly in order to maintain a delicate balance between the distinctness and autonomy of the county governments, and the supervisory powers of national government.<sup>232</sup>

## 6 Remedies for violation of constitutional devolution provisions

In most cases a court would be approached to interpret constitutional devolution provisions in the context of a challenge to legislation or conduct of any of the governments or their

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<sup>226</sup> Arts 6 and 189.

<sup>227</sup> *Speaker of the Senate* para 190.

<sup>228</sup> Art 190.

<sup>229</sup> Art 225 which talks about stoppage of transfer of funds to the county government.

<sup>230</sup> Art 192.

<sup>231</sup> Art 186(4).

<sup>232</sup> Art 6.

officials, raising the question of what remedies the court can grant. Both mandatory and discretionary remedies are implied by a number of constitutional provisions. When a court finds a law or conduct inconsistent with devolution provisions of the Constitution, it must declare it invalid to the extent of the inconsistency.<sup>233</sup> Appropriate discretionary reliefs are also envisaged in a number of provisions.<sup>234</sup> Four basic remedies related to a declaration of invalidity, arranged in hierarchical order, are possible. First, the law may be ‘read down’ to avoid the inconsistency.<sup>235</sup> Secondly, if that is not possible, the law must be declared invalid.<sup>236</sup> Thirdly, instead of declaring the whole law invalid, the substantive impact of the declaration should, where possible, be limited and controlled by altering the offending law through severance, reading-in or notional severance to cure the constitutional defect.<sup>237</sup> Fourthly, it might be necessary to limit the temporal impact of the order of invalidity by suspending the order of invalidity or limiting the retrospective effect of the order.<sup>238</sup> In addition, with or without a declaration of invalidity, other appropriate reliefs could be fashioned to meet the exigencies of the situation.

### 6.1 Reading down of the law

Given that a declaration of invalidity may lead to very severe and disruptive consequences, the constitutional remediation provisions must be read as envisaging powers of the courts to make orders that mitigate some of the consequences. The first step is to try and avoid a declaration of invalidity through reading down. Reading down is an approach to interpretation of a statute in situations where two interpretations are possible: one leading to inconsistency and another to consistency.<sup>239</sup> The court must choose the approach that avoids inconsistency and thereby avoid invalidity, which should be declared only where it cannot be

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<sup>233</sup> Art 2(4) on constitutional supremacy envisages such a declaration.

<sup>234</sup> See Article 3(1) which requires every person to respect, uphold and defend the Constitution, Article 23(1) which empowers the High Court to provide redress in cases of violation of rights, Article 23(3) which identifies a number of appropriate reliefs, and Article 165(7) which empowers the High Court to ‘make any order or give any direction it considers appropriate to ensure the fair administration of justice’.

<sup>235</sup> See Bishop M ‘Remedies’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) Chap 9, 86.

<sup>236</sup> See Bishop (2011) ch 9, 86.

<sup>237</sup> See Bishop (2011) ch 9, 86.

<sup>238</sup> See Bishop (2011) ch 9, 87.

<sup>239</sup> See Bishop (2011) ch 9, 87.



avoided. The South African Constitutional Court rendered this rule thus: ‘judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the action.’<sup>240</sup> When such a choice is made, reading down becomes a remedy.

In respect of devolution, the Constitution envisages reading down as a mechanism of avoiding conflict of national and county legislations.<sup>241</sup> Likewise, by requiring existing laws to be construed with alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution, reading down is envisaged and will play a critical role in bringing devolution into operation.<sup>242</sup> This will be more critical during the transition period.

## 6.2 Declaration of invalidity of legislation or conduct

Where it is not possible to read down the legislation, a declaration of invalidity must follow. This is an important mandatory remedy implied in the supremacy clause, but is restricted to the extent of inconsistency, once a court concludes that a law or conduct is inconsistent with a constitutional provision.<sup>243</sup> The remedy of invalidity follows automatically the moment inconsistency is found.<sup>244</sup> In respect of fundamental rights, the Constitution includes among the listed ‘appropriate reliefs’ a declaration of invalidity of any law that violates rights.<sup>245</sup>

## 6.3 Reading in and severance

A court can limit the substantive impact and mitigate the consequences of a declaration of invalidity by invalidating only part of a law through reading in, severance, and notional severance.<sup>246</sup> By providing that any other law that is inconsistent with the constitution ‘is

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<sup>240</sup> *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Ltd v Smit No and others* 2000 (10) BCLR 1079 (CC) para 23.

<sup>241</sup> See Art 191(5) discussed in Chap 6 section 8.2.

<sup>242</sup> See section 7(1) and Chap 11 section 3.4.

<sup>243</sup> See Bishop (2011) ch 9, 96.

<sup>244</sup> See Bishop (2011) ch 9, 19 and 20 where he talks of ‘automatic remedialism’ and emphasises that ‘in constitutional law a finding that law or conduct is unconstitutional results automatically in a declaration of invalidity’.

<sup>245</sup> Art 23(3)(d).

<sup>246</sup> See Bishop (2011) ch 9, 97.

void to the extent of the inconsistency’, the Constitution incorporates these limiting elements as mechanisms for avoidance and control of the consequences of a declaration of invalidity.<sup>247</sup> This terminology ‘reflects a narrow striking down’ of legislation as opposed to striking down the whole statute.<sup>248</sup>

By ‘reading in’ a court adds words to the statute to cure the defect in it and make it consistent with the Constitution.<sup>249</sup> It effectively changes the text to save a law from being declared invalid in whole or in part. Although ‘reading-in’ and severance have been criticised as forms of ‘writing’ and ‘editing’ legislation that usurp legislative power,<sup>250</sup> there is judicial support for reading-in as a good remedy in cases of under-inclusion of protected persons.<sup>251</sup> South African Courts have supported this remedy, arguing for the ‘equality of the vineyard [and not] the graveyard’.<sup>252</sup> The essence of this is that in a statute that is unfairly discriminatory because it provides benefits to some groups and not others, reading-in is the correct remedy as it would benefit everybody. In contrast, a declaration of invalidity would benefit nobody.<sup>253</sup> From this perspective, reading-in comes closer to the ‘including’ principle that features prominently in the county- and devolution-empowering provisions. In *Rotich Samuel Kimutai v Ezekiel Lenyongopeta and 2 others*, the Court of Appeal had long before the adoption of the new Constitution recognised reading-in as a remedy to absurdity: ‘Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.’<sup>254</sup>

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<sup>247</sup> Art2(4).

<sup>248</sup> See Ackermann J in the South African case of *Ferreira v Levin NO* 1996 (1) BCLR 1 (CC) para 131.

<sup>249</sup> See Bishop (2011) ch 9, 104.

<sup>250</sup> See Bishop (2011) ch 9, 105.

<sup>251</sup> See Bishop (2011) ch 9, 109.

<sup>252</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC) (*NCGLE v Minister of Home Affairs*) para 75. See also *Minister of Home Affairs and another v Fourie and another* 2006 (3) BCLR 355 (CC) para 149.

<sup>253</sup> See Bishop (2011) ch 9, 106.

<sup>254</sup> [2005] eKLR (*Rotich Samuel Kimutai*) page 6.

Severance involves reading a statute that is partly unconstitutional in such a manner that the unconstitutional part is severed from the rest, leaving the constitutional part intact.<sup>255</sup> Through severance the court is able to control and limit the consequences of its order of invalidity to only those offending provisions of the statute. Kriegler J of the South African Constitutional Court rendered the test for severability as involving determining whether the good can be separated from the bad: ‘If the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute.’<sup>256</sup> One must first ask whether it is possible to sever the invalid provisions and, secondly, whether what remains gives effect to the purpose of the legislative scheme. Notional severance involves a court leaving the words of a statute unaltered, but subjects its application to a condition.<sup>257</sup>

Sometimes severance and reading-in are combined so that the interpretation excises certain words from the provision and reads in others. This interpretative approach as a remedy will be useful not only for the interpretation of old order laws to bring them into conformity with the devolved system under the new Constitution but also new order laws to facilitate devolution. The South African Constitutional Court referred to both ‘severance’ and ‘reading in’ as an interpretive solution to both old and new order legislation.<sup>258</sup> The South African Supreme Court of Appeal has also viewed this kind of interpretation as envisaging ‘some form of pruning exercise’ which ‘involves discarding the offensive portions’ of the old order law and ‘giving meaning and effect to the non-offensive ones’.<sup>259</sup>

In *John Harun Mwau*, the High Court of Kenya appears to have by implication adopted this technique of severance and reading-in for interpreting these old order laws. The Court understood ‘all laws’ in force as including the former Constitution and the National Accord and Reconciliation Act of 2008 (NARA). It then held that section 9(2) of the Sixth Schedule amended or modified the provisions of the NARA to the extent that elections could be held

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<sup>255</sup> *Coetzee v Government of the Republic of South Africa and Matiso and others v Commanding Officer Port Elizabeth Prison and others* 1995 (10) BCLR 1382 (CC) (*Coetzee and Matiso*).

<sup>256</sup> *Coetzee & Matiso* para 16.

<sup>257</sup> See Bishop (2011) ch 9, 97.

<sup>258</sup> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and others* 2006 (8) BCLR (*New Clicks*) para 14, both severance and reading-in were used to make the South African Medicines Act and Regulations make sense within the meaning of the new Constitution.

<sup>259</sup> *Majomatic 115 (Pty) Ltd v Kouga Municipality and others* [2010] 3 All SA 415 (SCA) para 6.

before 2012, if the coalition government established under the NARA was dissolved. It also held that by section 12 of the Sixth Schedule saving the positions of the President and the Prime Minister until the first elections, section 6 of the NARA must be read as having been amended or modified to exclude the possibility by one coalition partner withdrawing from the coalition and early elections being necessitated without the agreement of the other.<sup>260</sup>

#### **6.4 Suspension of a declaration of invalidity**

The inconsistency of a law or conduct with the Constitution is a matter to be determined objectively, and once established, must lead to an automatic declaration of invalidity. This is because, it is not the court that invalidates the law, which is invalid from inception; the court only declares what it already is. Ackerman J of South African Constitutional Court observed that '[t]he Court's order does not invalidate the law; it merely declares it to be invalid'.<sup>261</sup> Likewise, Kriegler J notes that a declaration of invalidity 'is descriptive of a pre-existing state of affairs'.<sup>262</sup> Article 2(4) of the Constitution does not read that 'the law will be declared void and the conduct invalid'. Instead, it reads, the law 'is void' and the conduct 'is invalid'. The essence of this is that a declaration of invalidity has retrospective effects and affects all actions taken in the past on the basis of the invalidated statute. The necessary implication is that the declaration can have very drastic consequences, some of which the courts must seek to avoid or mitigate.<sup>263</sup> Courts can therefore regulate the effect of their orders of invalidity on both the future and the past.<sup>264</sup>

In contrast to South Africa, which explicitly empowers the courts to suspend a declaration of invalidity, to allow Parliament an opportunity to rectify the law,<sup>265</sup> the Kenyan Constitution makes no such explicit provision. It is, however, submitted that the implied powers of the

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<sup>260</sup> *John Harun Mwau* paras 157 and 158. See also *Republic v Transitional Authority and another Ex parte Medical Practitioners, Pharmacists and Dentists Union (KMPDU) and 2 other* [2013] eKLR (para 67) in which the High Court severed the phrase 'this section' in section 34 of the Intergovernmental Relations Act as being misplaced and replaced it with 'this Act'.

<sup>261</sup> *Ferreira v Levin NO* 1996 (1) BCLR 1 (CC) para 27.

<sup>262</sup> *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) para 94.

<sup>263</sup> See Steytler (1998) 30 writing in the context of South Africa.

<sup>264</sup> See Bishop (2011) ch 9, 111.

<sup>265</sup> See ss 98(5) and (6) of the South African Interim Constitution and 172(1)(b) of the Constitution of the Republic of South Africa, 1996.

Kenyan courts to fashion and grant appropriate reliefs envisage suspension as one such relief. The South African Constitutional Court has observed that:

The need for the Courts to have such a power has been recognised in other countries. In Canada for instance where no provision is made specifically in the Constitution for such powers, the Courts have achieved this result by suspending an order invalidating a statute for sufficient time to allow Parliament to take remedial action.<sup>266</sup>

Where the result of invalidating everything done under an unconstitutional law would be disproportional to the harm which would result from giving the law temporary validity, suspension of a declaration of invalidity as an appropriate relief would be justified. For example, a declaration of invalidity may create a lacuna in the law that may cause uncertainty, administrative confusion or potential hardship.<sup>267</sup> Thus, the aim and effect of a suspension, as Chaskalson P noted, is to permit:

[T]his Court to put Parliament on terms to correct the defect in an invalid law within a prescribed time. If exercised, this power has the effect of making the declaration of invalidity subject to a resolute condition. If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period, and the normal consequences attaching to such a declaration ensue.<sup>268</sup>

But suspension may in certain circumstances be inadequate in mitigating the consequences. The Court may thus limit the application of the declaration of invalidity by delineating who may benefit from the relief granted and under what circumstances. Transactions that may have been finalised under the invalidated law before the declaration is made could be excluded from the application of the order.<sup>269</sup> However, individual litigants must not be

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<sup>266</sup> *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (*Executive Council of the Western Cape Legislature*) para 107.

<sup>267</sup> See Bishop (2011) ch 9, 116.

<sup>268</sup> *Executive Council of the Western Cape Legislature* para 106.

<sup>269</sup> See Steytler (1998) 30.

singled out for benefit of the order. Instead, all people who are in the same situation as the litigants should benefit from the order.

#### **6.4 Other appropriate relief**

In respect of the Bill of Rights, Article 23(3) empowers the courts to grant ‘appropriate relief’, including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights, an order for compensation, and an order for judicial review. These appropriate reliefs are implied in the other constitutional provisions, including those on devolution, that grant the court jurisdiction to interpret the Constitution. They are also inherent in the common law powers of the courts to grant such orders as will meet the ends of justice. For example, the High Court’s unlimited jurisdiction includes power to fashion appropriate reliefs.<sup>270</sup> The power to declare a law invalid includes the power to fashion appropriate reliefs to avoid and control the consequences of the declaration. The Supreme Court’s jurisdiction to interpret the Constitution and even the exercise of appellate jurisdiction imply powers to grant appropriate reliefs, whether temporary or final. This includes the power to alter the lower court’s appropriate relief with a relief the appellate Court deems fit.<sup>271</sup> The Supreme Court has held that the appropriate reliefs envisaged by Article 23(3) imply a power for the courts to grant relief for infringement of other provisions of the Constitution other than the Bill of Rights.

Article 165(3)(d) makes it clear that that power extends well beyond the Bill of Rights when it provides that the High Court has jurisdiction to hear any matter relating to any question with respect to interpretation of the Constitution ‘*including the determination of (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention, of this Constitution; (iii) any matter relating ... to the constitutional relationship between the levels of government.*’ These provisions make it clear that the Kenyan Courts have a

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<sup>270</sup> See Art 165(3)(a).

<sup>271</sup> See *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) para 60. See also Bishop (2011) Chap 9, 50.

far-reaching constitutional mandate to ensure the rule of law in the governance of the country.<sup>272</sup>

Such appropriate relief will depend on the circumstances of each case and the constitutional provision under interpretation. In *Fose* Ackermann J commented on what is appropriate:

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these important rights.<sup>273</sup>

It is submitted that the need to fashion new remedies to ensure that devolution is protected and enforced is apparent and imperative. Just as remedies for rights are informed and shaped by the purposes of the right,<sup>274</sup> devolution remedies must be shaped and informed purposively by the values and purposes of devolution. From this perspective the devolution remedies must correct past problems of centralisation<sup>275</sup> and regulate the behaviour of the two levels of government.<sup>276</sup> Appropriate reliefs must not only be focused on the case before the court but also guide and direct future conduct by the two levels of government and state organs to avoid future repetition of the violations.<sup>277</sup> They must shape the development and operation of the devolved system of government. The remedies must also be effective,<sup>278</sup> serving the interests of not only the individual litigants but society as a whole<sup>279</sup> so as to entrench the

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<sup>272</sup> *Communications Commission of Kenya* para 360 (emphasis in original).

<sup>273</sup> *Fose* para 19. See also Bishop (2011) ch 9, 56.

<sup>274</sup> *Fose* para 19.

<sup>275</sup> See Bishop (2011) ch 9, 67-8.

<sup>276</sup> See Bishop (2011) ch 9, 65. See also *Fose* para 17.

<sup>277</sup> See *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) para 45.

<sup>278</sup> See Bishop (2011) ch 9, 62-3. See also the Canadian case of *Osborn v Canada (Treasury Board)* [1991] 2 SCR 170, 346, in which Sopinka J stated that '[i]n selecting an appropriate remedy under the Charter, the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the Charter and to provide the form of remedy to those whose rights have been violated that best achieves that objective'.

<sup>279</sup> See *Fose* para 38.

new form of governance and transform society. The appropriate reliefs may include common law and statutory remedies where they are suitable to the devolution demands. Where they are not, the courts must creatively fashion other constitutional remedies that may effectively deal with the special demands of the constitutional litigation.<sup>280</sup> The courts have wide discretion in this respect.<sup>281</sup>

## 7 Conclusion

Over the years special principles and rules for the interpretation of a supreme Constitution and a Bill of Rights have been developed. Significant among these principles and rules is the requirement that a supreme Constitution must be interpreted purposively, a principle adopted and incorporated in the Constitution. Purposive interpretation will require the determination and identification of the purposes of devolution and giving full effect to them. In determining these purposes the interpreter must start but not end with the text of the provision – he or she must interpret it contextually, drawing on both intra-textual and extra-textual contexts. While intra-textual context draws from the other provisions and aspects of the Constitution, extra-textual context draws from sources outside the Constitution, including historical conditions of the country and comparative studies from other countries and international law. In these comparative studies, South Africa is a crucial source for Kenyan interpretation of devolution provisions given that Kenya's devolution borrowed significantly from the South African Constitution.

While county-empowering provisions must be interpreted liberally, broadly and generously in favour of the counties in order to give full effect to the objectives and purposes of devolution, devolution intervention and limitation provisions must be interpreted narrowly and restrictively in order to restrain national government and create space for the county governments and the system of devolution to take root. In doing this, courts as the authoritative and determinative interpreters of the constitution will be seeking to stand between the national and county governments as 'the veritable guardian-angels'<sup>282</sup> of devolution to enable the counties to take root. In this manner the promise of devolution as a transformative agent in Kenyan society will be achieved. To do this the courts must realise

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<sup>280</sup> See Steytler (1998) 32 in the context of the South African Bill of Rights remedies.

<sup>281</sup> See Bishop (2011) ch 9, 45.

<sup>282</sup> See *Speaker of the Senate* (para 104) where the Court described the Senate as the veritable guardian angel of the counties.



that interpretation is not a neutral concept but rather a utilitarian and egalitarian concept which connotes social good and places a heavy responsibility on the judiciary as the decisive interpreter of the Constitution and the social good.<sup>283</sup>



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<sup>283</sup> Klare KE 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146-88, 150.

## CHAPTER THREE

### Constitutional history of devolution

#### 1 Introduction

Chapter Two has identified history as one of the key extra-textual sources to consult in a purposive interpretation, in order to establish the purpose of the devolution provisions in the Constitution. This chapter examines Kenyan political, economic, social and cultural history to the extent that it is relevant to interpretation and determination of the purposes for which devolution was adopted. To establish the problems and challenges which led to the adoption of devolution, the chapter traces the establishment of a political and economic system from the colonial and post-independence periods to the adoption of the new Constitution.

#### 2 Colonisation and its economic objectives

As a political and economic entity, Kenya is a creature of Western countries' colonial policy and adventure in Africa.<sup>1</sup> In the scramble for and division of Africa into spheres of influence, Kenya came under control of the British: first as a territory managed on behalf of the British government by the British East Africa Association, which later became the Imperial British East Africa Company (IBEACO); then as a protectorate; and finally as a colony.<sup>2</sup> The scramble was aimed at expansion of commercial opportunities and informed by imperial policies based on conquest and subjugation of the natives.<sup>3</sup> Mackinnon formed the British East Africa Association in 1887 solely 'to open up the British portion of East Africa to commerce and civilization'.<sup>4</sup> The General Act of the Berlin Conference set out the rules of international law to govern the acquisition and establishment of authority over territory in Africa. Article 35 disclosed the agenda of the conference as including establishment of

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<sup>1</sup> Ojwang JB *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (1990) 19.

<sup>2</sup> Ghai YP & McAuslan JPWB *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (1970) 3.

<sup>3</sup> Juma L 'Ethnic politics and the constitutional review process in Kenya' (2002) 9 *Tulsa Journal Comparative & International Law* 471- 532, 476-7 where he observes that '[t]hrough conquest, deliberate annexation of territory and lopsided treaties, the British coalesced the ethnic groups and the minority settler population into a Nation State'.

<sup>4</sup> Ghai & McAuslan (1970) 3, 6.

sufficient authority in the occupied regions ‘to protect existing rights and as the case may be, freedom of trade and transit’.<sup>5</sup>

### ***2.1 The exclusive economy and development, and the legacy of marginalisation***

The stated colonial objective necessitated economic and development policies not meant to promote the welfare of African natives but to serve the narrow interests of the British settlers and businessmen.<sup>6</sup> According to Oyugi, having divided the colony into ‘native’ and settler areas, the colonial government implemented a doctrine of separate development with separate policies for the two areas. This led to separate institutions, including local government catering exclusively for the interests of the different areas.<sup>7</sup> Ghai and McAuslan call it a ‘dual economy’ meant to exclusively serve the white settlers.<sup>8</sup>

As an instrument for implementation of this policy, government was designed to be controlled and used by one group to the exclusion and disadvantage of the rest. A system was implemented to provide security of land tenure for the white settlers, publicly supported credit facilities for their agricultural activities, controlled involvement by Africans in agriculture and marketing of certain cash crops to ensure monopoly by the white settlers, and coercion to ensure cheap African labour. Laws were enacted to reduce land in the African reserves and access rights of the Africans to such land so as to force them to go and provide labour on the white settler farms.<sup>9</sup> The demands of the markets back home informed the choice of the sectors to benefit from government investment policies, leading to neglect of other sectors that were not in high demand.<sup>10</sup> Since most sectors of interest were based on agriculture, land which could support them was zoned as high or medium potential, allocated to whites, and received investment in infrastructure, while the low potential areas were

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<sup>5</sup> Ghai & McAuslan (1970) 4.

<sup>6</sup> Mutakha JK ‘Regional inequalities in Kenya in the context of decentralization and devolution: Dynamics and policy options’ in *Report of the National Conference on Equity and Growth: Towards a Policy Agenda for Kenya* (2006) 125. <http://www.sidint.net/docs/inequalities%20Conference%202006.pdf> (accessed: 1 November 2013).

<sup>7</sup> Oyugi WO ‘Local government in Kenya: a case of institutional decline’ in Mawhood P (ed) *Local Government in the Third World: The Experience of Tropical Africa* (1983) 1-2.

<sup>8</sup> Ghai & McAuslan (1970) 258.

<sup>9</sup> Ghai & McAuslan (1970) 96-7.

<sup>10</sup> Mutakha (2006) 125.

reserved for Africans and neglected,<sup>11</sup> thereby starting the creation of regional disparities and development deficits.<sup>12</sup> The 1915 Crown Lands Ordinance was enacted to allocate to settlers land belonging to African communities.<sup>13</sup> Karuti Kanyinga, in his discussion of the relation between land, politics and election violence, estimates that a lot of high potential land was allocated to white settlers.<sup>14</sup> The low potential lands became native reserves and were allocated to Africans on an ethnic basis, with solid socio-political boundaries enforced to avoid inter-ethnic political interactions among the Africans.<sup>15</sup> This laid a foundation for the ethnicisation of Kenyan society.<sup>16</sup>

In agriculture, laws were enacted to aid white settlers and disempower the natives.<sup>17</sup> In 1914, agricultural legislation ostensibly aimed at the prohibition of the import of certain coffee plants to prevent coffee leaf disease was enacted under which Africans and Asians were administratively denied certificates of registration to engage in coffee-growing.<sup>18</sup> The African reserves were only useful for sourcing cheap labour, which once prepared would be relocated to the high potential areas. Migration of people from African reserves to the white highlands in search of employment created the problem of squatters on settler farms, and later of rural to urban migration for non-existent opportunities. The migration of educated people to high and medium potential areas robbed the low potential zones of their high and medium potential human resources, which they badly needed for the development of these areas, thereby worsening the regional disparities.<sup>19</sup> Furthermore, since most of the schools were

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<sup>11</sup> Karuti K 'The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya', (2009) 27 *Journal of Contemporary African Studies* 328, where he adds: 'Population pressure resulted in congestion and declining productivity in the "native areas". The administration shifted attention towards settler farming and neglected the reserves.'

<sup>12</sup> Ghai & McAuslan (1970) 25. See also Mutakha (2006) 125.

<sup>13</sup> See Juma (2002) 480, where he observes that the purpose of the legislation was twofold. 'First, it ensured that all the fertile land, both suitable for agriculture and ranching, were made available for white settlers ... Secondly, it created a situation where the natives would be landless and thus form a pool from which cheap labor could be drawn.'

<sup>14</sup> Karuti (2009) 328.

<sup>15</sup> Karuti (2009) 328.

<sup>16</sup> Karuti (2009) 328. See also Maxon RM *Britain and Kenya's Constitutions 1950-1960* (2011) 3.

<sup>17</sup> Ghai & McAuslan (1970) 81.

<sup>18</sup> Ghai & McAuslan (1970) 82.

<sup>19</sup> Mutakha (2006) 125-6.

established by Christian missionaries who found predominantly Islamic regions more resistant to Christianity, missionary schools were hardly established in these areas. This resulted in their marginalisation in an economy that was to later offer more opportunities for people with formal education.<sup>20</sup>

These developments encouraged the growth of major urban areas within and around these high and medium potential areas. In particular, after construction of the Mombasa-Uganda railway line, Nairobi emerged as the government administrative headquarters, attracting industrial and commercial activities. The introduction of local manufacturing revolved around Nairobi and the other urban centres in the high and medium potential areas and along the railway line.<sup>21</sup> Low potential areas ended up producing raw materials to be processed in Nairobi and the other major urban areas.<sup>22</sup>

## ***2.2 The centralised political system***

To achieve the objective of an exclusive economy, a political system based on the British unitary system of a highly centralised government with the concentration of power in the hands of the white minorities was developed. It was founded upon command and control of African activities. Initially, the territory was administered on behalf of the British government by the IBEACO, which was chartered as an instrument of both acquisition of territory and administration.<sup>23</sup> This system was essentially centralised, as the company administered the territory on behalf of the British Government in London. From 15 June 1895, however, the British government assumed direct administration when the country was declared a protectorate and a commissioner appointed to administer it. The first legal instrument establishing an administrative system was the East Africa Order in Council of 1897. The Commissioner was appointed by Her Majesty as the chief executive officer of the territory with extensive powers, including the responsibility of establishing an administration for the territory. He had powers to legislate through the Queen's Regulations, establish a court for the protectorate, to sit in Mombasa with appeals going to the High Court in Zanzibar and other courts, regulate the native courts which were to have exclusive criminal jurisdiction

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<sup>20</sup> Mutakha (2006) 126.

<sup>21</sup> Mutakha (2006) 126.

<sup>22</sup> A good example is the case of the semi-arid areas producing livestock to be slaughtered and processed in the slaughter houses and meat commissions in Nairobi and the other urban areas.

<sup>23</sup> Ghai & McAuslan (1970) 3.

over Africans, and establish a constabulary or other force to be employed in the maintenance of law and order, and to deport persons.<sup>24</sup> Since the details of the system were not provided, the first Commissioner developed a system of provincial administration, with the Commissioner having unfettered powers internally but being accountable to the Secretary of State, who had authority to approve any regulations he made.

A 1902 Order in Council replaced the 1897 one with two significant changes: the freeing of the Commissioner from constant restrictions from London; and the granting of discretion to divide the country into provinces and districts for administration purposes. Although the freeing of the Commissioner was regarded as administrative devolution, he remained under the control of the colonial office and the provinces and districts he established were mere administrative outposts under his control, leaving the system essentially centralised.<sup>25</sup> The first line of attack against this centralised system of government was agitation by white settlers and Indian businessmen who sought to be involved in law-making. They sought horizontal separation of power as well as participation at the local level.

### ***2.3 Emergence and development of local government***

Local government emerged and was developed along dualist lines, with one stream for the white settled areas and another for African reserves.<sup>26</sup> The involvement of Africans in the administration of the protectorate started with the creation of the African native courts under the 1897 East African Order in Council; the appointment of African village headmen under the 1902 Order in Council and Village Headmen Ordinance; and the 1902 Order in Council under which the Commissioner created provinces and districts and appointed provincial and district commissioners. The provincial commissioners were empowered to appoint chiefs as agents of the central government, and any native or natives to be official headmen or

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<sup>24</sup> Ghai & McAuslan (1970) 37.

<sup>25</sup> Ghai & McAuslan (1970) 41.

<sup>26</sup> Southhall R & Wood G 'Local government and the return to multi-partyism in Kenya' (1996) 95 *African Affairs* 503, where they observe that '[t]he early development of local government in Kenya reproduced the contours of settler colonialism, which allocated land, responsibilities and privileges on a differential racial basis'.

collective headmen of any village or villages.<sup>27</sup> The functions of the village headmen included the maintenance of law and order, collection of taxes, maintenance of roads in their areas and the settlement of minor disputes between and among Africans.<sup>28</sup> On the other hand, the townships of Mombasa and Nairobi were established in 1903 and administered by committees.<sup>29</sup>

Notwithstanding these efforts, the first local government structures were recognised and formalised in 1919 when the town councils of Nairobi and Mombasa were established and District Advisory Committees for county areas recognised.<sup>30</sup> In rural African non-scheduled areas, the District Advisory Committees were, according to the 1924 Native Councils Ordinance, replaced by Local Native Councils, which comprised the district commissioner, the assistant district commissioner, headmen and other Africans appointed at the discretion of the provincial commissioner.<sup>31</sup> According to the *Omamo Report* all resolutions passed by the local native councils were subject to the approval of the provincial commissioner and the governor of the colony. This made it difficult for them to earn respect and recognition among Africans who perceived them as instruments of indirect colonial rule. This resistance resulted in the governor's appointment in 1926 of a Commission of Inquiry headed by R. H. Feetham to inquire and report on the system of government in the country with emphasis on what was most suitable for the white settled areas.<sup>32</sup>

The Feetham Commission recommended that a policy of separate development for the Africans and the settlers be pursued; that district councils comprising elected non-officials with full executive authority be established in Nairobi, Naivasha, Nakuru, Laikipia, Uasin Gishu, Trans-Nzoia, Kisumu and Londian; and that townships be excluded from the district councils and be administered by the district commissioners.<sup>33</sup> The 1929 Local District

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<sup>27</sup> Commission of Inquiry on Local Authorities in Kenya *Report of the Commission of Inquiry on Local Authorities in Kenya: A Strategy for Local Government Reform in Kenya* (1995) (herein after the Omamo Report) 6.

<sup>28</sup> Southhall & Wood (1996) 503.

<sup>29</sup> *Omamo Report* (1995) 6.

<sup>30</sup> Southhall & Wood (1996) 503.

<sup>31</sup> Southhall & Wood (1996) 503.

<sup>32</sup> *Omamo Report* (1995) 7.

<sup>33</sup> *Omamo Report* (1995) 7.

Councils Ordinance gave effect to this separated system of local government,<sup>34</sup> creating local district councils comprising members elected by whites to replace the 1919 district advisory committees in the white settled areas. Some Asian members were allowed to vote or be elected to these councils – but no Africans, even if they lived in these areas. Following pressure from Africans, the 1937 Native Authority Ordinance was enacted, permitting the election of Africans by Africans to the Local Native Councils even though the district commissioner retained the power to remove any elected member perceived to be ‘inappropriate’. Further pressure led to the Local Government (African District Councils) Ordinance of 1950, which created African District Councils, which were corporate bodies with increased powers including the authority to appoint their own administrative staff and to set up committees to deal with specific matters and functions, replacing local native councils.<sup>35</sup> More changes in the white settled areas led to the 1962 Local Government (County Councils) Ordinance that drew a distinction between rural and urban local government. As a consequence, between 1952 and 1963 the country developed three parallel systems of local government: municipalities, white settler areas, and African areas.

Financing of these separate local governments directed more money into white local authorities than those in the African reserves.<sup>36</sup> Even when in 1953 the Local Government Loans Authority was established to provide loans to local governments, the facility was skewed in favour of local authorities in white areas.<sup>37</sup> Government became an exclusive property used for the benefit of whites against the natives, creating a notion that control of government by an individual entitles him or her to use it exclusively for the benefit of a few associated with him or her by race, ethnicity, friendship or even political affiliation.

#### ***2.4 Concluding remarks***

The colonial period ensured that by the time Kenya attained independence in 1963, it had a history of a highly centralised system of government; a highly ethnicised people who participated in political activity from the vantage point of ethnicity; and a country with serious regional disparities. These factors conspired to ensure that the regional distribution of

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<sup>34</sup> *Omamo Report* (1995) 7.

<sup>35</sup> *Omamo Report* (1995) 8; see also Southhall & Wood (1996) 504.

<sup>36</sup> Oyugi WO ‘Local government and development in Kenya’ (1978) Discussion Paper Institute of Development Studies at the University of Sussex Brighton 1-35, 16-18.

<sup>37</sup> Oyugi (1978) 16.



employment opportunities, infrastructure, and access to professional services such as health care was uneven. The rural areas produced professionals such as doctors and lawyers but did not benefit from their services since most of them moved to the high and medium potential areas where their services were well remunerated. Such centralisation unevenly distributed the purchasing power and markets which were also centralised around Nairobi.<sup>38</sup> Even the tax base became unevenly distributed with the most lucrative tax bases such as income tax and VAT concentrated in urbanised areas that had more employment opportunities. More money circulated in Nairobi and its environs making it easy and more profitable to do business in there than in other places.<sup>39</sup> The result was that by the time of independence, regional disparities and inequalities that required correcting had been entrenched.<sup>40</sup>

The colonial system of divide and rule coupled with the party politics of the last years before independence had also created negative ethnicity.<sup>41</sup> Land having been the central platform on which the colonial system was founded had itself created a multiplicity of problems calling for resolution. Poverty and unemployment among Africans were major problems to be tackled. Yet Africans had been socialised in a highly centralised and oppressive system of government which may not have been appropriate for addressing these problems. Would they adopt this discredited colonial system, and how would they redistribute land? At independence the people's expectation was the deconstruction of the colonial political and economic system and the construction of a system aimed at serving the welfare of all the inhabitants of Kenya. It was genuinely hoped that independence would introduce different approaches to governance, economic investment and development that would fundamentally redress these problems.

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<sup>38</sup> Mutakha (2006) 126.

<sup>39</sup> A good example the high property values in Nairobi, which make it more profitable to invest in rental housing.

<sup>40</sup> Mutakha (2006) 126.

<sup>41</sup> Maxon (2011) generally discloses how ethnicity was used by the colonial government during the constitutional negotiations of the 1950s and 1960s. The book also makes it clear that Africans were not allowed to form nation-wide political movements that could allow them to mobilise their supporters across ethnic groups.

### 3 The post-independence phase

The hopes of the people were never realised as the government inherited the centralised system with its political and economic structures intact.<sup>42</sup> Although the country attained independence with a federal Constitution, referred to as the Majimbo Constitution, delicately negotiated at Lancaster House and in Nairobi,<sup>43</sup> within a few years it was frequently amended to abandon the non-centralised system and revert to the colonial centralised system of control, command and patronage.

#### 3.1 The federal independence system

The process of making the independence Constitution divided the country into two camps which disagreed not on 'whether independence would be achieved but rather the form it should take'.<sup>44</sup> The Kenya African Democratic Union (KADU) pushed for a federal system while the Kenya African National Union (KANU) strongly opposed this and wanted to retain the centralised system. The debate among the two parties was informed by the negative ethnicity which the colonial system had helped to cultivate in the country, with KANU being perceived as representing the two major and more populous communities in the country, while KADU was perceived as representing the minority communities which were worried about the possibility of losing to larger communities what they saw as their ancestral land.<sup>45</sup> As a result, the debate was couched in terms of KANU wanting nation-building and a united country while KADU was portrayed as wanting to divide the country along tribal lines. In the end KANU won by changing strategy, which involved accepting the proposed federal Constitution for the sake of hastening independence but once elected into government, planning to immediately amend it to recentralise power and create a unitary system.<sup>46</sup>

The irony of the Kenyan situation is, therefore, one of a country which attained independence with a leadership that had no intention of implementing the independence Constitution and deconstructing the colonial centralised control and command system to construct a new constitutional dispensation. Macharia Munene has pointed out that the KANU leadership

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<sup>42</sup> Mutakha (2006) 127.

<sup>43</sup> Maxon *Kenya's Independence Constitution* (2011a) 267-8.

<sup>44</sup> Oyugi (1983) 117.

<sup>45</sup> Oyugi (1983) 117.

<sup>46</sup> Munene GM 'Constitutional development in Kenya: A historical perspective' in Yash Vyas et al (ed) *Law and Development in the Third World* (1994) 56.

went to elections with clear intentions not to implement the new Constitution, which they perceived as an imposition by the outgoing colonial government. He even argues that they understood their victory in the 1963 elections as giving them a mandate to amend the Constitution.<sup>47</sup>

The Independence Constitution created a federal system with three levels of government: the national and regional, with local government as a competency of the regional government. Seven regions were created, with each regional assembly having power to legislate in various functional areas and elect a president and vice president.<sup>48</sup> They had both legislative and executive authority over certain matters.<sup>49</sup> The executive authority of the regions was, however, subject to that of the national government and the national legislature.<sup>50</sup> The national legislature was bicameral with a senate meant to protect the interests of the regions.

### **3.2 Recentralisation under the Kenyatta regime**

Consistent with the stated intention, the Kenyatta regime repeatedly amended the Constitution until it completely lost its identity and any pretensions to a non-centralised system.<sup>51</sup> It was amended to do away with regional governments and to centralise power in the office of one “imperial” presidency. Both parliament and the judiciary were reduced to institutions subservient to the executive, personified by the “imperial” presidency, as they ceased to play any meaningful role of checks and balances. Susanne D. Mueller observes that ‘it appears that many of the tools of repression which were articulated under colonialism, and

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<sup>47</sup> Munene (1994) 58. Also see Maxon (2011) chaps 8 and 9, in which he clarifies that in fact it is KANU which was assisted by the departing colonial powers and not KADU, as was previously believed. See also Okoth-Ogendo HWO ‘The politics of constitutional change in Kenya since independence, 1963-69’ (1972) *African Affairs* 18, where he observes that ‘KANU therefore treated the May elections of 1963 as a referendum on regionalism’.

<sup>48</sup> Oyugi (1983) 118 and Maxon *Kenya’s Independence Constitution* (2011) chapters 5 and 6.

<sup>49</sup> Oyugi (1983) 118.

<sup>50</sup> Section 105(2) of the Independence Constitution provided that: ‘The executive authority of a region shall be exercised as – (a) not to impede or prejudice the exercise of the executive authority of the Government of Kenya; (b) to ensure compliance with any provision made by or under an Act of Parliament applying to that region.’ In respect of the legislative powers, section 66(4) of the Independence Constitution further provided that: ‘If any law made by a regional assembly is inconsistent with any law validly made by Parliament, the law made by Parliament shall prevail and the law made by the regional assembly shall, to the extent of the inconsistency, be void.’

<sup>51</sup> Mutakha (2006) 130.

then refined by a new ruling class following independence, are still being used to consolidate the state against its detractors'.<sup>52</sup> The process of recentralisation involved the abandonment of regionalism; the weakening of local government; the retention of the colonial economic and investment policy; and the mismanagement of the transfer of land from white settlers to Africans.

### **3.2.1 The abandonment of regionalism**

The first steps towards recentralising power were administrative and aimed at denying regional governments administrative autonomy. The Ministry of Home Affairs, which was headed by Jaramogi Oginga Odinga, directed in 1963 that all civil servants down to the district assistants would continue as officers of the national government and only be seconded to the regional governments.<sup>53</sup> The Civil Secretaries who previously were Provincial Commissioners and had been designated by the Constitution to become heads of the civil service in the regions and be responsible to the regional assemblies, were directed to maintain close liaison with the central government.<sup>54</sup> This effectively turned the public servants of the regional governments into a restored colonial provincial administration answerable to central government, which used them to frustrate the implementation of the federal arrangements.<sup>55</sup> Furthermore, since the salaries of these officers were still coming from the central government, their primary loyalty was to the central government rather than the regions. In addition, the regional assemblies were directed to refer draft legislations to central government for advice before their introduction in the regional assemblies.<sup>56</sup> The central government also refused to release funds to the regional governments as they had undertaken to do. This was followed by the crossing of the floor by the KADU members of Parliament to join the ruling party, KANU.

This, then, set the stage for the first constitutional amendment in 1964 which declared Kenya a republic and abolished the offices of Prime Minister and Governor-General, and combined their powers into the newly created office of the President. The amendment also deleted

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<sup>52</sup> Mueller SD 'Government and opposition in Kenya, 1966-9' (1984) 22 *Journal of African Studies* 399.

<sup>53</sup> Oyugi (1978) 20-1.

<sup>54</sup> Oyugi (1983) 119-20; s 116 Independence Constitution.

<sup>55</sup> Oyugi (1983) 120.

<sup>56</sup> Ghai & McAuslan (1970) 210.

Schedule Two which provided for some of the functions of the regional governments.<sup>57</sup> In addition, the provisions for financial arrangements between central and regional governments and the independent revenue of the regions were repealed, making them entirely dependent on grants from the central government.<sup>58</sup> The control of police was centralised to the central government and any role by the regions eliminated. Through these amendments the system of regional government was by 1965 reduced to something nominal. Two more amendments in 1964<sup>59</sup> and 1965 almost completed the process of doing away with regionalism.<sup>60</sup> The exclusive legislative competence of the regional assemblies was scrapped by redesignating it as a concurrent function, while the exclusive executive competence was also abolished. The 1965 amendment emphasised the inferior status of the regions and the regional assemblies by renaming them provinces and provincial councils, reducing the regional system to a glorified local government which derived its legislative and executive authority from delegation by the central government.<sup>61</sup> By an amendment of 1966, the Senate was abolished by being merged with the House of Representatives to become the National Assembly in which constituencies were created to absorb the former Senators.<sup>62</sup> Although in practice by early 1965 the regional assemblies or provincial councils had ceased to perform any functions or have any significance, it was not until 1968 that they were legislated out of the Constitution.<sup>63</sup>

### **3.2.2 The weakening of local government**

As independence came closer, it became necessary to simplify the local government system under a uniform set of laws instead of the colonial parallel system. The 1963 Local Government Regulations were therefore promulgated providing for two types of local government: municipal councils for urban areas, and county councils for the rural areas that followed the existing district boundaries. Both the white settled areas county councils and the African district councils were dissolved and replaced by the newly created county councils. Since the Independence Constitution established a federal system, local authorities became a

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<sup>57</sup> Okoth-Ogendo (1972) 19-20.

<sup>58</sup> Okoth-Ogendo (1972) 9-34. Also see Act No 28 of 1964.

<sup>59</sup> See Act No 38 of 1964, which re-designated the regional presidents as Chairmen.

<sup>60</sup> See Act No 14 of 1965, which did away with the name 'regions' and reverted to the colonial name 'provinces', while 'regional assemblies' became 'provincial councils'. See Also Okoth-Ogendo (1972) 20.

<sup>61</sup> Ghai & McAuslan (1970) 213.

<sup>62</sup> See Act No 40 of 1966; Ghai & McAuslan (1970) 214.

<sup>63</sup> See Act No 16 of 1968; Ghai & McAuslan (1970) 213.

competency of the newly created regional assemblies, which had power to constitute them, assign functions to them, and allocate them financial resources.<sup>64</sup> The county councils and the municipalities were then assigned the functions of primary education and public health. The regional assemblies made available to the local authorities substantial grants to enable them to discharge their functions. The 1964 Graduated Personal Tax Act made this tax the most important source of revenue for local authorities.<sup>65</sup>

The attitude of the independence government towards regionalism did not, however, spare local government, which suffered negative implications from some of the steps taken to abolish regionalism.<sup>66</sup> According to Oyugi, the problems of the local authorities were intertwined with those of regionalism. A strong system of local government could not be allowed after the frustration of majimbo; they were therefore streamlined to make them simply appendages of the central government.<sup>67</sup> Though not completely abolished the way the regions were, local government was slowly but surely weakened in a number of ways.

First, through political and administrative mechanisms, central government secured representation in the local authorities through the District Commissioner, who under regionalism was supposed to be the Regional Government Agent became the nominee and agent of central government on the county and municipal councils. He was to provide liaison between local and central government, interpret central government policies to the local authorities and keep the Ministry of Local Government fully informed as to what was happening in the councils. In addition, though a commission had in 1963 recommended the abolition of the Ministry of Local Government – since local government had become a competence of the regions – central government refused to abolish the ministry and transfer its powers to the regions.<sup>68</sup> The local government finance officers who had been posted to the regions were required to become the eyes of the Ministry in the regions, ensuring that the local authorities complied with central government financial guidelines.

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<sup>64</sup> Seven Regions were created by the Internal Self Government Constitution of 1963. See Maxon RM *Kenya's Independence Constitution: Constitution-Making and End of Empire* (2011) 170.

<sup>65</sup> *Omamo Report* (1995) 9.

<sup>66</sup> See Oyugi (1983) 122, where he observes that 'if the centre feared the regions, it feared even more the possibility that the local authorities might be used by the regions to gain what the latter had failed to extract from the centre'.

<sup>67</sup> Oyugi (1983) 122.

<sup>68</sup> Oyugi (1983) 122.

Secondly, local government suffered a perpetual lack of adequate funding since there was no clear financial policy to ensure adequate finances that matched the functions they performed. Their major sources of revenue were school fees, poll rates and central government grants which could not raise adequate revenue.<sup>69</sup> Independence brought increased demand for the local government services such as education and health, yet the revenues were not enough. School fees collections depended on enrolments, which were very low in some county councils. The collection of poll rates was equally poor, which was a result of the fact that during the struggle for independence this was one of the oppressions that Africans had complained about, even encouraging their people not to pay.<sup>70</sup>

As a competence of regional governments, local government was entitled to additional funding from regional government grants. When regions were denied funding by the central government, they became unable to provide this additional funding to the local authorities.<sup>71</sup> When the regions were eventually abolished and local government put under the control of central government, ideally additional funding was expected to come from central government. Yet central government did not seem keen on providing it and, when it did, it did not follow any clear policy for funding and providing grants. Even though it was clear that the local authorities had different fiscal capacities,<sup>72</sup> there was no provision for any system of financial equalisation.<sup>73</sup> The initial response by central government was the

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<sup>69</sup> See s 142(1)(a)(b)(c) and (d) Constitution of Kenya, 1963. See also Oyugi (1978) 25, 27-8.

<sup>70</sup> Oyugi (1978) 25.

<sup>71</sup> Oyugi (1978) 21.

<sup>72</sup> Sharp AM & Jetha NM 'Central government grants to local authorities: A case study of Kenya' (1970) 13 (1) *African Studies Review* 43-56. At 46 the authors observe that: 'The uniform grant per taxpayer had three defects. First, it did not account for either the differing needs or fiscal abilities of local authorities. Second, since the grant did not vary with tax effort, there was no inducement for their tax effort. Finally, the annual growth in the volume of grant was limited, the increase being determined by the increase in the number of taxpayers (population).'

<sup>73</sup> Sharp & Jetha (1970) 49 state that: 'It is clear that equalization as an objective of government grant policy has not been important in Kenya. And this is quite understandable. In the first place, until recently the government was more interested in encouraging local authorities to undertake greater responsibilities than in pursuing an equalization policy. This explains the predominance of specific grants. Now, however, this is no longer valid as local authorities have identical functions... . Lastly, the problem of yawning disparities in local outlays did not receive much attention just after independence because the responsibility for local government had shifted to the regions.'

introduction of the Graduated Personal Tax of 1964 as the main source of revenue for local government. In the case of the county councils, this new tax did not make a difference since in practice it virtually replaced the poll rates. It also faced collection problems since it was collected by the provincial administration which had become unpopular, making them less enthusiastic about pursuing people for payment.<sup>74</sup> In 1964 the central government followed this move with the introduction of general grants to replace the specific grants used before independence. This, too, did not solve the financial problems of local government. According to Oyugi, even the 1968 decision to redistribute fifty per cent of the Graduated Personal Tax from Nairobi and Mombasa did not effectively address the financial problem.<sup>75</sup>

It appears that following the abolition of regionalism, central government, contrary to the provisions of the Constitution, was keen on ensuring a weak local government heavily dependent on it and which it controlled the same way the colonial government had done.<sup>76</sup> The central government took a number of decisions that virtually crippled local government. In 1964 the central government entered into an agreement with employers and trade unions (both public and private) to increase their establishments by ten per cent by January 1965 and employ additional people. Local authorities were forced to employ more staff than they needed.<sup>77</sup> In 1966 central government decided to provide free outpatient healthcare services in all medical and health facilities operated by the central government and the local authorities. Local authorities were not consulted, yet the decision reduced their revenues from fees and charges. In 1967 central government reduced Graduated Personal Tax rates from Sh. 48.00 per head per annum to Sh. 24.00 per head per annum, which in less than a year was abolished altogether without proposing an alternative source of revenue. Many rural local authorities, which relied heavily on this source, lost about sixty per cent of their revenue.<sup>78</sup> Between 1963 and 1969, the central government increased the salaries of teachers without consulting and involving local authorities in the negotiations, yet they were expected to pay the new salaries as soon as they were agreed upon by the central government and the Teachers Unions.<sup>79</sup> The consequence of all these decisions was that local authorities were

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<sup>74</sup> Oyugi (1978) 26.

<sup>75</sup> Oyugi (1978) 29.

<sup>76</sup> Oyugi (1978) 21.

<sup>77</sup> Oyugi (1978) 30.

<sup>78</sup> Oyugi (1978) 30.

<sup>79</sup> Oyugi (1978) 31.



unable to meet their financial obligations, which led to an outcry from the public. The response by the central government was to enact the Transfer of Functions Act of 1970, which transferred a number of functions such as primary education, roads and health from local to central government. While this relieved the local authorities of a heavy financial burden, it took from them some of the most important sources of revenue, such as school fees, thereby making it impossible for them to discharge their remaining functions and deliver services.<sup>80</sup> This was compounded by the fact that although functions were transferred, personnel were not reduced commensurately, forcing the councils to continue paying huge salaries to staff they did not require. When the local authorities tried to lay off the workers, the Local Government Workers' Union intervened and local authorities were directed by central government to retain the workers.

Thirdly, legislation increased central government control over local government activities. Under the 1963 Local Government Regulations, local government was a competence of regional assemblies which had power to constitute, assign functions, and provide financial resources to them. After the abolition of regionalism, the regulations were amended to become the Local Government Act of 1965,<sup>81</sup> under which the Minister for Local Government acquired absolute control and could virtually do anything in respect of local government. The relationship between central and local government became that of a superior and a subordinate with the local authorities required to seek approval of the ministry for virtually everything they did.<sup>82</sup> Policies of local government were made by the Minister, the Ministry through its audit, budget and legal departments monitored the activities of local government closely, and budgets required the approval of the Ministry.<sup>83</sup> The Minister was empowered to elevate an area to municipality status without consulting the local authority under which it previously fell.<sup>84</sup> The Ministry shared power with the local authorities to appoint senior staff such as clerks, treasurers, engineers and medical officers whose salaries and dismissal

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<sup>80</sup> Oyugi (1978) 32.

<sup>81</sup> Local Government Act, chap 265 of the Laws of Kenya.

<sup>82</sup> See ss 85(3) approval of standing orders; 107(1) approval of appointment of senior officers; 108(2), 109(1), 110(2) and 138(2) approval of salaries and allowances; 144(2) approval of compulsory acquisition of land; and 160(1) approval of naming and renaming of streets. See also Oyugi (1983) 126.

<sup>83</sup> S 3(3) on approval of budget, ss 92 and 93 on control of finance committees, and ss 203 and 204 on approval of by-laws.

<sup>84</sup> Ss5, 6, 8 and 9 LGA.

required the approval of the Minister, matters which shifted the officers' loyalty away from the local authorities to central government.<sup>85</sup> The Minister could dissolve a council and appoint a Commission to take over its functions. In these circumstances, it is apt to conclude that the local government existing at the time of the adoption of devolution was merely performing delegated functions of the central government.

Having abolished the regions as well as weakened and side-lined the local authorities, the central government was faced with the problem of how to involve the local communities in development. In 1966 the central government attempted to put in place a rudimentary system of district planning by establishing District Development Committees and District Development Advisory Committees which were dominated by central government administrators such as the Provincial Administration, but with representation from the local authorities and members of Parliament elected from constituencies within the district. This initiative only served to bring local government under more central government control, especially in matters of planning.<sup>86</sup>

### ***3.2.3 The adoption of the colonial economic and investment policy***

The independence government did not only adopt the centralised colonial political system, but also its economic, development and investment policies. Rather than seek to reduce the disparities, the government adopted development and investment policies that increased regional disparities. Sessional Paper No. 10 of 1965 on *African Socialism and its Application to Planning in Kenya*,<sup>87</sup> which appears mixed up in terms of its vision and design, shows that the government either knowingly or unknowingly adopted the colonial economic, development and investment policies that had started the entrenchment of regional disparities.<sup>88</sup> While it set out a vision with egalitarian objectives of organising and developing the nation's resources for the benefit of all who lived in it, it adopted means which did the opposite. The sessional paper identified the objectives as political equality, social justice, human dignity, including freedom of conscience, freedom from want, disease, and

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<sup>85</sup> Ss 107(1), 108(1), 109(1) and 110(1) LGA.

<sup>86</sup> Malcolm W 'District planning and local government in Kenya' (1990) 10 *Public Administration and Development* 438.

<sup>87</sup> This paper was adopted in 1965 by the first independence government as the economic blueprint for Kenya.

<sup>88</sup> Mutakha (2006) 130.

exploitation, equal opportunities and higher per capita incomes.<sup>89</sup> Yet when dealing with ‘Provincial Balance and Social Inertia’, it stated:

One of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will yield the largest increase in output. This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development. A million pounds invested in one area may raise net output by £20,000 while its use in another may yield an increase of £100,000. This is a clear case in which investment in the second area is the wise decision because the country is £80,000 per annum better off by so doing and is therefore in a position to aid the first area by making grants or subsidized loans.<sup>90</sup>

The independence government did not only adopt colonial development and investment policies, but also perfected these policies by extending the concept of zoning beyond land to people. High, medium and low potential people were identified in terms of their receptiveness to and activeness in development and this played a major role in deciding where and where not to invest. Investment money would go where the colonial government had already created some infrastructure, which, it will be remembered, was not informed by objective criteria and started the creation of regional disparities and imbalances. What is even stranger is the suggestion in this paragraph that the government should invest tax payers’ money in a high potential area in priority over a low potential area, but after profits have been made in the high potential area, the low potential area should be aided by the high potential area by way of loans, whether subsidised or not.<sup>91</sup> As early as July 1965, Barak Obama Senior wrote a critique of this paper and stated about this approach thus:

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<sup>89</sup> Sessional Paper No. 10 of 1965 ‘African socialism and its application to planning in Kenya’ para 4.

<sup>90</sup> Sessional Paper No 10 of 1965 para 133. See also *Speaker of the Senate and another v Attorney General and others* [2013] eKLR at para 169 (*Speaker of the Senate*) where the Supreme Court decries this sessional paper as a validation of the sectarian, partisan and exclusionary nature of the colonial state itself, by the independence founding fathers.

<sup>91</sup> Mutakha (2006) 132.

The government talks of dealing only with areas where the returns out of any development programme are ostensible. But surely the returns are low only because these areas are and were undeveloped in the beginning. Must we be so short-sighted as to look only into intermediate gains when these areas are rotting in poverty?<sup>92</sup>

It is perhaps for reasons such as this that the Supreme Court in *Speaker of the Senate* lamented that ‘the *burden* of taxation is shared and remains political-choice-neutral, but the *benefit* of public expenditure is skewed, and remains politically partisan’.<sup>93</sup>

Further, the government adopted and perfected the colonial policies that had encouraged the migration of human resources from low to high potential areas. It even invented a weird idea of developing people without necessarily developing the environment in which they lived. The Sessional Paper provided that ‘the purpose of development is not to develop an area, but to develop and make better off the people of the area’.<sup>94</sup> It noted that if an area is deficient in resources, development could be achieved by investing in the education and training of the people whether in the area or elsewhere, investing in the health of the people, and encouraging some of the people to move to areas richer in resources, and of course developing those limited resources that are economic.<sup>95</sup> The paper then emphasised that with education and training and some capital, the people of a province could make the best of limited resources and if the potential for expansion was small, medical services, education and training would qualify such people to find employment elsewhere.<sup>96</sup> Ghai and McAuslan hold the view that the 1970 economic problems in independent Kenya were no different from the problems witnessed in the colonial days, adding that many of the institutions of law and administration being used to deal with them had likewise been inherited from the colonial government.<sup>97</sup>

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<sup>92</sup> Obama BH ‘Another critique of sessional paper No 10: Problems facing our socialism’ (1965) *East Africa Journal* 32.

<sup>93</sup> *Speaker of the Senate* para 167 (emphasis in original).

<sup>94</sup> Sessional Paper No 10 of 1965 para 134.

<sup>95</sup> Mutakha (2006) 132.

<sup>96</sup> Sessional Paper No 10 of 1965 para 134.

<sup>97</sup> Ghai & McAuslan (1970) 79.

### ***3.2.4 The mismanaged land transfer question***

As this was happening, the transfer of land from the white settlers was also mismanaged as the greater part of land was allocated to political elites on the basis of political patronage. And with an imperial presidency which then became tribally owned by the president's ethnic community, the resettlement of Africans favoured people from the president's community. Those who considered themselves as the ancestral owners of some of the land before it was taken by the colonial settlers were left out and felt aggrieved. Karuti Kanyinga argues that this process created a problem which has not yet been resolved. He even links the post-election violence which the country suffered in 2007/2008 to this land problem.<sup>98</sup>

### ***3.3 Moi inherits the instruments of centralisation***

When Kenyatta died in 1978 and Moi took over the presidency, he openly promised to follow in the footsteps of Kenyatta, thereby eliciting support from the public and particularly the Kikuyu community which revered Kenyatta. Nobody stopped to ask whether the foundation Kenyatta had laid for the country was worthy being followed. Moi therefore continued to consolidate centralisation of power through the imperial presidency and to weaken the local government even further.<sup>99</sup> A key constitutional amendment in the Moi days was in 1982, when Kenya was turned into a one-party state, while local government was weakened through administrative mechanisms. Drawing from Kenyatta's 1966 District Development Committees and District Development Advisory Committees, Moi issued a directive in 1982 that the districts were to become centres for development in the rural areas and required all ministries to ensure the implementation of the directive by the following year.<sup>100</sup> This was followed in 1983 by what was called District Focus for Rural Development Strategy, which involved the establishment of District Development Committees to serve the purpose of involving local people in the identification, design, implementation and management of all development projects and programmes in the district. The committees largely comprised central government officials in the district, namely, the district commissioner and all the departmental heads of the line ministries with local authorities represented by their chairmen

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<sup>98</sup> Karuti (2009) 325-344.

<sup>99</sup> Malcolm (1990) 441 observes that '[t]he early 1980s saw a continuation of the trends towards marginalization and weakening of local government'.

<sup>100</sup> Malcolm (1990) 443.

and clerks.<sup>101</sup> Though it appeared that the system sought to involve local authorities in local planning, ultimately the authority and autonomy of local government was eroded through closer control by central government officials. They could not undertake any development project unless it had been approved by the district development committees.<sup>102</sup>

Local government was further weakened when in 1984 the Public Service Commission took over the recruitment but not the payment of clerks of councils. Although this measure had the advantage of protecting local government officers from political victimisation, it served to reduce the administrative autonomy of local government.<sup>103</sup> Furthermore, it is under Moi that the Minister for Local Government used his powers under the Act extensively, upgrading all manner of townships to municipality status, many of which could not deliver the required services without the financial support of the central government. This in effect served to further erode the autonomy of local government as the services provided by local government deteriorated to unacceptable levels.<sup>104</sup> According to Southall and Wood:

To be sure, the delivery and extension of such services was severely constrained by a tightening national budget, an alarming growth of population and massive informal, urban growth. None the less, by the end of the 1980s, local authorities, to all intents and purposes, had been rendered impotent.<sup>105</sup>

Coupled with centralisation of power in the presidency in a manner that became highly oppressive to the citizens, protests and calls for reform began to surface, leading to demands for constitutional review.

#### **4 Constitutional review and the devolution agenda**

Kenya's Constitution of 2010 is a product of a long process that started with agitation for constitutional reform in 1990. The first achievement of this struggle was Moi's acceding to pressure and permitting constitutional amendments focused on reforming the presidential

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<sup>101</sup> See Southall & Wood (1996) 508, where they note that 'this worked out in practice as a tightening of central control'.

<sup>102</sup> Malcolm (1990) 443-5.

<sup>103</sup> Malcolm (1990) 442. See also Southall & Wood (1996) 507.

<sup>104</sup> Southall & Wood (1996) 507.

<sup>105</sup> Southall & Wood (1996) 509.

election process and reinstating a multiparty political structure.<sup>106</sup> By 1994, the agitation was more focused on the demand for a new constitution. According to Bannon, '[c]onstitution-making became the vehicle through which democratization, promotion and protection of human rights and social justice were robustly agitated [for]'.<sup>107</sup>

This resulted in further moderate constitutional reforms in 1997 and the enactment of the Constitution of Kenya Review Act of 1997,<sup>108</sup> which after wider consultation was amended in 1998 to establish a legal framework for the conduct of comprehensive constitutional review. The Act provided for three organs of review: the commission, the district forums and the national forum, through which the process was to be conducted.<sup>109</sup> Section 3(2) of this Act provided for a Constitution of Kenya Review Commission comprising 27 members nominated by various interest groups, including parliamentary political parties, religious organisations, women's organisations and civil society. The process failed to take off after some of the interest groups disagreed over the sharing of the slots allocated to them.<sup>110</sup> As a consequence, a Parliamentary Select Committee (PSC), chaired by Raila Odinga, was established to hear views from experts and members of the public on how to restart the process. At this point a splinter group comprising some opposition political parties, civil society and religious organisations started their own process at Ufungamano House and established what was referred to as the People's Commission.<sup>111</sup> The PSC in the meantime recommended further amendments to the Act, which were effected in 2000.<sup>112</sup> The amendments provided for a review process to be conducted through five organs of review: the Commission, the constituency constitutional forum, the national constitutional conference, the referendum to determine any issues on which there was to be disagreement, and the National Assembly.<sup>113</sup> The amendments also reduced the Commission to 17 members

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<sup>106</sup> Bannon AL 'Designing a constitution-drafting process: Lessons from Kenya' (2007) 116 *Yale Law Journal* 1824-72, 1831.

<sup>107</sup> Bannon (2007) 1832.

<sup>108</sup> Constitution of Kenya Review Act No 13 of 1997.

<sup>109</sup> Section 2B(1) of CKRA.

<sup>110</sup> The Parliamentary political parties disagreed over the 13 persons they were supposed to nominate, while the women organisations also disagreed over the five persons they were supposed to nominate.

<sup>111</sup> Ufungamano is a house owned by religious organisations with facilities for conferences and meetings.

<sup>112</sup> See the Constitution of Kenya Review Act No 5 of 2000.

<sup>113</sup> Section 4(1) of CKRA.

to be appointed on merit following applications and interviews by the PSC.<sup>114</sup> The Commission was first appointed and gazetted on 10 November 2000 with Professor Yash Pal Ghai as the Chairman.<sup>115</sup> Ghai declined to take the oath of office, insisting that he must first negotiate a merger between the Commission and the Ufungamano group.<sup>116</sup> A merger agreement was reached, which led to further amendments to the Act in May 2001,<sup>117</sup> which in turn reconstituted the Commission by bringing in an additional twelve members.<sup>118</sup>

#### **4.1 Devolution as a principle and object in the review legislation**

An examination of the review process reveals that Kenyans commenced the formal process having already determined that devolution was to be a major solution to the problems bedeviling the country.<sup>119</sup> They were also clear about the reasons they wanted devolution, and the nature, form and extent of it. The functions of the constitutional review commission set out by the review Act indicate that the agenda of review in terms of the matters to be considered and decided had already been determined. Devolution thrust itself on the review agenda at this early stage as part of those matters. The Act explicitly required the Commission to ensure that the people of Kenya ‘examine the federal and unitary systems of government and recommend an appropriate system for Kenya’, and ‘examine and review the place of local government in the constitutional organisation of the Republic of Kenya and the degree of devolution of powers to local authorities’.<sup>120</sup> Though these provisions seemed to commit these matters to the people of Kenya, it appears that in setting out the objects and purpose of review the Act had predetermined the content of the new Constitution, and that devolution of power would be part of it. Section 3 provided that the objects and purpose of the review and eventual alteration of the Constitution was to secure provision in the Constitution on the following matters: first, to guarantee peace, national unity and integrity of

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<sup>114</sup> CKRC Final Report (2005) 39-40.

<sup>115</sup> Constitution of Kenya Review Commission, Final Report of the Constitution of Kenya Review Commission (2005) 3.

<sup>116</sup> Emman Omari ‘Kenya: Fresh unity bid for reform rivals’ *Daily Nation* 29 November 2000, available at <http://www.allafrica.com> (accessed 12 October 2014).

<sup>117</sup> Constitution of Kenya Review (Amendment) Act No 2 of 2001

<sup>118</sup> See section 6(4) CKRA.

<sup>119</sup> *CKRC Final Report* (2005) 44, where devolution is identified as one of the objects of the review process.

<sup>120</sup> See s17(d) (ii) and (vi) of the Constitution of Kenya Review Act of 1997 as amended and revised several times in 2001.



the country in order to safeguard the well-being of the people; secondly, to establish a free and democratic system of government that enshrines good governance, constitutionalism, rule of law, human rights, and gender equity; thirdly, to recognise and demarcate separation of powers and create checks and balances; fourthly, to promote the people's participation in the governance of the country through democratic, free and fair elections and devolution and exercise of power; fifthly, to respect ethnic and regional diversity and communal rights; and finally, ensure provision of the basic needs of the people through establishment of an equitable framework for economic growth and equitable access to national resources. Although this Act was amended several times and in 2008 even replaced by a new Act,<sup>121</sup> these guiding principles remained intact throughout, with devolution of power tagged among them as a pact. For instance, section 4 of the 2008 Act has similar provisions requiring that the eventual Constitution must provide for devolution of power.<sup>122</sup>

#### **4.2 Devolution as demanded in the views of the people**

The Kenyan constitution-making process was founded on the participation of the people who expressed their views about the form of government they wanted. A scrutiny of the CKRC *Final Report* of 2005 reveals that there was overwhelming support for devolution as one of the mechanisms of restructuring the state and addressing the problems of centralisation.<sup>123</sup> The report records the people as having complained about the centralised system and its marginalising tendencies.<sup>124</sup> They expressed a feeling of alienation from the central government, marginalisation, neglect, deprivation in terms of resources, and victimisation for their political or ethnic affiliations – even discrimination in the allocation of resources and development opportunities.<sup>125</sup> They lamented their exclusion and associated their problems with government policies over which they had no control or even influence. They complained about central government officials at the local level, such as provincial administration that

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<sup>121</sup> The 1997 Act was amended in 1998, 2000 and 2001.

<sup>122</sup> Constitution of Kenya Review Act of 2008.

<sup>123</sup> CKRC Final Report (2005) 234.

<sup>124</sup> CKRC Final Report (2005) 234.

<sup>125</sup> CKRC Final Report (2005) 234.

was not answerable to them but to central government in Nairobi and thus alienated them from decision-making.<sup>126</sup>

The people therefore demanded a fundamental restructuring of the state through devolution of power to local levels to enable them to have greater control over their affairs. They asked for a share of both local and national resources. They rejected the notion of leaders at the local level being nominated or appointed by the central government.<sup>127</sup> For instance, they rejected nominated councillors and demanded direct election of mayors and election of chiefs.<sup>128</sup> They also demanded the abolition of provincial administration and its replacement with strengthened local governance systems that would be answerable to the people.<sup>129</sup> Ghai asserts that there was almost universal demand for the abolition of provincial administration and the transfer of their powers to elected local government.<sup>130</sup> They recommended that local governance structures should have financial independence, with no interference from the centre. Furthermore, they asked for involvement of local councils in decision-making at the national level through the Senate.<sup>131</sup>

Broad consensus emerged<sup>132</sup> and the Commission concluded that there was no doubt that in the people's views and consistent with the goals of review, 'there has to be transfer of very substantial powers and functions to local levels'; to bodies which are democratic and participatory since 'people will not be content with mere administrative decentralization (deconcentration)'.<sup>133</sup> Despite this overwhelming support, the views of the people did not give details regarding the form and structure of the devolution, matters which were left to the

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<sup>126</sup> CKRC Final Report (2005) 234. See also Ghai YP 'Devolution: Restructuring the Kenyan state' (2008) 2 *Journal of Eastern African Studies* 210-26, 215.

<sup>127</sup> CKRC Final Report (2005) 235.

<sup>128</sup> CKRC Final Report (2005) 235.

<sup>129</sup> CKRC Final Report (2005) 235.

<sup>130</sup> Ghai (2008) 215. See also Stephenie Diepeveen "'The Kenya we don't want": Popular thought over constitutional review in Kenya, 2002' (2010) 48 *Journal of Modern African Studies* 231-58.

<sup>131</sup> CKRC Final Report (2005) 235.

<sup>132</sup> CKRC Final Report (2005) 236.

<sup>133</sup> CKRC Final Report (2005) 237.

technical input of the CKRC.<sup>134</sup> Similarly, the Committee of Experts reports people's support for the system of devolution.<sup>135</sup>

The Commission's final report of 2005 then recommended that the devolution principles must include a design that reflects cost-benefit factors, clearly defined levels, functions and powers, efficient and equitable mobilisation, allocation and management of resources, enhanced participation and accommodation of diversity, financial arrangements for funding of the devolved governments, and intergovernmental relations including mechanisms for co-ordination 'fashioned in a way that ensures autonomy and accountability by the devolved units'.<sup>136</sup> Autonomy seems to have been emphasised by recommendations that devolved governments should be able 'to recruit, retain and dismiss staff', that they be suspended only in specified circumstances of 'emergencies, war, or corruption or gross inefficiency' and after an independent commission has made recommendations, and finally that 'devolution structures and levels be entrenched in the Constitution'.<sup>137</sup> Moreover, the devolved governments should be 'entitled to an equitable share of revenue raised nationally to enable them to provide basic services and perform their responsibilities'.<sup>138</sup> On the other hand, 'national government institutions and departments should be arranged to ensure equitable distribution of resources throughout the country'.<sup>139</sup> It was further recommended that transitional mechanisms for phasing out the old order and replacing it with the new one, once devolution is adopted, ought to be put in place.<sup>140</sup>

### **4.3 Devolution as captured in the Draft Constitutions**

The constitution review legislation required the Commission to conduct civic education, collect and collate the views of the people, and prepare a report and a draft constitution. The Commission released its first report<sup>141</sup> and draft constitution in September 2002. The draft Constitution provided for devolution to five levels of government: the national, provincial,

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<sup>134</sup> Ghai (2008) 215 and Committee of Experts on Constitutional Review Final Report (2010) 237.

<sup>135</sup> Committee of Experts on Constitutional Review Final Report (2010) 90.

<sup>136</sup> CKRC Final Report (2005) 238.

<sup>137</sup> CKRC Final Report (2005) 238.

<sup>138</sup> CKRC Final Report (2005) 238.

<sup>139</sup> CKRC Final Report (2005) 242.

<sup>140</sup> CKRC Final Report (2005) 238.

<sup>141</sup> See *The People's Choice: The Report of the Constitution of Kenya Review Commission* (2002).

district, location and village. The National Constitutional Review Conference, which was required to debate and adopt with or without amendments the Commission's draft, and which was held at Bomas of Kenya between 2003 and 2004, adopted the principle of devolution. However, it directed that the Commission prepare a special report improving on the architecture and design of devolution. The Commission presented to the conference plenary a special report on devolution which was then committed to the Technical Working Committee of the conference to work out the technical design details and improve on the weaknesses noticed in the Commission's draft.<sup>142</sup> After very delicate negotiations, on 15 March 2004 the conference plenary adopted a much improved draft which borrowed quite a number of features from the South African Constitution. It provided for four levels of government: the national, regional, district and location. It also provided for a better designed Senate, mechanisms for revenue sharing and intergovernmental relations as well as dispute resolution mechanisms. The improved design appears to have been a gradual move towards a stronger form of devolution than had been proposed by the Commission. This is what became known as the Bomas draft.<sup>143</sup>

However, sections of the government who were unhappy with the draft walked out of the conference in protest and engineered amendments to the Review Act<sup>144</sup> to empower Parliament to amend the Bomas Draft and to provide for a mandatory referendum to pass the draft.<sup>145</sup> This followed the High Court judgment in *Timothy Njoya and others v Attorney General, and others*, which held that a completely new constitution could not be enacted by Parliament but must be adopted by the people in a referendum.<sup>146</sup> Secondly, after these amendments, the Parliamentary Select Committee, at the time chaired by Simon Nyachae, proceeded to a retreat in Kilifi where changes to the Bomas draft were made, leading to what

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<sup>142</sup> See Constitution of Kenya Review Commission 'Special working document for the National Constitutional conference: Report on devolution of powers' (19 August 2003) which was prepared in response to the direction of the conference.

<sup>143</sup> See the Draft Constitution of Kenya 2004 (Bomas Draft).

<sup>144</sup> See the Constitution of Kenya Review (Amendment) Act of 2004.

<sup>145</sup> Initially, the legislation had provided for an optional referendum to resolve any issues on which there was disagreement.

<sup>146</sup> *Timothy Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004).

was called the Wako Draft.<sup>147</sup> The changes went to the heart of the devolution that had been adopted at the Bomas Conference.<sup>148</sup> Ghai notes that they ‘considerably weakened the devolution chapter’<sup>149</sup> by largely retaining the existing centralised system which had been strongly criticised and rejected by the people and the conference participants. When this Wako Draft was taken to the referendum in November 2005 it was rejected by the people partly because of this weakened devolution system.

The referendum campaign divided not only the people along ethnic lines, but also the Cabinet as some Ministers who opposed the proposed new Constitution were immediately after the referendum fired from their Cabinet positions. This set the stage for highly contested presidential elections in 2007 which ended with the controversial declaration and swearing of the incumbent as the winner, sparking post-election violence in 2007 and 2008. The violence was only brought to an end after a negotiated coalition government brokered by the international community was put in place, with one of the agendas being the completion of the constitution-making process. Three separate processes established to determine what led to the violence all concluded that there was need to complete the constitutional review process. Firstly, the Waki Commission Report<sup>150</sup> identified four underlying causes of the violence. Among them and touching on the need to adopt a devolved system of government were, first, the over-centralisation of both political and economic power, personified by the ‘imperial’ presidency. Secondly, there was a feeling of exclusion of people who came from communities other than that of the President from state resources and other benefits. The Commission recommended that these underlying causes could only be addressed through the completion of the constitutional review process. Secondly, the Kriegler Commission Report<sup>151</sup> also identified problems which, it recommended, could only be addressed through constitutional reforms. Thirdly, the Kenya National Dialogue and Reconciliation Committee

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<sup>147</sup> The Draft was called Wako after the name of the then Attorney General who was required to prepare a final draft taking into account the changes members of Parliament had proposed in Kilifi before the draft was taken to the referendum.

<sup>148</sup> Mutakha (2006) 141.

<sup>149</sup> Ghai (2008) 217.

<sup>150</sup> Commission of Inquiry to investigate the Post-Election Violence (CIPEV) appointed through Legal Notice No 4473 of 2008.

<sup>151</sup> Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007.

chaired by Kofi Anan agreed on four agendas that aimed to solve the root causes of the crisis facing the country. Agenda four focused on long-term issues and solutions through constitutional and legal reforms. This agenda was framed in a manner that once again points to devolution as one of the solutions to the governance problem. It states:

Poverty, the inequitable distribution of resources and perception of historical injustices and exclusion on the part of segments of the Kenyan society constitute the underlying causes of the prevailing social tensions, instability and cycle of violence. Discussions under this agenda item will be conducted to examine and propose solutions for long-standing issues such as, inter alia,

- undertaking constitutional, legal and institutional reform;
- tackling poverty and inequity, as well as combating regional development imbalances;
- tackling unemployment, particularly among the youth;
- consolidating national cohesion and unity;
- undertaking land reform;
- addressing transparency, accountability and impunity.<sup>152</sup>

On the recommendations of the Kenya National Dialogue and Reconciliation Committee, the Constitution of Kenya Review Act of 2008 was enacted to replace the old review legislation. The Constitution was also amended to entrench and protect the process of review in the Constitution. The Act provided for four organs of review: the Committee of Experts; the Parliamentary Select Committee; the National Assembly; and the referendum.<sup>153</sup> The Committee of Experts was composed of nine members<sup>154</sup> and its main functions were to study the previous draft constitutions and isolate agreed issues from the contentious ones.<sup>155</sup> It was required to seek the views of the people and build consensus on the contentious issues, leading to a harmonised draft Constitution to be approved by the PSC.<sup>156</sup>

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<sup>152</sup> See agenda four of the Kenya National Dialogue and Reconciliation Committee.

<sup>153</sup> S 5 CKRA 2008.

<sup>154</sup> S 8(4) CKRA 2008.

<sup>155</sup> Ss 23 and 30 CKRA 2008.

<sup>156</sup> S 32 CKRA 2008.

This legislation maintained devolution as one of the supra-constitutional objects and principles of review that must eventually be part of the new Constitution.<sup>157</sup> The Committee of Experts identified devolution as one of the contentious issues that needed to be resolved.<sup>158</sup> The Committee presented its Harmonized Draft Constitution to the PSC, as required by the law, on the 8 January 2010.<sup>159</sup> When the PSC made proposals to change several aspects of devolution which would have weakened the system, the Experts Committee in its preparation of the final draft to go to the referendum rejected a number of them. For instance, they rejected a proposal that the Senate be referred to as a ‘lower house’,<sup>160</sup> a proposal to create a hierarchical relationship between national and county levels of government by making provision that the ‘national government takes precedence over county governments’,<sup>161</sup> a proposal that ‘checks and balances and the separation of powers’ as one of the objects of devolution be deleted,<sup>162</sup> and a proposal that the Commission on Revenue Allocation be omitted from the final Constitution.<sup>163</sup> The draft was passed in a referendum in August 2010.

Ultimately, it can be said that reasonably strong devolution has survived in the Constitution of 2010 and must be interpreted using this history as one of the extra-textual sources. In *Speaker of the Senate*, the first case that directly raised issues of devolution, the Supreme Court categorically stated that this history must inform the manner in which the devolution provisions are interpreted.<sup>164</sup> The Court observed that devolution was meant to be ‘a positively emotive capsule’ for addressing the historical problems set out herein.<sup>165</sup>

## 5 Conclusion

This history indicates that there are serious regional disparities, with visible development deficits that have exacerbated the feeling of negative ethnicity. There has been a highly centralised and authoritarian governance system revolving around the office of the imperial presidency, which became the ultimate prize, making elections for that office a highly

<sup>157</sup> S 4(d) and (e) CKRA 2008.

<sup>158</sup> Committee of Experts on Constitutional Review Final Report (2010) 66-7.

<sup>159</sup> Committee of Experts on Constitutional Review Final Report (2010) 83.

<sup>160</sup> Committee of Experts on Constitutional Review Final Report (2010) 115.

<sup>161</sup> Committee of Experts on Constitutional Review Final Report (2010) 125.

<sup>162</sup> Committee of Experts on Constitutional Review Final Report (2010) 125.

<sup>163</sup> Committee of Experts on Constitutional Review Final Report (2010) 128.

<sup>164</sup> *Speaker of the Senate* paras 165-96.

<sup>165</sup> *Speaker of the Senate* para 173.

competitive affair. This authoritarian system has been highly exclusive and has been allocating opportunities on the basis of political patronage rather than objective criteria informed by the needs of the people. The system has a serious deficit of participatory and deliberative democratic values. This has created a strong feeling of exclusion among people from regions in the country that have been neglected in the government's development efforts. These, then, are some of the problems the new Constitution and devolution were meant to address. As set out in Chapter Four, this historical background informed the values, objects and principles of devolution. It must therefore inform the interpretation of the devolution provisions in the Constitution.





## **CHAPTER FOUR**

### **Values, objects and principles of devolution**

#### **1 Introduction**

Chapter Two established that a purposive interpretation of the constitutional provisions on devolution must be informed by the constitutional values, objects and principles of devolution. Besides Articles 174 and 175, which set out the objects and principles of devolution, a number of other provisions which form part of the basic structure of the Constitution do so as well. This chapter examines these provisions to establish their legal significance. It addresses the question of the meaning, content, nature, status and functions of these values, objects and principles, and whether these provisions are merely interpretive aids or enforceable operative norms in their own right.

#### **2 Centrality of devolution in the constitutional design**

Three factors demonstrate the centrality of devolution in the Kenyan constitutional design: devolution is regarded as part of the exercise of the sovereign power of the people, the national values and principles of governance, and the basic structure of the Constitution.

##### **2.1 Devolution as part of the exercise of the sovereign power of the people**

Article 1 declares that all sovereign power belongs to the people and establishes the principle of devolution by delegating the exercise of such sovereign power to government at two levels. Article 1(4) provides for the exercise of the sovereign power of the people at the national and county levels, while Article 1(3) delegates the legislative sovereign power of the people to ‘Parliament and the legislative assemblies in the county governments’ and the executive power to the ‘national executive and the executive structures in the county governments’. Thus, the county governments do not exercise decentralised power delegated to them by national government. Instead, they share with the national government the exercise of the sovereign power of the people assigned to them directly by the people of Kenya. This power, even if limited in subject matter, is not derived from the national government but the people.<sup>1</sup>

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<sup>1</sup> See the German Southwest State Case (1951) 1 BVerFGE 14 para 4, in Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 72.

By providing for devolution in this manner, the principle of devolution in the Kenyan system is elevated to the status of one of the essential organisational features of the governance system. From this perspective Article 1 can be raised by the county governments as a defence whenever the national government stretches its powers too far as to obliterate those of the county governments. Both levels of government are bound by this provision not to usurp the authority of the other. If, for example, the national government usurps the legislative or executive authority of the county, the county government can raise the issue as one of an exercise of sovereignty. Thus Parliament cannot use Article 186(4) as conferring to national government concurrency of powers over all matters to the extent of usurping the entire legislative power of the county governments. Article 1 therefore necessitates a narrow reading and application of Article 186(4).

The High Court in *Commission for the Implementation of the Constitution v Parliament of Kenya and another* has underscored the centrality of the sovereignty of the people by stating that '[t]he golden thread running through the Constitution is the sovereignty of the people of Kenya'.<sup>2</sup> By splitting and assigning to two levels of government the sovereignty of the people, which is an important founding principle of the Constitution, devolution is made a central feature of the Constitution.

## **2.2 Devolution as part of the national values and principles of governance**

Article 10(2) establishes the national values and principles of governance by providing that they include –

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.

In constitutional terms, values are states of social affairs which a political society is committed to and seeks to promote and sustain by governmental and other social means that

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<sup>2</sup> [2013] eKLR para 71.

themselves are consistent with the Constitution.<sup>3</sup> A value is therefore an important desired condition a society would like to attain; it is a goal, whereas a rule is a means to achieving the goal. ‘Sharing and devolution of power’ is thus one of the important desired conditions the Kenyan people have set for themselves and must work towards fully attaining. As such, values identify and set the parameters within which, and the objects in pursuit of which, all power conferred under the Constitution must be deployed.<sup>4</sup> The two levels of government and all other constitutional entities must exercise their authority and discharge their functions not as ends in themselves but as a means of attaining these values as the ultimate goals. Although Article 10 refers to ‘values and principles’, the Supreme Court in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*<sup>5</sup> defined values as ‘declarations of general principles and statements of policy’ in a manner that does not draw a distinction between values and principles:

Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions.<sup>6</sup>

Accordingly, the terms ‘values and principles’ in Article 10 refer to the same thing.

In constitutional architecture and design, a distinction may be drawn between statements of policy and principle which produce value- and principle-setting provisions, and specific normative prescriptions which produce rule-setting provisions. While some designs settle for a ‘highly legalistic’ approach, solely based on rule-setting provisions, others combine both value- and principle-setting provisions, and rule-setting provisions. As the Supreme Court has observed, Kenya’s Constitution has settled for such a combination of ‘specific normative prescriptions, and general statements of policy and principle’.<sup>7</sup> Thus, besides Article 10, other values are traceable in other chapters of the Constitution, which begin with foundational

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<sup>3</sup> Michelman FI ‘The rule of law, legality and the supremacy of the Constitution’ in Woolman S et al *Constitutional Law of South Africa* 2 ed ch 11 (2011) 35-6.

<sup>4</sup> See Steytler N & Fesha YT ‘Defining local government powers and functions’ (2007) 124 *South African Law Journal* 320-38, 332.

<sup>5</sup> [2012] eKLR (*Gender Representation*).

<sup>6</sup> *Gender Representation* para 54.

<sup>7</sup> *Re The matter of the interim Independent Electoral Commission* [2011] eKLR para 69.

provisions setting out values, objects and principles, followed by provisions setting out concrete and specific rules.

### ***2.2.1 Sharing and devolution of power***

In terms of Article 10(2)(a), ‘sharing and devolution of power’ are expressly included among the national values and principles of governance. ‘Devolution’ is defined as a system of multilevel governance under which the Constitution has created two distinct and interdependent levels of government. ‘Sharing’ in this provision should be understood in the context of a multilevel system of government that combines a measure of autonomy anchored in self-rule at the county level and a measure of shared rule at the national level. In the context of shared rule the two levels of government share in the exercise of power, decision-making, and the performance of functions. Shared rule has three dimensions: First, some powers are divided and separated, and assigned and exercised exclusively. Second, other powers are assigned and exercised concurrently. These dimensions of sharing power are concretised by Article 186 which assigns to the two levels of government exclusive and concurrent functions and powers. Third, the county governments have participation rights in some of the decision-making processes at the national level. This is secured through the Senate which protects county interests. If need be, other intergovernmental institutions of this kind should be created to enhance shared rule. In addition, the multilevel system provides an institutional framework for sharing by the Kenyan people, communities and regions in the benefits of governance, such as services, resources and development. Thus ‘sharing and devolution of power’ as national values of governance underscore the determination to move away from a centralised system to a non-centralised one.

The fact that Article 10(2) lists ‘sharing and devolution of power’ among other widely recognised core values, such as democracy, rule of law, and human dignity, underscores the central nature of devolution in the Kenyan constitutional design. This supports the argument that devolution is, like the rule of law and human dignity, an unalterable element of the law.<sup>8</sup>

### ***2.2.2 Nature, status and functions of values and principles***

In nature and status, the values and principles inspire and set the goals and the agenda of the rest of the constitutional provisions. Their main purpose is to serve as aids for the

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<sup>8</sup> See s 2.3 of this chapter.

interpretation of the other provisions of the Constitution. Reflecting on the role of the founding values in the South African Constitution, the Constitutional Court asserted:

The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves.<sup>9</sup>

This means that unless read with other provisions of the Constitution or other law, the value provisions may not themselves be a basis for instituting a claim in court. As stated by the South African Constitutional Court in *Britannia Beach Estate (Pty) Ltd and other v Saldanha Municipality*, ‘although these values underlie our Constitution they do not give rise to independent rights outside those set out in the Bill of Rights’.<sup>10</sup> Thus, the values must be used together with other specific and concrete provisions of the Constitution or other law. Where the other provisions of the Constitution or the other law adequately and constitutionally cover the subject matter, the value provisions need not be relied upon. Where, however, the other provisions or other laws are inadequate or unconstitutional, the value provisions can be relied upon to either complement the other provisions or attack their constitutionality.<sup>11</sup>

Nonetheless, there are nuanced ways in which these values and principles get enforced. The process of realising and giving effect to the specific and concrete provisions of the Constitution must be informed by these values. It is for this reason that Articles 259(1)(a) and 159(2)(e) require that the Constitution be interpreted in a manner that promotes and protects these values and principles. In a constitutional design such as the Kenyan one, which combines value and principle provisions, and specific and concrete norm- and rule-setting provisions, a nuanced interpretation and use of these provisions is called for. Their interpretation and use must recognise a dialectical relationship between them, which ensures that they reinforce each other. The Supreme Court in *Gender Representation* stated thus:

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<sup>9</sup> *Home affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others* 2004 (5) BCLR 445 (CC) (*NICRO*) para 21.

<sup>10</sup> 2013 (11) BCLR 1217 (CC) (*Britannia Beach*).

<sup>11</sup> See *Institute for Democracy in South Africa and others v African National Congress and others* 2005 (5) SA 39 (WC) (*IDASA*) paras 31, 32, 33, and 34; *Britannia Beach* para 16 citing *IDASA* with approval.

Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that *contributes to the development of both the prescribed norm and the declared principle or policy*; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner *as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.*<sup>12</sup>

Thus, the values and principles must inform and ‘*inspire the development of concrete norms for specific enforcement*’,<sup>13</sup> while the specific norms and rules ‘*can support the principle maturing into a specific, enforceable right*’.<sup>14</sup> From this perspective, Article 10(1) provides for various ways in which these values bind and must be used in the realisation of the provisions of the Constitution.

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them –
- a) applies or interprets this Constitution;
  - b) enacts, applies or interprets any law; or
  - c) makes or implements public policy decisions.

These provisions do two things: they identify the entities that are bound by and must use these values, and identify the circumstances in which these values become relevant and must be used.<sup>15</sup>

### **2.2.2.1 Who are bound by the values**

Article 10(1) binds three broad categories of entities, both in the public and private domain. These are: those that are purely state offices comprising state organs and state officers; those

<sup>12</sup> *Gender Representation* para 54 (emphasis in original).

<sup>13</sup> *Gender Representation* para 69 (emphasis in original).

<sup>14</sup> *Gender Representation* para 69 (emphasis in original).

<sup>15</sup> *Communications Commission of Kenya and others v Royal Media Services and others* [2014] eKLR (*Communications Commission of Kenya*) para 365.

that are purely ‘public service’ offices comprising public officers; and private individuals and associations.<sup>16</sup> Article 260 defines ‘state organ’ as being ‘a commission, office, agency or other body established under this Constitution’, and state officers as persons holding state offices. Public officers are defined as holders of public offices in the national government, a county government or public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.<sup>17</sup> They, however, include public servants in state corporations or companies and public entities in which the government holds shares.<sup>18</sup>

### **2.2.2.2 Applying and interpreting the Constitution**

In the application and interpretation of other provisions of the Constitution, particularly those on devolution, the values and principles should be a guiding light. In *Speaker of the Senate and another v Attorney General and others* the Supreme Court observed that ‘[n]ational values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259(a)’.<sup>19</sup> Although these values are interpretation aids, the language of Article 10 is obligatory and not discretionary. It imposes an obligation on those who apply or interpret the other provisions of the Constitution not just to take into account but in fact to protect and promote the value of sharing and devolution of power.

The use of the terms ‘protect and promote’<sup>20</sup> imposes identifiable and enforceable obligations. Understood in this manner, the national values including ‘sharing and devolution of power’ identify the objects in pursuit of which all authority and power conferred by the Constitution must be exercised and used. By setting positive standards to be pursued in the

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<sup>16</sup> Art 260.

<sup>17</sup> Art 260.

<sup>18</sup> See *Nairobi Law Monthly Co Ltd v Kenya Electricity Generating Co and others* [2013] EKLK paras 44-51, in which the respondents against whom it was sought to enforce the right of access to information, argued that being a publicly listed company, they did not form part of the ‘State’ within the meaning of Articles 35 and 10 of the Constitution. As such, they were not bound by the obligations created by the two Articles. The High Court held that being a state corporation in which the government had 70% shareholding, the respondents were part of the state and were bound by the constitutional obligations.

<sup>19</sup> [2013] eKLR (*speaker of the Senate*) para 195.

