



Rapid Results Initiative PRESENTATION TO THE University Of Nairobi, CCU, Friday 6/9/13

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Overview and objects of the Constitution



- * What is a Constitution?
- * Why does it matter? - Meaning and significance
- * How is it drafted? Interpreted? Implemented
- * What is the role? - of lay persons
 - of law practitioners
 - or students?
 - law scholar or theorist?

Overview and objects of the Constitution



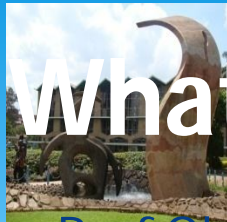
- * Normative and structural issues in the Constitution of Kenya 2010.
- * Norms – rules, policies, principles, values eg. on public finance?
- * Sources of the law in Kenya: Constitution; Statutes or Acts of parliament (eg. Public Finance Management Act; rules and regulations eg. Public procurement and disposal Act (2005); University of Nairobi Financial Regulations



What is this Constitution? (Art. 2)



- * Two broad meanings.
- * 1. It is a set of rules, standards or principles which govern the Kenyan polity or social system.
- * 2. The Constitution of Kenya 2010 is an instrument, document or set of documents which act as the main reference point in governing the Kenyan polity or social system. (- a single document? What of international or transnational law United Nations Convention against corruption? What of the Judicature Act which names (other) laws applicable in Kenya?
- * Rome's Draft Constitution had listed all laws



What is this Constitution? (Art. 2) (Cont.)



Prof Okoth Ogendo gives the following five meanings of “constitution” which we adapt:

- * a single constitutive act (reconstituting Kenya in 2010) (Cf Constituting Kenya 1963; codifying amendments 1969)
- * a fundamental norm, value, or moral principle (1969 and previous Constitutions focused on rules; not principles, not values, not policies...)
- * a set of common aspirations or expectations; as work in progress and which must show immediate and timed benefits (Art. 10...)
- * a social and economic programme (cf. Chinese, ex-socialist states) – eg right to work “is ensured” through prudent management of resources including finance.
- * an important juridical fact.

What is this Constitution? (Art. 2) Cont.



- * Prof Ben Nwabueze and Prof Yash Ghai and most scholars have focused on the political perspective and objects or purpose of a Constitution...
- * What about perspectives on matters of socio-economic development and public finance?



Role and Significance of the Constitution in Popular Sovereignty:



- * The people are sovereign (Art 1) – implementing popular sovereignty.
- * Constitutive role, including reconstruction through amendment and review (Arts...2
- * Election of governors or rulers; appointment of administrators like university managers and administrators
- * Monitoring and evaluating governors or rules (participation in governance), including management of public finance (below)



Role and significance of the Constitution in Popular Sovereignty cont:



- * Supremacy of the Constitution
- * Kenyan perspective - Constitution as the supreme law of the land and binding all persons, organs and laws: Article 2
- * Any law, rule, regulation that is inconsistent with the Constitution is unconstitutional – eg AG's letter to National Treasury is the custodian of financial policy of the government and hence decides on allocation even to judiciary, parliament... Contrary to chapter 12 of the Constitution on public finance

Constitutionalism, rule of law, human rights



- * Constitutionalism is achieved through “acceptance and adherence to the principles and rules in the Constitution.”
- * According to Prof Vicki Jackson and Prof Mark Tushnet, constitutionalism involves having the rule of law applied to people and government officers, as well as judicial independence and existence of basic human rights.
- * There can be a Constitution without constitutionalism – eg public finance to be used for public good are wasted on wrong priorities... and without people’s participation

Pillars of the Constitution – Norms, Structure and Architecture or Design



- * Why pillars? – secure liberty; access to financial and related resources; Hd government... good governance;
- * Examples of pillars or constitutional fundamentals?



Effective institutions



- The functional institutions of the state: i.e. the three arms of government—the parliament, executive and judiciary; Commissions (Chapter 15) and 2 independent offices; public service- PSC, TSC, etc
- * Separation of powers
 - * Checks and balances
 - * Interdependence
 - * Structure as institutions, organs or agencies
 - * Structure as how institutions, organs and agencies relate – eg central or national Govt v. county Govt on devolution; NA v. Senate on Division of Revenue Bill 2013; Judiciary v. National Assembly on JSC (including procurement, employment, use of finances by JSC...)



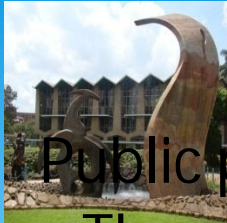
Public participation



Public participation (as part of the human rights or the Bill of Rights, Chapter Four (below))

Definition:

- * Encompasses a group of procedures designed to consult, involve, and inform the public to allow those affected by a decision to have an input into that decision



Public participation under the Constitution of Kenya:

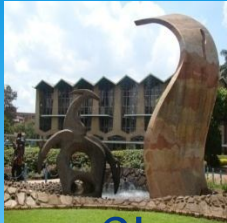
- The sovereign and constituent power (again)
- Overarching values and principles
- Substantive and procedural electoral justice in Kenya
- Associational political life and rights
- Right of recall
- Amending the Constitution by parliamentary initiative
- Amending the Constitution by popular initiative and referendum
- Universal suffrage and electoral sovereignty
- Popular basis of legislative authority
- Participation in judicial monitoring
- Participation in collective bargaining agreements and related employment rights.



