

“In Kenya, corruption in government can be attributed to the predominance of arbitrary power, especially in the legal (as opposed to constitutional) order. Invariably, the legal order grants executive, legislative, and judicial actors broad powers without establishing effective procedural mechanisms to circumscribe their exercise. In the absence of effective regulation, law therefore often aids the abuse of power and corruption. In these circumstances, constitutional reform needs to be accompanied by comprehensive democratization of the legal order. While Kenya’s Draft Constitution provides norms and values that can enhance government accountability, there is an urgent need to establish strongly institutionalized procedural and public participation mechanisms that will circumscribe the exercise of power. In this regard, participatory and accountable transition mechanisms will be required if the new constitutional order is to be realized.”



—Migai Akech, February 22, 2010

Abuse of Power and Corruption in Kenya: Will the Proposed New Constitution Enhance Government Accountability?

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The views expressed in this presentation represent the opinions and analysis of the speaker and do not necessarily reflect those of the National Endowment for Democracy or its staff.

Outline

- ▶ Concerns, arguments & objectives
- ▶ Conceptual framework – representative democracy and government accountability
- ▶ Abuse of power & corruption in the three branches of government in Kenya
- ▶ The Constitution–Making Process
- ▶ Government Accountability in the Draft Constitution (DC)
- ▶ Conclusion

Concerns

- ▶ Concerns – abuse of power & corruption continue to thrive, in spite of numerous democratization reforms.
- ▶ Abuse of power & corruption occur not just in the executive, but in the legislature and the judiciary as well.
- ▶ What explains the persistence of abuse of power & corruption in Kenya?
- ▶ Existing accounts of corruption:
- ▶ democratization may provide incentives for corruption, especially in the mounting of electoral campaigns.
- ▶ Michela Wrong: corruption is prevalent in Kenya because ethnic cabals believe that it is their “turn to eat” once they assume the reigns of government.

Arguments

- ▶ However, these explanations may be symptoms of a much deeper problem, namely institutional failure.
- ▶ That is, bad, dysfunctional or failed institutions often facilitate the abuse of power in government, which in turn creates an environment in which corruption can thrive.
- ▶ **Argument** – Abuse of power & corruption can be attributed to the predominance of arbitrary power, especially in the legal (as opposed to constitutional) order.
- ▶ “Arbitrary” – “not restrained or limited in the exercise of power: ruling by absolute authority.”

Objectives

- ▶ What do I mean?
- ▶ The legal order invariably grants executive, legislative & judicial actors broad powers without establishing effective procedural mechanisms to circumscribe their exercise.
- ▶ And in the absence of effective regulation, law (old and new) therefore often aids abuse of power & corruption.
- ▶ **Objectives**: Examine the exercise of governmental power in Kenya & the potential of the Draft Constitution to enhance government accountability.

Representative Democracy & Government Accountability

- ▶ Problem of representative democracy:
- ▶ Elected representatives of the people (and the bureaucrats to whom they delegate power) are not always accountable to the people.
- ▶ Accordingly, there is often a need for mechanisms that enhance day-to-day accountability of the 3 branches of government, irrespective of the system of government adopted by the polity in question.
- ▶ For example, such mechanisms enable the people to call to account unauthorized, illegitimate, unjust or corrupt exercise of power.

Abuse of Power & Corruption in Kenya

- ▶ Although Kenya has established numerous institutions that seek to enhance government accountability, abuse of power & corruption continue to thrive in the 3 branches of government due to the predominance of arbitrary power in the legal order.
- ▶ The president, ministers & senior public servants often use law to intimidate their juniors into silence or obeying illegal commands.
- ▶ Indeed, public servants are often unwilling accomplices to abuse of power or corruption.
- ▶ Members of parliament exercise their “collective power” without restraint, and can become mercenaries for hire by the highest bidder (in a manner of speaking!).
- ▶ The Chief Justice can compromise the decisional independence of judges.