<sup>20</sup> See Arts 259(1)(a), 159(2)(e) and 20(4)(a).

exercise of authority,<sup>21</sup> the values impose substantive limitations upon all constitutional authority and power. As the Supreme Court stated:

We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010: we bear the responsibility for casting the devolution concept, and its instruments in the shape of county government, in the legitimate course intended by the people. It devolves upon this Court *to signal directions of compliance by State organs, with the principles, values and prescriptions of the Constitution*; and as regards the functional machinery of governance which expresses those values, such as devolution and its scheme of financing, this Court bears the legitimate charge of showing the proper course.<sup>22</sup>

It is noted, however, that the clearer the value is in terms of its content, the more operative it is.

### **2.2.2.3 Enacting, applying and interpreting other laws**

The values and principles are also relevant and become operative whenever an entity 'enacts, applies or interprets any law'.<sup>23</sup> When enacting the enabling legislation required to give effect to the devolution provisions, Parliament and the county assemblies must ensure that the resultant legislation protects and promotes the values of sharing and devolution of power. In *Jasbir Singh Rai* the Supreme Court declared that the Article 10 values bind Parliament in the course of enacting legislation. The Court had been asked to depart from its own earlier decision declaring section 14 of the Supreme Court Act, which had conferred on the Supreme Court additional original jurisdiction, unconstitutional, since Parliament did not have power to confer original jurisdiction. Mutunga CJ, in his concurring opinion, declining to depart from the earlier decision, identified a violation of Article 10, which sets out non-discrimination as one of the national values, as another ground on which he would have found section 14 unconstitutional. He pointed out that 'Article 10 of the Constitution requires

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<sup>21</sup> In *United Democratic Movement v President of the Republic of South Africa* 2002 (11) BCLR 1179 (CC) para 19, the South African Constitutional Court observed that: 'These founding values have an important place in our Constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid.'

<sup>22</sup> *Speaker of the Senate* para 53.

<sup>23</sup> Art 10(1)(b).



Parliament to be non-discriminatory when it enacts laws'.<sup>24</sup> Once enacted, the application and interpretation of the legislation must protect and promote the values of 'sharing and devolution of power'.

#### **2.2.2.4 Making and implementing public policy decisions**

The values and principles bind any one of the identified entities whenever it 'makes or implements public policy decisions'.<sup>25</sup> The exercise of most of the powers assigned to the two levels of government must be through making and implementing policy decisions. Indeed, the day-to-day running of government revolves around the making and implementation of policy decisions. These decisions and their implementation must be informed by the constitutional values of sharing and devolution.<sup>26</sup> They must not be made and implemented in a manner that subverts these values and principles. If founded upon the specific concrete and rule provisions of the Constitution, the interpretation of these provisions must be informed by the value provisions. Where they are founded on legislation, the legislation itself must be constitutional, and be interpreted by taking into account the values.

### **2.3 Devolution as part of the basic structure of the Constitution**

The main question to be addressed in this section is whether devolution forms part of the basic structure of the Constitution, and if so, whether it can be removed from the Constitution. These questions are answered by examining three issues: the meaning and rationale of the concept of the basic structure, the comparative jurisprudence, and the application of the concept under the Kenyan Constitution.

#### **2.3.1 Meaning and rationale of the basic structure**

The doctrine of the basic structure of the Constitution is founded and rationalised upon recognition of the following factors. First, the fact that every constitution is 'not simply a set of values, but rather a hierarchy or ordering of values' with some being more important than others.<sup>27</sup> Komers, who sees the German Basic Law as an 'objective order of values',

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<sup>24</sup> *Jasbir Singh Rai* paras 82 and 83.

<sup>25</sup> Art 10(1)(c).

<sup>26</sup> *Communications Commission of Kenya* para 366.

<sup>27</sup> Roznai Y 'Unconstitutional constitutional amendments: The migration and success of a constitutional idea' (2013) 61 *American Journal of Comparative Law* 657, 711.

describes as significant the fact that ‘the framers are said to have arranged these values in a hierarchical order’.<sup>28</sup>

Secondly, these more important and fundamental constitutional rules or values are supra-positive law and supra-constitutional law. They are a higher moral order containing norms against which the positive law must be assessed,<sup>29</sup> and are viewed as having preceded and transcended the Constitution and thus bind its maker.<sup>30</sup> Carlo Fusaro and Dawn Oliver thus argue:

[E]very constitutional arrangement is based upon a set of core principles which cannot be changed and which can be regarded as intrinsic to its specific identity: this explains the tendency in many constitutional arrangements to identify a set of supraconstitutional provisions which the constitution’s text itself, or even more frequently the courts (by induction), state cannot be amended or suppressed.<sup>31</sup>

Thirdly, these supra-positivist and supra-constitutional law rules and values are the fundamental pillars supporting its constitutional authority, which bind even the drafter of the Constitution. Fourthly, these rules and values may be expressly or implicitly provided for by the Constitution. Consequently, these rules and values form a basis for annulment of any other provisions of the Constitution that are in conflict with the basic structure or values.<sup>32</sup> As such, every provision must be compatible with the elementary principles of the basic structure.

The consequence of these rules and values is that they explicitly or impliedly impose substantive limitations on the constitution amendment power. Edward Everett argued that there is a difference between to amend and to essentially change. While to amend is to make changes that are consistent with the leading provisions of the Constitution, which are left intact and continue in ‘happier’ and ‘more perfect operation’, to change those essential provisions themselves is not to amend. He argued that ‘there is a prior limitation of the

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<sup>28</sup> Komers (1989) 54.

<sup>29</sup> Komers (1989) 39 and 54.

<sup>30</sup> Roznai (2013) 676.

<sup>31</sup> Roznai (2013) 714, quoting Fusaro C & Oliver D, ‘Towards a theory of constitutional change’ in *How Constitutions Change: A Comparative study* (2011) 405, 428.

<sup>32</sup> See Barak A ‘Unconstitutional constitutional amendments’ (2011) 44 *Israel Law Review* 321, 329.

amending power, growing out of the nature of the Constitution as a compact'.<sup>33</sup> The amending power is understood as having been intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution, and not to include a power to abolish or destroy it.<sup>34</sup> 'An amendment cannot annihilate or eliminate the constitution.'<sup>35</sup>

### ***2.3.2 Comparative jurisprudence on the basic structure***

The Bavarian and German Constitutional Courts pioneered the modern judicial recognition of the concept of the basic structure which imposes limitations on the amendment power by implication. The Bavarian Constitutional Court expressed the doctrine of the basic structure as follows:

That a constitutional provision itself may be null and void is not conceptually impossible just because it is a part of the Constitution. There are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the Constitution that they also bind the framers of the Constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.<sup>36</sup>

As such, every provision must be compatible with the elementary principles of the basic structure. The German Constitutional Court in the *Southwest State Case* approvingly referred to the above statements and asserted that '[a] constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate'.<sup>37</sup> The essence of this is that even a particular constitutional provision or

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<sup>33</sup> Edward Everett, 'Speech of the Hon. Edward Everett, in the House of Representatives of the United States, March 9, 1926: In Committee, on the proposition to amend the Constitution', cited in Roznai (2013) 671. See also Calhoun J, *Disquisition on Government: And, A Discourse on the Constitution and Government of the United States* (1951) 300-1, who argued that the amending power is implicitly limited in scope as it must be consistent with the nature of the system and the character of the Constitution.

<sup>34</sup> Roznai (2013) 675.

<sup>35</sup> Roznai (2013) 675.

<sup>36</sup> *Southwest State Case* (1951) 1 BVerFGE 14 para 2, in Kommers (1989) 71-2.

<sup>37</sup> *Southwest State Case* para 2, in Kommers (1989) 71.

constitutional amendment may be unconstitutional if it conflicts with these ‘overarching principles and fundamental decisions’.<sup>38</sup> The German Courts identified the Bill of Rights, particularly the right to human dignity;<sup>39</sup> federalism and the federal character of the state;<sup>40</sup> democracy;<sup>41</sup> and rule of law<sup>42</sup> as some of the aspects that constitute the basic structure which cannot be removed from the Constitution.

This was picked up by the Indian Supreme Court, which in a succession of cases firmly established that the basic structure is unamendable and that courts have jurisdiction to review any amendment on grounds that it is against the basic structure. First, in *Golak Nath v State of Punjab*<sup>43</sup> the Supreme Court held that the amendment power could not be used to abridge or take away fundamental rights. The Court reasoned that a constitution amendment was a law within the meaning of Article 13(2) which barred any law that abridges or takes away fundamental rights.<sup>44</sup> This reasoning was however overruled in *Kesavananda Bharati v State of Kerala*, in which the Court held that ‘the power to amend the Constitution does not include the power to alter the basic structure, or the framework of the Constitution so as to change its identity’.<sup>45</sup> This power ‘cannot be exercised so as to damage or destroy the essential elements or the basic structure of the Constitution’.<sup>46</sup> The doctrine established in this case was followed by the Supreme Court in *Indira Nehru Gandhi v Raj Narain*, in which Chandrachud J explained:

[T]he power to amend, did not include the power to abrogate the Constitution, that the word ‘amendment’ postulates that the old Constitution must survive without loss of identity, that the old Constitution must accordingly be retained though in the amended form, and therefore the power

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<sup>38</sup> Kommers (1989) 52-3.

<sup>39</sup> Kommers (1989) 37-8.

<sup>40</sup> Kommers (1989) 36, 40, 69, 72 and 76.

<sup>41</sup> Kommers (1989) 43, 72 and 76.

<sup>42</sup> Kommers (1989) 42.

<sup>43</sup> *Golak Nath v State of Punjab* (1967) AIR SC 1643.

<sup>44</sup> See Seervai HM, *Constitutional law of India: A Critical Commentary* 2ed Vol 2 (1976) 1512.

<sup>45</sup> *Kesavananda Bharati v State of Kerala* (1973) AIR SC 1461.

<sup>46</sup> See *Kesavananda*, the judgment of Chandrachud J, 2565.

of amendment does not include the power to destroy or abrogate the basic structure or framework of the Constitution.<sup>47</sup>

In *Minerva Mills Ltd v India*, in which Parliament had amended the amendment clause to provide that the Supreme Court has no power to declare amendments unconstitutional, the Court justified its power thus:

[I]f by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even put an end to it by totally changing its identity.<sup>48</sup>

These Indian cases have identified the following as the essential features that constitute the basic structure: The supremacy of the Constitution; the federal character of the Constitution; the republican and democratic form of government; separation of powers between the legislature, the executive and the judiciary; and the secular character of the Constitution. Also identified are the dignity of the individual secured through fundamental rights, and the mandate to build a welfare state contained in the directive principles of state policy; the unity and integrity of the nation;<sup>49</sup> the independence of the judiciary; and the power of judicial review.

The South African courts have also indicated support for the recognition of an implied non-amendable basic structure of the Constitution, although not identifying its devolution as part of such a basic structure.<sup>50</sup>

What constitutes the basic structure will vary from country to country. As Chandrachud J stated in *Kesavananda*,

[f]or determining whether a particular feature of the Constitution is part of its basic structure, one has perforce to examine in each individual case the place

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<sup>47</sup> *Indira Nehru Gandhi v Raj Narain* (1975) AIR SC 2461.

<sup>48</sup> *Minerva Mills Ltd v India* (1980) AIR SC 1789, 1824.

<sup>49</sup> *Kesavananda* paras 292 and 582.

<sup>50</sup> See *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) para 204. See also *Premier of KwaZulu-Natal and others v President of the Republic of South Africa and others* 1995 (12) BCLR 1561 (CC) (*Premier of KwaZulu-Natal*) para 49.

of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance.<sup>51</sup>

### ***2.3.3 Application of concept under the Kenyan Constitution***

For a number of reasons, it is submitted that the Kenyan Constitution incorporates the concept of the basic structure which is unalterable. First, the Constitution making history indicates that devolution as a central feature of the Kenyan Constitution was a supra-constitutional value binding the makers of the Constitution. As discussed in Chapter Three, devolution first appeared as such a value in the legislation governing the constitution-making process. It was a principle and object of review, which the process was required to pursue and deliver through the new Constitution.<sup>52</sup>

Secondly, the Constitution explicitly provides for values and principles of governance which are set out by Article 10(2). They include constitutionalism, democracy, rule of law, human dignity, and devolution of power, values which other countries have recognised as part of the basic structure.<sup>53</sup> The fact that 'sharing and devolution of power' are listed among these Article 10 values is quite instructive about the central status of devolution in the Kenyan constitutional design. As an organisational element of the polity, devolution has been elevated by Article 1(3) and (4) to the same status as the sovereignty of the people.

Thirdly, prior to and during the process of the making and enactment of the new Constitution, the High Court in *Rev. Timothy M Njoya and others v Attorney General and others*<sup>54</sup> recognised the concept of the basic structure of the Constitution and its implied limitations on Parliament's amendment power. The Court drew a distinction between the constituent power of the people to promulgate a new constitution constituting a framework of government for the country and the amendment power of Parliament to amend an existing Constitution. The issue was whether the statutory process for constitution-making which granted Parliament power to adopt a new constitution was constitutional. The Court held that Parliament's power

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<sup>51</sup> *Kesavananda* 2465.

<sup>52</sup> See Chap 3 section 4.1

<sup>53</sup> See German and Indian jurisprudence, which identify the federal character of the state as part of the basic structure.

<sup>54</sup> [2004] KLR 261 (*Rev Timothy M Njoya*).

to amend the Constitution did not include the power to introduce a completely new constitution that changed its basic structure, since such power belonged to the people as part of their constituent power. Ringera J adopted the approach in the Indian *Kesevananda* case when he observed that ‘Parliament has no power and cannot in the guise or garb of amendment either change the basic features of the Constitution or abrogate and enact a new Constitution.’<sup>55</sup>

Fourthly, the Supreme Court has already recognised and asserted the centrality of devolution. In *Speaker of the Senate* Mutunga CJ noted that devolution was ‘instrumental in mobilizing support for the Constitution in the referendum’.<sup>56</sup> The Court acknowledged the centrality of devolution, noting that ‘[d]evolution is one of the main fulcrums on which Kenya’s newly renegotiated social contract turns’.<sup>57</sup> It added that it ‘is the core promise of the new Constitution’ meant to play a central role ‘in the deconstruction-reconstruction of the Kenyan state’.<sup>58</sup> Mutunga CJ described devolution as ‘a fundamental principle of the Constitution’ which is ‘pivotal to the facilitation of Kenya’s social, economic and political growth’.<sup>59</sup> It was regarded by Kenyans as an act of liberation, self-empowerment, freedom, opportunity, self-respect, dignity and recognition.<sup>60</sup> It is thus submitted that devolution is an essential feature with which Kenya’s new Constitution is identified.

The basic structure of the Kenyan Constitution should include the sovereignty of the people, the supremacy of the Constitution, the principle of sharing and devolution of power, democracy, rule of law, the Bill of Rights, especially the right to human dignity, separation of powers, and the independence of the judiciary. One of the implications of the doctrine of the basic structure is that it puts substantive limitations on the amending power of certain aspects of the Constitution. The basic structure is put beyond the constitution amendment power thereby forming what are referred to as the ‘irrevocable’ or ‘eternity clauses’ of the Constitution.<sup>61</sup> Although Article 255 singles out a number of constitutional provisions which cannot be altered without approval by the people in a referendum, the Constitution does not

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<sup>55</sup> *Rev Timothy M Njoya* 298.

<sup>56</sup> *Speaker of the Senate* para 173.

<sup>57</sup> *Speaker of the Senate* para 164.

<sup>58</sup> *Speaker of the Senate* para 183.

<sup>59</sup> *Speaker of the Senate* para 195.

<sup>60</sup> *Speaker of the Senate* para 173.

<sup>61</sup> *Roznai* (2013) 663-4.

have any explicit provision for non-amendable provisions. Nonetheless, implied non-amendable aspects of the Constitution can be identified.

### **3 Objects of devolution**

In contrast to national values and principles of governance, a clear distinction is drawn between objects of devolution and principles of devolution. While Article 174 sets out the objects and Article 175 the principles, both must be interpreted separately as different norms.

#### **3.1 Nature and import of objects**

As discussed in Chapter Two,<sup>62</sup> the objects of devolution form part of the purposes of the Constitution, which Article 259(1)(a) provides must be promoted whenever the Constitution is interpreted. They are also part of the value system, since it has been noted that some chapters of the Constitution begin with value provisions. They provide justification for the adoption of devolution by specifying the problem areas experienced in the past which devolution aims to address. Thus, they direct and guide policy and legislative action towards certain ends, and identify the ultimate ends in pursuit of which power should be deployed. From this perspective, the objects serve three important purposes. First, they are aids for interpreting other provisions of the Constitution or legislation. Secondly, they direct and guide the development and implementation of policy and legislation. Thirdly, they may impose substantive limitations on the exercise of power to ensure the achievement of these ends.

Although they are rendered in generalised terms, to the extent that they limit the exercise of power and guide the development of legislation and policy, they may, in some circumstances, especially when read jointly with other provisions of the Constitution or legislation, give rise to enforceable obligations. For example, when read with the power- and function-conferring provisions, they may transform discretionary powers into obligations. They do not, however, by themselves confer authority and power on any one of the two levels of government. The authority and power must emanate from the function- and power-conferring provisions. The objects point at the goals that ought to be achieved in the functional areas assigned to each level of government.<sup>63</sup> They set the parameters within which the authority and power of the

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<sup>62</sup> Chap 2 section 2.1

<sup>63</sup> Steytler & Fessha (2007) 332-233.



two levels of government are to be exercised,<sup>64</sup> and set positive standards which must be complied with or achieved.<sup>65</sup> Such parameters can impose limitations on the extent of the authority and power or transform the functions and powers into obligations. They may also create enforceable obligations when read with the Bill of Rights.

This approach draws lessons from the manner in which the South African courts and scholars have interpreted section 152 of their Constitution, which sets out the objects of local government, and section 153, which provides for developmental local government. In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*, Yacoob J observed that '[m]unicipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty'.<sup>66</sup> He founded this public duty on, first, section 27(1)(b) of the Constitution, which provides for the right of access to sufficient food and water; second, section 152, which provides for objects of local government, including 'to ensure the provision of services to communities in a sustainable manner, to promote social and economic development, and to promote a safe and healthy environment'; and third, section 153, which provides that 'a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community'.<sup>67</sup>

The objects may in some circumstances impose development and service delivery obligations upon levels of government which translate into correlative justiciable individual rights. In *Joseph and others v City of Johannesburg and others*,<sup>68</sup> the applicants challenged the decision of the City to disconnect their electricity supply, despite the fact that the applicants had no direct contractual relationship with the City to provide electricity. The owner of the apartment block in which the applicants had rented rooms and who had failed to pay the bills is the one who had contracted with the municipality for supply of electricity.<sup>69</sup> The Constitutional Court relied on sections 152 and 153 of the Constitution, which set out the objects of the South African local government and developmental duties of local government,

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<sup>64</sup> Steytler & De Visser (2011) ch 8, 8.

<sup>65</sup> See *United Democratic Movement* para 19.

<sup>66</sup> 2005 (2) BCLR 150 (CC) (*Mkontwana*) para 38.

<sup>67</sup> See *Mkontwana* para 38 footnote No 49. See also Steytler & De Visser *Local Government of South Africa* (2011) ch 9, 6-8.

<sup>68</sup> 2010 (3) BCLR 212.

<sup>69</sup> Steytler & De Visser (2011) ch 9, 7.

respectively. Read together with other provisions, these sections have been interpreted as giving rise to the ‘right to basic municipal services’ and therefore obligations to provide those services. The Court read these sections together with the function-assigning provisions and recognised ‘the right’ of the tenants to receive electricity as a basic municipal service. The Court gave the following explanation of a basic municipal service:

The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public services provider. The [City of Johannesburg] accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise. In *Mkontwana*, Yacoob J held that ‘municipalities are *obliged* to provide water and *electricity* to residents in their area *as a matter of public duty*.’ Electricity is one of the most common and important basic municipal service and has become virtually indispensable, particularly in urban society. The obligation borne by local government to provide basic services is sourced in both the Constitution and legislation.<sup>70</sup>

The Judge reasoned that section 152(1), which sets out the objects of local government, ‘creates an overarching set of constitutional obligations that are to be achieved in accordance with section 152(2)’.<sup>71</sup>

This approach opens up a new range of rights and obligations arising out of the objects of devolution. The nature and extent of such rights and duties will depend on the circumstances of each case and must be left open to further development.<sup>72</sup>

### 3.2 Content of objects

The objects of devolution set out in Article 174 can be grouped into the following broad categories: those promoting and advancing democracy and accountability; development and

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<sup>70</sup> *Joseph* para 34 (emphasis in original).

<sup>71</sup> See *Joseph* para 34.

<sup>72</sup> See Steytler & De Visser (2011) chap 9, 9.

service delivery; equity and inclusiveness; and those limiting centralisation. Each of these categories has a number of objects, some of which overlap, leaving very little difference, if any, among them.

### **3.2.1 Democracy, accountability, participation and self-governance**

A number of objects focus on democracy, accountability, participation, self-governance, and subsidiarity as they are necessary for development, which ought to involve the people.

#### **3.2.1.1 Democracy and accountability**

Democratic governance is good for and underpins development since it aims to secure inclusion both politically and developmentally, and results in limiting centralisation. Thus the first object is ‘to promote democratic and accountable exercise of power’.<sup>73</sup> This object has two linked goals: the representation and participation of the people, and accountability for decisions. It must be secured through a combination of representative and participatory democracy as envisaged by Article 1(2). ‘The people may exercise their sovereign power either directly or through their democratically elected representatives.’ Representative democracy is reflected in and secured through the constitutional provisions for largely directly and democratically elected county assemblies and county governors,<sup>74</sup> which implies a need to establish strong political leadership at the county level to spearhead development.<sup>75</sup> Participatory democracy is secured through the obligation of the county assemblies to conduct their business and hold their meetings in public and in an open manner.<sup>76</sup> They also must facilitate public participation and involvement in their legislative and other business.<sup>77</sup> Participation is also required even on the part of the executive arm of government and state officers when they discharge their functions. The Supreme Court emphasised the necessity of such public participation because it ‘ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits – generally a contract and investment regime enveloped in non-disclosure, do not happen’.<sup>78</sup> The importance of the democratic exercise of power should be understood within the context of the Constitution’s regard for

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<sup>73</sup> Art 174(a).

<sup>74</sup> Ars 177(1)(a) and 180(1). See also Steytler & De Visser (2011) ch 1, 23.

<sup>75</sup> See Steytler & De Visser (2011) ch 1, 21.

<sup>76</sup> Art 196(1)(a).

<sup>77</sup> Art 196(1)(b).

<sup>78</sup> See *Communications Commission of Kenya* para 381.

democracy as a core value. The Preamble to the Constitution regards democracy as an essential value, while Article 10(2)(a) includes it among national values and principles of governance.<sup>79</sup>

Accountable exercise of power ensures that representatives are open, transparent and responsive to the views, concerns and needs of the people. This creates room for both the people and the representatives to take remedial action. Although the provision uses the term ‘promote’, which appears open-ended, read together with other provisions of the Constitution, the object seems to have been concretised into enforceable obligations in certain circumstances. For example, when the object is read with Article 176(2), which empowers county governments to decentralise power to lower units, it imposes an obligation to do so in a democratic manner. Similarly, the object of accountability is concretised into obligations when read with the provisions on leadership and integrity which emphasise the servant nature of leadership with authority being presented as a public trust vesting responsibility to serve as opposed to a power to rule the people.<sup>80</sup> Leaders are subjected to ‘accountability to the people for decisions and actions’,<sup>81</sup> with their activities restricted to guard against conflict of interest.<sup>82</sup> Both national and county governments are obliged to be open and transparent to the public in the manner they exercise power and be open to monitoring and evaluation by the public with their performance being publicly discussed and criticised. These obligations should be interpreted as giving expression to both the right of access to information, which is provided for by Article 35, and the right to freedom of expression, set out by Article 33. Democratic and accountable exercise of power appear to require, as Steytler and De Visser note, ‘a relationship of “co-governance” between’<sup>83</sup> the people and the political structures of the counties.

### **3.2.1.2 Self-governance and participation**

Another object of devolution is ‘to give powers of self-governance to the people and enhance [their] participation in the exercise of power’ and in the making of decisions that affect

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<sup>79</sup> Art 249(1) also identifies ‘to secure the observance by state organs of democratic values and principles’ as one of the objects of commissions and independent offices.

<sup>80</sup> Art 73(1).

<sup>81</sup> Art 73(2) (d).

<sup>82</sup> Arts 75, 76 and 77.

<sup>83</sup> See Steytler & De Visser (2011) ch 1, 25.

them.<sup>84</sup> Interpreted against the Kenyan historical background of a highly centralised system, in which governance, development and service delivery have been a top-down affair, this objective requires the empowerment and participation of the people in their own governance and development. It is against this background that Mutunga CJ in *Speaker of the Senate* understands Kenyans to have perceived devolution of economic and political power as an ‘act of liberation ... self-empowerment, freedom, opportunity, self-respect, dignity and recognition’.<sup>85</sup> Participation must not, however, be seen as contradicting representative democracy – representative and participatory democracy can happily co-exist and mutually complement each other. In *Robert N Gakuru and others v The Governor Kiambu County and others*,<sup>86</sup> the High Court of Kenya, while heavily relying on the South African case of *Doctors for Life International v Speaker of the National Assembly and others*,<sup>87</sup> held that ‘[p]ublic participation ought not to be seen as a derogation from Parliamentary representation or representation at the County Assembly level’.<sup>88</sup> The adoption of representative and participatory democracy by other provisions of the Constitution gives these objects of devolution legal bite that is enforceable.<sup>89</sup> Development and service delivery decisions must be made in a manner that involves the people at the local level. Both national and county governments must structure their governance, development and service delivery systems in a manner that enables the people to realise their ‘self-governance’ and ‘participation’. The provision uses the terminology of ‘to give’, which imposes obligations on both levels of government.

The obligation to give self-governance and participation requires the national and county governments to encourage the involvement of communities and community organisations at the local level to manage their own affairs.<sup>90</sup> This obligation should see the communities involved in the political and administrative processes of the two levels of government. They must participate in the legislative, executive and administrative processes.<sup>91</sup>

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<sup>84</sup> Art 174(c).

<sup>85</sup> *Speaker of the Senate* para 173.

<sup>86</sup> [2014] eKLR (*Robert N Gakuru*).

<sup>87</sup> (2006) BCLR 1399 (*Doctors for Life*).

<sup>88</sup> *Robert N Gakuru* para 55.

<sup>89</sup> See Art 196(1).

<sup>90</sup> Steytler & De Visser (2011) ch 6, 3.

<sup>91</sup> See *Robert N Gakuru* and *Doctors for Life*.

### **3.2.1.3 Managing own affairs and development**

A further aspect of democracy is the object ‘to recognise the right of communities to manage their own affairs and further their development’ which has the potential for better development.<sup>92</sup> When people, communities or regions manage their own affairs, they are not developed but instead develop themselves. Development decisions made by the people themselves at the local level or by their representatives closer to them are more likely to be better as they may reflect their local values and preferences. This creates room for diversity of development priorities among the different regions of the country. This should be understood in the context of equity both among the different regions of the country and within the county for those counties that have minorities. Read together with Article 176(2), this should be understood as a matter to be considered when determining whether to decentralise county functions and services or not. The application of the subsidiarity principles in this case may also be guided by this object to recognise the right of communities to manage their own affairs and development. To ‘recognise the right of communities’ could simply mean allowing communities to manage their own affairs and development. But it could include taking positive steps that may help communities develop the capacity to manage their own affairs. This object ties in with the definition of development, which emphasises that people are not developed but develop themselves.<sup>93</sup>

### **3.2.2 Development and service delivery**

The democratic and accountable exercise of power must be deployed to achieve development and service delivery.<sup>94</sup> According to Article 174(f), devolved government is meant ‘to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya’. Development is, however, often desired but rarely properly defined.<sup>95</sup> Traditionally, it was narrowly defined in terms of economic growth and measured by a single narrow instrument of per capita income, which was restrictive and neglected its other important aspects.

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<sup>92</sup> Art 174(d).

<sup>93</sup> See De Visser (2005) 10, where he refers to Mkandawire, who lamented that ‘development has become an alienating and humiliating concept for people helplessly sensing that they are to be developed and made to feel that their other preoccupations are retrograde’.

<sup>94</sup> See Steytler & De Visser (2011) ch 1, 27.

<sup>95</sup> De Visser (2005) 9.

Read with the other objects, this object indicates that the constitutional conception of developmental devolved government captures the contemporary broad definition of development which encompasses various elements. Development involves upliftment of the people aimed at improving the quality of their life and well-being,<sup>96</sup> addressing the satisfaction of material needs. From this perspective, economic development must not be allowed to occur at the expense of the environment.<sup>97</sup> Development must also be equitable and inclusive targeting inter-social and intergenerational equity aimed at ensuring social justice and redistribution, which address poverty, gender equity and protection of marginalized groups and communities. It must target environmental protection and be sustainable, ensuring that ‘the development of one generation must not deny the development of the next generation.’<sup>98</sup> Finally, development entails empowerment and participation of the people in their own development.<sup>99</sup> The object of development must be read with the value of sustainable development which the Supreme Court has defined in very broad terms, noting that it ‘requires that we at least link it to the vision of the Constitution which is transformative and mitigating’.<sup>100</sup>

As mentioned, development includes service delivery. As such, this object also talks about ‘provision of proximate, easily accessible services’.<sup>101</sup> First, this object establishes a service delivery obligation on the part of the two levels of government. As in the case of South Africa’s section 152 which provides for the objects of local government, this Kenyan provision may establish a service delivery obligation.<sup>102</sup> Secondly, the services must be proximate and accessible. Proximity of services connotes nearness while accessibility may include concerns for persons with disabilities such as providing them with assistive devices that give them easier access to the services.

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<sup>96</sup> Steytler & De Visser (2011) ch1, 27.

<sup>97</sup> Steytler & De Visser (2011) ch 1, 27-8.

<sup>98</sup> Steytler & De Visser (2011) ch 1, 28.

<sup>99</sup> De Visser (2005) 10-11.

<sup>100</sup> *Communications Commission of Kenya* paras 375-7 and 379.

<sup>101</sup> Art 174(g).

<sup>102</sup> Steytler & De Visser (2011) ch 9, 6; *Mkontwana* para 105 and *Joseph v City of Johannesburg* para 33.

### **3.2.3 Equity and inclusiveness**

At the centre of the Kenyan devolution is the quest for equity and inclusiveness which are captured by a number of objects of devolution. The Constitution by implication makes a commitment to inclusive development that benefits all, right at the beginning where the Preamble declares the commitment of the Kenyan people ‘to nurturing and protecting the well-being of the individual, the family, communities and the nation.’

#### **3.2.3.1 National unity in diversity**

The starting point for equity and inclusiveness is the recognition of diversity and the need for unity in such diversity. Consequently, one of the objects of devolved government is ‘to foster national unity by recognizing diversity’.<sup>103</sup> The key terms and phrases that call for interpretation are the notion of ‘national unity’ and the concept and extent of ‘diversity’ in the Kenyan society, which call for recognition as means of achieving national unity. National unity is fostered by the recognition of diversity, so that no group is or feels left out as this would undermine national unity.

Unity connotes a state of harmony, accord, and mutual agreement or co-existence among two or more different entities.<sup>104</sup> Thus, ‘national unity’ connotes a state of harmonious co-existence among different entities within the whole nation of Kenya. The Preamble to the Constitution talks of the Kenyan people being ‘determined to live in peace and unity as one indivisible sovereign nation’. The constitutional conception of national unity therefore, is that of living together peacefully as one nation. But what are the different entities among which there is need for harmonious and peaceful co-existence? What are the differences that divide the Kenyan people? These are answered by the interpretation of the term ‘diversity’. Diversity refers to a state of being different or heterogeneous<sup>105</sup> manifested in various dimensions such as race, ethnicity, religion, gender, culture and language. According to the Preamble to the Constitution, the constitutional conception of diversity recognises the ‘ethnic, cultural and religious’ dimensions. In addition, Article 130(2) recognises the dimension of spatial diversity when it requires that the national executive in its composition should ‘reflect

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<sup>103</sup> Art 174(b).

<sup>104</sup> See Oxford Dictionary Thesaurus and Word Power Guide (2001) 1414.

<sup>105</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 362.



the regional and ethnic diversity of the people of Kenya'.<sup>106</sup> Thus, from the devolution perspective the main diversity to be addressed is the ethnic diversity which is linked to regional diversity as well as the marginalised communities. Indeed some of the objects discussed herein explicitly refer to these diversities.

The concept of 'recognizing' therefore envisages taking positive and proactive steps to address the causal nexus between diversity and national unity or disunity. Chapter Three has established that the centralised system in Kenya has been perceived as using some of these diversities as discriminating factors in the allocation of resources, development opportunities and other social services. Arising out of these exclusions, national unity and cohesion have been compromised by feelings of inequity, inequality, social injustice, regional disparities, and marginalisation. Mutunga CJ in *Speaker of the Senate* referred to these negative effects of historically skewed development and allocation of resources in the Kenyan highly centralised political and economic system thus:

The fusion of political and economic power has led to the emergence of *state-made* rather than *market-created* economic elites. Indeed, Kenya's socio-economic character is a product of public-policy choices made and pursued by the government. State behaviour, flowing from this politico-economic fusion, and expressed mainly through official policy, markedly shape the specific character of Kenya's development outlook. Additionally, the colossal ethnic mobilization in the acquisition and retention of state power has led to an illiberal and undemocratic practice, whereby the allocation of development resources tends to favour the ethnic base, to the exclusion of other factors of merit. Thus, the *burden* of taxation is shared and remains political-choice-neutral, but the *benefit* of public expenditure is skewed, and remains politically partisan.

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<sup>106</sup> See also Arts 241(4), 246(4) and 259(4), all of which require regional and ethnic diversity to be reflected in the composition of the command of the Defence Forces, the National Police Service, commissions and independent offices.

He notes that this developmental imbalance is a product of what Duncan Okello and Kwame Owino referred to as a ‘rigged-development’ approach, which is founded on partisan, divisive and sectarian values and has its roots in the colonial heritage of the country.<sup>107</sup>

Interpreted in the context of and against this historical background, ‘recognizing diversity’ must include taking measures that address and seek to remedy these shortcomings. It is for this reason that development is interpreted as including inter-regional equity. Although the provision uses the term “foster”, which appears open-ended and permissive, read with other provisions the object appears to create obligations for both national and county government. The object binds national government in how it conducts its affairs, ensuring that it does not undermine devolution, and how it relates to counties. The object also binds county governments to protect internally marginalised communities, which they could do through decentralisation. For example, the public finance chapter provides for the use of public finances in a manner that addresses some of the disparities and inequities that are informed by and founded upon some of these diversities.

### **3.2.3.2 Equitable sharing of national and local resources**

In terms of Article 174(g), one of the objects of devolved government is ‘to ensure equitable sharing of national and local resources throughout Kenya’. This object must in the first place be understood in the Kenyan historical context of skewed development, the apparent inequalities and regional disparities in terms of infrastructure, and the marginalisation felt by various groups in different parts of the country. These inequities are acknowledged by a number of constitutional provisions. Article 203(1), which sets out the criteria to be considered when determining equitable shares, includes both ‘economic disparities within and among the counties and the need to remedy them’,<sup>108</sup> and ‘the need for affirmative action in respect of disadvantaged areas and groups’.<sup>109</sup> Similarly, Article 204, which establishes an equalisation fund, dedicates it to the provision of ‘basic services including water, roads, health facilities, and electricity to marginalized areas to the extent necessary to bring the

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<sup>107</sup> *Speaker of the Senate* paras 167 and 168 (emphasis in original).

<sup>108</sup> Art 203(1)(g).

<sup>109</sup> Art 203(1)(h).

quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible'.<sup>110</sup>

From this historical perspective, equity, social justice and inclusiveness envision devolution as a transformative agent in Kenyan society. According to Michelman, constitutions may be divided into two types: those that are 'primarily preservative, in the sense that their aim is to consolidate and memorialize in the law, in a relatively enduring form, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past'; and those that 'are primarily transformative, aimed at bringing to pass a societal future that will differ "starkly" and "dramatically" from a decisively rejected past'.<sup>111</sup> Developmental devolution consequently imposes obligations to work towards addressing the disparities of the past and transform Kenyan society. It demands balanced development of the country and delivery of services. For these reasons, Mutunga CJ in *Speaker of the Senate* held the view that Kenyans perceive devolution as the remedy meant to cure these historical problems:

The Constitution's provisions on *Devolution* were key pillars in the deconstruction process. Indeed, a reading of the *Final Report of the Constitution of Kenya Review Commission* (CKRC) shows that, vast segments of the Kenyan population felt that they were victims of state, either in terms of *political repression, or in terms of developmental exclusion*.<sup>112</sup>

In the second place, equity and social justice must be interpreted as going beyond the historical context and operating as living values that must continuously inform interaction in society. Since social, economic and political society is dynamic, equity and social justice cannot be an event but must be a continuous process. The Constitution conceives these as values that must guide the continuous development and sharing of resources and opportunities in the Kenyan society. This is why Article 203 settled for criteria rather than formulae for revenue-sharing. Whereas criteria can be fixed, formulae must remain dynamic as circumstances will keep changing. Article 201, for example, requires expenditure of public resources to be done in a manner that 'promotes the equitable development of the country'.<sup>113</sup> The general import of the criteria is to incorporate equity and financial equalisation as a

<sup>110</sup> Art 204(2).

<sup>111</sup> Michelman (2011) 24. See also *Communications Commission of Kenya* para 377.

<sup>112</sup> *Speaker of the Senate* para 173 (emphasis in original).

<sup>113</sup> Art 201(1) (b) (iii).

continuous process of revenue-sharing. In any case, the very notion of equitable sharing of revenue raised nationally, as captured by Articles 201, 202 and 203, envisages equity and social justice as a continuous process. The obligations the object creates are therefore continuous in nature.

### **3.2.3.3 Protection and promotion of minorities and marginalised communities**

In furtherance of equity and inclusiveness, the Constitution makes specific provision for minorities and marginalised communities; one of the objects of devolution is ‘to protect and promote the interests and rights of minorities and marginalized communities’.<sup>114</sup> This provision serves two distinct purposes: first, it is an affirmative action provision to benefit previously marginalised communities which should be uplifted from their marginalization. Secondly, it is a respect, protection and promotion provision meant to protect and promote those communities that may choose to retain a certain lifestyle that is defined as conferring the status of a marginalised community. Article 260 defines a marginalised community as including ‘an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy’. It is submitted that this is a status a community can choose to retain. In the context of such a marginalised community, protection and promotion may mean refraining from interference with the community’s lifestyle, preventing interference by a third party or encouraging and providing public awareness about the community’s lifestyle.

### **3.2.4 Limiting centralisation**

Another object is ‘to enhance checks and balances and the separation of powers’.<sup>115</sup> The concept of devolution is founded on the concept of a combination of self-rule and shared rule. This necessitates the creation of two levels of government with divided and separated powers. By dividing powers and assigning some to county governments and others to national government, devolution reduces the powers of the centre and denies it absolute control of power thereby limiting central power.<sup>116</sup> Through the assignment of both exclusive and

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<sup>114</sup> Art 174(e).

<sup>115</sup> Art 174(i).

<sup>116</sup> Bosire CM *Devolution for Development, Conflict Resolution, and Limiting Central Power: An Analysis of the Constitution of Kenya 2010* (unpublished Phd thesis, University of Western Cape, 2013) 68. See also Baldi

concurrent powers,<sup>117</sup> Kenyan devolution not only captures the concept of self-rule and shared rule, but also that of vertical separation of powers, and checks and balances. Exclusive powers exclude the national government from the domain of counties, thereby denying it absolute power.<sup>118</sup> Even in the concurrent functional areas, the national government's laws can only prevail where constitutionally identified justificatory factors have been demonstrated. Through the protection of their functional areas, the two levels of government are able to check and balance the exercise of power by each other.

The creation of a bicameral Parliament with a Senate as an integral part of devolution also creates mechanisms for limiting the power of the national government. The involvement of the Senate in law-making in matters concerning counties is envisaged as a means of checking and balancing the power of national government. But more important is the Senate's involvement in the amendment of the Constitution. The same applies in cases where the counties are also involved in constitutional amendments. From this perspective, this object of devolution lays a basis for a generous interpretation of powers and functions in favour of county governments.

### ***3.2.5 Decentralisation of state organs and functions***

Article 174(h) includes 'to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya' among the objects of devolved government. The phrase 'state organ' identifies the entities that must decentralise themselves, their functions and services. Read together with the phrase 'from the capital of Kenya', it excludes county governments. Instead, it focuses on only the national government, organs at the national level, and independent institutions such as commissions and independent offices. The use of the phrase 'from the capital of Kenya' requires the national government and these other organs to deconcentrate their functions and services to the countryside through their departments, offices or agents in the field which implement decisions made at the centre. Their functions and services must be spread across the country away from the capital, which is consistent with Article 6(3) that requires national state organs to ensure reasonable access

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B 'Beyond the federal-unitary dichotomy' Working paper, Institute of Governmental Studies, University of California, Berkeley (1999) 6 and 12.

<sup>117</sup> See Chap Six s 4.

<sup>118</sup> Bosire (2013) 70.

to their services in all parts of the country. Decentralisation in this context does not include the creation of local government since this is a competence of county governments.

#### **4 Principles of devolution**

Article 175 sets out three principles of devolved government. Properly interpreted, both the objects and principles of devolved government apply to the concept of devolution generally and to both levels of government. The three principles call for county governments that are subject to democratic principles and separation of powers in their design and operations; that respect the gender representation in their institutional composition; and that have reliable resources to enable them govern and deliver services. Although these principles focus on county governments, their effective realisation in certain instances may require the co-operation and involvement of the national level of government. The phraseology that county governments ‘shall reflect’ these principles appears obligatory thereby making them operative norms that are enforceable. Their enforceability may, however, differ from one principle to another.

##### **4.1 Democratic principles and separation of powers**

The first principle is the requirement that county governments must reflect ‘democratic principles and the separation of powers’. This principle addresses two things. First, the county governments’ institutional arrangement must be based on the doctrine of separation of powers. In this respect, the Constitution has adopted a design that reflects separation between the county assemblies and the county executive committees, ensuring that personnel in one branch cannot be members of the other branch of county government. These design provisions read with this principle make it an enforceable operative norm which binds the county governments by prohibiting membership of one person in both branches of government.

Secondly, in their operations, these branches of county government must also reflect and respect separation of powers in the sense that one branch must not unduly intrude on the functions of the other branch. The county assemblies, for instance, must not involve themselves in the performance of executive functions as this would compromise their ability to effectively oversee the executive. Instead, the two branches must provide checks and balances on each other. In addition, these branches and county governments must generally in their operations reflect and respect democratic principles, which incorporate a combination of representative and participatory democracy. Read with Article 196, which requires county

assemblies to facilitate public participation and involvement in their business, this principle becomes part of an enforceable operative norm.<sup>119</sup>

#### **4.2 Gender representation in county bodies**

The second principle of devolution prescribes that not more than ‘two-thirds of the members of representative bodies in each county government shall be of the same gender’.<sup>120</sup> What is the meaning of ‘representative’ bodies? First, they include elected bodies – county assemblies. Second, they also include appointive positions. Article 81(b), which sets out the general principles for the electoral system, includes the principle that not more than ‘two-thirds of the members of elective public bodies’ should be of the same gender. Whereas this provision is limited in its application to elective bodies, Article 175 is general and covers all representative bodies, including appointed representatives. This approach is further supported by the fact that while in respect of the county assembly this principle is concretised by Article 197, in respect of the county executive committee there is no such concretisation. This means that in the absence of any other provision specifically referring to the composition of the county executive, the Article 175 principle must apply.

The gender terminology draws a distinction between men and women. Interpreted against the Kenyan historical background, the principle in the short term is meant to uplift women and give them more representation. However, it is phrased in terms of gender to ensure that in the long term it might benefit even men who in future may turn out to be the ones who are less represented.

#### **4.3 Reliability of resources for counties**

The third principle is that county governments ‘shall have reliable sources of revenue to enable them to govern and deliver services effectively’.<sup>121</sup> Sources are reliable if they are predictable and county governments know what to expect every year. This is necessary to enable counties to budget on a short to medium term basis. The implication of this is that the principle requires the sharing of the revenue raised nationally to be done on a medium term basis such as the Medium Term Expenditure Framework (MTEF), which is normally a three year framework.

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<sup>119</sup> See Chap 5 section 5.6.4.1. See also *Robert N Gakuru and Doctors for Life*.

<sup>120</sup> Art 175(c).

<sup>121</sup> Art 175(b).

Resources to enable counties ‘to govern and deliver services effectively’ imply sufficiency of funds. This creates a nexus between functions and funds and embodies the doctrine of funds must follow and match functions. The functions comprise the administration functions evidenced by the word to ‘govern’, and the development and service delivery functions evidenced by to ‘deliver services’. The content of these functions must be considered within the context of the functional assignment to counties. This principle must be read with other provisions which incorporate and concretise the concept that resources must follow and match responsibilities.<sup>122</sup> This point is discussed in detail in Chapter Seven.<sup>123</sup> This principle is addressed to national government which plays a critical role in the transfers from revenue raised nationally, and in identifying and authorising additional taxing powers for county governments.

## 5 Concluding remarks

Properly and purposively interpreted, the values, objects and principles of devolution are goals which set the parameters for the exercise of the authority and power conferred upon the national and county governments. As one of the national values of governance, devolution forms part of the basic structure of the Constitution, which cannot be amended out of the Constitution. Although their main purpose is to serve as interpretation aids, when read with other provisions, they may in some circumstances create enforceable obligations. Consequently, some of the values and objects serve to transform some functions and powers into enforceable obligations. The Constitution envisages their usefulness in the realisation and giving of effect to the other provisions of the Constitution in various ways. These include use in interpretation and application of other provisions of the Constitution, enactment, interpretation and application of other laws, and the making and implementation of public policy decisions.

To some extent, comparative jurisprudence has been useful in this chapter. The German and Indian cases in particular have been useful in establishing the doctrine of the basic structure of the Constitution, of which it has been argued that the Kenyan devolution forms a part. The South African cases have also been useful in indicating that objects and values can transform discretionary powers and functions into binding obligations.

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<sup>122</sup> Article 203, providing for the criteria for determining the equitable shares, creates this nexus. Article 187 requires transfer of functions with the necessary funds.

<sup>123</sup> Chap 7 section 2.3.



## CHAPTER FIVE

### The levels of governance, structures, institutions and systems of county governance

#### 1 Introduction

This chapter focuses on the interpretation of the constitutional provisions which establish the orders of government as well as the county territorial units, and the demarcation and alteration of their boundaries. In addition, it interprets the provisions establishing the structures, institutions, and systems of county governance.

#### 2 The levels of governance

The primary constitutional provision governing the constitutional creation of levels of government is Article 1 which provides: '[t]he sovereign power of the people is exercised at – (a) the national level; and (b) the county level'.<sup>1</sup> This provision indicates that the Constitution creates only two levels of government – the national and county. This is reinforced by the delegation of the legislative and executive authority of the sovereign people to institutions at both the national and county levels.<sup>2</sup> Article 6(2) specifically refers to relations among only two levels of government, stating that 'the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation'.

However, this does not preclude the possibility of and a role for a statutorily created local government, an institution that is foreseen in the Constitution. Article 176(2), which empowers county governments to decentralise their functions and provision of their services to lower levels, envisages the creation of local government as a competency of county government. Such decentralisation in respect of cities and urban areas must be done within a national legislative framework enacted under Article 184. Under this Article national government has legislative power to determine criteria for classification of areas as urban areas or cities, establish principles of governance and management of urban areas and cities,

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<sup>1</sup> Art1(4). See also *John Mining Temoi v Governor Bungoma County and others* [2014] eKLR (*John Mining Temoi*) para 42.

<sup>2</sup> Art 1(3). See also Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review* (2010) 91, where it states that '[i]n accordance with the majority's preferences, the levels of government in the RHDC were reduced to two: national and county'.

and provide for the participation by residents in the governance of urban areas and cities. However, the power to apply the criteria and principles lies with the county governments which have power to decentralise their functions and provisions of services in terms of Article 176(2).

### **3 Number and boundaries of counties**

#### **3.1 Forty-seven counties**

Article 6(1), read with the First Schedule, establishes 47 counties which are listed by name but whose boundaries are not defined. Because of this listing, the number and names of counties are constitutional issues which can only be changed through constitutional amendments. Even though they are listed in the schedules to the Constitution, the South African Constitutional Court in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* held that schedules are not explanatory adjunct provisions subordinated to the other provisions of the Constitution: ‘Nor are the Schedules texts lacking constitutional status which could be amended by an ordinary Act of Parliament’.<sup>3</sup> Thus, to increase or reduce the number of counties which are listed in the First Schedule requires a constitutional amendment, as does a change in the name of any one of them.

#### **3.2 Boundaries of the 47 counties**

Although the boundaries are not defined, the 47 counties listed by name in the First Schedule bear names similar to those of the 41 districts provided for in the independence Constitution, as amended and increased to 47 districts by the 1992 Districts and Provinces Act.<sup>4</sup> The Independence Constitution defined both the regions and the districts by listing them by name and defining their boundaries in a schedule to the Constitution. Section 36(1) of the 1963 Constitution divided Kenya into 40 districts and the Nairobi area, which was both a district and a region. Section 36(2) defined the boundaries of the Nairobi area by reference to Part II and the districts by reference to Part III of Schedule 11 of the Constitution.<sup>5</sup> The 1992 Districts and Provinces Act sought to amend the number and boundaries of districts by increasing them from 41 to 47. It is submitted that by adopting the names of the 47 districts,

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<sup>3</sup> 1995 (10) BCLR 1289 (*Executive Council of the Western Cape Legislature*) para 34.

<sup>4</sup> See ss 36(1), (2) and 91 of the Constitution of Kenya 1963; Districts and Provinces Act, 1992.

<sup>5</sup> S 36(1) and (2) Constitution of Kenya, 1963.

the Constitution by necessary implication adopted the boundaries of those districts as defined in the Independence Constitution, as amended by the 1992 Districts and Provinces Act.

As was mentioned by the High Court in *Michuki and Another v Attorney General and 2 others*,<sup>6</sup> the Independence Constitution was amended several times but at no time were the provisions with regard to boundaries affected by the amendments. What is more significant is the fact that the Constitution of Kenya (Amendment) Act of 1968, which produced a revised version of the Constitution after repealing many of the sections that had been amended over the years, including the schedules of the Constitution, did not once again affect the provisions defining the provinces and districts as well as their boundaries. Instead, the Amendment Act explicitly provided for the continuation of the boundaries of the provinces and districts as if they had been re-enacted as part of the Amendment Act.<sup>7</sup> The effect of this was that although Parliament revised the Independence Constitution to make it physically smaller by repealing the very many detailed schedules, it retained the boundaries of the provinces and districts not by retaining the relevant schedule but by re-enactment by reference. Accordingly, the boundaries remained part of the revised Constitution but the exact contents could only be found in Schedule 11 in the 1963 Constitution document.

After the 1992 amendment the President by administrative action, without further amendments to the Constitution, created more districts, raising the number as at 2003 to 74. In the 2008 *Michuki* case, the constitutionality of the Districts and Provinces Act and the new districts that had been created were challenged. One major ground of challenge questioned section 5 of the Districts and Provinces Act which purported to amend section 4 of the Constitution of Kenya (Amendment) Act 1968. The Court found that the section was unconstitutional as an Act of Parliament cannot amend the constitution, which can only be amended by a constitutional amendment following the constitutionally laid down procedures. It therefore declared section 4 of the Act unconstitutional. The Court however upheld the new districts that had been created by the Act but not those by presidential administrative action. Although the number of districts had been increased through presidential decree to 74 by the time of the writing of the Bomas Draft Constitution, the High Court in 2009 in *Job Nyasimi and 2 others v Attorney General and Another*<sup>8</sup> in an interlocutory application declared that all

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<sup>6</sup> (2008) 2 KLR (ep) (“*Michuki*”) 423-32, 426.

<sup>7</sup> S 4 Constitution of Kenya (Amendment), 1968.

<sup>8</sup> (2009) eKLR.

Districts that had been created without following the Constitution and the Districts and Provinces Act were illegal. The Court held that only the 47 districts established by the 1992 Districts and Provinces Act were to be recognised as constitutional.

It is, thus, submitted that the boundaries of the 47 counties which the Constitution adopted by implication are those of the independence districts as amended by this Act. For purposes of establishing the boundaries of the 47 counties Article 6 and the First Schedule of the Constitution must be read together with the re-enacted provisions and schedules of the 1963 Constitution and the amendments to these boundaries introduced by the 1992 Districts and Provinces Act as extra-textual sources. This approach is fortified by the fact that according to the Committee of Experts, it adopted the 47 districts as the counties, since ‘they were lawfully recognized administrative units’.<sup>9</sup>

### **3.3 Alteration of boundaries**

Article 188(1) provides that ‘the boundaries of a county may be altered’. The question is whether boundary alteration is limited to adjustment of boundaries of existing counties or includes creation of new counties or reduction of the existing 47 by merger. The constitutional provisions envisage three possibilities: (a) the adjustment and alignment of the boundaries of the 47 counties, (b) the merger of two or more counties to reduce the number of counties, and (c) the subdivision of one or more counties to create a new county thereby increasing the total number of counties. For the latter two, a constitutional amendment is necessary, while for the first the Constitution prescribes a procedure which is not a constitutional amendment.

#### ***3.3.1 The grounds of alteration***

Article 188(2) identifies the following factors that may either singly or in combination justify alteration of boundaries. The first is ‘population density and demographic trends’<sup>10</sup> which refer to the concentration of population in particular places and the movement of population from other places towards these points of concentration. These trends may arise as a result of urbanisation. The ‘physical and human infrastructure’<sup>11</sup> is the second factor which may involve improvement in the transport, health and educational infrastructure, among others.

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<sup>9</sup> Committee of Experts on Constitutional Review (2010) 92.

<sup>10</sup> Art 188(2)(a).

<sup>11</sup> Art 188(2)(b).

Such improvements may attract people, leading to migration trends and population density that necessitate alteration of boundaries. Thirdly, people with ‘historical and cultural ties’<sup>12</sup> may seek to be in the same county, which may require alteration of boundaries by merger of two or more counties, a division of one county or an adjustment of the boundaries of the existing counties to ensure that a particular population group or community joins their kin in another county. Fourthly, and related to this, are the ‘views of the communities affected’<sup>13</sup> which must be considered. Fifthly, the ‘cost of administration’<sup>14</sup> which may require reduction may call for a merger of two or more counties, or alignment of boundaries. Sixthly, ‘the objects of devolution of government’<sup>15</sup> may call for sub-division in order to give communities an opportunity to manage their own affairs. Finally, ‘geographical features’,<sup>16</sup> which may have been a hindrance to access to services, may have been addressed by the better aligned boundaries.

### ***3.3.2 The process for alteration***

The Constitution provides for a lengthy process requiring the input of an independent commission, Parliament and the people.

#### ***3.3.2.1 Resolution of Parliament to establish the commission***

The first step in this process is a resolution by Parliament to establish an independent Commission for this purpose.<sup>17</sup> The process may be initiated by Parliament on its own motion or by a petition by a member of the public, a county or group of counties to Parliament to set up the commission. The Constitution provides for participatory exercise of the parliamentary powers and Article 119(1) recognises the right of members of public to petition Parliament. This includes the right of one or more counties to initiate the process by petitioning Parliament. The decision setting up the commission is the responsibility of both the National Assembly and the Senate since the provision vests it in Parliament which comprises the two houses. This means that each house must have its own sitting, and following its own decision-making procedures not only pass a resolution to set up the commission but also,

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<sup>12</sup> Art 188(2)(c).

<sup>13</sup> Art 188(2)(e).

<sup>14</sup> Art 188(2)(d).

<sup>15</sup> Art 188(2)(f).

<sup>16</sup> Art 188(2)(g).

<sup>17</sup> Art 188(1).

either identify the persons to serve in the commission or provide for mechanisms through which such persons will be appointed. The resolution is a matter other than a bill which affects counties, and must be passed by the Senate through the county delegation votes.<sup>18</sup> Although it is not a bill, it should be processed in both houses as if it were an ordinary bill since it does not relate to election of members of county assembly or county executive.<sup>19</sup> Neither is it an Annual Allocation of Revenue Bill.<sup>20</sup> Any differences between the two houses must thus be resolved through reconsideration and mediation.<sup>21</sup> The resolution of the two houses must be based on the grounds of boundary alteration discussed above.

Article 188(1)(a) prescribes that the boundaries of a county may only be altered by a Parliamentary resolution adopting recommendations ‘by an independent commission set up for that purpose by Parliament’. This excludes the Independent Electoral and Boundaries Commission because it is not set up for this purpose. Its purpose is to deal with electoral boundaries and not the boundaries of counties.<sup>22</sup>

### **3.3.2.2 Recommendations by an independent commission**

Although this commission is *ad hoc* in nature set up for a specific task, its description by the Constitution as independent must be interpreted as drawing on the principles of the independence of commissions under Chapter Fifteen of the Constitution.<sup>23</sup> In setting it up Parliament is bound by the provisions of this chapter in terms of composition, independence and reporting. Because of the emphasis on the value of participation, and the grounds which must be taken into account when altering the boundaries,<sup>24</sup> it is submitted that the commission has an obligation to hear views from the public in the affected areas before making its recommendations.

### **3.3.3.3 The resolution by Parliament**

Alteration of boundaries can only be effected if the recommendation by the Commission is adopted by a resolution of ‘the National Assembly, with the support of at least two-thirds of

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<sup>18</sup> Art 123(2) and (4).

<sup>19</sup> Art 110(2)(a)(i).

<sup>20</sup> Art 110(2)(a)(ii).

<sup>21</sup> See Arts 112(1) and (2), and 113.

<sup>22</sup> Arts 88(4) (c) and 89(2) and (3).

<sup>23</sup> Chap 15 of the Constitution provides for Commissions and Independent offices.

<sup>24</sup> Art 188(2)(e).

all'<sup>25</sup> its members, and 'the Senate, with the support of at least two-thirds of all the county delegations'.<sup>26</sup> If neither House gets the required support, the resolution is defeated. If successful, the next question is whether the resolution of the two Houses of Parliament is sufficient to effect an alteration of boundaries without a constitutional amendment. Given that the numbers of counties and their names are entrenched in the Constitution, any changes to the number and names would require a constitutional amendment.<sup>27</sup> Yet Article 188 is explicit that boundaries of a county may be altered by a resolution of Parliament. As the *Michuki* case held, an Act of Parliament cannot purport to amend the Constitution, which can only be amended by a constitutional amendment following the constitutionally laid down procedures. Accordingly, a resolution by Parliament within the meaning of Article 188 cannot effect boundary alterations which require a constitutional amendment.<sup>28</sup>

Article 188 should be harmonised with the amendment provisions by being interpreted narrowly to apply to boundary alterations that do not require constitutional amendments. Where boundary alterations are restricted to boundary adjustment and alignment, a resolution within the meaning of Article 188 suffices. Such a resolution would subsequently be read as an extra-textual source in the same manner the boundaries in the Independence Constitution, as amended in 1992, are read. Where, however, the alterations involve the merger of counties to reduce the number, or the subdivision of counties to create new ones, a constitutional amendment of Article 6(1) and the First Schedule would be required. In this event, the resolution under Article 188 should be interpreted narrowly as being a necessary step in the constitutional amendment process. The resolution would then be reduced into a Bill to amend the First Schedule of the Constitution<sup>29</sup> and processed in terms of Article 256.

#### **3.3.2.4 Referendum**

Once Parliament has amended the First Schedule, the next question is whether it should be followed by a referendum in terms of Article 255. The Constitution provides that amendments that relate to 'the objects, principles and structure of devolved government'

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<sup>25</sup> Art 188(1)(b)(i).

<sup>26</sup> Art 188(1)(b)(ii).

<sup>27</sup> Art 6(1).

<sup>28</sup> *Executive Council of the Western Cape Legislature* para 34.

<sup>29</sup> *Executive Council of the Western Cape Legislature* para 34.

must go to the referendum.<sup>30</sup> It is submitted that boundary alterations limited to adjustment and alignment of the boundaries of the existing 47 counties or the change of a county name do not relate to the structure of devolved government and can be passed without a referendum. Likewise, those that increase or reduce the number of counties by just a few do not relate to the objects, principles and structure of devolved government. However, those that involve the change of the total number of counties, either by increment or reduction of the total number do so and must go to the referendum. For example, increasing the counties to a very large number will reduce their geographic size and strength, thereby undermining their ability to counterbalance the centre which is one of the objects of devolution. Similarly, reducing them to a very small number will make them stronger to counterbalance the centre, but this may affect the other objects of devolution, such as inclusive development, protection of minorities and effective delivery of proximate and easily accessible services. Either way, the structure and objects of devolved government would be affected.

Furthermore, the number of counties has implications for the composition of the National Assembly<sup>31</sup> and the Senate,<sup>32</sup> and the voting and decision-making processes.<sup>33</sup> A political party may increase its majorities in the National Assembly and the Senate and significantly change the entire system of governance by simply increasing counties in areas where it is popular and reducing those in areas controlled by the opposition. To guard against such a scenario amendments that change counties numbers must go to the referendum.

#### **4 Separation of powers**

The Constitution determines and organises county structures, institutions and systems of governance. Articles 175 and 176 provide for clear separation of powers between the legislative and executive arms: ‘There shall be a county government for each county, consisting of a county assembly and a county executive.’<sup>34</sup> In addition, Article 235 recognises the right of each county to establish its own administration.

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<sup>30</sup> Art 255(1)(i) and (2).

<sup>31</sup> In terms of Art 97(1)(b), the 47 women members of the National Assembly are based on the total number of counties.

<sup>32</sup> In terms of Art 177(1)(a), each county elects one Senator.

<sup>33</sup> Art 123 reflects the principle of equality of counties with each having one vote.

<sup>34</sup> Art 176(1).



The county government follows pure separation of powers along the lines of the national presidential system, which bars cabinet members from being members of Parliament at the same time. Furthermore, the structure, the recruitment to and removal from office of the county executive draw heavily from the procedures followed at the national level. Similarly, the county legislative arm goes the same route except for the fact that it is not bicameral like the national Parliament. Because of these similarities, it is submitted that where the Constitution is silent about certain county matters, the interpreter may draw analogies from the corresponding provisions in respect of the national government institutions to give meaning to county institutions.

## **5 County assembly**

### **5.1 Composition and election of the county assembly**

In terms of Article 177(1) a county assembly comprises four broad categories of members to represent a variety of interests in a county. These are: members elected in wards; members of marginalised groups; special seat members to ensure gender balance; and the Speaker.

#### **5.1.1 The ward representatives**

The primary group comprises ‘members elected by the registered voters of the wards, each ward constituting a single member constituency’.<sup>35</sup> Although this provision presupposes that each county must be divided into geographic constituencies known as wards, Article 89(3) only provides for the ‘review of the number, names and boundaries of wards periodically’ by the Independent Electoral and Boundaries Commission. This provision implies the power to initially determine the number of wards and demarcate their boundaries as the framers of the Constitution could not have meant review of non-existent wards.

The distribution of wards among the counties should be informed by the criteria and factors set out by Article 89. Delimitation is primarily based on population quotas set out in Article 89(6). However, the number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than forty per cent for cities and sparsely populated areas,<sup>36</sup> and thirty per cent for other areas.<sup>37</sup> It is submitted that just as in the case of delimitation of constituencies for parliamentary elections, the delimitation of wards should

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<sup>35</sup> Art 177(1)(a).

<sup>36</sup> Art 89(6) (a).

<sup>37</sup> Art 89(6) (b).

also take into account geographical features and urban centres; community of interest, historical, economic and cultural ties; and means of communication.<sup>38</sup>

Members in this category are elected for a term of five years ‘on the same day as a general election of members of Parliament, being the second Tuesday in August, in every fifth year’.<sup>39</sup> This is in contrast with the position in some non-centralised countries which hold national and constituent level elections at different times and conducted by different election management bodies.<sup>40</sup>

### **5.1.2 Members of marginalised groups**

The second category comprises ‘members of marginalized groups, including persons with disabilities and youth, prescribed by an Act of Parliament’.<sup>41</sup> This provision requires membership of the county assembly by members of the relevant marginalised groups themselves and not representation by persons not belonging to these groups. In *Commissioner for the Implementation of the Constitution v Attorney General and others*,<sup>42</sup> the Court viewed groups of this kind as having been previously marginalised and denied a chance to participate in governance institutions. Thus, it understood the rationale of such seats as being ‘to open up political space for entry and participation of persons, groups and categories of people who, due to various disadvantages and vulnerabilities, have historically been unable or incapable of generally and effectively finding their way through a strictly competitive methodology and have thus been relegated to the peripheries of the political playground’.<sup>43</sup>

Article 260 defines disability in a very broad manner that discloses a variety and diversity of disabilities,<sup>44</sup> and incorporates elements of the social approach to the definition of disability

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<sup>38</sup> See Art 89(5).

<sup>39</sup> Art 177(1)(a). See Arts 101(1) and 136(2)(a).

<sup>40</sup> This is likely to undermine devolution in the sense that the elections will not focus on local county issues, as the voters will be more focused on and guided by party affiliations informed by the presidential and parliamentary candidates they support. County assembly candidates may lose not because of the local issues they stand for, but the fact that they are not supported by or vying on political party tickets of the presidential and parliamentary candidates preferred at the local level.

<sup>41</sup> Art 177(1)(c).

<sup>42</sup> [2013] eKLR (*Commissioner for the Implementation of the Constitution*).

<sup>43</sup> *Commissioner for the Implementation of the Constitution* para 55.

<sup>44</sup> According to Art 260, disability includes ‘any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or

envisioned by the United Nations Convention on the Rights of Persons with Disabilities.<sup>45</sup> Despite this definitional recognition of diversity of disabilities, the High Court in the context of the composition of the Senate, in *Ben Njoroge and another v Independent Electoral Boundaries Commission (I.E.B.C) and others*,<sup>46</sup> rejected an attempt by the IEBC to depart from the order of priority in the party lists on grounds of diversity of disability. Ougo J stated:

The wording of Article 98(2) (c) in my view is mandatory in that IEBC's mandate was to consider the party lists in order of priority in which the nominees were listed. To argue that they had to achieve the principle of diversity and ensure the two disabilities of physical and visual were represented and that they had to strike a balance in my view was wrong in light of Article 90(2) (b) of the Constitution.<sup>47</sup>

The IEBC is thus bound by the priority in the party lists and cannot change that priority on grounds of the diversity of disability.

Article 177(1)(c) also provides for membership of the county assembly by persons who are themselves youths. Article 260 of the Constitution defines youths as persons who have attained the age of eighteen years but not thirty-five years.<sup>48</sup> The members must be 18 years

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long-term effect on an individual's ability to carry out ordinary day-to-day activities'. Also see the discussion on disabilities in Chap 10 section 3.2.3.

<sup>45</sup> The Convention recognises that disability is an evolving concept and 'results from interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'. It therefore focuses more on the external, attitudinal and environmental barriers which hinder the persons with disabilities from participating fully in the activities of society and seeks to address them. It sees the external barriers as the problem and not the impairments themselves. See UNHR Office of the High Commissioner for Human Rights *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* (2010) Professional Training Services No 17.

<sup>46</sup> [2013] eKLR (*Ben Njoroge*) 17.

<sup>47</sup> *Ben Njoroge* 16.

<sup>48</sup> This is consistent with age of adulthood of 18 years at which Article 83(1)(a) as read with the Registration of Persons Act prescribes for a person to qualify to be registered as a voter and become eligible to vote and stand for election to political office. See also African Union *The African Youth Charter* (2006), which defines youth as young people between the ages of 15 and 35 years; Commission of the European Communities *Youth, Investing and empowering* (2009) EU Youth Report p 6 [http://ec.europa.eu/youth/documents/youth\\_report\\_final.pdf](http://ec.europa.eu/youth/documents/youth_report_final.pdf) (accessed 13 October 2013); and Government of the

and less than 35 years when elected to office. They must remain within this age bracket throughout their term for if they attain the age of 35 years before the end of the term, they must vacate their seats. This is because youth is a qualification for the youth seats and it is to be regarded as any other qualification, the loss of which leads to vacation of the office.

By use of the term ‘including’, Article 177(1)(c) indicates that the marginalised groups are not limited to persons with disabilities and the youth. Other groups and other interests such as community and cultural groups can be identified and included in the group. This interpretation is reinforced by Article 197(2)(a) which requires Parliament to enact legislation to ‘ensure that community and cultural diversity of a county is reflected in its county assembly and county executive committee’. Through the County Governments Act<sup>49</sup> Parliament has provided for six persons to represent the marginalised groups. Their nomination must ensure that community and cultural diversity of the county is reflected in the county assembly,<sup>50</sup> and that there is adequate representation to protect minorities within the county in accordance with Article 197 of the Constitution.<sup>51</sup>

In terms of Article 177(2), the election of members in this category is done through nomination by political parties, in proportion to the ward county assembly seats the parties win in the county. The nomination process is guided by Article 90(1) and (2) which in part requires each political party participating in the general elections to nominate and submit in advance of the elections a list of persons who would stand elected if the party were to be entitled to all the seats provided for under this category. The list must alternate between male and female candidates in the priority in which they are listed. The Election Act prescribes that the list submitted by each political party for this category of members must have eight candidates, four of whom must be persons with disability, while four must be youth.<sup>52</sup> The list must alternate between male and female in the priority in which they are listed.<sup>53</sup> It must also prioritise a person with a disability, the youth and any other candidate representing a

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Republic of South Africa *The National Youth Policy* (2009-2014), which however provides for the age range 14 to 35 years. <http://www.thepresidency.gov.za/medislib/downloads/home/publications> (accessed 13 October 2013).

<sup>49</sup> The County Governments Act 17 of 2012 (CGA)

<sup>50</sup> See s 7(1)(a) CGA.

<sup>51</sup> See s 7(2) CGA.

<sup>52</sup> S 36(1)(f) of the Election Act.

<sup>53</sup> S 36(2) of the Election Act.

marginalised group.<sup>54</sup> The political parties participating in the elections are responsible for the preparation and submission to the IEBC of lists of their nominees in this category.<sup>55</sup> They must ensure that their lists comprise the appropriate number of qualified candidates, arranged as required by the law. Following the declaration of the final results, each party is allocated members from its list in proportion to the total of its elected ward county assembly members,<sup>56</sup> prioritised in terms of their positioning in the party list.

The IEBC has the responsibility to receive, scrutinise and confirm that the lists comply with the requirements of the Constitution and other laws, and reject any that does not comply.<sup>57</sup> After the election of the ward county assembly members, the IEBC must determine the proportion of each political party, allocate and designate from its list of county assembly members under this category.<sup>58</sup> In allocating and designating the members, the IEBC is bound by the prioritisation in the party lists. Although the County Government Act of 2012 provides for six members in this category,<sup>59</sup> the Election Act of 2011 empowers the IEBC to draw from the lists only four members.<sup>60</sup> It is submitted that this conflict should be resolved in favour of the CGA which, being a later statute, should be interpreted as having implicitly repealed the provision of the Election Act.

### **5.1.3 The gender balance special seats**

The third category comprises a ‘number of special seat members necessary to ensure that no more than two-thirds of membership of the assembly are of the same gender’,<sup>61</sup> which gives effect to Article 197(1).<sup>62</sup> Both Articles 177(2) and 90 prescribe that the two-thirds gender balance members have to be nominated by political parties according to their proportion of members elected from the wards.<sup>63</sup> Each party is required to submit in advance of the

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<sup>54</sup> S 36(3) of the Election Act.

<sup>55</sup> Art 90(2)(a).

<sup>56</sup> Art 90(3).

<sup>57</sup> See *Lydia Mathia v Naisula Lesuuda & another* [2013] eKLR (*Lydia Mathia*) 23.

<sup>58</sup> See Arts 90(3), and s 36(4) Election Act.

<sup>59</sup> S 7(1)(a) CGA.

<sup>60</sup> S 36(8) Election Act.

<sup>61</sup> Art 177(1)(b).

<sup>62</sup> Art 197(1) prescribes that not more than two-thirds of the county assembly members shall be of the same gender.

<sup>63</sup> Art 177(2).

elections a list of its proposed members equal to the number of wards in the county.<sup>64</sup> The gender balance members required shall be determined only after the declaration of the elected members from the wards.<sup>65</sup> Indeed, the total number of members in each county assembly can only be determined after such a declaration, and this has to be done in a three-stage process. First, the election of the members from the wards determines not only the gender balance question but also the political party proportions for sharing the six slots for the marginalised groups and the additional gender special members, if any. The second stage involves the nomination of the members of marginalised groups shared among political parties on the basis of their proportion arising out of the party members elected in the wards.<sup>66</sup> The third stage uses the total numbers of members from the two categories to determine whether the gender balance has been attained. If at this stage the two-thirds gender balance is attained from members elected from the wards together with those nominated to represent marginalised groups, then the nominated gender balance candidates would not become members of the county assembly. However, if the balance is not attained then the third stage proceeds to the filling of the slots with members from party lists on the basis of proportional representation informed by the members elected from the wards and the marginalised group representatives.

#### **5.1.4 The Speaker**

Article 177(1)(d) provides for ‘the Speaker, who is an ex officio member’ as a distinct category of membership of the county assembly. Ex officio refers to the fact that the Speaker becomes a member of the county assembly not through the regular election processes such as those relating to the other three categories already discussed, but by virtue of holding the office of Speaker. If the member ceases to be the Speaker, he or she loses membership in the county assembly. Korir J in *Republic v Transitional Authority and Another; ex parte Crispus Fwamba and 4 others*<sup>67</sup> observed in this regard that ‘[t]he fact that he is ex-officio member means that he is a member by virtue of his office. He is not like the other members who become members after undergoing certain electoral processes’.<sup>68</sup>

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<sup>64</sup> S 36(1)(e) Election Act.

<sup>65</sup> See Art 177(3).

<sup>66</sup> Art 177(3).

<sup>67</sup> [2013] eKLR (*Ex parte Fwamba*).

<sup>68</sup> *Ex parte Fwamba* page 9.

The member is elected as Speaker by the members of the assembly. The county assembly elects a Speaker from among persons who are not members of the assembly.<sup>69</sup> The High Court in *Ex parte Fwamba*, relying on *Frankline v Interim Clerk of Machakos County Assembly and 4 others*<sup>70</sup> rejected the proposition that disputes relating to the election of speakers of a county assembly must be dealt with as election petitions. It noted that ‘the election of a speaker of a county assembly is *sui generis*.’<sup>71</sup> Article 178(3), read together with Article 200(2)(c), on the other hand, requires Parliament to enact legislation providing for the election and removal from office of speakers of county assemblies. These provisions envisage legislation which provides for matters such as any additional and specific qualifications for seeking election as speaker; the procedures for nomination and election; the vote percentages required for being declared a winner; and the need for a second vote if these percentages are not secured in the first round of voting. Given that the speaker is listed as a member of the county assembly, the person seeking election as speaker must in the first place be qualified for election as a county assembly member in terms of Article 193.<sup>72</sup>

Since all sittings of a county assembly must be presided over by the Speaker,<sup>73</sup> or in his or her absence, another member of the assembly elected by the assembly,<sup>74</sup> the implication is that the election of the speaker must be done at the first sitting of the county assembly after the general election. It thus follows that the envisaged legislation must provide for the convening of the first sitting of the assembly after the elections of all the other categories of members have been concluded, to ensure that the county assembly is fully and properly constituted. Section 36(4) of the Election Act requires the IEBC to designate from each qualifying party list the nominated candidates who are duly elected as county assembly members, within thirty days after the declaration of the election result. This means that the first sitting of county assemblies ought to be after these thirty days. Yet all county assemblies elected their speakers within 14 days, within which the first sitting was in terms of the transitional provisions of the County Governments Act, required to be held after the first

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<sup>69</sup> Art 178(1).

<sup>70</sup> *Frankline v Interim Clerk of Machakos County Assembly and 4 others* Election Petition No 5 of 2013.

<sup>71</sup> *Ex parte Fwamba* page 9.

<sup>72</sup> See *Justus Nyaribo v Clerk to Nyamira County Assembly* [2013] eKLR page 3.

<sup>73</sup> Art 178(2)(a).

<sup>74</sup> Art 178(2)(b).

elections.<sup>75</sup> The conflict between the two laws should be understood and harmonised within the context of the fact that the provisions of the County Governments Act are transitional, governing the first sitting of county assemblies after the first elections under the Constitution.

The High Court in *Ex parte Fwamba* erroneously rejected the argument that the Nairobi county assembly was not properly constituted when it elected the speaker before the designation of the other members of the assembly. The Court failed to consider section 12 of the First Schedule to the Election Act, which provides that ‘a person shall not be elected as speaker of a county assembly, unless supported by votes of two-thirds of all the members of the county assembly’ and that if none of the candidates gets such votes that there would be a second vote in which only the two top candidates shall participate, with the one getting the highest votes being declared the winner. ‘All the members’ in this provision refers to ‘all the members’ when the assembly is fully constituted. Even after holding as he did, the judge’s conscience was not clear. He thus hastened to add that: ‘However, I must state that our Constitution promotes inclusiveness. In future the Commission should ensure that the nominated members are gazetted at the same time with the elected members so that they can equally participate in the business of the county assembly starting with the election of the speaker’.<sup>76</sup> It is submitted that any legislative provision envisaging election of the speaker before the designation of these other members is unconstitutional and invalid.

## 5.2 Disqualification for election

A person must first successfully go through the test of the disqualifications set out in Article 193(2) before being evaluated for the qualifications set out by Article 193(1). Article 193(1) provides for qualifications a person requires to be eligible for election as a member of a county assembly unless the person is disqualified under sub-article (2). If a person is found ineligible by reason of any of these disqualifications, the fact that he or she meets all the qualifications stipulated under Article 193(1) is irrelevant. Although Article 193(1) explicitly refers to eligibility ‘for election as a member of a county assembly’, it is submitted that read together with other provisions, such as Article 194 discussed later, these matters also become relevant for vacation of office once elected. Article 193(3) sets the following disqualifications:

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<sup>75</sup> See s 136(1) CGA.

<sup>76</sup> *Ex parte Fwamba* page 17.



### **5.2.1 Being a state officer or other public officer**

Article 193(2)(a) renders ineligible for election a person who ‘is a State Officer or other public officer, other than a member of the county assembly’. A ‘State Officer’ includes a ‘member of a county assembly’<sup>77</sup> and a ‘public officer’ includes a person who holds any office in the county government or public service, whose remuneration and benefits are payable directly from the Consolidated Fund or out of money provided by Parliament.<sup>78</sup> This includes employees of all state entities which are fully or partly funded by money provided by Parliament. This ensures that the civil service is not politicised and that it remains professional.

### **5.2.2 Having held office as a member of the IEBC**

Article 193(2)(b) renders ineligible for election a person who ‘has, at any time within the five years immediately before the date of election, held office as a member of the Independent Electoral and Boundaries Commission’. This refers to a person still serving as a member of the IEBC or one who at any time in the last five years served even if he or she is no longer serving. The rationale for barring such members is to allow a cooling-off period and maintain the impartial and independent status of the IEBC. Essentially, the IEBC members must not degenerate into politicians with vested interests in the processes they manage.

### **5.2.3 Having not been a citizen for the last ten years**

In terms of Article 193(2)(c), a person is ineligible for election if he or she ‘has not been a citizen of Kenya for at least the ten years immediately preceding the date of election’. This provision refers to citizens by registration who are only eligible for election after being such citizens for at least ten years.<sup>79</sup> It also refers to citizens by birth who under the former Constitution had lost their citizenship by reason of acquiring citizenship of another country, since the former Constitution did not provide for dual citizenship. Since Article 14(5) entitles such a person to regain Kenyan citizenship on application, he or she would not be eligible unless ten years have lapsed since regaining citizenship.

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<sup>77</sup> Art 260.

<sup>78</sup> Art 260.

<sup>79</sup> See Art 14 on citizenship by registration.

#### **5.2.4 Being of unsound mind**

A person is rendered ineligible if he or she ‘is of unsound mind’.<sup>80</sup> A person of unsound mind is an adult who from infirmity of mind is disordered, deranged, unstable, or unbalanced and is incapable of managing himself or his affairs.<sup>81</sup> Thus, the reason for disqualifying a person of unsound mind is that his or her mental status cannot be trusted to handle the responsibilities of the office. A person is to be regarded of ‘unsound mind’ if there has been a formal state process declaring such a status – for example, if a person has been lawfully placed under curatorship.

#### **5.2.5 Being an undischarged bankrupt**

Article 193(2)(e) renders ineligible a person who is ‘an undischarged bankrupt’. The effect of bankruptcy in law is that a person is declared as being unable to manage his own affairs. If he cannot manage his own affairs, the law deems the person as being incapable of managing the affairs of other people as their representative. The use of the term ‘undischarged’ means that the person must have been declared by a formal court process bankrupt and remains undischarged at the time of the election process.

#### **5.2.6 Serving imprisonment of at least six months**

According to Article 193(2)(f), a person who ‘is serving a sentence of imprisonment of at least six months’ is ineligible for election. This provision focuses not on the conviction but the type of sentence the person is serving. Persons serving shorter periods or sentenced to pay a fine would be able to serve their sentences and still be able to attend to the business of the assembly. The person is disqualified from ‘being elected a member’ and not from being nominated for election as a member. As such, a person who is serving a sentence at the time of nomination but will not be serving at the time of election should be allowed to contest. This must, however, be distinguished from the disqualifications discussed in the next section under which a mere conviction for offences that may, for instance, amount to misuse or abuse of office would suffice regardless of the nature of the sentence.

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<sup>80</sup> Art 193(2)(d).

<sup>81</sup> See the Oxford Dictionary Thesaurus and Word Power Guide (2001) 1421.

### ***5.2.7 Having misused or abused a state or public office or contravened Chapter Six***

Article 193(2)(g) provides for ineligibility of a person who ‘has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six’ of the Constitution. This provision has two important elements that must be examined. The first identifies three distinct grounds that can lead to ineligibility – misuse of a State office or a public office; abuse of a State office or a public office; and contravention of Chapter Six of the Constitution. The second requires that a person must have ‘been found, in accordance with any law’ to have misused or abused office, or contravened Chapter Six for him or her to be rendered ineligible. The finding of misuse or abuse of office or contravention of Chapter Six must be in terms of the relevant law in place, and need not be in a court of law. A finding on the basis of any other mechanisms provided for by law suffices. ‘In accordance with any law’ includes a law that allows a finding of abuse, misuse or contravention of Chapter Six in non-judicial proceedings.<sup>82</sup> For example, a person against whom disciplinary proceedings by the employer were taken, leading to a finding of misuse or abuse of office would be ineligible on the basis of such a finding. Similarly, a state officer who is a professional, such as a lawyer, doctor or accountant who is a member of a professional body, and is found by the disciplinary mechanisms of such a body to have failed to observe the ethical and professional requirements of the body, would be ineligible for election.<sup>83</sup> However, if there is a pending appeal against the finding to a body lawfully provided for to determine such appeals, the person would be eligible for election.<sup>84</sup> The IEBC does not itself make a finding about the identified grounds – it only relies on findings made by other entities.

### **5.3 Qualifications for election**

If a person is not rendered ineligible by Article 193(2), he or she must meet the qualifications prescribed by Article 193(1).

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<sup>82</sup> Ss 40, 41 and 42 of the Leadership and Integrity Act, for instance, delegate the enforcement of the Leadership and Integrity Code to other public entities, which are empowered to investigate any complaint lodged against state officers, working under them and take the prescribed disciplinary action that may lead to ineligibility for election.

<sup>83</sup> See s 11(e) of the Leadership and Integrity Act, 2012.

<sup>84</sup> See Art 193(3).

### **5.3.1 Registered as a voter**

Article 193(1)(a) requires that a person must be a registered voter for him or her to be eligible.<sup>85</sup> As a non-citizen does not qualify for registration,<sup>86</sup> he or she is not eligible for election as a county assembly member. Moreover, Article 78(1), which is part of Chapter Six, is explicit that ‘a person is not eligible for election or appointment to a State office unless the person is a citizen of Kenya’. Being a citizen for purposes of registration and eligibility for election includes dual citizenship. Although Article 78(2) prescribes that ‘a State officer or member of the defence forces shall not hold dual citizenship’, this has been interpreted as not rendering a person ineligible for election or appointment but as barring a person from holding office once elected or appointed.<sup>87</sup>

Though Article 83(2) requires that a person be registered at only one registration centre, there is no requirement for purposes of eligibility that the person be registered in the county where he or she seeks election.

### **5.3.2 Satisfy educational requirements**

Although Article 193(1)(b) does not directly prescribe any educational requirements for election as a county assembly member, it empowers Parliament to do so. The foundation of the requirement of educational qualifications is that Kenya has adopted a republican representative democratic system, which recognises that representatives require certain competencies to be able to discharge their representative mandates and tasks. In *Thuo Mathenge and another v Nderitu Gachagua and 2 others*,<sup>88</sup> the High Court underscored this rationale in the context of the educational qualifications required for election as governor.

Since Article 193(1)(b) empowers Parliament to provide for additional educational qualifications, the issue of unconstitutionality can only arise when standards are set that would be undemocratic. Otherwise a mere setting of educational standards is not in itself unconstitutional. Article 193(1)(b) permits a limitation of Article 38(3)(c) as all the other qualifications and disqualifications. Here, however, the content is determined in legislation.

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<sup>85</sup> See also *Diana Kethi Kilonzo and another v Independent Electoral and Boundaries Commission and 10 others* [2013] eKLR para 86 which deals with registration as voter for eligibility for election as a Senator.

<sup>86</sup> Art 83(1)(a).

<sup>87</sup> *Bishop Donald Kisaka v Attorney General and 2 others* [2014] eKLR (*Bishop Kisaka*) para 14.

<sup>88</sup> [2013] eKLR (*Thuo Mathenge*).

The limitation clause applies to the extent that the educational requirement would render election impossible for ordinary citizens. It is submitted that the county assembly is assigned very important functions which should call for reasonably high standards of formal education. In determining the educational standards to be fixed, Parliament should be guided by the principles of leadership and integrity, which include ‘competence and suitability’.<sup>89</sup>

### **5.3.3 Satisfy moral and ethical requirements**

Article 193(1)(b) requires a member of the county assembly to satisfy ‘moral and ethical requirements prescribed by the Constitution or an Act of Parliament’. The leadership and integrity standards prescribed in Chapter Six are some of the ethical and moral requirements a person seeking election as county assembly member must satisfy. As in the case of abuse or misuse of office, or contravention of Chapter Six, lack of the moral and ethical qualifications required must be based on a finding made, not by the IEBC, but some other entity lawfully authorised to do so. A pending appeal against such a finding would make the person eligible for election.<sup>90</sup>

The High Court in *International Centre for Policy and Conflict and others v Attorney-General and others*<sup>91</sup> explained the rationale and objectives of these integrity provisions thus:

In addition, the Constitution and particularly the provisions of Chapter Six are aimed at improving the lives of citizens through good governance. The processes by which public institutions conduct public affairs, manage public resources, and guarantee the realization of human rights must be in a manner that is free of abuse and with due regard for the rule of law. Impeccable moral and ethical standards on the part of State officers are important prerequisites, in inspiring confidence in the citizens. They also influence, motivate, and enable others to contribute towards the effectiveness and success of the public institutions in which State officers serve or lead.<sup>92</sup>

This qualification becomes operational more as a disqualification leading to ineligibility, as discussed in the foregoing sections, than as a qualification.

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<sup>89</sup> Art 73(2)(a).

<sup>90</sup> Art 193(3).

<sup>91</sup> [2013] eKLR (*ICPC case*).

<sup>92</sup> *ICPC case* para 133.

### **5.3.4 Nominated by a political party or an independent candidate**

According to Article 193(1)(c), for a person to be eligible he or she must be ‘either nominated by a political party; or an independent candidate supported by at least five hundred registered voters in the ward concerned’. The provision thus allows a person to by-pass political parties and stand as an independent.

### **5.4 Vacation of office of a county assembly member**

Article 194(1) provides for vacation of office of a member of a county assembly on a number of grounds. The first instance is if the member dies.<sup>93</sup> The second is if the member is absent from eight sittings of the assembly without the permission in writing of the speaker of the assembly, and is unable to offer a satisfactory explanation for the absence.<sup>94</sup> Sittings in this case should be calculated on the basis of a full day’s sittings depending on the days the assembly is scheduled to meet. A member in default who renders a satisfactory explanation to the Speaker can be excused. The Speaker must, however, exercise his or her discretion in this regard, judiciously and fairly. Such exercise may lawfully be regulated by the rules of procedure which may require the speaker to act through a committee of the Assembly. The third case arises where the member is removed from office under this Constitution or legislation enacted under Article 80 to give effect to the integrity standards set out in Chapter Six.<sup>95</sup> The fourth arises where a member tenders a resignation in writing addressed to the Speaker of the assembly.<sup>96</sup> The fifth instance is where, if having been elected to the assembly as a member of a political party, the member resigns from the party or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause (2); or, as an independent candidate, the member joins a political party.<sup>97</sup> Article 194(2) requires Parliament to enact legislation to provide for the circumstances under which a member of a party may be deemed to have resigned from it.<sup>98</sup> Sixth, all members must vacate office at the end of the term of the assembly which is the last day before the next elections are

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<sup>93</sup> Art 194(1)(a).

<sup>94</sup> Art 194(1)(b).

<sup>95</sup> Art 194(1)(c).

<sup>96</sup> Art 194(1)(d).

<sup>97</sup> Art 194(1)(e).

<sup>98</sup> The Political Parties Act 11 of 2011 has made provision in this regard.

held.<sup>99</sup> Seventh, the member must vacate if he or she becomes disqualified for election on grounds specified in Article 193(2).<sup>100</sup> As already mentioned, some of the matters relevant for eligibility for election are also relevant for removal from office as a county assembly member. If, for instance, in terms of Article 194(1)(g), a member becomes disqualified for election, the member ceases to be a member of the county assembly.

The Constitution also envisages removal from office of a county assembly member on grounds other than those discussed above. Article 104 read together with Article 200(2)(c) envisages removal of a county assembly member by the electorate in the ward he or she represents by way of recall. This is a removal under which the voters are simply saying that they are dissatisfied by the performance of their member. Parliament must however prescribe the grounds and procedure for such a recall.<sup>101</sup>

## 5.5 Internal structures and systems

The effective functioning of the county assembly requires that the assembly should have well designed and organised internal structures, systems and functionaries that facilitate its work. The Constitution provides for the office of the speaker and a committee system for the county assembly. Although the CGA provides for the offices of the Speaker, the Clerk, the majority and minority party leaders, the county assembly service board, and the committees of the county assembly, this chapter discusses only the constitutionally recognised committee system and the office of the Speaker.

### 5.5.1 The Speaker and his or her functions

The office of Speaker of the county assembly is an extremely important office in the new constitutional dispensation. The Speaker is to preside over the proceedings of the county assembly<sup>102</sup> and generally manage its processes. In *Judicial Service Commission v Speaker of the National Assembly and another*,<sup>103</sup> the High Court of Kenya emphasised the importance of the office of the national Speaker and identified a number of its important roles and functions. The Speaker determines the business of the assembly; restrains disorderly conduct

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<sup>99</sup> Art 194(1)(f).

<sup>100</sup> Art 194(1)(g).

<sup>101</sup> Arts 104(2) and 200(2)(c).

<sup>102</sup> Art 178(2) (a).

<sup>103</sup> [2014] eKLR (*Judicial Service Commission*).

and restricts debate. He or she determines ‘whether motions tabled by members of Parliament are admissible. If they are in violation of the Constitution or an Act of Parliament, he may propose changes or rule that they are inadmissible.’<sup>104</sup> The Speaker ‘is the representative of the House in relation to other organs and authorities such as the Presidency and the Senate’, and ‘his rulings are binding precedents’ in the House.<sup>105</sup> The Court then concluded that the Speaker is ‘the presiding and principal officer of the National Assembly on whose shoulders lie the responsibility for the proper constitutional conduct of proceedings and decisions in the National Assembly’.<sup>106</sup> Quoting from the decision of the Tanzanian High Court in *Hon Augustine Lyatonga Mrema v Speaker of the National Assembly and another*, the Court added that the Speaker is ‘the chief functionary and constitutional head’ who is required ‘to discharge duties of a judicial or interpretative character, having finality attached to the same’.<sup>107</sup>

It is submitted that although these statements were made in respect of the Speaker of the National Assembly, they apply in a similar manner to the Speaker of the county Assembly. In *Martin Nyaga Wambora and others v The Speaker of the Senate and others*, the High Court found the Speaker and Clerk of a county assembly guilty of contempt of court for proceeding with a motion for removal of the Governor from office even after being served with court orders stopping the proceedings.<sup>108</sup> The Court stated that ‘it is the responsibility of the Speaker of the County Assembly to preside over the business of the County Assembly. In addition, it is his duty to direct the Clerk of the County Assembly in the preparation of the Order Paper showing the business for each sitting day of the County Assembly.’<sup>109</sup> The essence of this is that the Speaker has the responsibility to admit or not any motion or business for discussion by the assembly, based on the legality and constitutionality of the motion.

The Constitution obligates the county assembly to ensure that its business is conducted in an open manner and that its sittings and those of its committees are held in public.<sup>110</sup> The county

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<sup>104</sup> *Judicial Service Commission* para 85.

<sup>105</sup> *Judicial Service Commission* para 86.

<sup>106</sup> *Judicial Service Commission* para 87.

<sup>107</sup> *Judicial Service Commission* para 87.

<sup>108</sup> [2014] eKLR (*Wambora*).

<sup>109</sup> *Wambora* para 279.

<sup>110</sup> Art 196(1)(a).



assembly must facilitate public participation and involvement in the legislative and other business of the assembly and its committees,<sup>111</sup> and the public and the media may not be excluded from any sittings unless in exceptional circumstances determined by the Speaker.<sup>112</sup> The responsibility of ensuring that all these constitutional requirements are met by the county assembly squarely falls on the Speaker. It is also envisaged that each county assembly will have its own rules of procedure and it will be the responsibility of the Speaker to ensure that the assembly over which he or she presides maintains rules that are functional and can facilitate the proceedings. Furthermore, it is envisaged that sometimes the county assemblies will work through committees; and it will be the responsibility of the Speaker to ensure that such committees are formed and discharge their responsibilities. The county assembly is also charged with the function of vetting and approving appointments by the county executive to various public service positions. The Speaker will need to ensure that the processes are conducted in a transparent and constitutional manner.

The functions of the office must be discharged in an independent and impartial manner, and in good faith, especially given that this is a constitutional public office constituted by one person. The Supreme Court in *Speaker of the Senate* underscored the importance of the office of Speaker, particularly, its ‘role of the presiding officer’ which it regarded as critical.<sup>113</sup> To maintain the impartiality of the Speaker in discharging these very important functions, the county assembly Speaker, just like the Speakers of Parliament, has no vote.<sup>114</sup>

### **5.5.2 Removal from office of Speaker**

Article 178 provides that ‘Parliament shall enact legislation providing for the election and removal from office of the speakers of county assemblies’.<sup>115</sup> In addition, Article 200 empowers Parliament to enact legislation to make provision with respect to ‘the manner of election or appointment of persons to, and their removal from, offices in the county governments, including the qualifications of voters and candidates’.<sup>116</sup> In determining the grounds for removal, once again the moral and ethical standards established under Chapter

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<sup>111</sup> Art 196(1)(b).

<sup>112</sup> Art 196(2).

<sup>113</sup> *Speaker of the Senate* para 140. See also section 3.2.5 of Chap 10 of this study.

<sup>114</sup> Art 122(2)(a) and (4) of the Constitution and s 20(2)(a) CGA.

<sup>115</sup> Art 178(3).

<sup>116</sup> Art 200(2)(c).

Six of the Constitution, become relevant since the Speaker is a ‘state officer’ to whom the chapter applies.

Both the CGA and the Elections Act make contradictory provision in this respect. Section 11 of the CGA provides for removal of the Speaker through a resolution of the county assembly, supported by not less than seventy five per cent of all the members of the county assembly.<sup>117</sup> Section 21 of the Elections Act, on the other hand, provides for such by a resolution supported by at least two-thirds of the members of the county assembly.<sup>118</sup> Given that the Election Act was enacted in 2011 and the CGA in 2012, the provisions of the CGA should prevail over those of the Election Act on grounds that the later law implicitly repealed the earlier law.

### ***5.5.3 The committee system***

A critical amount of the work of a legislative body is done in committees and not in sittings of the full house of the legislative body. Even though there is no constitutional provision that explicitly provides for the establishment of committees of the county assembly; a number of provisions envisage the existence of committees by repeatedly making reference to them. Article 195(1) grants the power to summon witnesses to not only the county assembly but also to ‘any of its committees’. Similarly, Article 196(1) (a) requires the county assembly to ‘conduct its business in an open manner, and hold its sittings and those of its committees, in public’. The same provision empowers Parliament to legislate ‘providing for the powers, privileges and immunities of county assemblies, their committees and members’.<sup>119</sup> Thus, the Constitution by implication provides for committees of the county assemblies.

## **5.6 Functions and powers of the county assembly**

The county assembly has two broad categories of functions – legislative, and oversight.

### ***5.6.1 Legislative functions and powers***

A core function of the county assembly is to legislate on behalf of the people.<sup>120</sup> The political autonomy of the county governments is expressed in the legislative power under which the

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<sup>117</sup> S 11(1) CGA.

<sup>118</sup> S 21(5)(c) of the Elections Act.

<sup>119</sup> Art 196(3).

<sup>120</sup> Arts 1 and 185(2).

county assemblies enact laws on behalf of the county.<sup>121</sup> In terms of Article 185 the county assembly is conferred with legislative functions and powers of making laws that are necessary for effective performance of the functions and exercise of the powers of the county government conferred under the Fourth Schedule.<sup>122</sup> They also have the functions and powers of making laws that are incidental to the effective performance of the functions and exercise of the powers of the county government conferred under the Fourth Schedule.<sup>123</sup>

### **5.6.2 Constitution amendment powers**

As part of its legislative functions and powers, the county assembly plays a role in constitutional amendments commenced by popular initiative. Once the promoters of a constitutional amendment by popular initiative have commenced the process<sup>124</sup> and the Independent Electoral and Boundaries Commission has confirmed that the preliminary requirements have been complied with,<sup>125</sup> the Constitution requires each county assembly to consider and approve or reject the bill within three months before forwarding it to the joint speakers of the two houses of Parliament.<sup>126</sup> A constitutional amendment of this kind is only introduced in Parliament if it has been approved by a majority of the county assemblies.<sup>127</sup> This is an important function because it brings counties to the centre of law-making by giving them a critical voice on the preservation of the Constitution as a whole and devolution provisions in particular.

### **5.6.3 Oversight functions and powers**

The Constitution prescribes that the county assembly, while respecting the principle of separation of powers, has authority to exercise oversight over the county executive committee and any other county executive organ.<sup>128</sup> In *Judicial Service Commission*, the High Court referred to and adopted the definition of oversight<sup>129</sup> rendered by Corder et al, who have

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<sup>121</sup> Task Force on Devolved Government (2011) 73.

<sup>122</sup> Art 185(2).

<sup>123</sup> Art 185(2) also see Chap 6 section 5.2.4 for details on incidental powers.

<sup>124</sup> Art 257(3) and (4).

<sup>125</sup> Art 257(5).

<sup>126</sup> Art 257(6).

<sup>127</sup> Art 257(7).

<sup>128</sup> Art 185(3).

<sup>129</sup> *Judicial Service Commission* para 179. See also section 5 of Chap 10 of this study.

defined it as ‘the crucial role of legislatures in monitoring and reviewing the actions of the executive organs of government’.<sup>130</sup> The oversight function flows from the concept of separation of powers in terms of which the legislature also monitors the implementation of its legislation by the executive.<sup>131</sup> The Court in *Judicial Service Commission* added that ‘oversight encompasses the review, monitoring and supervision of government and public agencies including the implementation of policy and legislation’.<sup>132</sup> The essence of oversight is that while the county executive is assigned executive functions, the county assembly, as part of the mechanisms of checks and balances, oversees how the executive discharges these executive functions. However, oversight functions and powers do not give the county assemblies the right to take over and perform executive functions.

The county assembly has authority to approve various actions by the county executive, divided into two – prior approvals before the actions take effect; and reviews after the fact to ensure that things have been done lawfully and properly.

### **5.6.3.1 Prior approvals**

The first is the power of the county assembly to vet and approve appointments by the governor of the members of the county executive committee.<sup>133</sup> The county assembly is required to ensure that the governor when making such appointments complies with the constitutional requirements and prescriptions. In accordance with Chapter Six of the Constitution, such vetting evaluates the persons concerned not only for their technical competence and suitability for the office they are being appointed to but also the personal integrity required for leadership.<sup>134</sup> In addition, the vetting must ensure not only gender balance and ethnic accommodation but also protection of minorities within the county.<sup>135</sup> While the county assembly may reject the proposed appointment of a person to a particular office and require the governor to propose another person, it cannot itself appoint a replacement as this would be taking over executive functions. The county assembly also

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<sup>130</sup> Corder H, Jagwanth S and Soltau F *Report on Parliamentary oversight and accountability* (1999) 1.

<sup>131</sup> Corder (1999) 2.

<sup>132</sup> *Judicial Service Commission* para 180, quoting Hironori Yamamoto *Parliamentary Oversight: A comparative study of 88 Parliaments*. (2007).

<sup>133</sup> Arts 179(2) and 185(2).

<sup>134</sup> See Arts 73(2)(a) and 232(1) and (2).

<sup>135</sup> See Arts 232(2) and 197(2)(a) and (b). See also *John Mining Temoi* para 52.

plays a role in the removal from office of both the Governor and the members of the executive committee, as detailed below.

Secondly, Article 185 confers on the county assembly the responsibility of receiving and approving plans and policies for the management and exploitation of the county's resources,<sup>136</sup> and the development and management of its infrastructure and institutions.<sup>137</sup>

Thirdly, county governments cannot spend their money unless such expenditure is approved by the county assembly. The county assembly must enact an appropriation bill to authorise any proposed expenditure by the county government.<sup>138</sup> The South African Constitutional Court held that approval of a budget is a legislative function.<sup>139</sup> Fourthly, any borrowing of money by the county government must be approved by the county assembly.<sup>140</sup>

### **5.6.3.2 After-the-fact reviews**

Another oversight function of the county assembly is to monitor and review the actions of the executive to ensure that the executive is acting properly. First, once the county assembly has passed a budget voting money for expenditure by the executive, the county assembly has a responsibility to monitor and ensure that the money is being properly spent. It is for this reason that the Auditor-General is required to submit his or her audit reports to both Parliament and the relevant county assembly.<sup>141</sup> The county assembly must within three months after receiving the report debate and consider the report, and take appropriate action.<sup>142</sup> Appropriate action may include corrective measures of a legislative nature and not executive action, where problems have been identified in the manner the county executive has implemented the budget. In considering the report the county assembly may summon any member of the executive for questioning regarding any issue raised by the report. Without compromising the independence of the office of the Controller of budget, the assembly may

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<sup>136</sup> Art 185(4)(a).

<sup>137</sup> Art 185(4)(b).

<sup>138</sup> Art 224.

<sup>139</sup> *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1998 (12) BCLR 1458 (*Fedsure*) para 45.

<sup>140</sup> Art 212. See further Chap 7 section 4.

<sup>141</sup> Art 229(7).

<sup>142</sup> Art 229(8).

summon the CoB to clarify issues regarding how the county executive is implementing the budget.

This monitoring and review oversight extends to the implementation of all legislation by the executive and other county entities involved in the discharge of county functions.

#### **5.6.4 Performance of functions in a participatory manner**

In the discharge of its functions, the Constitution creates obligations for county assemblies to engage the public in their processes. Key among them is Article 196(1)(b) that prescribes that ‘a county assembly shall facilitate public participation and involvement in the legislative and other business of the assembly and its committees’. The issues to be considered are: whether the provision creates an obligation on the part of the county assembly to facilitate participation; the intersection of the participation right and the duty to facilitate participation; the mutual co-existence of representative democracy and the people’s participation; the nature and scope of the obligation; the threshold of the obligation to facilitate participation; and justiciability of the obligation.

##### **5.6.4.1 Obligation to facilitate public participation and involvement**

By use of the mandatory term ‘shall’, the provision imposes a constitutional obligation to facilitate public participation and involvement. In *Robert N Gakuru and others v The Governor Kiambu county and others*,<sup>143</sup> the High Court, relying on a number of South African decisions, came to the conclusion that the provision indeed establishes an obligation.<sup>144</sup> The duty to facilitate public participation and involvement in the work of the county assembly is an aspect of the right to political participation.<sup>145</sup> This includes engaging in public debate and dialogue with elected representatives at public hearings, and ensuring that the citizens are given the necessary information and an effective opportunity to exercise

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<sup>143</sup> [2014] eKLR (*Robert N Gakuru*).

<sup>144</sup> In *Doctors for Life International v Speaker of the National Assembly* (2006) BCLR 1399 para 14, for instance, the South African Constitutional Court interpreted the use of the term “‘must” facilitate public involvement in the legislative and other processes of the Council and its committees’ in section 72(1)(a) of the country’s Constitution as imposing an obligation upon the legislature to facilitate public involvement in the legislative and other processes of the National Council of Provinces.

<sup>145</sup> Art 38.

their right to political participation.<sup>146</sup> This gives effect to one of the core values of Article 10(2). This Article includes among the values of governance, democracy and participation of the people, good governance, transparency and accountability to the people, which evidence Kenya's combination of representative and participatory democracy.<sup>147</sup>

#### **5.6.4.2 Co-existence of representation and participation**

Although it had been argued in *Robert N Gakuru* that all the wards had elected members of the county assembly who were involved in the enactment of the County Finance Act and therefore adequately represented the applicants, the Court held that '[p]ublic participation ought not to be seen as a derogation from Parliamentary representation or representation at the County Assembly level'.<sup>148</sup> Neither should representation in the county assembly by elected members be a substitute for public participation and involvement. The Court rejected this argument and held that the people must be facilitated to participation.<sup>149</sup> Representation and participatory elements should not be seen as being in tension with each other as they are mutually supportive. On the value and benefits of public participation, the High Court quoted with approval from the South African case of *Doctors for Life*. Elections as the foundation of representative democracy would be meaningless without massive participation by the voters. Continuous participation by the public encourages citizens to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It promotes democratic and pluralistic accommodation which produces laws that are widely accepted, thereby strengthening the legitimacy of the laws. Participation also acts as a counterweight to secret lobbying and influence-peddling. Democracy must be both representative and participatory for it to be accountable, responsive and transparent to the people.<sup>150</sup>

#### **5.6.4.3 Nature and scope of the obligation**

The nature and scope of the obligation to 'facilitate public participation and involvement', calls for examination of the terms 'facilitate', 'participation' and 'involvement'. To facilitate

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<sup>146</sup> See *Robert N Gakuru* para 54 quoting *Doctors for Life* para 105.

<sup>147</sup> See also Art174 and *Doctors for Life* para 110 and 111.

<sup>148</sup> *Robert N Gakuru* para 55.

<sup>149</sup> *Robert N Gakuru* para 78.

<sup>150</sup> *Robert N Gakuru* para 55 quoting *Doctors for Life* para 115.

refers to ‘make easy or easier’, to ‘promote’ or to ‘help forward’.<sup>151</sup> To participate is to take part, be or become actively involved with others in an action or matter.<sup>152</sup> ‘Involvement’ refers to the action of including, engaging or significantly associating someone in something.<sup>153</sup> To involve the public is therefore to include, engage and significantly associate the public with the legislative process. It is the process of allowing the public to participate in the decision-making process. To facilitate public participation and involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process of the county assemblies.<sup>154</sup> In *Francis Chachu Ganya and 4 others v Attorney General and another*,<sup>155</sup> the High Court observed that ‘[p]articipation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views’.<sup>156</sup>

The county assemblies have the discretion of determining how best to fulfill their duty to facilitate public participation and involvement. The Constitutional Court in *Doctors for Life* however noted that although the legislature itself has the discretion to determine the best way to go about it, ‘the duty to facilitate public involvement will often require Parliament and the Provincial Legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.’<sup>157</sup> When a court is called upon to determine whether the county assembly has complied with its duty to facilitate public participation in a particular case, consideration must be given to what the county assembly has itself assessed as an appropriate method for participation. In the *Doctors for life* case the Court observed that:

The question will be whether what Parliament has done is reasonable in the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by the Parliament to facilitate public

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<sup>151</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 449.

<sup>152</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 935.

<sup>153</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 687. See also *Robert N Gakuru* para 55 quoting *Doctors for Life* para 119.

<sup>154</sup> See *Doctors for Life* para 120.

<sup>155</sup> [2013] eKLR (*Francis Chachu Ganya*).

<sup>156</sup> *Francis Chachu Ganya* para 30.

<sup>157</sup> *Doctors for Life* para 145.



participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the court must balance, on the one hand, the need to respect Parliamentary institutional autonomy, and on the other, the right of the public to participate in the public affairs. In my view, this balance is best struck by this court considering whether what Parliament does in each case is reasonable.<sup>158</sup>

This duty requires the county assembly to take positive steps and measures to facilitate public participation in Bills under consideration. The court then identified at least two aspects of the duty: 'the duty to provide meaningful opportunities for public participation' and 'the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided'.<sup>159</sup> It should be perceived as a continuum that ranges from providing information and building awareness to partnering in decision-making.<sup>160</sup>

The nature and extent of public participation that is reasonable in a given case depend on factors such as the nature and importance of the legislation and the intensity of its impact on the public. If there is a specific group that can be identified as directly affected by the legislation, the legislature will be expected to ensure that such a group is given a reasonable opportunity to have a say.

Having examined and referred to these South African cases, the High Court in *Robert N Gakuru* came to the conclusion that 'public participation ought to be real and not illusory and

<sup>158</sup> *Doctors* para 146.

<sup>159</sup> See *Doctors for Life* para 129.

<sup>160</sup> In *Matatiele Municipality and others v President of the Republic of South Africa and others* 2007 (1) BCLR 47 (CC) para 55, the South African Constitutional Court observed: 'The Constitution contemplates that the public should be given the opportunity to participate in the law-making process. When the provincial legislatures make rules to regulate their proceedings, they are required to do so with due regard to representative and participatory democracy, accountability, transparency and public involvement. In addition they are empowered to hold public hearings and receive petitions, representations or submissions from any interested persons or institutions.'

ought not to be treated as a mere formality for purposes of fulfillment of the Constitutional dictates .... [I]t behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively'.<sup>161</sup> The Court observed that the county assemblies must go beyond mere tweeting of messages and leaving it to those who care to scavenge for information. They must 'do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspects as payment of taxes and levies, the duty is even onerous'.<sup>162</sup> The Court, however, cautioned that being involved does not necessarily mean that everybody must be heard orally.<sup>163</sup> Similarly, it does not mean that one's views must prevail,<sup>164</sup> they however, have to be considered in good faith before arriving at a decision.

#### **5.6.4.4 Justiciability of the obligation**

Public participation is a critical part of the legislative process and is part of the manner and form of the legislative process prescribed by the Constitution. Thus, failure by the county assemblies to facilitate public participation and involvement is justiciable and the courts can intervene to correct the error. The Court in *Robert N Gakuru* after extensively quoting from South African decisions arrived at the position that the courts must intervene where the obligation to facilitate public participation and involvement has not been discharged.<sup>165</sup> For instance, the Court quoted *Doctors for Life* thus:

Under our Constitution, therefore, the obligation to facilitate public involvement is a requirement of the law-making process. It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid.<sup>166</sup>

Being a critical part of the manner and form of the legislative process, all the rules discussed in Chapter Ten regarding the justiciability of the manner and form of the legislative process

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<sup>161</sup> *Robert N Gakuru* para 75.

<sup>162</sup> *Robert N Gakuru* para 75.

<sup>163</sup> *Robert N Gakuru* para 67.

<sup>164</sup> *Robert N Gakuru* para 71.

<sup>165</sup> *Robert N Gakuru* para 63.

<sup>166</sup> *Doctors for Life* paras 207 and 208.

by the Senate apply to the county assemblies in the same manner. A county law would be rendered invalid for failure to facilitate public participation and involvement.

## **6 The county executive**

The Constitution provides that each county shall have a county executive, which is the equivalent of the Cabinet at the national level and in which, vests the county executive authority.<sup>167</sup>

### **6.1 Election of the governor**

The head of the executive arm of a county government is the governor. Even though the Constitution describes the governor and his deputy as the chief executive and deputy chief executive of the county respectively,<sup>168</sup> this does not connote the concept of a chief executive from a management perspective, but is meant to identify him as the political head of the county government in the same manner the Constitution describes the president as the head of government.

In line with the presidential system the Constitution provides for the election of the county governor directly by the registered voters in the county,<sup>169</sup> together with a deputy as a running mate.<sup>170</sup>

The governor and deputy governor must be eligible for election as members of a county assembly.<sup>171</sup> The rules regarding the election of the county assembly, particularly those dealing with qualifications and disqualifications, apply to the election of the governor and the deputy.<sup>172</sup> Such a person must be a registered voter, satisfy any educational, moral and ethical requirements prescribed by the Constitution or an Act of Parliament, and should be nominated by a political party.<sup>173</sup> Alternatively, the person could be an independent candidate who in the case of election as a county assembly member must be supported by at least five

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<sup>167</sup> Art 179(1) and (2)(b).

<sup>168</sup> Art 179(4).

<sup>169</sup> Art 180(1).

<sup>170</sup> Art 180(5).

<sup>171</sup> Art 180(2).

<sup>172</sup> See section 5.2 on eligibility for election as county assembly member.

<sup>173</sup> Art 193(1).

hundred registered voters in the ward.<sup>174</sup> Should the candidate be supported by five hundred registered voters from the county or five hundred from each ward in the county? Article 137(1)(d), which requires that a candidate who stands election for president, whether independent or not, must be nominated by not fewer than two thousand voters from each of a majority of the counties, should be adapted for use for the election of the governor and his deputy. Thus, a candidate for governor or deputy governor should be supported by five hundred registered voters in a majority of the wards in the county. The qualifications are not a closed list as the Constitution recognises and permits the introduction of additional educational, moral and ethical qualifications by legislation.<sup>175</sup> In *Thuo Mathenge* the High Court emphasised the need for educational qualifications for election as governor thus:

In answering this question one needs to look at the intention and purpose of having educational requirement (sic) both in the Constitution and Election Act. I take the view that the said provisions was (sic) aimed at improving standard of representation and an attempt at good governance because the business of a County requires certain level of competence as is required in other profession since education centrally broadens the vision, adds to knowledge, brings about maturity and enlightenment which is necessary in administration of the County.

The issue of educational qualification of a candidate is therefore very crucial as its determination will go a long way to carve out the path on which the politics and leadership of the counties has to be run and I therefore take the view that the degree which is required for one to run for that office of Governor must be a valid degree issued by a university recognised in Kenya and that the Commission for University Education (formerly Higher Education) must validate the said degree and authenticate the institution which awarded the degree under Regulation 47(2) of the Election (General) Regulations 2012 otherwise the constitutional and statutory requirement of a degree will be defeated.<sup>176</sup>

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<sup>174</sup> Art 193(1)(c)(ii).

<sup>175</sup> Art 193(1)(b).

<sup>176</sup> *Thuo Mathenge* paras 6 and 7.

The Constitution limits the governor and the deputy to two terms of five years each.<sup>177</sup> This must, however, be read together with Articles 180(8) and 182(3) which provide a situation under which a deputy governor or any other person assumes office of governor for the remainder of the term when it falls vacant before the end of a term. Such remainder of the term is regarded as a full term if the person assumes office more than two and half years before the date of the next regularly scheduled election,<sup>178</sup> and not a full term in any other case.<sup>179</sup>

## **6.2 Vacation of the office of governor**

Other than the cases of death and resignation,<sup>180</sup> the Constitution provides for two broad circumstances under which the office of governor may fall vacant: vacation of office<sup>181</sup> and removal from office.<sup>182</sup> While vacation from office is mandatory once the identified circumstances have arisen, removal from office is discretionary since Article 181(1) employs the phrase ‘may be removed’.

### ***6.2.1 Vacation of office upon ceasing to be eligible for election***

Article 182(1)(c) prescribes that ‘the office of a county governor shall become vacant if the holder of the office ceases to be eligible to be elected county governor under Article 180(2)’. As already discussed, since a candidate for election as a governor must be eligible for election as a county assembly member, he or she must successfully go through the test of disqualifications under Article 193(2) as well as meet the qualifications under Article 193(1). If after being elected as governor the person by reason of any one of these matters becomes ineligible for election to the office, the office becomes vacant by operation of law. If the governor purports to remain in office, a voter or other interested party can move the Court to declare that the office has become vacant. For example, if a governor is elected as a candidate sponsored by a political party, but subsequently he or she expressly or by conduct resigns from the party, he or she must vacate office.<sup>183</sup> In addition, a governor who ceases to be

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<sup>177</sup> Art 180(7).

<sup>178</sup> Art 182(3)(a).

<sup>179</sup> Art 182(3)(b).

<sup>180</sup> Art 182(1)(a) and (b).

<sup>181</sup> Art 182(1)(c) and (d).

<sup>182</sup> Art 182(1)(e).

<sup>183</sup> Art 193(1)(c)(i).

eligible for election by reason of contravention of Chapter Six of the Constitution automatically loses the office of governor by operation of law, and a party can approach the court for a declaration to that effect.

### ***6.2.2 Vacation of office upon conviction of an offence***

Article 182(1)(d) prescribes that the office of governor must become vacant if the governor 'is convicted of an offence punishable by imprisonment for at least twelve months'. This provision is consistent with the fact that Article 193(2)(f) prescribes 'a sentence of imprisonment of at least six months' as a disqualification for election. This is however subject to any appeal against the sentence being first determined.<sup>184</sup> This is because the moral standing of such a governor would be in question in addition to such a governor being unable to effectively discharge the functions of his office while in prison. If the sentence is, however, suspended, then the office should not become vacant.

### ***6.2.3 Removal from office of the governor***

Consistent with the value of a republican system of government which requires that representatives of the people hold office during good behavior, one instance of vacation of office is through the removal of the governor from office before end of term for bad behavior, among other reasons. In terms of Article 182(1)(e) the office of a governor shall become vacant if the governor 'is removed from office under this Constitution'. Such removal is governed by Article 181, which establishes an impeachment process.

#### ***6.2.3.1 Grounds for removal under impeachment***

The Constitution identifies the following grounds as a basis for removal of a county governor from office: (a) gross violation of the Constitution or any other law;<sup>185</sup> (b) serious reasons for believing that the county governor has committed a crime under national or international law;<sup>186</sup> (c) abuse of office or gross misconduct, or (d) physical or mental incapacity to perform the functions of the office.<sup>187</sup> These grounds are similar to those the Constitution provides for the removal of the President from office by way of impeachment by

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<sup>184</sup> Art 193(3).

<sup>185</sup> Art 181(1)(a).

<sup>186</sup> Art 181(1)(b).

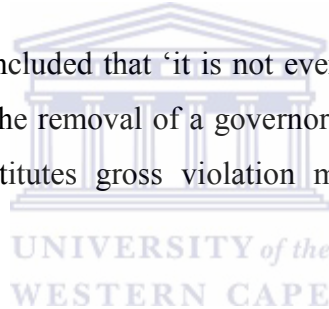
<sup>187</sup> Art 181(1)(c).

Parliament.<sup>188</sup> Each one of them is a jurisdictional fact comprising different aspects which must be established to form a basis for the bringing of the motion for removal.

### 6.2.3.1.1 Gross violation of the Constitution or any other law

In the case of ‘gross violation of this Constitution or any other law’,<sup>189</sup> the jurisdictional fact lies not in every violation of the Constitution or any other law, but in the grossness of the violation. The ordinary dictionary meaning of the word gross is something ‘blatantly wrong or unacceptable’.<sup>190</sup> In *Hon Lady Justice Nancy Makokha Baraza* the Tribunal established to remove the Deputy Chief Justice from office, defined the use of the term ‘gross’ to ‘suggest that the conduct was glaring, flagrant or very bad’.<sup>191</sup> In *Wambora*, the High Court adopted the definition of gross rendered by the Nigerian Supreme Court in *Hon Muyiwa Inakoju and others v Hon Abraham Adeolu Adeleke*,<sup>192</sup> in which gross was defined as something ‘atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious, and shocking’.<sup>193</sup> It must be some extremely negative conduct.<sup>194</sup>

The Kenyan High Court then concluded that ‘it is not every violation of the Constitution or written law [which] can lead to the removal of a governor, it has to be a gross violation’.<sup>195</sup> The court held that what constitutes gross violation must ‘be serious, substantial and



<sup>188</sup> See Art 145(1).

<sup>189</sup> Art 181(1)(a).

<sup>190</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 564.

<sup>191</sup> Tribunal Matter No. 1 of 2012 para 43.

<sup>192</sup> *Hon. Muyiwa Inakoju and others v Hon Abraham Adeolu Adeleke* Supreme Court of Nigeria S.C 272 of 2006.

<sup>193</sup> *Hon. Muyiwa Inakoju and others v Hon Abraham Adeolu Adeleke*.

<sup>194</sup> In *Wambora* para 251, the High Court quoted the Nigerian Supreme Court which identified grave violations or breaches of the Constitution capable of being described as gross thus: ‘(a) interference with the constitutional functions of the legislature and the judiciary by an exhibition of overt unconstitutional executive power, (b) abuse of the fiscal provisions of the Constitution, (c) abuse of the code of conduct for Public Officers, (d) disregard and breach of Chapter IV of the Constitution on fundamental rights, (e) interference with local government funds and stealing from the funds, pilfering of the funds including monthly subventions for personal gains or for the comfort and advantage of the State Government, (f) instigation of military rule and military government, (g) any other subversive conduct which is directly or indirectly inimical to the implementation of some other major sectors of the Constitution.’

<sup>195</sup> *Wambora* para 252.

weighty'.<sup>196</sup> It ruled out vicarious liability against the governor by holding that 'there must be a nexus between the governor and the alleged gross violations of the Constitution or any other written law'.<sup>197</sup> The governor cannot therefore be removed on the basis of just any allegation of violation of the constitution or the law, but only for gross violation linked to his or her own actions or omissions.

#### **6.2.3.1.2 Serious belief that there has been commission of crime**

The second case of 'where there are serious reasons for believing that the county governor has committed a crime under national or international law'<sup>198</sup> is constituted by two distinct factors: reasons for the belief that a crime has been committed and the nature of the crime. First, it is not every belief that would justify the removal of a governor. The jurisdictional fact lies in the requirement that the belief must be based on 'serious reasons'. The party bringing the removal process must allege some facts which constitute the serious reasons for his belief. Serious reasons are weighty, important, grave, critical or momentous reasons as opposed to frivolous ones. Thus, the belief that the governor has committed a crime must be based on strong evidence of an unproven fact. This ground must be distinguished from cases that require a conviction and sentence as it deals with cases where there is no conviction by a court. Because of the absence of a court conviction, there must be compelling reasons to believe guilt – pre-empting a criminal charge.

Secondly, the nature of the crime believed to have been committed must be recognised either under national or international law. Given that crimes under international law are serious ones, not all crimes under national law should suffice – only serious crimes should. Furthermore, even where a conviction leads to vacation of office, only conviction for serious offences punishable by imprisonment for at least twelve months suffices.<sup>199</sup>

#### **6.2.3.1.3 Abuse of office or gross misconduct**

A governor may also be removed in terms of Article 181(1)(c) for 'abuse of office or gross misconduct'. With regard to 'abuse of office' the dictionary definition of 'abuse' is 'to use wrongly, improperly, incorrectly, corruptly or to misuse, or to abuse one's authority or

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<sup>196</sup> *Wambora* para 252.

<sup>197</sup> *Wambora* para 252.

<sup>198</sup> Art 181(1)(b).

<sup>199</sup> See Art 182(1)(d).



privileges’.<sup>200</sup> Thus, to abuse office is to use the office of governor wrongly, improperly incorrectly, or corruptly for purposes other than those mandated by the Constitution. With regard to ‘gross misconduct’ the definition ascribed to the word gross in relation to gross violation applies to misconduct in the same manner. Misconduct, on the other hand, is defined as ‘improper conduct, wrong behaviour, or unlawful conduct by an official in regard to his or her office’.<sup>201</sup> This ground is distinguished from the previous one in the sense that while on the previous ground the conduct must be what constitutes a crime, gross misconduct on this ground need not amount to a crime for it to suffice as a ground for removal. Conduct in both official office and private life could suffice as gross misconduct. However, not all misconduct by the governor forms a basis for removal from office – the misconduct must be gross.

#### **6.2.3.1.4 Removal on medical grounds**

In terms of Article 181(1)(d), a governor may be removed from office on grounds of ‘physical or mental incapacity to perform the functions of office of county governor’. The jurisdictional fact that must be proved is the physical or mental state of the governor which makes it impossible for him or her to discharge the functions of the office of governor. But it is not every physical or mental condition that will lead to removal. It must be a condition that results in incapacity to perform the functions of the office. There are many conditions which can afflict a person without incapacitating him or her.

Section 33 of the County Governments Act provides that the procedures followed for the removal of the President under Article 144 of the Constitution should, with necessary modifications, apply to the removal of the governor.<sup>202</sup> It is submitted that the justiciability rules discussed in a subsequent section apply in respect of removal on medical grounds.

#### **6.2.3.2 Procedure for removal**

The Constitution is silent about the procedures and processes for removal; instead it leaves it to Parliament to attend to these through legislation.<sup>203</sup> Through the CGA, Parliament has provided for procedures and processes which draw heavily from those provided for by the

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<sup>200</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 7.

<sup>201</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 825.

<sup>202</sup> S 33(9) CGA.

<sup>203</sup> Art 181(2).

Constitution for the impeachment of the President. The process is not judicial; the county assembly commences the proceedings by bringing the charges and the Senate investigates and makes a finding. The Act requires that the removal proceedings be commenced by a member of the county assembly who is supported by at least a third of all the members, giving notice to the Speaker of his or her intention to move a motion for the removal of the governor under Article 181 of the Constitution.<sup>204</sup> If upon moving the motion it gets supported by at least two-thirds of all the members of the county assembly, the Speaker of the county assembly is obligated to inform the speaker of the Senate within two days of the passing of the motion.<sup>205</sup> The Speaker of the Senate is then required, within seven days of receiving the notice to convene a meeting of the Senate, to hear the charges against the Governor.<sup>206</sup> At such a meeting, the Senate may resolve to appoint a special committee comprising eleven of its members to investigate the matter.<sup>207</sup>

The committee must investigate the matter and report its findings to the Senate within ten days.<sup>208</sup> In the course of the investigations, the governor has a right to appear and be represented before the special committee to defend himself or herself against the allegations made.<sup>209</sup> In the event of a report to the effect that the allegations have not been substantiated, there would be no further proceedings and the matter comes to an end.<sup>210</sup> But if the committee reports that the allegations have been substantiated, the Senate shall give the governor an opportunity to be heard before it votes on the impeachment charges.<sup>211</sup> If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.<sup>212</sup> If however the Senate fails to secure the required majority, the governor continues in office and the motion can only be re-introduced in the Senate after three months.<sup>213</sup> Since the removal of a governor goes to the very core of county

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<sup>204</sup> S 33(1) CGA.

<sup>205</sup> S 33(2)(a) CGA.

<sup>206</sup> S 33(3)(a) CGA.

<sup>207</sup> S 33(3)(b) CGA.

<sup>208</sup> S 33(4) CGA.

<sup>209</sup> S 33(5) CGA.

<sup>210</sup> S 33(6)(a) CGA.

<sup>211</sup> S 33(6)(b) CGA.

<sup>212</sup> S 33(7) CGA.

<sup>213</sup> S 33(8) CGA.

government, this is a matter concerning counties and the votes must be by the 47 county delegations.

### **6.2.3.3 Justiciability of the removal process**

Although the responsibility for removal of a governor has been constitutionally and legally reposed in the county assembly and the Senate, the process of discharging this responsibility is justiciable. As such, the doctrine of the political question cannot be raised as a bar against the court's exercise of its supervisory and interpretative jurisdiction. The High Court in *Wambora* considered this issue and held that although the doctrine of the political question imposes a fundamental limitation upon judicial power in order to ensure that courts do not intrude into areas committed to the other branches of government,<sup>214</sup> the court has jurisdiction to interpret the constitutional limits of what has been committed to the other branches and the extent of such committal. It examined the United States' Supreme Court decision of *Walter L Nixon v United States*,<sup>215</sup> which held that the political question doctrine proscribed judicial non-interference where 'the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches'.<sup>216</sup> The US Supreme Court noted, however, that 'the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power'.<sup>217</sup>

It is therefore the responsibility of the Court to review legislative and executive action including their interpretation of the Constitution, 'that transgresses identifiable textual limits'.<sup>218</sup> The High Court then concluded that 'the impeachment claim was not justiciable and could not be resolved by the Courts because the language and structure of [the Constitution and the law] reposed the sole authority of impeachment on the Senate'.<sup>219</sup> However, if the Court 'finds that either the County Assembly or the Senate contravened the Constitution and the law in the process of removing the [Governor] from office it must intervene by granting appropriate reliefs'.<sup>220</sup> Though the county assembly and the Senate

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<sup>214</sup> *Wambora* para 201.

<sup>215</sup> *Walter L Nixon v United States* 506 US 224 (1993).

<sup>216</sup> *Wambora* para 204 quoting the Nixon decision.

<sup>217</sup> *Wambora* para 204 quoting the Nixon decision.

<sup>218</sup> *Wambora* para 204 quoting the Nixon decision.

<sup>219</sup> *Wambora* para 205.

<sup>220</sup> *Wambora* para 207.

have powers to remove the Governor from office, they must do so within the limits prescribed by the Constitution.

Two distinct circumstances in which the court can intervene are identified. First, a county assembly and the Senate cannot be allowed to take a Governor through a removal process if there is no allegation in respect of the listed grounds. Permitting such would be allowing an abuse of the process. A court of law can thus inquire into the removal process on grounds that the charges do not allege any one of these jurisdictional facts. In *Wambora* the Governor had been charged with ‘violation of the Constitution; violations of the Public Procurement and Disposal Act 2005 and Regulations 2013; violation of the Public Finance Management Act 2012; violation of the County Government Act 2012; [and] abuse of office’, and was found guilty and impeached by the Senate on grounds of ‘violation of the Public Procurement and Disposal Act, 2005 and Regulations 2013; violation of the Public Finance Management Act, 2012; [and] violation of the Constitution of Kenya’.<sup>221</sup> The High Court, having been urged to find that the charges as framed did not meet the constitutional threshold for failing to allege gross violation,<sup>222</sup> held that ‘[t]he charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law’.<sup>223</sup> It added that ‘[t]he charges as framed must state with [a] degree of precision the Article(s) or even sub-Article(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated’.<sup>224</sup>

Secondly, the removal process is justiciable on grounds of lack of due process. Although the process is undertaken by political bodies – namely, the county assembly and the Senate – it is quasi-judicial and subject to the constitutional requirements of due process. Both the county assembly and the Senate must observe and respect constitutional due process requirements. A court can therefore inquire into the removal process if it is alleged that there was breach of constitutional due process requirements. The Court in *Wambora* held that ‘for the removal process to be valid, the process used must strictly adhere to both the substantive and the procedural law contained in both Article 181 of the Constitution and section 33 of [the

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<sup>221</sup> *Wambora* para 242.

<sup>222</sup> *Wambora* para 243.

<sup>223</sup> *Wambora* para 253.

<sup>224</sup> *Wambora* para 253.

County Government] Act respectively'.<sup>225</sup> In particular, the governor must be given notice and a fair hearing at both the county assembly and the Senate proceedings. Indeed, the Senate has responsibility to investigate the process used by the county assembly in making its resolution for removal, and if it finds that the county assembly did not comply with the Constitution and the law, it may refuse to admit the resolution. According to the Court, this was meant to make the removal process self-correcting without precluding the Court's supervisory jurisdiction.<sup>226</sup>

Since Article 181(2) requires Parliament to enact legislation to provide for procedures for removal, any procedural limitations provided for by the CGA are justiciable for as long as they are constitutional.

### **6.3 Functions of the governor**

The Constitution does not explicitly set out the functions and powers of the governor but many are implied by a number of constitutional provisions. Others can be implied by drawing analogies with some of the powers of the President. The County Governments Act has provided clarity by identifying various categories of functions and powers of the governor.

One set of the governor's functions falls in the arena of appointment of persons to various positions and offices and their dismissal from such offices. The governor appoints members of the county executive<sup>227</sup> and, in terms of Article 235, he appoints and confirms persons to hold or act in certain county offices.<sup>228</sup> According to Article 183 the governor as the head of the county executive committee implements county legislation,<sup>229</sup> national legislation within the county to the extent that the legislation requires,<sup>230</sup> and manages and coordinates the functions of the county administration and its departments.<sup>231</sup>

There are also functions which the governor can draw from transfers of functions from the national level of government or delegation of functions by the national government through legislation or administrative action. These are implied by Article 187 which envisages

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<sup>225</sup> *Wambora* para 233.

<sup>226</sup> *Wambora* para 236 and 237.

<sup>227</sup> Art 179(2)(b) and s 30(2)(d) CGA.

<sup>228</sup> Art 235(1)(b); see also s 44 (2)(a) and (b) and 44(1)CGA.

<sup>229</sup> Art 183(1)(a).

<sup>230</sup> Art 183(1)(b).

<sup>231</sup> Art 183(1)(c).

transfer of functions through agreement between the national and county levels of government.<sup>232</sup> Arising out of this the Act has clarified that the president may from time to time, through mutual consultations with the governor, assign some of his or her state functions to the governor.<sup>233</sup>

#### **6.4 Deputy Governor**

The Constitution provides for the position of deputy governor as one of the members of the county executive committee.<sup>234</sup> The deputy governor is elected together with the governor as a running mate.<sup>235</sup> Each candidate for election as governor is required to nominate a person to run with him or her as a candidate for the office of deputy governor.<sup>236</sup> Upon the candidate for the office of governor being declared the winner, the nominated candidate for the office of deputy governor is also declared elected as deputy governor.<sup>237</sup> Such a person must have the same qualifications required from the person seeking election as governor; and must be a person qualified for election as a member of the county assembly. Like the governor, the deputy governor is prohibited from holding office for more than two terms.

Because the deputy governor is elected with the governor and not appointed, when a vacancy occurs in the office of county governor, the deputy governor is constitutionally mandated to assume office as governor for the remainder of the term of the governor.<sup>238</sup> In the event that this happens with more than two and a half years remaining before the next regularly scheduled elections, the deputy governor will be deemed to have served a full term as governor. In any other case, he or her shall not be deemed to have served a full term as governor.<sup>239</sup>

Although the Constitution does not explicitly set out the functions of the deputy governor, like the deputy president, the deputy is essentially the principal assistant of the governor and deputises for the governor in the performance of his or her functions. Specifically, in the

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<sup>232</sup> Art 187(1).

<sup>233</sup> S 30(2)(b) CGA.

<sup>234</sup> Art 179(2)(a).

<sup>235</sup> Art 180(5) and (6).

<sup>236</sup> Art 180(5).

<sup>237</sup> Art 180(6).

<sup>238</sup> Art 182(2).

<sup>239</sup> Art 183(3).

absence of the governor, the deputy governor is constitutionally empowered to act as the governor.<sup>240</sup>

The Constitution does not expressly provide for the removal of the deputy governor from office. It appears that the governor is denied the right to terminate the deputy. This is perhaps because the deputy governor is not a mere appointee of the governor and does not owe his or her office to the governor, since they both were elected by the people as a team. They both thus represent the people. However, noting that the deputy president is removed in the same manner as the president, it is submitted that the manner provided for the removal of the governor should also apply to the removal of the deputy governor from office. Indeed, in *Dorothy N Muchungu v Speaker of the County Government of Embu*, the High Court held that a purposive reading of the Constitution as a whole leads to the conclusion that the Constitution by implication provides for removal of a deputy governor from office in the same manner the governor is removed.<sup>241</sup>

### **6.5 Executive committee members and their appointment**

Article 179(2)(b) provides for county executive committee members appointed by the governor with the approval of the county assembly. Since Article 260 defines State officers as including county executive committee members, persons to be appointed to these positions must meet the moral and ethical qualifications required from State officers under Chapter Six of the Constitution, particularly by Articles 73 and 75. They must also satisfy the values and principles of public service set out by Article 232. As such, the approval process must consider three important things: competency and suitability for the offices to which they are being appointed; leadership integrity and ethics of the persons being appointed; and the community and cultural balance, representation of minorities and marginalised groups as well as gender balance and persons with disabilities.<sup>242</sup> If any nominated candidate is not approved, the governor would be required to nominate another person for the relevant office. Since the country has adopted a presidential system which puts emphasis on separation of powers, Article 179(2)(b) explicitly provides that the persons appointed to the county executive committee must not be members of the county assembly.

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<sup>240</sup> Art 179(5).

<sup>241</sup> [2014] eKLR (*Dorothy N Muchungu*) para 92.

<sup>242</sup> S 35(1)(a) and (b) and (2) CGA.

The governor is restricted in terms of the total number of members he or she can appoint to the executive committee. Where the county assembly has less than thirty members the governor shall not appoint executive committee members that are more than one-third of the size of the county assembly.<sup>243</sup> But where the county assembly has thirty or more members, the governor shall appoint a maximum of ten members.<sup>244</sup> This means that the largest county executive committee can comprise only twelve members, namely, the governor, the deputy governor, and ten other members.

### **6.6 Removal of executive committee members**

The members of the county executive committee are accountable to the governor for the performance of their functions and exercise of their powers.<sup>245</sup> The Constitution is silent on whether or not the governor can remove members of the executive committee from office. Drawing analogies from the powers of the President to remove Cabinet Secretaries from office, the CGA provides for such removal of executive committee members. First, the powers of the governor to appoint executive committee members and organise and reorganise the committee include the power to remove a member from office. Section 31(a) of the CGA empowers the governor to dismiss a county executive committee member at any time, if he or she considers it appropriate or necessary.

Secondly, section 40(1) of the CGA provides that a member may be removed for incompetence, abuse of office, gross misconduct, failure without reasonable excuse or written authority of the governor to attend three consecutive meetings of the county executive committee, gross violation of the Constitution or any other law, or physical or mental incapacity rendering the executive committee member incapable of performing the duties of his office. Section 40(2) empowers the county assembly to vote for the removal of a member of the executive committee. A member of the county assembly who is supported by at least one-third of all the members of the county assembly may on the basis of any of the above grounds propose a motion requiring the governor to dismiss a county executive committee member. The assembly then appoints a five member committee of its members to investigate the matter and report its findings to the county assembly within ten days.<sup>246</sup> If on the basis of

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<sup>243</sup> Art 179(3)(a).

<sup>244</sup> Art 179(3)(b).

<sup>245</sup> Art 179(6).

<sup>246</sup> S 40(3) CGA.



the report of the committee a resolution is passed by a majority of the members of the county assembly, the Speaker of the county assembly is required to promptly deliver the same to the governor who is obligated to dismiss the executive committee member.<sup>247</sup>

### **6.7 Functions of the county executive committee**

The executive committee performs the functions of implementation of county legislation, implementation within the county of national legislation where such is required by the legislation, internal management and coordination of the functions of the county administration and its departments and performance of any other functions conferred on it by the Constitution or national legislation.<sup>248</sup> The executive committee also has the function of preparation of proposed county legislation for consideration by the county assembly,<sup>249</sup> and provision to the county assembly of full and regular reports on matters relating to the county.<sup>250</sup> By implication of Article 185(4), the executive committee also develops plans and policies for the management and exploitation of the county resources; and for the development of the county infrastructure and institutions, which have to be submitted to the county assembly for approval.

The county executive also has the responsibility to perform any other executive functions conferred upon it by national government.<sup>251</sup> There could also be executive functions of the county government arising out of transfer of functions as envisaged by Article 187 of the Constitution. This article provides for transfer of functions from one level of government to the other by agreement between the two levels of government.

Subject to the framework of uniform norms and standards established by an Act of Parliament and any county law enacted by the county assembly, the county executive has the constitutional function and power to establish and abolish offices in the county's public service; to appoint persons to hold or act in such offices and confirm such appointments; and to discipline and control its staff as well as remove from office those who do not perform as required.<sup>252</sup> These functions and powers must also be read together with the functions and

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<sup>247</sup> S 40(6) CGA.

<sup>248</sup> Art 183(1).

<sup>249</sup> Art 183(2).

<sup>250</sup> Art 183(3).

<sup>251</sup> Art 186(3).

<sup>252</sup> Art 235.

powers of not only the Governor but also the Executive Committee members conferred upon them or envisaged by the Constitution. It is argued that the powers and functions of the Governor are also executive powers and functions of the county government.

## 7 The county administration

Article 235(1) explicitly provides for the right of county governments to have their own public services. Within a framework of uniform norms and standards prescribed by an Act of Parliament, this Article confers on the county governments three distinct powers. First is the power to determine and structure their own county administration or public service. This includes determination, creation and abolition of offices, evidenced by reference to responsible for ‘establishing and abolishing offices in its public service’.<sup>253</sup> Contrasted with the South African Constitution which expressly provides for a single public service for the three levels of government,<sup>254</sup> the county public service is ‘its public service’<sup>255</sup> and not part of the national government public service.

Second is the power to recruit the personnel of its public services, evidenced by the reference to the responsibility for ‘appointing persons to hold or act in those offices, and confirming appointments’.<sup>256</sup> Third is the power of disciplinary control and removal, including dismissal of its public service personnel, evidenced by reference to the responsibility for ‘exercising disciplinary control over and removing persons holding or acting in those offices’.<sup>257</sup> Examined against the background of the former local government on which the centralised government used to impose chief officers such as Town Clerks and Treasurers, these are important powers that enhance the autonomy of county governments.

The values and principles of public service also apply to county administration.<sup>258</sup> Their enforcement is however excluded from the functional domain of the Public Service

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<sup>253</sup> Art 235(1)(a).

<sup>254</sup> See s 197(1) of the Constitution of the Republic of South Africa, 1996. See also *Premier of the Western Cape v President of the Republic of South Africa and others* 1999 (4) BCLR 382 (CC) (*Premier of the Western Cape*) 60.

<sup>255</sup> Art 235(1)(a).

<sup>256</sup> Art 235(1)(b). See also *John Mining Temoi* para 43.

<sup>257</sup> Art 235(1)(c).

<sup>258</sup> Art 232(2)(a).

Commission established under Article 233(1).<sup>259</sup> Nevertheless, the Public Service Commission can hear and determine appeals in respect of county governments' public service.<sup>260</sup> The Public Service Commission may also indirectly have influence over the county public services through advising national government regarding the uniform norms and standards to legislatively prescribe for county governments.

## 8 Conclusion

A number of conclusions emerge from a purposive interpretation of various devolution provisions in this chapter. First, whereas the Constitution establishes two levels of government, this does not preclude the possibility of establishment of a statutory local government level. Local government is made a competence of the county government, although in respect of the urban areas and cities the competence must be discharged within a framework of national legislation. Secondly, the centrality and strong nature of devolution are demonstrated by the entrenchment in the Constitution of the levels of government, and the names and the number of counties. This necessitates constitutional amendments in the event of any changes to these aspects, which is a strong protection of the system. A purposive interpretation has established that while county boundary alterations that do not involve change of county names or number of counties can be effected by a parliamentary resolution, alterations that lead to the change of the names or total number of counties must go through constitutional amendments. Those that change the total number of counties must go through a referendum as well. Thirdly, the counties have institutional autonomy demonstrated by constitutional recognition and establishment of two institutions for each county: the legislative and executive including the county administration. The autonomy is also demonstrated by the fact that these institutions are elected by the voters in the counties and not appointed by the national government on behalf of the counties. The institutions are designed on the basis of the presidential system which applies at the national level of government.

To a lesser extent, comparative jurisprudence has been useful. While the South African cases have been useful in the interpretation of the county assemblies' duty to facilitate public participation and involvement in their businesses, cases from Nigeria and the United States of

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<sup>259</sup> Art 234(3)(b).

<sup>260</sup> Arts 234(2)(i) and (3)(b).

America have assisted in the interpretation of provisions on removal of the governor from office. Overall the chapter lays a basis for the next chapter, which goes into the interpretation of the overall functional distribution among the different levels of government.



## CHAPTER SIX

### Functions and powers of the levels of government

#### 1 Introduction

Central to a multilevel system of government is the distribution of functions and powers.<sup>1</sup> The scope of the functions and powers, and their entrenchment and protection in the Constitution, define the nature and extent of the devolution and serve its needs.<sup>2</sup> Accordingly, it is important to have clarity about which level of government is empowered to do what. This avoids confusion and duplication of mandates and responsibilities, and allows for proper accountability to citizens in respect of service delivery.<sup>3</sup> As Steytler and Fessha observe, when there is no clarity, ‘blame can easily be shifted from one sphere of government to the other’.<sup>4</sup> Clarity also enables fair allocation of resources, since resources must follow and match responsibilities – funds follow functions.<sup>5</sup> Financial dimensions of powers and functions often drive contestation in the functional definitional area and this may lead to conflict over resources and authority.<sup>6</sup>

This chapter interprets the constitutional assignment of functions and powers to the two levels of government. It provides clarity regarding which Fourth Schedule functions and powers are exclusive, concurrent and residual. An interpretation approach to address the overlaps of exclusive functions and powers and demarcate their ambit and proper cut-off points is also provided. Also addressed is an interpretive approach for resolution of conflict of national and county laws in areas of legislative concurrency. Although it is appreciated that functional definition cannot achieve absolute clarity since new areas of uncertainty will always arise,<sup>7</sup> the chapter nevertheless seeks to provide guidelines useful for the

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<sup>1</sup> Boeckenfoerde M, Dann P & Wiesner V *Max Planck Manual on Different Forms of Decentralization* (2007) 5.

<sup>2</sup> Watts RL *Comparing Federal Systems in the 1990s* (1996) 65.

<sup>3</sup> Steytler N & Fessha YT ‘Defining local government powers and functions’ (2007) 124 *South African Law Journal* 320, 324.

<sup>4</sup> Steytler & Fessha (2007) 324.

<sup>5</sup> Watts (1996) 38, 41 and 42.

<sup>6</sup> Steytler & Fessha (2007) 322.

<sup>7</sup> See Steytler and Fessha (2007) 32, where they state the following: ‘It is submitted that, however much the schedules may be reviewed and functional areas shifted from one sphere of government to the other, the

interpretation of functional assignment and exercise of powers. The chapter argues that county functions and powers must be purposively and generously interpreted to give effect to the object of devolution.

## 2 Definitions of functions and powers

Although the Constitution sometimes uses the terms ‘functions’ and ‘powers’ separately and at other times interchangeably,<sup>8</sup> there is a clear distinction between these terms.

### 2.1 Functions

Functions are the specific goals or purposes comprising goods and services which governments provide. They are the tasks or responsibilities of a government,<sup>9</sup> and are identified by demarcated areas of state activity called functional areas.<sup>10</sup> They refer to the different subjects in respect of which the levels of government have responsibility to exercise powers or authority to provide certain required services or goods.<sup>11</sup> The subject areas may be identified as health, agriculture, education, housing or foreign affairs, among others. Although, unlike the South African Constitution, the Kenyan Constitution does not use the phrase ‘functional areas’, the functions listed in the Fourth Schedule should be understood as identifying functional areas by way of subject areas in which the two levels of government have responsibility to provide services. For example, while national government has responsibility in the functional area of ‘[f]oreign affairs, foreign policy and international trade’,<sup>12</sup> county governments have responsibility in the functional area of ‘[a]nimal control and welfare’.<sup>13</sup> In disputes concerning the functions of the levels of government, one must first determine the subject matter or subject area of the function in dispute.<sup>14</sup>

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question of the definition of (newly) allocated functions will always be present. This is an issue inherent to any system of decentralized government.’

<sup>8</sup> See Arts 1(3), 186 and 187. See also Rautenbach IM & Malherbe EFJ *Constitutional Law* (1996) 61.

<sup>9</sup> Currie I & De Waal J *The New Constitutional and Administrative Law Volume 1 Constitutional Law* (2001) 235.

<sup>10</sup> Bronstein V ‘Legislative competence’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 15, 1.

<sup>11</sup> See Rautenbach & Malherbe (1996) 62.

<sup>12</sup> Item 1, Part 1 of the Fourth Schedule.

<sup>13</sup> Item 6, Part 2 Fourth Schedule.

<sup>14</sup> See Bronstein (2011) 1.

## 2.2 Powers

Powers are the legal authority of government to act or take certain actions within the confines of a permitted functional area.<sup>15</sup> They are the tools in the hands of government deployed in pursuit of government functions. Powers are the type of actions a level of government can take or things it can do in an identified functional area in order to perform the functions. For instance, for the county government to perform its health functions, it may require policy formulation and legislative powers to formulate county policy on county health facilities and pharmacies and translate it into county law, and executive powers to administer and implement that law.

Different powers over a specific functional area can be assigned to different levels of government either exclusively or concurrently.<sup>16</sup> Such powers demarcate and limit the scope of operation in the functional area for which a level of government has responsibility. Thus, while there may be many common or concurrent functional areas, the powers in these areas need not be concurrent – they can be either exclusive or concurrent. Because of this, it is possible for each of the two levels of government to be responsible for different powers in respect of the same functional area. For example, although both national and county governments have responsibility in the functional area of housing, the responsibility of national government is limited to ‘housing policy’ or legislative powers only.<sup>17</sup> Similarly, although both national and county governments have responsibility in the functional area of agriculture, the responsibility of national government is restricted to ‘agricultural policy’ or legislative powers only.<sup>18</sup> The actual agricultural development actions are exclusively assigned to county governments. This approach to the distribution of powers requires close scrutiny at the interpretation level to avoid levels of government assuming powers which they do not have. A good example is the constitutional provision that national government has the function of ‘[e]nergy policy including electricity and gas reticulation and energy regulation’.<sup>19</sup> This provision may be misinterpreted as conferring powers upon national government to reticulate electricity and gas. Yet the operational phrase is ‘energy policy’,

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<sup>15</sup> Currie & De Waal (2001) 235.

<sup>16</sup> See Rautenbach & Malherbe (1996) 62 and 95.

<sup>17</sup> Item 20, Part 1 Fourth Schedule.

<sup>18</sup> Item 29, Part 1 Fourth Schedule.

<sup>19</sup> Item 31, Part 1 Fourth Schedule.

which demarcates and limits the responsibility and powers of national government to policy or legislative matters only. The energy matters in respect of which national government may make policy or legislate include electricity and gas reticulation. Thus, national government may make policy or legislate to govern the reticulation of electricity and gas, but may not itself reticulate electricity and gas.

### **2.2.1 Legislative powers**

Legislative powers confer the authority to legislate on a functional area.<sup>20</sup> Implied in the power to legislate are the policy formulation powers, which confer upon a level of government the authority to formulate policy in an identified functional area, since legislation is informed by and reflects policy decisions. Likewise, express powers to formulate policy imply powers to legislate in the relevant functional area, since a policy has no legal binding effect unless translated into law. A policy is a broad and a ‘novel principle of action’ that informs legislative and administrative decisions with the aim of achieving a certain outcome.<sup>21</sup> Whereas laws and regulations are legislative instruments, a policy is not.<sup>22</sup> However, ‘[a]s a matter of sound government, in order to bind the public policy should normally be reflected in such instruments’.<sup>23</sup> Moreover, ‘policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation)’, since this will interfere with separation of powers.<sup>24</sup>

Secondly, both the national and county governments have constitutional powers to formulate policy in some of their functional areas. Some national government functional areas explicitly mention policy. For example, national government is responsible for and has powers to formulate policy on foreign affairs,<sup>25</sup> language,<sup>26</sup> national economic and planning,<sup>27</sup>

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<sup>20</sup> See Currie & De Waal (2001) 130.

<sup>21</sup> Oxford Dictionary (2002) 902.

<sup>22</sup> *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] 4 All SA 68 (A) (*Akani Garden Route*) para 7.

<sup>23</sup> *Akani Garden Route* para 7.

<sup>24</sup> *Akani Garden Route* para 7. See also *Communications Commission of Kenya and others v Royal Media Services and others* [2014] eKLR (*Communications Commission of Kenya*) paras 288, 289, 290 and 291.

<sup>25</sup> Item 1, Part 1 Fourth Schedule.

<sup>26</sup> Item 5, Part 1 Fourth Schedule.

<sup>27</sup> Item 9, Part 1 Fourth Schedule.



monetary,<sup>28</sup> education,<sup>29</sup> housing,<sup>30</sup> health,<sup>31</sup> agriculture,<sup>32</sup> veterinary,<sup>33</sup> energy<sup>34</sup> and tourism matters.<sup>35</sup> The powers of national government in some of these areas are limited to policy formulation, and the translation of such policy into national legislation. The intra-county administration and implementation of such policy and legislation are exclusively assigned to county governments. However, in functional areas assigned to national government by simple listing, with no aspect of it being assigned to county government, the national government has all powers – policy, legislative and executive. For example, in the foreign policy and monetary policy areas, national government is not limited to policy and has powers to implement its own policy.

Thirdly, even where national government functional areas are listed without any mention of policy, the provisions must be interpreted as including policy formulation and legislative powers. For example, the powers of the national government in the ‘[d]isaster management’<sup>36</sup> functional area include the power to formulate a disaster management policy and legislate it into law. The same principle applies to counties.

### **2.2.2 Executive powers**

Executive powers confer authority on the executive to take action in an identified functional area. Two types of executive action can be identified. First, executive powers confer authority to administer and implement legislation in a functional area. Levels of government have powers to administer and implement their own legislation or legislation of another level of government. In a number of cases the power to legislate confers upon the national and county governments the exclusive executive powers to administer and implement their own legislation. Article 183(1)(a) recognises that national government can make provision in its legislation, requiring a county government to implement, within the county, the national legislation or portions of it. In terms of Article 187(1) national government can also transfer

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<sup>28</sup> Item 10, Part 1 Fourth Schedule.

<sup>29</sup> Item 15, Part 1 Fourth Schedule.

<sup>30</sup> Item 20, Part 1 Fourth Schedule.

<sup>31</sup> Item 28, Part 1 Fourth Schedule.

<sup>32</sup> Item 29, Part 1 Fourth Schedule.

<sup>33</sup> Item 30, Part 1 Fourth Schedule.

<sup>34</sup> Item 31, Part 1 Fourth Schedule.

<sup>35</sup> Item 35, Part 1 Fourth Schedule.

<sup>36</sup> Item 24, Part 1 Fourth Schedule.

the administration and implementation of its legislation to county governments. While assignment by legislation is at the discretion of national government, transfer under Article 187 is subject to agreement among the governments.

In several other cases, the national government has powers to formulate policy and legislate, while county governments administer and implement such policy and legislation in respect of intra-county matters. However, matters that have county external dimensions must be administered and implemented by national government. The essence of this is that in respect of intra-county matters, the powers of national government are limited to policy and legislation. For example, in the functional area of health, the national government may legislate in respect of county health facilities, while the administration and implementation of such legislation in the counties must be done by counties. Similarly, in the area of agriculture, the national government may legislate in respect of the agriculture matters listed in the county functional list, but the county governments must themselves implement the legislation in respect of the intra-county aspects of these matters.

In the health functional area in particular, the Constitution provides for ‘health policy’ as a distinct functional area, from ‘national referral health facilities’. The implication is that in the ‘national referral health facilities’ area, national government has both legislative and executive or implementation functions. However, in the ‘health policy’ area, national government is limited to legislation and inter-county implementation, while administrative and implementation powers and functions in respect of intra-county health services are assigned exclusively to county governments. Thus, national government has no power to run county health services. It cannot procure goods such as medical equipment and medicine nor medical personnel, such as doctors and nurses, on behalf of the county governments. National government can however establish and legislate for quality control mechanisms as well as procedures for monitoring and evaluation to ensure that the quality standards are adhered to by the counties whenever they procure medical equipment and medicine. It can also legislate for uniform norms and standards for service by health personnel in the county governments. Issues of minimum salaries and remuneration, career progression and a number of others, could be formulated and legislated as uniform norms and standards.<sup>37</sup> A similar split exists in the functional areas of housing, agriculture, veterinary and energy.

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<sup>37</sup> Art 235.

Secondly, this is contrasted with the other functional areas in which national government is assigned powers without specific reference to policy. In such areas, national government has policy, legislative and implementation powers. For example, in the functional area of ‘disaster management’, national government has both legislative and implementation powers.<sup>38</sup>

There are also aspects of the county functional areas which indicate that national government has been assigned legislative aspects. For example, counties are assigned ‘county health services, including in particular veterinary services (excluding regulation of the profession)’.<sup>39</sup> The implication is that regulation and not implementation of the profession is assigned to national government. Similarly, counties are assigned ‘trade development and regulation, including trade licences (excluding regulation of professions)’.<sup>40</sup>

### 3 Original powers and functions

There are two sets of powers and functions, distinguished by their source, which both the national and county governments have. The first set comprises powers and functions which are conferred by the Constitution itself, called original constitutional powers. The second set comprises powers and functions that are assigned or transferred by one level to the other either by legislation or executive action called secondary powers.

Original powers and functions are those which are derived from the Constitution and cannot be changed otherwise than by a constitutional amendment.<sup>41</sup> Some original powers must however be exercised within a regulatory framework of national legislation. The basis of original powers stems from Article 1(3)(a) and (b) that delegates the authority to exercise the legislative and executive sovereign power of the people to both the national and county governments.<sup>42</sup> In particular, sovereign power is delegated to ‘Parliament and the legislative

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<sup>38</sup> Item 12, Part 1 of Fourth Schedule.

<sup>39</sup> Item 2(e), Part 2 Fourth Schedule.

<sup>40</sup> Item 7(b), Part 2 Fourth Schedule.

<sup>41</sup> Steytler N & De Visser J *Local Government Law of South Africa* (2011) Issue 5 ch 5, 5. See also *City of Cape Town v Robertson* 2005 (3) BCLR 199 (CC) 60.

<sup>42</sup> Art 1(4).

assemblies in the county government,<sup>43</sup> and to ‘the national executive and the executive structures in the county governments’.<sup>44</sup>

Even the powers and functions that are exercised within the framework of national legislation are original because they derive from the Constitution and are not conferred by national legislation. The national legislation only regulates the exercise of the powers and functions by setting out norms and standards to be followed by county governments whenever they exercise the powers and perform the functions. For example, although Article 235 provides that county governments are responsible, within a framework of uniform norms and standards prescribed by national legislation, for the establishment and abolition of offices in their own public services, the county powers derive from the Constitution and not the legislation. Before the enactment of such legislation, county government can exercise their powers within a framework of the existing legislation read with the necessary alterations and modifications to bring them into conformity with the Constitution. County governments can, however, add to the national framework legislation the necessary operational details through their own legislation.<sup>45</sup> While Parliament can repeal the regulatory framework, it cannot repeal the powers themselves.<sup>46</sup>

The main source of original powers and functions is Article 186 and the Fourth Schedule. Article 186(1) states that ‘except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule’. The Fourth Schedule contains two lists of functional areas for the two levels of government. Part 1 lists functional areas for national government and Part 2 the functional areas for the counties. Although the Fourth schedule is titled ‘distribution of functions between the national and county governments’, in terms of Article 186(1), it embodies both functions and powers which must be distinguished.

These listed functional areas often lack clarity and overlap in a number of respects. In some areas both the national and county governments appear to have the same function with the

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<sup>43</sup> Art 1(3) (a).

<sup>44</sup> Art 1(3) (b).

<sup>45</sup> See Malherbe R ‘The constitutional distribution of powers’ in De Villiers B (ed) *Review of Provinces and Local Governments in South Africa: Constitutional Foundation and Practice* (2008) 19-28, 22 and 23.

<sup>46</sup> See *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and another* 1999 (12) BCLR 1360 (CC) para 26.

only differentiation being the attachment of the prefix of either 'national' or 'county'. The definitions, contents and contours of these functions and powers still call for determination. The problem of lack of clarity is compounded by the fact that the assignment of functions and powers by Article 186 recognises three categories of functions and powers: the exclusive, concurrent and residual. Yet the Fourth Schedule does not explicitly specify which functions and powers are exclusive to each government and which are concurrent. A further problem is Article 186(4) which purports to confer upon Parliament seemingly very expansive legislative powers: 'For greater certainty, Parliament may legislate for the Republic on any matter'. Does this render the concept of exclusive functions and powers in respect of the county government non-existent? Does it transform all county functions and powers into concurrent functions and powers?

#### **4 Power-holders and types of powers and functions**

Given the nebulous nature of the functions and powers assigned to each level, the success of the devolution system will depend on the approach to interpretation adopted and how Article 186 is interpreted. Article 186 must be interpreted to determine, first, the definition, content and contours of the functional areas assigned to each level of government; secondly, the meaning and extend of the legislative powers conferred upon Parliament by Article 186(4); thirdly, the exclusive functions and powers of each level; fourthly, the concurrent functions and powers as well as the distinction between them and the issues of functional overlap and interdependence; and fifthly, the residual functions and powers assigned to national government. Furthermore, the recognition of concurrency presupposes conflict whose resolution must be determined. But in determining all these matters, it must be appreciated that the two levels of government do not derive all their constitutional functions and powers from Article 186. Some are derived from other provisions of the Constitution which must be considered together with Article 186.

It will be argued that the Constitution draws a distinction between functions and powers, and assigns legislative and executive powers in a functional area either exclusively or concurrently. Further, a functional area can also be split so that legislative powers are exclusive while executive powers are concurrent. Thus, while there are many common or concurrent functional areas, many powers in these functional areas are exclusive and others are concurrent. While common or concurrent functional areas do not automatically translate

into concurrent powers, all concurrent powers must be in common or concurrent functional areas.

#### **4.1 Exclusive powers and functions**

Exclusive powers and functions are those which are vested in only one level of government to the exclusion of the other level.<sup>47</sup> An attempt by a level of government to exercise a power or perform a function that is exclusive to another level of government is unconstitutional and invalid.<sup>48</sup> Exclusive assignment of powers and functions reinforces the autonomy of the governments and makes it clear which government is accountable for delivery of which services in that area.<sup>49</sup> Although the Kenyan Constitution does not use the term ‘exclusive’ powers and functions, it is argued that by implication it recognises that both national and county governments have some exclusive powers and functions in which the other level of government cannot interfere or share.

##### ***4.1.1 Determination of exclusive powers and functions***

In order to determine the exclusive functional areas of each level of government, it is important to examine not only Article 186 and the Fourth Schedule functional lists of the two levels of government but also the other constitutional provisions that confer powers and functions upon the two levels of government and their interrelationship. In certain circumstances, express assignment of certain powers and functions on one level of government may imply assignment of certain excluded powers and functions on the other level. Given that national government has residual powers, the determination of exclusive powers and functions must be approached by first focusing on the identification of county exclusive powers, and second, the national and county concurrent powers and functions. Once these are isolated and set aside, what remain are exclusive powers and functions of national government. In determining the exclusive powers and functions of county government, it is important to note that a matter that may not be explicitly mentioned may be included in a functional area through the concept of incidental powers or the use of the

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<sup>47</sup> See Watts (1996) 33.

<sup>48</sup> Art 2(1), (2) and (4). See also Bronstein (2011) 2.

<sup>49</sup> Watts (1996) 33-4.

‘including’ phrase. Consequently, county exclusive powers and functions ‘can bleed into areas of national exclusive jurisdiction’.<sup>50</sup>

#### ***4.1.2 Exclusive powers and functions of national government***

The national government has exclusive powers and functions in respect of all matters other than those vested in the county governments by the Constitution or national legislation.<sup>51</sup> The Constitution identifies four sets of national government exclusive powers and functions.

First, the national government has exclusive legislative powers and functions to legislate in respect of the functional areas listed in Part 1 of the Fourth Schedule. Some of the functional areas in this part are concurrent, since they overlap with Part 2 county functional areas, enabling county governments to also legislate in them. For example, both the national and county governments have power to legislate in respect of agriculture, health, housing and energy, among others. There are however other matters in this part in respect of which county governments cannot legislate, which are thus categorised as exclusive legislative areas of national government. On this basis, only the national government can legislate in respect of foreign policy, foreign trade and international trade; immigration and citizenship; language policy; national defence and the use of the national defence services; police services; the courts; monetary policy, currency and banking; education standards curricula, examinations and the granting of university charters; universities, primary schools, and secondary schools; national referral health facilities; and national elections. In addition, national government has exclusive legislative powers in respect of the regulation of the veterinary profession in the health functional area, and in respect of the regulation of other professions in the trade development, regulation and licensing functional area. This is because the Constitution expressly excludes county governments from the regulation of the professions in these functional areas.<sup>52</sup>

Secondly, the national government has exclusive legislative powers through a myriad of provisions which explicitly require national legislation to be enacted. In some, the Constitution requires an ‘Act of Parliament’ or ‘national legislation’ to provide for certain matters. For example, by Article 196(1) providing that ‘Parliament shall enact legislation

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<sup>50</sup> See Bronstein (2011) 5.

<sup>51</sup> See Bronstein (2011) 5.

<sup>52</sup> Items 2(e) and 7(b), Part 2 Fourth Schedule.

providing for the powers, privileges and immunities of county assemblies, their committees and members,' the national government is conferred with an exclusive function to determine these matters.<sup>53</sup>

In respect of such matters, only national government can legislate, even if the law deals with or affects a matter that falls within the legislative powers of county government under the Fourth Schedule. For example, even though county governments have the functional area of 'cultural activities, public entertainment and public amenities, including sports and cultural activities and facilities,'<sup>54</sup> only Parliament can legislate to 'ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage'.<sup>55</sup> Similarly, while county governments have the functional area of agriculture including crop and animal husbandry,<sup>56</sup> only national government can legislate to 'recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya'.<sup>57</sup>

Thirdly, national government has exclusive power to legislate in all areas of residual functions.<sup>58</sup> As discussed below, all the functional areas not enumerated in the Fourth Schedule and other provisions of the Constitution or legislation, and assigned to county governments, are regarded as residual functional areas.<sup>59</sup> Very close scrutiny of the functional areas and other provisions of the Constitution must be undertaken before it is determined that a matter is not assigned to the counties and is therefore residual. As discussed later, a matter that may not be explicitly mentioned may be included in a functional area through the concept of incidental powers or the use of the 'including' phrase.<sup>60</sup>

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<sup>53</sup> In *Ex parte President of the Republic of South Africa in re Constitutionality of the Liquor Bill 2000* (1) BCLR 1 (CC) case at para 46, the South African Constitutional Court observed that 'by contrast with Schedule 5, the Constitution contains no express itemisation of the exclusive competences of the national legislature. These may be gleaned from individual provisions requiring or authorising "national legislation" regarding specific matters.'

<sup>54</sup> Item 4(h), Part 2 Fourth Schedule.

<sup>55</sup> Art 11(3)(a).

<sup>56</sup> Item 1(a), Part 2 Fourth Schedule.

<sup>57</sup> Art 11(3)(b).

<sup>58</sup> Art 186(3).

<sup>59</sup> Currie & De Waal (2001) 164. See also s 4.4.

<sup>60</sup> See section 5.2.1.



Fourthly, national government has exclusive executive powers and functions to administer and implement its own laws, except those expressly excluded by the Constitution, legislation, or assignment and transferred by national government. Although generally every level of government that has power to legislate is also empowered to administer and implement its own laws, there are cases in which the Constitution has split the power to administer and implement laws from the power to make the laws. For example, in the area of agriculture and county health services, national government can only legislate but only the county governments can administer and implement the intra-county aspects of such legislation. There are also cases in which the national government has been empowered to assign or transfer its executive power to administer and implement its own laws to the county government.<sup>61</sup>

#### ***4.1.3 Exclusive powers and functions of county government***

By providing that '[f]or greater certainty, Parliament may legislate for the Republic on any matter', Article 186(4) seemingly converts all county powers and functions into concurrent ones. This raises the question: Do county governments, under the Kenyan constitutional design, have any exclusive powers and functions?

##### ***4.1.3.1 Constitutional justification for county exclusive powers and functions***

On the face of it, Article 186(4) suggests that there are no exclusive county powers as all become concurrent by virtue of this sub-article. It is argued, however, that a purposive approach renders such interpretation untenable and that, notwithstanding this provision, county governments have exclusive powers and functions. First, Article 1(3) and (4) expresses the intention of the Constitution-framers that the sovereign power of the people is shared out distinctly and exercised at the national and county levels. Assignment of exclusive powers to county governments would enhance their sovereign exercise of legislative power, which would be otherwise if all their powers and functions were to be concurrent.

Secondly, the notion of distinct levels of government expressed by Article 6(2) is best realised through some measure of distinct and exclusive functions and powers.

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<sup>61</sup> Art 183(1)(b) and 187(1).

Thirdly, the structure of devolution embodied in the Fourth Schedule also expresses the intention of the Constitution-framers to confer some exclusive powers and functions; there are two lists of functions – the national and county. If the intention was to create concurrency in all matters, there was no need to provide a detailed list of national functions.<sup>62</sup> The Constitution-framers could simply have set a list of concurrent functions as was done in the South African Interim Constitution.<sup>63</sup> Yet by drawing two lists which only partially overlap, there is a clear indication that a notion of exclusivity for both national and county governments is set, complemented by concurrency where they overlap. Furthermore, the title of the Fourth Schedule uses the term ‘distribution’ of functions which implies a sharing out of the functions to the two levels of government. However, the lists themselves do not state what is exclusive or not and must be interpreted to determine the exclusive powers and functions of each level of government.

Fourthly, within the intra-textual context of Article 186 itself, this provision appears as sub-article (4), coming after three other provisions which make it clear that the intention of the framers of the Constitution is to confer both exclusive and concurrent powers and functions. Article 186(1) refers to ‘the functions and powers of the national government and county governments, respectively’ being set out in the Fourth Schedule. Article 186(2), which expressly provides for concurrent functions and powers, by implication recognises exclusive functions and powers. If a function or power is not conferred on more than one level of government, it is assigned to only one level of government and is thus exclusive. This Article uses the phrase ‘a function or power’ which suggests that not all functions and powers are conferred on more than one level of government. If all the functions and powers were concurrent, this provision would not have been necessary. Article 186(4) cannot thus be taken to nullify the previous sub-articles and must be interpreted narrowly. It must be read in context and harmoniously with the other sub-articles of 186, which clearly demonstrate an intention to confer both exclusive and concurrent powers and functions on both levels of government.

Fifthly, Article 191(1), which explicitly provides for resolution of conflict between national and county laws in respect of matters within the concurrent powers of both levels of government, by implication recognises exclusive functional areas. If indeed all county

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<sup>62</sup> See Part 1 Fourth Schedule.

<sup>63</sup> Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993), Schedule 6.

powers were concurrent, this provision would be worded differently – it refers to conflicts ‘in respect of matters falling within concurrent jurisdiction of both levels of government’. Implicit in this phraseology is that there are matters that do not fall within concurrent jurisdiction but are exclusive, which do not invite the use of Article 191.

Sixthly, Article 186(4) confers upon Parliament legislative powers only. It does not confer on national government executive powers and functions in the areas of county exclusive executive power and functions. Moreover, as discussed later, even the legislative powers under this provision are limited.<sup>64</sup> Finally, there are other provisions of the Constitution such as those in the financial area, which confer on county governments exclusive powers and functions. In terms of Article 209(2) and (3), county governments have exclusive power to impose property rates and entertainment taxes.

In conclusion, the ambit of Article 186(4), as explained below,<sup>65</sup> is limited and does not convert county exclusive powers into concurrent ones.

#### **4.1.3.2 Identifiable county exclusive powers and functions**

County governments, like national government, have both legislative and executive exclusive powers which are exercisable in their identified functional areas. Three broad sets of exclusive county government powers and functions provided for by the Constitution can be identified. First, county governments have exclusive legislative powers in some of the functional areas listed in Part 2 of the Fourth Schedule. Although Part 2 lists what are referred to as county functions, some of the functional areas in this list envisage concurrent legislative powers, since national government can also legislate in that area. There are, however, other areas in respect of which national government is excluded from legislating. These thus constitute exclusive legislative powers and functions of county government. In the broad functional area of cultural activities, public entertainment and public amenities, only county government can legislate in respect of racing,<sup>66</sup> liquor licensing,<sup>67</sup> cinemas,<sup>68</sup> video shows and hiring,<sup>69</sup> and libraries.<sup>70</sup> Legislation in respect of trade development and regulation

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<sup>64</sup> See section 4.4.

<sup>65</sup> Section 4.4.

<sup>66</sup> Item 4(b), Part 2 Fourth Schedule.

<sup>67</sup> Item 4(c), Part 2 Fourth Schedule.

<sup>68</sup> Item 4(d), Part 2 Fourth Schedule.

<sup>69</sup> Item 4(e), Part 2 Fourth Schedule.

on matters of markets, trade licences and cooperative societies are also in the exclusive domain of county governments. Similarly, only county government can legislate in respect of ensuring and coordinating the participation of communities and locations in governance at the local level. They also have the exclusive power to assist communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.<sup>71</sup>

Secondly, county governments have exclusive legislative powers and functions in respect of certain matters explicitly identified by the Constitution. For example, only county government may legislate to impose property rates and entertainment taxes.<sup>72</sup> National government may legislate to regulate the manner in which the taxes are to be imposed to avoid prejudicing national economic policies, economic activities across county boundaries or national mobility of goods, services, capital or labour.<sup>73</sup> Nonetheless, national government cannot itself impose such property rates and entertainment taxes on behalf of the counties.

Thirdly, in functional areas in which the national government powers and functions are limited to policy formulation, and translation of the policy into legislation, county governments have exclusive executive powers to administer and implement such policy and legislation. All that the national government can do regarding administration and implementation of its own such policy and legislation is monitoring and evaluation to ensure compliance.

## **4.2 Concurrent powers and functions**

Concurrent powers and functions are those which can be exercised or performed by both national and county governments in the same functional area at the same time. The concept of concurrent functions involves shared jurisdiction and collaboration and joint tasks.<sup>74</sup> Concurrent powers and functions can be both legislative and executive. In the legislative

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<sup>70</sup> Item 4(f), Part 2 Fourth Schedule.

<sup>71</sup> Item 14, Part 2 Fourth Schedule.

<sup>72</sup> Art 209(3).

<sup>73</sup> Art 209(5).

<sup>74</sup> Watts (1996) 34.

arena, concurrency means that both the national Parliament and the legislatures of the various constituent units possess the power to pass laws on the same matters.<sup>75</sup>

Concurrent legislative competence has several practical implications for the exercise of legislative authority by the national government. Parliament cannot prevent the constituent unit legislatures from enacting legislation on any of the listed functional areas, veto constituent unit legislation, or block constituent unit initiatives that deal effectively with matters over which they possess concurrent competence.<sup>76</sup> Both levels of government may freely legislate on any concurrent matter and their legislation can exist alongside each other.<sup>77</sup> Because the legislatures at both levels have the same legislative competency, conflicts may occur and therefore the Constitution provides for how to determine which legislation prevails over the other.<sup>78</sup> In contrast to situations of exclusive powers and functions in which a purported exercise of another government's exclusive powers leads to unconstitutionality and invalidation of the legislation, in cases of concurrency, one law prevails over the other without rendering it invalid. The other law is only rendered inoperative for as long as the overriding legislation exists.<sup>79</sup> The clear principle is: if there is an overlap in the functional areas, then concurrency has been established.

Article 186(2) provides that '[a] function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government'. The Constitution does not, however, expressly identify the concurrent functions and powers that the two levels of government may perform and exercise. Because of this, concurrent powers and functions must be determined through interpretation. The functional areas listed in the Fourth Schedule must be closely examined to determine which functions are concurrent.

In the agriculture functional area, both the national and county governments can legislate in respect of crop and animal husbandry; livestock sale yards; county abattoirs; plant and animal

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<sup>75</sup> Madlingozi T & Woolman S 'Provincial legislative authority' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 19, 8.

<sup>76</sup> Madlingozi & Woolman (2011) 8.

<sup>77</sup> See Malherbe R 'The constitutional distribution of powers' in De Villiers B (ed) *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* (2008) 19-28, 23.

<sup>78</sup> Steytler & De Visser (2011) ch 5, 17. See also Bronstein (2011) 2.

<sup>79</sup> Bronstein V 'Conflicts' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011a) ch 16, 15.

disease control; and fisheries.<sup>80</sup> This arises out of the fact that in Part 1 the national government may legislate on agriculture policy, which is boundless, while Part 2 also empowers counties to legislate on agriculture. This means that the county governments have both legislative and executive powers. In the health functional area, the national government can legislate on health policy, while counties are restricted to legislating in respect of county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sale food to the public; veterinary services (excluding regulation of the profession on which only national government can legislate); cemeteries, funeral parlours and crematoria; and refuse removal, refuse dumps and solid waste disposal.<sup>81</sup> They both can also legislate in respect of housing.<sup>82</sup> In the energy functional area, both can legislate in respect of electricity and gas reticulation and energy regulation.<sup>83</sup> In all these areas, national government can only formulate policy and legislate.

In the functional area of cultural activities, public entertainment and public amenities, the national and county governments have concurrent power to legislate in respect of betting, casinos and other forms of gambling;<sup>84</sup> and sports and cultural activities and facilities.<sup>85</sup> They both are also empowered to legislate in the transport functional area in respect of roads, traffic, and ferries and harbours (excluding the regulation of international and national shipping and matters related thereto in which only the national government can legislate).<sup>86</sup> They both have power to legislate in respect of disaster management.<sup>87</sup>

There are also other provisions of the Constitution which appear to confer concurrent powers and functions on national and county governments. In matters of land and environment, a number of provisions discussed in a subsequent section appear to confer concurrent functions and powers upon both national and county government.<sup>88</sup>

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<sup>80</sup> Items 29, Part 1 and 1(a)-(e), Part 2 Fourth Schedule. Agricultural policy includes the power to legislate.

<sup>81</sup> Items 28, Part 1 and 2(a)-(g), Part 2 Fourth Schedule.

<sup>82</sup> Items 20, Part 1 and 8(d), Part 2 Fourth Schedule.

<sup>83</sup> Items 31, Part 1 and 8(e), Part 2 Fourth Schedule.

<sup>84</sup> Items 34, Part 1 and 4(a), Part 2 of the Fourth Schedule.

<sup>85</sup> Items 17, Part 1 and 4(h), Part 2 Fourth Schedule.

<sup>86</sup> Items 18(a), (c) and (f), Part 1 and 5(a), (c) and (e), Part 2 Fourth Schedule.

<sup>87</sup> Items 24, Part 1 and 12, Part 2 Fourth Schedule.

<sup>88</sup> See section 6.1.

### 4.3 Residual powers and functions

The conventional concept of residual powers and functions refers to functional areas not expressly mentioned and listed in the Constitution.<sup>89</sup> Article 186(3) assigns the residual powers and functions to the national government: ‘A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government’. A function or power may thus be removed from the arena of residual functions and powers. Where national legislation assigns a constitutionally unassigned function or power to the county governments, the function or power ceases to be unassigned and residual at least for as long as the assigning legislation continues to exist.

To determine residual functions and powers one must first determine whether the subject matter has not been assigned to any one of the two levels of government by examining first the functional lists, second, other provisions of the Constitution which assign functions, and finally, any legislation that may have assigned unassigned functions and powers to the county. But it must be remembered that since it has been argued that the use of the term ‘including’ in the definition of the content of some of the county functional areas means the listing is not exhaustive, care must be taken before labelling a function as unassigned.

Although the Constitution mentions residual powers and functions as a separate type of powers and functions, these are assigned to national government as exclusive powers and functions, leaving only two types of powers and functions – exclusive and concurrent.

### 4.4 Meaning and limited application of Article 186(4)

Article 186(4) provides that ‘[f]or greater certainty, Parliament may legislate for the Republic on any matter’. As already argued, the suggestion that there are no exclusive county powers and that all become concurrent by virtue of this Article is untenable.<sup>90</sup> The text of the provision supports such a conclusion and Article 186(4) must be given limited application. First, the provision confers upon Parliament powers to legislate on any matter ‘for greater certainty’. This limits the county exclusive matters in which Parliament may legislate to only those where greater certainty is lacking in the already assigned functional areas. Thus, the purposive interpretation leads to the conclusion that the provision only applies in situations where greater certainty or clarity in the functional areas already assigned by Article 186(1),

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<sup>89</sup> Bronstein (2011) 1. See also Watts (1996) 34.

<sup>90</sup> See section 4.1.3.

(2) and (3) is lacking. Consequently, Article 186(4) must be read in conjunction with these other sub-articles which confer exclusive, concurrent and residual powers. From this perspective, Article 186(4) means that although the other three sub-articles provide for exclusive, concurrent and residual functions and powers, some areas of uncertainty or lack of clarity may exist. Although there are some functional areas that clearly appear to be county exclusive functions and thus, on closer scrutiny, some aspects of such functional areas cannot clearly be placed in anyone of these three categories of functions. In cases of such uncertainty or lack of clarity, Article 186(4) provides that Parliament may legislate. Article 186(4) is therefore not meant to confer new all-embracing functional areas, but to enable Parliament to legislate on aspects of the already conferred functional areas where there is uncertainty and lack of clarity as to whether or not the matter falls in the exclusive, concurrent or residual functional areas.

An example is the ‘trade development and regulation’ functional area which Part 2 of the Fourth Schedule provides for as a county functional area.<sup>91</sup> Since trade, other than international trade, is not provided for by Part 1 of the Fourth Schedule as a national government functional area, it is readily regarded as not a concurrent functional area, but a county exclusive area. Furthermore, since it is expressly assigned to counties, it is not residual. Yet inter-county trade and trade across the country cannot be regulated by county governments. Given the territorial dimension of functional areas, only intra-county matters can exclusively be regulated effectively by county governments, but not inter-county matters.<sup>92</sup> There is therefore doubt whether or not the framers of the Constitution intended to assign such inter-county trade development and regulation matters as county exclusive functions. It is in such matters of uncertainty that Article 186(4) clarifies that Parliament may legislate.

This interpretation is supported by the second qualifying element. The provision confers upon Parliament powers to legislate on such matters ‘for the Republic’ which imports the principle

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<sup>91</sup> Item 7, Part 2 Fourth Schedule.

<sup>92</sup> See *Liquor Bill* case para 52. The Court set this appropriateness principle thus: ‘From this it is evident that where a matter requires regulation inter-provincially, as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4, or through the powers of intervention by section 44(2). The corollary is that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially.’



that inter-county matters are best regulated by the national government, and qualifies and limits the powers conferred upon Parliament. It can only justify its legislation on grounds that it has legislated ‘for the Republic’ since the matter goes beyond the ability of county governments to exclusively ‘regulate effectively’. Conversely, Parliament cannot invoke Article 186(4) to legislate for counties on matters they can themselves effectively regulate. In a sense it imports the same test as Article 191, not as an override clause but as an empowerment clause. It is not an override clause because counties would have no jurisdiction to legislate on matters that have an extra-county dimension.

Based on this second point, it may be argued that Article 186(4) is another version of the residual clause embodied in Article 186(3). It allows Parliament to legislate ‘for the Republic’ and not for the counties. This suggests that it legislates on inter-county matters which fall outside county exclusive powers. However, read together with the first point regarding uncertainty, Article 186(4) is not just another version of the residual clause. It serves a separate, limited, but very important role of conferring legislative power on Parliament in ostensibly county exclusive functional areas, but where there may be doubts, including whether or not a function is residual. The provision addresses uncertainty in what appear to be county exclusive functional areas, but does not empower Parliament to legislate on what are clearly county exclusive areas.<sup>93</sup> Beyond the limits defined by Article 186(4), the intra-county aspects of the functional area remain exclusive county functions, over which national government has no role.

#### **4.5 Summary of exclusive and concurrent powers**

Based on the foregoing analysis, the following table attempts to place the functional areas and powers in the Fourth Schedule in their respective categories of exclusive and concurrent. The table does not, however, include functions and powers that are clearly national government exclusive powers and functions such as foreign affairs, immigration and citizenship, defence, and security. The table focuses on the difficult functional areas that required close scrutiny.

Table of functional areas and powers

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<sup>93</sup> See *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and another* 1999 (12) BCLR 1360 para 25.