Abuse of Power & Corruption – Executive

- ▶ Kenya has been experimenting with a divided/hybrid executive since 2008, owing to a power-sharing agreement that was the result of an international mediation process.
- ▶ So in theory, the President shares executive power with a Prime Minister whose function is to “coordinate and supervise the execution of the functions and affairs” of government.
- ▶ In practice, the exercise of executive power is not constrained by doctrine of “collective responsibility”:
- ▶ President often ignores PM, cabinet, or makes important decisions affecting the portfolios of ministers without involving or informing them.
- ▶ It is also alleged that the President govern with people who are not known or accountable to the people – the so-called “kitchen cabinets.”

Executive & Public Service

- ▶ President controls the public (or civil) service; public servants serve at the “pleasure of the president.”
- ▶ Public servants thus have no job security, and can be transferred/dismissed at any time.
- ▶ These powers of the president undermine the idea of “public service neutrality.”
- ▶ Public Service Commission, whose members are appointed by president, often fails to protect interests of public servants.
- ▶ Old and new laws such as Official Secrets Act and Public Officer Ethics Act ([p.21](#)) enable executive to intimidate public servants.
- ▶ In these circumstances, public servants cannot resist the illegal instructions of their seniors. This may explain why they are often accomplices to grand corruption schemes and abuse of power.

Executive II

- ▶ Recent corruption scandals should therefore be seen in this context.
- ▶ Public servants who have refused to implement illegal instructions have been transferred to irrelevant ministries, or dismissed – e.g., former Deputy Governor of Central Bank who refused to approve an illegal tender.
- ▶ Judicial decision – Head of Public Service has power to transfer public servant from one position to another without due process.
- ▶ Another example – in the months preceding the 2007 elections, Head of Public Service ordered Administration Police force to train its officers “to disrupt polling and... ensure that government supporters amongst the candidates and voters prevailed.” (CIPEV Report at 407). This blatant abuse of power was not punished.

Abuse of Power & Corruption – Legislature

- ▶ Arguable – legislature is becoming an institution of “genuine countervailing power”
- ▶ Emerging concern: legislature is not accountable, especially in the manner in which Members of Parliament (MPs) exercise their “collective powers” of making policies and laws, and exercising oversight of executive branch.
 - Legislature is perceived as the one of the most corrupt public institutions.
- ▶ Due to absence of a strongly institutionalized ethics regime:
 - (i) MPs are vulnerable to capture by special interests.
 - Lobbying exercises can be disguised as “Capacity building initiatives”.
 - (ii) Committees of the legislature often consist of MPs against whom credible allegations have been made.
- ▶ The Speaker (president of legislature) lacks security of tenure.
- ▶ Clerk (head of Parliamentary Service) also lacks security of tenure.

Legislature II

- ▶ Recent examples of abuse of legislative power:
- ▶ 1. Legislature has been influenced unduly by special interest groups in exercising its law-making power – as the Tobacco Control Act illustrates.
 - Tobacco lobby wined & dined MPs to enact favorable legislation.
- ▶ 2. Legislature has enacted unconstitutional laws – for example, the Constituency Development Fund Act.
 - While this act has good intentions (i.e., participation of citizens in development projects at the local level), it is arguably unconstitutional because it gives MPs power to simultaneously expend public resources and account for the expenditure to the legislature (i.e., themselves!).
- ▶ 3. Legislature has failed to amend laws declared unconstitutional by the courts – such as the Kenya Roads Board Act, which makes MPs members of district road committees.

Abuse of Power & Corruption – Judiciary

- ▶ In practice, the president appoints the Chief Justice (head of judiciary) and judges without consulting anybody.
- ▶ The president also appoints all members of the Judicial Service Commission (which in theory is supposed to regulate matters such as judicial appointments & discipline).
- ▶ Thus president has sufficient power to undermine judicial independence.
- ▶ The Chief Justice also enjoys immense powers, some of which are delegated to him by the JSC, but which are not regulated.
 - Examples: power to determine which judges hear what cases, where litigants can file cases and how, supervision & discipline of judges, transfers, allocation of office space, housing & vehicles.
- ▶ Thus CJ has power to undermine decisional independence of judges, which have been enhanced by Public Officer Ethics Act.