Common or concurrent functional areas	National exclusive powers	National and county concurrent powers		County exclusive powers
Education	Education standards, curricula, examinations and the granting of university charters (Part 1, Item 15)	Education policy (Part 1, Item 15)	Pre-primary education and village polytechnics (Part 2, Item 9)	Home craft centres and childcare facilities (Part 2, Item 9)
	Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions (Part 1, Item 16)			
Transport	Transport including the construction and operation of national trunk roads (Part 1, Item 18(b))	Road traffic (Part 1, Item 18(a))	Traffic (Part 2, Item 5(c))	County transport including parking (Part 2, Item 5(c))
	Standards for the construction and maintenance of other roads by counties (Part 1, Item 18(c))			The construction and maintenance of other roads by counties (Implied by Part 1, Item 18(c))
	Regulation of international and national shipping matters (implied by Part 2, Item 5(e))	Marine navigation (Part 1, Item 18(f))	Ferries and harbours (Part 2, Item 5(e))	
Health	National referral health facilities (Part 1, Item 23)	Health Policy (Part 1, Item 28)	Policy on county health services, including county health facilities and pharmacies; ambulance	Implementation of national government health policy in respect of intra-county matters (implied by

			services; promotion of primary health care; licensing and control of undertakings that sell food to the public; cemeteries, funeral parlours and crematoria; and refuse removal, refuse dumps and solid waste disposal (Part 2, Item 2)	Part 1, Item 28)
			Policy on county health services, including county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; cemeteries, funeral parlours and crematoria; and refuse removal, refuse dumps and solid waste disposal (Part 2, Item 2)	Implementation of county health policy on county health services, including county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; cemeteries, funeral parlours and crematoria; and refuse removal, refuse dumps and solid waste disposal (Part 2, Item 2)
Agriculture		Agricultural policy (Part 1,	Agriculture, including crop and	Implementation of national

		Item 29)	animal husbandry; livestock sale yards; county abattoirs; plant and animal disease control; and fisheries (Part 2, Item 1(a), (b), (c) and (e))	government agricultural policy in respect of intra-county matters (implied by Part 1, Item 29)
			Agriculture, including crop and animal husbandry; livestock sale yards; county abattoirs; plant and animal disease control; and fisheries (Part 2, Item 1(a), (b), (c) and (e))	Implementation of county policy on agriculture including crop and animal husbandry; livestock sale yards; county abattoirs; plant and animal disease control; and fisheries (Part 2, Item 1(a), (b), (c) and (e))
	Regulation of veterinary profession (implied in Part 2, Item 2(e))	Veterinary policy (Part 1, Item 30)	County policy on veterinary services (implied by Part 2, Item 1(a) and (b))	Implementation of national government veterinary policy in respect of intra-county matters
			County policy on veterinary services (implied by Part 2, Item 1(a) and (b))	Implementation of county policy on veterinary services in respect of intra-county matters (Part 2, Item 2(e))
Environment and natural resources		Protection of the environment and natural resources with a view to	Control of air pollution, (Part 2, Item 3)	Control of noise pollution, other public nuisances and outdoor advertising (Part 2, Item 3)

		establishing a durable and sustainable system of development (Part 1, Item 22)		
	Policies on natural resources and environmental conservation, including soil and water conservation; and forestry (Implied by Part 2, Item 10)			Implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation; and forestry (Part 2, Item 10)
	Protection of natural resources in the field of fishing, hunting and gathering (Part 1, Item 22(a))			
Water	Water protection and securing sufficient residual water (Part 1, Item 22(c))			County public works and services, including water and sanitation services (Part 2, Item 11(b))
	Hydraulic engineering and the safety of dams (Part 1, Item 22(c))			County public works and services, including storm water management systems in built-up areas (Part 2, Item 11(a))
	The use of international waters and water resources (Part 1, Item 2)			
Energy		Protection of	County energy	Implementation of

		the environment and natural resources with a view to establishing a durable and sustainable system of development including energy policy (Part 1, Item 22(d))	regulation (Part 2, Item 8(e))	national government energy policy in respect of intra-county matters (implied by Part 1, Item 22(d))
		Energy policy including electricity and gas reticulation and energy regulation (Part 1, Item 31)		County electricity and gas reticulation (Part 2, Item 8(e))
Economic policy, planning and development (including built environment)	National economic policy and planning (Part 1, Item 9)			County planning and development in the areas of land survey and mapping; and boundaries and fencing (Part 2, Item 8(b) and (c))
	General principles of land planning and the co-ordination of planning by the counties (Part 1, Item 21)			
Criminal law		Criminal law (Part 1, Item 7(b))	Control of drugs and pornography (Part 2, Item 13)	
Animal health and welfare		Veterinary policy (Part 1,	Animal control and welfare, (Part 2,	Implementation of national

		Item 30)	Item 6)	government veterinary policy in respect if intra-county matters (implied by Part 1, Item 30)
				Licensing of dogs (Part 2, Item 6(a))
			Facilities for the accommodation, care and burial of animals (Part 2, Item 6(b))	
Housing		Housing policy (Part 1, Item 20)	County planning and development, including housing (Part 2, Item 8(d))	Implementation of national government housing policy in respect of intra-county matters (implied by Part 1, Item 20)
Trade	International trade (Part 1, Item 1)	Consumer protection (Part 1, Item 14)	Fair trading practices (Part 2, Item 7(c))	Trade development and regulation including markets (Part 2, Item 7(a))
	Regulation of professions (implied by Part 2, Item 7(b))			Trade licences (Part 2, Item 7 (b))
				Trade development including cooperative societies (Part 2, Item 7(e))
Tourism		Tourism policy and development (Part 1, Item 35)	Trade development and regulation including local tourism (Part 2, Item 7(d))	
Statistics and data		National statistics and	County planning and development	

		data on population, the economy and society generally (Part 1, Item 11)	including statistics (Part 2, Item 8(a))	
Culture and sports	Ancient and historical monuments of national importance (Part 1, Item 25)	Promotion of sports and sports education (Part 1, Item 17)	Sports and cultural activities and facilities (Part 1, Item 4(h))	Cultural activities including museums (Part 2, Item 4(g))
	Language policy and the promotion of official and local languages (Part 1, Item 5)			
Public entertainment		National betting, casinos and other forms of gambling (Part 1, Item 34)	Public entertainment including betting, casinos and other forms of gambling and racing (Part 2, Item (a) and (b))	Public entertainment including liquor licensing; cinemas; and videos shows and hiring (Part 2, Item 4(c) and (e))
Public amenities				Public amenities including libraries; and county parks, beaches and recreation facilities (Part 2, Item 4(f) and (i))
Disaster		Disaster management (Part 1, Item 24)	Fire fighting services and disaster management (Part 2, Item 12)	
Decentralization and local governance				Ensuring and coordinating the participation of communities and locations in



				governance at the local level (Part 2, Item 14)
				Assisting communities and locations to develop the administrative capacity for effective exercise of the functions and powers and participation in governance at the local level. (Part 2, Item 14)

Using this table as a rough guide, the conclusion that arises is that the county exclusive functions and powers are mainly the traditional local government functions and powers, while the concurrent ones are the new and enhanced powers of the county governments.

### 5 Ambit of powers

When determining the exclusive powers and functions of the two levels of government, questions of the ambit or scope of such powers often arise because exclusive powers and functions tend to overlap. The terms of the functional areas listed in the Fourth Schedule or set out in other constitutional provisions create overlaps that can make broadly defined national government powers and functions subsume the more narrowly defined county powers and functions in the same functional area, leaving county governments without any exclusive functions. For example, the national government ‘national economic policy and planning’<sup>94</sup> functional area may appear to include the ‘county planning and development’ functional area.<sup>95</sup> The ambit of the powers and functions, therefore, refers to the boundaries and cut-off points of the powers and functions of the two levels of government.<sup>96</sup> Such

<sup>94</sup> Item 9 of Part 1 of the Fourth Schedule.

<sup>95</sup> Item 8 of Part 2 of the Fourth Schedule.

<sup>96</sup> Steytler & De Visser (2011) ch 5, 19.

boundaries and cut-off points define and determine the scope of the powers and functions of each government.

### **5.1 Bottom-up approach to interpretation of exclusive functional areas**

The problem of overlaps in exclusive functional areas should be addressed through the ‘bottom-up’ approach to interpretation, which commences by asking the question of whose functions should be defined first. The essence of the bottom-up approach is that the interpretation must begin by determining and scooping out the exclusive powers and functions of the county governments before determining the remainder as national government exclusive powers and functions.<sup>97</sup> Steytler and De Visser have argued that this approach has been developed by the South African courts when interpreting local government powers and functions vis-à-vis national and provincial spheres of government.<sup>98</sup> The bottom-up approach was first established by the South African Supreme Court of Appeal as follows:

It is to be expected that the powers that are vested in government at the national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason inferentially with the broader expression as the starting point is bound to denude the narrower expression of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government.<sup>99</sup>

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<sup>97</sup> See Steytler & Fessha (2007) 331.

<sup>98</sup> Steytler & De Visser (2011) ch 5, 21. See also Steytler & Fessha (2007) 332. This contrasts with the narrow restrictive approach adopted by the South African Constitutional Court with respect to provincial powers.

<sup>99</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (2) BCLR 157 (SCA) (*DFA (SCA)*) paras 35-6. The case concerned the exercise of the land use planning powers and functions. While the Constitution assigned to local government the municipal planning functions, it assigned to provincial government provincial planning, regional planning and development, and urban and rural development functions. The national government enacted the Development Facilitation Act which established provincial development tribunals and permitted them to determine applications for the re-zoning of land and the establishment of townships. The City of Johannesburg challenged this arguing that rezoning formed part of ‘municipal planning’ which was constitutionally a local government function. The High Court interpreted the provincial government function of urban and rural development expansively to include re-zoning. The Supreme

Although the Kenyan Constitution does not expressly identify the exclusive and concurrent functional areas, it is submitted that once the exclusive powers and functions of county governments have been determined, the rules developed under this approach should provide instructive lessons for the determination of the cut-off points of those exclusive powers and functions. In particular, these rules are useful where the broad functional area is the same, with the only difference between the two levels of government being determined by the prefixes ‘national’ and ‘county’. For example, in the broad planning functional area, the powers of the two levels are differentiated by being described as ‘national economic policy and planning’<sup>100</sup> and ‘county planning and development’.<sup>101</sup> Likewise, in the area of public works, the Constitution provides for ‘national public works’<sup>102</sup> as contrasted with ‘county public works and services’.<sup>103</sup> Furthermore, the constitutional provision for ‘ancient and historical monuments of national importance’<sup>104</sup> must be distinguished from county museums<sup>105</sup> which must be understood as being those of county importance.

## 5.2 Interpreting the Fourth Schedule powers

The interpretation of the fourth Schedule powers to determine whether they are exclusive or concurrent involves the examination of the specific functional areas in both lists. Likewise, the process of using the bottom-up approach involves the examination of specific county exclusive functional areas against the corresponding national functional areas to determine which aspect is reserved for county government exclusively. In adopting and adapting this approach there are a number of factors to be considered, which broaden, limit or give full effect to the powers. These include the ‘including’ principle; the territorial dimension; the ‘full effect’ principle; and the concept of incidental powers, which apply to not only the determination of exclusive but also concurrent powers.

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Court of Appeal rejected this approach and established the bottom-up approach, holding that municipal planning includes the power to approve applications for the re-zoning of land and the establishment of townships.

<sup>100</sup> Item 9, Part 1 of the Fourth Schedule.

<sup>101</sup> Item 8, Part 2 of the Fourth Schedule.

<sup>102</sup> Item 19, Part 2 of the Fourth Schedule.

<sup>103</sup> Item 11, Part 1 of the Fourth Schedule.

<sup>104</sup> Item 25, Part 1 of the Fourth Schedule.

<sup>105</sup> Item 4(g), Part 2 of the Fourth Schedule.

### 5.2.1 The ‘including’ principle

The content of most of the county government functions is defined and broadened by the use of the term ‘including’ followed by a listing of some of the activities that constitute the functional area. The significance of the use of this term is that the list is not exhaustive and closed, other items can be added to the list.<sup>106</sup> For example, the county governments have the functional area of ‘agriculture, including crop and animal husbandry; livestock sale yards; county abattoirs; plant and animal disease control; and fisheries.’<sup>107</sup> The rule of interpretation is that on the basis of the *ejusdem generis* principle, other activities that are related to the listed ones can be identified and included as functions of county government.<sup>108</sup> First, this means that a number of functional areas that may at a glance appear to be unassigned may actually have been assigned by such implication and are therefore not residual functions and powers of national government. Secondly, in trying to fill these lists of ‘including’, the interpreter must also examine the national functional list for what is excluded to ensure that additions are not made to the county list of what has been expressly assigned to national government.

### 5.2.2 The territorial dimension

The determination of the scope of exclusive county functional areas must also be guided by functional appropriateness which requires that functions be assigned or left to the level of government that can best perform them.<sup>109</sup> This is informed by the territorial dimension, which requires that matters that are best regulated intra-county are exclusive to the county, while those that are inter-county are left to national government. A county government would therefore not have exclusive power to regulate a matter that has external dimensions.<sup>110</sup> Although some items specifically refer to ‘county’, it is an inherent principle of all county functions and powers that they are limited to the intra-county matters. Territorial dimension thus serves to limit the scope of the county functions and powers.

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<sup>106</sup> See *Communications Commission of Kenya* para 359.

<sup>107</sup> Item 1 of Part 2 of the Fourth Schedule.

<sup>108</sup> De Ville JR *Constitutional and Statutory Interpretation* (2000) 124.

<sup>109</sup> In the *Liquor Bill* case para 51 the court noted that: ‘The Constitution-makers’ allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere, and accordingly the competences itemised in Schedules 4 and 5 are referred to as being in respect of “functional areas”’.

<sup>110</sup> See *Liquor Bill* case para 52.

It should be noted however that the mere prefixing of a functional area as ‘county’ does not necessarily mean that the functional area is intra-county. What constitutes a functional area prefixed as ‘county’ can only be determined in the context of each functional area. The factors which determine what is county and what is national may include the objects of or the use to which a facility is put, the ownership of the facility and the control of the facility.<sup>111</sup> The use to which a facility is put may bring into play the intra-county and inter-county dichotomy of defining functional areas. For example, a health service may be called county simply because it is intended for use within the boundaries of the county or that it is a service confined within the county boundaries. A road may be referred to as county because it begins and ends within the county and can serve only travelers within the county. Similarly, a functional area may be prefixed ‘county’ from the perspective of its control and regulation. This may even mean that a service is owned and rendered by the private sector but controlled and regulated by the county. Accordingly, ‘county health services, including, in particular – county health facilities and pharmacies’ may incorporate both the control and regulation functions.<sup>112</sup> While the county may control and regulate health facilities that are privately owned, it may also own its own health facilities.

### **5.2.3 The ‘full effect’ principle**

A purposive approach which has been recommended by the South African Constitutional Court requires that functional areas and powers be interpreted in a manner that gives full effect to the functions and powers of the levels of government. The Court rejected the idea of any presumptions in favour of any one of the levels of government. Instead, it emphasised a functional view which seeks to ensure that each level of government is enabled to discharge its ‘responsibilities completely and successfully’ and to exercise its powers fully and effectively.<sup>113</sup> Each functional area must be determined in the light of its vision informed by its textual context, the objects of devolution and the core values of the Constitution. Justice Ngcobo stated in this regard that ‘[t]he functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise

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<sup>111</sup> See Steytler & Fessha (2007) 334.

<sup>112</sup> Item 2(a) of Part 2 of the Fourth Schedule.

<sup>113</sup> Bronstein (2004) 9-10.

their respective legislative powers fully and effectively.<sup>114</sup> Therefore, national government functions cannot be interpreted in a manner that includes county government functions as this will deny the counties their constitutional right to exercise their powers fully and effectively. The purpose of the legislation must be determined by taking into account its stated objective as well as its unstated effect.<sup>115</sup> This principle serves to broaden the scope of the county powers.

#### **5.2.4 Incidental powers and functions**

The ambit of the powers may be extended beyond the specific terms of the functional list by the notion of incidental powers and functions. Article 185(2) empowers a county government to ‘make any laws that are necessary for, or incidental to, the effective performance’ of its functions and exercise of its powers under the Fourth Schedule. An incidental power refers to a situation where a matter that would have fallen in the functional area of the national government is regarded as being so integrally linked to matters in a functional area of county government as to be incidental and form part of that functional area.<sup>116</sup> Incidental powers and functions deal with grey areas around cut-off points of the functional areas; however, they are not meant to introduce new functional areas for county governments.<sup>117</sup>

The operative words in Article 185(2) are the phrases ‘necessary for, or incidental to, the effective performance’ of a function or exercise of a power. These phrases should be interpreted purposively and informed by not only the subsidiarity principle but also the objects and principles of devolution. The South African Constitutional Court defined the phrase ‘reasonably necessary for, or incidental to’ as meaning ‘reasonably necessary for and reasonably incidental to’.<sup>118</sup> Thus, a law may address an issue that is not directly mentioned as part of the functional area, yet be viewed as part of the functional area because it is

<sup>114</sup> *Ex parte Western Cape Provincial Government and others: In re: DVB Behuising (Pty) Limited v North West Provincial Government and Another* 2000 (4) BCLR (CC) (DVB Behuising) para 17.

<sup>115</sup> See *Ex Parte Speaker of the KwaZulu Natal Provincial Legislature: In re KwaZulu Natal Amakhosi and Iziphakenyiswa Amendment Bill of 1995* 1996 (7) BCLR 903 (CC) 19.

<sup>116</sup> See Steytler & De Visser (2011) Chapter 5, 7. See also *DVB Behuising* para 58 in which the South African Constitutional Court perceived the incidental nature of the powers in terms of the provisions in question being so ‘inextricably linked’ to the other provisions that they became foundational and integral to the achievement of the purpose of the legislation.

<sup>117</sup> See Steytler & De Visser (2011) ch 5, 7 and 8.

<sup>118</sup> *Liquor Bill* case para 81.

‘necessary for, or incidental to, the effective performance’ of the function. For example, although the Constitution does not expressly assign county governments functions in respect of criminal matters, the success of the county governments in the discharge of some of their functions necessarily requires that they exercise some criminal jurisdiction by creating offences. For instance, the effective performance of the county government liquor licensing function may necessarily include county liquor regulatory laws, which create criminal offences and impose penalties for non-compliance.<sup>119</sup> The same applies to their ‘control of drugs and pornography’ powers.<sup>120</sup>

While Article 185(2) expressly provides for county government incidental powers, it is instructive to note that the Constitution does not expressly provide for national government incidental powers. This should be interpreted as a deliberate omission intended to protect the county domain from invasion by national government. Article 185(2) read together with this deliberate omission imply an intention to protect and empower county governments to be able to effectively perform their functions and exercise their powers.

An issue regarding incidental powers will arise when legislation of county government is challenged for going beyond its functional areas and intruding into the exclusive functional areas of the national government. The determination of whether such legislation falls within the ambit of incidental powers revolves around determining the dominant characteristic of the legislation in question. In Canadian jurisprudence, the classification of the subject which the legislation deals with is done through what is referred to as the ‘pith and substance’ analysis. The ‘pith and substance’ of the legislation is identified by finding ‘the dominant or most important characteristic’ of the legislation,<sup>121</sup> or the most important purpose of a particular provision.<sup>122</sup> First, impugned provisions must be given natural interpretation but within their context, and then their role must be examined in isolation in order to characterise them.<sup>123</sup> Where the impugned provisions ‘can stand alone’ because they are within the powers of the

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<sup>119</sup> See Steytler & De Visser (2011) ch 5, 7.

<sup>120</sup> Item 13, Part 2 of the Fourth Schedule.

<sup>121</sup> See Hogg PW *Constitutional Law of Canada* 3 ed (1992) 15.7. See also Watts RL *Federalism: The Canadian Experience* (1997) 45-6.

<sup>122</sup> See *Kitkatla Band v British Columbia* (Minister of Small Business, Tourism and Culture) 2002 SCC, 31 [200] 2 SCR 146 para 58. See also *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641, 58 DLR (4<sup>th</sup>) 255.

<sup>123</sup> See Bronstein (2011a) 18.

county government, they require no further inquiry. Where the impugned provisions intrude into the exclusive legislative area of national government, it becomes necessary to establish the extent of the incursion. It must be determined how invasive the intrusion is.<sup>124</sup>

Secondly, is the impugned provision part of a broader legislative scheme that is within the competence of county governments? Where the legislative scheme is within the powers of county government, the relationship between the specific impugned provision and the scheme must be examined. It must be asked how well the provision is integrated into the scheme of the legislation and how important it is for the effectiveness of the legislation.<sup>125</sup> This may involve a proportionality approach to the interpretation. The more the impugned provision pushes the legislative boundaries of county government and encroaches on the national government domain, the more essential the provision must be to an otherwise valid legislative scheme for it to be considered incidental. The less it pushes the boundaries of county legislative powers, and intrudes into the national government domain, the easier and more likely that it will be sustained as an incidental power.<sup>126</sup>

### **5.3 Consequences of clear exclusive powers**

Once the scope of the exclusive powers has been determined, the consequence is that each government is entitled to exercise its powers without interference from the other. The problem, however, is that such distinct exclusive powers may be exercisable in respect of the same subject matter creating a functional inter-dependence problem because completely exclusive functions may support or depend on each other. For example, while national government has exclusive powers and functions over primary and secondary schools, county governments have exclusive powers and functions over county planning and development. They also have exclusive powers over water and sanitation, as well as electricity reticulation. Problems may therefore arise when national government designates the setting up of a primary school in an area county government has in exercise of its planning functions zoned not for schools. Similarly, a school may not be complete without provision of water and sanitation and electricity, which are exclusive functions of county government.

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<sup>124</sup> See Bronstein (2011a) 19.

<sup>125</sup> See Bronstein (2011a) 19.

<sup>126</sup> See Bronstein (2011a) 19.



Rules for the resolution of the problem of such functional interdependence are that, first, each level of government is entitled to perform its functions and none can displace the functions of the other. Once the bottom-up approach has been used to demarcate the exclusive functions of both the county and national governments, each government must be allowed to perform its own functions. In both *Swartland v Louw*<sup>127</sup> and *City of Cape Town v Maccsands*,<sup>128</sup> it was held that a person with a mining license must also comply with the planning requirements of the municipality.<sup>129</sup> He or she must obtain approval from both national and local government since the land on which the mining was to take place falls within the municipal planning jurisdiction.<sup>130</sup> The two levels of government have coordinate powers in their respective functional areas.<sup>131</sup> Secondly, the two levels of government must cooperate with each other when discharging their coordinate exclusive functions.<sup>132</sup>

## 6 Other original sources other than the functional lists

Four other sets of additional powers and functions can be identified in the Constitution: those relating to land; local government; public service; and amendment of the Constitution.

### 6.1 Powers and functions over land

Article 69(1) requires the 'state' to undertake a wide range of activities in the environmental area. Some of these activities fall within the exclusive functional areas of the two

<sup>127</sup> [2010] JOL 26136 (CC).

<sup>128</sup> [2010] JOL 25970 (CC).

<sup>129</sup> *Maccsands* para 28. In these cases, mining was an exclusive responsibility of the national government while land use planning was an exclusive function of local government. The mining companies secured mining permits from the national government under the Mineral and Petroleum Resources Development Act but the relevant local authorities argued that the land on which the mining was supposed to be done had not been zoned for mining and that unless the companies applied for and secured re-zoning, they could not be allowed to mine. The mining companies supported by the national Department of Minerals and Energy, argued that the national government's power over mining is an exclusive power, which trumps municipal authority over municipal planning and that the mining permit already included the land use right required.

<sup>130</sup> See also *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Another* 2014 (2) BCLR 182 (CC).

<sup>131</sup> See *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and others* (City of Johannesburg Metropolitan Municipality as amicus curiae) 2014 (5) BCLR 591 (CC) para 19.

<sup>132</sup> *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 883 (*Grootboom*) (CC) paras 39-40.

governments, identified by the functional list, while others are new entrants. These powers and functions are concurrent because the provision uses the phrase ‘the state’, which encompasses both national and county government. Article 260 defines the ‘state’ as being the collectivity of offices, organs and other entities which comprise the government of the Republic of Kenya as defined under the Constitution. The provision then defines ‘State office’ as including offices in the county government.

The provisions relating to community land draw a distinction between powers and functions which are conferred exclusively upon the national government and those that are conferred upon both levels of government. Whereas Article 63(5) places the responsibility to enact legislation to give effect to the entire Article on Parliament, Article 63(4) prescribes that ‘community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively’. The language of the Constitution in various respects suggests that whenever the term ‘legislation’ is used alone, it encompasses both national and county legislation. But when the Constitution uses ‘Parliament’, ‘Act of Parliament’ or ‘national legislation’ the terms are restricted to legislation of national government. In this case, community land can be disposed of or used in terms of county legislation or national legislation.<sup>133</sup>

## **6.2 Powers and functions over local government.**

The Constitution creates a possibility for the creation of local government below the county level.<sup>134</sup> Article 176(2) requires every county government to ‘decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so’.<sup>135</sup> This implies that counties may establish local authorities below them. Decentralisation was defined in Chapter One as the transfer of powers by a central government to sub-units which exercise those received powers under the ultimate control of the decentralising government.<sup>136</sup>

Article 176(2) should be interpreted as conferring upon county governments the local government competence to decentralise in a manner that goes beyond mere

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<sup>133</sup> See for example, Art 71.

<sup>134</sup> See section 2 of Chap 5.

<sup>135</sup> Art 176(2).

<sup>136</sup> See section 7.3 of Chap 1.

deconcentration.<sup>137</sup> The Fourth Schedule confers on the county government the responsibility of ensuring and coordinating the participation of communities and locations in governance at the local level. It also empowers them to assist communities to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.<sup>138</sup> Read together the conclusion that county governments have power to organise local government as one of their competences becomes irresistible.

Article 184, however, also requires national legislation to provide for the governance and management of urban areas and cities.<sup>139</sup> It is submitted that when county governments decentralise in respect of urban areas, they must do so within a regulatory framework of national legislation. A harmonised interpretation of Articles 176(2) and 184 is that the organisation of local government whether urban or rural is an exclusive function and power of county governments. National government can only legislate for how county governments can decentralise to urban areas to provide a regulatory framework. Although Ghai and Ghai observe that ‘decentralizing functions does not mean creating lower levels of government – having local offices of the county government is enough to satisfy the Constitution,’<sup>140</sup> given the conclusion made about deconcentration, the requirement to decentralise under Article 176(2) read together with the objects of devolution would not be satisfied by a mere opening of administrative offices.

However, this competence is discretionary since the Constitution uses the phrase ‘to the extent that it is efficient and practicable to do so’. The essence of this is that county governments are the ones to determine when and the extent to which it is efficient and practicable to do so.

The power of national government under Article 184 is limited to, first, legislating and does not extend to the actual management of urban areas and cities. Secondly, the Article imposes an obligation and not discretion to legislate. Thirdly, the scope of what national government can legislate on is limited to: establishing criteria for classifying areas as urban areas and cities;<sup>141</sup> categorising the urban areas into different types;<sup>142</sup> establishing the principles of

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<sup>137</sup> Ghai & Ghai (2011) 129.

<sup>138</sup> Item 14, Part 2 of the Fourth Schedule.

<sup>139</sup> Art 184(1).

<sup>140</sup> Ghai & Ghai (2011) 129.

<sup>141</sup> Art 184(1)(a).

governance and management of urban areas and cities;<sup>143</sup> and providing for participation by residents in the governance of urban areas and cities.<sup>144</sup>

### **6.3 Powers and functions over public service.**

The Constitution has settled for a dual system of public service under which each of the two levels of government has its own public service or public administration. However, the powers and functions relating to the establishment of the county government public service are subject to regulation by national government which must establish norms and standards to guide counties. The county governments have responsibility, ‘within a framework of uniform norms and standards prescribed by an Act of Parliament,’ for the establishment and abolition of offices in their public services, appointment and confirmation of persons to serve in those offices, and exercise of disciplinary control over and removal from office of such persons.<sup>145</sup>

### **6.4 Powers and functions over constitutional amendment.**

The constitutional amendment provisions confer powers and functions on both the national and county levels of government. While all constitutional amendments must be considered and passed by both houses of Parliament,<sup>146</sup> amendments commenced by way of popular initiative must be considered by the county assemblies before being introduced in Parliament. After going through the preliminary stages and processes, the Electoral and Boundaries Commission is required to submit the constitutional amendment Bill ‘to each county assembly for consideration’.<sup>147</sup> The Bill must be considered by each county assembly and once a majority of the county assemblies have approved it, it is introduced in Parliament for consideration.<sup>148</sup> This provision was meant to ensure that before a constitutional amendment is regarded as a popular initiative, it must have support spread across a wide area in the country. This particular power and function falls within the domain of exclusive powers and functions since each level is assigned its own identifiable functions or role which must be discharged sequentially before an amendment can validly be effected.

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<sup>142</sup> Art 184(2).

<sup>143</sup> Art 184(1)(b).

<sup>144</sup> Art 184(1)(c).

<sup>145</sup> Art 235(1)(a), (b) and (c).

<sup>146</sup> Art 255(1) and (3).

<sup>147</sup> Art 257(5).

<sup>148</sup> Art 257(6) and (7).

## 7 When powers become duties

The intersection of powers and functions with the Bill of Rights provisions transforms some of the powers and functions of both levels of government into binding duties. The Constitution imposes a rights implementation duty on ‘the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights’.<sup>149</sup> Similarly, ‘the state’ is required to ‘take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation’ of the socio-economic rights guaranteed under Article 43 of the Constitution.<sup>150</sup> Article 43(1) provides for economic and social rights which it itemises as including the highest attainable standards of health, accessible and adequate housing and reasonable standards of sanitation, freedom from hunger and adequate food of acceptable quality, clean and safe water in adequate quantities, social security and education. The provision then requires ‘the state’ to ‘provide appropriate social security to persons who are unable to support themselves and their dependants’.<sup>151</sup> Furthermore, all ‘state organs and all public officers’ are required to address the needs of vulnerable groups within society, such as women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.<sup>152</sup> There is also an obligation for the state to ‘enact and implement legislation to fulfill’ international obligations in respect of human rights.<sup>153</sup>

All these provisions impose duties upon the state which, in appropriate circumstances, transform the constitutionally assigned policy, legislative and executive powers and functions into binding duties of the levels of government. The use of the term ‘state’ in all these provisions means that they impose duties on both the national and county government.<sup>154</sup> This interplay or intersection increases the burden on the part of the levels of government. When discussing the nexus between functional assignment and the allocation of financial resources, the Supreme Court in *Speaker of the Senate and another v Attorney General and*

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<sup>149</sup> Art 21(1).

<sup>150</sup> Art 21(2).

<sup>151</sup> Art 43(3).

<sup>152</sup> Art 21(3).

<sup>153</sup> Art 21(4).

<sup>154</sup> Art 260. See also *Grootboom* para 82 where the South African Constitutional Court expressed the view that the socio-economic rights bind all spheres of government.

*others*<sup>155</sup> recognised this intersection and was of the view that the greater burden of socio-economic rights falls upon county governments. It observed that:

It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities.<sup>156</sup>

The Bill of Rights provisions do not however trump the other chapters and provisions of the Constitution. They must therefore be interpreted in the context of the whole Constitution to harmonise them with the rest of the provisions. Moreover, the level and nature of the duties for each level of government, which arise out of the intersection between the Bill of Rights, particularly socio-economic rights, and powers and functions, vary considerably. While some rights fit neatly into functional areas of each of the two levels of government, others do not and their application is nuanced.<sup>157</sup> For example, social security is a broad and nebulous subject which encompasses some of the listed functional areas and others not listed. Whereas national government is assigned agricultural policy and county governments are assigned agriculture, it is not clear whether food security is included in these functions, yet it forms part of the right to social security.

In order to clarify which rights transform which functions into duties for both national and county governments, a close examination of the intersection between the rights and the functional areas of the two governments is necessary. Steytler and De Visser suggest two types of intersection between socio-economic rights and functional areas. These are direct intersection, where the realisation of the right fits neatly within a functional area of a

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<sup>155</sup> [2013] eKLR (*Speaker of the Senate*).

<sup>156</sup> *Speaker of the Senate* para 193.

<sup>157</sup> See Steytler & De Visser (2011) ch 9, 14(1).

government, and supportive intersection, where the functional area does not cover the right directly, but a government nevertheless plays an important contributory or supportive role in its realisation.<sup>158</sup>

### 7.1 Direct intersection

Direct intersection refers to a situation where the nature and scope of a socio-economic right corresponds with a functional area or areas of either national or county government. For example, the county government functional areas of ‘water and sanitation services’,<sup>159</sup> intersect directly with the right to ‘clean and safe water in adequate quantities’.<sup>160</sup> However, depending on the nature of a particular functional area and the manner of its assignment, the duty to fulfill a particular right may be shared between the national and county government.<sup>161</sup> The county government health functional area<sup>162</sup> and the national government health policy and national referral health facilities<sup>163</sup> directly intersect with the right to ‘the highest attainable standards of health’, including the right to health care services and reproductive health care.<sup>164</sup> Thus, the right imposes an obligation on both governments.<sup>165</sup> Since some of the socio-economic rights dovetail into each other, the determination of the intersection between these rights and functional areas largely depends on the definition of the content of the rights. For example, the right to food may be defined as including the right to water.<sup>166</sup>

### 7.2 Supportive intersection

Supportive intersection refers to a situation where there is no direct intersection between a socio-economic right and a particular functional area of a level of government, yet the fulfillment of the right is dependent on that government playing a supportive role to the efforts of the other level of government. Since the fulfillment of the right is dependent on

<sup>158</sup> Steytler & De Visser (2011) ch 9, 14(1).

<sup>159</sup> Item 11(b), Part 2 Fourth Schedule.

<sup>160</sup> Art 43(1) (d).

<sup>161</sup> Steytler & De Visser (2011) ch 9, 14(1).

<sup>162</sup> Item 2(a), (b), (c), and (d), Part 2 of the Fourth Schedule.

<sup>163</sup> Items 23 and 28, Part 1 Fourth schedule.

<sup>164</sup> Art 43(1) (a).

<sup>165</sup> See also the housing functions of both county and national government and their intersection with the right to accessible and adequate housing under Art 43(1)(b).

<sup>166</sup> See Steytler & De Visser (2011) ch 9, 14(1)-14(2).

both the national and county governments, coordination and cooperation in terms of the principles of cooperative government are critical.<sup>167</sup> In the South African *Grootboom* case, although there was no direct intersection between the right to housing and any of the municipal government functional areas, the Constitutional Court held that all spheres of government ‘must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions of the Constitution’.<sup>168</sup> According to the Court, ‘each sphere of government must accept responsibility for implementation of particular parts of the [national housing] programme’.<sup>169</sup> The right to housing entails more than ‘bricks and mortar’ and includes ‘appropriate services such as the provision of water and removal of sewage’.<sup>170</sup>

A good example in the Kenyan case is the right to education.<sup>171</sup> Although there is no direct intersection between any of the county functional areas and the right to education at the university, secondary and primary school levels, national government which is assigned education at these levels cannot discharge its functions without the supportive role of county governments. Universities, secondary and primary schools require water and sanitation; refuse removal, refuse dumps and solid waste disposal; electricity; street lighting; and county access roads, all of which fall within county government functional areas.<sup>172</sup>

## 8 Secondary sources of powers and functions

Secondary sources of powers and functions of counties are powers and functions either assigned or transferred by national government. Assignment and transfer of powers and functions could be effected to all the counties or individually to specific counties.

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<sup>167</sup> Steytler & De Visser (2011) ch 9, 14(2).

<sup>168</sup> *Grootboom* case para 82.

<sup>169</sup> *Grootboom* case para 40.

<sup>170</sup> *Grootboom* case para 35. See also Steytler & De Visser (2011) ch 9, 14(2).

<sup>171</sup> Art 43(1) (f).

<sup>172</sup> See Steytler & De Visser (2011) ch 9, 14(2), where they observe that ‘the scope of local government’s supportive role can be wide, and may reach most, if not all, socio-economic rights. For example, in fulfilling the right to basic education, the proper functioning of primary and secondary schools is dependent on municipalities providing water, refuse removal and access roads to such schools.’



### 8.1 Assigned powers and functions

The Constitution by implication in Article 186(3) empowers the national government to assign any of its powers and functions to the county governments through legislation. Since national government cannot assign to county governments functions and powers which the Constitution itself has already assigned to counties, it can only assign its own constitutionally assigned functions and powers. Such assignment involves its exclusive including residual powers and functions but not concurrent powers and functions since the Constitution itself assigns such concurrent powers and functions upon counties. There are, however, some powers and functions which the national Parliament cannot assign to county governments since they are intended to be discharged by Parliament itself. For example, any legislative power drawn from a constitutional provision requiring an Act of Parliament cannot be assigned.

Article 183(1)(b) also empowers national government to assign some of its executive powers and functions to implement its own legislation to county government. It identifies among the functions of the county executive committee the responsibility to ‘implement, within the county, national legislation to the extent that the legislation so requires’. The phrase ‘to the extent that the legislation so requires’, indicates that such additional powers and functions are assigned by the legislation. In addition, a county executive committee can ‘perform any other functions conferred on it by this Constitution or national legislation’.<sup>173</sup> While under Article 186(3) national government can assign both legislative and executive powers and functions, under Article 183(1)(b) and (d) national government can only assign executive powers and functions limited to implementation of national legislation or parts of it. Unless the assigning legislation expressly says so, the assigned powers and functions are exclusive to county government until the legislation is repealed or amended to redesignate them.<sup>174</sup>

In both cases, this kind of assignment is envisaged as being in the discretion of national government which does not require the agreement of the county governments to assign them the powers and functions.

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<sup>173</sup> Art 183(1) (d).

<sup>174</sup> See *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) para 49. See also *S v Mhlungu and others* 1995 (7) BCLR 793 (CC) para 32.

Though there is no explicit provision for accompanying financial resources to discharge such assigned functions, the assigned functions ought to be considered at the time of division and allocation of revenue to avoid burdening counties with unfunded mandates.<sup>175</sup> This may lead to increased allocations to county governments. When considering the criteria under Article 203, the Commission on Revenue Allocation must take these additional functions into account before making its recommendations. Likewise, Parliament must consider these functions before passing the DORA.

## **8.2 Transferred executive powers and functions**

According to Article 187(1), one level of government may, by agreement with government at the other level, transfer any of its functions and powers to it. Although the provision appears to authorise the transfer of both legislative and executive powers and functions, the provision must be interpreted as limited to transfer of executive powers and functions, because national government need not negotiate on the transfer of legislative powers since it can assign them at its own discretion.

The transfer must be informed and guided by the subsidiarity principle. The transfer may be done where ‘the function or power would be more effectively performed or exercised by the receiving government’.<sup>176</sup> What is not clear is whether this aspect of the provision serves to put pressure on the governments to agree to transfer functions and powers where subsidiarity is proved. In addition, the transfer of such a function or power must not have been ‘prohibited by the legislation under which it is to be performed or exercised’.<sup>177</sup>

Compared to assignment by legislation, such transferred powers and functions depend on the terms of the agreement. The agreement could reduce the functions and powers to mere agency. Where the agreement confers discretion, the transferring government remains with the constitutional responsibility to ensure that the function is properly discharged.<sup>178</sup> This means that the transfer can be terminated any time and the transferring government resumes actual performance of the functions.

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<sup>175</sup> See Art 175(b).

<sup>176</sup> Art 187(1)(a).

<sup>177</sup> Art 187(1)(b).

<sup>178</sup> Art 187(2)(b).

To avoid the emergence of unfunded mandates, the Constitution explicitly provides that when such transfer is effected, arrangements must be made to ensure that the necessary resources for the performance of the functions or exercise of the powers are also transferred to the receiving government.<sup>179</sup> Because this is by agreement, counties can ensure that the transfer is accompanied by sufficient funds.

## **9 Conflict in the powers and functions**

As a consequence of concurrent legislative competences contemplated by Article 186(2), conflict of laws may arise. Following the example of South Africa,<sup>180</sup> Article 191 of the Kenyan Constitution provides for resolution of conflicts between the national and county laws. Conflict refers to inconsistency between laws enacted by the national and county governments in respect of concurrent functional areas in which both governments are competent to legislate.<sup>181</sup> Conflict may also occur when Parliament legislates for the Republic in terms of Article 186(4) in what otherwise appear to be county exclusive functional areas.

Resolution of conflict of laws under Article 191 must follow a three phased analysis and interpretation process.<sup>182</sup> First, the Court must establish that both the national and county laws are competent and valid.<sup>183</sup> Second, it must be established whether or not a conflict between the two laws exists. Third, if the threshold of conflict is established the process proceeds to the application of Article 191 in resolving the conflict.

### **9.1 Establishing competence**

In terms of Article 191(1) the provisions of the Article apply to conflicts in respect of legislation on matters falling within the concurrent, and not exclusive, functional areas.

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<sup>179</sup> Art 187(2)(b).

<sup>180</sup> Section 146 Constitution of the Republic of South Africa.

<sup>181</sup> See Currie & De Waal (2001) 221.

<sup>182</sup> See Bronstein (2004) (ch 15, 2). The author proposed four phases to the analysis and interpretation of similar provisions under the South African Constitution, although two of them can be merged into one.

<sup>183</sup> Bronstein (2011) 2; Currie & De Waal (2001) 220.

Legislation in an exclusive functional area of another government would be unconstitutional.<sup>184</sup>

## 9.2 Establishing the existence of a conflict

The determination of the existence of conflict begins with efforts to avoid conflict. Article 191(5) provides:

In considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict.

Thus, where it is possible to adopt a narrow construction of a statute which avoids conflict with another law, such construction must be preferred to a broader construction which would give rise to conflict. The implication of this is that a finding of conflict necessitating the application of Article 191 is a last resort when the conflicting provisions cannot be reconciled and harmonised through interpretation.<sup>185</sup>

This preference must however be based on ‘a reasonable interpretation’. Reasonableness should be guided by a purposive approach which seeks to give maximum effect to the objects and purposes of devolution. Avoiding conflict should not be seen as an end in itself, but a means to an end, seen in the context of the overall purposes and objects of devolution and how the two laws contribute to these purposes and objects. If avoiding conflict is what advances the purposes and objects of devolution in the given situation, then such preference becomes useful. If however, a declaration of conflict is what advances these objects then a conflict would rather be declared so that the dispute is resolved with a view to protecting and advancing the purposes and objects of devolution.<sup>186</sup>

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<sup>184</sup> In the South African case of *Certification of the Kwazulu-Natal Constitution* (1996) 11 BCLR 1419 (CC), the Constitutional Court drew a distinction between legislation that are competent and valid but conflict with each other, and legislation that are unconstitutional for want of competence.

<sup>185</sup> See Currie & De Waal (2001) 221. See also *Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill, No 83 of 1995* 1996 (4) BCLR 518 (CC) para 15.

<sup>186</sup> See Bronstein V ‘Conflict’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2004a) ch 16, 14, where she observes that ‘I have argued above that it is counter-productive to routinely harmonize legislative conflict by screening out cases before FC s 146 analysis can take place. The argument depends upon the assumption that the FC s 146 analysis will ultimately be worthwhile. On my view, FC s 146 should not become

In establishing the existence of a conflict, a distinction must be drawn between two types of conflict – direct and indirect conflict.

### **9.2.1 Direct conflict**

Direct conflict refers to a situation where there are express provisions of the national and county laws which are inconsistent with each other. Comparative experience has suggested a test for direct conflict, which asks whether or not the two conflicting laws can be enforced at the same time. In the Australian case of *Clyde Engineering Co Ltd v Cowburn* the High Court noted that ‘where the two laws can be obeyed at the same time there is no inconsistency’ and therefore no conflict.<sup>187</sup> The South African Constitutional Court rendered this test in the following terms:

For purposes of this inquiry as to inconsistency we are of the view that a provision in a provincial bill of rights and a corresponding provision in Chapter 3 are inconsistent when they cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey each without disobeying either.<sup>188</sup>

It is submitted that this direct conflict approach should be used in the application of Article 191. However, in some circumstances, it would need to be supplemented by the indirect conflict approach in order to give full effect to the objects of devolution and protect county space.<sup>189</sup>

### **9.2.2 Indirect conflict**

Indirect conflict refers to situations in which a finding of conflict may be made in the absence of express conflicting provisions. A national or county law may be silent on a matter and leave a gap. The silence or gap must not be taken as an oversight that should be filled with details by the other level of government. It may be deliberate and meant to protect certain targeted interests from the rigorous compliance demands of the law. In such a situation, the silence or gap has textual content that can create conflict with another law that is express on

a rubber stamp for centralization of power. Rather, it should facilitate “democratic accountability at the most appropriate level.”

<sup>187</sup> *Clyde Engineering* 504.

<sup>188</sup> *Certification of the KwaZulu-Natal Constitution* (1996) 11 BCLR 1419 (CC) para 24.

<sup>189</sup> See Bronstein (2011a) 10.

that matter. Bronstein refers to such legislative silence or gaps as regulatory spaces and observes that ‘silence in national legislation is capable of having sufficient texture to conflict with provincial legislation. Gaps in provincial legislation can also conflict with Acts of Parliament’.<sup>190</sup>

By such a silence that exempts such interests or groups from the compliance demands, the legislation should be understood to have fully covered the field that required to be regulated. If the other level of government legislates to fill the gap with details that require the exempted groups to comply, a direct conflict test would find that there is no conflict since the two laws can be obeyed at the same time. Yet the targeted groups would have lost the protection the silence afforded them. If however an indirect conflict test is used, the regulatory spaces would be regarded as deliberate, and a finding of conflict, requiring Article 191 resolution, would be made. Given that the effect of Article 191 is to reject the doctrine of the pre-eminence of national legislation over county legislation, the use of a combination of both direct and indirect tests, depending on the circumstances, will provide the necessary flexibility required to protect devolution.

### **9.3 Article 191 resolution of the conflict of laws**

Upon the establishment of the existence of a conflict, the inquiry then engages the provisions of Article 191 to determine how to resolve the conflict.

#### ***9.3.1 Purposive interpretation***

This provision should be interpreted strictly against the national government in order to protect the sphere of the county governments against encroachment by national government. The general principle is that devolution to counties is one of the mechanisms of achieving democratic and accountable exercise of power. Consequently, counties must not be hindered from exercising their assigned powers and functions. National government’s power to override county legislation can only be sustained upon proof of the listed circumstances as jurisdictional facts. Article 191 must not then become a backdoor for recentralisation of power.<sup>191</sup>

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<sup>190</sup> Bronstein (2011a) 10.

<sup>191</sup> See Bronstein (2011a) 14 and 16.

Article 191 gives preference to county legislation, and protects it against national legislation, unless specified circumstances exist which justify an override by national legislation.<sup>192</sup> The Article imposes upon national government the burden of proving the identified circumstances whenever it seeks to intrude into or encroach upon the domain of county government. This approach is consistent with that which South Africa, from whose Constitution Kenya borrowed these provisions, has used in the interpretation of similar provisions.<sup>193</sup>

### **9.3.2 Consequences of conflict**

Article 191(6) prescribes that a finding ‘by a court that a provision of a legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency’. This means that even when the court declares that national legislation prevails over county legislation, this does not render the county legislation null and void.<sup>194</sup> Neither of the two levels has the power to invalidate the laws of the other. As the South African Constitutional Court has stated:

Neither Parliament nor a provincial legislature has the competence to invalidate laws of the other passed in accordance with the Constitution; nor does the Constitution lay down that a consequence of inconsistency will be the invalidity of one of the laws. It follows that a law that is subordinated by virtue of the application of section 126(3) is not nullified; it remains in force and has to be implemented to the extent that it is not inconsistent with the law that prevails. If the inconsistency falls away the law would then have to be implemented in all respects.<sup>195</sup>

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<sup>192</sup> Art 191(4). See also Currie & De Waal (2001) 223 with reference to South Africa.

<sup>193</sup> See *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (1996) 1 BCLR 1 para 109, where the South African Constitutional Court observed that section 146 of the Final Constitution ‘gives preference to provincial legislation, and protects it against national legislation, unless circumstances exist in which a national override can be justified’.

<sup>194</sup> See Bronstein (2004a) 15.

<sup>195</sup> *Education Bill* case para 19 with reference to the South African Interim Constitution. See Hogg PW, *Constitutional Law of Canada* (1992) 3 ed para 16.6, cited in the *Education Bill* case at para 17, where he states: ‘The most usual and most accurate way of describing the effect on the provincial law is to say that it is rendered inoperative to the extent of the inconsistency. Notice that the paramouncy doctrine applies only to the extent of

Moreover, where it is county legislation which has prevailed, the national legislation remains in force in all other counties that do not have prevailing county laws in place.<sup>196</sup> The subordinated legislation also remains in force and must be implemented to the extent that it is not inconsistent with the law that has prevailed. Further, if the inconsistency in the legislation ceases either because it has been repealed or amended, the subordinated legislation is revived and becomes operative.<sup>197</sup>

#### 9.4 The override circumstances which must be proved

Article 191(2)(a) provides for two broad circumstances under which national legislation may prevail over county legislation. The first is where it is proved that the 'national legislation applies uniformly throughout Kenya' and satisfies any of the following three conditions: (a) the national legislation deals with a matter that cannot be regulated effectively by an individual county legislation,<sup>198</sup> (b) requires uniformity across the nation for it to be dealt with effectively, and the legislation provides for such uniformity through norms and standards, or national policies,<sup>199</sup> (c) is necessary for the achievement of certain specified purposes discussed below.<sup>200</sup>

The second broad circumstance is where it is proved that national legislation is aimed at preventing unreasonable action by a county which is prejudicial to the economic, health or

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the inconsistency. The doctrine will not affect the operation of those parts of the provincial law which are not inconsistent with the federal law, unless of course the inconsistent parts are inseparably linked with the consistent parts. There is also a temporal limitation on the paramountcy doctrine. It will affect the operation of the provincial law only so long as the inconsistent federal law is in force. If the federal law is repealed, the provincial law will automatically "revive" (come back into operation) without any reenactment by the provincial Legislature.' See also *Ex parte Speaker of the Kwazulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of Kwazulu-Natal, 1996* (1996 11 BCLR 1419 (CC)). See also *Butler v Attorney-General* (Vict.) (1961)106 CLR 268 at 286; and *Western Australia v The Commonwealth* (1994-1995) 183 CLR 373, 464 464, in respect of the position of the Australian High Court.

<sup>196</sup> See Currie & De Waal (2001) 222.

<sup>197</sup> See Currie & De Waal (2001) 222.

<sup>198</sup> Art 191(3)(a).

<sup>199</sup> Art 191(3)(b).

<sup>200</sup> Art 191(3)(c). Also see section 9.4.1.3.



security interests of Kenya or any other country, or impedes the implementation of national economic policy.<sup>201</sup>

The conditions for a national override are justiciable. Although the South African Constitutional Court indicated that there was need to handle the subjective intent of Parliament with caution and respect, it nevertheless emphasised the following:

The courts would have jurisdiction to determine whether “the interests of the country as a whole require that a matter be dealt with uniformly” for the purposes referred to in NT 146(2)(b), or that it is necessary for the objectives set out in NT 146(2)(c), or that the matter concerned cannot, within the meaning of NT 146(2)(a), be regulated effectively by individual provincial legislation. Such an exercise involves both an objective and a subjective element. The test in each case is ultimately objective because it is not the subjective belief of the national authority which is the jurisdictional fact allowing the national legislation to prevail over the provincial legislation, but there is inherently some subjective element involved in the assessment of what the interests of the country require or what is necessary. Some deference to the judgment of the national authority in these areas is inevitable.<sup>202</sup>

Each of these broad circumstances raises a number of interpretation questions which are separately discussed in the following sections.

#### **9.4.1 National legislation must apply uniformly**

According to Article 191(2)(a), national legislation prevails over county legislation if it ‘applies uniformly throughout Kenya, and any of the conditions specified in clause (3) is satisfied’. The key issue in this provision is the phrase ‘applies uniformly’: the national legislation must not be selective and targeted at specific individual counties but apply to all counties or the country as a whole. However, in terms of Article 191(2)(b), selectively targeted legislation may prevail where it seeks to prevent unreasonable action by a county.<sup>203</sup> The main challenge, however, is when one seeks to enact a national legislation but which in

<sup>201</sup> Art 191(2)(b)(i) and (ii).

<sup>202</sup> *First Certification judgment* at footnote 277.

<sup>203</sup> See Bronstein (2011a) 17.

reality is meant for a specific sector that can be found in only one or a few counties. For instance, although legislative powers in respect of agriculture are a concurrent function, within agriculture there are various sectors, some of which may be confined to specific counties, making enactment of legislation that may appear to be aimed at uniform applicability across the country look deceptive. Klaaren suggests that

a law purporting to apply nationally, but crafted to pertain only to a manufacturing process in the Western Cape, may well fail to satisfy the requirement of uniform applicability. Should the province choose to regulate such a matter, its legislation would prevail.<sup>204</sup>

It is submitted that this approach would be instructive for purposes of protecting county space and promoting the value and benefits that lie in diversity. Once the uniform applicability is established then the other three conditions must be tested.

#### **9.4.1.1 The matter provided for cannot be regulated effectively by the counties**

In terms of Article 191(3)(a) national legislation that applies uniformly prevails if ‘the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties’. The phrase ‘cannot be regulated effectively’ must be understood in light of the principle of functional appropriateness. Given that by adopting devolution, Kenya has recognised the value of subsidiarity, of seeking ‘democratic accountability at the most appropriate level’,<sup>205</sup> the claim that a matter cannot be regulated effectively by individual county governments must be interpreted strictly against national government. The courts must accordingly be inclined to protect the county autonomy where ‘no collective choice is necessary’.<sup>206</sup> Thus, a matter that can appropriately and effectively be regulated by county government must not be subjected to national uniformity. In *Mashavha v President of the Republic of South Africa and others*,<sup>207</sup> the South African Constitutional Court found that the provinces could not individually effectively regulate the administration

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<sup>204</sup> Klaaren (1999) ch 5, 5.

<sup>205</sup> See Bronstein (2011a) 16.

<sup>206</sup> See Bronstein (2011a) 16.

<sup>207</sup> (2004) 12 BCLR 1243 (CC) (*Mashavha*).

of social assistance, hence it held that it needed uniform norms and standards. The Court stated the following in this respect:

In my view social assistance to people in need is indeed the kind of matter referred to in section 126(3)(a), and in a wider sense envisaged by the meaning of the need for minimum standards across the nation in subsection (c). Social assistance is a matter that cannot be regulated effectively by provincial legislation and that requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic, for effective performance. Effective regulation and effective performance do not only include procedural and administrative efficiency and accuracy, but also fairness and equality for example as far as the distribution and application of resources and assistance are concerned. A system which disregards historical injustices and offends the constitutional values of equality and dignity could result in instability, which would be the antithesis of effective regulation and performance.<sup>208</sup>

#### **9.4.1.2 The legislation establishes uniform norms, standards and national policies**

A national override will also be justified if the legislation ‘provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing norms and standards,<sup>209</sup> or national policies’.<sup>210</sup> This provision has three elements which national government must prove. First, the matter requires to be dealt with ‘effectively’, which requires the national government to prove that county governments cannot individually deal with or regulate the matter effectively.

Secondly, such effectiveness requires uniformity across the country. The national government must prove that indeed the matter requires uniformity across the nation, which the legislation

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<sup>208</sup> *Mashavha* para 57. S 126(3)(a) of the South African Interim Constitution provides thus: ‘An Act of Parliament which deals with a matter referred to in subsection (1) or (2) shall prevail over a provincial law inconsistent therewith, only to the extent – (a) it deals with a matter that cannot be regulated effectively by provincial legislation.’

<sup>209</sup> Art 191(3)(b)(i).

<sup>210</sup> Art 191(3)(b)(ii).

is providing, and which cannot be provided for by the counties individually. Bronstein cautions that ‘the courts should not advance uniformity for uniformity’s sake’. Whereas the courts have a duty to defend national unity, they are not required to impose identical regulatory regimes throughout the country.<sup>211</sup> Uniformity must be applied in a manner that also appreciates that by adopting a non-centralised system of government, the country also undertook to protect diversity, which may require different regulatory regimes in different counties. A non-centralised system seeks to balance unity with diversity. In *Mashavha*, the Constitutional Court observed that:

It is inherent in our constitutional system, which is a balance between centralised government and federalism, that on matters in respect of which the provinces have legislative powers they can legislate separately and differently. That will necessarily mean that there is no uniformity.<sup>212</sup>

Diverse approaches provide opportunities for experimentation and innovation by some counties which, if successful may set the pace for other counties. As Justice Luis Brandeis stated in *New State Ice Co v Liebmann*: ‘It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.’<sup>213</sup>

Thirdly, the national legislation provides for the necessary uniformity through either norms and standards, or national policies. This limits the national legislation to broad framework legislation which avoids details that may occupy the entire county policy and legislative arena. The use of the terms ‘norms’, ‘standards’, and ‘national policies’ evidences a restriction to framework legislation. The essence of norms and standards is to establish a measure against which other actors can be assessed and evaluated. National government is thus empowered to establish a framework of norms and standards, and national policies with which counties must conform, when they legislate for their own details. The South African Constitutional Court in *Second Certification* case defined standards and norms in a manner that suggests this perspective:

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<sup>211</sup> Bronstein (2011a) 18.

<sup>212</sup> *Mashavha* para 49.

<sup>213</sup> 285 U.S. 262, 311 (1932).

Under the [Interim Constitution], an override for the purpose of uniformity is permitted where legislation contained norms or standards. Neither of these words is capable of precise definition. The Concise Oxford Dictionary defines ‘standard’ as ‘an object or quality or measure serving as a basis or example or principle to which others conform or should conform or by which the accuracy or quality of others is judged’. ‘Norm’ is defined as ‘a standard or pattern or type’. Given the ill-defined import of the words norms and standards, and the governing criterion of uniformity, it is likely that even under the [Interim Constitution], framework legislation and national policies which sought to establish uniformity by establishing standards, rules or patterns of conduct would have been held to fall within the scope of norms and standards.<sup>214</sup>

This means that there is a level of detail beyond which national government cannot go when providing uniformity through norms, standards and national policies. It must not regulate the matter in full to pre-empt and exhaust the concurrent field to such an extent that it leaves no scope for the counties to legislate in that field.<sup>215</sup>

#### **9.4.1.3 The legislation must be necessary for certain specified purposes**

A national override will also be justified if ‘the national legislation is necessary for: the maintenance of national security; the maintenance of economic unity; the protection of the common market in respect of the mobility of goods, services, capital and labour; the promotion of economic activities across county boundaries; the promotion of equal opportunity or equal access to government services; or the protection of the environment’.<sup>216</sup>

##### **9.4.1.3.1 The legislation must be necessary**

The first key requirement that must be proved is that the legislation is ‘necessary’. The use of the term ‘necessary’ creates a link between the national legislation and the objective sought to be achieved. Thus the national government must clearly indicate and prove which objective the legislation seeks to meet. In this context, ‘necessary’ means that the national legislation is

<sup>214</sup> *Certification of the Amended Text of the Constitution of the Republic of South Africa* para 159.

<sup>215</sup> See Malherbe (2008) 19-28, 22 and 23.

<sup>216</sup> Art 191(2) and (3)(c).

a step that must be taken in order to achieve the intended objective – it is something that one cannot do without.

Both the necessity of the national legislation and the identified objective are jurisdictional facts that must be proved by the national government for its legislation to prevail over county legislation. The Constitutional Court in the *Second Certification* case held that these matters are objectively justiciable.

The issue as to whether or not the particular national legislation dealt with a matter which was necessary for the maintenance of national security or economic unity or the protection of the common market or any of the other factors listed in [New Text] 146(2)(c) is now objectively justiciable in a Court without any presumption in favour of such national legislation.

In light of this observation it is submitted that these required objectives are meant to constrain the national government and protect the legislative domain of county governments. As such they must be interpreted narrowly and strictly against the national government. Each of the identified objectives must thus be considered.

#### **9.4.1.3.2 For the maintenance of national security**

The Constitution defines ‘national security’ in very broad terms as being ‘the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests’.<sup>217</sup> Because of these broad terms, it is argued that matters of national security are broad and nebulous, and straddle the functional areas of and indeed have been assigned to both national and county governments. While some are assigned to each government exclusively, others are concurrent. Because of this broad definition, national government must specifically identify the national security aspect it seeks to deal with and which it says is beyond the ability of effective county regulation. It will not be enough to simply allege ‘national security’ without specific substantiation.<sup>218</sup> In *Randu Nzai Ruwa and others v Internal Security Minister and another*,<sup>219</sup> the High Court stated that:

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<sup>217</sup> Art 238(1).

<sup>218</sup> *Republic v Muneer Harron Ismail and others* [2010] eKLR (Muneer Harron).

<sup>219</sup> [2012] eKLR (*Randu Nzai Ruwa*).

Where, however, there is a complaint raised as in this petition, that national security has been wrongly invoked to take away a fundamental right the court needs to be judicially satisfied that the action of the State is reasonable and justifiable. If this were not so, the State could make any decision or take any action in the name of national security with the comfort that it will never be required to account for that action. The State could be tempted to use the blank cheque to overdraw! ... The need for the State to demonstrate satisfaction of the limitation clause is therefore not only constitutional but in line with public policy.<sup>220</sup>

It is submitted that this approach suffices in the application of Article 191, when the maintenance of national security is alleged as the justification for national legislation prevailing over county legislation.

#### **9.4.1.3.3 For the maintenance of economic unity**

The maintenance of economic unity is a ground that seeks to avoid county governments legislating in a manner that creates barriers to trade within the national economy. It aims at ensuring that while diversity among the counties is good and has its own value counties must not be allowed to exercise their concurrent legislative powers in a manner that fragments the economy. Counties must not be allowed to regulate activities in a manner that is too costly and burdensome for the entire national economy. The South African Constitutional Court defined economic unity from this perspective thus:

In the context of trade, economic unity must in my view therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intra-provincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level.<sup>221</sup>

The implication of this is that in economic activities that are not confined to one county but instead spill over into other counties or take place across the country, county legislation may

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<sup>220</sup> *Randu Nzai Ruwa* para 53.

<sup>221</sup> See *Liquor Bill* case para 75.

not be appropriate and national government may plead that a national regulatory framework that prevails over county legislation is necessary.

#### **9.4.1.3.4 For the protection of the common market**

The Constitution provides that national legislation would prevail over county legislation if it is ‘necessary for the protection of the common market in respect of the mobility of goods, services, capital and labour’.<sup>222</sup> The commonness of the market in this provision refers to the whole country as a market available to all citizens. Citizens from one county should be allowed free access to the market for their goods, services, capital or labour in other counties. This is a provision that aims to ensure that county governments do not resort to unnecessary trade and economic protectionism. Such inter-county protectionism can have a disintegrating effect on the country as a whole because it can elicit retaliation by other counties.<sup>223</sup> It can also undermine macro-economic stability of the country’s economy as a whole.

#### **9.4.1.3.5 For the promotion of economic activities across county boundaries**

In terms of Article 191(3)(c)(iv), national legislation may prevail where it is necessary for the promotion of economic activities across county boundaries. Like economic unity and the common market requirements, this focuses on inter-county as opposed to intra-county activities. Some economic activities may have both national and international dimensions. Activities such as manufacturing, production and distribution across the country and county boundaries may be severely constrained if governed by a multiplicity of county laws.<sup>224</sup> Constraints of this kind may be addressed by national legislation that prevails over county legislation.<sup>225</sup>

#### **9.4.1.3.6 For the promotion of equal opportunity and access to government services**

National legislation may also be necessary if it aims at ‘the promotion of equal opportunity or equal access to government services’.<sup>226</sup> This focuses on the need to avoid county

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<sup>222</sup> Art 191(3)(c)(iii).

<sup>223</sup> See Bronstein (2011a) 22.

<sup>224</sup> See *Liquor Bill* case para 72.

<sup>225</sup> See *Liquor Bill* case paras 73 and 74.

<sup>226</sup> Art 191(3)(v).



governments legislating in a manner that discriminates against citizens from other counties. For example, a county may deny citizens from other counties medical services in its facilities. To address problems associated with such approach, national government may allege and prove that national legislation that prevails over county legislation is necessary.

#### **9.4.1.3.7 For the protection of the environment**

The national government can plead the protection of the environment as a reason that makes it necessary for national legislation to prevail over county legislation.<sup>227</sup> Environmental matters by their nature are capable of having spill-over effects. Regulatory and legislative measures in one county can create environmental burdens or negative externalities in other counties.<sup>228</sup> The governments and citizens in the other counties that are affected would be disadvantaged since they are not represented in the county assembly legislating and would not be in a position to exert democratic accountability from such a county assembly.

#### **9.4.2 The legislation aims at preventing unreasonable action by county**

The national legislation will prevail if it ‘is aimed at preventing unreasonable action by a county that – is prejudicial to the economic, health or security interests of Kenya or another county; or impedes the implementation of national economic policy’.<sup>229</sup>

First, ‘preventing’ refers to measures to stop something that is already happening or avoid that which is about to happen. Second, unreasonable action has the connotation of arbitrariness and lacking any rational basis.<sup>230</sup> Action comprises both acts of commission and omission with the result that failure to take action amounts to unreasonable action. What is unreasonable will not be determined on the basis of the subjective view of national government. Instead, it must be objectively proved as a jurisdictional fact.<sup>231</sup> With reference to the South African Constitution, Klaaren sets the standard of unreasonableness quite high, calling it a ‘high threshold’ which is aimed at preventing ‘renegade or out-of-place provincial legislation’.<sup>232</sup> He further argues that ‘provincial legislation which either directly

<sup>227</sup> Art 191(3)(c)(vi).

<sup>228</sup> See Bronstein (2011a) 24.

<sup>229</sup> Art 191(2)(b)(i) and (ii).

<sup>230</sup> See Stone RTH ‘The inadequacy of privacy: Hunter v. Southam and the meaning of “unreasonable” in section 8 of the Charter’ (1988-1989) 34 *McGill Law Journal* 685-704, 688.

<sup>231</sup> See Stone (1988-1989) 688-9.

<sup>232</sup> Klaaren (1999) ch 5, 16.

discriminates against out-of-province actors does so indirectly without justification' would be a type of legislation over which national legislation should prevail. Thirdly, 'prejudicial action' refers to action that causes injury or damage.<sup>233</sup> This, too, cannot be based on the subjective view of national government, but must objectively be proved as jurisdictional facts.<sup>234</sup> Fourthly, 'interests' in this provision are the identified public interest areas to which injury or damage could be caused by the action of county government. These are identified as economic, health or security interests of the country or another county. Fifthly, 'impedes' means to hinder or obstruct the doing of something. 'Implementation' refers to the process of administering and giving effect to decisions already made. 'National economic policy' refers to general principles established to govern economic matters in the whole country.

By its nature, this ground presupposes that national legislation targeted at a particular county can be enacted. That is why the provision does not include the requirement of uniform applicability.

## 10 Conclusion

Through a purposive interpretation of the constitutional provisions on the assignment of powers and functions, this chapter has established a number of things. First, the Constitution assigns to national and county governments both exclusive and concurrent functions. Contrary to the impression created by Article 186(4), county governments have some very clear exclusive functions. Secondly, although the functional lists do not specify and distinguish the exclusive powers and functions of the two levels of government, through the bottom-up approach the county exclusive functions can be isolated before the remainder is regarded as national government exclusive powers and functions. Thirdly, Article 186(4) plays a limited but very important role of assigning to Parliament legislative powers in respect of unclear aspects of what otherwise are county government exclusive functional areas. Fourthly, although the functional lists do not specify the concurrent powers and functions, there are significant areas of concurrency. When conflict of national and county laws arises in these areas of concurrency, Article 191 must be interpreted narrowly and strictly against the national government in order to resolve such conflicts in a manner that does not unduly interfere with the county legislative domain.

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<sup>233</sup> See Hawkins, RJ 'Substantially modifying the Visual Artist's Rights Act: A copyright proposal for interpreting the Act's prejudicial modification clause' (2008) 55 *UCLA Law Review* 1437-77 p 1449.

<sup>234</sup> See Hawkins (2008) 1450.

The South African jurisprudence has been very useful in this chapter in a number of respects. First, the bottom-up approach it developed has proved useful in demarcating the cut off points in the national and county exclusive functional areas. Secondly, the concept of the intersection of powers and functions with the Bill of Rights has drawn lessons from that developed by the South African jurisprudence and scholarship. Thirdly, the interpretation and application of Article 191, which is in similar terms to section 146 of the South African Constitution, has benefited immensely from the South African jurisprudence. Overall, a purposive interpretation reveals that what on first reading appear to be very limited county powers and functions are actually very substantial. Against this background, the next chapter examines the fiscal and financial powers and functions of the two levels of government.



## CHAPTER SEVEN

### Financing counties

#### 1 Introduction

The success of a non-centralised system of government is dependent upon not only a clear assignment of functions and competences but also an adequate allocation of financial resources to enable the levels of government to effectively discharge their functions. There is no point assigning functions and powers to a level of government if it does not have the capacity and financial resources to perform the functions and exercise the powers.<sup>1</sup> The general principle is that resources must follow and match responsibilities.<sup>2</sup> Among the fundamental changes the new Constitution has introduced are those in the public finance area, in which the raising, sharing, expenditure, control, audit and overall management of public finances are informed by devolution and follow an approach completely different from what the country has previously known.<sup>3</sup>

#### 2 Principles of financial devolution

The Constitution establishes a financial model that fundamentally changes the approach to the management of public resources, especially public finances and how they are allocated given the devolved system of government. The model is based on the economic theory of fiscal decentralisation which links the allocation of expenditure responsibilities to that of

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<sup>1</sup> Ghai YP & Ghai JC *Kenya's Constitution: An Instrument for Change* (2011) 122, where they state that 'giving powers to a government is of little consequence unless it has not only capacity, but also the resources to exercise them'.

<sup>2</sup> The Constitution of Kenya Review Commission *Special Working Document for the National Constitutional Conference: Report on Devolution of Powers* (2003) 100-1 states that: 'Financial resources are important to each level of government as they enable or constrain governments in the exercise of their constitutionally assigned responsibilities particularly legislative and executive. Responsibilities should not be given without accompanying means necessary for the effective discharge of the responsibilities. This may suggest the need to match the means to the responsibilities.' See also Murray C & Simeon R 'South Africa's financial constitution: towards better delivery?' (2000)15 *SAPR/PL* pp 477-504, 477; and Brand D *Financial Constitutional Law: A Comparison between Germany and South Africa* (2006) 104.

<sup>3</sup> Kirira N 'Public finance under Kenya's new Constitution' (2011) *Society for International Development (SID) Constitution Working Paper No. 5*, 1.

revenue sources, and recognises a number of principles.<sup>4</sup> Both Articles 201 and 175 have provided principles of financial devolution and public financial management, which must guide revenue raising, sharing and expenditure. First is the principle of financial autonomy of levels of government which emphasises own revenue and financial effort to ensure better accountability by the governments.<sup>5</sup> Secondly, this is balanced against the principle of solidarity which recognises vertical and horizontal imbalances in the fiscal capacity of the governments, necessitating financial equalisation measures.<sup>6</sup> Equalisation is pursued through constitutional provision for transfers from revenue raised nationally, aimed at supplementing county own revenues to enable them to effectively deliver on their constitutional mandates. Thirdly, in making the transfers, the principle of funds following functions is provided for and aims at avoiding unfunded mandates.<sup>7</sup> Fourthly, because of financial autonomy in respect of ability to determine their own budgets and budgetary priorities, there should be prudent and responsible use of funds, which demands value for money and use of money for the right purposes.<sup>8</sup> Fifthly, the Constitution consequently establishes the principle of accountability to the residents of the counties who must see that the funds have been used prudently and responsibly.<sup>9</sup> This must be secured through the constitutional principles and requirement of transparency.<sup>10</sup>

In nature these principles are goals and mostly serve as interpretation tools for giving meaning to other substantive constitutional provisions on financial matters. The principles have informed the design of the concrete financial provisions, which themselves are hard enforceable rules of the Constitution. All the other provisions of the chapter on public finance must therefore be read together with these principles. Thus, when the courts review financial legislation for constitutionality, these principles must serve as yardsticks against which the legislation must be measured.

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<sup>4</sup> Brand (2006) 76.

<sup>5</sup> Arts 175(b) and 203(1)(e) & (i).

<sup>6</sup> Art 201(b).

<sup>7</sup> Art 175(b).

<sup>8</sup> Art 201(d).

<sup>9</sup> Art 201(a).

<sup>10</sup> Art 201(a).

## 2.1 Financial autonomy and financial own effort

The Constitution establishes county governments that are meant to have financial autonomy in two respects: access to sufficient revenue from both their own sources and transfers from revenue raised nationally, and ability to determine their own budgets and budgetary priorities. In terms of Article 175(b) county governments must have ‘reliable sources of revenue to enable them govern and deliver services effectively’. Moreover, the Constitution establishes criteria to be used in the sharing of revenue raised nationally, which focuses on the need to develop and enhance the fiscal capacities of the counties as they are a factor that determines their equitable share entitlement. Article 203(1)(e) requires consideration of ‘the fiscal capacity and efficiency of county governments’. To realise part of this principle, the Constitution assigns to county governments some original taxing and other revenue-raising powers which they should use to raise revenue locally. The counties must therefore first make their own local efforts to fully utilise these revenue-raising powers before turning to their equitable share of the revenue raised nationally.

This principle aims at the full realisation of the fiscal potential and financial efficiency of the counties. It will also serve to ‘promote a stronger accountability relationship between the county governments and their citizens, whose tax money they would be collecting and spending’.<sup>11</sup> Accordingly, one criterion focuses on the need to optimise the economy of each county ‘to provide incentives for each county to optimize its capacity to raise revenue’.<sup>12</sup> Pursuant to this goal the Constitution leaves it to Parliament to determine and authorise any other tax that may be imposed by both national and county governments.<sup>13</sup> Similarly, it is for this purpose that the power of both the national and county governments to raise revenue through imposition of charges and fees is rendered in very open-ended terms, so as to allow them adequate flexibility for future identification of additional instruments of raising revenue.<sup>14</sup> To translate this principle into hard enforceable rules of law, the Constitution specifically identifies one of the functions of the Commission on Revenue Allocation<sup>15</sup> as

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<sup>11</sup> World Bank *Devolution without Disruption: Pathways to a Successful new Kenya* (2012) 60.

<sup>12</sup> Art 203(1)(i).

<sup>13</sup> Art 209(2) and (3)(c).

<sup>14</sup> Art 209(4).

<sup>15</sup> See section 3 of this chapter.

being to, when appropriate, ‘define and enhance the revenue sources of the national and county governments’.<sup>16</sup>

## 2.2 Solidarity and financial equalisation

As a corrective measure of unequal access to county own revenue and historical disadvantages, the Constitution includes among the principles of public finance the promotion of an equitable society in which the burden of taxation is shared fairly,<sup>17</sup> the revenue raised nationally is shared equitably among national and county governments,<sup>18</sup> and expenditure promotes the equitable development of the country.<sup>19</sup> The provision goes beyond inter-social equity and demands for even inter-generational equity. Therefore, the principles of public finance require that ‘the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations’.<sup>20</sup>

These provisions embody the principle of solidarity which is founded upon the need for social justice.<sup>21</sup> Solidarity is a notion that recognises the unacceptability of disparities between various parts and the need for appropriate action to reduce the disparities in such a manner that the stronger players assist the weak.<sup>22</sup> The objective of this principle is to secure uniformity of living conditions or at least comparable basic public services at comparable tax rates for all citizens wherever they may be within the country. Viewed against a historical background of regional disparities in the country, the main concern of the principle is redistribution and ensuring a balanced development of the country. The principle responds to the reality that it is very difficult to effectively match revenue-raising powers to expenditure responsibilities since it is not possible to achieve equal spatial distribution of the tax base and the other revenue raising sources. It seeks to avoid extreme competition that may destabilise

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<sup>16</sup> Art 216(3)(b).

<sup>17</sup> Art 201(b)(i).

<sup>18</sup> Art 201(b)(ii).

<sup>19</sup> Art 201(b)(iii).

<sup>20</sup> Art 201(c).

<sup>21</sup> Task Force on Devolved Government *Final Report on Devolved Government in Kenya: Developmental Government for Effective and Sustainable Counties* (2011) 248: ‘The adoption of this philosophy was informed by the fact that Kenya was coming from a history of extreme disparities in terms of infrastructure development and incomes due to inequalities in the financial resource endowments and allocation.’

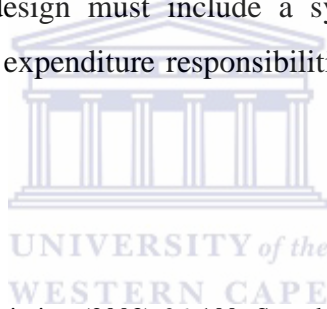
<sup>22</sup> Brand (2006) 22.

the necessary economic stability and equilibrium. The principle recognises that not all the regions of the country are endowed with an equal resource base.<sup>23</sup>

Solidarity is balanced against the financial autonomy of the counties as it does not seek the equality of the counties in their fiscal capacities but, instead, equity that can enable them to provide comparable public services to their inhabitants. Solidarity is therefore not a threat to financial autonomy as it aims at reducing the gap between the counties but does not and cannot permanently erase the gap.<sup>24</sup>

### 2.3 Finances must follow functions

This principle aims at ensuring that funds follow and match functions to enable each level of government to effectively discharge its constitutional responsibilities.<sup>25</sup> Therefore, in a country with a history of regional disparities the design of the revenue-raising powers must be balanced against the design of the spending power. If the revenue-raising powers cannot yield sufficient resources, the design must include a system of transfers to ensure the matching of the resources to the expenditure responsibilities.<sup>26</sup> Article 175 provides for the




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<sup>23</sup> Constitution of Kenya Review Commission (2003) 96-100. See also Art 106(3) and (2), Basic Law of the Federal Republic of Germany, which incorporates this principle in the system of sharing of certain revenues among the Federal and Land governments by noting that ‘the financial requirements of the federation and the Lander shall be coordinated in such a way as to establish a fair balance, to avoid excessive burdens on taxpayers, and ensure uniformity of living standards throughout the federal territory’. Section 36(1) and (2) of the Constitution of Canada of 1967, on the other hand, justifies its financial equalisation on, among other things, the need to address regional disparities, promote equal opportunities for the well-being of all Canadians, further economic development to reduce disparity in opportunities, and provide essential public services of reasonable quality to all Canadians with a view to securing ‘reasonably comparable levels of public services at reasonably comparable levels of taxation’.

<sup>24</sup> Brand (2006)164 and 251.

<sup>25</sup> Kriel RR & Monadjem M ‘Public Finances’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) 14, who note that in the South African system the maxim that ‘finances follows functions’ has been legislated in to the Division of Revenue Act 7 of 2003 section 27(2).

<sup>26</sup> Mutakha JK ‘Regional inequalities in Kenya in the context of decentralization and devolution: Dynamics and policy options’ in *Report of the National Conference on Equity and Growth: Towards a Policy Agenda for Kenya* (2006) Regal Press Ltd pp 115-42, 139. <http://www.sidint.net/docs/inequalities%20Conference%202006.pdf> (accessed 1 November 2013).



matching of funds to functions when it requires that ‘county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively’.<sup>27</sup>

Since the Constitution provides for assignment and transfer of functions by national government to county governments, an important objective of this principle is the avoidance of unfunded mandates when counties become responsible for national functions.<sup>28</sup> The concept of unfunded mandates has been defined as referring to situations where responsibilities are shifted from the national government to sub-national governments without providing the necessary funding to perform them.<sup>29</sup> The avoidance of unfunded mandates is necessary because the additional assigned responsibilities strain the allocated resources which have been matched with the constitutionally assigned duties.

#### **2.4 Prudent and responsible use of public finances**

Article 201(1)(d) prescribes that ‘public money shall be used in a prudent and responsible way’. The Constitution also prescribes that ‘financial management shall be responsible, and fiscal reporting shall be clear’.<sup>30</sup> ‘Prudent’ here connotes a measure of carefulness, precaution, wisdom and good judgment in the expenditure and use of money. It calls for sensible, economical and frugal use of public funds.<sup>31</sup> As used in this provision, the term embodies the concept of value for money and use of money for the right purposes. ‘Responsible’, on the other hand, involves the quality of being accountable for one’s actions and responsive to the needs of the people.<sup>32</sup> As used in this provision, the two terms imply avoidance of wasteful use of funds and the choosing of priorities that are beneficial to the people.

The provisions should be interpreted and understood within a historical context of rampant corruption, outright theft and wasteful use of public resources. The principles seek to redress

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<sup>27</sup> Art 175(b).

<sup>28</sup> Kriel & Monadjem (2011) 14.

<sup>29</sup> See Dilger RJ & Beth RS ‘Unfunded Mandates Reform Act: History, impact, and issues’ *Congressional Research Service Report* [www.crs.gov](http://www.crs.gov) (accessed 18 September 2013) 10-11, where he notes that such assignments have been referred to in Canada as service responsibility ‘downloading’ and in Australia as ‘cost shifting’.

<sup>30</sup> Art 201(e).

<sup>31</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 1033-4.

<sup>32</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 1102.

a past of leaders' self-interest and greed at the expense of the interests of the people. The High Court in *Timothy Njoya and others v Attorney General and others* commented on the history that motivated these principles in the context of members of Parliament defending their continued exemption from paying taxes as follows:

The country is coming from a background of greed and financial misappropriation. Public money has in the past not always been applied in its intended purpose of the development of the country. It is for this reason that principles of public finance were included in the Constitution. In my view, the reason that the Committee of Experts included the provision that 'the burden of taxation would be shared fairly' was to put a stop to the manner in which public finances were used before and to put in place more equitable and transparent financial management processes, in a manner that applies to all.<sup>33</sup>

## 2.5 Accountability through transparency

The principles of public finance call for accountability from all public entities dealing with public finances, including the two levels of government. Article 201(a) prescribes that all aspects of public finances should be guided by 'openness and accountability', which must include the participation of the public in financial matters. Accountability is defined by Corder et al as follows:

Basically accountability means 'to give an account' of actions or policies, or 'to account for' spending and so forth. Accountability can be said to require a person to explain and justify – against criteria of some kind – their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future. A condition of the exercises of power in a constitutional democracy is that the administration or executive is checked by being held accountable to an organ of government distinct from it.<sup>34</sup>

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<sup>33</sup> [2013] eKLR 22.

<sup>34</sup> Corder H, Janganth S & Soltau F *Report on Parliamentary Oversight and Accountability* (1999) 2.

Reference to ‘openness’ should be understood as incorporating the concept of transparency. This principle should be understood within the context of concerted efforts by the constitution-framers to institute a system of good governance through stringent controls on those who exercise power so that the interests of the people are truly served. The provision should be read as building on one of the key values of governance in Article 10 which include ‘good governance, integrity, transparency and accountability’.<sup>35</sup> Transparency abhors financial operations that are shrouded in secrecy, and instead requires openness and involvement of the people.

### 3 Sources of revenue of counties

The Constitution identifies two sources of revenue for the county governments: own revenue from taxation, fees and charges for services and goods; and transfers from revenue raised nationally. Borrowing is a possible further source.

#### 3.1 Own revenue-raising powers

Pursuant to the principle of financial autonomy, the Constitution empowers the two levels of government to raise revenue through the imposition of taxes and charges for services. The High Court in *Cereal Growers Association and another v County government of Narok and others* adopted *Black’s Law Dictionary* definition of a tax as ‘[a] monetary charge imposed by the government on persons, entities, transactions or property to yield revenue’.<sup>36</sup> The Court, however, failed to draw the necessary distinction between a tax and a charge, and instead wrongly regarded a charge as a tax.<sup>37</sup> A tax is a levy imposed by the state on people, businesses, property, income, commodities, or transactions.<sup>38</sup> It is distinguished from charges, because it is not linked to, nor does it necessarily bear any direct relationship to the benefits of government goods and particular services received. It is not assessed against the

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<sup>35</sup> Art 10(2)(c).

<sup>36</sup> [2014] eKLR (*Cereal Growers*) para 46.

<sup>37</sup> *Cereal Growers* para 46 where the Court wrongly stated: ‘In my view therefore and reading the provisions of Article 209(3) and 209(4) of the Constitution, the County government may impose an entertainment tax as it is constitutionally provided for but then any other tax or charge that may be imposed by the county government must be provided for under an existing Act of Parliament. I say so because in my view a charge is a form of tax.’

<sup>38</sup> See *City of Johannesburg v Renzon and Sons (Pty) Ltd* 2010 (1) SA 206 (W) (*Renzon*) 215.

consumption of goods or services, while charges for services have a bearing to services and commodities provided as well as the burdens created by a person or property.<sup>39</sup>

County governments have been granted limited taxing powers; they can only raise revenue through the imposition of property rates, entertainment taxes, and any other taxes authorised by an Act of Parliament.<sup>40</sup> They also have powers to raise revenue by imposition of charges for services limited to the functions they perform.<sup>41</sup> Their borrowing powers are severely curtailed as they must secure national government guarantees.<sup>42</sup> Compared to the national government revenue-raising powers, the county governments have very limited own revenue powers and must share in the revenue raised nationally.

The national government is empowered to raise revenue through the imposition of income tax, value added tax, customs duties and other duties on import and export goods, excise tax, and any other tax or duty authorised by an Act of Parliament which must not include property rates and entertainment taxes.<sup>43</sup> It can also impose charges for services in respect of the functions it performs. While the revenue raised by county governments is regarded as own revenue, that raised by the national government is, as discussed below,<sup>44</sup> not own revenue of the national government.

### **3.1.1 Property Rates**

Property rates are the main tax own source of revenue for county governments, particularly those that have major urban areas but not those that are mainly rural. A property rate is a tax on the value of immovable property, calculated by applying a rate (an amount in the Kenya shilling) against the value of the property.<sup>45</sup> Thus, the property rates have two elements: the

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<sup>39</sup> *Renzon* 215.

<sup>40</sup> Art 209(3).

<sup>41</sup> Art 209(4).

<sup>42</sup> Art 212.

<sup>43</sup> Art 209(1)(2).

<sup>44</sup> Section 3.2.1 of this chapter.

<sup>45</sup> See Steytler N & De Visser J 'Local Government' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 22, 95. See also *Gerber and others v MEC for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA) (*Gerber*) para 23, in which the South African Supreme Court of Appeal noted that rates are 'the assessment levied by local authorities at so much per pound of assessed value of buildings or land owned'.

property which must be valued and a rate in a money unit set. The rates due are thus determined by multiplying the value of the property with the money unit set as the rate.<sup>46</sup> The definition distinguishes rates from any other levies that are based on a flat rate irrespective of the value of the property. The valuation of property is thus critical for imposition of property rates.<sup>47</sup>

A clear distinction must thus be drawn between a property rate which is based on the value of the property and a service charge which in most cases is based on consumption.<sup>48</sup> A clear definition of what constitutes property rates is necessitated by the fact that the Constitution identifies property rates and entertainment taxes as exclusive taxes of the county governments, which will avoid national government imposing property rates and entertainment taxes under the guise of other names.

### **3.1.1.1 Original powers**

The power of the county governments to impose property rates is an original power as it derives directly from the Constitution and is not delegated by enabling national legislation.<sup>49</sup> It can therefore be exercised even in the absence of any enabling national legislation as Article 209(3)(a) is sufficient anchorage.<sup>50</sup> Moreover, this is an exclusive power of county government since Article 209(2), when providing for an Act of Parliament to authorise

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<sup>46</sup> Steytler N & De Visser J *Local Government Law of South Africa* (2013) Issue 5 ch 13, 9-10, and Steytler & De Visser (2011) ch 22, 95.

<sup>47</sup> See Steytler & De Visser (2011) ch 13, 12 where they point out that ‘flat rates’ do not qualify as rates on property.

<sup>48</sup> See, for comparison, the South African case of *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) paras 53 and 68, in which the municipality had determined the cost of the sewage service on the basis of the assessed value of the property. The South African High Court held that this was a property rate regardless of the name the City called it. Budlender AJ observed that: ‘The nature of the payment which has to be made is determined by its actual nature, not the label which is put on it.’

<sup>49</sup> In *City of Cape Town and another v Robertson and another* 2005 (3) BCLR 199 (CC) the South African Constitutional Court held the power of local government to impose rates as being an original one. See also *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1998 (12) BCLR 1458 para 39. See also Steytler & De Visser (2011) ch 13, 7 who have observed that one ‘consequence of being an original power is that a municipality’s power to levy rates is not dependent on enabling national legislation’.

<sup>50</sup> Art 209(3)(a).

national government to impose any other tax or duty, specifically provides that such other tax or duty may not be property rates and entertainment taxes.

Viewed against the nature of local government under the repealed Constitution, this power serves to enhance the financial autonomy of the county governments and to affirm the intention of the framers of the Constitution to devolve real power. As discussed below, national government can, however, through legislation, regulate the manner in which the power is exercised.

### **3.1.1.2 Legislative powers**

The Constitution explicitly prescribes that ‘no tax or licensing fee may be imposed, waived or varied except as provided by legislation’.<sup>51</sup> A county assembly must therefore pass legislation that forms a basis for imposition of property rates or entertainment tax. This makes the act of imposing a tax a legislative act.<sup>52</sup> Being a legislative power, the exercise of the power to impose property rates is discretionary as the county assemblies are not under an obligation to exercise it. However, this discretion must be informed by the county government’s need to make its own efforts to raise revenue. The ‘discretion not to levy rates may be constrained’<sup>53</sup> by a county government’s duty to efficiently utilise its own local revenue sources ‘to enable [it] to govern and deliver services effectively’.<sup>54</sup> As already noted, failure to efficiently utilise its own local fiscal capacity is a factor that may be considered adversely against a county in the process of sharing revenue raised nationally.

### **3.1.1.3 Limitation of the powers**

Although the imposition of property rates is an original and legislative power, its exercise is nevertheless subject to some limitations. First, the county assemblies and Parliament are prohibited from enacting any law that excludes or authorises the exclusion of a state officer from payment of tax on grounds of the office he or she holds or the nature of the work that he or she does.<sup>55</sup> Secondly, the power of the county assemblies, just like that of Parliament, to waive any tax or licensing fees is subjected to the maintenance of a public record of such

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<sup>51</sup> Art 210(1).

<sup>52</sup> See *Fedsure* para 45, where the Court held that the power to raise taxes or rates is a legislative power.

<sup>53</sup> Steytler & De Visser (2011) ch 13, 8.

<sup>54</sup> Art 175(b).

<sup>55</sup> Art 210(3).

waiver and the reasons for the waiver.<sup>56</sup> Moreover, such waiver and the reason for it must be reported to the Auditor-General.<sup>57</sup> Thus any national or county legislation that is contrary to these limitations is inconsistent with the Constitution and invalid.<sup>58</sup>

Thirdly, the Constitution prohibits county assemblies from exercising their taxation and other revenue-raising powers in a manner that ‘prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour’.<sup>59</sup> It is argued that these requirements, which are set out by Article 209(5), imply a regulatory power on the part of the national government to establish a legislative framework for the exercise of county taxing powers. When invoked and a conflict of laws arises, it must be resolved in terms of Article 191 to determine whether the national legislation will prevail over county legislation. Such power would, however, be limited to regulating the power of the county governments to impose property rates and cannot be used by national government to completely eliminate their taxing power.<sup>60</sup>

Such national government regulatory power would also be subject to the principles of co-operative government discussed in Chapter Nine, which would require consultation with the county governments. In addition, when a Bill seeking to establish such a regulatory framework is published, the Commission on Revenue Allocation must be consulted since the Bill deals with a ‘financial matter concerning county governments’.<sup>61</sup> This obligation to consult is an active one requiring the national government to solicit and consider the

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<sup>56</sup> Art 210(2) (a).

<sup>57</sup> Art 210(2) (b).

<sup>58</sup> In *Timothy Njoya and others v Attorney General and others* [2013] eKLR the High Court considered this matter in the context of a claim by members of Parliament that they should, in terms of the National Assembly Remuneration Act, continue to be exempted from payment of taxes. The Court concluded that this would be contrary to the intention and will of the Kenyan people when they made the Constitution and that any legislation exempting members of Parliament from payment of taxes would be unconstitutional. ‘It is my determination that the National Assembly Remuneration Act will continue to be in force with regard to the remuneration of the members of the National Assembly. This legislation was enacted before the promulgation of the current Constitution. The Act however, *must*, by virtue of section 7 of the Sixth Schedule, be brought into conformity with the Constitution. As a result, any legislation made by Parliament or agreement that is made in violation of the provisions of the Constitution is void.’ (emphasis in original).

<sup>59</sup> Art 209(5).

<sup>60</sup> See Steytler & De Visser (2011) Ch 22, 89.

<sup>61</sup> Art 205(1).

recommendations of the CRA.<sup>62</sup> If Parliament fails to consult the CRA, the resultant legislation would be inconsistent with the Constitution for failure to follow the prescribed procedure.<sup>63</sup>

### **3.1.2 Entertainment taxes**

The only other tax source which the Constitution identifies in Article 209(3)(c) and empowers county governments to impose is ‘entertainment taxes’. Like property rates, this is an original exclusive taxing power that derives directly from the Constitution and is not delegated by national legislation.<sup>64</sup> It can therefore be exercised even in the absence of any enabling national legislation as the constitutional provisions are sufficient anchorage.<sup>65</sup> Indeed, since this is an exclusive county government taxing power, national government cannot legislate in respect of this tax, unless it is legislating a regulatory framework in terms of Article 209(5). It must limit itself to framework regulatory legislation touching on the matters listed under Article 209(5), and Article 191 must be invoked for resolution of any conflict of laws. According to Article 210(1) it is one of the taxes that cannot be imposed, waived or varied otherwise than by legislation. The imposition of entertainment tax is a legislative act which can only be exercised by the county assemblies and not the county executive.<sup>66</sup>

#### **3.1.2.1 Definition of entertainment tax**

‘Entertainment taxes’ embodies two important concepts: ‘tax’ and ‘entertainment’. As already noted, a tax is ‘a contribution to state revenue, compulsorily levied on people, businesses, property, income, commodities, or transactions’.<sup>67</sup> ‘Entertainment’, on the other hand, is defined as any exhibition, performance, amusement, game, sport or race to which persons are ordinarily admitted on payment. It includes entertainment through cable

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<sup>62</sup> Art 205(2), Steytler & De Visser (2011) ch 22, 92.

<sup>63</sup> *Robertson v City of Cape Town and Another; Truman-Baker v City of Cape Town* 2004 (9) BCLR 950 (C) paras 93 and 109. See also Chap 9, section 3.1.2.2.

<sup>64</sup> *Cereal Growers* para 46.

<sup>65</sup> Art 209(3)(a).

<sup>66</sup> Art 210(1).

<sup>67</sup> See *Renzon and Sons* 215. See also section 3.1 above.



television networks for which persons are required to make payment by way of contribution or subscription or installation and connection charges.<sup>68</sup>

Entertainment tax is thus a tax or duty which sub-national governments levy specifically on any form of entertainment itself, such as on an entry ticket and, which is not part of some broader tax such as value-added tax. Such activities must be understood in the sense of amusement of some sort. Entertainment in this sense connotes something in the nature of organised entertainment.<sup>69</sup> The entertainment activities upon which the tax or duty may be levied are varied and limitless as they represent the diversity of society. As such, different sub-national governments are able to identify different entertainment activities on which they can levy entertainment tax. They generally include any exhibitions, performances, amusements, game, sport or race to which persons are ordinarily admitted on payment.<sup>70</sup>

The tax is paid by the patrons or spectators who are admitted on payment to an entertainment activity. It is, however, collected and remitted to the government by the proprietors or organisers of the entertainment activity.<sup>71</sup> It is often included in the price of the entry ticket or admissions fees as a percentage.<sup>72</sup> This suggests that a county government can impose a tax on an event organised by national government.

Under the replaced constitutional dispensation entertainment taxes were provided for by the Entertainments Tax Act,<sup>73</sup> which at first glance appears to have taken a narrow view of entertainment. Section 2, for example, defines entertainment as including an exhibition, performance or amusement to which persons are admitted for payment. Close scrutiny, however, discloses that the use of the term ‘includes’ creates room for a broad meaning of the activities on which entertainment tax may be imposed. Its use indicates that the listed activities are not a closed exhaustive list.<sup>74</sup> However, given that the Constitution assigns to

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<sup>68</sup> Government of India *Department of excise entertainment and luxury tax* <http://excise.delhigovt.nic.in/ex4.asp> (accessed 28 February 2014) (Government of India).

<sup>69</sup> Government of India *State receipt audit manual: Entertainment tax and entertainment duty* <http://agpunjab.gov.in/pdf/met.pdf> (accessed 27 February 2014) para 1.2.

<sup>70</sup> Government of India *State receipt audit manual* para 3.1.

<sup>71</sup> Government of India.

<sup>72</sup> Government of India.

<sup>73</sup> Entertainments Tax Act, Cap 479.

<sup>74</sup> *Communications Commission of Kenya and others v Royal Media Services and others* [2014] eKLR (*Communications Commission of Kenya*) para 359.

county governments entertainment taxes as an exclusive taxing power, this Act being a national legislation is invalid unless national government justifies it as a regulatory framework legislation meant to give effect to the limitations the Constitution imposes on county government taxing powers under Article 209(5). Such justification must also satisfy the requirements of Article 191.

### ***3.1.3 Charges and fees for services and goods***

Article 209(4) empowers County governments, just like national government, to ‘impose charges for services’ as one of the ways of raising revenue. This is a source of revenue that is ordinarily directly linked to the discharge of the functions the county governments are assigned by the Constitution. It empowers them to levy and recover fees, charges or tariffs in respect of any function or service they perform or provide. While some functions entail the production and sale of tangible goods for which the governments may charge a price, other functions entail the provision of a service for which the providing government may charge fees – what in some jurisdictions is referred to as user charges or fees. Yet other functions entail regulation and licensing of activities for which the regulating and licensing government may charge licensing fees and impose fines or penalties for infractions of the regulations. As sources linked to functional areas, these are exclusive to the level of government that has been assigned a function upon which the charge is to be imposed.

#### ***3.1.3.1 Definition of charges for services***

‘Charges for services’ as used in Article 209(4), first, entail payments a person makes for a government provided service which are sometimes referred to as user fees, levy or tariff. They are the equivalent of a price for goods in the private business sector. Secondly, services are the commodities which the government supplies and for which a fee or price is paid. Commodities are used in the broad sense to encompass tangible goods for which the government may charge a price; non-tangible services for which the government may charge fees; and regulation and licensing services for which licensing fees may be charged. There are cases in which there may be a combination of tangible goods and services for which the government charges fees.

It is submitted that charges for services within the meaning of Article 209(4) must be understood in broad and not narrow terms and must include four broad categories: charges as price and fees for commodities supplied and utility services; charges as user fees for services

rendered; charges as fees for regulation, licensing and permits; and charges as rent and royalties from land and other natural resources.

### **3.1.3.1.1 Charges as price for commodities and utility services**

Utility and commodity charges and user fees are viewed as public sector counterparts to prices in the private sector and are associated with services and utilities necessary for everyone in a community.<sup>75</sup> However, their main distinguishing feature is that they are voluntary payments based on direct, measurable consumption of publicly provided goods and services. Payments by users vary depending on the quantity of goods and services consumed.<sup>76</sup>

A number of functions assigned to county governments will involve the supply of tangible goods and provision of utility services for which charges as a price will be appropriate. The agriculture function may involve the production of quality seeds by county governments for supply to the farmers.<sup>77</sup> County government pharmacies may make medicine available at a price, while the water and sanitation function involves the production and supply of water to the citizens at a price.<sup>78</sup> In addition, the county government function relating to electricity and gas reticulation involves the distribution of consumer products for a price.<sup>79</sup>

### **3.1.3.1.2 Charges as user fees for services**

These are user fees and charges associated with a broad range of public services that generally add to the quality of life in the community but which may not be required by all residents.<sup>80</sup> The Constitution assigns to county governments certain functions that in nature are focused on delivery of this kind of services for which the governments may appropriately charge user fees. They can charge fees in respect of their plant and animal disease control functions,<sup>81</sup> pharmacies, ambulance services, veterinary services, cemeteries, funeral parlours

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<sup>75</sup> Bezruki D et al *Best Practices Report: Local Government User Fees* (2003-2004) Joint Legislative Audit Committee, 11.

<sup>76</sup> Advisory Commission on Intergovernmental Relations *Local Revenue Diversification: User Charges* (1987) Staff Report, 3.

<sup>77</sup> Item 1 Part 2, Fourth Schedule.

<sup>78</sup> Item 2(a) Part 2, Fourth Schedule.

<sup>79</sup> Item 8(e) Part 2, Fourth Schedule.

<sup>80</sup> Bezruki et al (2003-2004), 11.

<sup>81</sup> Item 1(d), Part 2 Fourth Schedule.

and crematoria, and refuse removal, refuse dumps and solid waste disposal functions.<sup>82</sup> They can levy fees for cinemas, video shows and hiring, library services, museums, parks, beaches and recreation facilities.<sup>83</sup> Likewise, charges can be levied for motor vehicle parking, ferries and harbours services.<sup>84</sup> Finally, land survey, mapping, boundaries and fencing services can attract levies.<sup>85</sup>

### 3.1.3.1.3 Charges as licensing fees

If a county government may regulate an area, it may levy license fees on individuals who may want to operate in the area. A number of functions assigned to county governments are regulatory in nature and suitable for imposition of charges in the form of licensing fees. Licensing fees may, for example, be levied for privately owned county abattoirs,<sup>86</sup> health facilities,<sup>87</sup> undertakings that sell food to the public,<sup>88</sup> ‘liquor licensing’,<sup>89</sup> and betting, casinos and other forms of gambling.<sup>90</sup> Licensing charges can also be levied for ‘trade development and regulation’,<sup>91</sup> and for approval of housing development plans.<sup>92</sup>

As part of the mechanisms for the enforcement of the regulatory powers of a government, a government must have the power to impose and recover fines and penalties for failure to comply with the regulations. The county government’s powers to impose charges for services must include the imposition and recovery of fines and penalties. In the area of ‘control of air pollution, noise pollution, other public nuisances and outdoor advertising’, which are regulatory in nature, the counties may impose penalties for release of pollutants.<sup>93</sup> In terms of Article 157(9) the Director of Public Prosecutions may authorise and specially instruct county

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<sup>82</sup> Item 2(a), (b), (e), (f) and (g) Part 2 Fourth Schedule.

<sup>83</sup> Item 4(d), (e), (f), (g) and (i) Part 2 Fourth Schedule.

<sup>84</sup> Item 5(c) and (e) Part 2 Fourth Schedule.

<sup>85</sup> Item 8 (a), (b), (c) and (d) Part 2 Fourth Schedule.

<sup>86</sup> Item 1(c) Part 2 Fourth Schedule.

<sup>87</sup> Item 2 (a) and (b) Part 2, Fourth Schedule.

<sup>88</sup> Item 2(d) Part 2, Fourth Schedule.

<sup>89</sup> Item 4(a), (d), (e) and (c) Part 2 Fourth Schedule.

<sup>90</sup> Item 4(a), (d), (e) and (c) Part 2 Fourth Schedule.

<sup>91</sup> Item 7 Part 2, Fourth Schedule.

<sup>92</sup> Item 8 Part 2, Fourth Schedule.

<sup>93</sup> Item 3 Part 2, Fourth Schedule.

governments to prosecute offenders under their laws and regulations, and impose and recover fines and penalties.

#### **3.1.3.1.4 Charges as rent and royalties from land and other natural resources**

Revenue can be derived from land and other natural resources. Article 62(1),(2) and (3) allocate public land to both national and county governments, making county governments one of the owners of public land. Article 65 implies recognition of leasehold tenure of land which could earn rent for the county governments. Furthermore, Article 66(2) recognises investment in property which could earn county governments some revenue, by providing that ‘Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies’.

#### **3.1.3.2 Original powers**

The power to impose charges for services is an original power as it is directly derived from Article 209(4) and is not dependent on enabling national legislation.<sup>94</sup> In terms of Article 210(1), charges are not taxes, thus their imposition can be done by the executive. The power need not be exercised through county legislation. However, the principle of legality requires all executive action to be anchored in enabling legislation.

#### **3.1.3.3 Limitations of the power**

The Constitution requires that this power be exercised in a manner that does not prejudice ‘national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour’.<sup>95</sup> As already noted, national government can realise this objective through a regulatory framework law to regulate the manner in which this power is exercised by the county governments. Such regulatory power is subject to the provisions of Article 191 and must stay within the permitted regulatory parameters and not take over the power of the county governments to impose charges. As an original power, one level of government cannot make decisions about the power of the other, except where there is concurrency.

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<sup>94</sup> *Cereal Growers* para 46.

<sup>95</sup> Art 209(5).

### **3.1.4 Additional assigned taxation powers**

Article 209(3)(c) provides that county governments may impose ‘any other tax that [they are] authorized to impose by an Act of Parliament’. This may not, however include any of the national government exclusive taxing powers. In terms of Article 209(1), ‘only the national government may impose’ income tax, value-added tax, customs duties and other duties on import and export goods, and excise tax. Nonetheless, the ‘authorized’ tax may be one of the other national government’s existing taxing powers. Since assigned tax powers originate from national legislation, they can be repealed by similar legislation.

Although on the face of it the authorisation falls under the discretion of the national government, does Article 175(b), which establishes the principle of reliable sources of revenue for county governments, impose a justiciable obligation on national government to do so? The discretion should be exercised in a cooperative manner which allows county governments to petition national government to assign them more taxing powers on the basis of Article 175(b). As a minimum, the High Court in *Robert N Gakuru* recognised that counties may petition the national government to do so.

I must however stress that County Governments are under Article 175(b) of the Constitution entitled to have reliable sources of revenue to enable them to govern and deliver services effectively. However this entitlement must be exercised in accordance with the Constitution and the law and where the existing legislation is not adequate for the purposes of ensuring the efficient governance and delivery of services the County Government ought to petition the National Government to increase allocation to them or enact appropriate legislation to enable them carry out their constitutional mandate as required under Articles 190(1), 202 and 203 of the Constitution.<sup>96</sup>

The next question is how national government should approach the petition. It is suggested that in view of the principle of cooperative government, the national government should at least show and provide reasons why the petition is rejected.

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<sup>96</sup> *Robert N Gakuru* para 82.

### 3.2 Transfers from ‘revenue raised nationally’

The Constitution provides for three forms of transfers: an entitlement to an equitable share of revenue raised nationally, additional allocations from the national government’s share of the revenue raised nationally given either conditionally or unconditionally, and equalisation funding from the revenue raised nationally.

#### 3.2.1 *The concept of equitable shares*

Article 202(1) of the Constitution provides that ‘revenue raised nationally shall be shared equitably among the national and county governments’. This provision builds on the financial model which the Constitution has adopted and one of the principles of public finance set out in Article 201(b)(ii). The equitable share is a right of each government and not a discretionary donation by national government to the county governments, and is as such an entitlement, which is justiciable.<sup>97</sup>

The county entitlement stems from the fact that because national government is assigned all the major taxing sources, this revenue does not accrue exclusively to it.<sup>98</sup> The design of revenue-raising powers ensures that the tax bases which raise more money, cannot easily be given a geographic home, are not equitably distributed across the country, and are best suited for redistributive purposes, are assigned to the national government.<sup>99</sup> The proceeds are, however, equitably shared among the two levels of government in an objective way.<sup>100</sup> This is because such allocation of revenue-raising powers has the effect of creating both vertical and horizontal imbalances which call for equalisation through transfers. Thus the revenue raised by national government is not own revenue of national government. While the revenue raised by the county governments accrues to each county that raises it and is retained for

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<sup>97</sup> See Steytler & De Visser (2011) ch 22, 104; Steytler & De Visser (2011) ch 12, 5, who have interpreted section 214 of the South African Constitution, from which Kenya borrowed the concept of equitable shares, as creating an ‘entitlement and not national largesse’. In *Uthekela District Municipality and others v President of the Republic of South Africa and others* (2002) (5) BCLR 479 (N) the South African High Court held that each of the three spheres of government has an entitlement to receive an equitable share of revenue raised nationally. In the DORA of 2000 district municipalities were not given allocations from the revenue raised nationally. A number of district municipalities challenged this omission and the court ruled in their favor.

<sup>98</sup> World Bank (2012) 53.

<sup>99</sup> Mutakha (2006)139.

<sup>100</sup> Mutakha (2006)139.

expenditure by it, revenue raised by the national government does not exclusively accrue to it. It accrues jointly to national and county governments and must be shared.<sup>101</sup>

### **3.2.2 The meaning of revenue raised nationally**

A major interpretation challenge is the determination of what is meant by ‘revenue-raised nationally’.<sup>102</sup> Meaning must be given to three distinct aspects of this phrase: ‘revenue’, ‘raised’ and ‘nationally’.

#### **3.2.2.1 Revenue**

In government revenue is an in-flow of resources that the government demands, earns, or receives by donation, which is to be used to finance public expenditure.<sup>103</sup> Such revenue comes from government exchange transactions such as charges for goods and services and privatisation of government assets; and non-exchange transactions such as taxes, duties, fines, penalties, and voluntary donations. As used in the provisions under discussion, revenue must be broadly understood as referring to all money received by or due to the national government from all its sources in the course of its operations.

#### **3.2.2.2 Raised**

In government accounting, revenues are recorded on the basis of the recognition principle, which regards anticipated revenue as revenue.<sup>104</sup> Thus, ‘raised’ should be understood in the context of government budgeting for a financial year which is normally based on expected income and projected expenditure. Thus, when governments budget, revenue ‘raised’ for that financial year can only refer to expected income for that year and not cash already collected or received, since what may be already collected and received is revenue ‘raised’ for the

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<sup>101</sup> Mutakha (2006) 139. See also Kriel & Monadjem (2011) 8, who state in respect of South Africa that: ‘Revenue raised nationally’ is synonymous with what is termed ‘equitable share’ and is allocated between the three spheres of government. Prior to allocation, this revenue is not yet ‘national government revenue’, even though it is received into the National Revenue Fund. Only when national government has received its portion of equitable share, through a constitutionally controlled allocation process, is this revenue called ‘national government revenue’.

<sup>102</sup> Task Force on Devolved Government (2011) 252.

<sup>103</sup> Government of the United States of America *Statement of Federal Financial Accounting Standards Number 7* [www.fasab.gov/pdffiles/handbook\\_sffas\\_7.pdf](http://www.fasab.gov/pdffiles/handbook_sffas_7.pdf) para 2.

<sup>104</sup> Government of the United States of America para 2.



previous financial year. This is because budgets,<sup>105</sup> and the Division of Revenue Bill as well as the Allocation of Revenue Bill, are adopted before a current financial year comes to an end.<sup>106</sup> ‘Raised’ therefore refers to projected and anticipated revenue<sup>107</sup> coming from national government revenue-raising powers under Article 209, and includes in-flows to the national government from all other sources, such as donations and borrowing. It does not mean actual cash already collected; rather, it refers to what is due or reasonably anticipated in the coming financial year.

### **3.2.2.3 Nationally**

‘Nationally’ refers to revenue raised by national government as distinguished from revenue raised by county governments in the context of the two-level system of government. Revenue raised nationally therefore refers to all the revenue accruing from the efforts of national government either from revenue-raising powers conferred upon it in terms of the Constitution or any other legitimate source of revenue. It includes all money reasonably anticipated<sup>108</sup> by the national government from taxes, charges for services, royalties, sales, fines, interest, dividends and rent on land as well as financial transactions in assets and liabilities.<sup>109</sup> Article 218(1)(a) explicitly refers to a ‘Division of Revenue Bill, which shall divide revenue raised by the national government’ among the national and county governments. Thus, revenue raised nationally is not restricted to revenue raised in exercise of the constitutional revenue-raising powers.<sup>110</sup> It includes revenue received or anticipated from other sources such as grants from foreign governments and international organisations,<sup>111</sup> forfeitures ordered by the courts and proceeds of crime traced and recovered by the government. Article 206 recognises a distinction between money received, and money raised when it establishes the Consolidated Fund as a fund ‘into which shall be paid all money raised or received by or on behalf of the

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<sup>105</sup> See Arts 221(1) and 224.

<sup>106</sup> See Art 218(1).

<sup>107</sup> See Art 220(1)(a), which refers to ‘estimates of revenue and expenditure’.

<sup>108</sup> See Art 220(1)(a), which refers to ‘estimates of revenue and expenditure’.

<sup>109</sup> See Art 209(1),(2) and (4); and Kriel & Monadjem (2011) ch 27, 29.

<sup>110</sup> Task Force on Devolved Government (2011) 252.

<sup>111</sup> International Monetary Fund, Chapter 5 ‘Revenue’  
<http://www.imf.org/external/pubs/ft/gfs/manual/pdf/ch5.pdf> (accessed 9 October 2013) 47.

national government'.<sup>112</sup> Revenue raised nationally is therefore much more than revenue raised by the national government within the meaning of Article 209.

The Task Force on Devolved Government, relying on the Audit and Exchequer Act, which defines revenue as including 'penalties, forfeitures, rents and dues and all other receipts of the government, from whatever source arising, over which Parliament has power of appropriation', arrived at the same conclusion.<sup>113</sup> Revenue raised nationally is therefore all money raised or received by or on behalf of the national government and over which Parliament has the power of appropriation.

#### **3.2.2.4 Revenue excluded from the Consolidated Fund**

The Constitution expressly establishes the principle of single general-purpose accounts for both the national and each county government into which all revenue raised by or on behalf of each government is received and out of which revenue can only be appropriated by the legislative arm of such a government. Article 207 establishes a general-purpose Revenue Fund for each county, while Article 206(1) and (2) establishes a general-purpose Consolidated Fund for revenue raised at the national level of government. Article 206, however, makes exceptions to the general-purpose single account rule and allows for reasonable exclusion and dedication of certain funds to specific purposes. Revenue may reasonably be excluded from the Consolidated Fund by an Act of Parliament and be payable into another public fund established for a specific purpose.<sup>114</sup> Likewise, excluded revenue may, under an Act of Parliament, be retained by the state organ that received it for the purpose of defraying its expenses.<sup>115</sup>

Money raised by the national government can only be excluded from the Consolidated Fund if it is dedicated revenue. Dedicated revenue is money from any source that is earmarked for a specific purpose. Taxes, levies, charges and donor grants may be earmarked for or dedicated to a specific issue. Dedication of revenue generally has the effect of removing that revenue from the normal budgetary process and parliamentary accountability checks and

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<sup>112</sup> Art 206(1).

<sup>113</sup> Task Force on Devolved Government (2011) 252.

<sup>114</sup> Art 209(1)(a).

<sup>115</sup> Art 206(1)(b).

balances the process entails.<sup>116</sup> It is against the background of this kind of risk that the Constitution requires that revenue can only be excluded from the Consolidated Fund if such exclusion is reasonably done. This limits the power of Parliament to dedicate funds to specific purposes. The limitation is necessary to ensure that all projects fairly compete for prioritisation through the annual budget processes.<sup>117</sup>

It is submitted that such dedication of revenue does not exclude it from the revenue raised nationally, which must be shared. The vertical division of revenue must be based on all revenue raised whether or not it is in the Consolidated Fund. First, Article 206(3) prohibits any withdrawals from dedicated national public funds without authorisation by an Act of Parliament. This means that dedicated funds must remain under control of Parliament and form part of the broader intergovernmental financial framework, including the Division of Revenue processes.<sup>118</sup> Secondly, within the Kenyan devolved system, equitable shares are allocated to governments informed by the constitutional duties and responsibilities assigned to them. Thus money dedicated to a national government entity which performs national government constitutional functions must be taken into account in the Division of Revenue process in order to avoid national government receiving double payment for one and the same function. Dedication of funds to national government's constitutionally assigned functions can distort the process of the vertical division of revenue. As such, if any revenue is dedicated

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<sup>116</sup> The South African Katz Commission on Tax Reform *Report of the Katz Commission into Tax Reform* (1994) <http://www.polity.org.za/polity/govdocs/commission/katz3.html> para 3.3.6 warned in 1994 that '[a]lthough many countries make considerable use of dedicated taxes of one kind or another, there is now widespread recognition internationally that a proliferation of dedicated financing mechanisms distorts public sector resource allocation unduly and tends to undermine fiscal management'.

<sup>117</sup> The Katz Commission on Tax Reform para 3.3.7 counseled against proliferation of dedicated funds noting that 'under circumstances of considerable change in the Government's spending priorities, the integrity and transparency of the budgetary processes through which national and provincial expenditure appropriations are made should not be compromised by pre-assignment of tax revenue to specific programmes or functions'

<sup>118</sup> The Katz Commission on Tax Reform paras 3.5.4 and 3.5.5 points out that '[a]lthough these constitutional provisions do not altogether preclude the earmarking of nationally collected taxes for the (conditional) financing of specific schedule 6 services within the budgetary process, it is clear that any such arrangements could only be considered as an integral part of the broader inter-governmental financial framework ... . As the financial viability and health of provincial governments depend in part on the development of robust own revenue bases, it is important that their comparatively limited taxing capacity should not be unnecessarily exploited by national government.'

to such functions, it must be taken into account in the vertical division of revenue as forming part of the national government equitable share.

In light of this definition of revenue raised nationally, section 2 of the Commission on Revenue Allocation Act<sup>119</sup> which defines revenue in a manner that excludes certain revenue from the ‘revenue raised nationally’ is unconstitutional for a number of reasons. It provides:

‘revenue’ means all taxes imposed by the national government under Article 209 of the Constitution and any other revenue (including investment income) that may be authorised by an Act of Parliament, but excludes revenues referred to under Articles 209(4) and 206(1)(a)(b) of the Constitution.<sup>120</sup>

There are three major problems which this section creates. First, whereas the Constitution repeatedly refers to ‘revenue raised nationally’ as being the revenue to be shared among the national and county governments, this section refers to and defines a new concept of ‘revenue’. Section 10 of the Act suggests that the new concept replaces the constitutional concept of ‘revenue raised nationally’. It requires the CRA to submit ‘recommendations to the Senate, National Assembly, national executive, County Assembly and county executive on the proposal made for equitable distribution of “revenue” between the national and county governments and amongst the county governments’.<sup>121</sup> The CRA should submit recommendations about the sharing of ‘revenue raised nationally’ and not ‘revenue’ as defined here. Secondly, while Article 209(4) explicitly includes charges for services, among the revenue that is to be raised by the national government, the section of CRAA expressly excludes such revenue from the ‘revenue’ it defines. Although charges for services may be dedicated to specific purposes, they cannot be excluded from ‘revenue raised nationally’, which must be vertically shared. Such charges are imposed in respect of the constitutional duties and functions of national government, which ultimately are taken into consideration when determining the equitable share of the national government. Thirdly, Article 206(1)(a) and (b) of the Constitution, which provides for dedicated revenue and excludes it from the Consolidated Fund, does not exclude such dedicated funds from the revenue raised

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<sup>119</sup> Commission on Revenue Act No 16 of 2011(CRAA).

<sup>120</sup> S 2(1) CRAA.

<sup>121</sup> S 10(1)(c) CRAA.

nationally. As already noted, dedication of revenue does not exclude it from the shareable revenue raised nationally.

Similarly, the Public Finance Management Act also seeks to define yet another concept not provided for in the Constitution. Section 2 of the Act provides that:

“national government revenue” means all taxes imposed by the national government under Articles 206(1) (a) and (b) and 209 of the Constitution, excluding county government revenue.<sup>122</sup>

This section is unconstitutional for the same reasons set out in relation to the provisions of the Commission on Revenue Allocation Act. First, ‘national government revenue’ is different from ‘revenue raised nationally’ and only becomes known after the vertical division of the revenue raised nationally.<sup>123</sup> Secondly, the provision tries to restrict revenue to be shared to only tax money leaving out other funds which the Constitution regards as part of revenue raised nationally.

### ***3.2.3 The process of the vertical division***

Implied in Articles 201, 202 and 203 is a revenue-sharing process that has two distinct aspects: the vertical division of revenue which ensures equity between the national and county governments, discussed in this section; and the horizontal allocation of revenue which ensures equity among the 47 counties, discussed in the next section. The vertical division must be done annually and be embedded in an Act of Parliament known as the Division of Revenue Act.<sup>124</sup> Equity or equitable share is a broad normative value that may be difficult to measure, yet entitlement to it gives rise to competing claims by both national and county governments that must be determined. As such, the Constitution provides for criteria, which are discussed in subsequent sections that can be used to give shape and content to the notion of equitable shares. In using the criteria, a delicate balancing must be done not only between the claims of national and county governments but also among the criteria themselves since some carry more weight than others. This balancing process must consider fairness in the vertical division of revenue between the two levels of government, fairness in the horizontal

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<sup>122</sup> S 2(1) Public Finance Management Act.

<sup>123</sup> See Kriel & Monadjem (2011) 8, where they note that national government revenue only becomes known after the vertical division of revenue.

<sup>124</sup> Art 218(1)(a).

allocation of revenue among the 47 counties, and good governance factors in both the vertical and horizontal sharing processes.

### **3.2.3.1 The institutional framework for the vertical division**

The Supreme Court in *Speaker of the Senate and another v Attorney General and others*<sup>125</sup> stated that ‘[t]he Division of Revenue Bill, 2013 was an instrument essential to the due operations of county governments, as contemplated under the Constitution, and so was a matter requiring the Senate’s legislative contribution’.<sup>126</sup> As such, the enactment of the Division of Revenue Act requires the participation of both the National Assembly and the Senate.

Article 95(4)(a) provides that the National Assembly determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve. This seems to suggest that this is an exclusive function of the National Assembly. However, Article 96(2) provides that ‘the Senate participates in the law-making function of Parliament by considering, debating, and approving Bills concerning counties, as provided for in Articles 109 to 113’. Article 110 defines a Bill concerning counties in a manner which makes it clear that the Division of Revenue Bill is a Bill that must be considered and passed by both the National Assembly and the Senate. The Bill not only affects the functions of the county governments,<sup>127</sup> but it is also a Bill referred to in Chapter Twelve affecting the finances of county governments.<sup>128</sup> The Supreme Court came to the conclusion that:

It is quite clear to us that the Division of Revenue Bill is a Bill bearing provisions that deal with the *equitable sharing of revenue* – which will certainly affect the functioning of county government. We have found no justification in the contention that the Division of Revenue Bill deals strictly with ‘national economic policy and planning’ and so, on this account, it is a measure unrelated to county government. The Bill deals *with equitable allocation of funds to the counties*, and so any improper design in its scheme

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<sup>125</sup> [2013] eKLR (*Speaker of the Senate*).

<sup>126</sup> *Speaker of the Senate* para 148.

<sup>127</sup> Art 110(1)(a).

<sup>128</sup> Art 110(1)(c). In South Africa, the Division of Revenue Bill is regarded as a Bill affecting provinces and dealt with in accordance with section 76 instead of 75.

will certainly occasion inability on the part of the county-units to exercise their powers and to discharge their functions as contemplated under the Constitution.

This is a critical test which will require that the Division of Revenue Bill be perceived as ‘*a Bill concerning county government*’ and, therefore, a subject of the legislative competence of both the National Assembly and the Senate.<sup>129</sup>

The process begins with the Commission on Revenue Allocation which must make recommendations concerning the basis for the equitable sharing of revenue between the national and county governments,<sup>130</sup> to the Senate, the National Assembly, the national executive, county assemblies and the county executives.<sup>131</sup> On the basis of these recommendations and the criteria set out in Article 203(1),<sup>132</sup> a Division of Revenue Bill is prepared and must ‘be introduced in Parliament’ at least two months before the end of each financial year.<sup>133</sup> Once the Bill has been published, the CRA must be consulted and given an opportunity to consider its provisions and make recommendations to the National Assembly and the Senate,<sup>134</sup> both of which must consider those recommendations before voting on the Bill.<sup>135</sup>

Although the process culminates in an Act of Parliament, creating the impression of a political process, the Constitution envisages an objective and professional process and product in which the CRA is a key player. Even though the Parliamentary Select Committee had proposed in 2010 the removal of the CRA from the Constitution, the Committee of Experts (CoE) reinstated it as an expert independent body to provide professional and independent advice on the division of revenue to the Senate, national and county

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<sup>129</sup> *Speaker of the Senate* paras 114 and 115 (emphasis in the original).

<sup>130</sup> Art 216(1)(a).

<sup>131</sup> Art 216(5).

<sup>132</sup> Art 218(1)(b) & (c).

<sup>133</sup> Art 218(1)(a).

<sup>134</sup> Art 205(1).

<sup>135</sup> Art 205(2).

governments.<sup>136</sup> The CRA is established as an independent constitutional commission,<sup>137</sup> eight of whose nine members serve for a non-renewable term of six years.<sup>138</sup> Two of the members are nominated by the political parties represented in the National Assembly<sup>139</sup> and five by parties represented in the Senate, in accordance with the proportion of their members in the two houses, respectively.<sup>140</sup> However, once appointed, the commission is independent, subject only to the Constitution and the law, and not subject to direction or control of any person or authority.<sup>141</sup> The commission is envisioned as a technical professional body whose members are appointed on the basis of ‘extensive professional experience in financial and economic matters’.<sup>142</sup>

The CRA provides technical and professional analysis of projected revenue sharing, and protects the criteria for revenue-sharing.<sup>143</sup> It provides expert, independent, impartial and long-term advice on financial matters; links county governments to national government decision-making on their finances; and enhances transparency and accountability in revenue and other revenue access mechanisms.<sup>144</sup> Although its recommendations are advisory in nature, they cannot be ignored without explanation. Article 218(2)(c) requires that the Division and Allocation of Revenue Bills be presented in Parliament together with a summary of any significant deviations from the CRA’s recommendations explaining each such deviation.

### **3.2.3.2 The factors for determining the vertical division**

In the determination of the vertical division of revenue both the CRA in making its recommendations and the two houses of Parliament in enacting the DORA must consider the criteria set out in Article 203. These criteria can be divided into two broad categories – those

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<sup>136</sup> Committee of Experts on Constitutional Review *Final Report of the Committee of Experts on Constitutional Review* (2010) 128.

<sup>137</sup> Art 215(2)(2).

<sup>138</sup> Arts 215(1)(2) and 250(6)(a). The commission includes the Principal Secretary for finance as an ex officio member who does not have a fixed term.

<sup>139</sup> Art 215(2)(b).

<sup>140</sup> Art 215(2)(c).

<sup>141</sup> Art 249(2).

<sup>142</sup> Art 215(4).

<sup>143</sup> Committee of Experts on Constitutional Review (2010) 132.

<sup>144</sup> Committee of Experts on Constitutional Review (2010) 132.



that relate to county government concerns and constitutional obligations, and those that relate to the national government concerns and constitutional obligations.

### **3.2.3.2.1 Factors in respect of national government**

The first issue to be considered is provision for debt servicing ‘that must be made in respect of the public debt and other national obligations’.<sup>145</sup> Repayment of the public debt is a legal obligation enforceable in law and must carry more weight than some of the other factors. There are two perspectives of public debt in this provision. First, national government may borrow to boost the revenue raised nationally which is shared among the two levels of government. This debt must be serviced by national government and that is the reason it must be taken into account as part of the share of national government.<sup>146</sup> Secondly, public debt may include county loans guaranteed by national government and on which county governments have defaulted requiring national government to bail them out. Such county debts should be taken into account, subject to arrangements for recovery from the concerned county’s future equitable share. It is for this reason that Article 214(2) defines the public debt as including loans guaranteed by the national government, suggesting that debts of the county governments form part of the public debt. Other national obligations may encompass contributions to regional and international organisations such as the African Union and the East African Community, which arise out of treaty obligations.

The second factor is ‘the needs of national government determined by objective criteria’.<sup>147</sup> ‘Needs’ must be considered as carrying less weight than ‘obligations’ which are founded in law, but are stronger and carry more weight than ‘interests’. Since ‘needs’ are not based in law while ‘interests’ may be politically driven, the Constitution qualifies the needs and interests by requiring that they should be ‘determined by objective criteria’. This implies that the needs and interests can be objectively determined independently of what the national government thinks. Such objectivity could be informed by the constitutionally assigned functions and responsibilities of national government. Recognition must be given to the fact that, arising out of the intersection between socio-economic rights under Article 43 and some of the functions of the national government,<sup>148</sup> some functions become enforceable

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<sup>145</sup> Art 203(1)(b).

<sup>146</sup> See for example the Division of Revenue Bill, 2011, of the Republic of South Africa 58.

<sup>147</sup> Art 203(1) (c).

<sup>148</sup> See section 7 of Chap 6.

obligations which must carry more weight. Furthermore, in considering the assigned functions, appreciation must be given to the fact that the two governments have been assigned both exclusive and concurrent functions. The allocation of resources to concurrent functional areas obviously poses some practical challenges which must be addressed.

The third factor to be considered is ‘the national interest’,<sup>149</sup> which though nebulous must be interpreted to mean genuine interests and concerns which are captured by the governance goals set and which benefit the country as whole.<sup>150</sup> This factor relates to both national and county governments and involves balancing of the claims of the national government against those of the county governments in order to get a proper balance and proportion to apply. From this perspective, ‘the national interests’<sup>151</sup> must be distinguished from ‘the needs of the national government’.<sup>152</sup> The national interests focus on the broader concerns that affect both levels of government and ensure the proper functioning and realisation of the overall objectives of devolution of power.

The fourth factor addresses good governance concerns, and aims at risk management and cushioning the governments against any unforeseeable events and emergencies. In this respect provision for a contingency fund affording national government the necessary ‘flexibility in responding to emergencies and other temporary needs, based on similar objective criteria’,<sup>153</sup> must be made. While the other factors focus on the known obligations, needs and interests, this factor addresses unpredictable and unforeseen events. Emergency as defined by Article 58(1)(a) revolves around the temporary and unforeseen nature of the occurrence. It does not thus compensate for poor planning and unbudgeted expenditures that the governments should have foreseen and provided for. Provision to national government in this respect must be structured to include conditional grants that may allow for swift allocation and transfer of funds to counties affected by emergencies that could not be provided for through the budgets or supplementary budgets of the governments.<sup>154</sup> However, a thin line must be drawn between funding for contingencies and emergencies, and funding

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<sup>149</sup> Art 203(1)(a).

<sup>150</sup> See for example the Division of Revenue Bill, 2011, of the Republic of South Africa 58.

<sup>151</sup> Art 203(1)(a).

<sup>152</sup> Art 203(1)(c).

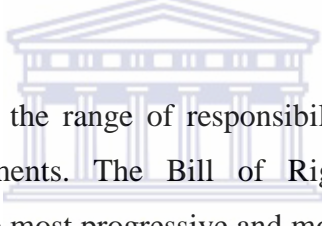
<sup>153</sup> Art 203(1)(k).

<sup>154</sup> See for comparison the Division of Revenue Bill, 2011, of the Republic of South Africa 60.

for disaster management which is a concurrent function of national and county governments.<sup>155</sup>

### 3.2.3.2.2 Factors in respect of county governments

The criteria translate into four broad factors relating to county governments. The first is the consideration of ‘the need to ensure that county governments are able to perform the functions allocated to them’.<sup>156</sup> This must be understood in light of the fact that Article 175(b) requires that county governments be availed ‘reliable sources of revenue to enable them to govern and deliver services effectively’. This factor has obligations that are enforceable in law and must carry more weight. The county functional areas must be considered bearing in mind their intersection with socio-economic rights such as health care, housing and sanitation, food, clean water and education.<sup>157</sup> In *Speaker of the Senate* the Supreme Court recognised this interplay between the functions assigned by Article 186 and the Fourth Schedule, on the one hand, and the Bill of Rights obligations on the other. It therefore stated thus:



It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities.<sup>158</sup>

Consideration of this factor must take into account both the constitutionally assigned functions and the additional functions assigned by national legislation as recognised by the

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<sup>155</sup> Items 24, Part 1 and 12, Part 2 of the Fourth Schedule.

<sup>156</sup> Art 203(1)(d).

<sup>157</sup> Art 43(1). See also section 7 of Chap 6.

<sup>158</sup> *Speaker of the Senate* para 193.

Constitution. Read together with Article 175(b), the factor includes the administrative costs necessary to govern effectively.

Secondly, ‘the developmental and other needs of the counties’<sup>159</sup> must be considered. This element recognises the fact that county governments, unlike the former local authorities, are not restricted to service delivery but are also important engines for development meant to drive development at the local level. Article 174(f) identifies promotion of ‘social and economic development’ and provision of ‘proximate [and] easily accessible services’ as a major object of devolution. Given that development objects of devolved government may transform some of the county government functions and powers into binding obligations which can be enforceable in law,<sup>160</sup> this factor must carry more weight. Effective service delivery may also depend on the development of the necessary infrastructure for such service delivery. Thus, the service delivery functions of the county governments must be understood within the context of the developmental and other needs including the backlogs of the individual counties, whose sum total provides the full picture of what county government as a level of government requires as an equitable share. The development needs of the counties must be reflected in the vertical division of revenue either by an increased equitable share of the county governments or the specific conditional grants coming through from the share of the national government.<sup>161</sup>

Thirdly, ‘the fiscal capacity and efficiency of county governments’ must be considered.<sup>162</sup> This ensures that counties make their own efforts to raise revenue as this is important in meeting the devolution objective of democratic, accountable and responsive government.<sup>163</sup> Residents who pay taxes to county governments would be incentivised to demand for accountability from them. This provision has two important terms that require interpretation: ‘capacity’ and ‘efficiency’. While capacity refers to the available sources of revenue such as the tax base, efficiency refers to the ability or willingness of the county government to utilise those sources such as the ability to administer or collect the revenue once determined. The fact that county governments are assigned very limited taxing powers and other revenue-

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<sup>159</sup> Art 203(1)(f).

<sup>160</sup> See section 3.1 of Chap 4.

<sup>161</sup> See for example the Division of Revenue Bill, 2011, of the Republic of South Africa 59.

<sup>162</sup> Art 203(1)(e).

<sup>163</sup> Art 174(a).

raising sources must be taken into account. Capacity must be considered in the vertical division while efficiency suffices in the horizontal allocation.

A fourth factor relates to good governance concerns and serves to complement the other factors that are based on quantifiable obligations, needs and interests of county governments. This relates to the stability, predictability and reliability of the revenues to enable county governments to plan long-term and embark on development projects that can be undertaken and implemented over a number of years without disruption because of lack of funds. Article 203(1)(j) requires consideration of ‘the desirability of stable and predictable allocations of revenue’. It is also for this reason that Article 175(b) establishes a principle of ‘reliable sources of revenue’ for county governments. This seeks to avoid sudden and radical changes in the allocations which the other factors may dictate. Any changes in the allocations must be done gradually to allow county governments to prepare for the change in the allocation and cushion themselves against the possible impact on their functioning. Predictability encourages forward planning, and avoids short-term annual based budgeting.

One major implication of this factor is that since the county government equitable share allocations are based on estimates of ‘revenue raised nationally’, these allocations should be protected. Where the revenue raised nationally falls short of the estimates, the equitable share will not be adjusted downwards.<sup>164</sup> The shares are assured since they are voted for, legislated and guaranteed and must be transferred accordingly. Article 219 guarantees the transfer of the equitable share to the counties without undue delay or deduction unless stopped under Article 225. Furthermore, stability, predictability and reliability read together with the MTEF should be interpreted as mandating the publication, together with the annual Division of Revenue, forward estimates for a further two years to enable counties to plan ahead.<sup>165</sup>

### **3.2.3.3 The amount of the county government equitable share**

Article 203(2) provides that ‘the equitable share of the revenue raised nationally that is allocated to county governments shall be not be less than fifteen per cent of all revenue collected by the national government’.<sup>166</sup> This minimum amount ‘shall be calculated on the basis of the most recent audited accounts of revenue received, as approved by the National

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<sup>164</sup> See for example the Division of Revenue Bill, 2011, of the Republic of South Africa 59.

<sup>165</sup> See for example the Division of Revenue Bill, 2011, of the Republic of South Africa 59.

<sup>166</sup> Art 203(2).

Assembly'.<sup>167</sup> It must be noted that these provisions do not play a role in the definition of 'revenue raised nationally'. They provide a minimum floor, which should act as a guide for resolving any dispute between national and county governments over the amount due to county governments. Otherwise, counties could get more depending on the assignment and costing of functions and the Article 203(1) criteria.<sup>168</sup> Moreover, since division of revenue is based on projections and not actual money received, Article 203(3) clarifies that for purposes of resolution of such disputes, the fifteen per cent is calculated on the basis of the most recent audited accounts of revenue received and approved by the National Assembly. This suggests that the dispute revolves around the issue of the projections and the fear that such projections may not be realised. That explains why the framers of the Constitution saw it necessary to rely on hard evidence of what has actually be collected and received. The Supreme Court stated the following about these provisions:

The real issue regarding the passing of the Division of Revenue Act, 2013 was: *What amount of revenue would be given to the counties?* In providing [Article 203(2)] that the revenue allocated to counties '*shall be not less than fifteen per cent of all revenue collected by the national government*', the framers of the Constitution were making an important statement, namely: "we are aware that this is not enough, and as we work towards a more perfect devolution, the fifteen per cent will constitute the *minimum* bundle of financial goods for counties even though certainly, more is desirable". The array of functions of county governments, as listed in the Fourth Schedule in the Constitution, would confirm this.

The "politics of formulae" yielded the minimum allocation-provision of not less than fifteen per cent, a plain indication that more was anticipated. If there was no expectation for more, the framers would have prescribed not a floor, but an upper ceiling or, in the alternative, a specific and static percentage. However, the "justice of formulae", which is the arena of the Supreme Court, moves the Court's interpretative indicator in the direction of

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<sup>167</sup> Art 203(3).

<sup>168</sup> World Bank (2012) 52.

the Senate's application, which stands for more resources to the counties, in the future.<sup>169</sup>

The general rule which emerges from the criteria in Articles 203 and 175(b) is that governments are allocated resources on the basis of the functions they have to perform. The minimum must not therefore be a reason not to consider what is equitable because the county governments' entitlement is to an equitable share and not the minimum.<sup>170</sup>

### **3.2.3.4 The nature of the equitable share**

Equitable shares are usually unconditional in the sense that they come without any attached conditions about the use of the money, often referred to as block grants.<sup>171</sup> The object is to enhance the financial autonomy of the county governments from the perspective of ability to determine their own budgets. Within the general constitutional requirement that equitable shares are to enable county governments 'to govern and deliver services effectively'<sup>172</sup> and 'to perform the functions allocated to them',<sup>173</sup> county governments have discretion to determine their own priorities.<sup>174</sup> Equitable shares of this kind are, therefore, very important as they enable county governments to achieve the objectives of devolution set out in Article 174. For example, the money can enable communities to determine their own priorities regarding socio-economic development and service delivery as well as manage their own affairs. This is in contrast to additional allocations which may come with conditions precisely because this allocation falls to the discretion of the national government.<sup>175</sup>

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<sup>169</sup> *Speaker of the Senate* paras 191 and 192.

<sup>170</sup> Art 202(1). See also Committee of Experts on Constitutional Review (2010) 127, where it is reported that this aspect was introduced by the Parliamentary Select Committee as a bare minimum and was not meant to be a definitive figure for what the counties are entitled to.

<sup>171</sup> Brand (2006) 90-1 observes that 'general or unconditional grants, on the other hand, are funds allocated to the recipient government to be used at its own discretion. These grants are sometimes referred to as block grants. Recipient governments prefer unconditional grants that can increase flexibility in their decision making.'

<sup>172</sup> Art 175(b).

<sup>173</sup> Art 203(1)(d).

<sup>174</sup> Steytler & De Visser (2011) ch 12, 9-10 discuss this issue in the context of South Africa and observe that 'because a municipality receives its equitable share as an entitlement, its use falls to the discretion of the municipality. When compared to the conditional grants, the nature of the equitable share is apparent; it is an unconditional allocation, as the DORA cannot prescribe conditions for its spending.'

<sup>175</sup> See section 3.2.6 for detailed argument.

### **3.2.4 The process of horizontal allocation**

The horizontal sharing of revenue involves splitting the share allocated to the county level of government equitably among the 47 counties. This involves two distinct processes: the development of the five year formula and the annual allocation of revenue.

#### **3.2.4.1 The institutional framework for horizontal allocation**

The five year formula is developed by the Senate in terms of Article 217,<sup>176</sup> informed by both the Article 203(1) criteria and the recommendations by the CRA.<sup>177</sup> The process must be consultative with the Senate being obligated to ‘consult the county governors, the Cabinet Secretary responsible for finance and any organisation of county governments’ and to ‘invite the public, including professional bodies’, to make submission on the matter.<sup>178</sup> Once the Senate has made a resolution adopting a formula, the resolution is sent to the National Assembly which may amend or reject the resolution only by a two-thirds vote of its members.<sup>179</sup> If the National Assembly rejects the resolution, the Senate may adopt a new resolution or request for the formation of a mediation committee to resolve the matter.<sup>180</sup>

When the CRA makes recommendations for the annual allocation of revenue among the 47 counties, it must be informed by the formula. The formula remains in force for the five year period which it covers. The recommendations of the CRA then form a basis for the preparation of the County Allocation of Revenue Bill (CARA) dividing the share allocated to the county level of government among the 47 counties.<sup>181</sup> Although Article 218 of the Constitution does not provide for who prepares this Bill, the Public Finance Management Act provides for its preparation by the National Treasury.<sup>182</sup> The National Treasury is under an obligation to accompany this Bill with a memorandum that explains the revenue allocation it proposes,<sup>183</sup> evaluates the Bill in relation to the Article 203(1) criteria,<sup>184</sup> and summarises any significant deviation from the recommendations of the CRA one by one.<sup>185</sup>

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<sup>176</sup> Art 196(3)

<sup>177</sup> Art 217(2)(a) and (b).

<sup>178</sup> Art 217(2)(c) and (d).

<sup>179</sup> Art 217(5)(b)(i) and (ii).

<sup>180</sup> Art 217(6)(a) and (b).

<sup>181</sup> Art 218(1)(b).

<sup>182</sup> S 191(1) Public Finance Management Act, 2012.

<sup>183</sup> Art 218(2)(a).



### **3.2.4.2 The factors for determining the formula for allocation**

In the determination of the horizontal allocation of revenue, the CRA in making its recommendations, the Senate in developing the five year formula and the two houses of Parliament in enacting the CARA must consider the criteria set out in Article 203. However, procedurally, the factors in the criteria determine the formula while the formula in turn determines both the vertical division and the horizontal allocation of revenue. This process focuses on fairness among the counties. First, the formula must consider ‘economic disparities within and among counties and the need to remedy them’.<sup>186</sup> This must be read together with ‘the need for affirmative action in respect of disadvantaged areas and groups’.<sup>187</sup> The factor must aim at rectifying inequalities. As such, it must consider variations in the poverty levels and in the inequalities in the counties to ensure that the formula is redistributive and focuses on economic development that can reduce poverty levels and inequalities. It also covers the overall unequal distribution of wealth in the 47 counties and the constitutional commitment to ensure a minimum level of public services to the whole population, regardless of their geographic location. It ought to take into account any variations in the functional responsibilities of the various counties and the services they are required to provide. Demographic variations in terms of their numbers, profiles and composition must be considered. A population that largely comprises old retired people may be more expensive in terms of healthcare than that comprising middle-aged people. Further, the geographic locations and sizes of the counties must be considered since the cost of service delivery in large and distant areas may be higher than in smaller-sized counties. Likewise, counties that are far removed from the capital may have higher costs of service delivery.

Secondly, consideration must be made of the county own revenue efforts which are based on and informed by the ‘fiscal capacity and efficiency of the county governments’.<sup>188</sup> Here, both ‘capacity’, which refers to the revenue-raising bases, and ‘efficiency’, which refers to the ability to make use of the capacity available, must be taken into account. Thus, a county that has good fiscal capacity which it has failed to utilise efficiently may not be compensated for

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<sup>184</sup> Art 218(2)(b).

<sup>185</sup> Art 218(2)(c).

<sup>186</sup> Art 203(1)(g).

<sup>187</sup> Art 203(1)(h).

<sup>188</sup> Art 203(1)(e).

its failure. On the contrary, a county which has fully utilised such a capacity must not be penalised as this may serve as a disincentive in the use of local efforts and fiscal capacity. County governments must be given incentives to raise more revenue locally. In this respect, allocations may also be informed by the ‘need for economic optimization of each county’<sup>189</sup> that may ‘provide incentives for each county to optimize its capacity to raise revenue’.<sup>190</sup> This factor may inform a deliberate policy of investment in previously neglected areas in order to enhance not only the county government own revenue-raising ability but also the revenue raised nationally.

Thirdly, the formula must consider the variations in the operational requirements of the counties. The institutional costs in some counties may be higher for various reasons, including the fact that some have larger county assemblies than others. While some counties include many urban areas which must be provided for, others have fewer urban areas.

### **3.2.4.3 The transfer of the equitable share**

Unless the transfer has been stopped in terms of Article 225, Article 219 provides that a ‘county’s share of revenue raised by the national government shall be transferred to the county without undue delay and without deduction’. This provision must be understood in the context of the equitable share being an entitlement of the county government. Once the DORA and the CARA have been enacted determining the equitable share of each county government, then the amounts become due and should be transferred from the Consolidated Fund as a direct charge.<sup>191</sup> Since the equitable share of the county government is an entitlement, the Constitution has sought to protect it from interference by the national government. As discussed in Chapter Eight, stoppage of transfer of funds is permitted in very limited circumstances and with very stringent checks and balances imposed on the exercise of the power.

However, since the division of revenue is based on projections, it should be lawful for the governments to develop a payment schedule dividing the amount due into reasonable periodic tranches. The phrase ‘without undue delay and without deduction’ must therefore be understood in the context of such reasonable periodic tranches.

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<sup>189</sup> Art 203(1)(i).

<sup>190</sup> Art 203(1)(i).

<sup>191</sup> Art 206(2)(a) and (c) and (4).

### **3.2.5 The justiciability of division and allocation of revenue**

The question whether or not the division and allocation of revenue are justiciable must consider two distinct issues – the process of arriving at those shares and the equitable shares themselves. Undoubtedly, the process of arriving at the shares and, in some respects, the equitable shares themselves are justiciable.

#### **3.2.5.1 Process**

Constitutional supremacy and legality require all processes prescribed by the Constitution to strictly comply with the constitutional prescriptions. In *Speaker of the Senate* the Supreme Court stated that the Constitution ‘vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs’.<sup>192</sup> It added that it has jurisdiction to resolve ‘any questions touching on the mode of discharge of the legislative mandate’.<sup>193</sup> Thus, all the institutions such as the Parliament, the Executive, the CRA and the Treasury, which have been mandated to play a role in the determination of both the vertical division and the horizontal allocation of revenue, must comply with the constitutional prescriptions.<sup>194</sup>

The Constitution has a number of substantive and procedural provisions and prescriptions relating to sharing of revenue both vertically and horizontally, which can be subjects of judicial determinative interpretation and review. First, a decision relating to the sharing of revenue that is arrived at without allowing for participation of all the constitutionally mandated institutions such as the CRA, the National Assembly, and the Senate is justiciable and can be referred back for all the institutions to play their prescribed role. In *Speaker of the Senate*, the main issue was that the National Assembly had denied the Senate a role in the consideration, debate and approval of the Division of Revenue Bill. The Court held that the Senate had a role to play which the Speaker of the National Assembly should have allowed it to discharge.<sup>195</sup> Although the Court did not in the specific circumstances of the case invalidate the DORA, it noted that this ‘would not compromise its options in the future’ in any matter of a similar nature.<sup>196</sup> Likewise if the DORA and the CARA were to be enacted

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<sup>192</sup> *Speaker of the Senate* para 54.

<sup>193</sup> *Speaker of the Senate* para 54.

<sup>194</sup> *Speaker of the Senate* para 61.

<sup>195</sup> *Speaker of the Senate* para 116.

<sup>196</sup> *Speaker of the Senate* para 153.

without the CRA being given an opportunity to comment on the provisions of the Bills, such Acts of Parliament would be justiciable on that ground alone.<sup>197</sup>

Even where all the mandated institutions participate, the Constitution makes provision for a variety of procedural requirements which must be complied with. The CRA when preparing its recommendations, and the Senate when preparing the five year formula, are required to consider the criteria set out in Article 203(1). The documents they present must indicate their own consideration and evaluation of the criteria, and how they have taken them into account. A failure in this respect is justiciable and reviewable by the courts. Although the court will not substitute its own view of the correct consideration of the criteria, it can review a failure to consider the criteria and refer the matter back to the relevant institution for consideration.

Article 218(2) requires that when the two Bills for the vertical and horizontal sharing of revenue are introduced in Parliament, they must be accompanied by a memorandum which explains the proposed revenue allocation, evaluates the relation between the bills and the Article 203(1) criteria, and summarises any significant deviation from the recommendations of the CRA and why. These provisions indicate that the criteria were intended to be taken seriously and a failure to present such a memorandum or to address all the matters the Constitution requires it to address would be evidence that the views were not considered. Furthermore, a decision by any of the two houses of Parliament which fails to follow the constitutionally required vote majorities is justiciable.

### **3.2.5.2 Substance**

Since Article 203(2) prescribes a minimum equitable share for the county governments, the vertical division of revenue can be challenged in court on this ground. If proved, the court must refer the matter back to the other institutions to make the necessary adjustments.

### **3.2.6 Conditional grants**

Article 202 provides that ‘county governments may be given additional allocations from the national government’s share of the revenue, either conditionally or unconditionally’.<sup>198</sup> Such

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<sup>197</sup> Art 205(1). See also the South African case of *Robertson and Another v City of Cape Town* 2004 (9) 950 (C) (*Robertson HC*) para 109 in which the Court invalidated an amendment on the grounds that the Financial and Fiscal Commission was not given an opportunity to present its comments on the amendment bill before it was passed.

<sup>198</sup> Art 202(2).

conditions limit the discretion and budgetary autonomy of county governments in respect of how they spend funds. Accordingly, the more money is allocated to counties in the form of conditional grants as opposed to equitable shares, the more their budgetary autonomy is curtailed.

Conditional grants imply monitoring by national government, including a requirement for a reporting mechanism on the part of the receiving county government. It may also imply stoppage of funds outside the mechanisms of Article 225 as part of the mechanisms for enforcement of conditions.

On the face of it, additional grants from the national government's share appear to be in the discretion of the national government. However, it is submitted that there is textual evidence that this discretion is structured in terms of process and content as the grants are subject to the constitutionally prescribed revenue-sharing process. First, grants form part of the process of equitable sharing of revenue. The provision for conditional and unconditional grants is part of Article 202, which is titled 'equitable sharing of national revenue'. In addition, Article 203(1) introduces the criteria by requiring that it be 'taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning county government enacted in terms of this Chapter'. National legislation concerning county government under the finance chapter must be interpreted as including any Bills making provision for additional grants to the counties. The import of this is that the criteria set out in Article 203 apply to these grants. Secondly, the CRA has an obligation to also 'make recommendations on other matters concerning the financing of' county governments; this includes financing by way of additional grants.<sup>199</sup> Article 216(3) makes it clear that in formulating its recommendations, the commission must promote and give effect to the criteria set out in Article 203(1).

### ***3.2.7 The equalisation fund***

The Constitution establishes the Equalisation Fund, secured at the rate of one half per cent from the revenue collected by the national government.<sup>200</sup> This is an affirmative action Fund to be used 'to provide basic services including water, roads, health facilities and electricity to

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<sup>199</sup> Art 216(2).

<sup>200</sup> Art 204(1).

marginalized areas'.<sup>201</sup> Since money from this fund is meant for specific purposes, if allocated to county governments the allocations must be regarded as conditional grants. The affirmative nature of the Fund stems from the fact that it is to last for a fixed period of twenty years, though Parliament may extend the period.<sup>202</sup> The use of the term 'including' indicates that the list of services for which the fund is to be used is not a closed one; other services of a similar nature could be identified to benefit from the Fund.<sup>203</sup>

A reading of this provision together with Article 204(3)(b) reveals that the Fund is not dedicated to counties but to marginalised areas and groups, though such areas and groups would be within counties. Although Article 204(3)(b) provides that the Fund is to be used by the national government, either directly or indirectly through conditional grants to counties in which there are marginalised groups, such use is subject to certain limitations. First, the identification of the marginalised areas must be done on the basis of policy and criteria determined by the CRA.<sup>204</sup> Secondly, the use of the Fund must be based on appropriations approved by Parliament,<sup>205</sup> after the CRA has been consulted to make recommendations and such recommendations have been considered by Parliament.<sup>206</sup> Thirdly, since the amount of money that goes into the Equalisation Fund is based on percentages of the revenue raised nationally, its determination is subject to the process leading to the enactment of the DORA in which it must be included. Fourthly, the national government is not the owner of the money in the Equalisation Fund but a mere trustee. For this reason, Article 204(5) requires any unexpended money in the Fund to remain in the Fund and be rolled-over to be used during subsequent financial years.

#### **4 Borrowing by county governments**

The Constitution provides for borrowing by both national and county government. Two types of borrowing are envisaged by the Constitution – borrowing by county governments to boost their own share of revenue; and borrowing by the national government to boost the 'revenue

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<sup>201</sup> Art 204(2).

<sup>202</sup> Art 204(6), (7) and (8).

<sup>203</sup> *Communications Commission of Kenya and others v Royal Media Services and others* [2014] eKLR (*Communications Commission of Kenya*) para 359.

<sup>204</sup> Art 216(4).

<sup>205</sup> Art 204(3)(a).

<sup>206</sup> Art 204(4).

raised nationally' which must be shared among the two levels of government. First, the power of the county government to borrow is not original as it is subject to national legislation first prescribing terms and conditions under which the national government may guarantee loans.<sup>207</sup> Secondly, counties can borrow but only if the national government guarantees the loan, and the county assembly has approved.<sup>208</sup> A national government guarantee involves the national government undertaking to step in and repay the loan if the county government defaults on its payments.<sup>209</sup> For purposes of transparency and fairness to ensure that the guarantees are given or denied on the basis of objective criteria, the national government is required to publish a report on the guarantees that it gave each year, within two months after the end of each financial year.<sup>210</sup>

When both national and county governments borrow, each is duty-bound to repay its own debt from its own share of revenue. It is for these reasons that Article 220(1)(c), which provides for the form, content and timing of budgets, requires that budgets of the national and county governments must contain 'proposals regarding borrowing and other forms of public liability that will increase public debt during the following year'. When, however, national government borrows to boost the revenue raised nationally, which is shared among the two levels of government, the repayment of such debt must be taken into account in the vertical division of revenue process. It is this borrowing that is envisaged by Article 203(1)(b) when it requires consideration of 'any provision that must be made in respect of the public debt and other national obligations'.

## 5 Expenditure of revenue

As part of the financial autonomy of the county governments, the Constitution confers upon the county governments the power to determine their own budgets and expenditure priorities

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<sup>207</sup> Art 213(1).

<sup>208</sup> Art 212.

<sup>209</sup> Vulovic V 'Sub-national borrowing, is it really a danger?' (2011). *Economic Dissertation. Paper 77* [http://digitalarchive.gsu.edu/econ\\_diss](http://digitalarchive.gsu.edu/econ_diss) (accessed 10 October 2013) 43 where a sovereign guarantee is defined as an indication that the 'national government accepts the responsibility of dealing with potential fiscal crises resulting from sub-national over-borrowing'. See also Vulovic CV *The Effect of Sub-national Borrowing Control on Fiscal Sustainability: How to Regulate?* <http://www.ieb.ub.edu/aplicio/fitxers/SMI10vuloic.pdf> at p 5.

<sup>210</sup> Art 213(2).

without any undue interference from the national government.<sup>211</sup> Budgets are financial statements which show how government's resources are to be generated and used in a given fiscal period, and are the key instruments for promoting a government's objectives, strategies and programmes.<sup>212</sup> Once the DORA and CARA have been enacted by Parliament, each county government is empowered 'to prepare and adopt its own annual budget and appropriation Bill'.<sup>213</sup> Moreover, each county government has a Revenue Fund into which 'all money raised or received on behalf of the county government' is paid and out of which its expenditure is drawn.<sup>214</sup> Withdrawals from the Revenue Fund can only be done on the basis of authorisation by appropriation legislation of a county.<sup>215</sup>

### 5.1 Legislative power

In terms of Article 224, each county government adopts its own annual budget and appropriation Bill. As the budget and appropriation Bills are the exercise of legislative authority, county executives can only expend public finances appropriated to them in terms of legislation adopted by their county assemblies. As noted, withdrawals from such a county government Revenue Fund can only be done on the basis of authorisation by an appropriation legislation of a county.<sup>216</sup>

### 5.2 Limitation and legislative regulation of the expenditure power

County governments' expenditure power must be exercised within a framework of certain limitations identified by the Constitution and national legislation. Whereas the Constitution identifies a framework relating to the primary contents of the budgets,<sup>217</sup> it also requires national legislation to prescribe matters of process and procedures of the budget.<sup>218</sup> However, the failure of Parliament to enact such legislation cannot stop the county government from

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<sup>211</sup> Art 224. See also Fleiner T & Fleiner LRB 'Federalism, federal states and decentralization' in Fleiner LRB & Fleiner T (eds) *Federalism and Multiethnic States: The Case of Switzerland* (2000) 1-40, 30-1.

<sup>212</sup> Kriel & Monadjem (2011) 23-4.

<sup>213</sup> Art 224.

<sup>214</sup> Art 207(1) and (2).

<sup>215</sup> Art 207(2)(b).

<sup>216</sup> Art 207(2)(b).

<sup>217</sup> Art 220(1).

<sup>218</sup> Art 220(2).



exercising its power.<sup>219</sup> But once enacted the legislation binds the county government to exercise its power within the set framework.

### ***5.2.1 The primary content of budgets***

In prescribing requirements relating to content of county budgets, Article 220(1) provides that they must disclose the estimates of revenue and expenditure and differentiate between recurrent and development expenditure,<sup>220</sup> proposals for financing any anticipated deficit for the period,<sup>221</sup> and any proposed borrowing and other form of liabilities which may increase the public debt.<sup>222</sup> Revenue in this provision must be understood as referring to all money collected by the government in the course of its operations. This may include all money coming from taxes, charges for services, sales, transfers, fines, interest, dividends and rent on land as well as financial transactions in assets and liabilities.<sup>223</sup>

Expenditure, on the other hand, refers to payments the government makes out of the revenue. The estimates for expenditure must draw a clear distinction between recurrent and development expenditure.<sup>224</sup> Reference to proposals for financing any anticipated deficits should be understood as requiring an indication of sources of funds that will be used to cover the deficit. It may require an indication of any borrowing if that is how the government intends to finance the deficit. Any other forms of public liability that may increase the public debt may refer to acquisition of goods, services or works on credit.

### ***5.2.2 Process and procedures of budgets***

Matters of process and procedures are set out by Article 220(2) which provides for national legislation that must prescribe ‘the structure of the development plans and budgets of counties, when the plans and budgets of the counties shall be tabled in the county assemblies, and the form and manner of consultation between the national government and county governments in the process of preparing plans and budgets’. Section 125(1) of the PFMA gives effect to this process.

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<sup>219</sup> See Chap 11 section 3.2.

<sup>220</sup> Art 220(1)(a).

<sup>221</sup> Art 220(1)(b).

<sup>222</sup> Art 220(1)(c).

<sup>223</sup> Kriel & Monadjem (2011) ch 27, 29.

<sup>224</sup> Art 220(1) (a).

## 6 Supervision

The county governments' expenditure power is subjected to a variety of supervision and control mechanisms and confers supervision and control powers upon a variety of institutions: the offices of Controller of Budget, the Auditor-General, the national government, and the Senate.

### 6.1 Controller of expenditure

The Constitution establishes the office of Controller of Budget<sup>225</sup> and vests it with the power to control expenditure by both the national and county governments. It is listed as one of the Chapter Fifteen independent offices.<sup>226</sup> The core function of the Controller of Budget as spelt out by Article 228(4) is to 'oversee the implementation of the budgets' of not only the county governments but also the national government. This aims at ensuring the expenditure by the governments is consistent with their own budgets. This is discharged by authorising the withdrawals of any public funds under Article 207, which it cannot do unless satisfied that the withdrawal is authorised by county law.<sup>227</sup> This is a significant power, but does not interfere with the financial autonomy of the county governments. It only binds the county governments to their own priorities as budgeted. The Controller has no role in the budget-making process of the counties as his or her role only arises after such budgets have been adopted.

### 6.2 National government supervision and control

As discussed in Chapter Eight, national government has limited power in terms of Article 225 to stop transfer of funds to a county government in certain circumstances. Once again, the national government also has legislative and regulatory powers through which it can legislate for a financial management system which the county governments must comply with<sup>228</sup> and a budgetary system which they must follow when preparing county budgets.<sup>229</sup>

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<sup>225</sup> Art 228(1).

<sup>226</sup> Art 248(3).

<sup>227</sup> Art 228(5).

<sup>228</sup> Art 190(2).

<sup>229</sup> Art 220(2).

### 6.3 The oversight role of the Senate

Article 96(3) provides that the Senate ‘exercises oversight over national revenue allocated to county government’. The extent of the oversight powers which this provision confers upon the senate is discussed in Chapter Ten, which concludes that the Senate’s oversight power is limited to revenue raised nationally allocated to county governments and does not extend to counties’ own raised revenues. It is also limited to ‘soft’ supervision as it has no direct mechanisms for enforcement. The Senate’s powers must be harmonised with that of other institutions, such as the county assembly, which are assigned similar powers.<sup>230</sup>

### 6.4 Auditor-General

The Auditor-General, as with the Controller of Budget, is established by the Constitution as one of the independent offices expected to audit the accounts of both the national and county governments.<sup>231</sup> In terms of Article 229, the Auditor-General is obligated to annually audit and report on the accounts of the national and county governments among others. As a Chapter Fifteen institution, it is independent and reports to the President and Parliament.<sup>232</sup>

## 7 Conclusion

A purposive interpretation of the financial provisions of the Constitution leads to the following conclusions: First, the national and county governments are assigned both revenue sources and expenditure responsibilities in a manner that ensures that each government is able to meet its constitutional obligations. Although the county governments have very limited own revenue-raising powers, including powers to impose taxes, charges for services and to borrow, they are entitled to equitable shares, and other additional grants, from ‘revenue raised nationally’. Secondly, although the national government has been assigned revenue raising powers over the most important and lucrative tax bases, the revenue generated accrues jointly to national and county governments, which must share it. Thus, the transfers from this revenue to county governments are not discretionary donations by national government, but constitutional entitlements that must be determined in an objective manner and not on the basis of political patronage. Thirdly, revenue raised nationally has been purposively and generously defined to include all revenue raised and due to national

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<sup>230</sup> See section 5.2.3 of Chap 10.

<sup>231</sup> Arts 229 and 248.

<sup>232</sup> Art 254(1).

government, to ensure the objectivity of the sharing process and the matching of funds to functions. National government cannot escape the objective processes by dedicating revenue to specific purposes, as such dedicated revenue must be taken into account in the division of revenue. Fourthly, these provisions give county governments a reasonable measure of financial autonomy. They have not only limited revenue-raising powers which they can independently exercise but also budgetary autonomy in terms of which they can determine their own policy priorities and appropriations.

The chapter has drawn lessons from South African jurisprudence and scholarship, particularly on the concept of equitable shares as entitlements and the objective criteria for sharing the revenue raised nationally. This is because of textual similarity between the Kenyan and South African Constitutions on these matters. The chapter contributes to the understanding of the nature of the county governments as relatively autonomous although, as will be seen in Chapter Eight, the national government is granted some limited intervention and supervision powers.



## CHAPTER EIGHT

### Supervision of county government affairs

#### 1 Introduction

The Constitution creates national and county governments that are ‘distinct and inter-dependent’.<sup>1</sup> Although this has been interpreted in Chapter Nine to mean that the county governments have reasonable autonomy, just as in every non-centralised system, provision is made for a certain measure of supervision of the county government affairs by the national government. Even though the Constitution does not expressly use the term ‘supervise’, this chapter interprets a number of constitutional provisions relating to the relationship between national and county governments as establishing and recognising some measure of supervision. Supervision, as was defined by the South African Constitutional Court in *Re: Certification of the Constitution of the Republic of South Africa, 1996*, is the ‘power of one level of government to intrude into the functional terrain of another’.<sup>2</sup> Such intrusion entails four distinct broad elements: regulation, monitoring, support, and intervention. Supervision powers can be used either, to assist and support the county governments, for instance, in building their own capacity, or to restrain and correct them when they are acting contrary to the constitutional requirements or failing to discharge their functions and deliver services.

Although supervision is hierarchical in nature and appears to detract from the federal principle of autonomy of the levels of government, it is justified as a necessary part of any non-centralised system. Supervision is necessary to ensure that there is no ‘failure of the constitutional machinery’,<sup>3</sup> and that the autonomy of the subnational governments is exercised within the national constitutional parameters. While examining the Indian federal system which some had labeled as not federal on account of its supervision and intervention provisions, Seervai argues that provision for national supervision or intervention powers does

<sup>1</sup> Article 6(2).

<sup>2</sup> (1996) 10 BCLR 1252 (CC) (*First Certification judgment*) para 370. The Court explained that it is the process of review by a higher level government of the actions of sub-national governments to measure the fulfillment of the sub-national government’s executive, statutory and constitutional obligations. It involves implementation of both supportive and corrective measures should the sub-national governments fall short on their obligations. See also Steytler N and De Visser J ‘Local Government’ in Woolman, S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 22, 112.

<sup>3</sup> Seervai, HM *Constitutional Law of India* 2 ed Vol 111 (1979) 1621.

not in itself detract from the federal principle.<sup>4</sup> He correctly refers to Article 4 section 4 of the Constitution of the United States of America which requires the Federal government to guarantee to every State a republican form of government. He argues that ‘if a State were to adopt a non-republican form of government, the United States would be under an obligation to intervene, and to restore by force, if necessary, a republican form of government to the State’.<sup>5</sup> The State governments must operate within the provisions of the Federal Constitution,<sup>6</sup> failing which the federal government can intervene to ensure compliance with the Constitution.<sup>7</sup> Saunders identifies two circumstances under which, in most federations the federal or national government can intervene in the affairs of subnational governments. Intervention may occur, first, in cases of external aggression or internal insurrection; and second, in cases where subnational governments are required to administer national legislation, but fail or become unwilling or unable to carry out the task effectively.<sup>8</sup> In situations of a devolved system emerging where the subnational governments did not previously exist as independent units, there is a real possibility of state failure in the sub-units. Newly created subnational governments may easily fail to govern or deliver services. Supervision thus becomes necessary to prevent such an eventuality. De Visser views supervision as a ‘counterweight’ meant to minimise the ‘disadvantages of autonomy and to prevent a possible “centrifugal” effect of decentralisation on government functioning’.<sup>9</sup>

However, supervision powers are often open to abuse and thus create some kind of dilemma. Saunders observes that, on the one hand, intervention is sometimes necessary in the interest of the security of the entire community, the integrity of the state, or the effective performance of government functions. On the other hand, intervention is inconsistent with the normal assumption in federal systems that constituent units have final responsibility for the conduct of their affairs.<sup>10</sup> Because of the possibility of abuse of the supervision powers, and

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<sup>4</sup> Seervai (1979) 1632.

<sup>5</sup> Seervai (1979) 1618.

<sup>6</sup> Seervai (1979) 1620.

<sup>7</sup> Seervai (1979) 1621.

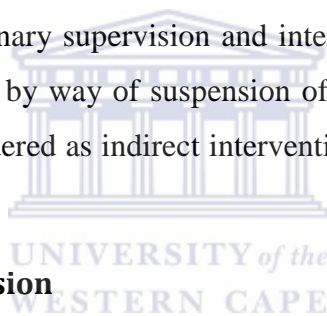
<sup>8</sup> Saunders C ‘Legislative, executive, and judicial institutions: A synthesis’ in Le Roy K & Saunders C (eds) *Legislative, Executive, and Judicial Governance in Federal Countries* (2006) 371.

<sup>9</sup> De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 169.

<sup>10</sup> Saunders (2006) 371.

particularly given their actual abuse during the Indian emergency of the mid-1970s,<sup>11</sup> more recent scholarship on the subject and constitution-making emphasise circumscribed and restrained use of the powers.<sup>12</sup> Supervision is therefore perceived as an exception to the autonomy of the subnational governments. As such, Saunders points out that in most countries the powers are only permissible in extraordinary circumstances.<sup>13</sup> In Argentina, for example, intervention is only permitted in extremely exceptional circumstances such as repelling foreign invasions and guaranteeing the republican system. It is also permitted upon request by the provincial authorities on grounds that it faced sedition or invasion from another province.<sup>14</sup>

Consistent with this more modern approach, Kenya explicitly provides for very circumscribed and constrained national government intervention in county government affairs. This chapter examines the distinct modes of supervision and, more importantly, the three distinct forms of intervention provided for by the Constitution. While Article 190 governs what is regarded as ordinary supervision and intervention, and Article 192 governs the extreme form of intervention by way of suspension of county governments, Article 225 focuses on what should be considered as indirect intervention by way of stoppage of transfer of funds.



## **2 Types and forms of supervision**

The Constitution expressly and implicitly provides for four major modes of supervision: regulation, monitoring, support, and intervention.

### **2.1 Regulation**

National government can supervise the affairs of county governments through regulation or rule-making. Regulation refers to the situation in which the national government sets a

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<sup>11</sup> Seervai (1979) 1621.

<sup>12</sup> According to Seervai (1979) 1633, the Indian Constitution was through the 44<sup>th</sup> Amendment, subsequently amended to circumscribe the emergency powers in order to reduce the possibility of abuse. Similarly, South Africa, which Kenya's devolution borrowed from, provides for very circumscribed and constrained supervision and intervention powers.

<sup>13</sup> Saunders (2006) 371.

<sup>14</sup> Hernandez AM 'Republic of Argentina' in Le Roy K & Saunders C (eds) *Legislative, Executive, and Judicial Governance in Federal Countries* (2006) 11.

framework within which county governments must operate and exercise their autonomy.<sup>15</sup> Such supervisory regulatory framework may be secured through Acts of Parliament or subsidiary legislation. An examination of the constitutional provisions reveals three distinct categories of legislative regulatory framework. First, Parliament can establish supervisory regulatory framework affecting the institutions of the county governments and their operations in a number of respects. In terms of Article 176(2), which empowers county governments to decentralise, they can establish local government structures below them.<sup>16</sup> In respect of cities and urban areas, they must do so in terms of national legislation contemplated under Article 184.<sup>17</sup> Such local government units would constitute part of the institutions of county government. Although the office of Speaker of a county assembly is an important institution of county government, Parliament is empowered to legislate for the election and removal from office of county assembly speakers.<sup>18</sup> Similarly, Article 181(2) empowers Parliament to legislate the procedures for the removal of a county governor from office. Furthermore, the powers, privileges and immunities of county assemblies, their committees and members are subject to regulation by national legislation.<sup>19</sup> Finally, the establishment of a county public service and administration as an important institution of county government must be in accordance with a regulatory framework of uniform norms and standards established by an Act of Parliament.<sup>20</sup>

Secondly, Parliament can establish a supervisory regulatory framework affecting the functions of the county governments and how they are performed. As discussed in Chapter Six, in a number of functional areas such as housing, agriculture, veterinary services, health and energy, national government is only assigned the power to make policy and legislate,<sup>21</sup> while county governments are assigned the power, to a large extent, to administer and implement such policies and legislation.

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<sup>15</sup> See De Visser (2005) 170. See also Steytler N & De Visser J *Local Government of South African* (2011) ch 15, 5.

<sup>16</sup> See Chap 5 section 2.

<sup>17</sup> The required legislation must set the criteria for the classification of areas as urban areas and cities, and the mechanisms for identification of different categories of urban areas and cities.

<sup>18</sup> Art 178(3).

<sup>19</sup> Art 196(3).

<sup>20</sup> Art 235(1).

<sup>21</sup> See for example Items 20, 28, 29, and 30, Part 1 of the Fourth Schedule.



Thirdly, Parliament can establish a supervisory regulatory framework affecting the county finances and how they are managed. County governments are required to operate financial management systems that comply with national regulations prescribed by national legislation.<sup>22</sup> Furthermore, whereas the county governments have financial autonomy including the power to make their own budgets, this must in various respects, be done within a regulatory framework of national legislation.<sup>23</sup> In addition, although county governments have powers to procure goods and services, such powers must be exercised within a framework of national legislation.<sup>24</sup>

It must however be noted that regulatory powers cannot be used to usurp the constitutional powers of county governments. They must be used to facilitate and provide support to county governments to ensure that they are able to perform their functions and exercise their powers effectively. The regulatory power can be used to strengthen the structures, powers and functions of the county governments and prevent a decline or degeneration of such structures, powers and functions.<sup>25</sup> The powers should be exercised in a purposive manner to give effect to the promise of devolution and not to obstruct it.

## 2.2 Monitoring

Monitoring is the process of observing and keeping under review.<sup>26</sup> It is the power to measure and test at intervals constituent unit governments' compliance with the government directives or regulations and constitutional requirements.<sup>27</sup> As a supervision mechanism, monitoring is hierarchical in nature in the sense that it enables national government to intrude into the domain of the county governments in various ways.<sup>28</sup> First, monitoring may be achieved through the imposition of a reporting obligation on the county governments, requiring them to regularly report to the national government.<sup>29</sup> This is regarded as the least intrusive

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<sup>22</sup> Art 190(2). See also Chap 7 section 5.

<sup>23</sup> Art 220(2).

<sup>24</sup> Art 227(2).

<sup>25</sup> *First Certification* (1996) para 371.

<sup>26</sup> See *First Certification* (1996) paras 372-3.

<sup>27</sup> See *City of Cape Town v Premier, Western Cape* 2008 (6) SA 345 (C) para 50. See also *First Certification* (1996) paras 372-3.

<sup>28</sup> Arts 190, 192 and 225 envisage monitoring to inform the need to intervene in any of the ways provided under these provisions.

<sup>29</sup> De Visser (2005) 180-1.

mechanism as it is too general and applies generally to all county governments. For example, the Public Finance Management Act provides for monitoring by imposing a reporting obligation upon the county government.<sup>30</sup> Secondly, monitoring empowers national government to request for information from specific county governments in specific cases.<sup>31</sup> Thirdly, national government may conduct inquiries and investigations and collect information about specific matters relating to county governments or any of them. Section 121(1) of the County Governments Act, for instance, empowers the ministry or government department responsible for matters relating to intergovernmental relations to conduct investigations, inquiries, research, and collect information regarding the performance of the county governments.

Monitoring is aimed at achieving two broad objectives: to inform the support and capacity needs and to inform of non-compliance and intervention needs and measures.<sup>32</sup> This creates a nexus between monitoring and the other mechanisms of supervision. Monitoring is thus viewed as being facilitative of the other mechanisms of supervision, such as regulation, support and intervention.<sup>33</sup> National government may not know what policies and standards to legislate for and the regulatory measures to take if it does not monitor the policy and standards needs on the ground.<sup>34</sup> Furthermore, any support obligation or intervention measure is predicated upon information that can only be obtained through monitoring. The South African Constitutional Court commented thus: ‘The monitoring power is more properly described as the antecedent or underlying power from which the provincial power to support, promote and supervise [local government] emerges.’<sup>35</sup>

Monitoring is discretionary in nature and not mandatory. However, its essence of observe and keep under review ‘does not represent a substantial power in itself ... but has reference to other, broader powers of supervision and control.’<sup>36</sup> It is however submitted that the

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<sup>30</sup> Art 92(3) PFMA. See further Chap 7.

<sup>31</sup> The appropriate steps envisaged by Art190(4) may include requesting for information.

<sup>32</sup> See Steytler & De Visser (2011) ch 15, 5.

<sup>33</sup> De Visser (2005) 178.

<sup>34</sup> De Visser (2005) 178.

<sup>35</sup> See *First Certification* (1996) paras 372-3.

<sup>36</sup> See *First Certification* 1252 paras 372-3.

discretion must be exercised in a delicately balanced and cautious manner that does not compromise the constitutionally intended autonomy of the county governments.<sup>37</sup>

Although the term ‘monitoring’ is not used in the Constitution, a careful examination of various constitutional provisions establishes that the Constitution by implication contemplates and envisages monitoring as one of the mechanisms of supervision. The duty of the national government to support county governments is premised on knowledge of when to support and what kind of support is required. Likewise, any power of intervention is premised on information about the functioning of the county government. In all such circumstances, the monitoring power is implied.

### **2.3 Support to county government**

The scheme of the Kenyan devolution through a number of constitutional provisions imposes an obligation upon the national government to assist and support the county governments to ensure that they are able to discharge their functions. Article 190(1) empowers Parliament to enact legislation to ‘ensure that county governments have adequate support to enable them to perform their functions’. This provision is very broad, and covers financial, human resources capacity building, physical infrastructure, and legislative and regulatory support. However, the support envisaged must be related to the functions of the county governments since it is meant to enable them to perform their functions. The Fourth Schedule includes among the functions of the national government, that of ‘capacity building and technical assistance to the counties’.<sup>38</sup> Section 15 of the Sixth Schedule envisages and addresses matters of support and assistance to county governments during the transition period.

Support has been defined in the context of the South African system as the process of strengthening the capacity of constituent unit governments to enable them to manage their own affairs, exercise powers and perform functions.<sup>39</sup> Such powers could be used by the

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<sup>37</sup> In *City of Cape Town v Premier, Western Cape* (para 51) Swain J explained that ‘the Constitution revealed a concern for the autonomy and integrity of local government and prescribes a hands-off relationship between local government and other levels of government on the one hand, but on the other hand, acknowledges the requirement that higher levels of government monitor local government functioning and intervene where such functioning is deficient or defective, in a manner that compromises this autonomy. This is a necessary hands-on component of the relationship.’

<sup>38</sup> Item 32 Part 1 Fourth Schedule.

<sup>39</sup> See *First Certification* para 371.

national government to strengthen existing constituent unit government's structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions.<sup>40</sup> Section 121(1) of the County Governments Act empowers the national government through the ministry or government department responsible for intergovernmental relations to provide support to county governments to enable them perform their functions.

Like the South African Constitution, the Kenyan Constitution draws a distinction between support that is supervisory in nature and that which is cooperative in nature.<sup>41</sup> Supervisory support flows from national government to county government in a hierarchical manner, while cooperative support is intergovernmental and may flow from any one of the governments to the other. Supervisory support is coercive in nature since national government can intervene if the county government does not agree with the support being offered. While supervisory support imposes an obligation upon the national government to support the county governments, cooperative government support imposes obligations on both national and county governments to assist and support each other. The South African Constitutional Court pronounced itself on supervisory support thus:

The legislative and executive powers to support [local government] are, again, not insubstantial. Such powers can be employed by provincial governments to strengthen existing [local government] structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions. This support power is to be read in conjunction with the more dynamic legislative and executive role granted to provincial government ... In terms hereof, the provinces must assert legislative and executive power to promote the development of [local government] capacity to perform its functions and manage its affairs and may assert such powers, by regulating municipal executive authority, to see to the effective performance by municipalities of their functions in respect of listed [local government] matters. Taken together these competences are considerable

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<sup>40</sup> See *First Certification* para 371.

<sup>41</sup> Arts 190(1) and 189(1)(b). See further Chap 9 section 3.1.4

and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in parts B of ... schs 4 and 5.<sup>42</sup>

## 2.4 Intervention

Intervention is defined as the competence, and sometimes a duty, of the national government to direct the activities and outcome of the counties. It involves national government supplanting the decision-making power of the county government. The Constitution provides for three distinct types of intervention: general or ordinary intervention in terms of Article 190, intervention by way of suspension of county governments in terms of Article 192, and intervention by way of stoppage of transfer of funds in terms of Article 225. Each one of these has its own specific constitutionally-identified factors which must be proved as jurisdictional facts to justify the intervention.<sup>43</sup> Similarly, each has its own remedies and safeguards which vary depending on the jurisdictional facts.

It is submitted that since intervention is an intrusion into the domain of the county governments, the provisions should be interpreted narrowly and restrictively against the national government, putting the burden of justification upon the intervening government. A jurisdictional fact is not a subjective personal opinion but an objective fact that exists independently, which must have existed before the intervention power could validly be exercised. Such existence of the jurisdictional fact is justiciable in a court of law.<sup>44</sup> If the court finds that the factual situation did not exist, it may invalidate the intervention.<sup>45</sup>

## 3 General or ordinary intervention under Article 190

Article 190 provides for three distinct matters. First, it identifies the circumstances under which intervention can be justified. Secondly, once the circumstances have been established, it provides for the intervention measures which national government can take. Thirdly, it provides for limits on and safeguards against abuse of the intervention powers.

Article 190(3)(a) identifies the circumstances under which intervention by national government in the affairs of county government can be justified.

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<sup>42</sup> *First Certification* para 371.

<sup>43</sup> See *Mnquma Local Municipality and Another v Premier of the Eastern Cape and others* (2009) ZAECBHC 14 (*Mnquma*) para 49.

<sup>44</sup> See *South African Defence and Aid Fund and Another v Minister of Justice* (1969) 1 SA 31 (A) 34A-35D.

<sup>45</sup> See *Mnquma* para 50.

Parliament shall, by legislation, provide for intervention by the national government if a county government –

- 1) is unable to perform its functions; or
- 2) does not operate a financial management system that complies with the requirements prescribed by national legislation.

These provisions lay a basis for general intervention in two broad circumstances which must be proved as jurisdictional facts.

### 3.1 Unable to perform functions

There are two elements of this provision which must objectively be established as jurisdictional facts: ‘unable to perform’ and ‘its functions’. In the context of this provision, ‘unable to perform’ must be interpreted as having two meanings. One, unable to perform refers to lack of capacity to perform which could be remedied by supportive intervention aimed at creating the necessary capacity for the county government to perform the function in question.<sup>46</sup> Two, unable to perform refers to failure to perform due to unwillingness on the part of the county government. This means that the county government has the capacity to perform but it is unwilling to do so, which may call for corrective intervention. In the South African Constitution, both section 100, in respect of intervention by national government in provincial affairs, and section 139, in respect of intervention by provincial government in municipal affairs, use the phrase ‘cannot or does not fulfil an executive obligation’. The Court in *Mnquma* correctly held that this phrase should be interpreted as capturing situations of both inability to perform and failure to perform the functions. Although the Kenya provision is worded differently as ‘is unable to perform’, it is submitted that it should be interpreted in the same manner. The Kenyan provision could not have been intended to cover cases of lack of capacity only but ignore cases of negligent or intentional dereliction of duty. In both cases unable to perform should be interpreted to include the inability or failure to effectively perform, which means that where a county government has attempted to perform but has been unsuccessful, intervention is justified.<sup>47</sup>

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<sup>46</sup> ‘Unable’ means not able or lacking the necessary power, competence, or ability to do or accomplish some specified act.

<sup>47</sup> See *Mnquma Local Municipality and Another v Premier of the Eastern Cape and others* 2009 ZAECHC 16 para 52.

In both cases the jurisdictional fact revolves around and is constituted by an omission or inaction on the part of the county government. In *City of Cape Town v Premier, Western Cape and others* the Court drew a distinction between jurisdictional facts that are constituted by omissions or inactions and those constituted by positive misconduct.<sup>48</sup> It concluded that in the case of section 139(1) of the South African Constitution, the jurisdictional fact was constituted by an omission or inaction and not a positive misconduct. It also observed that the section applied to an ongoing failure and not a past one which has already been addressed.

Section 139(1) provides that intervention is justified where a municipality “cannot or does not fulfil an executive obligation in terms of the Constitution or legislation” and is the only conceivable provision of this section which could apply in this case. This case is concerned with omission or inaction by the municipality and not positive misconduct. It is also framed in the present tense, being concerned with an ongoing failure and not a past failure. Intervention would not be appropriate where a past omission had already ceased.<sup>49</sup>

The phrase ‘its functions’, on the other hand, encompasses three types of functions: the original constitutional functions of the county governments, the statutorily assigned functions, and the executive delegated or transferred functions. Unlike the South African situation under which the national government can only intervene for failure to fulfill an executive obligation, the Kenyan provisions suggest that intervention may be justified in executive, legislative and administrative functions of the county government. Since, however, it is the executive arm of the national government which intervenes it may be argued that the provision does not envisage intervention in the legislative matters. Yet, if the function the county government fails to perform is the passing of its own budget, an intervention that passes a budget for the county would be justified. The conclusion thus is that there may be a few cases where national government may justifiably intervene to legislate for the county, namely, where the county assembly is unable to legislate, for example, where it is unwilling or incapable of passing a budget.