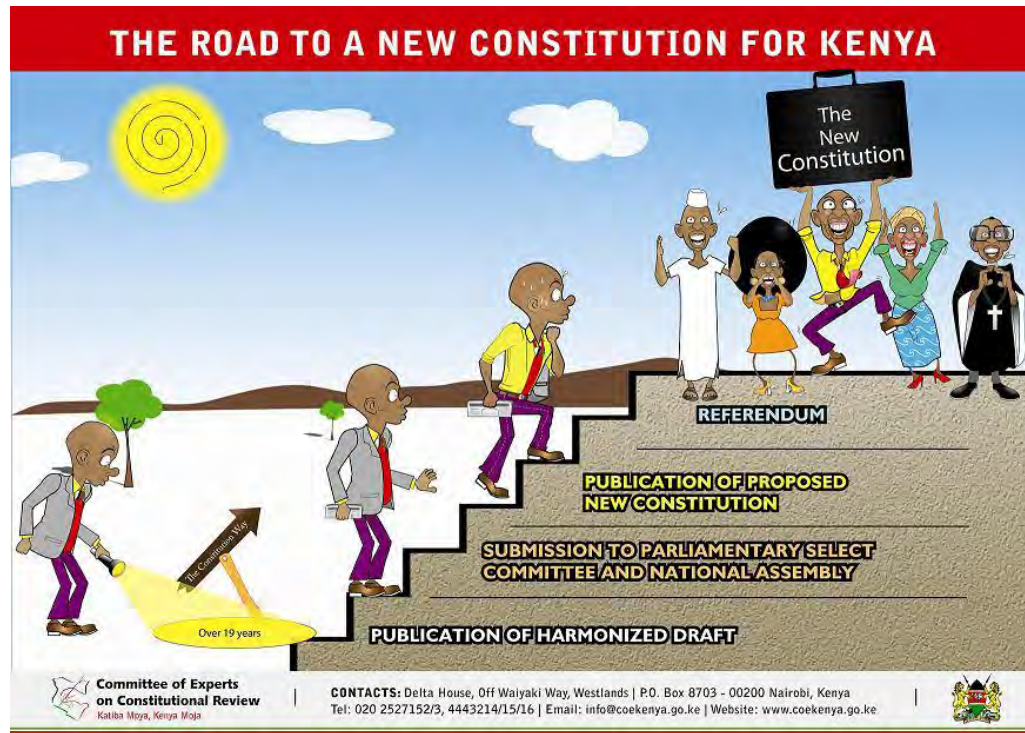
Judiciary II

- ▶ Further, the law fails to establish due process mechanisms to ensure that the process of removing judges – including the exercise of the power to recommend the establishment of a tribunal – is transparent, impartial, and fair.
 - For example, this power was abused in the case of the so-called “radical surgery” of 2003 that led to the removal of some 20 judges without due process.
- ▶ In these circumstances, judges are not secure in their positions, and may become enablers of corruption, as recent decisions of the High Court demonstrate.
- ▶ Examples: *Saitoti*, *Kotut* cases, where the High Court issued decisions prohibiting the Attorney-General from prosecuting individuals implicated in corruption by a commission of inquiry.

Draft Constitution – Process I

- ▶ The constitutional review process, which began in 2000, was revived in 2008, after the public rejected an earlier draft constitution in the referendum of November of 2005.
- ▶ The review process is informed by a perception that a new constitution is necessary if Kenya is to resolve the issues that generated the post-election crisis of 2008.
- ▶ A Committee of Experts (CoE) was appointed to: identify issues agreed upon in existing draft constitutions (2003, 2005), invite representations from the public, identify “contentious” issues, and make recommendations on resolution of these issues to a Select Committee of the legislature (PSC).
- ▶ PSC’s role is then to deliberate and build consensus on the contentious issues “on the basis of the recommendations of the CoE.” The review process has now reached this point.

New Constitution – 14 days after publication of result of referendum



Draft Constitution – the Executive

- ▶ Verdict – the DC demonstrates a desire of the drafters to retain the prevailing organization of executive power. For example:
- ▶ President retains control of the public service. Thus the president can dismiss Principal Secretaries (formerly permanent secretaries), without consulting anyone and without due process.
- ▶ My view – There is a need to liberate the public service; the tenure of principal secretaries (unlike ministers) should not be determined by the president – instead, they should emerge from within the ranks of the public service, and should be transferred/dismissed by the Public Service Commission subject to due process.
- ▶ Although there is provision for impeachment of president, this is likely to be episodic, and may not therefore constitute a credible accountability mechanism.
- ▶ Note: Position of Prime Minister has been abolished.

Draft Constitution – the Legislature

- ▶ DC establishes a bicameral legislature (a National Assembly as the upper house and a Senate as the lower house).
- ▶ Speakers of the 2 houses do not have security of tenure – they may be removed from office by a resolution supported by the votes of not less than two thirds of the members.
- ▶ In contrast, the clerks (or administrative heads) of both houses can only be removed from office pursuant to the recommendations of a tribunal.
- ▶ Membership of the Parliamentary Service Commission has been expanded, and the DC requires the legislature to nominate 2 individuals “experienced in public affairs” to represent the public.
 - Not clear – how will the legislature nominate these individuals?
- ▶ DC does not establish how legislature will exercise its powers & privileges, which have been abused in the past.
- ▶ But, citizens have right to recall MPs and petition the legislature.

Draft Constitution – the Judiciary

- ▶ DC makes an effort to reduce the powers of the Chief Justice.
- ▶ First, it establishes an office of “Chief Registrar of Judiciary”, which will be responsible for administration and accounting in the judiciary.
 - There is a need to clearly spell out the functions of this office to avoid turf wars between its holder and the Chief Justice.
 - The Chief Registrar should also be given security of tenure.
- ▶ Secondly, it disperses power within the superior courts: CJ will preside over Supreme Court, while Court of Appeal and High Court will be presided over by the most senior ranking judges.
- ▶ President will appoint CJ and judges subject to recommendations of Judicial Service Commission and approval of the legislature.
- ▶ Further, vacancies in these offices will be filled through a competitive process.

Judiciary II

- ▶ Membership of the JSC has been expanded.
 - Thus the president is to appoint one man and one woman to “represent the public.”
 - The exercise of this power should be circumscribed. Otherwise it may become an instrument for the president to influence the decisions of the commission.
 - Subordinate courts, practicing lawyers and the legal academy will also be represented in the commission.
- ▶ DC also circumscribes the power to dismiss the CJ and judges.
 - Process of removal will now be initiated by JSC, which is required to give a hearing to the affected judge.
 - If after this process the JSC is satisfied that there is a ground for removal, it can then ask the president to establish a tribunal to inquire into the matter.

Conclusion

- ▶ All in all, the Draft Constitution has made significant efforts to circumscribe the exercise of power, especially in the case of the judiciary.
- ▶ However, the president retains considerable arbitrary power, especially over the public service.
- ▶ There is a need to guarantee the neutrality (and accountability) of the public service if Kenya is to deal effectively with the problem of corruption in government.
- ▶ Equally, mechanisms to circumscribe the exercise of the collective power of the legislature are required.
- ▶ At the same time, it is important to recognize that the realization of a new constitutional order will require the reform of the existing legal order and governance practices.

Conclusion II

- ▶ In this respect, the transition provisions of the draft constitution provide a much-needed framework for the reform of the legal order and practices that have facilitated abuse of power and corruption.
 - DC establishes a “Select Committee on the Implementation of the Constitution,” and gives it the responsibility of preparing all the necessary legislation.
 - Because there is likely to be considerable resistance to the realization of the new constitutional order, it is important for the citizenry to insist on a participatory and accountable transition process.
 - In my view, the “Commission on the Implementation of the Constitution” proposed by the Committee of Experts may therefore provide a better transition mechanism.