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<sup>48</sup> 2008 (6) SA 345 (C) (*City of Cape Town*) para 79.

<sup>49</sup> *City of Cape Town* para 79.

### 3.2 Failure to operate the prescribed financial management system

The other broad circumstance in which the intervention power can be invoked concerns where it is established that a county government ‘does not operate a financial management system that complies with the requirements prescribed by national legislation’.<sup>50</sup> ‘Does not operate’ could flow from two situations. First, this means an inability to operate the system, which may arise out of the lack of capacity necessary to operate the system, and may be addressed by supportive intervention to provide the needed capacity. Secondly, it means a deliberate unwillingness or refusal to operate the prescribed system. This may be addressed by corrective intervention aimed at enforcement of the statutory requirements.

The jurisdictional fact which must be proved in this case is constituted by a county government’s failure to operate its financial management system in compliance with requirements prescribed by legislation. In determining a failure in this case it must be noted that this particular ground deals with matters relating to finances only and is distinguished from other cases of inability to perform functions. It is similarly distinguished from the cases of serious financial breach and persistent material breaches which are covered by Article 225 and which lead to stoppage of transfer of funds to the county government although overlaps are possible. Serious material breach and persistent material breaches may also suffice as grounds under Article 190(3)(b), but not all non-compliance matters under this Article suffice as material breaches under Article 225.

### 3.3 The intervention measures

Once any one of the identified jurisdictional facts has been established, Article 190(4) provides for the intervention measures that can be taken as follows:

Legislation under clause (3) may, in particular, authorise the national government –

- a) to take appropriate steps to ensure that the county government’s functions are performed and that it operates a financial management system that complies with the prescribed requirements ; and

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<sup>50</sup> Art 190(3)(b).



- b) if necessary, to assume responsibility for the relevant functions.

Legislation is a precondition to any steps being taken. The provision identifies two broad sets of measures that may be undertaken, namely, appropriate steps, and assumption of responsibility for the functions. Under the first set, the national government takes measures that may include directing the county government on what to do to ensure that the county government functions are performed, or that the county's financial management system complies with prescribed requirements. Under the second set, however, the national government not only takes the decisions regarding what to do but also executes them by assuming responsibility and performing the functions on behalf of the county government.

### **3.3.1 Appropriate steps**

'Appropriate' refers to something suitable or fitting for a particular purpose or occasion. The South African High Court in *Mnquma* noted that the word 'appropriate' means 'specially suitable' or 'proper'.<sup>51</sup> Thus, the phrase 'appropriate steps' refers to steps that are specially suitable and proper for the purpose of ensuring that the county government's functions are performed or that the financial management system is operated in a manner that complies with the prescribed requirements. In accordance with the legality principle, there must be a rational relationship between the appropriate steps chosen and the purpose pursued.<sup>52</sup>

The use of the phrase 'appropriate steps' suggests that there is an open list of steps that may be considered appropriate which the national government may choose from. The legislation envisaged by the Constitution must therefore provide for this list from which national government can be able to choose when taking appropriate steps. Section 121 of the County Government Act provides for some steps which may be taken by the ministry or government department responsible for intergovernmental relations that may be regarded as appropriate steps to pick from. While some of them are best viewed as monitoring and support, nothing stops national government from utilising them as appropriate steps. For example, the national government may assess the performance of the county government,<sup>53</sup> and may conduct research and inquiries, to determine the support requirements and their extent.<sup>54</sup> It may also

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<sup>51</sup> See *Mnquma* para 74 (emphasis in original).

<sup>52</sup> *City of Cape Town* paras 88-9. See also Steytler & De Visser (2011) ch 15, 21.

<sup>53</sup> S 121(2)(a) CGA.

<sup>54</sup> S 121(2)(c) CGA.

assist the county government to identify the causes of their performance problems and the potential solutions.<sup>55</sup> In respect of failure on the part of county government to operate a financial management system that complies with the prescribed requirements, section 121 only provides for collaboration between the relevant county secretary and the cabinet secretary for finance on any support matters relating to finance.<sup>56</sup> It is submitted that this is inadequate for purposes of identifying the appropriate steps to be taken where the county government does not operate a financial management system that complies with the prescribed requirements. Apart from the reporting obligations imposed upon the county government by section 92(3), the Public Finance Management Act does not make provision for any other appropriate steps that are specific to the intervention contemplated under Article 190(3) of the Constitution.

In choosing the appropriate steps, the national government must ensure that any intrusion on the functional integrity of the county government comes as a last resort. Moreover, measures that are least intrusive must be preferred to those that are more intrusive.<sup>57</sup>

### **3.3.2 Assumption of responsibility**

Article 190(4) provides that the legislation may authorise national government ‘if necessary, to assume responsibility for the relevant functions’. The implication is that assumption of responsibility for the functions in question is one of the most drastic measures in the circumstances of intervention and can only be invoked where all other lesser measures are not viable. This is because ‘if necessary’ refers to: first, assumption of responsibility may be necessary to maintain essential national standards, or to meet established minimum standards for rendering services by the counties.<sup>58</sup> National legislation dealing with sectoral areas such as health, agriculture, and housing may prescribe minimum standards and levels for service delivery, to be observed by county governments. Secondly, it may also be necessary to

<sup>55</sup> S 121(2)(f) CGA.

<sup>56</sup> S 121(2)(h).

<sup>57</sup> *First Certification Judgment* para 124 and *Mnquma* para 41. See also *Premier of Western Cape & others v Overberg District Municipality & others* 2011 (4) SA 441(SCA), in which the provincial executive dissolved the council for failure to approve the budget on the required date. The Supreme Court of Appeal found that the Provincial Executive wrongly interpreted section 139 (4) which gave it power to take appropriate steps to ensure that the budget is approved. The Court found that the appropriate steps were not limited to the drastic action of dissolving the councils.

<sup>58</sup> See Steytler & De Visser (2011) ch 15, 23 writing in respect of South Africa’s section 139.

prevent one county from taking unreasonable action that is prejudicial to the interests of another county or the country as a whole.<sup>59</sup> A dysfunctional county can be detrimental or a hindrance to cooperation with other counties and can damage processes of agreements among counties and delivery of shared services. It can also create problems for and obstruct national government laws and programmes implemented by the county government. Intervention may also avoid the problems of one county being replicated in other counties. Thirdly, it refers to demands of maintaining economic unity aimed at avoiding detrimental effects to the whole country, of erratic county policies and behavior that may necessitate assumption of responsibilities.

When discussing this issue in the context of the South African Constitution, Steytler and De Visser observe that ‘appropriate steps’ may ‘range from the relatively mild directive to the more intrusive assumption of responsibility and dissolution’.<sup>60</sup> There is, however, no legal requirement that assumption of responsibility must be a measure of last resort after all other measures have been considered unviable.<sup>61</sup> The essence of assumption is that the powers of the county government are ousted and are taken over for performance by the national government.

Assumption of responsibility as an appropriate step taken for corrective purposes must be linked and limited to functions which the county government has been unable to perform. It can therefore only be undertaken to the extent that it is necessary to ensure the performance of those specific functions and cannot be a blanket takeover of all the functions of the county government.<sup>62</sup> National government cannot be allowed to intrude into the entire functional areas of the county government where it does not serve the purpose of the intervention.

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<sup>59</sup> See Steytler & De Visser (2011) ch 15, 23.

<sup>60</sup> Steytler & De Visser (2011) ch 15, 21.

<sup>61</sup> See *Mnquma* para 72 where the South African Court rejected the suggestion that the steps be taken in a progressive sequence.

<sup>62</sup> Steytler & De Visser (2011) ch 15, 27 note that ‘the extent of the assumption of responsibility must be linked to the purpose of the intervention’.

### **3.4 Limitation of the power and safeguards against abuse**

Since intervention is a severe intrusion into county autonomy it can easily be abused if not appropriately constrained.<sup>63</sup> Accordingly, the Constitution imposes a number of limitations to the exercise of the intervention power.

#### ***3.4.1 Intervention must be founded upon national legislation***

The first limitation is the requirement that the intervention must be provided for by legislation. In the absence of such legislation, the national government would be unable to act lawfully.<sup>64</sup> Section 121 of the County Governments Act has provided for such authority in the form of an elaborate process that starts with monitoring and evaluation which may lead to the invocation of intervention under Article 190(2) of the Constitution.

#### ***3.4.2 Requirement of notice to county before intervention***

Article 190(5)(a) prescribes that '[t]he legislation under clause (3) shall require notice to be given to a county government of any measures that the national government intends to take'. This is necessary since the grounds for intervention are accusations against the county government alleging a failure on the part of the county government to either perform its functions or comply with the prescribed financial management system. The county government must be given an opportunity to be heard about the allegations made against it. Since intervention is corrective in nature, notice may enable the county government to take remedial steps rendering the intervention unnecessary. Besides, rules of natural justice would require that the county government be given a hearing before being condemned.

The notice must (a) give details of the alleged failure, and (b) give the county government adequate time to take any steps that may be necessary to remedy the situation. Section 121(5) of the County Governments Act requires the Cabinet Secretary responsible for intergovernmental relations to give notice to the county government stating the nature of the intended intervention, the measures to be taken and the period required to rectify the problem.

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<sup>63</sup> Murray C & Simeon R 'From paper to practice: the National Council of Provinces after its first year' (1999) 14 SA *Public Law* 103.

<sup>64</sup> Art 2(2) prohibits a claim or exercise of state authority 'except as authorised under this constitution'.

### **3.4.3 Measures that assist the county to resume its functions**

Since intervention is corrective and restorative in nature, Article 190(5)(c) prescribes that '[t]he legislation under clause (3) shall – require the national government, when it intervenes, to take measures that will assist the county government to resume full responsibility for its functions'. This serves to limit the discretion of national government to measures that can restore the ability of county government as soon as possible. The measures must be forward-looking and not punitive in nature.

### **3.4.4 Intervention limited to only measures that are necessary**

Article 190(5)(b) provides that '[t]he legislation under clause (3) shall – permit the national government to take only measures that are necessary'. In addition, assumption of responsibility for the relevant function can only be an appropriate step 'if necessary'.<sup>65</sup> What is necessary must be guided by the purpose of intervention, which as noted is corrective and restorative.

Since Article 190(5)(b) limits the autonomy of county government, it should be interpreted strictly and restrictively in the same manner that limitations to fundamental rights are interpreted.<sup>66</sup> In this manner the provision should be understood as requiring details of the measures that are necessary to be identified and provided for by the legislation contemplated under Article 190. Given that the measures in these circumstances conflict with county sovereignty, the rule of law demands that they be spelt out in legislation to enable the county governments whose conduct is to be governed by the legislation to know the risk of operating the government in a manner that may invite intervention and where possible be able to avoid intervention. The rule of law also requires that the law be sufficiently precise, clear and accessible to avoid vagueness<sup>67</sup> and where it confers discretionary powers, the discretion must be defined and restricted or controlled to ensure the general applicability of the law to avoid arbitrariness.<sup>68</sup>

The Public Finance Management Act does not identify any measures that the national government may take when it intervenes in the affairs of county government under Article

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<sup>65</sup> Art 190(4)(b).

<sup>66</sup> See Chap 2 section 5.2.

<sup>67</sup> See Chap 2 section 5.1.

<sup>68</sup> See Chap 2 section 5.1.

190(3) of the Constitution.<sup>69</sup> It is submitted that this failure will render any attempt to intervene under this legislation questionable on grounds of illegality.

### ***3.4.5 Termination of the intervention by the Senate***

In terms of Article 96(1) the Senate must perform its protective mandate, by reviewing the national government's decision to intervene in the affairs of the county government. In this regard Article 190(5) provides that the legislation contemplated under Article 190(3) must 'provide for a process by which the Senate may bring the intervention by the national government to an end'. This serves to ensure that the national government does not abuse its power of intervention. For instance, if the national government intervenes in circumstances that do not warrant such intervention, or takes measures that are not appropriate, or takes measures that are punitive, the Senate may terminate the intervention. The provisions serve to recognise both legal and political safeguards against abuse of the intervention power by the national government.<sup>70</sup>

The provision requires the legislation to 'provide for a process' by which the Senate may bring the intervention to an end, which should be interpreted as envisaging a process empowering the Senate to get notification, hear the parties, make a decision on the matter, and to monitor the entire process.<sup>71</sup> Implied in this provision is an obligation on the part of the national government to inform the Senate whenever it takes intervention measures against any county government. The role of the Senate is limited to overseeing the intervention actions of the national government but does not include managing or prescribing to national government how best to execute the intervention. Rather, the provision only empowers the Senate to scrutinise the measures taken by the national government and not to decide for it what measures to take.<sup>72</sup>

## **4 Intervention by way of suspension of county government**

The most drastic and intrusive intervention measure is provided for by Article 192(1):

The President may suspend a county government –

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<sup>69</sup> S 121(2)(g) and (4) CGA at least identifies both a recovery plan and assumption of responsibility for the functions by the national government as some of the measures that may be taken against a county government.

<sup>70</sup> See *Mnquma* para 82.

<sup>71</sup> See Steytler & De Visser (2011) ch 15, 25 with respect to South Africa.

<sup>72</sup> See Steytler & De Visser (2011) ch 15, 26.

- a) in an emergency arising out of internal conflict or war; or
- b) in any other exceptional circumstances.

A suspension is a temporary withholding of a privilege or interruption from a position.<sup>73</sup> Suspension of a county government therefore is a temporary extinguishment, interruption or halting of the government which during the period of suspension does not exist and serve as the government. It is argued later that it actually amounts to dismissal of the county government from office.<sup>74</sup> This means that the entire county government, any one of its two arms, or both, could be suspended. Article 200(2)(e), which requires Parliament to enact legislation providing for ‘the suspension of assemblies and executive committees’, implies that the suspension can lawfully be directed at either the county assembly or the county executive. Indeed, if, as is discussed below, a suspension must be founded upon proven allegations against the county government, then it is reasonable to argue that such allegations could be made and proved against only one arm of a county government. In this event, only such an arm would be liable to suspension. It would be unfair to punish one arm for the sins of the other.

The President is conferred with the power to suspend a county government only in certain specified circumstances which constitute jurisdictional facts. These are an emergency arising out of internal conflict or war, and any other exceptional circumstances.

#### **4.1 Emergency arising out of internal conflict or war**

The suspension power can be invoked only if there is ‘an emergency arising out of internal conflict or war’.<sup>75</sup> Must a state of emergency first be declared? It is submitted that a state of emergency must have been factually established and lawfully declared in terms of Article 58 for it to be a basis for suspension. This approach would make invocation of suspension more difficult since it is a very drastic intrusion into the central objective of democratic government.<sup>76</sup> While under Article 58 an emergency can be declared on more grounds than just internal conflict and war, for purposes of suspension, only emergencies arising out of internal conflict or war suffice. If a state of emergency has been declared for any other

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<sup>73</sup> See Oxford Dictionary Thesaurus and Word Power Guide (2001) 1304.

<sup>74</sup> Art 192(6).

<sup>75</sup> Art 192(1)(a).

<sup>76</sup> Art 174(a).

reason, such as a natural disaster, it would not justify the invocation of suspension of a county government.

Moreover, the mere fact of the declaration of an emergency is not sufficient to warrant the suspension of a county government. There must be something alleged against the county government in relation to the emergency to warrant the suspension of the government. A good example would be a situation under which the county government is perhaps the cause of the internal conflict or is taking part in the conflict or war. It is for this reason that the Constitution requires an independent commission to first investigate allegations made against the county government and for the President to be satisfied that the allegations are justified, before a county government is suspended.<sup>77</sup>

Suspension being a very drastic measure that seeks to curtail democratic governance, must be interpreted strictly against the intervening national government and narrowly to confine the intervention grounds to only those mentioned in the provision. The existence of an emergency must be established both as a matter of fact and a matter of law. As a matter of fact, Article 58 identifies various factual circumstances that may lay a basis for a declaration of a state of emergency. As a matter of law the provision sets out procedures that must be followed before a declaration is lawfully made. These are matters that must be established objectively and not subjectively as jurisdictional facts.

#### **4.2 Any other exceptional circumstances**

The ground of ‘any other exceptional circumstances’ is broad and undefined. To avoid abuse, this ground should be restrictively interpreted. Having specifically mentioned emergencies arising out of internal conflict and war, this particular ground should be interpreted *eiusdem generis* and strictly to ensure that suspension can only be invoked when the circumstances are exceptionally serious. This would require that the national government proves that the gravity of the circumstances is something comparable to internal conflict or war. As a measure of last resort, the national government must show that it has considered all other possible measures and found them not viable for dealing with the problem. Where the county government has become the problem and cannot function by its failure, for example, to approve a budget, exceptional circumstances may be justified. If the working relationship between the county assembly and the county executive has become too polarised to a level of making it

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<sup>77</sup> Art 192(2).



impossible for the two to govern and deliver services, this can constitute justifiable exceptional circumstances. The suspension measure must be taken against both the county executive and county assembly where they both make governance impossible.<sup>78</sup>

Although the South African Constitution does not have provision for suspension of provincial or local governments, it has provision for dissolution of municipal councils in ‘exceptional circumstances’.<sup>79</sup> In *Mnquma*, the High Court noted that it is neither desirable nor possible to lay down precise rules as to what circumstances are to be regarded as exceptional. For purposes of dissolution of a municipal council, the Court raised the bar high and defined ‘exceptional circumstances’ as something ‘markedly unusual or specially different’.<sup>80</sup> It offered two reasons for such a high standard. First, the purpose for requiring exceptional circumstances where intervention takes the form of dissolution of the municipal council is to ensure that no inroads are made without good reason into the autonomy of another sphere of government.<sup>81</sup> Secondly, it is recognised that the dissolution of the municipal council is the more drastic and far-reaching of the forms of intervention authorised by the Constitution.<sup>82</sup> ‘Not only must the dissolution be an “appropriate” step to remedy the situation, it can only be resorted to if exceptional circumstances have been found to exist.’<sup>83</sup> From this perspective, the court saw exceptional circumstances for purposes of dissolution of a municipal Council as signifying that this is ‘a step that should not easily be resorted to’.<sup>84</sup> Thus, the phrase must be given a narrow rather than a broad interpretation. This approach, it is submitted, is appropriate for the suspension of county government in the Kenyan context.

The use of the phraseology limits the circumstances under which the national government can drastically intrude into the affairs of county governments. The provision envisages extreme circumstances calling for extreme measures, not to be used if things are normal and are ordinarily functioning normally. Suspension of the county government is an extreme attack on the democratic right of the people of the county and can only be permitted in rare cases.

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<sup>78</sup> See section 123(1) of the CGA which envisages suspension ‘if the county government engages in actions that are deemed to be against the common needs and interests of the citizens of the county’.

<sup>79</sup> Section 139 of the Constitution of the Republic of South Africa, 1996.

<sup>80</sup> *Mnquma* para 79.

<sup>81</sup> *Mnquma* para 79.

<sup>82</sup> *Mnquma* para 79.

<sup>83</sup> *Mnquma* para 79.

<sup>84</sup> *Mnquma* para 80.

### 4.3 The process of suspension

Article 192(2) provides for a three-step process for suspension of a county government that involves three institutions: the President, an independent commission of inquiry and the Senate. Although the Constitution confers upon the President the power to suspend a county government, the decision to suspend cannot be taken unless an independent commission of inquiry has investigated the allegations made against the county government, to the satisfaction of the President that the allegations are justified, and the Senate has authorised the suspension. But how does the process commence in the first place?

While the Constitution does not expressly provide for this, it recognises that the power of the President has to be exercised within a framework of national legislation enacted by Parliament.<sup>85</sup> The County Governments Act envisages that the action of the President may be activated by a citizen who may petition the President to suspend a county government in accordance with the provisions of the Constitution if the county government engages in actions that are deemed to be against the common needs and interests of the citizens of a county.<sup>86</sup> Such petition must be supported by the signatures of not less than ten per cent of the registered voters in the county.<sup>87</sup> Within fourteen days the President in turn must submit a report on the allegations made and the grounds giving rise to the petition for suspension to the Summit, which is established as the apex intergovernmental relations body for approval,<sup>88</sup> and appointment of members of the commission to inquire into the allegations.<sup>89</sup>

#### 4.3.1 The independent commission of inquiry

Because of the grave consequences of a suspension, an independent commission of inquiry must be established to investigate the allegations made against the county government and report back to the President.<sup>90</sup> This is to ensure that the decision to suspend a county government is very carefully considered by an independent body as opposed to, for instance,

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<sup>85</sup> Art 200(2)(e) provides that ‘in particular, provision may be made with respect to the suspension of the assemblies and executive committees’.

<sup>86</sup> S 123(1) CGA.

<sup>87</sup> S 123(2) CGA.

<sup>88</sup> S 123(3) CGA.

<sup>89</sup> S 123(4) CGA.

<sup>90</sup> Art 192(2).

investigations by a parliamentary committee.<sup>91</sup> Since the commission investigates allegations made against the county government, such government must be given notice and an opportunity to defend itself against the allegations.

#### ***4.3.2 The President's decision on the commission's report***

Once the commission finalises its work it must report its findings to the President. The commission may find that the allegations against the county government are not justified or that they are justified. If it finds that they are not justified, then the matter ends there and a suspension power cannot be invoked against the county government. If, however, it finds that the allegations against the county government have been proved, the matter then goes to the next stage. The President considers the matter and if satisfied that the county government should be suspended, the matter is referred to the Senate for authorisation.

#### ***4.3.3 Authorisation by the Senate***

The need for Senate authorisation is founded in the fact that the Senate is established as a house that represents and protects the interests of the counties and their governments.<sup>92</sup> This provision puts the Senate in a position of wielding a veto power over the President. This is necessary because where there is no termination of the suspension by the Senate, the county government stands dismissed at the end of the 90 days stipulated by Article 192(5). The county government does not come back to office but instead, elections for a new county government are held.<sup>93</sup> But even if the Senate authorises the suspension of a county government allowing it to take effect, it can at a later stage terminate the suspension before the expiry of the prescribed ninety days.<sup>94</sup> The need for such termination may arise if it turns out that the decision to suspend the county government was a mistake or the emergency or exceptional circumstances cease to exist. The emergency or the internal conflict or war leading to the declaration may come to an end necessitating the termination of the suspension. On the other hand, the exceptional circumstances giving rise to the suspension may be addressed satisfactorily thereby necessitating the re-establishment of democratic

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<sup>91</sup> For comparison with experience elsewhere, see Ghai YP & Regan AJ *The Law, Politics and Administration of Decentralisation in Papua New Guinea* (1992) 371, where they discuss the use of a Parliamentary Committee in Papua New Guinea, thereby politicising the process.

<sup>92</sup> Arts 192(2) and 96(1).

<sup>93</sup> Art 192(6).

<sup>94</sup> Art 192(4).

government. The Senate is therefore empowered to re-evaluate the situation and see whether or not to terminate the suspension. Once the Senate terminates the suspension, the county government then resumes its position and responsibilities.

It is submitted that the decision to authorise a suspension or to terminate the suspension is a matter concerning counties in which the vote belongs to the county delegations and not a vote of the individual senators.<sup>95</sup> The vote would have to be taken in terms of Article 123 of the Constitution.

#### **4.4 Consequences of suspension**

A suspension of the county government means that both the county executive and the county assembly, or either of them, are temporarily stopped from performing their functions or acting as the government of the county as an interim measure before an election is called within 90 days if there is no termination by the Senate. The Constitution requires that an Act of Parliament be enacted to provide for arrangements to ensure the performance of the county government functions during the period of suspension.<sup>96</sup> The legislation should thus provide, first, for who should run the affairs of the county government during suspension; and second, the rules which such a person will use when performing the functions of the county government during suspension.

One important matter to note is that the corporate existence and identity of a county government are not affected by the suspension. As a result, the exercise and performance of the powers and functions of the county government by any other entity during the suspension period is done on behalf of the county government. Any rights acquired or liabilities incurred by the entity therefore belong to the county which would continue to benefit from or be bound by them even after the suspension has ended.

#### **4.5 Restoring democratic rule**

Suspension by its very nature is to be temporary, lasting for a fixed period of ninety days only<sup>97</sup> and cannot be extended. The county government resumes office if the suspension is terminated before the end of 90 days, otherwise elections for a new government are held on

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<sup>95</sup> See Chap 10 section 3.2.5.

<sup>96</sup> Art 192(3).

<sup>97</sup> Art 192(5).

the expiry of the 90 days.<sup>98</sup> In essence, suspension is a remedial measure aimed at quickly correcting the situation and re-establishing an elected government for the county. If the suspension runs its full course of 90 days, it amounts to the dismissal of the county government which must be replaced by a newly elected government.

## **5 Intervention by stoppage of transfer of funds**

Article 225(3) provides for what should be considered as an indirect supervisory intervention by way of stoppage of transfer of funds to county government:

Legislation under clause (2) may authorise the Cabinet Secretary responsible for finance to stop the transfer of funds to a State organ or any other public entity –

- a) only for a serious material breach or persistent material breaches of the measures established under that legislation; and
- b) subject to the requirements of clause (4) to (7).

In the absence of the required legislation which meets all the requirements, stoppage of transfer would not be lawful. Since the constitutional provisions do not specify the funds that are subject to stoppage, they must be understood to refer to all types of funds due to county governments, including equitable shares and conditional and unconditional grants.

### **5.1 Grounds for stoppage of transfer of funds**

The constitutional provisions contemplate an objective process in which stoppage can only be invoked in two specified circumstances, which are jurisdictional facts:<sup>99</sup> (a) a ‘serious material breach’ or (b) ‘persistent material breaches’ of the measures established by national legislation.

#### **5.1.1 Serious material breach**

The concept of ‘serious material breach’ must be understood in the context of the legislation envisaged by Article 225(2) of the Constitution, which should provide for expenditure controls and transparency, and mechanisms for the implementation of such controls. The

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<sup>98</sup> Art 192(6).

<sup>99</sup> See *First Certification judgment* para 283 where the South African Constitutional Court held with reference to a similar provision (s 2160 of the Constitution), that [t]he question whether there has been a serious or persistent material breach of the provisions would also be justiciable’.

controls aim at ensuring responsible and prudent management of resources to enable the county governments meet their financial obligations as and when they fall due. A breach justifying stoppage of transfer must therefore be a breach of these expenditure controls and transparency. It is for this reason that the term ‘material’ is used, which means substantive, and not petty or peripheral breach of the expenditure control and transparency rules contemplated by Article 225(2). Such material breach must also be ‘serious’ in the sense of being of a grave, weighty or important nature; every material breach cannot lead to stoppage of transfer of funds.<sup>100</sup>

The requirement of ‘serious’ focuses on a singular material breach. This is contrasted with ‘persistent material breaches’ which are plural and become a ground for stoppage because they are many and repeated or ongoing.<sup>101</sup> Such breaches would be serious material breaches if they involve the county government being unable to meet its financial commitments.<sup>102</sup>

As mentioned earlier, the Public Finance Management Act attempts to provide for this matter but combines it with matters arising out of Article 190(3) in a manner that fails to clearly bring out this distinction.<sup>103</sup> This fails to recognise the clear distinction the Constitution makes between the two jurisdictional facts. Section 94(1) of the Act fails to draw a clear distinction between the factors that may evidence the occurrence of a serious material breach and those that may evidence the occurrence of persistent material breaches. Factors are given which apply to both situations, yet the Constitution presents the two as distinct jurisdictional facts. The section read together with others seems to leave the determination of what constitutes a serious material breach or persistent material breaches to the discretion of the Cabinet Secretary. This discretion is not appropriately defined and controlled to ensure

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<sup>100</sup> See Kriel RR & Monadjem M ‘Public finances’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) 1-57, 42.

<sup>101</sup> Kriel & Monadjem ((2011) 42), have pointed out with respect to South Africa that ‘the phrase “serous” is intended to create a high threshold’ for the remedy of stoppage of transfer to be invoked.

<sup>102</sup> See Steytler & De Visser (2011) Ch 15, 30 who, while discussing intervention in South African municipalities experiencing serious financial problems, observe that: ‘A serious financial problem refers generally to a municipality’s inability to meet its financial commitments. This not only refers to meeting its contractual obligations to pay creditors, whether they be staff or suppliers; it also refers to its commitment to manage its financial system soundly. The reference to a municipality also includes any municipal entity.’

<sup>103</sup> See s 93(3) of the Public Finance Management Act.

general applicability of the law and can lead to arbitrariness, which can invalidate the provision.<sup>104</sup>

### ***5.1.2 Persistent material breaches***

The concept of ‘persistent material breaches’ must be contrasted with that of ‘serious material breach’. In this case the breaches need not be serious but what elevates them to a level of justifying stoppage is their persistence. If the county government repeatedly defaults in making payment of its debts when they fall due, it may be said to have committed persistent material breaches.<sup>105</sup> While one serious material breach may justify stoppage of transfer, persistent material breaches would require more than just one breach or an isolated occurrence of a material breach.<sup>106</sup>

## **5.2 The process and safeguards against abuse**

Stoppage of transfer of funds is an exception to the general rule that county governments have financial autonomy arising out of the fact that their equitable shares of revenue raised nationally are entitlements. They must be transferred to county governments promptly and without undue delay and deduction, except where the transfer has been stopped in terms of Article 225.<sup>107</sup> Stoppage of transfer must thus be interpreted strictly with a view to protecting the financial autonomy of the county governments. Articles 225(4) to (7) set out both the process to be followed and the safeguards against abuse of the stoppage power which are discussed in the following sections.

### ***5.2.1 Report of the Controller of Budget***

Before Parliament approves or renews the decision, a report by the Controller of Budget regarding the situation must be presented to Parliament.<sup>108</sup> This is necessary because the Controller of Budget is an independent office which has constitutional mandate to oversee the

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<sup>104</sup> See section 3.4.3 above.

<sup>105</sup> See s 93(3)(b).

<sup>106</sup> See Kriel & Monadjem (2011) 42 who observe that ‘[t]he word “persistent” suggests continuing in some action “against opposition” and may indicate a remedy of last resort’.

<sup>107</sup> Art 219 is similar to provisions relating to the provincial sphere of government in South Africa where the equitable share is regarded as an entitlement that cannot be tampered with in any way by the national sphere of government. See ss 227(3) and 216(2) of the Constitution of the Republic of South Africa, 1996.

<sup>108</sup> Art 225(7) (a).

implementation of budgets by the two levels of government. The office may therefore have information relevant to the decision that may lead to a different decision by Parliament.

### ***5.2.2 Notice and right to be heard***

Article 225(7)(b) prohibits Parliament from approving or renewing a decision to stop transfer of funds unless the county government ‘has been given an opportunity to answer the allegations against it, and to state its case, before the relevant parliamentary committee’. The implication of this is that the jurisdictional facts of ‘serious material breach’ and ‘persistent material breaches’ must be constituted by something blamable against the county government. The county government must be alleged to have done or omitted to do something which is the cause of either the serious material breach or the persistent material breaches. There is therefore a causal link between the conduct of the county government and the reasons giving rise to the need to stop transfer of funds. The county government is entitled to be heard and defend itself against any such allegations before any stoppage decision is approved or renewed. The mere fact that a county government has financial problems and is unable to meet its financial obligations is not sufficient reason to stop transfer of funds to it.

In addition, these provisions appear to emphasise the corrective and restorative nature of intervention and fairness in the entire process of stoppage of transfer of funds. Accordingly, if the problem cannot be linked to the conduct of the county government, the corrective and restorative measure is not appropriate for these purposes.<sup>109</sup>

### ***5.2.3 Parliamentary approval***

Although the initial decision to stop transfer of funds is the responsibility of the Cabinet Secretary responsible for finance,<sup>110</sup> the decision must be submitted to Parliament for review and approval. Article 225(5)(b) provides that the decision ‘may be enforced immediately, but will lapse retrospectively unless, within 30 days after the date of the decision, Parliament

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<sup>109</sup> See Steytler & De Visser (2011) chap 15, 31 who, with reference to the South African provincial intervention in the affairs of a municipality experiencing serious financial problems, observe that: ‘The financial problem must be caused by, or result in, a failure by the municipality to comply with its executive obligations in terms of legislation or the Constitution. There must thus be a causal link between the problem and the executive obligation which has not been complied with.’

<sup>110</sup> Art 225(3).



approves it by resolution passed by both houses. In terms of this provision, the Cabinet Secretary has two options: to either approach Parliament for its approval of the decision first before implementing it, or to implement it immediately and subsequently seek Parliament's approval. If immediate enforcement is opted for, the same may not continue beyond 30 days and the decision must lapse retrospectively, if it does not get the necessary parliamentary approval.

Each house of Parliament must make its own resolution approving or rejecting the stoppage. This is a matter concerning counties in which the Senate must vote by the delegation 47 votes. The resolution should be processed as an ordinary Bill concerning counties in which either house can veto the other by a simple majority vote.

#### ***5.2.4 The amount of money subject to and period of stoppage***

Stoppage can only be imposed on not more than fifty per cent of the funds due to a county government.<sup>111</sup> As already mentioned, any funds due to the county government, including equitable shares, conditional and unconditional grants can be a subject of stoppage of transfer. The use of the term 'funds', read in the context of Article 202, which provides for different types of funds due to county government, should be given a plural connotation referring to these different types of funds. Where a county government's use of the equitable share is in compliance with the prescribed requirements, and only the use of a conditional grant is non-compliant, there would be no justification for stoppage of transfer of the equitable share. Stoppage is a corrective intervention which must focus only on problem areas and funds requiring correction. Accordingly, the fifty per cent refers to the specific fund the Cabinet Secretary has decided to stop. If the stoppage is of the transfer of the equitable share, then only fifty per cent of that share can be stopped. If, on the other hand, the stoppage targets a conditional grant, then only fifty per cent of such grant can be stopped.

A further safeguard is that stoppage of transfer is a temporary measure that lasts for only 60 days at a time. If Parliament approves the decision to stop the transfer of funds to a county government, the stoppage cannot last for more than 60 days.<sup>112</sup> In addition, Parliament is granted power to renew and extend the decision to stop transfer of funds. Nonetheless, this

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<sup>111</sup> Art 225(4).

<sup>112</sup> Art 225(5)(a).

power is equally limited to renewal for no more than 60 days,<sup>113</sup> which is meant to put pressure on the county government to remedy the situation so that it can return to normal operations.

### **5.3 Efficacy of stoppage of transfer of funds**

The efficacy of stoppage of transfer of funds as a supervisory mechanism for national government is limited. First, stoppage of transfer of funds is an indirect supervisory mechanism in the sense that other than stoppage of transfer of funds, the national government takes no other corrective measures, leaving the county to correct its conduct. It acts as a threat which forces a county government to ensure fiscal discipline by taking steps and acting in a manner that avoids the imposition of stoppage of transfer of funds. Secondly, this is not a good corrective and restorative mechanism since it may make it impossible for the county government to perform its functions. For example, if the problem leading to the intervention is that the county government has been unable to perform its functions by reason of being unable to meet its financial obligations by failing to pay those owed money, stoppage of transfer of funds to the county government only worsens the situation. A county government without funds would be unable to perform its functions and pay for services, resulting in the suffering of innocent citizens who rely on such services. Thirdly, the process of imposition and the safeguards against abuse of the power of stoppage of transfer of funds already discussed make this intervention difficult to work. The stoppage can only be imposed for 60 days and extended for not more than 60 days at a time. The process of imposition requires approval by both Houses of Parliament after receiving a report from the Controller of Budget and hearing the county government concerned. By the time the Controller of Budget completes investigations and files a report, and each of the two Houses hears the county government and makes its resolution, the 60 days would have lapsed. Because of all these factors, South Africa from whose system Kenya borrowed these provisions, rarely uses stoppage of transfer of funds since it has been found to be ineffective.

## **6 Conclusion**

In this chapter a purposive interpretation has been very useful in a number of respects. First, it reveals that even without the use of the term ‘supervision’, the Constitution by implication envisages the supervision of county governments by national government through various

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<sup>113</sup> Art 225(6).

methods. Supervision through regulation is envisaged but must be discharged on the basis of clear constitutional provisions which empower Parliament to legislate on certain matters that affect county governments. Monitoring is also envisaged to serve clear objectives such as support and intervention. Secondly, the Constitution expressly provides for three types of intervention – general or ordinary intervention in terms of Article 190, intervention by way of suspension of county governments in terms of Article 192, and intervention by way of stoppage of transfer of funds in terms of Article 225. The powers in these cases are expressly and sufficiently circumscribed and constrained to avoid abuse and not to detract from the principle of distinct and autonomous county governments. In each case specific jurisdictional facts which must be proved have been set out. It has been argued that a narrow and restrictive interpretation of these powers is what will give full effect to the central role of devolution and its objectives.

South African comparative jurisprudence and scholarship have been beneficial. The text of the Kenyan and South African provisions on intervention and stoppage of transfer of funds have striking similarities. Thus, the strict and narrow interpretation approach used by South African courts has been instructive. Moreover, even without provision for suspension of lower level governments in South Africa, interpretation of the Kenyan suspension provisions has drawn lessons from the South African interpretation of provisions on the dissolution of municipal councils.

## CHAPTER NINE

### Cooperative government and intergovernmental relations

#### 1 Introduction

The Constitution has established a cooperative system of devolved government which necessitates a system of intergovernmental relations and resolution of disputes among and within the different levels of government. This chapter interprets the constitutional provisions dealing with cooperative government, intergovernmental relations, and dispute and conflict resolution.

#### 2 Cooperative government

Article 6(2) of the Constitution provides that '[t]he governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation'. This provision forms the foundation of Kenya's cooperative form of devolved government which combines a certain measure of autonomy on the part of each of the two levels of government, with a measure of joint and collaborative action and decision-making by the two levels of government. This provision indicates that Kenya, like South Africa, has made a deliberate choice to adopt a system of cooperative as opposed to competitive devolved government.

Where there is a measure of concurrent competences a system of cooperative government becomes essential.<sup>1</sup> In *re Certification of the Constitution of the Republic of South Africa, 1996*, the South African Constitutional Court commented on a similar choice by South Africa thus:

The Constitutional system chosen by the [Constitutional Assembly] is one of cooperative government in which powers in a number of important functional areas are allocated concurrently to the national and provincial levels of government. This choice, instead of one of "competitive federalism" which some political parties may have favoured, was a choice

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<sup>1</sup> Currie I and De Waal J *The New Constitutional and Administrative Law Volume 1 Constitutional Law* (2001) 119.

which the [Constitutional Assembly] was entitled to make in terms of the [Constitutional Principles].<sup>2</sup>

Cooperative government could, if well managed and operated, avoid disputes arising. Disputes among governments or organs of state have the potential of interrupting the smooth functioning of the political and government system, thus making a system that can avoid them a worthy venture.<sup>3</sup> For fuller understanding of cooperative government, intergovernmental relations and dispute resolution, four important terminologies in this provision call for interpretation: ‘distinct’, ‘interdependent’, ‘consultation’ and ‘cooperation’.

## 2.1 Distinct governments

‘Distinct’ or distinctiveness refers to the autonomy of the levels of government. It connotes, first, a certain measure of autonomy for each of the orders of government as entities and in powers and functions.<sup>4</sup> Article 1 of the Constitution which states that the sovereign power of the people is shared among the two levels of government<sup>5</sup> demonstrates the significance of this autonomy. The 47 counties are creatures not of national government but of the Constitution as the expression of the sovereign will of the people.<sup>6</sup> Each level elects its own political structures and institutions which it controls. In this sense each level of government is distinct from the other. Understood against the historical background of local government that was completely subservient to the central government, the Constitution has made a paradigmatic shift by adopting orders of government that are distinct.<sup>7</sup>

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<sup>2</sup> 1996 (10) BCLR 1253 (CC) (*First Certification* judgment) para 287.

<sup>3</sup> See *Minister of Police and others v Premier of the Western Cape and others* 2013 (12) BCLR 1365 (CC) para 19.

<sup>4</sup> Steytler N & De Visser J *Local Government of South African* (2011) chap 16, 3.

<sup>5</sup> Article 1(3) and (4).

<sup>6</sup> See Chap 5 section 2.

<sup>7</sup> The South African Constitution uses the terms spheres of government that are distinctive, interrelated and interdependent, which the courts and scholars have already given legal meaning to. In *Premier of Western Cape v President of the Republic of South Africa* 1999 (4) BCLR 382 (CC) para 50, the Constitutional Court observed that ‘[d]istinctiveness lies in the provision made for elected governments at national, provincial and local levels’. See also Levy N & Tapscott C ‘Intergovernmental relations in South Africa: The challenges of cooperative government’ in Levy N & Tapscott C (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 11 where they observe that the spheres of government are ‘distinctive from the perspective of their legislative and executive autonomy’.

Secondly, distinctness as autonomy connotes exclusion of hierarchy in the relations between the governments.<sup>8</sup> This is an extension of the autonomy concept which ensures that in the areas where county governments are final decision-makers they are not treated as mere agents but equal partners of the national government, to which they are not subordinate.<sup>9</sup> When explaining the status of local government in South Africa as a distinct sphere of government, Steytler and De Visser associate this terminology with autonomy and elevate local government to the status of ‘equal partners’.<sup>10</sup>

This meaning of distinctness applies to county governments which are described as a distinct level of government, and which are not the equivalent, of the former local government. However, as in the South African case, the autonomy of the county governments is relative as the national government is granted limited powers of supervision and intervention in county affairs.<sup>11</sup> Steytler and De Visser describe this relative autonomy as a relationship that

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<sup>8</sup> Steytler & De Visser ‘Local government’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 22, 15 where they observe that ‘[t]he result was that “[t]he Constitution has moved away from a hierarchical division of government power in favour of a new vision, in which local government is interdependent, and (subject to permissible constitutional constraints) inviolable and has latitude to define and express its unique character.”’

<sup>9</sup> In the South African case of *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Authority Metropolitan Council and others* 1998 (12) BCLR 1458 (*Fedsure*) para 126, which was decided in the context of the Interim Constitution, Kriegler J made it very clear that ‘for the first time in our history, provision was made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions.’ At para 38 the Court described this new status of local government in a historical context thus: ‘The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.’

<sup>10</sup> Steytler & De Visser in Woolman et al (2011) ch 22, 126-7. See also Steytler & De Visser *Local Government Law of South Africa* (2011) chap 16, 3. See also Woolman S & Roux T ‘Co-operative Government & Intergovernmental Relations’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) chap 14, 7 where they recognise the notion of autonomy and exclusion of hierarchy. See also Stauffer T & Topperwien N ‘Balancing self-rule and shared rule’ in Fleiner LRB &Feiner T (eds) *Federalism and Multiethnic States: The Case of Switzerland*, 2 ed (2000) 52.

<sup>11</sup> See Chap 8.

‘simultaneously exhibits elements of autonomy and hierarchy’.<sup>12</sup> However, since the supervision and intervention powers are constitutionally circumscribed and constrained, they do not subordinate the county government to national government and must be exercised within the framework of cooperative government. This interpretation is consistent with the drafting history of the Constitution.<sup>13</sup>

In sum therefore, the two levels of government are distinct and have autonomy from each other in the sense that there is no subordination of one order of government to the other as they are coordinate to each other.

## 2.2 Interdependent governments

The two levels of government are also interdependent, which connotes dependency, interconnectivity and the need to work in concert in the discharge of the constitutional mandate of governance. Though each has been assigned its own functions, the governments are dependent on each other and none can operate in isolation. As the Supreme Court in *the Matter of the Interim Independent Electoral Commission* observed, ‘[t]here is, therefore, in reality, a close connectivity between the functioning of national and county government’.<sup>14</sup> Rawal DCJ has in *Speaker of the Senate and another v attorney General and others* asserted ‘that the *core value of devolution* is hinged upon the twin principles of *co-operation and interdependence*. The beads in a chain may have different appearances; however, when joined by a thread, they all become part of one ring; one cannot stand without the other.’<sup>15</sup>

The governments are interdependent because of the assignment of functions. First, the assignment under Article 186 recognises the concept of both exclusive and concurrent functions. Secondly, other functions are assigned on the basis of the national government formulating policy and setting standards while the county governments implement the policies and standards.<sup>16</sup> Thirdly, because of the economies of scale, shared services, and the spillover effect of both services and taxes, the counties may be interdependent among themselves. For this reason, the Supreme Court noted that ‘it is clear to us that an *interdependence* of national and county governments is provided for’ because of the

<sup>12</sup> Steytler & De Visser (2011) chap 22, 126-7.

<sup>13</sup> See Committee of Experts on Constitutional Review (2010) 125. See Also Chap 3.

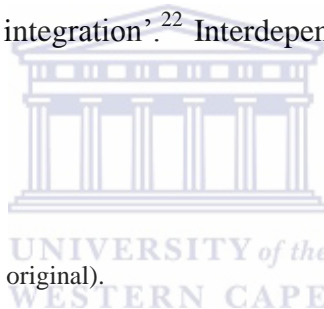
<sup>14</sup> [2011] eKLR para 40.

<sup>15</sup> [2013] eKLR (*Speaker of the Senate*) para 228.

<sup>16</sup> See the Fourth Schedule generally.

concurrence of functions and operations, ‘as is clear from the terms of the Fourth Schedule which makes a *distribution of functions between the national and county governments*’.<sup>17</sup> Once again the notion of interdependence draws from the South African system where the courts have given similar meaning to the terminology.<sup>18</sup>

Cooperative government obligations result in certain restraints and limitations upon the exercise of the distinct powers of the levels of government.<sup>19</sup> In *International Legal Consultancy Group v The Senate and Another*, the High Court of Kenya observed that when the Senate exercises its oversight powers over county finances ‘in reference to members of County Government, there must be a measure of restraint by the Senate’.<sup>20</sup> The national and county governments must have a common loyalty to the country, its people and the Constitution and must all seek to secure the welfare of the Kenyan people.<sup>21</sup> The Task Force on Devolved Government reported that ‘[t]he thrust of this principle is that governments must function as a cohesive whole in order to achieve the desired outcomes including the effective delivery of services and national integration’.<sup>22</sup> Interdependence is indeed the foundation of cooperative government.



<sup>17</sup> [2011] eKLR para 39 (emphasis in the original).

<sup>18</sup> In *Independent Electoral Commission v Langeberg* (2001) 9 BCLR 883 (*Langeberg*) paras 39-40, Yacoob J of the Constitutional Court stated that: ‘All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other’s toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 are designed in an effort to achieve this.’ See also *Government of the Republic of South Africa and others v Irene Grootboom and others* 2000(1) BCLR 1360 (CC) paras 39-40 where Yacoob J observed that: ‘[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other. But the national sphere of government must ensure responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State’s s 26 obligations’. See also Steytler & De Visser (2011) chap 16, 3.

<sup>19</sup> Steytler & De Visser (2011) ch 16, 3.

<sup>20</sup> [2014] eKLR para 67. With regard to South Africa, Woolman and Roux (2011) chap 14, 9 emphasise this noting that ‘[w]hile the different spheres of government have distinct responsibilities, they must work together in order for the South African government as a whole to fulfil its constitutional mandate’.

<sup>21</sup> Steytler & De Visser (2011) ch 16 p 3.

<sup>22</sup> Task Force on Devolved Government (2011) 154.



### 3 Cooperative intergovernmental relationships

As a consequence of the distinctness and the interdependence of the two orders of government, the Kenyan Constitution provides a normative framework for the conduct of intergovernmental relations. Article 6(2) prescribes that the two levels of government ‘shall conduct their mutual relations on the basis of consultation and cooperation’. Article 189 then lays down detailed rules of operation to govern and give effect to the cooperative government and cooperative intergovernmental relations. Intergovernmental relations are defined as the processes of interactions between different governments and between organs of state from different governments in the course of the discharge of their functions.<sup>23</sup>

#### 3.1 Goals of cooperative government

Cooperative government seeks to achieve four important goals. First, it seeks to ensure a well-coordinated and cohesive system of government, which provides services to the people as a whole.<sup>24</sup> Effective and cost effective service delivery at the local level that is well coordinated with national priorities is therefore at the core of cooperative government and intergovernmental relations envisaged by the Constitution.<sup>25</sup> Secondly, it seeks to avoid competition among the governments and their working at ‘cross-purposes or in a mutually destructive way’.<sup>26</sup> The Task Force on Devolved Government reports that ‘[a] cohesive multi-sectoral perspective should be adopted with a view to avoiding wasteful competition, ineffective use of human resources and costly duplication’.<sup>27</sup> Thirdly, the system aims to avoid duplication of roles as this is wasteful. In *International Legal Consultancy Group*, the Court recommended the enactment of statutory provisions ‘to guide the Senate and County Assemblies on how they should co-operate in the oversight of national revenue allocated to the county,’ in order ‘to avoid duplication of roles and consequent inefficiencies’.<sup>28</sup> Fourthly,

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<sup>23</sup> Task Force on Devolved Government (2011) 157. See also *Langeberg Municipality* para 20 where the South African Constitutional Court defined intergovernmental relations thus: ‘[t]he concept of intergovernmental relations here is inescapably a reference to relations between spheres of government and organs of state within those spheres’. With reference to South Africa Steytler and De Visser (2011) ch 16, 4 recognise that the interactions may be both the hierarchical supervisory relations and the more equal cooperative relations.

<sup>24</sup> Woolman & Roux (2011) ch 14, 14.

<sup>25</sup> Task Force on Devolved Government (2011) 157.

<sup>26</sup> Steytler & De Visser (2011) ch 16, 7.

<sup>27</sup> Task Force on Devolved Government (2011) 157.

<sup>28</sup> *International Legal Consultancy Group* para 63.

the system seeks ‘to promote harmonious co-existence’<sup>29</sup> among the governments and their institutions. It is designed to facilitate political compromises and solutions to conflict and problems between the two levels of government, avoiding conflict and adversarial relationships.<sup>30</sup> The Court in *International Legal Consultancy Group* observed that ‘pertinent political questions between the two levels of government should be resolved in a manner that does not result in acrimony and hostility’.<sup>31</sup>

In areas of concurrent law-making, cooperation is desirable in order to avoid conflicting legislative provisions, and thus reduce conflict of laws requiring the application of Article 191. Furthermore, it is necessary in order to determine which national laws or parts of them should be implemented by county governments, and to ensure that adequate provision is made in the budgets of the different governments for the implementation of these laws.

### 3.2 Cooperative government obligations

As set out by Articles 6(2) and 189, the concept of cooperative government imposes certain obligations upon the two levels of government.<sup>32</sup> These are the obligation (a) to respect the constitutional status of the institutions of the other level of government, (b) to respect the functional and institutional integrity of the other level, (c) to consult, (d) to cooperate, (e) to support and assist, and (f) to avoid judicial settlement of disputes.

These principles of cooperative government are not themselves easily and always dispositive of a matter in court. However, they serve as policy directives and interpretive tools that can be used to give effect to other provisions of the Constitution. They can, however, be dispositive when raised as preliminary issues regarding whether or not the matter is ripe for determination by the courts.<sup>33</sup> Their open-ended nature and flexibility avail courts a

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<sup>29</sup> *International Legal Consultancy Group* para 68.

<sup>30</sup> Woolman & Roux (2011) ch 14, 8.

<sup>31</sup> *International Legal Consultancy Group* para 70.

<sup>32</sup> See Woolman & Roux (2011) 8 footnote 2 where they refer to *Ex parte President of the Republic of South Africa in re Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) para 40 where the Court said that Chapter 3 ‘introduces a new philosophy to the Constitution, namely that of co-operative government and its attendant obligations. In terms of that philosophy, all spheres of government are obliged in terms of [FC] s 40(2) to observe and adhere to the principles of co-operative government set out in chap 3 of the Constitution.’ Also see Currie & De Waal (2001) 123.

<sup>33</sup> See Woolman & Roux (2011) chap 14, 9.

significant amount of latitude in deciding whether an intrinsically political matter is sufficiently ripe for judicial intervention.<sup>34</sup> Thus, each of these obligations is examined to establish the extent to which it is justiciable and dispositive of a matter.

### **3.2.1 Respect for functional and institutional integrity**

Article 189(1)(a) requires the governments to perform their functions and exercise powers in a manner that respects the functional and institutional integrity of each other, and the constitutional status and institutions of each other.

#### **3.2.1.1 The governments and their institutions**

Respect for the integrity and constitutional status of the government and institutions of each level of government emphasises the relative autonomy and distinctive nature of each level of government. The institutions of the county government include the county governor, the county executive, and the county assembly which must be treated with respect. Thus, although national government has limited supervision and intervention powers, it cannot exercise them in a manner that disrespects and undermines the integrity and constitutional status of the county governments and their institutions. It is argued that it was in pursuit of respect for the institutions of the other level of government that the Court in *International Legal Consultancy Group* urged for restraint whenever the Senate issues summons against members of the county government in exercise of its oversight powers.<sup>35</sup> Though national government has powers to legislate for the Republic, it cannot do so in a manner that denigrates and demeans the integrity and constitutional status of the county governments and their institutions. This is to guide the manner in which the governments conduct themselves towards each other. Respect and disrespect to the other government or its institutions may be exhibited by mere attitude which may hinder cooperation or consultation. It could also be exhibited through the exercise of powers and functions. For example, the national government in exercise of its legislative powers may pass legislation meant to demean and disrespect the county governments and their institutions. The Order of Precedence Act of 2014 is a debatable case in point. The Act provides for an order of precedence, which it defines as ‘a list of officers arranged in their order of seniority or hierarchy in the Republic of

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<sup>34</sup> See Woolman & Roux (2011) ch 14, 9.

<sup>35</sup> *International legal consultancy group* para 67.

Kenya',<sup>36</sup> and in which the county governor is ranked among largely national government public officers.<sup>37</sup> It also determines who can use a flag on their motor vehicle<sup>38</sup> and who may be addressed by which title.<sup>39</sup> These matters appear mundane and may very well require regulation, but by introducing hierarchy in this manner, may affect the relative autonomy of county governments, at least in their areas of final decision-making. The Act clarifies that it does not in any way or form 'affect the status of the arms or branches of government under the Constitution',<sup>40</sup> but is silent on whether or not it affects the status of county governments and their institutions. However, the memorandum and objects and reasons of the Act emphasise that the Act is 'aimed at providing a yardstick for providing the proper position of all officers, their seniority and hierarchy for the purpose of state functions'.

### **3.2.1.2 The functions and powers of the governments**

The obligation to respect the integrity of the functions and powers of each level embodies a number of basic principles. First, one level of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another level or organ of state.<sup>41</sup> This obligation concerns itself with the manner in which power is exercised, not whether or not a power exists.<sup>42</sup> This limits the manner in which each of the levels of government performs its constitutionally assigned distinctive functions and exercises its powers. This is done by focusing on and restricting the manner in which the powers are exercised.<sup>43</sup> As Steytler and De Visser have noted with respect to South Africa, 'co-operative government thus serves as a constraining principle on all the three spheres of government when they exercise their distinctive powers and functions'.<sup>44</sup> The principle proceeds on the basis that the government is operating within its constitutional functional areas and powers, but doing so in a manner that is unacceptable as it undermines the effective functioning of the

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<sup>36</sup> S 2 Order of Precedence Act, 2014 (OPA).

<sup>37</sup> S 4(1) OPA.

<sup>38</sup> S 5(1) OPA.

<sup>39</sup> S 6(1) OPA.

<sup>40</sup> S 4(3) OPA.

<sup>41</sup> See Woolman & Roux (2011) ch 14, 8.

<sup>42</sup> *Premier of the Western Cape* para 57.

<sup>43</sup> Currie & De Waal (2001) 123.

<sup>44</sup> Steytler & De Visser (2011) chap 22, 127 while discussing the position of South African spheres of government.

other. From this perspective, the Court in *International Legal Consultancy Group* commented about the exercise of the Senate's oversight powers thus: 'The Senate should endeavour to improve accountability at the county level and not cripple the County Governments.'<sup>45</sup> This principle becomes relevant once it is established that the government has acted in its areas of competence. Only then does the question as to whether the government is performing its functions and exercising its powers in a 'manner that respects the functional and institutional integrity of government at the other level' arise.<sup>46</sup> If the government has acted outside its area of competence, the dispute must be dealt with on the basis that the government acted both unlawfully and unconstitutionally.<sup>47</sup> The purpose of this obligation is to prevent one level of government from using its powers in a manner that undermines the other level of government, and prevents it from functioning effectively.<sup>48</sup>

Secondly, this is a no-encroachment obligation requiring the governments not to encroach on the domain of the other.<sup>49</sup> This obligation recognises the significance of the fundamental principle of allocation of powers to national and county governments, and the need to protect the powers.<sup>50</sup> The Constitution imposes limits on the powers and functions of each level of government which must be observed.<sup>51</sup> It underpins the division and protection of powers between the Kenyan national and county governments and their performance and exercise which may ultimately spill over and encroach upon the functions and powers of the other government. It thus seeks to confine the levels of government within their enumerated functional areas and powers and guards against abuse of power. Thus, one level of government must not assume any power or function of the other.<sup>52</sup> National government, for

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<sup>45</sup> *International legal consultancy group (judgment)* para 68.

<sup>46</sup> See Woolman & Roux (2011) ch 14, 16.

<sup>47</sup> See Woolman & Roux (2011) ch 14, 16.

<sup>48</sup> *Premier of the Western Cape* para 58.

<sup>49</sup> In the *First Certification* judgment para 289 the South African Constitutional Court made it clear that '[t]hese principles, which are appropriate to cooperative government, include an express provision that all spheres of government must exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of the government in another sphere'.

<sup>50</sup> See *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and another* 1999 (12) BCLR 1360 paras 79 and 80 (*Executive Council of the Province of the Western Cape*).

<sup>51</sup> See *Executive Council of the Province of the Western Cape* paras 80 and 81.

<sup>52</sup> See *Liquor Bill case* para 41.

instance, cannot through the exercise of its legislative powers take over the functions of county governments.<sup>53</sup> For example, the County Government (Amendment) Act No 13 of 2014, which establishes County Development Boards chaired by the respective county Senators,<sup>54</sup> confers on the Boards powers that are unconstitutional as they encroach on those of the county governments. Although the Boards are disguised as intergovernmental relations forums, their powers go beyond cooperative consultation.<sup>55</sup> The Boards encroach on the county government development functions and powers as they must ‘consider and give input on any county development plans before they are tabled in the county assembly for consideration’.<sup>56</sup> They also encroach on the county budgetary powers and functions since the Boards must ‘consider and give input on county annual budgets before they are tabled in the county assembly for consideration’.<sup>57</sup> They must also consider and advise on any issues of concern that may arise within the county’.<sup>58</sup> By requiring the operational expenses of the Boards to be provided for in the annual estimates of the respective county governments, the Act creates unfunded mandates for county governments.<sup>59</sup> This Act encroaches on not only the powers of the county executive to develop development plans and annual budgets, but also the county assemblies’ powers to approve and legislate the proposed plans and budgets into county laws. To subject the two county government arms to the approval of these Boards is a very serious intrusion into the relative county autonomy. This exercise of power also interferes with the county governments’ effective performance of its functions and exercise of its powers. The legislation undermines the democratic accountability mechanisms. The people elect county governors and their governments with mandate to make development decisions without interference, for which they may hold them accountable at the next elections at the end of the five-year term. They can also recall them mid-stream.

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<sup>53</sup> See *Premier of the Western Cape* para 60 where the South African Constitutional Court stated that ‘[t]his power given to the national legislature is one which needs to be exercised carefully in the context of section 41(1)(g) to ensure that in exercising its powers, the national legislature does not encroach on the ability of the provinces to carry out the functions entrusted to them by the Constitution’.

<sup>54</sup> S 91A(1)(a) of CGAA.

<sup>55</sup> S 91A(2)(a) CGAA.

<sup>56</sup> S 91A(2)(b) CGAA.

<sup>57</sup> S 91A(2)(c) CGAA.

<sup>58</sup> S 91A(2)(d) CGAA.

<sup>59</sup> S 91B(2)(b) CGAA.

Thirdly, the actual integrity of each sphere of government and organ of state must be understood in light of the powers and purpose of that entity.<sup>60</sup> In determining whether or not a government has breached this obligation, the overall functional distribution, the purposes meant to be achieved by such distribution, and the relations among the two levels of government must be examined. This will involve looking at the functions and powers of the levels of government, not in isolation but in relation to each other and the overall objectives of devolution.

### **3.2.2 The obligation to consult**

Cooperative government entails intergovernmental dialogue which requires that the governments liaise and work with each other when conceiving, developing and implementing policies and legislation. As noted, Article 6(2) requires the mutual relations of the governments to be based on ‘consultation and co-operation’. Article 189(1)(b) also requires the governments to consult. In financial matters, Article 220(2)(c) requires national legislation to provide for the form and manner of consultation between national and county governments when preparing the plans and budgets.

#### **3.2.2.1 The meaning of consultation**

Consultation entails the duty to make conscious and deliberate efforts to seek out the views of the other party, and to consider them before arriving at a decision. It ensures that the exercise of the autonomous and distinct powers is informed not merely by the narrow interests of the government exercising its powers, but also the wider interests of the other level of government and all other concerned persons.<sup>61</sup> It serves as a means for improving decision-making for the benefit of all concerned.<sup>62</sup> In *The Commission for the Implementation of the Constitution v Attorney General and another*,<sup>63</sup> the High Court adopted the legal definition the South African courts have given to the term consultation:

It seems that ‘consultation’ in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party ... in a situation of conferring with each other where

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<sup>60</sup> Woolman & Roux (2011) ch 14, 8.

<sup>61</sup> Steytler & De Visser (2011) ch 16, 13.

<sup>62</sup> Steytler & De Visser (2011) ch 16, 13.

<sup>63</sup> [2013] eKLR para 39.

minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word consultation in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.<sup>64</sup>

In light of this broad definition, consultation in the context of the Kenyan cooperative government must be understood as encompassing three key elements.

### **3.2.2.1.1 Invitation to present views**

There must be an invitation to the other government to present its views on a matter under consideration.<sup>65</sup> In *Robertson and Another v City of Cape Town*, the South African High Court defined consultation thus: '[t]he essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice'.<sup>66</sup> The invitation could be passive, extended to the public in general with a closing date within which the consulted party may choose whether to respond or not. But it can also be more active by purposely soliciting the views of specific parties. This entails an active effort to obtain the views of those supposed to be consulted.<sup>67</sup>

### **3.1.2.1.2 Afford reasonable opportunity to present views**

The second element is that the consulted government must be afforded a reasonable and adequate opportunity to present its considered views.<sup>68</sup> The South African High Court in *Hayes and Another v Minister for Housing, Planning and Administration, Western Cape and other* explained that 'as long as the lines of communication are open and the *parties are afforded a reasonable opportunity to put their cases or points of view to one another*, the

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<sup>64</sup> *Maqoma v Sebe and Another* 1987 (1) SA 483 (Ck) 491E.

<sup>65</sup> See Steytler & De Visser (2011) ch 16, 13.

<sup>66</sup> 2004 (9) 950 (C) (*Robertson HC*) para 108. See also the South African Intergovernmental Relations Framework Act No 13 of 2005 which at section 1(1) defines consultation as 'a process whereby the views of another on a specific matter are solicited, either orally or in writing, and considered.'

<sup>67</sup> Steytler & De Visser (2011) ch 22, 135.

<sup>68</sup> Steytler & De Visser (2011) ch 16, 13.



form of such consultation will usually not be of great import'.<sup>69</sup> For example, an invitation to present views the following day on a matter that requires time for consideration or to an institution that requires time to consult its members will not afford the invited party a reasonable and adequate opportunity to present its considered views. Some matters may even require research before forming an informed opinion. An invitation to the county governments to give a collective opinion on a matter must thus be allowed adequate time to enable them to come together for discussion before forming the collective opinion.

In the South African case of *Robertson and Another v City of Cape Town; Truman-Baker v City of Cape of Town* the court emphasised that consultation was a 'bi-lateral process' requiring active engagement with the party whose views or advice is sought. In this case the Court held that both the Minister for local government and Parliament had failed to invite the Fiscal and Financial Commission for consultation.<sup>70</sup> In their assessment, Steytler and De Visser regard the decision in this case as supporting the proposition that when there is a duty to consult with a particular body, there must be conscious effort to invite and consult that party. While the decision of the consulting government cannot unreasonably be delayed by dilatory conduct of the consulted government, active consultation is more than a mere invitation to submit views.<sup>71</sup>

### **3.2.2.1.3 The views must be considered in good faith**

Consultation implies an obligation to consider the views of the other government in good faith before making the decision.<sup>72</sup> Consultation is not an end in itself. It is meant to ensure that better decisions are arrived at after considering the views of both governments. The other government must thus not be consulted as a mere formality, but with commitment to consider and take into account the views shared, if they add value that improves the decision being made. This can be secured through the requirement that the consulting government gives reasons why the views of the consulted party were not accepted. For example, Article 218(2)(c) requires that the Division of Revenue Bill and the Allocation of Revenue Bill must be introduced in Parliament together with a summary of any significant deviation from the recommendations of the CRA, and an explanation for each of such deviations.

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<sup>69</sup> 1999 (4) SA 1229, 1242J-1243A (C) (emphasis added).

<sup>70</sup> *Robertson HC* para 109.

<sup>71</sup> Steytler & De Visser (2011) ch 16, 14.

<sup>72</sup> Steytler & De Visser (2011) ch 22, 134.

### **3.1.2.2 The consequences of failure to consult**

One major consequence of failure to consult may be the invalidation of the decision taken even if it is legislation on grounds that the process for decision-making was tainted with unconstitutionality. The principle of constitutional supremacy requires compliance with both the substantive and procedural prescriptions of the Constitution. Thus, where it is proved that the Constitution requires consultation before a decision is made, the absence of such consultation must lead to the invalidation of the resulting decision.<sup>73</sup>

### **3.1.3 The obligation to cooperate**

The third obligation of the governments is to cooperate with each other which emanates from the provisions of Article 6(2) requiring that the governments ‘shall conduct their mutual relations on the basis of consultation and co-operation’. This is elaborated by Article 189(2) which prescribes that ‘[g]overnment at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and authorities’. The essence of cooperation is the need to work together and, as already mentioned, this need is necessitated by among other things, concurrency in the functional assignment to the two levels of government. As used together with the term ‘mutual’, cooperation contemplates more friendly and collegial relations as opposed to ‘conflictual or antagonistic’ adversarial relations.<sup>74</sup>

The South African Constitutional Court recognised the need to cooperate in the context of the Interim Constitution even before the Final Constitution had made express provision for co-operative government. In *Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995*, the Court said the following about a National Education Policy Bill that called for the executive cooperation between the provinces and the national government: ‘Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through co-operation.’<sup>75</sup> And in the *First Certification*

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<sup>73</sup> Steytler & De Visser ((2011) ch 16, 16) they observe that ‘[m]aking consultation mandatory means that it is a validity requirement for the legislation’. See also *Robertson HC* para 93. Amendments to the Structures Amendment Act of 2002 were invalidated for having been enacted without consultation with the Financial and Fiscal Commission. The decision was later set aside by the Constitutional Court but for different reasons.

<sup>74</sup> See Steytler & De Visser (2011) ch 16, 8.

<sup>75</sup> 1996 (4) BCLR 518 para 34.

judgment, the Court held that '[i]ntergovernmental co-operation is implicit in any system where powers have been allocated concurrently to different levels of government and is consistent with the requirement of [the Constitutional Principle] XX that national unity be recognised and promoted. The mere fact that [the New Text] has made explicit what would otherwise have been implicit cannot in itself be said to constitute a failure to promote or recognize the need for legitimate provincial autonomy.'<sup>76</sup> This obligation is, however, very difficult to enforce since the governments cannot be compelled by a court order to work together.

### ***3.1.4 The obligation to assist and support***

The fourth obligation is to assist and support each other. Article 189(1)(b) and (c) require the national and county governments to assist and support each other, and where appropriate implement the legislation of each other. As was mentioned in Chapter Eight, a distinction must be drawn between support in the context of cooperative government, and support in the context of supervision and intervention.<sup>77</sup> While supervision and intervention support is hierarchical flowing from national government to county government, cooperative support is not hierarchical. It can flow from any government to another both vertically and horizontally. This provision may be constitutional anchorage for a claim for support from one county to a neighbouring county, and even from a county to the national government.<sup>78</sup> Cooperative assistance and support must be done within the context of mutual respect for the functional and institutional integrity of each other and therefore requires the cooperation and consent of the governments involved. The active participation of both governments is required, with the recipient having the discretion whether or not to accept the assistance or support. This serves to enhance the objective of devolution of enabling communities to manage their own affairs.

## **3.2 Application of cooperative government and intergovernmental relations**

The application of cooperative government and intergovernmental relations has three major dimensions: the vertical, horizontal and fiscal.

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<sup>76</sup> *First Certification judgment* para 290.

<sup>77</sup> Art 190(1).

<sup>78</sup> Steytler & De Visser (2011) ch 22, 133.

### **3.2.1 Vertical intergovernmental relations**

Reference to ‘[t]he governments’ at the national and county levels in Article 6(2) and to ‘[g]overnment at either level’ in Article 189(1), means that the principles and obligations of cooperative government and intergovernmental relations apply, first, vertically between national and county governments. This relate to interactions between the national government, on the one hand, and the 47 counties or any one of them, on the other hand. These interactions are done through the branches of these governments, especially the executive arm to enable them to coordinate their policies and programmes, and the organs of state within these governments.

Pursuant to these constitutional provisions, the Intergovernmental Relations Act was enacted to provide some of the institutions through which such relations could be conducted.<sup>79</sup> Section 7 of this Act establishes a National and County Government Co-ordinating Summit whose members are the President, or in his absence, the Deputy President and the governors of the 47 counties. Section 13 provides for the establishment of sectoral working groups and committees which bring together officials of ministries at the national and county levels of government. The Summit is, however, a consultative body and cannot make decisions that bind national and county governments.

### **3.2.2 Horizontal intergovernmental relations**

At the horizontal level, the constitutional provisions envisage cooperation and intergovernmental relations among two or more of the 47 counties.<sup>80</sup> The principles and obligations of cooperative government accordingly also apply to relations between one county and another county or counties. The Constitution even envisages that two or more counties ‘may set up joint committees and joint authorities’ for the purpose of discharging some of their functions that may relate to shared services.<sup>81</sup> It envisages that county governments can form an ‘organisation of county governments’ through which they can be consulted by the Senate when it is determining the five-year formula for sharing revenue among the counties.<sup>82</sup>

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<sup>79</sup> Intergovernmental Relations Act 2 of 2012.

<sup>80</sup> Art 189(1) and (2).

<sup>81</sup> Art 189(2).

<sup>82</sup> Art 217(2)(c).

It is in pursuit of cooperative government that the Intergovernmental Relations Act has provided for the establishment of the Council of County Governors.<sup>83</sup> The Council serves as a forum for consultation among the county governments, sharing information with a view to learning from each other, considering matters of common interest, resolution of disputes between counties, facilitation of capacity building, for monitoring of implementation of inter-county agreements on inter-county projects, and consideration of reports of other intergovernmental forums such as the vertical ones.<sup>84</sup>

Although this Act does not make any express provision for horizontal cooperation and intergovernmental relations between the legislative arms of the county governments, the constitutional provisions do not preclude cooperation between the county assembly speakers of different counties. Neither do they preclude cooperation among the members of the county assemblies of different counties.

### ***3.2.3 Fiscal intergovernmental relations***

In many multilevel systems of government, control over and distribution of financial resources and the amounts allocated to different orders of government are contentious issues. The Kenyan devolution was necessitated by concerns about the extreme disparities<sup>85</sup> arising out of the previous system that was largely centrally controlled and was based more on political patronage rather than objective criteria.<sup>86</sup> As a result, the Constitution adopts a financial system that seeks to subject these matters to intergovernmental processes that create checks and balances and are based on objective criteria. Rawal DCJ in *Speaker of the Senate* captures this spirit of checks and balances and accountability as follows:

It is well to remember that the revenue collected is from and for the people, for whose benefit the three arms of the government have been entrusted with power and authority, under the Constitution. Further, the wisdom of our Constitution is its *categorical rejection of exclusionary claims to powers of*

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<sup>83</sup> S 19, Intergovernmental Relations Act No 2 of 2012 (IRA).

<sup>84</sup> S 20(1) IRA.

<sup>85</sup> *Speaker of the Senate* para 169-96.

<sup>86</sup> Mutakha JK 'Regional Inequalities in Kenya in the context of decentralization and devolution: Dynamics and policy options' in *Report of the National Conference on Equity and Growth: Towards a Policy Agenda for Kenya* (2006) Regal Press Ltd pp 115-42 at p 137. <http://www.sidint.net/docs/inequalities%20Conference%202006.pdf> (accessed 1 November 2013)

*governance: its letter and spirit is suffused with the call for accountability, co-operation responsiveness and openness.*<sup>87</sup>

Mutunga CJ concluded his advisory opinion by also underscoring the spirit of checks and balances and cooperative approaches to the sharing of resources. He asserted that '[b]oth Houses of Parliament represent the same *people*, and the resources at the core of this dispute, are *owned by the people of Kenya*. In the equitable distribution of resources *owned* by the people of Kenya, *the principles of checks and balances, mediation, dialogue, collaboration, consultation, and interdependence are not necessarily conflictual*, granted that they are all invoked in the interests of the people of Kenya'.<sup>88</sup>

Pursuant to the provisions of Article 220(2)(c) requiring national legislation to provide for 'the form and manner of consultation between the national government and county governments in the process of preparing plans and budgets', the Public Finance Management Act<sup>89</sup> has provided for the establishment of an Intergovernmental Budget and Economic Council. The Council comprises the Deputy President, a representative of the Parliamentary Service Commission, a representative of the Judicial Service Commission, the Chairman of the CRA, the Chairperson of the Council of County Governors, every County Executive Committee member for finance, and the Cabinet Secretary responsible for intergovernmental relations.<sup>90</sup> The Council provides a forum for intergovernmental relations and consultation on various matters relating to finances.<sup>91</sup>

#### **4 Intergovernmental disputes and their resolution**

Although cooperative government and consultation were designed as mechanisms of avoiding intergovernmental disputes, the nature of multilevel governance is such that there are occasions when avoidance fails, and disputes over functions, powers and resources arise.<sup>92</sup> In such an event, the Constitution provides for how the disputes must be resolved in an amicable manner before resorting to adversarial litigation. Articles 189(3) and (4) impose

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<sup>87</sup> *Speaker of the Senate* para 229 (emphasis in original).

<sup>88</sup> *Speaker of the Senate* para 197 (emphasis in original).

<sup>89</sup> S 187 PFMA.

<sup>90</sup> S 187(1) PFMA.

<sup>91</sup> S 187(2) PFMA.

<sup>92</sup> Steytler N 'The settlement of intergovernmental disputes' in Levy N & Tapscott C (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 176.

a fifth obligation which relates to settlement of intergovernmental disputes: ‘In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation’. The provisions establish an obligation to avoid adversarial litigation and make every reasonable effort to settle disputes through other means.

#### 4.1 The rationale of the obligation

Three major reasons why governments must avoid adversarial litigation when dealing with intergovernmental disputes are identified. First, a major aim is to encourage a culture of solving society’s problems by building political compromises at the political level. In the *First Certification* judgment, the South African Constitutional Court explained the reason for this requirement in the South African Constitution<sup>93</sup> as being the need to resolve disputes at a political level.<sup>94</sup> This requirement compels governments at the two levels to work out differences and disputes among themselves in the political arena, which affirms the process of cooperative devolved government.<sup>95</sup> A similar sentiment is reflected in Article 6(2) which calls for ‘mutual relations’ based on consultation and cooperation as opposed to adversarial approaches that may strain relations. The High Court in *Okiya Omtatah Okoiti* reasoned ‘that alternative dispute resolution mechanisms should be sought in the first instance so as not to strain the relationship between the national government and the county governments and in the case of counties, among themselves’.<sup>96</sup> This should contribute to much needed national integration and cohesion.

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<sup>93</sup> S 41(1)(g) of the South African Constitution, 1996.

<sup>94</sup> *First Certification* judgment para 291. See also Steytler (2001) 177 where he observes that: ‘Whereas adversarial litigation is rule-based, politics deals with interests and the accommodation of diverse interests – the very purpose of co-operative government. Political settlement through compromise and accommodation, which lies at the heart of non-judicial dispute resolution, reflects the letter and spirit of co-operative government.’ See also Klug H ‘South Africa: From constitutional promise to social transformation’ in Goldsworthy J (ed) *Interpreting Constitutions: A Comparative Study* (2006) 276 where he observes that: ‘Co-operative governance in this sense integrates the different geographic regions and discourages them from seeking early intervention by the courts, instead they are forced into an ongoing interaction designed to produce interregional compromises through political negotiation – as has in practice been the German experience.’

<sup>95</sup> Steytler (2001) 177.

<sup>96</sup> *Okiya Omtatah Okoiti* para 74.

Secondly, the nature of some intergovernmental disputes is such that they are suited for resolution politically through non-judicial mechanisms, since they involve ‘policy choices and administrative judgments’.<sup>97</sup> Disputes relating to the duty to support and assist as well as supervision and intervention powers will be well suited for politically negotiated or mediated settlement.<sup>98</sup> Furthermore, given the open-textured nature of the constitutional provisions on a number of issues, non-judicial mechanisms will easily render more pragmatic solutions to disputes than legal answers will. For example, disputes regarding the performance and exercise of concurrent functions and powers could easily be resolved through political compromises, without having to resort to litigation in terms of Article 191. Likewise, issues relating to funding of additionally assigned and transferred functions will find easier answers in politically negotiated compromises than in judicial intervention. A good example is the provision that national government may require county government to implement within the county such national legislation or parts of it.<sup>99</sup>

Thirdly, while adversarial adjudication often focuses on past acts and facts and finds in favour of one of the parties to the dispute, alternative dispute resolution mechanisms focus on and address the present and future interests of both parties.<sup>100</sup> This addresses how they relate to each other and how their relationships could be structured in the future,<sup>101</sup> a matter that is critical for cooperative intergovernmental relations. Thus, the governments are obliged to respect and arrange their activities in a manner that advances intergovernmental relations and bolsters co-operative governance.<sup>102</sup> In the context of cooperative government, avoiding confrontational adversarial litigation may not only prevent damaging relationships, but may in fact enhance the relationships as the alternative dispute resolution mechanisms serve to educate the parties. The parties come to understand fully and better the interests and concerns of each other.<sup>103</sup>

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<sup>97</sup> Steytler (2001) 177.

<sup>98</sup> Steytler (2001) 178.

<sup>99</sup> Art 183(1) (b).

<sup>100</sup> Steytler (2001) 188.

<sup>101</sup> Steytler (2001) 188.

<sup>102</sup> *Minister of Police and others v Premier of the Western Cape and others* 2013 (12) BCLR 1365 (CC) (*Minister of Police and others*) para 64.

<sup>103</sup> Steytler (2001) 188.



Fourthly, alternative dispute resolution mechanisms are more cost-effective and efficient methods of resolving disputes.<sup>104</sup> Litigation is often very costly and time-consuming as decisions can be delayed for long, subjecting the implementation of policies and decisions to unnecessary delays.<sup>105</sup> This will make it difficult for both national and county governments to move with speed and provide the urgently needed development and services.<sup>106</sup> The public purse from which all derive their funding must therefore be protected from unnecessary expense arising out of litigation in matters that could easily be settled through other less expensive means.<sup>107</sup>

This obligation gives rise to six important issues: (a) What constitutes an intergovernmental dispute?; (b) Who are the parties to an intergovernmental dispute?; (c) What is the nature and extent of the obligation to avoid adversarial litigation?; (d) What is the nature and extent of the obligation to settle disputes by other means?; (e) What are the non-judicial alternative dispute resolution mechanisms?; (f) The role of the courts.

#### ***4.1.1 What constitutes an intergovernmental dispute***

The obligation to avoid adversarial litigation applies only when there is an intergovernmental dispute. Two terms require examination: ‘dispute’ and ‘intergovernmental’. A dispute is defined as a specific disagreement over a matter of fact, law or policy in which one party makes a claim or assertion, while the other party refutes or counter-claims, resulting into a specific impasse over which the parties cannot agree as opposed to a broad and general disagreement about a problem.<sup>108</sup> Since one aspect of the obligation is to avoid litigation in the courts, the dispute must be one that has legal aspects that can be resolved through court processes. This means that differences between levels of government that are merely political with no legal dimension that can be dealt with in the courts are not disputes for the purposes

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<sup>104</sup> See Nelson SC ‘Alternatives to litigation of international disputes’ (1989) 23 (1) *The International Lawyer* 188 discussing the issue in the context of international disputes.

<sup>105</sup> Steytler (2001) 189.

<sup>106</sup> *Minister of Police and others* (para 64) the Court noted that ‘often litigation of that order stands in the way or delays sorely needed services to the populace and other activities of government’. See also *Premier of the Western Cape Province v George Municipality* Unreported decision Cape High Court, case no 8030/2003 cited in Steytler & De Visser (2011) ch 16, 30.

<sup>107</sup> *Minister of Police and others v Premier of the Western Cape and others* para 64.

<sup>108</sup> Steytler & De Visser (2011) ch 16, 32.

of these provisions.<sup>109</sup> ‘Intergovernmental’ refers to the parties to the disputes, that is, between governments.

#### **4.1.2 The parties to an intergovernmental dispute**

Article 189(3) is concerned with ‘in any dispute between governments’ which refers to the two levels of government and any state organs of government and entities within these levels of government; this includes counties and organs within counties.<sup>110</sup> Section 30(2) of the Intergovernmental Disputes Act provides that the Act applies to ‘resolution of disputes arising (a) between the national government and a county government; or (b) amongst county governments’.<sup>111</sup> Not all organs of state should, however, be included. Given that alternative dispute resolution mechanisms are justified because of the need to enter into political compromises and settlement, the parties to an intergovernmental dispute must be entities that have the power and are capable of entering into political compromises. These include the Chapter Fifteen commissions and independent offices, which are excluded because they should not enter into political compromises.<sup>112</sup> The obligation, as per the definition, does not also include disputes that involve private citizens. In *Republic v Transitional Authority and another Ex parte Medical Practitioners, Pharmacists and Dentists Union (KMPDU) and 2 others*,<sup>113</sup> the High Court examined this issue and held that ‘[c]learly, that Part does not expressly apply to disputes by ordinary citizens arising from the exercise of powers by and obligations placed upon the Authority. To interpret the said provisions to include disputes by individuals who are aggrieved by actions or omissions of the authority would be overstretching the said provisions yet there is no ambiguity arising therefrom’.<sup>114</sup> But not every dispute involving the levels of government or organs of state within them qualifies as an intergovernmental dispute.

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<sup>109</sup> Steytler & De Visser (2011) ch 16, 32.

<sup>110</sup> In *Langeberg Municipality* para 20, the South African Constitutional Court defined parties to an intergovernmental dispute as ‘spheres of government and organs of state within those spheres’.

<sup>111</sup> The Intergovernmental Disputes Resolution Act of 2012.

<sup>112</sup> *Langeberg Municipality* para 20 with reference to the Independent electoral Commission.

<sup>113</sup> [2013] eKLR (*Ex parte Medical Practitioners*).

<sup>114</sup> *Ex parte Medical Practitioners* para 68. This was affirmed in *Okiya Omtatah Okoiti and another v Attorney General and 6 others* [2014]eKLR (*Okiya Omtatah Okoiti*).

### **4.1.3 Dispute must involve exercise of state authority**

The purpose of the constitutional provisions on cooperative government and intergovernmental relations is to regulate relations of governments when they perform and exercise their constitutional governance functions and powers. Intergovernmental disputes can only arise when the governments act in the public law domain in exercise of their public power and state governance authority.<sup>115</sup> This excludes relations created by private law from the category of intergovernmental disputes.<sup>116</sup> While the broad authority of governments includes the power to enter into contracts of sale, ‘the enforcement of such [contracts] is the subject of private law and is not subject’ to the principles and obligations of cooperative government and intergovernmental relations.<sup>117</sup>

## **4.2 The obligation to avoid adversarial litigation**

The Constitution imposes an obligation on governments involved in an intergovernmental dispute to avoid adversarial litigation in preference for alternative dispute resolution mechanisms as a first option. They must ‘make every reasonable effort’ to settle the disputes by other means and procedures,<sup>118</sup>

### **4.2.1 The nature of the obligation**

Article 189(3) requires the governments to ‘make every reasonable effort to settle the dispute’ by means other than judicial intervention. These provisions are borrowed from the South African Constitution which requires all the three spheres of government to ‘make every reasonable effort’ to settle disputes by means other than adversarial litigation.<sup>119</sup> However, unlike the Kenyan provision, the South African Constitution goes further than this and prescribes that it ‘must exhaust all other remedies before it approaches a court to resolve the dispute’.<sup>120</sup> This South African text has been interpreted as incorporating only one and not two obligations. The Constitutional Court asserted in *National Gambling Board v Premier of Kwa Zulu Natal and others* that the governments are required to ‘comply with their obligation to try and resolve their disputes amicably’ before approaching any court for adversarial

<sup>115</sup> Steytler (2001) 182, when referring to a similar provisions in the South African Constitution.

<sup>116</sup> Steytler (2001) 181.

<sup>117</sup> Steytler (2001) 182.

<sup>118</sup> Art 189(3).

<sup>119</sup> S 41(3) of the Constitution of the Republic of South Africa.

<sup>120</sup> S 41(3) of the Constitution of the Republic of South Africa.

litigation.<sup>121</sup> In the assessment of the Court, this obligation forms ‘an important aspect of cooperative government’.<sup>122</sup>

Despite this textual difference, ‘every reasonable effort’ in the Kenyan provision should be interpreted to include the need to exhaust other remedies. In the circumstances, the manner in which the South African courts and scholars have interpreted their provisions should provide instructive lessons for Kenya when determining the nature and extent of the obligation created. In *International Legal Consultancy Group*, the Kenyan High Court observed that ‘before resulting to summons, the Senate should have sought consultations or mediation with the respective County Governors with regard to the concerns raised by the Controller of Budget’s report’.<sup>123</sup>

The use of the phrase ‘every reasonable effort’ implies an onerous obligation on the part of the governments which must make these efforts in good faith and with a commitment to resolving the dispute.<sup>124</sup> Going through motions of alternative dispute resolution without any commitment and desire to reach a compromise would not suffice as ‘every reasonable effort’, and a court to which the dispute is brought may refer it back to the governments to make every reasonable effort.<sup>125</sup> This entails much more than an effort to settle a pending court case. The governments must not pay lip-service to this obligation as they are required to re-evaluate their positions fundamentally.<sup>126</sup>

The reasonableness of the effort must be determined taking into account both the disputed issues and the mechanisms of alternative dispute settlement that have been used. As will be discussed later, different mechanisms are more suitable for different types of disputes and a choice of a more suitable mechanism contributes to the reasonableness of the effort. Moreover, a choice of mechanisms that are illegal would be manifestly unreasonable.<sup>127</sup>

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<sup>121</sup> 2002 (2) BCLR 156 (CC) (*National Gambling Board*) para 36.

<sup>122</sup> *National Gambling Board* para 33.

<sup>123</sup> *International legal consultancy group (judgment)* para 68.

<sup>124</sup> Steytler (2001) 198.

<sup>125</sup> Steytler (2001) 199.

<sup>126</sup> *National Gambling Board* para 35-36.

<sup>127</sup> See Steytler (2001) 199.

### 4.2.3 Enforcement of the obligation

The obligation is binding on the governments and the courts must be astute to hold the governments to account for the steps they have actually taken to honour their cooperative governance obligations. In enforcing this obligation, the court must read Article 189(3) together with Article 159(2)(c) which requires it to promote ‘alternative forms of dispute resolution’. The obligation to avoid litigation can be enforced by the courts, which have discretion to fashion appropriate remedies. Where a court is not satisfied that a government has made every reasonable effort, it may refer the dispute back to the governments in dispute on grounds that it is not yet ripe for litigation.<sup>128</sup> By such referral, so that the governments explore other means and procedures, the Court would be encouraging cooperative government. In *Ex parte Medical Practitioners*, the High Court observed that ‘the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy’.<sup>129</sup> The South African Constitutional Court has asserted that the ‘courts must ensure that the duty is duly performed’.<sup>130</sup> Likewise, in *National Gambling Board* the Court declined to grant the parties direct access noting that ‘[t]he parties’ failure to comply with the obligations of chapter 3 is sufficient ground for refusing direct access’.<sup>131</sup>

As the guardian of the Constitution, the Court must devise and formulate other remedies that can be used to give effect to the constitutional provisions. For example, in cases of intransigence which can be attributed to a state officer that is obviously abusing his or her office, an order of costs against the officer and not the government or institution would be an appropriate mechanism to enforce cooperative government obligations.<sup>132</sup>

### 4.3 The non-judicial alternative dispute resolution mechanisms

Article 189(4) requires national legislation to be enacted to ‘provide for procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including

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<sup>128</sup> See Steytler (2001) 203.

<sup>129</sup> *Ex parte Medical Practitioners* para 61.

<sup>130</sup> *Uthukela District Municipality and others v President of the Republic of South Africa and others* 2002 (11) BCLR 1220 (CC) para 13.

<sup>131</sup> *National Gambling Board* para 37.

<sup>132</sup> See s 31 of the South African Division of Revenue Act 5 of 2002.

negotiation, mediation and arbitration.’ The nature of the dispute must determine the choice of the dispute settlement mechanism. According to Steytler:

A commission of inquiry is preferable where there is a dispute of fact. Conciliation is concerned with the future rather than with the unraveling of the past and is therefore appropriate for accommodating differences in policy. Arbitration and adjudication are again more suitable for disputes involving legal questions.<sup>133</sup>

Some disputes may involve a combination of questions of fact, policy and the law, and may require a combination of mechanisms or one mechanism serving more functions.<sup>134</sup> For example, negotiation could be combined with mediation which is then followed by arbitration.<sup>135</sup>

#### **4.3.1 Negotiation**

Negotiation is one of the processes of private decision-making by the parties themselves in which the parties control the process and the outcome. It involves bargaining by and between the parties to a dispute who seek to resolve the conflict between them through the exchange of resources or structuring of relationships.<sup>136</sup> The process does not follow formal structured procedures as the parties who are in control can follow any method that is likely to yield results.

#### **4.3.2 Mediation**

Mediation introduces into the process of negotiation the services of an outsider called a mediator who facilitates the negotiations. The mediator must be an acceptable, impartial and neutral third party, whose main roles are to ease the tensions among the parties, create a conducive atmosphere for negotiation, and help the parties reach an agreement.<sup>137</sup> Since the mediator is not an independent authority whose decisions are binding on the negotiating parties, he or she can only make proposals for a possible solution, which the parties who still

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<sup>133</sup> Steytler (2001) 188.

<sup>134</sup> Rycroft A ‘Rethinking the con-arb procedure’ (2003) 24 *Industrial Law Journal* 299.

<sup>135</sup> Steytler (2001) 188.

<sup>136</sup> Steytler (2001) 186.

<sup>137</sup> Steytler (2001) 187.

control the process may or may not accept. The mediator improves the negotiation process by introducing a measure of formality and structure.<sup>138</sup>

### **4.3.3 Arbitration**

Arbitration involves the parties in dispute agreeing to appoint a neutral third party known as an arbitrator and giving him the authority to make a decision on their behalf.<sup>139</sup> The arbitrator must be an impartial and neutral third party who makes a decision on the basis of the evidence and submissions adduced by the parties in dispute.<sup>140</sup> The proceedings must follow procedures determined by the parties. As contrasted with a mediator whose decision is not binding on the parties, an arbitrator's decision is usually binding.<sup>141</sup>

### **4.3.4 Other methods**

Article 189(4) uses the term 'including', which means that the legislation is not limited to providing for negotiation, mediation and arbitration – it could identify other like methods and provide for them. For example, the legislation may provide for appointment of an independent commission of inquiry by the governments in dispute to establish the facts in dispute and make formal recommendations.<sup>142</sup> The legislation could also provide for conciliation, which is a variant of mediation in which the mediator plays a more interventionist role by investigating the dispute independently and making formal recommendations regarding the terms of settlement of the dispute.<sup>143</sup> The facilitator assists the parties to establish a positive and compromising relationship which corrects perceptions, reduces fears and improves communication.<sup>144</sup> It must however be appreciated that there is a very fine line between mediation and conciliation.<sup>145</sup>

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<sup>138</sup> Steytler (2001) 187.

<sup>139</sup> Chartered Institute of Arbitrators *Consumer Arbitration Scheme for the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA)* England (2000).

<sup>140</sup> Steytler (2001) 188.

<sup>141</sup> Steytler (2001) 188.

<sup>142</sup> Steytler (2001) 187.

<sup>143</sup> Steytler (2001) 187.

<sup>144</sup> Du Preez O 'Conciliation: A founding element in claims management' (2014) 119 *Procedia: Social and Behavioral Sciences* 117.

<sup>145</sup> Faris J 'Deciphering the language of mediatory intervention in South Africa' (2006) 39 *CILSA* 434.

#### 4.4 The role of the judiciary in intergovernmental relations

Although the Constitution provides for and emphasises the need to settle intergovernmental disputes by alternative dispute resolution mechanisms, it does not oust the jurisdiction of the courts from intergovernmental relations and disputes. Article 189(3) only requires the governments to ‘make every reasonable effort’ to settle the disputes by alternative methods to be provided for by national legislation without completely precluding adversarial litigation. The South African courts have interpreted similar provisions as embodying discretion for the court to determine whether or not to hear a matter even where such other means have not been used or exhausted. In *City of Cape Town v Premier of the Western Cape*, the High Court of South Africa observed that:

To disregard the provisions of section 40(4) of the Constitution, which vests in a court a discretion to hear a matter, even if not satisfied that the parties have made every reasonable effort to settle the dispute, would run counter to the provisions of section 34 of the Constitution, which guarantees the right of the individual to have any dispute resolved by the application of law, decided in a fair public hearing before a court.<sup>146</sup>

Similarly, the Constitutional Court in the *First Certification* judgment noted that the requirement to use other means does not oust the jurisdiction of the courts or deprive any organ of government of the powers vested in it under the Constitution.<sup>147</sup>

The Courts, and especially the Supreme Court, are the guardians of the Constitution and must have a final say in any dispute between the governments established under the Constitution. Requirement of alternative dispute resolution does not exclude the courts’ jurisdiction but only prescribes what should happen before turning to the courts. Exceptional circumstances may exist which make alternative dispute resolution unnecessary and justify adjudication by the courts without first using other means or exhausting them.

First, given that some of the disputes among the governments may be in respect of the different interpretations of constitutional provisions they may have, the courts become the correct avenue to render a determinative interpretation. Article 163(6) expressly provides that

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<sup>146</sup> 2008 (6) SA 345 (c) para 17.

<sup>147</sup> *First Certification judgment* para 291. See also *Minister of Police and others v Premier of the Western Cape and others* para 58. See also Currie & De Waal (2001) 123.



‘[t]he Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government’. The High Court and the Court of Appeal have jurisdiction in various constitutional interpretation matters that involve intergovernmental relations disputes.<sup>148</sup> These provisions must have been informed by the recognition of the fact that questions of interpretation are better suited for judicial intervention than alternative dispute resolution.

A matter concerning county government may involve the constitutional status of county government as a government, the functions and powers of the county government or even the resources that county governments are entitled to. In effect, these are matters of intergovernmental relations. It may even involve the composition of the two houses of Parliament, as was the case in *the Matter of the Principle of Gender Representation in the National Assembly and the Senate*<sup>149</sup> in which the Supreme Court was called upon to give an Advisory Opinion about whether the not-more-than-two-thirds gender representation rule in either of the houses was to be implemented immediately or progressively. The Court found that ‘[t]he gender composition of both the National Assembly and the Senate, if it could touch on the constitutionality of these organs is an issue bearing impact on county government’ and is therefore a matter concerning counties.<sup>150</sup> Given the novel and far-reaching nature of the innovations of Kenya’s devolved system, the Supreme Court emphasised the important role of the judiciary in the intergovernmental relations by giving its advice on matters relating to the new system. It stated:

The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of county government. The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court’s Advisory-Opinion jurisdiction will be most propitious; and

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<sup>148</sup> Arts 165(3) and (6), and 164(3).

<sup>149</sup> [2012] eKLR (*Gender Representation*).

<sup>150</sup> *Gender Representation* para 20.

where such is the case, an obligation rests on the Court to render an opinion in accordance with the Constitution.<sup>151</sup>

In the exercise of this jurisdiction, the judiciary will have an opportunity to police and enforce the devolution bargain and balance of power between the two levels of government. The Supreme Court in *Speaker of the Senate* has endorsed this view, noting that the ‘Courts must patrol Kenya’s constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order’.<sup>152</sup>

Secondly, alternative dispute resolution mechanisms cannot be used to negotiate unconstitutional positions.<sup>153</sup> The governments cannot negotiate and contract themselves out of the basic principle of constitutional supremacy as this would be unconstitutional and invalid. Indeed, any third party who is not bound by the cooperative government obligations can challenge any unconstitutional or illegal attempt to reach a political compromise or settlement.<sup>154</sup> Settlement of disputes by other means must be done constitutionally and in the interest of the people. Thus, although private citizens are not parties to intergovernmental disputes and are not bound by the cooperative government obligations, they have stakes in the manner in which political compromises are arrived at. They have an interest in ensuring that the governments operate constitutionally and can therefore challenge any political compromise that is unconstitutional.

Thirdly, there will be no need to refer the dispute back to the parties, as it would serve no value where parties have already taken firm positions. While one party may genuinely want to negotiate, the other may be intransigent or use negotiation as merely a delaying tactic.<sup>155</sup> If a party to a dispute becomes intransigent, pays lip-service to the efforts to settle the matter by other means, or deliberately creates a dispute by acting in a manner it knows is wrong, or on the basis of ulterior motives, the Court must be free to adjudicate in the matter without

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<sup>151</sup> *Gender Representation* para 19.

<sup>152</sup> *Speaker of the Senate* para 161.

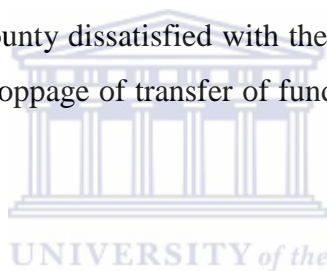
<sup>153</sup> See *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 53-9.

<sup>154</sup> Steytler (2001) 199.

<sup>155</sup> Steytler (2001) 183.

insisting on every reasonable effort first being made. It is for this reason that the Supreme Court in *Speaker of the Senate* decried the refusal by the Speaker of the National Assembly to resort to mediation in resolving the disagreement with the Senate. The Court asserted that ‘[s]uch course of action is precisely what Archibald Cox had in mind: “*If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another*”’. The pressure now falls on the Supreme Court.’<sup>156</sup>

Fourthly, even where the Constitution makes provision for specific alternative dispute resolution mechanisms, the judiciary as the final arbiter of the Constitution, retains supervisory powers which it can use to review the non-judicial processes.<sup>157</sup> For example, for cases of intervention in terms of Article 190 and suspension of county government in terms of Article 192, non-judicial mechanisms are envisaged. The Senate is even empowered to terminate the intervention or suspension. It is submitted that a county government dissatisfied with the manner in which the non-judicial mechanisms have been used can approach the Courts for review. Likewise, a county dissatisfied with the manner in which the non-judicial mechanisms have been used in stoppage of transfer of funds under Article 225 can also seek judicial intervention.



## 5 Conclusion

A purposive interpretation reveals that there is sufficient provision in the Constitution about how to manage intergovernmental relations and dispute resolution among the levels of government established under the Kenyan devolved system. First, the constitutional choice of a cooperative as opposed to a competitive devolved system of government was a deliberate one aimed at providing intergovernmental relations that urge cooperation and avoidance of disputes. Cooperative government imposes obligations upon the governments to cooperate, consult and respect each other. Secondly, even when disputes cannot be avoided, and therefore arise, the Constitution provides for resolution of such disputes through mechanisms and procedures that avoid litigation in the first instance. The governments must make every reasonable effort to resolve the disputes by means other than judicial intervention. This requirement does not, however, oust the jurisdiction of the judiciary, which is assigned a critical role in not only intergovernmental relations but also in the settlement of disputes.

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<sup>156</sup> *Speaker of the Senate* para 146.

<sup>157</sup> Steytler (2001) 178-9.

Since the concept of cooperative government borrowed from the South African Constitution, South African jurisprudence and scholarship have provided very useful lessons in the interpretation of the Kenyan provisions. These have been relevant in respect of the notions of distinct and interdependent governments, and the obligations to respect, consult and to avoid resolution of disputes through litigation. They have also been relevant in respect of the role of the courts in intergovernmental relations including when they can decline to deal with a dispute and refer it back to the parties, and the circumstances under which they can adjudicate before other means have been used. The overall conclusion is that effective cooperative government is critical to the realisation of a fully devolved system of government.



## CHAPTER TEN

### The Senate as an institution of shared rule

#### 1 Introduction

As part of the institutional framework for cooperative intergovernmental relations discussed in Chapter Nine, the national legislature is conceptualised and designed as a bicameral body, comprising the National Assembly and the Senate.<sup>1</sup> The Senate is the chamber through which counties are represented and participate in policy-making on county matters at the national level of government, as part of the institutional framework for ‘shared-rule.’<sup>2</sup> The Senate is thus one of the important structural pillars that support and protect the devolved system of government.<sup>3</sup> This chapter examines the constitutional provisions on the nature of the Senate, its nexus with devolution, its composition and election, its legislative and other functions, its decision-making processes, and its relations with counties and county governments.

#### 2 The Senate as an integral part of devolution

The design of the Constitution places it on the list of constitutional systems in which a bicameral parliament<sup>4</sup> is an integral part of devolution.<sup>5</sup> While the National Assembly’s role is to represent ‘the people of the constituencies and special interests,’<sup>6</sup> the Senate ‘represents the counties, and serves to protect the interests of the counties and their governments’.<sup>7</sup> The Senate provides a forum for the representation and protection of the counties and their governments as well as their interests in the decision-making processes at the national level, and the participation of the counties and indirectly their governments in such processes. In effect the Senate represents both the people organised along the lines of the counties and the county governments, creating an arrangement in which the two houses represent different

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<sup>1</sup> Article 93.

<sup>2</sup> See Art 96.

<sup>3</sup> See Chaps 7 and 8.

<sup>4</sup> For a history of second chambers see Preece AA ‘Bicameralism at the end of the second millennium’ (2000) 21 *University of Queensland Law Journal* 67-84

<sup>5</sup> See Dinan J ‘United States of America’ in Le Roy K & Saunders C (eds) *Legislative, Executive, and Judicial Governance in Federal Countries* (2006) 318, where he examines how the American bicameral legislature was conceived as part and parcel of the federal arrangement.

<sup>6</sup> Art 95(1), (2) and (3).

<sup>7</sup> Art 96(1).

interests of the people.<sup>8</sup> This creates a nexus between devolution and the Senate which provides a forum through which the counties and their governments engage in decision-making at the national level.<sup>9</sup> This nexus is reflected in the composition and election of the Senate, its decision-making processes, and its mandate, powers and functions.

In *Re: the Matter of the Interim Independent Electoral Commission*,<sup>10</sup> the Supreme Court recognised the nexus between bicameralism and devolution, and viewed Parliament as a shared institution:

Many offices established by the Constitution are shared by the two levels of government, as is clear from the terms of the Fourth Schedule which makes a ‘distribution of functions between the national government and county governments’...We have taken note too that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county level – such as finance, budget and planning, public service, land ownership and management, elections, administration of justice – dovetail into each other and operate in unity.<sup>11</sup>

In *Speaker of the Senate and another v Attorney General and others*, the Supreme Court after emphasising that the people have established a system of governance defined by particular

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<sup>8</sup> *Speaker of the Senate and another v Attorney General and others* [2013] eKLR (*Speaker of the Senate*) (para 197) the Supreme Court noted that ‘[b]oth Houses of Parliament represent the same people’.

<sup>9</sup> Saunders C ‘Legislative, executive, and judicial institutions: A synthesis’ in Le Roy K & Saunders C (eds) *Legislative, Executive, and Judicial Governance in Federal Countries* (2006) 344, 356 where she states thus: ‘Bicameralism has become accepted as the most obvious mechanism by which the constituent units can play a role in national institutions and thus be a key component of the arrangements for shared rule.’ See also Watts RL *Federal Second Chambers Compared*, a Paper Presented at a Conference on ‘Federalizing Process in Italy: Comparative Perspectives.’ An International Conference Organised by the Department for Institutional Reforms, Italy, and the Forum of Federations, Rome, February 17-19, 2010, 2 where he refers to Amellier who is among those who argue that bicameral federal legislatures are by definition a characteristic feature of a federal system. Note, however, that Watts states that there are federal countries without second chambers of parliament.

<sup>10</sup> [2011] eKLR (*Interim Independent Electoral Commission*).

<sup>11</sup> *Interim Independent Electoral Commission* para 39.

concepts and values such as devolution, observed that ‘[a] fundamental element in the scaffolding structure for the said constitutional principles and values is the institutional scheme of *bicameralism* in the legislative arrangements; and this is the dual-chamber set up in the institutions of law-making’.<sup>12</sup> This conceptualisation and design of the national legislature as an integral part of devolution<sup>13</sup> is consistent with comparative experience in other countries with multi-level systems of government.<sup>14</sup>

### 3 The composition and election of the Senate

The composition and election of the Kenyan Senate are governed by Article 98(1) which provides for different categories of membership and modes of election. There are 47 members directly elected by each county, 16 women members, two members representing the youth, two members representing persons with disabilities, and the Speaker. These can be divided into three broad categories: the county Senators; the special interest Senators; and the Speaker.

#### 3.1 The county Senators

Article 98(1)(a) provides for one Senator for every county who represents and protects both the county and its people, and the government of the county. The representation of each county by one member reflects the principle of equality of representation of all the counties regardless of differences in demography and geographical size. This is the case in a number of federal systems with bicameral legislatures.<sup>15</sup>

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<sup>12</sup> *Speaker of the Senate* paras 136 and 139 (emphasis in the original).

<sup>13</sup> Task Force on Devolved Government *Final Report on Devolved Government in Kenya: Developmental Devolved Government for Effective and Sustainable Counties* (2011) 17.

<sup>14</sup> Patterson S & Mughan A *Senates: Bicameralism in the Contemporary World* (1999) 2; Norton P ‘Adding value? The role of second chambers’ (2007) 15:1 *Asia Pacific Law Review* 7; and Swenden W ‘Subnational participation in national decisions: The role of second chambers’ in Enderlin H, Walti S and Zurn M (eds) *Handbook on Multilevel Governance* (2010) 103-23.

<sup>15</sup> See Watts RL *Federal Second Chambers Compared* (2010) 7 where he observes that out of 18 federations 9 – namely, United States of America, Australia, Argentina, Brazil, Mexico, Nigeria, Pakistan, Russia and South Africa – have equal representation of the constituent units, but the rest do not, although they make efforts to weight representation in favour of smaller regional units or significant minorities.

### 3.2 The special interests Senators

Article 98(1) provides for three categories of special interest senators: women senators; senators representing the youth; and senators representing persons with disabilities. These three categories of Senators should be understood as special interest groups that were previously marginalised and whom the Constitution offers an opportunity for representation, protection and participation. Persons who themselves belong to these categories must be nominated to represent them. In *Commissioner for the Implementation of the Constitution v Attorney-General and others*,<sup>16</sup> the Court of Appeal declared section 34(9) of the Election Act, which provided for the inclusion of Presidential and Deputy Presidential candidates among persons eligible for nomination to the Senate under these special interest groups, unconstitutional. The Court viewed these groups as having been previously marginalised and denied a chance to participate in governance institutions. It therefore understood the rationale of the special seats as being ‘to open up political space for entry and participation of persons, groups and categories of people who, due to various disadvantages and vulnerabilities, have historically been unable or incapable of generally and effectively finding their way through a strictly competitive methodology and have thus been relegated to the peripheries of the political playground’.<sup>17</sup>

Although the members of these special interest groups are elected to the Senate through party lists on the basis of proportional representation,<sup>18</sup> this is not the orthodox method in which the number of seats due to a political party is determined by the total votes the party received. Rather, it is based on the total number of seats the party wins out of the 47 county Senators who are directly elected by the registered voters in the counties.<sup>19</sup> The persons must however first meet all the qualifications set out for members of Parliament.<sup>20</sup> These include attainment of the age of 18 years required for registration as a voter. These special interest senators are included in the Senate as recognition of the Constitution’s commitment to inclusivity and

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<sup>16</sup> [2013] eKLR (*Commissioner for the Implementation of the Constitution*).

<sup>17</sup> *Commissioner for the Implementation of the Constitution* para 55.

<sup>18</sup> Arts 98(2) and 90.

<sup>19</sup> Art 90(3).

<sup>20</sup> Art 99.



protection of previously marginalised groups and communities without detracting from and undermining the role of the Senate as representative of the counties in the devolved system.<sup>21</sup>

### **3.2.1 Women Senators**

Article 98(1)(b) provides for 16 women members who are elected through nomination by political parties according to their proportion of members of the county Senators. These members are elected in accordance with Article 90(2) which, in part, requires each political party participating in the general elections to nominate and submit in advance of the elections a list of 16 women members who would stand elected if the party were to be entitled to all the 16 seats.<sup>22</sup> After the general election, each party is then allocated women members in proportion to the total of its elected county Senators,<sup>23</sup> picked from the submitted party list.

The responsibility for the election of these women members is shared between the political parties and the Electoral and Boundaries Commission. The political parties are responsible for the preparation and submission to the IEBC, long before the election date, of lists of the women nominees.<sup>24</sup> They must ensure that the party lists reflect the regional and ethnic diversity of the people of Kenya,<sup>25</sup> and that the nominated women meet the qualifications for election as Senators. The IEBC, on the other hand, has the responsibility to receive, scrutinise and confirm that the lists comply with the requirements of the Constitution and other laws, failing which the IEBC must reject such a list. In *Lydia Mathia v Naisula Lesuuda and Another* the High Court held that ‘the IEBC should have rejected the list and asked the TNA [The National Alliance Party] to resubmit another list in compliance with the requirements that IEBC had sought from TNA. Article 90(2)(c) bestows upon IEBC the responsibility of ensuring that the party lists met certain criteria set out in the Constitution and legislation.’<sup>26</sup> After the election of the county Senators, the IEBC is responsible for determining the

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<sup>21</sup> Art 10 of the Constitution includes inclusiveness and protection of marginalised groups among the values of governance.

<sup>22</sup> Art 90(2) (a).

<sup>23</sup> Art 90(3).

<sup>24</sup> Art 90(2)(a).

<sup>25</sup> Art 90(2)(c).

<sup>26</sup> [2013] eKLR (*Lydia Mathia*) 23.

proportion of each political party, and allocating to it women members from its submitted party list.<sup>27</sup>

Article 90(2)(b) expressly excludes the women lists from order of priority thus: '[E]xcept in the case of the seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed.' The parties, however, have the discretion to arrange the list in their own order of priority. The lists must, however, reflect the regional and ethnic diversity of the people of Kenya. In *Lydia Mathia*, the High Court, after quoting Article 90(2)(b), held that in designating the 16 women from the party lists, the IEBC can depart from the order of priority to ensure regional and ethnic diversity. It stated: 'The plain meaning of this sub-article is that with the women nominated to the Senate IEBC had the mandate to designate, bearing in mind regional and ethnic diversity of the nominees and not necessarily looking at the order of priority in which nominees were listed.'<sup>28</sup>

It is argued that although Article 90 appears to empower the IEBC to designate which women from the party lists are duly elected for each political party, the provision does not empower the IEBC to pick and choose from the lists in total disregard of any priority set out by the parties. The correct interpretation is that where the list does not reflect the regional and ethnic diversity of the people of Kenya, the IEBC should reject the list and ask the concerned party to present a compliant list. This can be done at any stage before the final designation of the women duly elected. While the IEBC has the responsibility of ensuring that regional and ethnic diversity is reflected, it must be protected from being drawn into the politics of picking and choosing for the political parties.

Even though the Constitution does not expressly state which interests the 16 women represent, they should be understood to represent women since the Constitution has sought to ensure inclusivity and gender equity in representative bodies. In practice, these women might end up representing the interests of the political parties that nominated them and not the women. This does not, however, imply a broad mandate to represent women on any matter, but is limited to matters in which the Senate is mandated to play a role. Even in such matters,

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<sup>27</sup> See Art 90(3) and s 36(4) of the Election Act which provides that '[w]ithin thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation'.

<sup>28</sup> *Lydia Mathia* 23.

the role of these 16 women in decision-making in the Senate is divided into two: decision-making in matters affecting counties and decision-making in matters that do not affect counties. Article 123(2) and (4) prescribe that in matters affecting counties, the women senators do not have individual votes. They instead must consult and share their concerns with the county Senators who cast one vote each on the basis of equality among the counties. In matters that do not affect counties, all Senators, including these women Senators, have individual votes. However, given the very broad definition of matters affecting counties, other than constitutional amendments that do not affect counties, matters that fall into this category are very few.<sup>29</sup> Firstly, the Senate's legislative mandate is limited to Bills concerning counties, which, it is submitted, are matters affecting counties in which the 16 women have no individual vote. Secondly, in matters that are not Bills, Article 123(2) requires the Speaker to first rule on whether or not the matter affects counties, and where it does not, the 16 women members would have individual votes along with the other Senators.<sup>30</sup>

### ***3.2.2 Senators representing the youth***

Article 98(1)(c) provides for two members, one from each gender, representing the youth, who must be elected in accordance with Article 90 on the basis of political party lists presented before the election date.<sup>31</sup> Since there are only two seats, the implication of Article 90 is that even if all parties present lists, at best only two parties – the majority and the second largest party – stand a chance to share the positions. Each gets one member and if the first party gets a male member, the other must settle for a female member.<sup>32</sup>

Although Article 98(1)(c) refers to members 'representing the youth,' creating the impression that any person who is not a youth could be nominated to represent the youth, it is submitted that, as already noted, these members must themselves be youth.<sup>33</sup> Article 260 of the Constitution defines youth as being the collectivity of all individuals in Kenya who have attained the age of 18 years but have not attained the age of 35 years. This definition is

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<sup>29</sup> See Art 110 defining Bills concerning counties; and *Interim Independent Electoral Commission* para 39 where the Supreme Court defined concerning county government in very broad terms.

<sup>30</sup> Art 123(3).

<sup>31</sup> Arts 98(2) and 90(2).

<sup>32</sup> Art 90(2)(b) and (c).

<sup>33</sup> *Commissioner for the Implementation of the Constitution* para 55.

consistent with age 18 years which is identified as the age of adulthood at which a person qualifies to be registered as a voter and becomes eligible to vote, and stand for election to political office.<sup>34</sup> Youth for purposes of Article 98(1)(c) must thus be persons between age 18 and 34 years.

Senate members under this category must be youth not only at the time of nomination but throughout the entire five-year term. If a person ceases to be a youth before the end of the term, he or she must cease to be a member of the Senate because the composition requirements provided for by Article 98(1) also act as qualifications.

The senators do not have broad mandate to represent youth on all matters since, like the 16 women, their mandate is limited to bringing on board the youth perspective on matters in which the Senate has a role. The role of these members is also subject to the decision-making limitations identified under Article 123.

### ***3.2.3 Senators representing persons with disabilities***

Article 98(1)(d) provides for two members, one from each gender, to represent persons with disabilities, who must be elected in accordance with Article 90 on the basis of political party lists presented before the election date.<sup>35</sup> Once again, the best that can happen in this case is for two parties – the majority party and the second largest party – getting one member each. This reduces the role of the IEBC to allocating the two seats to the two parties. If the majority party gets a male member, then the other party must produce a female member.

Although Article 98(1)(d) refers to members ‘representing persons with disabilities,’ it is submitted that these members must themselves be persons with disabilities.<sup>36</sup> Article 260 defines disability as including ‘any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out

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<sup>34</sup> Art 83(1)(a) as read with the Registration of Persons Act. See also African Union *The African Youth Charter* (2006) which defines youth as young people falling between the ages of 15 and 35 years. See also Commission of the European Communities *Youth, Investing and Empowering* (2009) EU Youth Report 6 [http://ec.europa.eu/youth/documents/youth\\_report\\_final.pdf](http://ec.europa.eu/youth/documents/youth_report_final.pdf) (accessed 13 October 2013); and Government of the Republic of South Africa *The National Youth Policy* (2009-2014), which however provides for the age of 14 to 35 years. <http://www.thepresidency.gov.za/medislib/downloads/home/publications> (accessed 13 October 2013).

<sup>35</sup> Arts 98(2) and 90(2).

<sup>36</sup> *Commissioner for the Implementation of the Constitution* para 55.

ordinary day-to-day activities'. These two aspects – perception by sectors of the community and the effect on participation in day-to-day activities – incorporate elements of the social approach to the definition of disability envisioned by the United Nations Convention on the Rights of Persons with Disabilities.<sup>37</sup> Article 98(1)(c) should therefore be understood in this context as providing an opportunity for persons with disabilities to be members of and participate in the Senate. Although the broadness of this definition implies a diversity of disability, which as a matter of practice should be considered in the preparation of the party lists, the IEBC cannot depart from the prioritisation of the party lists on the basis of this diversity of disability. In *Ben Njoroge and another v Independent Electoral Boundaries Commission (I.E.B.C) and others*,<sup>38</sup> the High Court rejected an attempt by the IEBC to depart from the order of priority in the party lists on grounds of diversity of disability. Ougo J stated that:

The wording of Article 98(2)(c) in my view is mandatory in that IEBC's mandate was to consider the party lists in order of priority in which the nominees were listed. To argue that they had to achieve the principle of diversity and ensure the two disabilities of physical and visual were represented and that they had to strike a balance in my view was wrong in light of Article 90(2)(b) of the Constitution.<sup>39</sup>

Compared to the *Lydia Mathia* decision, this appears to be a correct interpretation as it does not draw the IEBC into the politics of political parties.

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<sup>37</sup> The Convention recognises that disability is an evolving concept and 'results from interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'. It therefore focuses more on the external, attitudinal and environmental barriers which hinder the persons with disabilities from participating fully in the activities of society and seeks to address them. It sees the external barriers as the problem and not the impairments themselves. See UNHR Office of the High Commissioner for Human Rights *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* (2010) Professional Training Services No 17.

<sup>38</sup> [2013] eKLR (*Ben Njoroge*) 17.

<sup>39</sup> *Ben Njoroge* 16.

### 3.2.4 The Speaker as an ex officio member

Article 98(1)(e) provides for a Speaker of the Senate who must be an ex officio member of the Senate. The Speaker is elected by the members of the Senate from among persons qualified for election as members of Parliament but who are not such members.<sup>40</sup> In practice the majority party candidate would easily win the seat. The Speaker's primary responsibility is to preside over the sittings and proceedings of the Senate,<sup>41</sup> and generally manage its processes. Other provisions of the Constitution, however, set out other very important constitutional responsibilities of the office of Speaker which constitute it as an important constitutional office.<sup>42</sup> In *Judicial Service Commission v Speaker of the National Assembly and another*,<sup>43</sup> the High Court of Kenya emphasised the importance of the office of the Speaker of the National Assembly and identified a number of its important roles and functions. The Speaker determines the business of the House, restrains disorderly conduct, and controls debate. He or she determines 'whether motions tabled by members of Parliament are admissible. If they are in violation of the Constitution or an Act of Parliament, he may propose changes or rule that they are inadmissible.'<sup>44</sup> The Speaker 'is the representative of the House in relation to other organs and authorities such as the Presidency and the Senate', and 'his rulings are binding precedents' in the House.<sup>45</sup> The Court then concluded that the Speaker is 'the presiding and principal officer of the National Assembly on whose shoulders lie the responsibility for the proper constitutional conduct of proceedings and decisions in the National Assembly'.<sup>46</sup> Quoting from a Tanzanian High Court decision in *Hon Augustine Lyatonga Mrema v Speaker of the National Assembly and another*, the Court added that the Speaker is 'the chief functionary and constitutional head' who is required 'to discharge duties of a judicial or interpretative character, having finality attached to the same'.<sup>47</sup> These

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<sup>40</sup> Art 106(1)(a).

<sup>41</sup> Art 107(1).

<sup>42</sup> See for example Art 110(3) which provides for determination by the Speakers of the question whether a Bill concerns counties or not, and if so, whether it is an ordinary or special Bill.

<sup>43</sup> [2014] eKLR (*Judicial Service Commission*).

<sup>44</sup> *Judicial Service Commission* para 85.

<sup>45</sup> *Judicial Service Commission* para 86.

<sup>46</sup> *Judicial Service Commission* para 87.

<sup>47</sup> *Judicial Service Commission* para 87.

responsibilities detailed for the Speaker of the National Assembly are equally applicable to the Speaker of the Senate.

The Speaker has no vote and where there is a tie, the question is lost,<sup>48</sup> and is not even counted when determining the number of members of the Senate for purposes of voting.<sup>49</sup> The functions of the office must be discharged in an independent and impartial manner, and in good faith, especially given that this is a constitutional public office constituted by one person. The Supreme Court in *Speaker of the Senate* underscored the importance of the office of Speaker, particularly its ‘role of the presiding officer’, which it regarded as critical.<sup>50</sup> After decrying the manner in which the Speaker of the National Assembly had conducted himself, the Court observed:

[W]e categorically affirm that lawful public-agency conduct under Kenya’s Constitution, requires every State agent to grapple, in good faith, with assigned obligations, and with a clear commitment to inter-agency harmony and co-operation. No State agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution, which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might, to a scheme of progressive, accountable institutional interplays.<sup>51</sup>

In discharging the responsibilities of this office, the Speaker of the Senate must thus remain focused on the primary mandate of the Senate, which is to represent and protect the interests of the counties and their governments.

### ***3.2.5 Decision-making in the Senate***

Article 123 distinguishes between matters which affect counties and those which do not. Where the matter does not concern the counties the vote is cast by the individual Senators

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<sup>48</sup> Art 122(2)(a) and (b).

<sup>49</sup> Art 122(4).

<sup>50</sup> *Speaker of the Senate* para 140.

<sup>51</sup> *Speaker of the Senate* para 146. See also *Lekota and Another v Speaker, National Assembly and Another* [2012] ZAWCHC 385 para 12, where the Western Cape High Court stated that: ‘The trite principle is that the Speaker, although affiliated to a political party, is required to perform the functions of the office fairly and impartially in the interests of the National Assembly and Parliament.’

including the special interest Senators and the total votes possible in the Senate are 67.<sup>52</sup> Where, however, the matter concerns or affects counties, the special interest Senators have no individual vote.<sup>53</sup> The votes belong to the 47 county Senators with each having only one vote which is cast by the county Senator, and the total votes possible in the Senate are 47.<sup>54</sup> A simple ‘majority of all the delegations’ determines the matter,<sup>55</sup> and not merely a simple majority of the members present and voting. Article 122(1) prescribes that ‘[e]xcept as otherwise provided in this Constitution, any question proposed for decision in either House of Parliament shall be determined by a majority of the members in that House, present and voting’. It is submitted that Article 123(4)(c) provides otherwise. Where, due to the special interest Senators, a county has more than one Senator, such Senators constitute a single delegation for the county and must consult with the other Senator on which way he or she should cast the vote for the county.<sup>56</sup> The provision aims at achieving equality of the counties in decision-making in matters that affect the counties.<sup>57</sup> A special interest senator is linked to a county by the place where he or she is registered as a voter.<sup>58</sup>

### 3.3 The obligation to consult the county governments

Article 96(1) provides that the ‘Senate represents the counties, and serves to protect the interests of the counties and their governments’. This provision refers to representation and

<sup>52</sup> Art 123(3).

<sup>53</sup> Art 123(4).

<sup>54</sup> Art 123(4)(a).

<sup>55</sup> Art 123(4)(c).

<sup>56</sup> Art 123(1) and (4)(b).

<sup>57</sup> This approach draws from both the German and the South African approaches. Section 60 of the Constitution of the Republic of South Africa, 1996, for example, provides for representation of each province in the National Council of Provinces by a single delegation of ten members comprising six permanent delegates and four special delegates with the Premier of the province or a delegate designated by him heading the delegation. These provisions capture and give effect to the principle of equality of representation to the provinces. Section 65(1) provides that ‘each province has one vote, which is cast on behalf of the province by the head of its delegation’. The Constitution draws a distinction between bills that can be passed by the National Council of Provinces on the basis of the nine votes belonging to provinces and cast following instructions or mandates from the provincial legislatures in terms of section 76, and bills that are passed on the basis of the individual members of the National Council of Provinces in terms of section 75. Where the votes belong to the provinces, the equality principle is adhered to; but not where they belong to individual members. See also Murray C & Simeon R ‘From paper to practice: the National Council of Provinces after its first year’ (1999) 14 (1) *SA Public Law* 102.

<sup>58</sup> Art 123(1).



protection of two distinct entities. First, the Senate represents and protects the counties and their people. This is the normal duty of representation which is similar to that of members of the National Assembly or members of Parliament in a unicameral legislature. Their representation and protection is based on their election mandate and continuous engagement with the voters as a whole. The question is thus: how can senators represent and protect the county governments, bodies that can articulate their own interest clearly? The only answer is that the Constitution implicitly imposes an obligation for formal communication between the Senate and the governments of the counties in matters that affect counties. It is submitted that there is an obligation to consult the governments of the counties on matters touching on the interests of the counties and those of their governments. Thus, the duty to consult may include direct invitation to county governments – both the county governor and his or her executive committee, and the county assemblies, to comment on any bill the Senate is considering. The Senate’s duty to consult with the counties may impact on the validity of the decisions it ultimately makes not following an appropriate participatory process with the county governments.

Although there should also be a duty on individual Senators to consult their county governments in order to effectively represent and protect them, a failure to do so cannot impact on the validity of the business conducted by the Senate as a whole. The obligation falls upon and is enforceable against the institution and not the individual members of Parliament.

Consultation, as discussed in Chapter Nine, entails a duty on the Senate to make conscious and deliberate efforts to seek the views of the county governments. It is argued that before it takes a decision, the Senate should invite the county governments and afford them reasonable opportunity to make their views known and, where necessary, allow for public hearings. It should consider their views in good faith before making its decisions.

#### **4 The mandate, functions and powers of the Senate**

The Constitution provides for two sets of mandates for the Senate – a legislative and an oversight function. It sets out the role and functions of Parliament as the repository of legislative authority, which derives from the people of Kenya,<sup>59</sup> and entails the functions and powers of both the National Assembly and the Senate. This Senate’s legislative mandate is

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<sup>59</sup> Art 94(1).

divided into two categories: namely, Constitution Amendment Bills and other Bills concerning counties.

#### **4.1 Legislative mandate in Constitution Amendment Bills**

A fundamental pillar of the Kenyan devolved system is the creation and protection of the levels of government and the entire system by the Constitution. Under this scheme, no level of government is a creature of any other, nor can a level of government abrogate the other except by constitutional change.<sup>60</sup> For this reason, one level of government cannot be allowed to amend the Constitution, without the involvement and approval of the other level.<sup>61</sup> If this were to happen, the level of government which has such power would be superior to the other level and may use such power to either abolish the other level or adjust the functions or resources of the other level of government.

Thus, the first legislative role through which the Senate represents and protects the interests of the counties and their governments is to participate in the enactment of any proposed amendments to the Constitution. The Constitution does not leave the participation of the Senate in constitutional amendments to be determined by whether or not each constitutional amendment Bill concerns counties. Instead, Article 94 expressly provides that Parliament, of which the Senate is a part, may consider and pass amendments to the Constitution.<sup>62</sup> In addition, Articles 256 and 257, which provide for amendment of the Constitution, give a role to both the National Assembly and the Senate. There are three types of constitutional amendments: amendments initiated by Parliament under Article 256; amendments commenced by popular initiative under Article 257; and amendments of entrenched provisions under Article 255, which require a referendum in addition to other processes to enact them. In all the three cases, both the National Assembly and the Senate must pass the

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<sup>60</sup> Task Force on Devolved Government (2011) 15.

<sup>61</sup> See Kincaid J 'Editor's Introduction: Federalism as a mode of governance' in Kincaid J (ed) *Federalism* Vol. 1 (2011) xxvi where he observes that: 'In order to preserve the balance of power between the general and constituent governments, neither the general nor the constituent governments can amend the federal (or national) constitution unilaterally; instead, the concurrent consent of the general government and a supermajority of the constituent governments is usually required for amendment'. See also Stauffer T & Topperwien N 'Balancing Self-Rule and Shared Rule' in Fleiner LRB & Fleiner T (eds) *Federalism and Multiethnic States: The Case of Switzerland* (2000) 41, 51-2 where they emphasise the need for shared institutions that ensure that neither of the two levels of government can interfere with the status of the other.

<sup>62</sup> Art 94(3).

amendment before it can take effect. Thus, the Senate is empowered to participate in all constitutional amendment Bills. These bills must, however, still be classified following the procedure of determining whether the Bill concerns counties or not. The purpose of such classification is not to determine whether the Senate will participate, but whether the Bill must be passed in the Senate by the 67 individual votes or the 47 county votes. Second, the classification must determine whether the Bill seeks to amend entrenched provisions listed by Article 255 or not, in which event it must also go to a referendum. Third, given that the basic structure of the Constitution is non-amendable, the process must also establish whether the proposed amendment touches on the basic structure of the Constitution.<sup>63</sup>

#### ***4.1.1 Amendments initiated by Parliament***

Article 256(1)(a) expressly provides for the participation of the Senate in the consideration, debate and passage of constitutional amendments initiated by Parliament by stating that the amendment Bill ‘may be introduced in either House of Parliament’. The Bill must be allowed a gestation period of ninety days after the first reading in each of the two houses before going to the second reading.<sup>64</sup> This provision aims at allowing reasonable time for members to reflect on the provisions of the Bill and their implications before it is passed. It also provides an opportunity for both houses of Parliament to ‘facilitate public participation and involvement’<sup>65</sup> by publicising the Bill and facilitating public discussion about it before the Bill is passed.<sup>66</sup> Since the Senate represents and protects the interests of the counties and their governments, these provisions read together should be understood as imposing an obligation on the Senate to consult the county governments, which should also be given an opportunity to discuss the Bill and make their input before it is passed.

Article 256(1)(d) prescribes that the Bill shall be passed if each of the houses passes it in both its second and third readings, ‘by not less than two-thirds of all the members of that House’. In the case of the Senate, ‘all members of that House’ will be determined by whether the amendment Bill affects counties or not. If it is a Bill that does not affect counties within the meaning of Article 110(1), then ‘all the members’ must refer to the 67 individual votes of the

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<sup>63</sup> See section 2.3 of Chap 4.

<sup>64</sup> Art 256(1)(c).

<sup>65</sup> Art 118(1)(b).

<sup>66</sup> Art 256(2).

Senators. But where the Bill affects counties, ‘all the members’ must refer to the 47 county delegation votes.

#### ***4.1.2 Popular initiative amendments***

Article 257 provides for constitutional amendments commenced by popular initiative. Such initiative may be ‘in the form of a general suggestion or a formulated draft Bill’<sup>67</sup> which must be ‘signed by at least one million registered voters’.<sup>68</sup> If the initiative is in the form of a general suggestion, its promoters must formulate it into a draft Bill before submitting it together with the supporting signatures to the Independent Electoral and Boundaries Commission.<sup>69</sup> Upon verifying the draft Bill and the signatures, the IEBC must submit the Bill to each county assembly for consideration within three months from the date of its submission to the IEBC.<sup>70</sup> A county assembly may consider and approve the Bill within three months of receiving it and through its speaker deliver the same jointly to the Speakers of the two houses of Parliament, with a certificate that the county assembly has approved the Bill.

If the draft Bill gets approved by a majority of the county assemblies, it is introduced in Parliament without delay to be considered and passed by each of the two houses.<sup>71</sup> The Bill is passed if it is supported by a majority of the members of each house.<sup>72</sup> Once again, ‘members of each house’ in the case of the Senate will be either 67 or 47 depending on whether the Bill affects counties or not. Likewise, the Senate would be expected to consult the county governments. Where Parliament passes the Bill, it is submitted to the President for assent.<sup>73</sup> Where, however, either of the houses fails to pass the Bill, or where the Bill relates to entrenched provisions, the proposed amendment is submitted to the people in a referendum.<sup>74</sup>

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<sup>67</sup> Art 257(2).

<sup>68</sup> Art 257(1).

<sup>69</sup> Art 257(3) and (4).

<sup>70</sup> Art 257(4) and(5).

<sup>71</sup> Art 257(6) and (7).

<sup>72</sup> Art 257(8).

<sup>73</sup> Art 257(9).

<sup>74</sup> Art 257(10).

### ***4.1.3 Amendments of entrenched provisions***

Constitution Amendment Bills passed under Articles 256 and 257 must go to a referendum if the proposed amendments relate to matters listed in Article 255.<sup>75</sup> Among the amendments that require such referendum are those that relate to devolution matters. These include amendments relating to the supremacy of the Constitution,<sup>76</sup> the territory of Kenya,<sup>77</sup> the sovereignty of the people,<sup>78</sup> the national values and principles of governance,<sup>79</sup> the functions of Parliament,<sup>80</sup> the objects, principles and structure of devolved government,<sup>81</sup> the independence of the Judiciary and the Commissions and independent offices,<sup>82</sup> and the provisions of the amendment chapter of the Constitution.<sup>83</sup> Other amendments not directly relating to devolution are amendments to the Bill of Rights<sup>84</sup> and the term of office of the President.<sup>85</sup>

Under Article 188 the Senate also plays a role in the protection of the territorial boundaries of the counties. Any recommendation by a commission set up to alter the boundaries of a county must be passed not only by the National Assembly but also the Senate, with the support of at least two-thirds of the county delegations. As noted in Chapter Five, where the alteration of county boundaries affects the number of counties or their names, it must be done by way of an amendment to the Constitution.<sup>86</sup>

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<sup>75</sup> According to Art 255(2)(a) and (b), the proposed amendment will be considered validly passed in the referendum if, first, ‘at least twenty per cent of the registered voters in each of at least half of the counties’ vote in such referendum; and secondly, the proposed amendment secures a simple majority of the citizens who cast their votes.

<sup>76</sup> Art 255(1)(a).

<sup>77</sup> Art 255(1)(b).

<sup>78</sup> Art 255(1)(c).

<sup>79</sup> Art 255(1)(d).

<sup>80</sup> Art 255(1)(h).

<sup>81</sup> Art 255(1)(i).

<sup>82</sup> Art 255(1)(g).

<sup>83</sup> Art 255(1)(j).

<sup>84</sup> Art 255(1)(e).

<sup>85</sup> Art 255(1)(f).

<sup>86</sup> See section 3.3 of Chap 5.

## 4.2 Legislative mandate in Bills concerning counties

The Constitution provides in this respect that ‘the Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113’.<sup>87</sup> This limits the Senate’s substantive legislative mandate to Bills concerning counties only. In all other Bills the only role of the Senate is to be involved, through its Speaker at the filtering stage, in the decision whether or not the Bill concerns counties. Article 110 identifies three categories of Bills concerning county governments: (a) a Bill containing provisions affecting the functions and powers of the county governments;<sup>88</sup> (b) a Bill relating to the election of members of a county assembly or a county executive;<sup>89</sup> (c) a Bill affecting the finances of county governments.<sup>90</sup> Although a Bill must satisfy any one of these three elements for it to be classified as concerning counties, some Bills may contain more than one element.

The three categories of Bills must be interpreted purposively and generously, in order to enable the Senate to play a role in the consideration, debate and passage of more laws so as to enable devolution, which is identified as one of the values of the Constitution, to take root.<sup>91</sup> This is because participation by the Senate is meant to represent the counties and protect their interests and those of their governments, and is envisaged by the Constitution as empowering the counties. Because of this constitutional commitment to protect devolution, the Supreme Court in *Speaker of the Senate* made it clear that ‘in interpreting the devolution provisions, where contestations regarding power and resources arise, the Supreme Court should take a generous approach’.<sup>92</sup> And regarding the role of the Senate in this ‘commitment to protect’ mandate, the Court added that:

Article 96 of the Constitution represents the *raison d’etre* of the Senate as “to protect” *devolution*. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163(6) of the Constitution, the Court has a duty to

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<sup>87</sup> Art 96(2).

<sup>88</sup> Art 110(1)(a).

<sup>89</sup> Art 110(1)(b).

<sup>90</sup> Art 110(1)(c).

<sup>91</sup> Art 10(2) (a).

<sup>92</sup> *Speaker of the Senate* para 187.

ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular.<sup>93</sup>

#### ***4.2.1 Bills containing provisions affecting functions and powers of counties***

In the first category, a Bill concerning county government is 'a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule.'<sup>94</sup> Three important terms in this provision require examination – 'provisions', 'affecting' and 'functions and powers'. The reference to provisions means that the requirement is not for the whole Bill to affect the functions and powers of the county governments. A few provisions or even one provision is sufficient to lead to classification of a Bill as concerning counties, depending on its impact on the county government functions and powers.

'Affecting', on the other hand, refers to the impact the provisions have on the functional areas of county government. The Bill need not be in the functional area of county government; what is important is the impact it has on the functional area. The Bill may be in respect of matters within the national government functional areas, and yet have provisions that indirectly impact on or affect the county functions and powers. Reference to functions and powers means, that effect on any one of the two suffices to classify it as concerning counties since the two are different things.<sup>95</sup>

Thus, the test is not whether or not a Bill falls in a functional area of a county government; rather, it is the impact the provisions of the Bill have on the functions of the county government. First, in settling on this test, it must be appreciated that the purpose of the process is to determine whether or not the Senate should participate in the consideration, debate and approval of the Bill and not whether Parliament is legislating in a concurrent functional area. Second, it is to determine the procedure to be followed depending on whether it is a special or ordinary Bill concerning counties. The issue is not about which government

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<sup>93</sup> *Speaker of the Senate* para 190 (emphasis in the original).

<sup>94</sup> Art 110(1)(a).

<sup>95</sup> See section 2 of Chap 6.

has competence to legislate in which functional area. It must be assumed that the competence of Parliament has been settled, whether concurrent or otherwise. It is about whether the Senate should participate in the Bill in issue.

The South African Constitutional Court considered matters of a similar nature in *Tongoane and others v Minister of Agriculture and Lands Affairs and other*<sup>96</sup> in which the question was whether Parliament had correctly classified a Bill requiring to be enacted following the procedure set out in section 75 or section 76. Section 76 Bills are enacted in a manner that grants the National Council of Provinces a more important role, in contrast to section 75 Bills in which it plays a less important role. Parliament's Joint Tagging Committee had tagged and Parliament processed the Bill in question as a section 75 Bill. In a challenge by the applicants, the Court observed that the tagging test is different from questions of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect the functional areas of the provincial sphere of government and not whether any of its provisions are incidental to its substance.<sup>97</sup> The Court further noted that the test for tagging Bills is informed by the purpose of tagging, which is not to determine the sphere of government that has the competence to legislate on a matter nor to prevent interference in the legislative competence of another sphere of government. Instead, tagging deals with how the Bill should be considered by the provinces and the National Council of Provinces. How a Bill must be considered by the provincial legislatures also depends on whether it affects the provinces.<sup>98</sup> The Court concluded that:

The subject matter of a Bill may lie in one area yet its provisions may have a substantial impact on the interests of the provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification. Therefore the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence.<sup>99</sup>

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<sup>96</sup> (2010) BCLR 741 (*Tongoane*).

<sup>97</sup> See *Tongoane* para 59.

<sup>98</sup> See *Tongoane* para 60.

<sup>99</sup> *Tongoane* para 59.



This approach is applicable in the Kenyan situation in which the purpose of determining whether the Bill concerns counties is whether the Senate should participate in its enactment, and if so, following which procedures. It is not to determine which level of government has competence to legislate. The application of this test requires the consideration of not just the objectives and purposes of the Bill, but also its provisions. The objective of the Bill may have nothing to do with the functions and powers of the county governments, yet if some of its provisions substantially affect the functions and powers of the counties, the Bill concerns counties.<sup>100</sup>

The provision may deal with two different situations. First, it refers to Bills that directly involve both the exclusive and concurrent functional areas of the county governments under the Fourth Schedule. This indeed amounts to what must be regarded as the obvious meaning of the provision. Secondly, it refers to Bills that fall outside the functional areas of county governments but which indirectly affect them. Bills in the exclusive functional areas of the national government can therefore be characterised as Bills concerning counties for as long as they contain provisions affecting the functions and powers of the county governments.<sup>101</sup>

It is submitted that it is indeed in matters falling outside the county functional areas in which the interests of the counties and those of their governments will require more protection through the Senate. In matters within their functional areas, the counties may be able to enact their own preferred legislation, which would enjoy precedence, subject only to the national government override powers provided for by Article 191(2) and (3). As the Court in *Tongoane* observed, '[y]et it is where matters substantially affect them outside their concurrent legislative competence that it is important for their views to be properly heard during the legislative process. The rationale behind section 76 is to protect provinces in legislations outside their functional areas.'<sup>102</sup> This approach is recommended for the Kenyan context, given the fact that the national government's expansive legislative powers may affect county governments even when it legislates in its own functional areas. In addition, the approach may be necessitated by the overlap and interdependence of functional areas.

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<sup>100</sup> See *Tongoane* para 59.

<sup>101</sup> See *Tongoane* paras 69-70.

<sup>102</sup> *Tongoane* para 63. Section 76 provides for a more difficult procedure for passing of bills that concern provinces because the provinces need the support of the NCOP.

#### **4.2.2 Bills relating to election of county governments**

The second category is that of Bills ‘relating to the election of members of a county assembly or a county executive’.<sup>103</sup> ‘Relating’ in this provision refers to having a connection with elections. Like ‘affecting’ in the previous provision, ‘relating’ to election must not be restricted to Bills that directly deal with elections. It includes Bills that are indirectly related to or have a connection with elections. This is a very broad provision that may embody a wide range of Bills. These include Bills dealing with regulation of political parties and how they nominate their candidates for participation in elections to the county assemblies and county executive committees, Bills on financing of elections, and even on the conduct of the elections. In the *Interim Independent Electoral Commission* the Supreme Court addressed this matter for the first time in the context of determining whether or not it had jurisdiction to give an Advisory Opinion in terms of Article 163(6), which grants it jurisdiction to render advisory opinions only ‘with respect to any matter concerning county government’. It found that the determination of the election date was a matter concerning counties. The Court took a generous approach to the interpretation of what concerns county government, informed by the institutional arrangements under the Constitution, particularly the bicameral Parliament under which the Senate brings together and protects county interests at the national level. It also took into account the fact that ‘certain crucial governance functions at both the national and county level – such as finance, budget and planning, public service, land ownership and management, elections, administration of justice – dovetail into each other and operate in unity’.<sup>104</sup> It concluded that:

There is, therefore, in reality, a close connectivity between the functioning of national government and county government: even though the *amicus curiae* Professor Ghai urged that the term ‘county government’ is not defined in the Constitution; and that the expression “county government” should not be too broadly interpreted, we consider that the expression “matters touching on county government” should be so interpreted as to incorporate any national-

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<sup>103</sup> Art 110(1)(b).

<sup>104</sup> *Interim Independent Electoral Commission* para 39.

level process bearing a significant impact on the conduct of county government.<sup>105</sup>

Similarly, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*,<sup>106</sup> the Supreme Court took the broad approach and ruled that it had jurisdiction to give an advisory opinion on the issue of gender representation in the Senate and the National Assembly since the composition of both the National Assembly and the Senate is a matter that concerns county government.

#### **4.2.3 Chapter Twelve Bills affecting finances of county governments**

The third category is of Bills which are ‘referred to in Chapter Twelve affecting the finances of county governments’. Chapter Twelve deals with public finance, and makes provision for a number of matters in respect of which Bills may be brought for enactment into law, which may rightly be referred to as Bills concerning county governments. First, the chapter envisages laws providing for raising revenue by the two levels of government. For example, Article 209(2) envisages that an Act of Parliament may authorise the national government to impose other taxes not mentioned in the Constitution, so long as they are not taxes identified as county exclusive taxes.<sup>107</sup> Secondly, the chapter contemplates the enactment of laws on loan guarantees by national government, which by their nature would involve Bills affecting the finances of the county governments.<sup>108</sup> Thirdly, the chapter provides for enactment of legislation to prescribe the form, content and timing of the budgets of the county governments, which are matters concerning the finances of county governments.<sup>109</sup> Fourthly, the chapter contemplates laws regulating the use of public funds. For example, laws regulating procurement of public goods and services by county governments would involve Bills affecting the finances of county governments.<sup>110</sup> Fifthly, Article 225 requires national legislation to be enacted to provide for both the functions and responsibilities of the national treasury and the ensuring of expenditure controls by both governments. Sixthly, Article 226, on the other hand, requires national legislation to be enacted to provide for the keeping of

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<sup>105</sup> *Interim Independent Electoral Commission* para 40.

<sup>106</sup> [2012] eKLR (*Gender Representation*) paras 20, 21 and 22.

<sup>107</sup> See also Art 209(3)(c).

<sup>108</sup> Art 213.

<sup>109</sup> Art 220(2).

<sup>110</sup> Art 227.

financial records and the auditing of accounts of all the governments. Furthermore, Article 190 envisages national legislation that establishes financial requirements which county governments must comply with in the operation of their financial management system. All these are legislation emanating from Bills concerning counties, the consideration, debate and passage of which must be done by both the Senate and the National Assembly.

More importantly, however, the chapter envisages Bills concerning sharing of revenue raised nationally, which, as discussed in the following sub-sections, are bills affecting the finances but also the functions and powers of the county governments. These are: the passage of the annual vertical Division of Revenue Bill; the determination of the five-year formula for horizontal allocation of revenue among counties; the annual horizontal Allocation of Revenue Bill; the sharing of the Equalisation Fund; the approval of the national government annual Appropriation Bill; and other matters affecting county government finances.

#### **4.2.3.1 The Division of Revenue Bill**

Article 218(1)(a) provides for the Division of Revenue Bill, which equitably divides the revenue raised nationally among the two levels of government. The Bill is required to be introduced in Parliament at least two months before the end of each financial year. The Bill must be introduced in Parliament and not just in one of the two houses of Parliament. This means that the Bill must be processed by each of the two Houses.<sup>111</sup> Furthermore, since this is a Bill to be passed into an Act of Parliament, it must be read within the context of the provisions of Article 96(2) which require that Bills concerning counties be considered, debated and approved by the Senate. A Bill which deals with the equitable sharing of revenue vertically within the meaning of Articles 202 and 203 is a Bill concerning counties in whose consideration, debate and approval the Senate has a role to play.<sup>112</sup> The Division of Revenue Bill should be classified as a Bill concerning counties because of two overlapping elements. First, it is a Bill referred to in Chapter Twelve affecting the finances of county governments,<sup>113</sup> of which Article 218 forms a part. Secondly, the Bill contains provisions affecting the functions and powers of the county governments.<sup>114</sup> In *Speaker of the Senate*, in

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<sup>111</sup> Task Force on Devolved Government (2011) 19.

<sup>112</sup> Task Force on Devolved Government (2011) 19.

<sup>113</sup> Art 110(1)(c).

<sup>114</sup> Art 110(1)(a).

which the issue was whether the Senate has a role in the consideration of the Division of Revenue Bill, the Supreme Court held as follows:

It is quite clear to us that the Division of Revenue Bill is a Bill bearing provisions that deal with the *equitable sharing of revenue* – which will certainly affect the functioning of county government. We have found no justification in the contention that the Division of Revenue Bill deals strictly with “national economic policy and planning” and so, on this account, it is a measure unrelated to county government. The Bill deals *with equitable allocation of funds to the counties*, and so any improper design in its scheme will certainly occasion inability on the part of the county-units to exercise their powers and to discharge their functions as contemplated under the Constitution.

This is a critical test which will require that the Division of Revenue Bill be perceived as ‘a Bill concerning county government’ and, therefore, a subject of the legislative competence of both the National Assembly and the Senate.<sup>115</sup>

A general principle accepted in most non-centralised systems is that the allocation of funds must be informed by the functions each level has to perform.<sup>116</sup> Article 203 sets out criteria for revenue sharing which emphasises the nexus between functional assignment and revenue allocation, with equity being among them. The vertical division of revenue among the national and county levels of government must be equitable and it is part of the business of the Senate to ensure this equity. Indeed, the Supreme Court in *Speaker of the Senate* concluded that:

The Division of Revenue Bill, 2013 was an instrument essential to the due operation of county governments, as contemplated under the Constitution, and so was a matter requiring the Senate’s legislative contribution. Consequently, the Speaker of the National Assembly was under duty to comply with the terms of Articles 110(3), 112 and 113 of the Constitution,

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<sup>115</sup> *Speaker of the Senate* paras 114 and 115 (emphasis in the original).

<sup>116</sup> Watts RL ‘Comparative Conclusions’ in Majeed A, Watts RL & Brown DM (eds) *Distribution of Powers and Responsibilities in Federal Countries* (2006) 332-3.

and should have co-operated with the Speaker of the Senate, as necessary, to engage the mediation forum for resolution of the disagreement.<sup>117</sup>

The second question is whether the Division of Revenue Bill is a special or ordinary Bill concerning counties. As will emerge later, this is obviously an ordinary Bill.

#### **4.2.3.2 The Allocation of Revenue Bill**

Article 218 also provides for the County Allocation of Revenue Bill, which is required to be introduced in Parliament at least two months before the end of each financial year. Bills which deal with the equitable horizontal sharing of revenue within the meaning of Articles 202 and 203 are obviously Bills that affect the functions of county governments and therefore Bills concerning counties requiring the approval the Senate.<sup>118</sup> Furthermore, the Allocation of Revenue Bill is a Bill which Article 110 includes among Bills referred to in Chapter Twelve affecting the finances of county governments, of which Article 218 forms apart.<sup>119</sup>

#### **4.2.3.3 The Equalisation Fund**

The Senate plays a role in matters relating to the equalisation fund established under Article 204(1). The fund's purpose is to deal with a deficit of certain infrastructure in marginalised areas.<sup>120</sup> The Constitution prescribes that the use of money out of the fund must be in accordance with an Appropriation Bill approved by Parliament.<sup>121</sup> Approval of such Appropriation Bill by Parliament may only be undertaken after the Commission on Revenue Allocation has been consulted and its recommendations considered.<sup>122</sup> It is instructive to note that the provision requires that the appropriation be approved by Parliament, of which the Senate is a part.

Moreover, the Appropriation Bill providing for the expenditure of money in the equalisation fund is a Bill not only affecting the finances of the county governments but also concerning counties as envisaged in Article 110 of the Constitution, in which the Senate must play a role.

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<sup>117</sup> *Speaker of the Senate* para 147.

<sup>118</sup> Task Force on Devolved Government (2011) 19.

<sup>119</sup> Committee of Experts on Constitutional Review (2010) 128 where the CoE makes it clear that this is a Bill in which the Senate plays a role.

<sup>120</sup> Art 204(2).

<sup>121</sup> Art 204(3).

<sup>122</sup> Art 204(4).

In addition, Article 204 establishes the equalisation fund to last for a period of twenty years. However, such a period could be extended by Parliament if it passes legislation to that effect.<sup>123</sup> The Senate plays a role in the enactment of this legislation since the Constitution expressly requires that the legislation be supported by ‘more than half of all the county delegations in the Senate’.<sup>124</sup>

#### **4.2.3.4 The national government Appropriation Bill**

The Budget estimates and annual Appropriation Bill of the national government as provided for by Article 221 raises serious issues regarding whether it requires consideration, debate and approval by the Senate. While a plain reading of this provision may lead to an initial conclusion that the Appropriation Bill is an exclusive function of the National Assembly, a closer scrutiny of the provisions yields a different result. First, the provision in part prescribes that the estimates for expenditure referred to in the provision ‘shall include estimates for expenditure from the Equalisation Fund.’<sup>125</sup> From the perspective discussed above in which Article 204 requires that expenditure of the money in the equalisation fund be in accordance with an Appropriation Bill approved by Parliament, the inclusion of expenditure from the equalisation fund in national government budget estimates and Appropriation calls for participation of the Senate.

Secondly, the provision in part also prescribes that the appropriation estimates must be passed ‘together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary’. If the Senate does not get sufficient resources to discharge its functions, the functions of the county governments would be affected.

Thirdly, as already noted, Bills relating to the Independent Electoral and Boundaries Commission and political parties are bills concerning counties since they relate to the election of members of county assemblies and county executives. The IEBC is mandated to conduct ‘continuous registration of citizens as voters’,<sup>126</sup> and to conduct elections, including any by-elections that may become necessary whenever any vacancy arises.<sup>127</sup> For these purposes, annual allocations to the IEBC through the national government Appropriation Bill must be

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<sup>123</sup> Art 204(7).

<sup>124</sup> Art 204(8).

<sup>125</sup> Art 221(2)(a).

<sup>126</sup> Art 82(1)(c).

<sup>127</sup> Art 82(1)(d).

made, which makes it a Bill concerning counties. Article 92 provides for ‘the establishment and management of a political parties fund’;<sup>128</sup> the rendering of ‘accounts and audit of political parties’;<sup>129</sup> and ‘restriction on the use of public resources to promote the interests of political parties’.<sup>130</sup> These provisions necessitate annual appropriations to political parties through the national Appropriation Bill, which makes it a Bill concerning counties.

#### **4.2.3.5 Determining the five-year formula**

The Senate has a controlling role in the allocation of the county share of revenue raised nationally among the 47 counties. The Constitution explicitly provides that the Senate ‘determines the allocation of national revenue among counties, as provided in article 217’.<sup>131</sup> At first glance and read alone, this Article gives an impression that it is about the annual allocation of revenue among counties. However, when read with Article 217, it emerges that the provision deals with the role of the Senate in the determination of the five-year formula<sup>132</sup> for the allocation of revenue among counties.<sup>133</sup>

Article 217 only deals with the determination of the five-year formula for the sharing of revenue among the counties for that period.<sup>134</sup> It does not deal with annual division of revenue and annual allocation of revenue, but does not exclude the Senate from playing a role in the annual vertical division and horizontal allocation of revenue. Article 96(3) read with Article 217 therefore only confers controlling powers and functions on the Senate to determine the five-year and or three-year formula.<sup>135</sup> This power of the Senate is provided for separately by Article 96(3) and not as a Bill concerning counties under Article 96(2). However, although the formula is passed as a resolution and not a Bill, Article 217 provides for the resolution in a manner that makes it look like a Bill and gives it binding effect as a

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<sup>128</sup> Art 92(f).

<sup>129</sup> Art 92(g).

<sup>130</sup> Art 92(h).

<sup>131</sup> Art 96(3).

<sup>132</sup> Section 16, Sixth Schedule provides for a transition three year formula for the first and second determinations.

<sup>133</sup> Task Force on Devolved Government (2011) 18.

<sup>134</sup> Art 217(1).

<sup>135</sup> Task Force on Devolved Government (2011) 18.



law. The matter is thus discussed among Bills concerning counties to avoid its being confused with the role of the Senate in the annual division and allocation of revenue.<sup>136</sup>

### **4.3 Types of procedures for processing Bills concerning counties**

Once a Bill has been classified as concerning counties, it must also be determined whether it is a special or an ordinary bill concerning counties,<sup>137</sup> as different procedures apply to the two categories.

#### ***4.3.1 Ordinary Bills concerning counties***

Ordinary Bills concerning counties are negatively defined as all other Bills concerning counties which are not special Bills.<sup>138</sup> These would include Bills containing provisions that affect the powers and functions of county governments but which do not in any way relate to the election of county assembly and executive members. They also do not include the Allocation of Revenue Bill. This means that all other Bills dealing with finances which concern counties are ordinary bills.

Where one Chamber passes the Bill but the other rejects it, the Bill must be referred to a mediation committee appointed under Article 113.<sup>139</sup> On the other hand, where either House passes the Bill but the other passes it in an amended form, the Bill must be referred to the originating House for reconsideration.<sup>140</sup> In the event that such reconsideration results in the passage of the Bill as amended, the Speaker of that House is obligated, within seven days, to refer the Bill to the President for assent.<sup>141</sup> However, where the reconsideration results in a rejection of the Bill as amended the Bill is referred to a mediation committee.<sup>142</sup>

The mediation committee consisting of an equal number of members from each House is to be appointed by the Speakers of the two Houses.<sup>143</sup> The mandate of the committee is to

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<sup>136</sup> See Task Force on Devolved Government (2011) 18.

<sup>137</sup> *Speaker of the Senate* para 141. See also Art 110(3).

<sup>138</sup> Art 110(2)(b).

<sup>139</sup> Art 112(1)(a).

<sup>140</sup> Art 112(1)(b).

<sup>141</sup> Art 112(2)(a).

<sup>142</sup> Art 112(2)(b).

<sup>143</sup> Art 113(1).

negotiate and develop a version of the Bill acceptable to both Houses.<sup>144</sup> Upon the mediation committee agreeing on a version of the Bill, each House votes to approve or reject it.<sup>145</sup> Where the two Houses approve the mediated version of the Bill the Speaker of the National Assembly is required to refer the Bill to the president within seven days for assent.<sup>146</sup> Where, however, the committee fails to agree on a version of the Bill within thirty days, or where an agreed version is rejected by either House, the Bill is defeated.<sup>147</sup> What emerges from these provisions is that in the case of ordinary Bills concerning counties, either House can override or veto the other without the requirement of a special majority vote. The Senate can override the National Assembly. This flows out of the provision that once a mediated Bill is rejected by either House, it is defeated.<sup>148</sup> The Senate needs only a simple majority of the 47 delegation votes to reject a mediated Bill.

#### ***4.3.2 Special Bills concerning counties***

A special Bill concerning counties is a Bill which ‘relates to the election of members of a county assembly or a county executive,’<sup>149</sup> and an ‘annual County Allocation of Revenue Bill referred to in Article 218’.<sup>150</sup> The determination of what constitutes a Bill relating to the election to county assembly and county executive should be done in the same manner as determining Bills concerning counties. This entails looking at the provisions of the Bill, a process that must not be restricted to examining the object and purpose of the Bill only. For this purpose the national government budget, which votes money for the conduct of elections, should be regarded as a special Bill relating to the elections as envisaged by the provisions. Similarly, a Bill on political parties must be interpreted as a Bill relating to the election of the assembly members and members of the county executive. In addition, a Bill on the Independent Electoral and Boundaries Commission is a Bill concerning counties.

The approval of a special Bill follows a combination of the procedure followed for passing ordinary Bills set out in Article 112, with additional special rules of procedure set out in

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<sup>144</sup> Art 113(1).

<sup>145</sup> Art 113(2).

<sup>146</sup> Art 113(3).

<sup>147</sup> Art 113(4).

<sup>148</sup> Art 113(4).

<sup>149</sup> Art 110(2)(a)(i).

<sup>150</sup> Art 110(2)(a)(ii).

Article 111. The special rules serve to alter some of the rules used for ordinary Bills. While the National Assembly does not need a special majority to amend an ordinary Bill which in the first instance has been passed by the Senate, it requires at least two-thirds of the members of the assembly to amend or veto a special Bill that has been passed by the Senate.<sup>151</sup> Where the National Assembly seeks to amend or veto a special Bill passed by the Senate but fails to secure the required majority, the Speaker of the National Assembly is obligated within seven days to refer the Bill in the form passed by the Senate to the President for assent.<sup>152</sup> This means that the mediation procedure required for ordinary Bills would not be required in these circumstances.

Where a special Bill concerning county governments is first introduced in the National Assembly and is passed, the Senate can reject or pass it either in the same form or with amendments by a simple majority of the delegation votes.<sup>153</sup> If the Senate rejects the Bill then it is referred to the mediation committee.<sup>154</sup> If the Senate amends the Bill it goes back to the National Assembly<sup>155</sup> which can only change or reject it if it musters two-thirds majority among its members.<sup>156</sup> Where a special Bill concerning county governments is first introduced in the Senate and passed by a simple majority of the delegation votes, the National Assembly can only amend or veto it by a two-thirds majority of its members. If the National Assembly musters the two-thirds majority and amends it, the Bill goes back to the Senate for reconsideration. If the Senate passes it as amended, it goes to the President for assent.<sup>157</sup> However, if the Senate rejects it, the Bill goes to the mediation committee.<sup>158</sup>

The main difference between these two types of Bills is that while with ordinary Bills each House can veto the other with a simple majority, with special Bills, the National Assembly requires a two-thirds majority to veto the Senate. This puts the Senate in a very strong position where special Bills concerning counties are first introduced and passed in the Senate. Failure to muster such a majority would lead to the Bill as passed by the Senate to go to the

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<sup>151</sup> Art 111(2).

<sup>152</sup> Art 111(3).

<sup>153</sup> Art 112(1)(a) and (b).

<sup>154</sup> Art 112(1)(a).

<sup>155</sup> Art 112(1)(b).

<sup>156</sup> Art 111(2).

<sup>157</sup> Art 112(2)(a).

<sup>158</sup> Art 112(2)(b).

President for signing into law. In terms of Article 109(4) and (5), all Bills concerning county government may originate in any of the two Houses of Parliament, unless it is a money Bill as defined in Article 114(3), which can only be introduced in the National Assembly.

#### **4.4. Process of determining Bills concerning counties**

Article 110(3) provides for the process of determining whether a Bill concerns counties or not and, if so, whether it is an ordinary or special Bill, in the following manner: ‘Before either House considers a Bill, the Speakers of the National Assembly and the Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill’. The provision caters for who determines, what is determined, and the timing of the determination.

##### **4.4.1 Who determines**

The two Speakers bear the responsibility for making these determinations jointly. This precludes unilateral exercise of this power by any of the Speakers as the exclusion of the other would ‘inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions’.<sup>159</sup> Article 110 read as a whole imposes upon the two Speakers an obligation to consult, coordinate and work in harmony to arrive at a decision in these matters.<sup>160</sup> The Supreme Court in *Speaker of the Senate* affirmed the process to be followed:

As Mr. Nowrojee submitted, the requirement for a joint resolution of the question whether a Bill is one concerning counties, is a mandatory one; and the legislative path is well laid out: it starts with a determination of the question by *either Speaker* – depending on the origin of the Bill; such a determination is communicated to *the other Speaker*, with a view to obtaining concurrence; failing a concurrence, *the two Speakers are to jointly resolve the question*. Both sets of Standing Orders are crystal clear on this scenario, and both, on this point, as we find, faithfully reflect the terms of the Constitution itself.<sup>161</sup>

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<sup>159</sup> *Speaker of the Senate* para 142 and 143.

<sup>160</sup> *Speaker of the Senate* para 125.

<sup>161</sup> *Speaker of the Senate* para 130 (emphasis in the original).

In what the Court described as the filtering role of the Senate, the Court emphasised that this process must be followed in respect of all the Bills coming before either Chamber of Parliament. It added that it is the constitutional task of the two Speakers to jointly determine the route the Bill must follow in the legislative process. Where the two Speakers determine that a Bill is not concerning county government, then in terms of Article 109(3), such Bill is rightly considered and passed exclusively by the National Assembly.<sup>162</sup> Since in terms of Article 94(1) the legislative authority is vested in Parliament and not just in any one of the two Houses of Parliament, it is submitted that it is only in this manner that a Bill considered and passed exclusively by the National Assembly can be said to have been enacted by Parliament. The Court concluded thus:

The emerging, broader principle is that both Chambers have been entrusted with the people's public task, and the Senate, even when it has not deliberated upon a Bill at all the relevant stages, has spoken through its Speaker at the beginning, and recorded its perception that a particular Bill rightly falls in one category, rather than the other. In such a case, the Senate's initial filtering role, in our opinion, falls well within the design and purpose of the Constitution, and expresses the sovereign intent of the people: this cannot be taken away by either Chamber or either Speaker thereof.<sup>163</sup>

The essence of this is that the filtering process is a key mandatory element of the manner and former of enactment of all Bills that come to Parliament, without which a law would be invalidated. The test is whether the two Speakers considered the Bill and agreed on what type of Bill it is before the other legislative processes were undertaken.

#### ***4.4.2 Timing and what is determined***

The provision prescribes that the process must be undertaken upfront before either House considers any Bill. As the Supreme Court noted, 'the business of considering and passing of any Bill [can] not be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: *What is the*

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<sup>162</sup> *Speaker of the Senate* para 131.

<sup>163</sup> *Speaker of the Senate* para 131.

*nature of the Bill in question?*<sup>164</sup> Any House that embarks on the consideration of any Bill before it goes through this process would be acting unconstitutionally and in futility.

Article 110(3) identifies two things to be determined – whether or not a Bill concerns counties, and if the Bill concerns counties, whether or not it is a special or an ordinary Bill. As already discussed,<sup>165</sup> the determination is done by examining all the provisions of the Bill as well as the objectives and purposes in order to establish whether they substantially impact upon or affect the functions and powers of the county governments.

Despite the Court's view that the legislative path is well laid out, it is submitted that these provisions do not exhaustively provide for the manner in which the Speakers are to exercise this power and discharge the responsibility. A number of interpretation questions remain. Should the exercise of these powers be structured either by legislation or parliamentary rules of procedure? What if the two Speakers disagree on the classification of a Bill? What if the members of either of the two Houses disagree with the decision of the Speakers regarding the classification of the Bill? Is the exercise of these powers justiciable? If the Speakers disagree, either of them can approach the Supreme Court for an advisory opinion. If the Members of Parliament disagree with the decision of the two Speakers, they have no recourse since the Constitution explicitly vests the responsibility in the Speakers. The decision of the Speakers is however reviewable on the grounds of failure to observe the prescribed manner and form of the legislative process.

#### **4.4.3 The consequences of following the wrong procedure**

If the decision of the Speakers is wrong and Parliament follows the wrong procedure, then the lawfulness of the resultant Act can be challenged in Court as the manner and form of the legislative process were not followed.

##### **4.4.3.1 Manner and form required by the Constitution**

If Parliament operates outside or in disregard of the manner and form prescribed by the Constitution for legislating, it cannot be heard to say that the courts are interfering in the internal procedures and processes of the legislature. The Supreme Court in *Speaker of the Senate* held that Kenya's legislative bodies have an obligation to discharge their mandate in

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<sup>164</sup> *Speaker of the Senate* para 141(emphasis in the original).

<sup>165</sup> See section 3.2.1 above.

accordance with the terms and procedures set out by the Constitution. It noted that '[w]here the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution.'<sup>166</sup> Non-compliance with procedural requirements is therefore justiciable in the courts.

It is not only the Supreme Court's jurisdiction which includes the power to resolve 'questions touching on the mode of discharge of the legislative mandate', but even the other 'Courts have competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation'.<sup>167</sup> In *Okiya Omtatah Okoiti and others v Attorney-General and others*<sup>168</sup> the High Court had occasion to also address this matter. It sought to uphold the principle of non-interference in the internal work of Parliament but only if Parliament acts within the confines of the Constitution.

In passing the Constitution, Kenyans gave the responsibility of making laws to Parliament. The decision of the people must be respected, so that this Court can only interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution. To agree with the National Assembly that this Court cannot interrogate its work will amount to saying that the National Assembly can fly beyond the reach of the radar of the Constitution. That is a proposition we do not agree with. Our view is that all organs created by the Constitution must live by the edict of the Constitution. Indeed, Parliament is commanded by Article 94(4) of the Constitution to protect the Constitution and promote democratic governance in the Republic of Kenya.<sup>169</sup>

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<sup>166</sup> *Speaker of the Senate* para 62.

<sup>167</sup> *Speaker of the Senate* paras 54 and 55.

<sup>168</sup> [2014] eKLR (*Okiya Omtatah*).

<sup>169</sup> *Okiya Omtatah* at para 54. See also the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others* [2013] eKLR para 49, where it held that 'separation of powers does not only proscribe organs of government from interfering with the other's functions', but 'also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government'.

Separation of powers does not therefore arise in cases of manner and form of the legislative process required by the Constitution. The Supreme Court arrived at this position after an extensive survey of comparative experiences in a number of countries such as Zimbabwe,<sup>170</sup> Canada<sup>171</sup> and South Africa.<sup>172</sup>

The South African Constitutional Court held that ‘legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid.’<sup>173</sup> In *Tongoane* the Court concluded that it has not only a right but also a duty to ensure compliance with the prescribed law-making procedures and can declare invalid any legislation enacted without observing such procedures.<sup>174</sup> The Court explained this approach noting that it is ‘deeply rooted in the supremacy of [the] Constitution.’<sup>175</sup> It then concluded that ‘enacting legislation that affects provinces in accordance with the procedure prescribed ... is a material part of the law-making process relating to legislation that substantially affects the provinces.’<sup>176</sup>




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<sup>170</sup> *Speaker of the Senate* para 56 where the case of *Biti and Another v Minister of Justice, Legal and Parliamentary Affairs and Another* (46/02) (2002) ZWSC 10 was considered. In this case legislation was challenged for unconstitutionality on grounds that it had been enacted irregularly in breach of both the Standing orders and the Constitution of Zimbabwe. The Court held that ‘in a constitutional democracy it is the courts, not Parliament, that determines the lawfulness of actions of bodies, including Parliament’.

<sup>171</sup> *Speaker of the Senate* para 57 where the case of *Amax Potash Ltd v Government of Saskatchewan* [1977] 2 SCR 576 at 590 was considered and the following words quoted with approval: ‘A state, it is said, is sovereign and it is not for the courts to pass upon the policy or wisdom of legislative will. As a broad general statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the Constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.’

<sup>172</sup> *Speaker of the Senate* para 59 where the South African case of *Doctors for Life International v The Speaker of the National Assembly and others* (2006) 12 BCLR 1399 (CC) was considered.

<sup>173</sup> *Doctors for Life International v The Speaker of the National Assembly and others* (2006) 12 BCLR 1399 (CC) para 208.

<sup>174</sup> *Tongoane* para 106.

<sup>175</sup> *Tongoane* para 107.

<sup>176</sup> *Tongoane* para 109.



The High Court of Kenya in *Judicial Service Commission* also emphatically concluded that ‘it is not a violation of the doctrine of separation of powers for the Court to issue orders restraining acts of the legislature that were alleged to be in violation of the Constitution’.<sup>177</sup>

Where the constitutional manner and form is supplemented by parliamentary rules of procedure such as the Standing Orders, such Standing Orders must be consistent with the Constitution. Parliament cannot through its Standing Orders abrogate or ignore the manner and form required by the Constitution. In terms of the supremacy clause, Standing Orders are ‘any law’ that must be consistent with the Constitution.<sup>178</sup> Parliament’s Standing Orders must be limited to rules ‘for the orderly conduct of its proceedings’<sup>179</sup> and not be used to breach the constitutional rights or to ignore constitutional provisions and requirements.<sup>180</sup> Neither can they be used to confer on Parliament or its committees powers which the Constitution does not confer on it or envisage.<sup>181</sup> Finally, a failure to make the Standing Orders or making them in an incomplete manner that leaves a lacuna that frustrates the realisation of constitutional provisions and rights would be unconstitutional,<sup>182</sup> since Article 124(1) is presented in peremptory terms that impose an obligation to make rules.

#### **4.4.3.2 Timing of challenges to manner and form**

Once it is established that Courts have jurisdiction to question the manner and form of the legislative process, the next issue concerns when a challenge can be mounted in respect of such issues. While citizens can challenge any law once it is enacted on grounds of its constitutionality, the general rule is that they cannot challenge the legislative process until it is completed.<sup>183</sup> But there are exceptions where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law.<sup>184</sup> The Supreme Court in

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<sup>177</sup> *Judicial Service Commission* para 173.

<sup>178</sup> Art 2(4).

<sup>179</sup> Art 124(1).

<sup>180</sup> *Lindiwe Mazibuko v Speaker of the National assembly and another* 2013 (11) BCLR 1297 (CC) (Mazibuko) paras 47, 60 and 66.

<sup>181</sup> *Judicial Service Commission* para 162.

<sup>182</sup> See *Mazibuko* paras 61 and 62.

<sup>183</sup> Bishop and Raboshackga (2004) ch 17, 33.

<sup>184</sup> For instance, where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object, the courts will intervene even before the legislative process is completed.

*Speaker of the Senate* acknowledged that the Court can be seized of the matter even before the legislative process is completed and noted that each case must be decided on the merits of its own facts.

It makes practical sense that the scope for the Court's intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; [and] the risk that may attend a possible violation of the Constitution.<sup>185</sup>

Similarly, in *Judicial Service Commission* the High Court held 'that there are exceptional circumstances in which Courts may interfere with Parliament's exercise of its powers where the latter acts in breach of the Constitution'.<sup>186</sup> According to the Court, '[t]his would include, for instance, where Parliament enacts a law that is contrary to the Constitution'.<sup>187</sup>

Thus, the conclusion is that although the Courts would be reluctant to entertain a challenge before the legislative process is completed, in a few exceptional circumstances, they would intervene. Chief Justice Langa identified exceptional circumstances justifying intervention thus: 'Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible.'<sup>188</sup> If excluded from participation in the legislative process, the Senate itself or members of public can take up the matter with the Courts.

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<sup>185</sup> *Speaker of the Senate* para 60.

<sup>186</sup> *Judicial Service Commission* para 119.

<sup>187</sup> *Judicial Service Commission* para 119. See also *Doctors for Life* para 69, where the South African Constitutional Court noted that the basic position is that where the flaw in the law-making process will result in an invalid law, it is appropriate to wait for the completion of the legislative process before declaring the resulting law unconstitutional and invalid. At paragraph 57, Justice Ngcobo, however, recognised exceptions stating that 'intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object'.

<sup>188</sup> *Glenister v President of the Republic of South Africa & others* 2009 (2) BCLR 136 (CC) para 43.

#### 4.5 Obligation to facilitate public participation and involvement

In the discharge of its legislative and other functions, the Senate is under a constitutional obligation to facilitate public participation and involvement. Article 118(1)(b) explicitly requires Parliament to ‘facilitate public participation and involvement in the legislative and other business of Parliament and its committees’. The rules discussed in respect of the obligation on the part of the county assemblies<sup>189</sup> apply in a similar manner to the Senate. However, the Senate’s obligation includes the duty to facilitate participation of the county governments. This is because in terms of Article 96(1), the Senate represents and serves to protect the county governments and their interests. Failure to fulfil this obligation will lead to the same consequences that arise in failure of manner and form of the legislative process, since facilitation of public participation and involvement is an important part of the legislative process.

#### 5 The oversight functions of the Senate

The Constitution expressly and by implication mandates the Senate to exercise oversight and scrutiny over the national government and, to a limited extent, county governments. As a legislative body, the Senate like the National Assembly has parliamentary oversight powers. Corder et al defined oversight thus:

Oversight refers to the crucial role of legislatures in monitoring and reviewing the actions of the executive organs of government. The term refers to a large number of activities carried out by legislatures in relation to the executive. In other words oversight traverses a far wider range of activity than does the concept of accountability.<sup>190</sup>

In a constitutional context, Parliament’s oversight function flows from the concept of separation of powers and responsible government. It is a corollary of law-making power and entails the monitoring of the implementation of such legislation by the executive.<sup>191</sup> In *Judicial Service Commission*, the High Court referred to and adopted the above definition of oversight noting, however, that such ‘monitoring does not entail controlling, giving instructions or micro managing, but checking regularly the progress or development [of a

<sup>189</sup> See Chap 5 section 5.6.4.

<sup>190</sup> Corder H, Janganth S and Soltau F *Report on Parliamentary Oversight and Accountability* (1999) 1.

<sup>191</sup> Corder et al 2.

subject]'.<sup>192</sup> The Court emphasised that '[p]arliamentary oversight encompasses the review, monitoring and supervision of government and public agencies including the implementation of policy and legislation'.<sup>193</sup>

Although Article 96(3) and (4) refer to oversight by the Senate only in respect of 'national revenue allocated to county governments', and 'considering and determining any resolution to remove the President or Deputy President from office', it is submitted that various constitutional provisions imply oversight powers on the part of the Senate in various other circumstances.<sup>194</sup> Two basic forms of the Senate's oversight can be identified: strong form oversight and weak form oversight.

### **5.1 Strong form oversight**

This form of oversight involves intervention and oversight by the Senate in which it can make binding decisions. This form of oversight has two variants, namely: where the Senate can make binding removal decisions and where the Senate can merely review the decisions of national or county government.

#### **5.1.1 Removal oversight**

In this form of oversight, the Senate can make removal decisions that have finality. First, the Constitution confers upon the Senate a very important role in the process of determining impeachment proceedings against both the President and the Deputy President as part of its role in the oversight of state officers.<sup>195</sup> It provides for impeachment of the President as a political process. The National Assembly votes to determine whether impeachment charges should be brought against the President or the Deputy President, while the Senate tries the case and votes to determine whether the charges have been proved. The impeachment can only be instituted and proved on one of three grounds: gross violation of a provision of the

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<sup>192</sup> *Judicial Service Commission* para 179.

<sup>193</sup> *Judicial Service Commission* para 180 quoting Hironori Yamamoto *Parliamentary Oversight: A Comparative Study of 88 Parliaments*.

<sup>194</sup> See Corder et al (1999), 2 discussing the oversight powers of the South African National Council of Provinces.

<sup>195</sup> Art 96(4).

Constitution or any other law; serious reasons to believe that the President has committed a crime under national or international law; or gross misconduct.<sup>196</sup>

Consistent with the US Presidential system, Article 145(2) requires that after a motion for the removal of the President from office has been passed by the National Assembly, the matter is referred to the Senate for trial. In such circumstances, the Senate appoints a special committee of its members to investigate the matter and report back to the full house.<sup>197</sup> If the special committee reports that the allegations against the President have been substantiated, the full house, after according the President an opportunity to be heard, takes a vote on the impeachment charges<sup>198</sup> and may remove the President from office if it secures at least two-thirds of all its members.<sup>199</sup> The decision of the Senate is binding since Article 145(7) provides that in the event of such vote ‘the President shall cease to hold office’. The Deputy President can also be impeached following the same procedures for the impeachment of the President.<sup>200</sup>

Secondly, as discussed in Chapter Five, the Constitution read together with the County Governments Act confers upon the Senate a role in the removal of a county governor from office. It can receive from the county assembly, a recommendation for removal of a governor, consider it and make a binding removal decision.<sup>201</sup>

Thirdly and related to removals is the role of the Senate in the approval of the appointment of the Inspector General of police. In terms of Article 245(2)(a), the Inspector-General of the National Police Service ‘is appointed by the President with the approval of Parliament’.<sup>202</sup> It is submitted that where the Constitution explicitly refers to Parliament, it means both the

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<sup>196</sup> Art 145(1).

<sup>197</sup> Art 145(3).

<sup>198</sup> Art 145(6).

<sup>199</sup> Art 145(7).

<sup>200</sup> Art 150.

<sup>201</sup> See Chap 5, section 6.2.3.

<sup>202</sup> This should be contrasted with many other cases such as the appointment of Cabinet Secretaries under Article 152(2); Principal Secretaries under Article 154(2); the Chief Justice and his Deputy under Article 166(1)(a); the Attorney-General under Article 156(2); the Director of Public Prosecutions under Article 157(2); the Controller of Budget under Article 228(1); the Auditor-General under Article 229(1); and Chairpersons of Commissions which the Constitution explicitly provides must be with the approval of the National Assembly.

National Assembly and the Senate. This provision should thus be understood as conferring approval functions on both the National Assembly and the Senate.

### **5.1.2 Review of national government intervention**

This form of oversight arises in cases where one level of government intervenes in the affairs of the other in a manner that may affect its integrity.<sup>203</sup> The Constitution confers on national government some limited supervision and intervention powers, which may be abused.<sup>204</sup> Aware of this risk the constitution-framers conferred upon the Senate oversight powers to check and countervail the national government in protection of the county governments. Whereas the Constitution envisages situations under which the national government may be required to intervene in the affairs of the county government,<sup>205</sup> it also requires legislation to be made to provide for a process through which the Senate may terminate the intervention by the national government.<sup>206</sup> Similarly, Article 192, which empowers the President to suspend a county government, also stipulates that such suspension cannot take effect unless the Senate has authorised it.<sup>207</sup> And even when it is authorised and it has taken effect, the Senate may terminate the suspension at any time.<sup>208</sup> Finally, in cases of stoppage of transfer of funds to counties, the decision to stop such transfer of funds may not be enforced immediately, unless approved by a resolution of Parliament passed by both Houses. If not approved within thirty days, the decision lapses retrospectively.<sup>209</sup>

### **5.2 Weak form oversight**

This form of oversight only enables the Senate to engage in debate or dialogue with the national government or county government. The Senate does not have any coercive powers to enforce its decisions against non-compliant national and county government officials and administrators. Three types of weak form oversight can be identified: oversight over national government, intergovernmental relations oversight, and oversight over national revenue allocated to county governments.

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<sup>203</sup> See Corder et al (1999) 13.

<sup>204</sup> Murray & Simeon (1999) 103.

<sup>205</sup> Art 190(3).

<sup>206</sup> Art 190(5)(d). See further Chap 8 section 3.4.5.

<sup>207</sup> Art 192(2).

<sup>208</sup> Art 192(4). See further Chap 8 section 4.3.3.

<sup>209</sup> Art 225(5). See further Chap 8 section 5.2.3.

### **5.2.1 Senate's oversight over national government**

Legislative bodies have general oversight functions which entail 'pro-active interaction initiated by a legislature with the executive and administration or other organs of state' aimed at encouraging compliance with constitutional obligations.<sup>210</sup> Thus, implied in the legislative function of the Senate is the oversight power to monitor the implementation of that legislation and review any subordinate legislation made pursuant to it.

This oversight is in respect of the national level of government and is limited to matters concerning county governments or matters which impact on county government.<sup>211</sup> In exercising this limited oversight the Senate must respect the oversight roles of both the county assemblies and the National Assembly. While discussing similar matters in respect of South Africa's National Council of Provinces (NCOP), the equivalent of Kenya's Senate, Corder et al correctly observe that:

Thus, the NCOP is not to oversee all of national government; it is to exercise oversight over the national aspects of provincial and local government. Its goal in doing this is to contribute to effective government by ensuring that provincial and local government concerns are recognised in national policy making, and that provincial, local, and national governments work effectively together. In this way the NCOP needs to respect the oversight roles of both the provincial legislatures and the National Assembly. A provincial legislature must conduct oversight of the provincial executive. This will include oversight of programmes contained in national legislation that the provincial executive is expected to implement and for which the province receives national funding. The National Assembly is primarily responsible for overseeing the national executive. However, neither provincial legislatures nor the National Assembly are in a position easily to identify and act upon problems with those national policies that are implemented by provincial executives. The NCOP is uniquely situated to fulfill this role.<sup>212</sup>

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<sup>210</sup> See Corder et al (1999) 12.

<sup>211</sup> See Corder et al (1999) 12 discussing the limited role of the South African NCOP.

<sup>212</sup> Corder et al (1999) 13.

It is submitted that Kenya's Senate, which is obligated to consult with county governments, is uniquely situated to play this oversight role and where necessary initiate legislative amendments to such national legislation being implemented by county governments.

Moreover, in a situation where several counties experience the same or similar problems with the implementation of national policy or legislation, it will not be possible for the relevant county assemblies exercising oversight and acting separately to resolve the problem.<sup>213</sup> Such matters would best be dealt with by the Senate, which can consult all the counties, appreciate the magnitude of the problem and take realistic remedial measures. An appropriate solution that is compatible with the needs of all the counties can then be devised. The Senate can also provide a forum through which the counties can then engage the national executive on the issue.

### ***5.2.2 Intergovernmental relations oversight***

The constitutional role of the Senate to represent and protect counties and their governments as well as their interests and those of their governments makes it a critical institution for intergovernmental relations. The Senate provides a bridge between counties and the national government, thereby contributing to the realisation of the constitutional commitment to co-operative government. Implied in this constitutional mandate is the Senate's oversight role in monitoring the effectiveness of the intergovernmental relations mechanisms in any field. It must exercise oversight over the general structure and procedures of intergovernmental relations. Corder et al rationalise this in the context of the South African National Council of Provinces, on grounds that 'intergovernmental executive bodies should be subject to the oversight of the legislative body that reflects the multi-level governance' system.<sup>214</sup>

### ***5.2.3 Oversight over national revenue allocated to county governments***

Article 96(3) provides that the Senate 'exercises oversight over national revenue allocated to county government'. Although this provision confers oversight powers upon the Senate, the nature and extent of these powers seem unclear and elusive. Is 'county government' limited to the county executive or does it include oversight over the county assembly? The notion of oversight is generally used in horizontal relations between the legislative and executive branches of government. In vertical relations, the terms often used are supervision and

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<sup>213</sup> See Corder et al (1999) 13.

<sup>214</sup> Corder et al (1999) 13.



intervention. Indeed, the Constitution has various provisions which empower national government to intervene in county government affairs. Thus, the Senate's oversight powers cannot encompass oversight over the county assembly. The county assembly is a legislative arm which should be allowed to exercise the legislative autonomy of the county government, subject only to the Constitution and national legislative norms and standards envisaged by the Constitution. This then limits the Senate to oversight over the county executive. Even then, the nature and extent can only be established if the provision is read in the context of other provisions, some of which confer similar powers on other organs of state. First, Article 226(2), for instance, explicitly provides: 'The accounting officer of a national public entity is accountable to the National Assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.'

This provision not only confers oversight powers in financial matters upon the county assembly, but also underscores the distinct nature of the two levels of government and the vertical separation of powers between them. Under this provision, the National Assembly can invite Cabinet Secretaries to account for poor performance of administrative organs or offices of the national government. Likewise, the county assembly can invite the governor or the county executive committee members to account for poor performance of the administrative organs or offices of the county government. Read together with Article 181, this provision forms the basis for the role of the county assembly in the process of the removal of the governor and the members of the county executive committee from office.

The provision appears to conflict with the oversight powers of the Senate under Article 96(3), making them seem doubtful. In *International Legal Consultancy Group v The Senate and another*,<sup>215</sup> the Senate's action of summoning nine County Governors and their County Executive Committee members responsible for finance to appear before it and produce various documents pertaining to the financial management within their respective counties, was challenged. Justice Mumbi Ngugi of the High Court, in an interlocutory ruling made ex parte after the Senate failed to appear even after being served, referred to the provisions of Article 226(2) and stated the following:

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<sup>215</sup> [2014] eKLR (*International Legal Consultancy Group*).

The Court appreciates that the Senate has an important role to play in the implementation of the Constitution, particularly so with regard to devolved government. However, just like all other state organs, it is bound by the Constitution, and it cannot arrogate to itself powers that it has not been given under the Constitution. On the material before me, and taking into account the provisions of Article 226(2), the Senate may have overstepped its mandate in purporting to summon the Governors and the County Finance Committees. While it does have power under Article 125 to summon anyone, that power cannot have been intended to be exercised arbitrarily and in isolation. Put differently, the provisions of Article 125 cannot be read in isolation, but must be read in conjunction with other provisions of the Constitution which allocate functions and powers to the various organs created by the Constitution.<sup>216</sup>

In light of Article 96(3), it is doubtless that the Senate has some oversight role over county government, the nature and extent of which remain doubtful.

Secondly, the Auditor-General who under Articles 226(3), and 229(4)(a) and (b) audits the accounts of both the national and county governments, is explicitly required to submit Audit Reports to ‘Parliament or the relevant county assembly’.<sup>217</sup> This means that reports in respect of the national government and its entities are submitted to Parliament, while those in respect of the county governments and their entities are submitted to the relevant county assembly. Article 229(8) then requires Parliament or the relevant county assembly to, within three months of receiving the report, ‘debate and consider the report and take appropriate action’. Once again, these powers of the county assembly appear to conflict with the Senate’s oversight powers under Article 96(3). The provisions create a possibility of both the Senate and the county assembly arriving at different decisions on the same matter, which raises the difficulty of whose decision should prevail.

These provisions must therefore be harmonised in order to determine the nature and extent of the oversight powers of the Senate. The rules of interpretation of the Constitution as a whole and harmonisation of conflicting provisions require that no provision should be interpreted in

<sup>216</sup> *International Legal Consultancy Group* para 14. A three judge bench of the High Court eventually delivered judgment in this case, holding that the Senate had constitutional powers to summon them.

<sup>217</sup> Art 229(7).

a manner that destroys the other. In *International Legal Consultancy Group* a bench of three High Court judges delivered judgement in which they endorsed this approach and held that in their view the Senate has oversight powers over the county governments in matters concerning national revenue allocated to them.<sup>218</sup> Harmonisation should, however, recognise that while Article 226(2) confers on county assemblies broader oversight powers over all financial matters and other aspects of county government operations, Article 96(3) confers powers that are limited to revenue raised nationally allocated to county governments and do not extend to counties' own raised revenues. National revenue allocated to the county governments must be understood as referring to allocations from revenue raised nationally such as equitable shares and conditional and unconditional grants. The Court stated in this regard thus:

Under Article 96(3), the Senate's oversight role is restricted to the National revenue allocated to the counties. It has no oversight over grants, loans and revenue generated locally by the counties. Under Article 226(2) of the Constitution the County Assembly has a wide berth to oversee all the financial resources of the county including revenues allocated by the National Government and the revenue generated locally by the respective county. The Senate cannot therefore overreach its oversight mandate under Article 96(3) to any other aspect of county Government operations and resources as that is the sole preserve of the County Assemblies.<sup>219</sup>

The Court recognised an overlap in the Senate and county assembly oversight powers over national revenue allocated to county governments and held that in such circumstances both the Senate and the county assembly have a collective role.<sup>220</sup> It added that there is no provision regarding how both the Senate and the county assemblies can exercise their oversight powers in a manner that avoids any jurisdictional overlaps. Thus, it recommended amendments to the Public Finance Management Act to provide for how the Senate and the county assemblies should cooperate in the discharge of this oversight function.<sup>221</sup>

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<sup>218</sup> *International Legal Consultancy Group (judgment)* paras 47 and 48.

<sup>219</sup> *International Legal Consultancy Group (judgment)* para 62.

<sup>220</sup> *International Legal Consultancy Group (judgment)* para 62.

<sup>221</sup> *International Legal Consultancy Group (judgment)* para 63.

However, even in these limited circumstances and with this recommendation, the Senate's oversight powers also appear to conflict with Article 96(1), which should be understood as establishing the most important role of the Senate as being to represent and protect the counties, their interests and those of their governments. This role is underscored in the Senate's review oversight role already discussed.<sup>222</sup> For example, if the Senate oversees a county and clears it as operating a financial management system that complies with statutory requirements, but subsequently national government intervenes alleging non-compliance, the Senate would find itself in a situation of conflict of interest. It would be unable to exercise its county protection oversight under Article 190(5)(d) without being accused of lack of disinterested impartiality. Similarly, the Senate would find it difficult to approve stoppage of transfer of funds to county government beyond thirty days under Article 225(5) from a disinterested position of impartiality. The same will be the case when it plays a role in the renewal of the decision to stop transfer of funds to county governments. In both situations the county government may even argue that the non-compliance matters it is accused of were approved by the Senate. It may also argue that the national government intervention or stoppage of transfer of funds is instigated by the Senate for ulterior motives. However, it must be emphasised that the role of the Senate to represent and protect the counties, their governments and their interests is to objectively ensure that counties follow the Constitution and the law. Further, that national government does not unconstitutionally, unlawfully and arbitrarily interfere with counties. It cannot be an uncritical protection of counties against national government on all issues even where counties are wrong.

Further harmonisation is therefore required. This calls for very delicate balancing between the important value of holding county governments accountable, and the need to maintain the trust of the county governments in the Senate as their honest protector against arbitrary action by national government. First, the Senate in exercise of its oversight powers must not only respect the oversight roles of the county assemblies<sup>223</sup> but also the integrity and constitutional and institutional status of the county governments, and exercise restraint.<sup>224</sup> The Court in *International Legal Consultancy Group* observed that 'when these powers are exercised in reference to members of the County Government, there must be a measure of restraint by the

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<sup>222</sup> See section 4.1.2 above.

<sup>223</sup> See Corder et al 13.

<sup>224</sup> Art 189(a).

Senate ... it must not do so arbitrarily and capriciously. It must exercise caution and refrain from acting in a manner that could be construed as micro-managing devolved units at the county level.<sup>225</sup> The Senate must sustain the spirit of cooperative government enshrined in Articles 6(2) and 189.<sup>226</sup>

Its oversight role under Article 96(3) should be harmonised with its protection role under Article 96(1) by narrowing the oversight role to supportive oversight in the same manner as supportive intervention envisaged by Article 190(1). The greater part of oversight in financial matters should be left to county assemblies which should be supported to develop their capacity and become more effective. The Senate's oversight should focus more on support to the county governors, county executives, and county assemblies to be more accountable. Such Senate oversight should be exercised in a cooperative manner.

## 6 Conclusion

A purposive interpretation in this chapter has demonstrated that a bicameral Parliament is an integral part of the devolved system of government which the Constitution establishes. The Senate plays a significant role of representing and protecting the counties and their governments. Although equality of membership among counties is interfered with by the special interest Senators, the decision-making in matters that affect counties allows for equality of the counties with each having only one vote. Similarly, although the Senate does not participate in the consideration, debate and approval of all the Bills, closer examination of what constitutes the Bills it participates in and other functions discloses that the Senate is the repository of fairly expansive powers. This is even further buttressed by its role as an institution for intergovernmental relations. Interpreted in this manner, the Senate becomes a critical institution in the realisation of devolution as the most transformative aspect of the Constitution.

In discharging its duties the Senate, like any other legislative chamber, is bound to observe not only the substantive but also procedural requirements of the Constitution. The system reposes the responsibility of determining Bills concerning counties in which the Senate must participate in the Speakers of the two houses of Parliament. A purposive interpretation has established that if the Speakers and Parliament fail to comply with the constitutional

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<sup>225</sup> *International Legal Consultancy Group (judgment)* para 67.

<sup>226</sup> *International Legal Consultancy Group (judgment)* paras 67 and 68.

requirements on the procedures in this regard, the Courts must intervene to protect not only constitutional supremacy but also legality.

South African jurisprudence and scholarship have provided instructive lessons in the purposive interpretation of the provisions relating to the Senate. First, the approach to the determination of Bills concerning counties, the consideration, debate and approval of which requires the participation of the Senate has benefited from this jurisprudence. Secondly, the jurisprudence has also been instructive in respect of the consequences of failure to follow the manner and form of the legislative process prescribed the Constitution as well as the Standing Orders. Finally, the jurisprudence has also been useful in respect of the Senate's obligation to facilitate public participation and involvement in its legislative processes.



## CHAPTER ELEVEN

### Transition to devolved government

#### 1 Introduction

Management of transition from an old to a new Constitution, which brings about fundamental change, is a difficult matter. Transition to Kenya's Constitution of 2010 is even more difficult since it aims to replace both the former Constitution and its highly centralised system, and introduce a devolved system of government.<sup>1</sup> The World Bank has described the Kenyan transition process as being complex and ambitious,<sup>2</sup> because the process must not only constitute the newly created county governments and transfer powers and functions from national government to them, but also wind up the former Local Authorities and collapse them and their powers and functions into the counties while ensuring that there is no disruption of services.<sup>3</sup> Transition to devolved government entails the deconstruction of the centralised system with its legal order and some of its structures and institutions, and the construction of the devolved system of government with a new legal order and new structures and institutions. The new system must not be patched on top of the old system as this would fail to achieve the objectives of devolution. However, a major challenge lies in using the old order institutions to deconstruct the old order, and construct the new devolved order and its successor institutions, as some of them may have vested interests in the continuation of the centralised system.

Chapter Eighteen and the Sixth Schedule of the Constitution provide for transitional and consequential matters with aspects of them focusing on transition to devolved government. This chapter examines aspects of these constitutional provisions relating to transition to devolved government. First is the gradual transition to devolved government. This section addresses the approach to interpreting transitional provisions; and the timing, period and phases of transition to devolved government. Second is the transition in the legislative area which involves the deconstruction of the old legal order through the enactment of enabling new order legislation, and the interpretation of the old order continued laws in a manner that makes them consistent with the new Constitution and facilitates transition to devolved

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<sup>1</sup> World Bank *Devolution without Disruption: Pathways to a Successful New Kenya* (2012) 184.

<sup>2</sup> World Bank (2012) v.

<sup>3</sup> World Bank (2012) 184.

government. Third is the transfer of functions and resources, and the restructuring of the provincial administration. The chapter also examines the numerous key institutions which the Constitution establishes or envisages as being responsible for managing the transition process.

## **2 The gradual transition to devolved government**

Article 263 provides for the birth of the new Constitution by its coming into force upon its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the *Gazette* of the final result of the referendum ratifying it. However, Article 264 provides for the death of the former Constitution in a manner that signals a gradual transition to the new dispensation and devolved government. It repeals the former Constitution thus:

Subject to the Sixth Schedule, for the avoidance of doubt, the Constitution in force immediately before the effective date shall stand repealed on the effective date.

The Sixth Schedule to which Article 264 is subject provides details of, among other things, transition to devolved government and puts Parliament at the center of the institutional framework. This gradual nature of the transition process poses challenges and threats to the successful management of transition to devolved government.

### **2.1 The approach to interpreting transitional provisions**

The transitional provisions are temporary in nature and cannot form a basis for permanent claims. They last for the period of transition only and cease to exist once their objective has been accomplished. While they last, they are part of the Constitution, and should be interpreted as such and be harmonised with the permanent provisions. Their main purpose is to facilitate the permanent provisions become operational and cannot be interpreted in a manner that obstructs or hinders the permanent provisions becoming operational.<sup>4</sup> The Court of Appeal approved this approach in *Center for Rights Education and Awareness and another v John Harun Mwau and other* and made it clear that '[a]lthough the schedule is an integral

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<sup>4</sup> *Dennis Mogambi Mong'are v Attorney General and 3 others* [2011] eKLR (*Dennis Mogambi Mong'are*) para 54; *John Harun Mwau & 3 others v Attorney General & 2 others* [2012] eKLR (*John Harun Mwau 1*) para 123; *Timothy Njoya & others v Attorney General & others* [2013] eKLR (*Njoya Two*) 19.



part of the Constitution, it should be understood for what it is – transitional in character ... . [I]t was intended to be a bridge between the old Constitution and the new'.<sup>5</sup> The provisions serve the special purpose of facilitating the transformation brought about by the new constitutional order. Although these statements were made in another context, their authoritative value equally applies to transitional provisions relating to devolution.

Transitional provisions thus provide for a structured process of transition and assign various responsibilities for managing transition to devolved government to some permanent institutions created by the permanent provisions of the Constitution, and other temporary institutions created by the transitional provisions. Being facilitative, transitional provisions cannot hinder permanent provisions from becoming operational. As argued later in this chapter, no provision of the Constitution can be hindered from coming into force simply because an institution created by the Constitution has failed to do what the Constitution requires it to do to facilitate the coming into operation of the constitutional provision.<sup>6</sup> For this reason, when there is a conflict between the permanent provisions of the Constitution and the transitional provisions, the transitional provisions should not be interpreted in a manner that defeats the permanent provisions of the Constitution. They cannot be interpreted to hinder the new order becoming operational. Rather, they should be interpreted in a purposive manner that harmonises them with the substantive provisions of the Constitution and gives effect to the objective of bringing the new order into operation. The High Court in *Dorothy N Muchungu v Speaker of the County Government of Embu and others*, observed that the duty of the courts 'is to interpret the Constitution in a manner that does not defeat its evident purpose, values and principles'.<sup>7</sup> Because of this, in *Dennis Mogambi Mong'are*, an attempt to use the permanent provisions to stop the vetting of judges and magistrates, which was provided for by the transitional provisions, was rejected. The Court held that the transitional provisions are part of the Constitution and cannot be questioned on the basis that they are unconstitutional.<sup>8</sup>

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<sup>5</sup> [2012] eKLR (*John Harun Mwau*) para 43.

<sup>6</sup> See section 3.2 of this chapter.

<sup>7</sup> [2014] eKLR (*Dorothy N Muchungu*) para 47.

<sup>8</sup> *Dennis Mogambi Mong'are* paras 42, 43 and 52. The court noted that the transitional provisions must be interpreted within the Kenyan historical context which indicated that the Kenyan people were desirous to make 'a break with the past and bring in a new constitutional dispensation' with a judiciary in which people had

An attempt in *Njoya Two* to use the transitional provisions to delay the coming into force of the substantive provisions requiring members of Parliament to pay taxes on their salaries and allowances was rejected. Although in *John Harun Mwau I* it had been held that in the case of conflict, the transitional provisions prevail over the permanent ones, the Court in *Njoya Two* rejected this approach, noting that:

[T]he correct position is as stated in the Executive Council of Western Cape Legislature ... case – that the Constitution must be read as an integrated whole, and that where there is a conflict, then the substantive provisions of the Constitution would prevail. The role of the transitional clauses in the Constitution is to ensure a smooth shift from the old to the new order, while the role of the Constitution is to address and correct past injustices, and ensures that the citizens rights are protected in the future.<sup>9</sup>

The Supreme Court in *Speaker of the Senate and another v Attorney-General and others* identified the constitutional provisions on devolution as key pillars in the process of the deconstruction of the previously centralised system.<sup>10</sup> It noted that the Constitution of 2010 was a bold and radical attempt ‘to restructure the Kenyan State’ and revise ‘the terms of a social contract whose vitality had long expired’ and become ‘dysfunctional, unresponsive, and unrepresentative of the people’s future aspirations’.<sup>11</sup> But the Court correctly warned that the success of this initiative of fundamentally restructuring and reordering the Kenyan State is not guaranteed. ‘It must be nurtured, aided, assisted and supported by citizens and institutions’.<sup>12</sup> The Court therefore acknowledges that this is the reason the ‘Supreme Court Act imposes a transitional burden and duty’ on it:

The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol

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confidence. They intended all the provisions of the Constitution including the transitional provisions on vetting of the judges and magistrates, to have effect.

<sup>9</sup> *Njoya Two* para 20.

<sup>10</sup> [2013] eKLR (*speaker of the Senate*) para 173.

<sup>11</sup> *Speaker of the Senate* para 160.

<sup>12</sup> *Speaker of the Senate* para 160. See also Ojwang JB *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (2013) 39 where he observes that ‘[t]he new Constitution cannot propel itself’ and identifies the judiciary as the key propeller.

Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.<sup>13</sup>

What emerges is that the purpose of transitional provisions, including those on transition to devolved government, is to facilitate the permanent provisions to become operational. They must thus be interpreted in a manner that gives effect to the permanent provisions, and when there is a conflict, the permanent provisions prevail. Consideration must be given to the disruptive potential of the transition process. Consequently, a generous interpretation that avoids such disruption and gives effect to the object of bringing devolved government into operation must be encouraged.<sup>14</sup>

## **2.2 Phases of transition to devolved government**

The process of transition from the centralised to a devolved system of government is divided into two distinct periods: the period before the first elections after the coming into force of the new Constitution, and the period after the first elections under the new Constitution.<sup>15</sup> While certain aspects and activities of the transition process are to run from the effective date of the new Constitution through the first elections and beyond, other aspects are confined to the period before the first elections, and yet others can only begin and be undertaken after the first elections.

### ***2.2.1 Period before the first elections***

The first period of transition to devolved government begins from the promulgation of the new Constitution and runs up to immediately after the first elections under the new Constitution.<sup>16</sup> Although section 2(2) of the Sixth Schedule suspends the provisions of the Constitution relating to devolved government, until the date of the first elections for county

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<sup>13</sup> *Speaker of the Senate* paras 160 and 161.

<sup>14</sup> See Steytler & De Visser (2011) ch 2, 31 discussing the approach of the Constitutional Court in *MEC for Local Government and Planning for the Western Cape v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* 2002 (2) BCLR 133 (CC). They also refer to and discuss *IMATU v Minister Pierre Uys* (2001) JOL 8451 (C) para 30.

<sup>15</sup> See Task Force on Devolved Government *Final Report on Devolved Government in Kenya: Developmental Devolved Government for Effective and Sustainable Counties* (2011) 309-13.

<sup>16</sup> Task Force on Devolved Government (2011) 309.

assemblies and governors held under the new Constitution, section 2(3)(a) clarifies that elections for the county assemblies and governors must be governed by provisions of the new Constitution. Similarly, a number of preparatory activities such as the enactment of enabling laws required by the Sixth Schedule and Chapters Eleven and Twelve of the Constitution were not suspended and must be undertaken during this period.<sup>17</sup> Section 2(3) of the Sixth Schedule explicitly recognises that certain laws critical to transition to devolved government must be enacted even before the first elections. A number of key preparatory laws relating to devolved government were enacted during this period. They include the Urban Areas and Cities Act of 2011,<sup>18</sup> Transition to Devolved Government Act of 2012,<sup>19</sup> County Governments Act of 2012,<sup>20</sup> Public Finance Management Act of 2012,<sup>21</sup> Transition County Allocation of Revenue Act of 2013,<sup>22</sup> and Transition County Appropriation Act of 2013.<sup>23</sup>

Section 2 of the Sixth Schedule provides for the suspension of certain provisions of the new Constitution, with implications for the management of transition to devolved government. First, although the Constitution establishes a bicameral Parliament in which the Senate is part and parcel of devolution and protects county interests, section 2(1)(a) and (b) suspend Chapters Seven and Eight which provide for representation of the people, and the legislature, until the first elections for Parliament under the new Constitution. The provisions of the chapters, however, apply to the first general elections under the new Constitution. Section 3(2) of the Sixth Schedule extends the application of the provisions of the former Constitution relating to certain aspects of Parliament. Section 10 provides that '[t]he National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for the unexpired term'. Pending the election of the first Senate, section 11 provides, 'the functions of the Senate shall be exercised by the National Assembly'.<sup>24</sup> It adds that 'any function or power that required to be performed or

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<sup>17</sup> Task Force on Devolved Government (2011) 308.

<sup>18</sup> Urban Areas and Cities Act No 13 of 2011.

<sup>19</sup> Transition to Devolved Government Act No 1 of 2012.

<sup>20</sup> County Governments Act No 17 of 2012.

<sup>21</sup> Public Finance Management Act No 18 of 2012.

<sup>22</sup> Transition County Allocation of Revenue Act No 6 of 2013.

<sup>23</sup> Transition County Appropriation Act No 7 of 2013.

<sup>24</sup> S 11(1) (a), Sixth Schedule.

exercised by both Houses, acting jointly or one after the other, shall be performed or exercised by the National Assembly'.<sup>25</sup>

The suspension and extension provisions did not suspend bicameralism, what was suspended is the election of the National Assembly and the Senate. It is for this reason that section 10 continues the National Assembly as it existed under the former Constitution not as the old order National Assembly, but 'as the National Assembly for purposes' of the new Constitution. The old order National Assembly was by operation of law transformed into the new order National Assembly, and conferred with two distinct roles: that of the new order National Assembly; and that of the Senate. Thus, bicameralism became operative but the functions of the Senate were assigned to the transformed National Assembly to perform them on an agency basis.

The implications of this are that in the discharge of its responsibilities in the management of transition to devolved government during the first period of transition, the transformed National Assembly is subject to the legislative 'manner and form' prescribed by Articles 109, 110, 111, 112, 113 and 123 which were therefore not suspended. Under these procedures, the National Assembly would have to first determine the nature of the Bill coming before it and if it requires the participation of the Senate, sit first as the National Assembly, and secondly as a Senate to deal with the matter following the decision-making processes of the Senate. One of the key devolution supporting pieces of legislation required for the deconstruction of both the old order unicameral Parliament and the old legal order, and construction of the new order bicameral Parliament and the new legal order, are the rules of procedure of the bicameral Parliament. Article 124(1) empowers each house of Parliament to 'make Standing Orders for the orderly conduct of its proceedings' and those of its committees. The Kenyan bicameral Parliament requires three sets of rules of procedure: the rules of the National Assembly, the rules of the Senate, and the joint rules of the two houses when they are dealing with joint matters such as when the two Speakers determine whether a Bill concerns county governments or not, and whether it is a special or ordinary bill.

Given the suspension and extension provisions, the transformed old order National Assembly should have enacted these rules in the early stages of the first period of transition. These were necessary to guide the proceedings of Parliament as it enacted other legislation. The National

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<sup>25</sup> S 11(1) (b), Sixth Schedule.

Assembly adopted the National Assembly Standing Orders, in which provision is made regarding how the speakers of the two houses of Parliament must determine whether a Bill concerns counties or not, only on 9 January 2013. This was long after some of the laws mentioned above had been enacted. The Standing Orders do not have any transitional provisions covering how the transformed old order National Assembly was to discharge its dual roles of the new order National Assembly and the Senate.

### ***2.2.2 Period after the first elections***

The second period of transition to devolved government runs from the conclusion of the first elections which bring into being the first county governments.<sup>26</sup> This is a three-year phase since section 15(1) of the Sixth Schedule requires the phased transfer of functions to county governments to run for three years from the date of the first elections. Although the Fifth Schedule sets out the periods within which required legislation must be enacted, the longest period provided for is five years from the effective date of the Constitution. Since the effective date was 27 August 2010, the five year period ends on 27 August 2015, six months before 4 March 2016 which is the date when the three-year phased transfer of functions must end. This is because the three-year period runs from 4 March 2013 when the first elections were held.

## **3 Transition to a new legal order**

The constitutionally entrenched devolved system requires an enabling legal system founded upon laws that are consistent with the new Constitution. This must be accomplished through the enactment of new laws, the review, amendment, and or repeal of old laws, and the interpretation of the old order laws in a manner that makes them consistent with the new Constitution.

### **3.1 Enactment of new order legislation**

The preparatory laws enacted in the first phase are just a few of those required to fully transit to a devolved system of government. Article 261(1) requires Parliament to enact any legislation required by the Constitution within the time-frames specified in the Fifth Schedule. Section 15 of the Sixth Schedule requires Parliament to enact legislation to provide for a well-managed and staggered transition from the centralised system to the devolved

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<sup>26</sup> Task Force on Devolved Government (2011) 311.

system of government. In addition, there are other legislation not specifically mentioned which will be necessary as part of the complementary and enabling legislation that form a legal system within the new constitutional dispensation. Furthermore, since the new Constitution is supreme, all the existing laws touching on devolution would need to be reviewed to ensure that they are consistent with the supreme Constitution. Some may have to be repealed altogether and replaced by new ones, while others may require amendments to make them consistent with the new Constitution.<sup>27</sup>

### **3.1.1 Role of Parliament**

Through the deconstruction of the old legal order and construction of a new one that is devolution-friendly, Parliament bears a critical and onerous responsibility of managing transition to devolved government. While some of Parliament's responsibilities must be discharged by the full houses of Parliament, others have been vested in its committees. First, the Constitution establishes a transitional 'Parliamentary Select Committee' known as the Constitutional Implementation Oversight Committee and charges it with the responsibility of overseeing the implementation of the Constitution.<sup>28</sup> The committee must receive reports from the Commission on the Implementation of the Constitution,<sup>29</sup> and 'take appropriate action on the reports including addressing any problems in the implementation of [the] Constitution'.<sup>30</sup> Among the matters the reports should touch on are those concerning 'the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfers of staff'.<sup>31</sup> The committee must also receive and act on reports relating to 'the devolution of powers and functions to the counties under the legislation contemplated in section 15' of the Sixth Schedule.<sup>32</sup>

This committee must exist in both transition periods.<sup>33</sup> Whereas in the first transition period the Committee can only comprise members of the National Assembly, it is submitted that in

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<sup>27</sup> Task Force on Devolved Government (2011) 310.

<sup>28</sup> S 4 Sixth Schedule.

<sup>29</sup> S 4(a) Sixth Schedule.

<sup>30</sup> S 4(c) Sixth Schedule.

<sup>31</sup> S 4(a)(iii) Sixth Schedule.

<sup>32</sup> S 4(a)(iv) Sixth Schedule.

<sup>33</sup> Task Force on Devolved Government (2011) 313.

the second period of transition, it should be a joint committee of the National Assembly and the Senate. First, though section 4 of the Sixth Schedule refers to ‘a select committee of the National Assembly’, the title of the section refers to a ‘Parliamentary Select Committee’. Secondly, the functions of the committee are matters concerning county governments within the meaning of Article 110(1) of the Constitution. Thirdly, during the second period of transition the consequences of failure to enact the required legislation within the required time are to be visited upon Parliament comprising both houses. Parliament can be dissolved for failure to enact required legislation within the constitutionally required time-frame.<sup>34</sup> Thus the Senate cannot suffer the consequences if it was not party to the failure.

Secondly, section 4(b) requires the Parliamentary Select Committee on the implementation of the Constitution to coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and the ‘relevant parliamentary committees’ to ensure the timely introduction and passage of the legislation required by the Constitution. Parliamentary committees relevant to specific sectoral areas that have been devolved play a key role in ensuring the enactment of legislation necessary for transition to devolved government. Again, whereas in the first period of transition there would only be committees of the National Assembly, during the second period of transition, each house would have its own committees.

### ***3.1.2 Role of the national executive***

The national executive is a key role player in the enactment of legislation necessary for transition to devolved government. First, the mandate to prepare bills for tabling in Parliament to be enacted into enabling legislation is vested in the Attorney-General in consultation with the Commission for the Implementation of the Constitution.<sup>35</sup> In the first period of transition to devolved government the Attorney-General is a member of both the executive and the legislature. However, although it is not clear whether in the second period he is a member of the legislature, it is clear that he is a member of the national executive.<sup>36</sup> By implication, the Attorney-General as a member of the executive is expected to prepare these bills on the basis of policy instructions of the executive. The import of this is that the

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<sup>34</sup> Art 261(7).

<sup>35</sup> Art 261(4).

<sup>36</sup> Art 152(1)(c).



national executive and its various ministries have responsibility to provide policy direction in the management of transition to devolved government. It was in appreciation of this responsibility that the executive through the Ministry of Local Government, in October 2010, established the Task Force on Devolved Government to provide a policy and legislative framework for the implementation of devolution.<sup>37</sup>

Furthermore, the Constitution specifically assigns to the national government the function of '[c]apacity building and technical assistance to the counties'.<sup>38</sup> The discharge of this function requires both legislative action setting the legal framework for such capacity building and technical assistance, and executive action to implement such legislation.

Once the laws have been enacted the responsibility of their implementation falls upon the executive arm of government. It is for this reason that the CIC is mandated to monitor, facilitate and oversee not only the development of legislation but also 'administrative procedures' which often are undertaken by the executive.<sup>39</sup> The implementation of the legislation referred to by section 15 to provide for phased transfer of functions to county government is central to the successful transition to devolved government. These provisions would involve the national executive and its ministries facilitating the devolution of power, assisting county governments in building capacity, and supporting them.<sup>40</sup>

### ***3.1.3 Role of the Commission for the Implementation of the Constitution***

The transitional provisions establish a transitional institution called the Commission for the Implementation of the Constitution (CIC) as a critical role player in the management of transition to devolved government as well.<sup>41</sup> Article 261(4) requires preparation of Bills by the 'Attorney-General, in consultation with the Commission'. This means that any legislation enacted without consultation with the Commission could be challenged because the prescribed legislative process was not followed.

Transitional provisions explicitly require proposed legislation relating to devolved government to be enacted after the Commission has been established, consulted and its

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<sup>37</sup> Task Force on Devolved Government (2011) 1-3.

<sup>38</sup> Item 32 Fourth Schedule.

<sup>39</sup> S 5(6)(a) Sixth Schedule.

<sup>40</sup> S 15(2)(i), (ii) and (iii).

<sup>41</sup> S 5(1), (2) and (3) Sixth Schedule.

recommendations considered by Parliament.<sup>42</sup> The Commission must be given at least 30 days to consider such legislation,<sup>43</sup> which enables it to consult with the public and stakeholders and give it serious consideration, before making its recommendations. In *The Commission for the Implementation of the Constitution v Attorney General and another*, the High Court affirmed that '[i]t is not in contention that the law requires that the respondents consult CIC and that CIC is granted at least a thirty day period to consider legislation regarding devolved government before enactment of such legislation'.<sup>44</sup> On the facts of the case, however, the Court held that the Commission had been consulted as required.<sup>45</sup> Consultation of the Commission is thus part of the manner and form constitutionally prescribed for the enactment of laws during the transition period.

The Commission must operate over the two periods of transition to devolved government. It must be constituted within 90 days after the effective date of the new Constitution, enabling it to begin its work in the early stages of the first transition period.<sup>46</sup> Its five year lifespan spills into the second transition period and can be extended by Parliament.<sup>47</sup>

### 3.2 Failure to enact enabling legislation

The Constitution provides that where Parliament fails to enact required legislation within the specified time-frame, any person may petition the High Court on the matter,<sup>48</sup> which may issue a declaratory order<sup>49</sup> directing Parliament and the Attorney-General to ensure the enactment of the law within the time the Court specifies in the order.<sup>50</sup> 'Within the period specified in the order' means that the Court can extend the time-frame specified in the Constitution for the enactment of legislation. The order of the Court would also require Parliament and the Attorney-General to report the progress to the Chief Justice.<sup>51</sup> Where even after the Court order, Parliament fails to enact the legislation it shall, on the advice of the

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<sup>42</sup> S 14(1) Sixth Schedule.

<sup>43</sup> S 14(2) Sixth Schedule.

<sup>44</sup> [2013] eKLR (*Commission for the Implementation of the Constitution*) para 34.

<sup>45</sup> *Commission for the Implementation of the Constitution* para 38.

<sup>46</sup> S 25(1) Sixth Schedule.

<sup>47</sup> S 5(7) Sixth Schedule.

<sup>48</sup> Art 261(5).

<sup>49</sup> Art 261(6)(a).

<sup>50</sup> Art 261(6)(b).

<sup>51</sup> Art 261(6)(b).

Chief Justice, be dissolved by the President and fresh elections held.<sup>52</sup> The newly elected Parliament must enact the legislation,<sup>53</sup> failing which the same process applies to it.<sup>54</sup>

The question, however, is what the county government and other aggrieved parties who may require such legislation to be able to operate or exercise their powers are supposed to do in the meantime. It is submitted that aggrieved parties, including county governments, can rely on any relevant old order legislation however incomplete it may be. The Supreme Court has justified this approach on grounds that:

[T]here ought to be no vacuum occasioned by failure or delay on the part of the legislature. This is why existing laws were given the leeway to continue operating, on condition that they would be construed with necessary alterations, adaptations, qualifications and exceptions to bring them into conformity with the Constitution.<sup>55</sup>

For example, if national government fails to enact legislation establishing a framework of uniform norms and standards within which county governments can establish their own administrations in terms of Article 235, the counties can proceed to establish offices and appoint officers to them relying on the old order legislation.

Such incomplete existing legislation must be interpreted by the courts in a manner that gives effect to the constitutional provisions. In such limited circumstances, Ojwang holds the view that the judiciary as a constant element in the new constitutional system should provide the ‘forum of empirical law-making, as necessitated by the demands of contested questions’.<sup>56</sup> He notes that the incomplete law must be interpreted to cater for the situation:

It is well known that no judicial officer is allowed, as a matter of firmly-established law, to decline to resolve a dispute falling within his or her jurisdiction on the ground that the issues are too difficult, or do not lend themselves to a correct answer. It follows from this principle that even where

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<sup>52</sup> Art 261(7).

<sup>53</sup> Art 261(8).

<sup>54</sup> Art 261(9).

<sup>55</sup> *Communications Commission of Kenya and others v Royal Media Services and others* [2014] eKLR (*Communications Commission of Kenya*) para 195.

<sup>56</sup> See Ojwang (2013) 78.

Parliament has not made a law regulating a specific matter in detail, it does not follow that the relevant question, therefore lies outside the purview of the law; it is the mandatory obligation of the Court to interpret the incomplete law of Parliament, and declare a complete scenario of law on the question. This indeed, is the very essence of judicial law-making as it has evolved in the common law tradition.<sup>57</sup>

Thus, the incomplete existing law must be used to give effect to the constitutional provisions to cover for the situation. The Supreme Court has, however, held that there are some existing laws which are not capable of being construed to bring them into conformity with the Constitution, or ‘*conditioned through judicial intervention without usurping the role of Parliament.*’<sup>58</sup> Such laws are invalid for all purposes.

### 3.3 Continuation of existing laws

Since the process of formulating and enacting new legislation as well as repealing or amending the old one would take a long time, section 7(1) of the Sixth Schedule which is titled ‘existing laws’, provides for the continuation in force of all the laws:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

In the Kenyan context, ‘existing laws’ or ‘law in force’ refer to Acts of Parliament and by-laws of the former local authorities since the devolved system aims to collapse these local authorities into the newly created county governments. They also refer to all laws already enacted even if their implementation had not yet started.<sup>59</sup>

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<sup>57</sup> Ojwang (2013) 91.

<sup>58</sup> *Communications Commission of Kenya* para 197 (emphasis in original).

<sup>59</sup> In the South African case of *Mashavha v President of the Republic of South Africa and others* 2004 (12) BCLR 1243 (CC) para 25, the Constitutional Court stated that: ‘Therefore the phrase “in force” should not be interpreted in section 235(6) to draw any distinction between laws which were actually being implemented, executed, or administered at a particular time and laws which had been enacted but not yet come into operation, or which were not being implemented actively. It simply refers to laws which existed (on the statute book, if one wishes to put it that way) immediately before 27 April 1994, and which would continue to exist in terms of section 229.’

These laws continue in force only if they are (a) consistent with the new Constitution, (b) they were not expressly or implicitly repealed by the coming into force of the new Constitution, and (c) they have not been subsequently expressly or implicitly amended or repealed by a competent authority under the new Constitution.<sup>60</sup> Given the fundamental change the Constitution introduces in the structure of governance and the status of a distinct level of government it confers upon the county governments, certain aspects of some old order laws are implicitly repealed by the coming into force of the new Constitution.<sup>61</sup> The South African Supreme Court of Appeal set the basic test for the survival of an old order provision as being ‘whether it has been amended or impliedly repealed or is inconsistent with the Constitution, but only to the extent of such inconsistency’.<sup>62</sup>

### 3.4 Interpretation of existing laws

Existing laws must be interpreted in a manner that brings them into conformity with the new Constitution.<sup>63</sup> Interpretation must thus identify aspects that were implicitly repealed by the coming into force of the Constitution, aspects that have subsequently been amended or repealed by lawful authority under the new Constitution, and aspects that are inconsistent with the Constitution, and regard them as such. The High Court in *Njoya*, in which the executive had entered into an agreement with Parliament exempting the members of the National Assembly from payment of taxes on their salary and allowances despite the fact that Article 210(3) explicitly prohibits the enactment of any law exempting any person from payment of tax by reason of the office the person holds, affirmed this approach. The Court determined that the old order National Assembly Remuneration Act will continue to be in force with regard to the remuneration of the members of the National Assembly but ‘[must], by virtue of section 7 of the Sixth Schedule, be brought into conformity with the Constitution.

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<sup>60</sup> See Steytler & De Visser (2011) ch 1, 30.

<sup>61</sup> Such repealed laws or aspects are therefore not part of the laws in force that survived. In the South African case of *CDA Boerdery (Edms) Bpk and another v The Nelson Mandela Metropolitan Municipality and others* 2007 (4) SA 276 (SCA) para 32 Cameron JA stated that ‘[t]he old-order subordination of the local authority’s power to levy rates of more than 2 cents in the Rand to the Administrator’s [Premiers] approval was implicitly repealed when the Constitution took effect. It did not survive the transition’.

<sup>62</sup> *Majomatic 115 (Pty) Ltd v Kouga Municipality and others* [2010] 3 All SA 415 (SCA) (*Majomatic*) para 6. Old order by-laws of the former local authorities that are found to be valid only apply in the territorial areas previously covered by the former local authorities to which they belonged.

<sup>63</sup> S 7(1), Sixth Schedule.

As a result, any legislation made by parliament or any agreement that is made in violation of the provisions of the Constitution is void.<sup>64</sup> Through such interpretation, courts should where new legislation has not been enacted, interpret existing laws in a manner that amends them to bring them into conformity with the Constitution and the devolved system of government.

The constitutional requirement that these laws be ‘construed with the alterations, adaptations, qualifications and exceptions’ necessary to bring them into conformity with the Constitution by implication adopts the interpretation remedy of severance and reading in of a statute, which was discussed in Chapter Two.<sup>65</sup> This technique involves excising or severing from a statute the unconstitutional aspects and leaving the constitutional part intact.<sup>66</sup> On the contrary, ‘reading in’ involves reading into the statute words that do not exist as if they actually exist in the statute to make it consistent with the Constitution. Sometimes both severance and reading in are done simultaneously, excising certain words from the provision while reading in other words that are not in the provision.<sup>67</sup>

#### **4 Transfer of functions and resources, and restructuring provincial administration**

In order to ensure that delivery of services to the citizens is not disrupted, the old order local government structures and institutions were continued, since the establishment of the county institutions was suspended until the first elections.<sup>68</sup> In the meantime preparatory legislation for the establishment and structuring of some of the county structures and institutions had to go on. In furtherance of decentralisation of functions and provision of services by county governments in terms of Articles 176(2) and 184, both the County Governments Act of 2012<sup>69</sup> and the Urban Areas and Cities Act of 2011<sup>70</sup> were enacted.

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<sup>64</sup> *Njoya* p 22.

<sup>65</sup> Section 6.3 of Chap 2.

<sup>66</sup> *Coetsee v Government of the Republic of South Africa and Matiso and others v Commanding Officer Port Elizabeth Prison and others* (referred to as *Coetsee and Matiso*) 1995 (10) BCLR 1382.

<sup>67</sup> See *Rotich Samuel Kimutai v Ezekiel Lenyongopeta and 2 others* [2005] eKLR page 6.

<sup>68</sup> S 18, Sixth Schedule.

<sup>69</sup> See ss 48, 49, 50, 51, 52, 53 and 54 of the CGA.

<sup>70</sup> See ss 11-30 and 54-60 of the UACA.

#### 4.1 Phased transfer of functions

An important aspect of transition to devolved government is the transfer of functions to county governments. Section 15 of the Sixth Schedule requires an Act of Parliament to be enacted to provide for ‘the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185’. Purposively interpreted, these provisions envisage the following broad transition issues that are pertinent to the transfer of powers and functions to county governments: a phased transfer of functions; national government facilitation, support and assistance; and transfer of the fiscal and financial powers and functions.

The functions of the former local authorities, which were assigned to county governments, were excluded from transfer over a period of three years since the provision refers to ‘from the national government to county governments’. These were to be transferred on day one immediately after elections to avoid disruption of services given that the local authorities were to cease to exist upon such elections. Indeed, section 23(1) of the Transition to Devolved Government Act requires the Transition Authority to, ‘by notice in the Gazette at least thirty days before the first elections under the Constitution, identify functions which may be transferred to county governments immediately after the first elections’. This was accomplished through Legal Notice No 16 of 2013. After this initial transfer of functions, section 23(2) of the Act provides that county governments must individually request for transfer of other functions as and when they are ready to assume them. Only functions from the national government to county governments were subject to staggered transfer over a three year period. However, although the provision appears restricted to legislative county functions assigned under Article 185, a contextual reading of this provision with the other sub-articles reveals that transfer of even the county executive functions was envisaged.

Before any function is transferred, a process of analysis and unbundling of the functions must be undertaken to ensure that only functions assigned by the Constitution to county governments are transferred, and that the national government does not wrongly hold on to other functions which the Constitution has assigned to county governments. Section 7(2)(a) of the TDGA recognised this when it identified one of the functions of the Transition Authority to be to ‘facilitate the analysis and the phased transfer of the functions provided

under the Fourth Schedule to the Constitution to the national and county governments'. In *Okiya Omtatah Okiiti and another v Attorney General and 6 others*<sup>71</sup> the applicant unsuccessfully tried to have the Court reverse the transfer of the health functions to county governments on grounds that those were national government functions which had been wrongly transferred to counties. He urged the Court to interpret and define 'national referral health facilities' in a manner that would include what are obviously 'county health facilities'.<sup>72</sup> The Court declined to interpret these phrases on grounds that these are matters of policy falling within the preserve of national government.<sup>73</sup> It is argued that the Court was wrong as these are constitutional matters appropriate for judicial interpretation. The Constitution has assigned powers and functions to the two levels of government. The effect of what the Court held is to reverse this assignment and empower the national government to determine what the counties can and cannot do.

The Constitution recognises an asymmetrical process of transfer of functions to various counties. The essence of this is that not all the counties would have the same functions transferred to them at the same time. This is necessitated by the differences in the capacities of the counties to assume the functions. Section 15(2)(c) is explicit that the required legislation must 'permit the asymmetrical devolution of powers to ensure that functions are devolved promptly to counties that have the capacity to perform them but that no county is given functions it cannot perform'. In *Republic v Transitional Authority and another Ex parte Medical Practitioners, Pharmacists and Dentists Union (KMPDU) and 2 others* the applicants sought to have the transfer of the health functions to county governments annulled on grounds, among others, that the county governments did not have the capacity to assume them.<sup>74</sup> The case was, however, dismissed on grounds that the applicants had not established that the counties did not have capacity to handle the functions. While the Court noted that there are shortages of personnel and other health facilities, it noted that this was a problem facing even the national government and could not be used to delay the transfer of the health functions to the county governments. It concluded that '[d]evolution in this country is a new system of governance and in its implementation, there are bound to be disagreements in the

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<sup>71</sup> [2014] eKLR (*Okiya Omtatah Okiiti*).

<sup>72</sup> *Okiya Omtatah Okiiti* para 3.

<sup>73</sup> *Okiya Omtatah Okiiti* paras 85, 90 and 91.

<sup>74</sup> [2013] eKLR (*Ex parte Medical Practitioners*) paras 12 and 13.



manner in which it is being done. That, however, ought not to be a ground for derailing the process unless it is shown that there are no mechanisms through which contentious matters can be resolved.’<sup>75</sup>

The Constitution prescribes that the Act of Parliament must ‘establish criteria that must be met before particular functions are devolved to county governments to ensure that those governments are not given functions which they cannot perform’.<sup>76</sup> This provision does a number of things: One, it recognises that not all the functional areas need be transferred to a county government at the same time. Two, even in a given functional area, not all the functions need be transferred at the same time. Some aspects of a functional area may be transferred ahead of other aspects. Three, not all the county governments need to have the same functions transferred to them at the same time. Some counties may be ready to discharge certain functions ahead of other counties, which in turn may be ready for other functions.

#### **4.2 National government must facilitate, assist and support county governments**

Section 15(2) of the Sixth Schedule imposes upon national government three intertwined responsibilities of managing the process of transfer of functions – the obligations to facilitate devolution of powers, assist, and support the county governments. An Act of Parliament must provide for the manner in which the ‘national government shall facilitate the devolution of power’.<sup>77</sup> To facilitate is to make easier or less difficult for something to happen, and to assist the progress of an entity or a process. This obligation is justiciable. If, for instance, a county government has satisfied the prescribed criteria for the transfer of certain functions but the national government fails to transfer them, the county government may approach a court for relief.

Section 15(2)(a)(ii) requires the legislation to provide for how the national government must ‘assist county governments in building their capacity to govern effectively and provide the services for which they are responsible’. Building capacity is not limited to human capacity relating to personnel matters only, but includes other non-personnel-related infrastructure necessary for the delivery of county services. Malherbe observes that administrative capacity

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<sup>75</sup> *Ex parte Medical Practitioners* para 90.

<sup>76</sup> S 15(2)(b) of the Sixth Schedule.

<sup>77</sup> S 15(2) (a) (i) Sixth Schedule.

‘is obviously a comprehensive term that includes administrative resources and structures, human resources in terms of sufficient, qualified and skilled staff, as well as financial resources’.<sup>78</sup> This includes a justiciable obligation to provide funds to enable the county governments make their first budgets and finance their activities.

Furthermore, an Act of Parliament must also provide for how national government must ‘support county governments’. Once the county governments have been elected and start running their own affairs, the national government is still under an obligation to support them. Read together, the obligations these three provisions impose on national government can be divided into two aspects: One, the establishment of basic infrastructure the counties would require to start functioning and be able to immediately upon elections take over the functions that were previously performed by the former local authorities. Two, the assistance and support of counties once they have been elected in building their own capacity to be able to receive other functions and discharge them effectively.

### **4.3 Transition in financial matters**

Critical to transition in the functional areas is the issue of resources required for the discharge of the responsibilities or functions. Thus, a purposive interpretation of section 15 of the Sixth Schedule also discloses that the Constitution envisages transition to devolved government in the resources area, including preparedness and capacity building in fiscal and financial matters, human resources, assets and liabilities, and the closure and transfer of public records.<sup>79</sup>

The transitional provisions envisage the audit, protection and preservation of the assets and resources of the former local authorities, for handing over to either county governments once they are elected, or to the national government. It also envisages determination of how the

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<sup>78</sup> Malherbe R ‘The constitutional distribution of powers’ in De Villiers B (ed) *Review of Provinces and Local Governments in South Africa: Constitutional Foundation and Practice* (2008) 49.

<sup>79</sup> In terms of section 3(d), (e) and (f), of the TDGA, the Act is to provide for policy and operational mechanisms for the audit, verification and transfer to county and national governments – assets and liabilities; human resources; pensions and other staff benefits of employees of the local authorities; the closure and transfer of government records; mechanisms for capacity building.

liabilities are to be dealt with. Since the county governments took over from the former local authorities, it follows that they must take over their liabilities.<sup>80</sup>

#### 4.4 Restructuring provincial administration

Within the context of transition to devolved government, one of the old order structures and institutions that must be addressed through restructuring is the system of provincial administration, whose powers are anchored in the Chiefs' Act.<sup>81</sup> Since colonial days, this was the institutional engine of the centralised system of government which was used for exerting centralised control right down to the local level. The system comprised the following hierarchy of administrative officers: provincial commissioners (PC), district commissioners (DC), divisional officers (DO), location officers (chief), and sub-location officers (assistant chief). Instructions and orders from the President's office would flow down through the chain of command to the chiefs who would then issue orders to be obeyed in terms of the Chiefs' Act. Section 17 of the Sixth Schedule provides for the restructuring of provincial administration in the following manner: 'Within five years after the effective date the national government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under this Constitution.'<sup>82</sup>

First, this provision imposes a mandatory obligation on national government to restructure the system of provincial administration, which is evidenced by the use of the term 'shall'. 'Restructure' is to organise something differently.<sup>83</sup> It is 'to change, alter, or restore the structure of something', 'to effect a fundamental change in an organization or system'; or 'to organize a system, business or society in a different way'.<sup>84</sup> Secondly, the restructuring must be done to 'accord with' the system of devolved government. 'Accord' is to be in agreement or consistent with, to concur, conform or be compatible or in harmony with the system of

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<sup>80</sup> In *Republic v Town Clerk of Webuye County Council and another* [2014] eKLR para 15, the High Court held that a judgment liability against a former local authority must be executed against the successor county government.

<sup>81</sup> Chiefs' Act Revised Edition of 2012.

<sup>82</sup> S 17 Sixth Schedule.

<sup>83</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 1103.

<sup>84</sup> Dictionary.com <http://dictionary.reference.com/browse/restructure> (accessed 5 April 2014).

devolved government.<sup>85</sup> For restructuring of provincial administration to accord with devolved government, it must be compatible with the constitutionally distinct nature of the county governments and recognise their relative autonomy in terms of their powers and functions.<sup>86</sup> Thirdly, it must be done to ‘respect’ the system of devolved government. Respect is ‘to hold in esteem or honor; to show regard or consideration for; to refrain from intruding upon or interfering with; to pay proper attention to; not to violate; or to treat courteously or kindly’.<sup>87</sup>

Although national government has been granted power to restructure provincial administration, the power must be exercised within the limits of the Constitution, since where such limits exist, they constrain the power of the national government. The restructuring of provincial administration must accord with and respect the system of devolved government from two distinct perspectives. First, the process of restructuring must itself accord with and respect devolved government. Secondly, the resultant restructured provincial administration must both in its structure and operations accord with and respect the system of devolved government. Understood within its context of being part of Part 4 of the Sixth Schedule which is titled ‘devolved government’, the purpose of the section is to facilitate transition to devolved government and not to retain the centralised system of government. The system can only be restructured to the extent that it can harmoniously co-exist with devolved government. This conclusion should be understood in the context of the observation already made that although provisions of schedules to the Constitution are part of the Constitution, those such as section 17, which are anchored upon transitional provisions of the Constitution, do not establish permanent rights and claims. Only schedules anchored upon permanent provisions of the Constitution are permanent in nature and can form a basis for permanent claims and rights. To restructure provincial administration to accord with and respect the system of devolved government must take into account Articles 6(2) and 189(1)(a) and requires three elements, discussed in the following sections.

#### ***4.4.1 Respect the constitutional status and institutions of counties***

The process and the resultant administration must accord with and respect the constitutional status and institutions of county governments. By providing for county governments that are

<sup>85</sup> See Oxford Dictionary Thesaurus and Word Power Guide (2001) 10.

<sup>86</sup> Art 6(2).

<sup>87</sup> Oxford Dictionary Thesaurus and Word Power Guide (2001) 1103.

distinct from and interdependent with national government, Article 6(2) envisages county governments that are, by and large, autonomous in nature and status. Article 189(1)(a) thus calls for respect for the county governments' 'constitutional status and institutions'. Some of the key institutions of the county government that must be respected are the governor, the county executive committee, the county assembly and the county administration.

#### ***4.4.2 Respect the functions and powers of counties***

The resultant restructured provincial administration must accord with and respect the system of devolved government in the sense that it performs its functions and exercises its powers within the functional areas of national government. The distinctiveness and the autonomy of county governments recognised by Article 6(2) envisage county governments that have clearly allocated and protected functions and powers. As such, Article 189(1)(a) provides for respect for 'the functional and institutional integrity' of the county governments. Thus, the restructured administration cannot encroach upon the functions and powers of county governments, which must be respected. If the system goes beyond these functional and power boundaries, its actions would be declared unconstitutional and invalid.

Any legislation or executive action that confers upon the restructured provincial administration the constitutional powers and functions of county governments would be unconstitutional. The National Government Co-ordination Act (NGCA) empowers the President to establish committees of Principal Secretaries and other mechanisms of co-ordination of the national government functions.<sup>88</sup> The President may decentralise such committees and other mechanisms.<sup>89</sup> The NGCA then recreates the former provincial administration and requires the Public Service Commission to appoint the former provincial administration administrative officers to the renamed offices, 'to co-ordinate national government functions and to perform such other functions as may be assigned to them under this Act or any other law'.<sup>90</sup> The "any other law" includes the Chiefs' Act (CA), which is one of the old order continued laws but was revised in 2012 after the enactment of the Constitution. Yet the CA confers on provincial administration a wide range of powers and functions, many of which are unconstitutional for encroaching on county functional areas. The Act confers the power on chiefs to issue orders that must be obeyed by people residing

<sup>88</sup> See s 13(1) of the National Government Co-ordination Act No 1 of 2013.

<sup>89</sup> See s 13(2) NGCA.

<sup>90</sup> See s 13(1) and (2) NGCA.

within the local limits of their jurisdiction.<sup>91</sup> Disobedience of these orders attracts penal consequences.<sup>92</sup> First, the chiefs can prohibit or restrict the consumption or possession of intoxicating liquor by, and supply of such liquor to young persons,<sup>93</sup> and the holding of drinking bouts.<sup>94</sup> These are county functional areas of '[c]ultural activities, public entertainment and public amenities, including liquor licensing'.<sup>95</sup> Secondly, the chiefs can order for the prevention of the 'spread of disease, whether of human beings or animals',<sup>96</sup> order for the destroying of locusts in any stage of development, and order for the suppression or control of animal or insect pests or plant pests, noxious weeds or diseases.<sup>97</sup> They can also order the restriction or prohibition of the 'use of grazing by any form of stock in any area which has been set apart for the purpose of reconditioning or which has been planted with any fodder-producing plants or grass'.<sup>98</sup> Again, these are county government agriculture functions which include crop and animal husbandry,<sup>99</sup> and plant and animal disease control.<sup>100</sup> Thirdly, the chiefs can require the proper burial of deceased persons in cemeteries,<sup>101</sup> and forbid the deliberate exposure of persons supposed to be dying.<sup>102</sup> Yet these are part of the county health functions which include cemeteries, funeral parlours and crematoria,<sup>103</sup> and the function of control of air pollution and other public nuisances.<sup>104</sup> Fourthly, the chiefs can issue orders to regulate the cutting of timber and prohibit the wasteful destruction of trees,<sup>105</sup> yet the implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation and

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<sup>91</sup> S 10 CA.

<sup>92</sup> S 18 CA.

<sup>93</sup> S 10(a) CA.

<sup>94</sup> S 10(b) CA.

<sup>95</sup> Item 4 Part 2, Fourth Schedule.

<sup>96</sup> S 10(h) CA.

<sup>97</sup> S 11(d) CA.

<sup>98</sup> S 11(j) CA.

<sup>99</sup> Item 1(a) Part 2, Fourth Schedule.

<sup>100</sup> Item 1(d) Part 2, Fourth Schedule.

<sup>101</sup> S 11(h) CA.

<sup>102</sup> S 11(i) CA.

<sup>103</sup> Item 2(f) Part 2, Fourth Schedule.

<sup>104</sup> Item 3 Part 2, Fourth Schedule.

<sup>105</sup> S 10(g) CA.

forestry are county functions.<sup>106</sup> They can also issue orders to control grass fires,<sup>107</sup> yet firefighting and disaster management is a county function.<sup>108</sup> These are clearly cases of usurpation of county functions which must be held unconstitutional.

#### ***4.4.3 Not perform or exercise national government functions and powers in a manner that interferes with county functions and powers***

The issue here focuses on the manner in which national government exercises its constitutional functions. The essence of this is that where the restructured provincial administration is exercising the constitutional powers and functions of national government, it must do so in a manner that does not encroach on the powers of county government. The restructured administration must do so in a manner that respects and does not interfere with the functions and powers of county governments. It must not impede the county governments from performing their own functions and exercising their own powers effectively. The South African Constitutional Court cautioned that the powers of municipalities must be respected by the national and provincial governments which may not use their powers to ‘compromise or impede a municipality’s ability or right to exercise its powers or perform its functions’.<sup>109</sup> Thus, national government’s power to restructure provincial administration must be exercised carefully within the context of recognition for the system of two levels of government with constitutionally divided, limited and protected powers and functions. Any encroachment even by the mere manner of the performance or exercise of the national government’s functions and powers, by the restructured administration, will be unconstitutional and invalid, and must be declared as such.<sup>110</sup>

#### ***4.4.4 Progressive restructuring***

Section 17 of the Sixth Schedule requires the national government to restructure provincial administration ‘within five years of the effective date’ of the Constitution, which was 27 August 2010, the date the Constitution was promulgated. Given the requirement to restructure

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<sup>106</sup> Item 10 Part 2, Fourth Schedule.

<sup>107</sup> S 10(n) CA.

<sup>108</sup> Item 12 Part 2, Fourth Schedule.

<sup>109</sup> *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and another* 1999 (12) BCLR 1360 (CC) para 29.

<sup>110</sup> See *Premier of the Western Cape v President of the Republic of South Africa and others* 1999 (4) BCLR 382 (CC) para 60.

‘to accord with and respect’, devolved government, restructuring is not an event but a process. Preparatory restructuring could begin in the first period of transition and must form part of the national government’s responsibility and obligation to facilitate, assist and support ‘devolution of power’ and ‘county governments in building their capacity’.<sup>111</sup> The process must however continue in the second period of transition after county governments have been elected and have established their own administrative structures which the restructuring must accord with and respect. This will ensure that the resultant restructured administration is not duplicative and wasteful, since the Constitution prescribes that public funds be used in a prudent and responsible manner.<sup>112</sup> In *Law Society of Kenya v Transition Authority and 2 others*, in which the High Court was invited to declare certain provisions of the National Government Co-ordination Act as unconstitutional, the Court declined on grounds that the matters raised required to be dealt with through consultation in terms of section 19 of the Act.<sup>113</sup> The Court stated:

The national government has five years from 22<sup>nd</sup> August 2010 (sic) to restructure the provincial administration. This is not a one off event; it is a process that involves public and stakeholder participation. Parliament has had a say in the process by enacting various statutes to govern devolution. The provisions of these statutes will always be subject to amendment as and when circumstances require within the process of ‘restructuring’. The National and County Governments are both recognized by the Constitution and must be given effect in the manner contemplated by the Constitution.

The County Governments have only just come into existence after the 4<sup>th</sup> March 2013 election. They must be incubated and supported and this Court is an integral part of that process. Article 189 requires that the National and County Governments respect each other, assist and support each other and co-ordinate their functions. Granting the declarations sought in the petition will undermine this objective and process of implementation of the

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<sup>111</sup> See s 15(2)(a) of the Sixth Schedule.

<sup>112</sup> Art 201(d).

<sup>113</sup> [2013] eKLR para 9.



Constitution, devolution and the restructuring of the provincial administration.<sup>114</sup>

Similarly, in *Minister for Internal Security and Provincial Administration v Centre for Rights Education Awareness (Creaw) and 8 others*<sup>115</sup> the Court of Appeal recognised that the restructuring of provincial administration ‘is required to be achieved progressively within 5 years’.<sup>116</sup>

#### ***4.4.5 Harmonisation of restructuring with other transitional provisions***

Restructuring provincial administration in terms of section 17 must be harmonised with other transitional provisions. First, during the first period of transition, provincial administration performed and exercised functions and powers that included some assigned to county governments. Secondly, during the second period and especially after transfer of functions to county governments, provincial administration, whether fully restructured or not, cannot perform the functions and exercise the powers of county governments. Any performance and exercise of county functions and powers would be inconsistent with the Constitution and thus null and void. Provincial administration can only perform and exercise the functions and powers assigned to national government. Thirdly, through agreements between the national and county governments envisaged by Article 187, the county governments can nonetheless allow provincial administration to perform and exercise county functions and powers on behalf of the counties. The same applies to any other national government personnel. Fourthly, given that provincial administration has vast numbers of staff that can perform county functions, as part of facilitation, assistance and support, some of these staff must be shifted to county governments.

## **5 Conclusion**

Transition provisions of the Constitution are, by their very nature, temporary and aim to facilitate transition to devolved government. As such, they must be interpreted in a manner that facilitates rather than hinders the coming into operation of devolved government. Through the suspension of some of the provisions of the new Constitution, and the extension of those of the former Constitution, the transition provisions provide for a gradual transition

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<sup>114</sup> *Law Society of Kenya* paras 13 and 14.

<sup>115</sup> [2013] eKLR (*Creaw*).

<sup>116</sup> *Creaw* para 11.

to devolved government. This process is spread across two distinct transition phases. These are the period before the first elections, and that after the first elections under the new Constitution, during which a number of identified transition activities must take place.

The transition to devolved government must involve the deconstruction of the centralised system and the construction of the devolved system. This must be secured through: (a) enactment of devolution compliant laws; (b) interpretation of old order continued laws in a manner that makes them consistent with the new Constitution and facilitates transition to devolved government; (c) transfer of functions and resources, and the restructuring of provincial administration.

The Kenyan transition to devolved government is a complex and difficult process. It envisages a massive deconstruction and reconstruction of the state. The process cannot propel itself but must be carefully and delicately managed, facilitated, assisted and supported. Consequently, it involves a multiplicity of institutions playing varying roles. The Supreme Court in *Speaker of the Senate* correctly viewed this large number of institutions as evidence of the Constitution's 'commitment to protect' devolution as the 'core promise of the new Constitution'.<sup>117</sup> It noted that '[t]he large panoply of institutions that play a role in devolution-matters, evidences the *central place of devolution* in the deconstruction-reconstruction of the Kenyan state'.<sup>118</sup> One of the major challenges of transitioning to devolved government is the fact that some of the old order institutions have to play a role in the deconstruction of the old order and construction of the new order. The risk of vested interests trying to transition to devolved government in their own image of centralised government is obvious.

Once again, South African jurisprudence has proved beneficial in the purposive interpretation of the constitutional provisions on transition to devolved government.

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<sup>117</sup> *Speaker of the Senate* paras 186, 187 and 183.

<sup>118</sup> *Speaker of the Senate* para 183 (emphasis in original).

## CHAPTER TWELVE

### Conclusion

#### 1 Outline of the major argument

At the beginning of this study it was asserted that devolution was adopted as the centrepiece and most transformative aspect of the Constitution. It was intended to address the many governance, economic and development problems of the country, which arose from the long history of a highly centralised, undemocratic and inequitable system. The main problem identified, however, was that this may not easily be realised since devolution is a novel concept that constitutes the most complex aspect of the Constitution. It also has a controversial history and may be resisted by those who have vested interests in the centralised system, given that it has the potential for introducing radical change with far-reaching implications for many aspects of governance. Thus, the main purpose of the study was to provide a comprehensive and consistent interpretation of the devolution provisions of the Constitution in order to give effect to the purposeful realisation of devolution as a radical break with the past. The study posed two major questions: One, whether a purposive interpretation could be used to provide a comprehensive, coherent and consistent interpretation of the constitutional provisions on devolution to give effect to devolution's transformative intent; and two, whether foreign jurisprudence, and especially South African jurisprudence, could be useful in this process.

#### 2 Interpretation approach

The devolution provisions must be interpreted through a purposive approach, which the Constitution itself has provided for, and which recognises that constitutional interpretation is a process of the practical realisation and application of the constitutional provisions by giving them content, shape and direction.<sup>1</sup> Thus, a purposive approach focuses on identifying the values, purposes and objects the provisions aimed to achieve, and giving effect to them. This is achieved through interpreting the Constitution as a whole, taking into account both intra-textual and extra-textual context. From this perspective the social, economic, political and cultural context of the country in its historical and contemporary dimensions was identified as

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<sup>1</sup> Du Plessis L 'Interpretation' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed (2011) ch 32, 19.

playing a critical role in the identification and shaping of the values, objects and purposes of devolution. These context and the values, objects and purposes of devolution have thus been significant points of reference in the purposive interpretation of the devolution provisions of the Constitution. ‘Sharing and devolution of power’ has itself been identified as an important value of governance, which is elevated to the fundamental status of being part of the basic structure of the Constitution.<sup>2</sup> The centrality of devolution in the Kenyan Constitution has been demonstrated by an interpretation that puts the principle of devolution beyond the Constitution amendment power, even with a referendum. The constitution-making history has disclosed that devolution was identified as a major solution to the problems of the centralised past, long before the Constitution was adopted. The Constitution-framers were thus required by the legislation guiding the constitution-making process to deliver a Constitution that incorporates devolution.

The historical and contemporary context has revealed that the main objects and purposes for adopting devolution were: to promote and advance democracy and accountability; development and service delivery; equity and inclusiveness; and limitation of centralisation and its centralizing tendency. It has been argued that in order to give full effect to these values and objects of devolution, the devolution and county-empowering provisions must be interpreted liberally, broadly and generously in favour of the counties and devolution. On the other hand, the national government intervention and devolution-limiting provisions must be interpreted narrowly and strictly against the national government. The study has demonstrated that through a purposive interpretation the Kenyan courts must, while informed and guided by the identified values and objects of the Constitution and devolution, play the critical role of developing and shaping devolution. The Supreme Court has already asserted that the courts must resolve the ‘constitution-making contradictions, clarify draftsmanship-gaps, and settle constitutional disputes’ that may have arisen from the compromises of the constitution-making process.<sup>3</sup> Purposive interpretation continues the ‘constitution-making

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<sup>2</sup> Art 10(2)(a).

<sup>3</sup> *Speaker of the Senate and another v Attorney General and others* [2013] eKLR (*Speaker of the Senate*) para 156. See also *Judges and Magistrates Vetting Board and others v The Centre for Human Rights and Democracy and others (Judges and Magistrates Vetting Board)* Supreme Court Petitions Nos 13A, 14 and 15 of 2013 para 212. See also Du Plessis L (2011) ch 32, 39 where he states that: ‘Modern free theorists contend that determining the intention of the legislature necessarily entails the filling in of gaps in the enactment, making sense of an open-ended provision. A “wait and see” attitude with regard to legislative reform is deemed

process which does not end with promulgation. The courts must ‘illuminate legal penumbras’<sup>4</sup> that may have been created by the constitution-making process.

### **3 Lessons from South African jurisprudence**

The second question asked whether lessons could be drawn from the jurisprudence developed by the South African courts, given that Kenya’s devolution heavily borrowed from the South African Constitution. The study has demonstrated that while South African jurisprudence is useful in defining the devolution terms, concepts and the intergovernmental relations, and giving meaning and content to the provisions, it must be used with circumspection, taking into account the contextual differences between South Africa and Kenya.

First is the fact that devolution occupies a central place in the Kenyan constitutional design, as compared to its place in the South African Constitution. While the main focus of the South African Constitution was to establish one sovereign, democratic state founded on a number of liberal democratic values, which do not include devolution,<sup>5</sup> the focus of the Kenyan Constitution is to establish a state in which the people are proud of their ethnic, cultural and religious diversity, and are determined to live in peace and unity as one indivisible sovereign nation.<sup>6</sup> This Kenyan state is founded on values among which ‘sharing and devolution of power’ occupy a central place.<sup>7</sup> The Constitution thus identifies one of the objects of devolution as being the need ‘to foster national unity by recognizing diversity’.<sup>8</sup> Sharing and devolution of power are thus elevated to founding values and are major devices through which the Constitution seeks to secure national unity in diversity. Moreover, the principle of the Kenyan devolution is anchored in Article 1, which provides for the sovereignty of the people and the sharing out of the power to exercise such sovereignty as one of the essential organisational features of the governance system. The county governments do not exercise

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inappropriate. The judiciary, with the help of the common law, must intervene in order to remedy defects in statute law, since legislative processes are not sufficiently expeditious and streamlined to cope with deficiencies that show up in day-to-day practice.’

<sup>4</sup> *Speaker of the Senate* para 156. See also De Villiers B ‘Introduction’ in De Villiers B (ed) *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* (2008) 10 commenting in respect of the South African Constitution.

<sup>5</sup> See s 1 of the Constitution of the Republic of South Africa.

<sup>6</sup> Paragraph 3 of the Preamble.

<sup>7</sup> Art 10(2)(a).

<sup>8</sup> Art 174(b).

decentralised power delegated to them by national government. Instead, they share with the national government the exercise of the sovereign power of the people assigned to them directly by the people of Kenya. This power, even if limited in subject matter, is not derived from the national government but the people.<sup>9</sup> Further, since devolution cannot propel itself, the Constitution establishes and envisages a multiplicity of institutions to facilitate, assist, support and protect devolution. The Supreme Court in *Speaker of the Senate* viewed this large number of institutions as evidence of the Constitution's 'commitment to protect' devolution as the 'core promise of the new Constitution'.<sup>10</sup> It noted that '[t]he large panoply of institutions that play a role in devolution-matters, evidences the *central place of devolution* in the deconstruction-reconstruction of the Kenyan state'.<sup>11</sup> For these reasons a more generous interpretation of the Kenyan provisions in most instances is justified as the correct and advisable approach in order to protect devolution than has been done in South Africa.

Secondly, while the South African Constitution establishes a multilevel system of government comprising three spheres of government; namely, national, provincial and local, the Kenyan devolution has only two levels of government – the national and county. Evidence from South African jurisprudence indicates that the Constitutional Court has interpreted the powers and functions of the provincial sphere of government strictly and narrowly,<sup>12</sup> while it has interpreted those of local government liberally, broadly and generously.<sup>13</sup> This approach has been criticised and explained by some scholars as arising out of a number of factors. First, apartheid history, which had attempted to divide the country through the creation of black Bantustans, makes for fertile ground to fear strong provinces and seek strong central government in order to redistribute and deal with the racial segregation and deprivation of the past. Secondly, the centralist ideological leanings of the monolithic African National Congress party, which was nurtured with the support of

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<sup>9</sup> See the German Southwest State Case (1951) 1 BVerFGE 14 para 4, in Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 72.

<sup>10</sup> *Speaker of the Senate* paras 186, 187 and 183.

<sup>11</sup> *Speaker of the Senate* para 183 (emphasis in original).

<sup>12</sup> See *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and others* 2011 (11) BCLR 1181 (*Limpopo 1*) paras 22 and 24, and *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and others* [2012] ZACC 3 (*Limpopo 2*).

<sup>13</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (2) BCLR 157 (SCA) (DFA) para 49.

centralist communist parties during the Cold War days and which controls government at both national and provincial spheres.<sup>14</sup> Thirdly, national government officials have interpreted concurrent functions in a manner that pre-empts provinces from the legislative arena and relegates them to the sole role of implementation of national government legislation.<sup>15</sup>

However, it is evident that the Court has also been generous and protective of the provincial sphere, especially regarding its participation in decision-making at the national level. In a number of cases, legislation has been invalidated on grounds that the manner and form followed did not accord the provinces or the NCOP its due role in the process.<sup>16</sup> In the circumstances, it is submitted that the Kenyan Courts should be inclined towards the jurisprudence that takes the liberal, broad and generous interpretation so as to give effect to devolution given its central position in the Kenyan constitutional design. Given that the Kenyan counties combine and aim to achieve the roles of both regional and local government levels,<sup>17</sup> the interpretation of the powers and functions as well as their intergovernmental rights of participation should be generous in the same manner that the South African Constitutional Court has treated both provincial and local government. This generous approach must be sustained whether one is dealing with powers and functions, finances, intergovernmental relations or the right of participation through the Senate in national government decision-making.

Thirdly, the text of some of the Kenyan devolution provisions differs from the equivalent South African provisions. In some cases these differences should be interpreted as having been deliberate. The Kenyan constitution-framers were aware of the South African provisions but deliberately chose to phrase the Kenyan provisions differently. For example, while the South African Constitution expressly provides for both provincial<sup>18</sup> and national<sup>19</sup> legislative

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<sup>14</sup> See Malherbe R ‘The future of provinces: Constitutional and structural aspects’ in De Villiers B *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* (2008) 46 and 48. See also De Villiers (2008) 6.

<sup>15</sup> See Malherbe (2008) 47.

<sup>16</sup> *Matatiele Municipality and others v President of the Republic of South Africa and others* 2007 (1) BCLR 47 (CC) (18 August 2006) para 55.

<sup>17</sup> Bosire CM *Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010* (Unpublished Phd thesis, University of Western Cape, 2013) 408-9.

<sup>18</sup> S 104(4) Constitution of the Republic of South Africa, 1996.

incidental powers, the Kenyan Constitution provides for county legislative incidental powers<sup>20</sup> but not for national government legislative incidental powers. This has been interpreted as a deliberate omission intended to protect the county legislative domain from invasion by national government. Article 185(2) read together with this deliberate omission imply an intention to protect and empower county governments to be able to effectively perform their functions and exercise their powers. The constitution-framers intended to protect devolution, given its centrality in the constitutional scheme.

#### **4 Evaluation of the whole system**

##### **4.1 The role of the values, objects and principles in the system**

Using the purposive interpretation, the study has disclosed a Kenyan history of a highly centralised political and economic system that was not at all accountable to the people. This system led to economic underdevelopment, poor service delivery, skewed development and service delivery, feelings of regional and ethnic disparities and marginalisation of communities, inequity in the distribution of resources, development and other opportunities, and exclusion of people and communities from decisions that affect their lives. Devolution was therefore adopted as a response to these problems and shortcomings, which it was meant to redress. This is reflected in the objects and principles of devolution which focus on developmental devolved government, the recognition of participation of the people and communities in their own development, equitable sharing of resources and opportunities, the protection of minorities and marginalised groups and communities, and democratic and accountable systems that limit centralised power.

A purposive interpretation has demonstrated that these values and objects of devolution are not only aids for the interpretation of other provisions of the Constitution, but are also themselves operative provisions which demarcate the limits of powers of the two levels of government. First, the powers are limited in the sense that they can only be used as a means of achieving these objects. The values and objects are specific goals and purposes meant to direct and guide action towards certain ends. They identify the ultimate ends in pursuit of which all power assigned within the devolved system of government should be deployed. Secondly, devolution as a value forms part of the basic structure of the Constitution, and

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<sup>19</sup> S 44(3) Constitution of the Republic of South Africa, 1996.

<sup>20</sup> Art 185(2).



imposes limitations even on the constitution amendment power – making certain provisions of the Constitution non-amendable. Thirdly, the values and objects, like the Bill of Rights, serve to transform some of the powers and functions of the levels of government into binding obligations. The powers and functions lose their discretionary nature and become obligations which the governments must discharge and which can be enforced by one government against the other or by citizens against any one of the governments.

A purposive interpretation in this respect has drawn some useful lessons from comparative jurisprudence. The German<sup>21</sup> and Indian cases in particular have been useful in establishing the doctrine of the basic structure of the Constitution, of which it has been argued that the Kenyan devolution forms a part.<sup>22</sup> Likewise, South African cases have been useful in indicating that objects and values can transform discretionary powers and functions into binding obligations.<sup>23</sup>

#### **4.2 The nature and structure of the system**

As already noted, in contrast to the South African system, the Kenyan Constitution establishes only two levels of government: national and county. However, the provisions empowering county governments to decentralise their functions and provision of their services have been purposively interpreted as envisaging a statutory local government level as a competence of county government. The study has demonstrated that in nature the county governments are relatively autonomous. Their territorial autonomy, including their boundaries, names and the numbers have constitutional protection. A purposive interpretation has established that while county boundary alterations that do not involve change of county names or number of counties can be effected by a parliamentary resolution, alterations that lead to the change of the names or total number of counties must go through constitutional amendments. Those that change the total number of counties must go through a referendum as well.

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<sup>21</sup> Southwest State Case (1951) 1 BVerFGE 14 para 2, in Kommers (1989) 71-2. See also *Kesavananda Bharati v State of Kerala* (1973) AIR SC 1461. *Indira Nehru Gandhi v Raj Narain*, in which Chandrachud (1975) AIR SC 2461. See *Minerva Mills Ltd v India* (1980) AIR SC 1789, 1824.

<sup>22</sup> *Golak Nath v State of Punjab* (1967) AIR SC 1643.

<sup>23</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (2) BCLR 150 (CC) para 38. See also *Joseph and others v City of Johannesburg and others* 2010 (3) BCLR 212.

To a lesser extent, comparative jurisprudence has been useful. While the South African cases have been useful in the interpretation of the county assemblies' duty to facilitate public participation and involvement in their businesses,<sup>24</sup> Nigerian<sup>25</sup> and the United States of America<sup>26</sup> cases assisted in the interpretation of provisions on removal of the governor from office.

### 4.3 Powers and functions

Although the assignment of powers and functions appears the most complex aspect of the Kenyan devolution, this study has demonstrated that through a purposive interpretation, it is possible to decipher clear functions of the two levels of government. The Constitution is open to interpretation that recognises exclusive, concurrent and residual powers of the two levels of government. Contrary to the impression created by Article 186(4), county governments have some very clear exclusive powers. The study has drawn lessons from the 'bottom-up' approach to interpretation developed by the South African courts and scholarship, to determine the exclusive powers and functions of both levels of government. This approach is essentially purposive and requires that county government powers and functions be determined first before the remainder is regarded as national government powers and functions. In this manner, one avoids subsuming county government exclusive powers and functions under those of the national government. Even though the approach was strictly developed to address the problem of overlaps in the exclusive powers and functions of the levels of government, the same approach has been useful in isolating exclusive powers and functions from concurrent ones in the first place. It has also been demonstrated that a purposive interpretation which in essence seeks to effectuate and give full effect to the purposes and objects of devolution may at times be realised by interpreting certain aspects of the devolution provisions narrowly and restrictively.

The study has interpreted the legislative powers of Parliament under Article 186(4) narrowly in order to protect the county legislative space. It, however, demonstrated that Article 186(4) plays a limited but very important role of assigning to Parliament legislative powers in respect of unclear aspects of what otherwise are areas of county government exclusive powers. Although the functional lists do not specify the concurrent powers and functions,

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<sup>24</sup> See *Doctors for Life International v Speaker of the National Assembly* (2006) BCLR 1399.

<sup>25</sup> *Hon Muyiwa Inakoju and others v Hon Abraham Adeolu Adeleke* Supreme Court of Nigeria S.C 272 of 2006.

<sup>26</sup> *Walter L Nixon v United States* 506 US 224 (1993).

there are significant areas of concurrency. These are determined by examining both the functional lists and other provisions of the Constitution to identify specific functions which both national and county governments can perform. In a number of cases, both the national and county governments can legislate on the same matter. When conflict of national and county laws arises in these areas of concurrency, the justification requirements under Article 191 must be interpreted strictly against national government, in order to resolve such conflicts in a manner that does not unduly interfere with the county legislative domain. In this manner, county governments' powers and functions, which initially appeared very limited, have turned out to be substantial.

#### **4.4 Financial powers**

In the financial area, it has been demonstrated that while county governments must be encouraged to raise their own revenue, they in reality have been assigned very limited revenue raising powers, comprising property and entertainment taxes as well as any other taxes authorised by national legislation. Nonetheless, property rates and entertainment taxes have purposively been interpreted as being original revenue raising powers deriving from the Constitution and not legislative powers donated by national government.

The abovementioned sources cannot yield adequate revenue for the county governments to enable them to discharge their constitutional obligations and responsibilities. Consequently, counties are entitled to a share of the revenue raised nationally, either as equitable shares or conditional grants. Thus, revenue raised nationally has been purposively interpreted as accruing not exclusively to national government but jointly to national and county governments, which must share it equitably in an objective manner in terms of the criteria spelt out by Article 203. This interpretation approach has also indicated that the shareable revenue raised nationally is more than the revenue raised by the national government in terms of Article 209. From this perspective, it has been concluded that even revenue excluded from the Consolidated Fund because it has been dedicated to specific purposes, is not excluded from the shareable 'revenue raised nationally', but must be included in the Division of Revenue Act and reflected as part of the share of national government, since it is dedicated to functions constitutionally assigned to national government. The fifteen per cent rule has also been interpreted narrowly as not playing a role in the definition of revenue raised nationally and the determination of the vertical division of revenue. It only plays a limited role in the resolution of disputes which should rarely arise if the system of vertical division of revenue guided by the functions and the criteria in Article 203 is well understood and applied.

Interpreted in this manner, it is concluded that the financial constitutional design ensures that county governments have reliable sources of revenue to enable them to discharge their governance and service delivery responsibilities.

The financial provisions bear striking similarities to those of the South African Constitution. Thus, South African jurisprudence and scholarship have provided lessons in the purposive interpretation of certain aspects of the Kenyan financial provisions. In particular, the concept of ‘original’ revenue raising powers drew from South African cases.<sup>27</sup> The principle that county equitable shares are entitlements and not largesse from national government was informed by the decision in a South African case.<sup>28</sup>

#### **4.5 Cooperative government and intergovernmental relations**

The system of devolution which the Constitution has adopted is cooperative and not competitive. This is because, compared to local government under the repealed Constitution, county governments under the new Constitution are fully-fledged governments with status to engage in intergovernmental relations with the national government or each other at the county level.<sup>29</sup> The national and county governments are described as distinct and interdependent, and are required to relate to each other in a cooperative and consultative manner. The notion of cooperative intergovernmental relations has been interpreted as imposing upon the two levels of government the obligations to respect the constitutional status and institutions and also the functions and powers of each other. When this principle is strictly interpreted against national government, county governments’ autonomy and space is protected. The governments must consult, cooperate, support and assist each other. It has been demonstrated that effective performance of certain functions and exercise of some of the powers in order to achieve the objects of devolution, require cooperation, consultation,

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<sup>27</sup> See *City of Cape Town and another v Robertson and another* 2005 (3) BCLR 199 (CC) in which the South African Constitutional Court held that the power of local government to impose rates is an original one. See also *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1998 (12) BCLR 1458 para 39. See also Steytler & De Visser (2011) ch 13, 7 who have observed that one ‘consequence of being an original power is that a municipality’s power to levy rates is not dependent on enabling national legislation’.

<sup>28</sup> *Uthekela District Municipality and others v President of the Republic of South Africa and others* (2002) (5) BCLR 479 (N).

<sup>29</sup> See Malherbe R ‘The constitutional distribution of powers’ in De Villiers B (ed) *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* (2008) 25.

assistance and support among the two levels of government. It has been demonstrated that in areas of functional interdependence, cooperative government ensures that the autonomy of county governments and the exclusivity of functions and powers of the levels of government is respected and maintained without compromising the effective performance of the interdependent functions by the two levels of government. Although the main objective of cooperative devolved government is to avoid conflict among and within the two levels of government, occasions arise when avoidance is not possible. In such circumstances, the two levels of government also have an obligation to avoid judicial settlement of disputes, and pursue alternative dispute resolution mechanisms before resorting to litigation.

Given that there are similarities in the Kenyan constitutional provisions in this respect to the South African provisions, the purposive interpretation has drawn instructive lessons from South African jurisprudence. The notion of distinct and interdependent levels of government<sup>30</sup> draws from the South African Constitution,<sup>31</sup> and its interpretation has drawn on South African decisions.<sup>32</sup> The concept of cooperative as opposed to competitive devolved government requiring cooperation and consultative relationships between the levels of government<sup>33</sup> also draws from the South African Constitution,<sup>34</sup> and their interpretation has consequently relied on South African jurisprudence.<sup>35</sup> The interpretation of the obligation to avoid adversarial litigation has also drawn lessons from South African decisions.<sup>36</sup>

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#### **4.6 The Senate as an institution of shared governance**

A key element of the system is the combination of the notion of ‘self-rule’ at the county level and ‘shared rule’ at the national level. Shared rule requires recognition of participation rights

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<sup>30</sup> Art 6(2).

<sup>31</sup> S 40(1) Constitution of the Republic of South Africa, 1996.

<sup>32</sup> *Fedsure* para 126. See also *Independent Electoral Commission v Langeberg* (2001) 9 BCLR 883 (*Langeberg*) paras 39-40.

<sup>33</sup> See Arts 6(2) and 189.

<sup>34</sup> See s 41 Constitution of the Republic of South Africa, 1996.

<sup>35</sup> *Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) (*First Certification* judgment) para 287. See also *Ex parte President of the Republic of South Africa in re Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) para 40. See also *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and another* 1999 (12) BCLR (CC) 1360 paras 79 and 80.

<sup>36</sup> See *First Certification* judgment para 291. See also *Langeberg Municipality* para 20.

of county governments in decision-making at the national level, which the Senate has been interpreted as providing infrastructure for. The Senate represents the counties and protects their interests and those of their governments. It thus participates in legislation-making at the national level in Bills concerning counties. Because of these and the need to protect devolution, Bills concerning counties have been interpreted broadly, liberally and generously in favour of the Senate to create room for it to play a role in Bills affecting counties. In this regard, the Supreme Court has correctly asserted that it would be willing whenever approached to ward off any threat to devolution.<sup>37</sup> Purposive interpretation demonstrates that failure to involve the Senate in the enactment of a Bill concerning counties is justiciable as part of the manner and form of the legislative process. Furthermore, the Senate's oversight powers to review national government intervention in county affairs are interpreted as forming part of its strong oversight powers. It can even veto the President on the issue of suspension of a county government. In contrast, its oversight powers over national government revenue allocated to county governments have been interpreted narrowly as forming part of its weak oversight powers, which it must exercise bearing in mind the co-operative government obligations to respect the constitutional status and institutions of county governments as well as the oversight functions of the county assembly. But it has been emphasised that this does not mean blind protection even when county governments are wrong and require corrective measures.

The concept of Bills concerning counties in which the Senate has a role to play<sup>38</sup> draws from the South African Constitution which provides for the participation of provinces in the national legislative process through the National Council of Provinces,<sup>39</sup> the equivalent of the Senate. As such the interpretation of how to determine a Bill concerning counties has drawn lessons from South African cases.<sup>40</sup> Likewise, this South African jurisprudence has been useful in the interpretation of the justiciability of the failure to involve the Senate in the legislative process dealing with Bills that concern counties.<sup>41</sup>

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<sup>37</sup> *Speaker of the Senate* para 190.

<sup>38</sup> Arts 96(2) and 110.

<sup>39</sup> See ss 42(4), 75 and 76 Constitution of the Republic of South Africa, 1996.

<sup>40</sup> *Tongoane and others v Minister of Agriculture and Lands Affairs and other* (2010) BCLR 741

<sup>41</sup> See *Doctors for Life International v The Speaker of the National Assembly and others* (2006) 12 BCLR 1399 (CC) para 208. See also *Glenister v President of the Republic of South Africa & others* 2009 (2) BCLR 136

## 4.7 Supervision

Despite this relative autonomy of the county governments and the cooperative form of devolution adopted, a measure of supervision entailing regulation, monitoring and intervention by national government is envisaged. Regulation has been interpreted narrowly to restrict it to framework legislation avoiding details that may cover the whole field and preempt county governments from their legislative domain.<sup>42</sup> Because of the risk of abuse of such supervision and intervention powers, the Constitution explicitly provides for very constrained and circumscribed intervention, suspension and stoppage of transfer of funds powers. It has been demonstrated that in order to achieve the objects of devolution, these powers must be interpreted narrowly and strictly against the national government. For example, it has been argued that appropriate steps and measures must be interpreted restrictively, limiting them to only those measures that address the functions that the county government has been unable to perform. Assumption of responsibility has also been interpreted narrowly to ensure that national government only takes this measure when it is absolutely necessary to do so. Similarly, in cases of suspension, ‘exceptional circumstances’ has been interpreted narrowly and strictly against national government to ensure that no inroads are made into the autonomy of the county governments, without good reason. As well, ‘material breach’ and ‘persistent material breaches’ for purposes of stoppage of transfer of funds to county governments have been interpreted narrowly and strictly against national government to ensure that stoppage of transfer becomes necessary only in a few instances. The overall conclusion is that while supervision is necessary to ensure that the objects of devolution are achieved, it is balanced against the need to protect the autonomy and the space of the county government. The study demonstrates that both objectives can be secured through a purposive interpretation and application of the constitutional provisions in this respect. In interpreting these aspects of supervision in this manner, the South African cases have been useful in some respects.<sup>43</sup>

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(CC) para 43; *Lindiwe Mazibuko v Speaker of the National assembly and another* 2013 (11) BCLR 1297 (CC) paras 47, 60 and 66.

<sup>42</sup> See Malherbe (2008) 21-3.

<sup>43</sup> See *Mnquma Local Municipality and Another v Premier of the Eastern Cape and others* (2009) ZAECBHC 14. See *South African Defence and Aid Fund and Another v Minister of Justice* (1969) 1 SA 31 (A) 34A-35D. See also *First Certification* judgment para 124; *Premier of Western Cape & others v Overberg District Municipality & others* 2011 (4) SA 441(SCA).

#### **4.8 The challenges of transition**

The study has revealed that a major challenge to the system is the management of the gradual transition from the centralised system to the devolved system. The constitutional transition provisions have been interpreted narrowly as being aimed at facilitating and bringing into operation the substantive provisions and the devolution provisions, in particular. Their role is limited both in time and purpose. In respect of enactment of legislation required to bring devolution into operation, it has been argued that a purposive interpretation must be used to adjust the old order laws to ensure that they give effect to the constitutional provisions and bring them into operation even before enabling legislation has been enacted. The courts must take a liberal approach when interpreting these old order laws even where they are incomplete to ensure that they give operational meaning to constitutional provisions in specific and suitable cases. Since the reality of devolution is that it will take a long time to enact the required devolution-compliant laws and to review and amend or repeal the old order laws, these old order laws are continued in existence. The study has demonstrated that the requirement that such laws be interpreted with alterations and modifications to bring them into conformity with the devolved system, adopts severance and reading in as an interpretation strategy as well as a remedy to legislative inconsistency with the Constitution. As part of transition to devolved government, the power of national government to restructure provincial administration to accord with and respect the system of devolved government has been interpreted strictly against national government to ensure that, first, the constitutional status and institutions of county government are respected. Secondly, the functions and powers which the restructured provincial administration performs and exercises must be limited in the national government functional areas and powers, and not include county functional areas and powers. Thirdly, even when performing national government functions and exercising national government powers, the restructured provincial administration must do so in a manner that does not interfere with or encroach on county functions and powers.

#### **5 Conclusion**

The lessons learnt are that it is one thing to adopt a devolved system and yet another to interpret it in a manner that delivers its objects and purposes. The approach to interpretation can either develop a system to its desired goals or be used to undermine its objectives and purposes. The constitutional provisions can provide for an effective non-centralised system, but if it is not developed through a purposive interpretation, it may not deliver this objective. The overall assessment is that the Kenyan Constitution establishes a non-centralised system



with constitutional provisions on all the essential elements of such a system, but if it is not clearly understood, applied and realised in the manner presented in this study, it may not deliver the desires of the Kenyan people. This therefore puts an obligation on the courts to develop devolution through a purposive interpretation. All other institutions involved in interpretation also bear responsibility to take a purposive approach, while developing policies and legislation necessary for the operation of the devolved system. A purposive interpretation can achieve the objective of realising devolution as the central and most transformative aspect of the Constitution. It has, however, been demonstrated that comparative jurisprudence is useful in taking this approach.



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