Public Finance



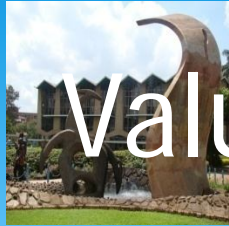
- * Definition
- * Purposes
- * Implementation including:
 - Priorities on health, food and education
 - Guidelines under Article 21 on delayed implementation, legislative policy & administrative measures



Value based leadership



- * Chapter 6 on leadership and integrity is key to the Constitutional norms, structure and architecture
- * The Leadership and Integrity Act, No. 19 of 2012 was passed to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution; to promote ethics, integrity and servant leadership among State officers; to provide for the extension of the application of certain provisions of Chapter Six of the Constitution and for connected purposes Chapter 6 of the Constitution is on Integrity and Leadership, in public administration, service, university governance...



Value based leadership cont.



- * Most integrity and anti-corruption issues focused on economic crimes like bribes.....
- * Chapter 6 adds more (Art 73 *et seq*)
- * Financial and related integrity questions in University administration management, staff, students, alumni, suppliers, research sponsors and other stakeholders
- * Can Saul become Paul under the law?
- * Are there forgivable sins under the constitutional integrity standards?



Human rights – the Role of Rights...Justice for all



- * Some of the key human rights are: Equality, equity, inclusion, integration, cohesion, non-discrimination, gender, ethnicity, ASAL, PWD, ethnicity ignored in composition of government especially financial management institutions like CBK, KRA
- * Article 27 of the Constitution on discrimination, affirmative action
- * Every person is equal before the law and has the right to equal protection and equal benefit of the law
- * Article 48: Access to justice for all (including the indigent or poor)



Human rights – the Role of Rights...Justice for all



- * Article 49: Rights of arrested persons
- * Article 50: Right to fair hearing
- * Article 51: Rights of persons detained, held in custody or imprisoned
- * Article 159: Use of ADR in realisation of right to access justice.
- * Human rights, planning, budgeting, etc – hence: how much is allocated to right to education budget for staff and pension in educational institutions?

Property -cf America's liberty, and the pursuit of happiness (or property)



- * Land as a main form of property (real v. personal property...)
- * Land question: (Chapter 5) : Mostly an issue of what Ruganda Cells agoromania...
- * Access to land and related resources (cf Chapter 5): ethnic and regional land sub questions
- * Present at historical land injustices (Art. 67(2)(e) – NLC's mandate - Coast, Central, Rift Valley (Maasai, Kalenjin), Nairobi
- * Land banking, land speculation; spontaneous settlements
- * Lower and upper limits to land ownership?



Property -cf America's liberty, and the pursuit of happiness (or property)



- * Idle land v. Land taxation
- * 999 leaseholds
- * Technical land use and zoning or planning issues – administration; adjudication, registration, fragmentation, consolidation, etc
- * Land v. land tenure reform- (re)distribution v. imposed land administration v. review of illegally or irregularly acquired land... (1969 v. 2010 Constitution) (Ndungu report)

Constitutional implementation through regulatory and policy reform in the university



- * The Constitution on right to education, fair administration process
- * Universities Act
- * Universities Charters
- * Code of Conduct
- * University finance regulations
- * Contracts for staff and job description, (or finance...)
- * University rules and regulations, including at sub – unit levels
- * Some are compliant. Some need review



The Constitution and Education



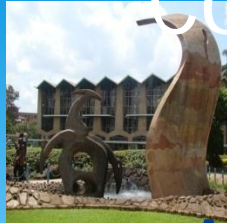
- * Tuition fees
- * Accommodation fees
- * Books and materials
- * Salaries v. allowance
- * The laptop issue
- In light of priorities
- In light of amount of money to be extended &
- in light of reforms & implementations of the Constitution, the laws on education, regulations on curriculum development, curriculum reform & curriculum support materials

Constitutional interpretation, construction and translation



- * Lawyers and non lawyers need these; they use these everyday
- * English canons of interpretation literal rule, golden rule, mischief rule (eg salary v. allowance)
- * US methodology of construction and translation – text, structure, history
- * Kenyan perspective on interpretation and implementation; Art. 259, 260 cf control or centralization v. liberty...

Constitutional implementation through amendment?



- * Amendment proposals: Why? Financial and related frustration? Self – interest?
- * Scrap Senate (Costly? Unesessary?)
- * Enhance allocation for devolution (from 15% to 40% 45%)
- * Art 260 on MPs as state officers so thaty SRC does not have mandate on MP’s salaries - allowances? So that rules on leadership and integrity don’t apply to MP’S? Cf: to secure separation of powers? Checks and balances?

Constitutional implementation



- * New Public Management (NPM) as an approach to constitutional implementation
- * Administrative efficiency and equity or fairness, including in public finance management
- * Political participation eg in education and university reform on students and related user fees, salaries, allowances...
- * Judicial due process in dispute on human rights, elections, public finance. etc
- * Another typology:
 - * Enactment of legislation (Fourth Schedule) But what of rules, regulations, standing orders
 - * Review of pre – 2010 legislation
 - * Electoral process, to fill offices
 - * Establish new institutions
 - * Reform existing institutions

Constitutional implementation and transnational legal process (TLP)



- * Constitution v. international or transnational Art 2
 - * International Criminal Court (Art 2 (5), Art 2(6) ...)
- Environment-
- * Article 42: Right to clean and healthy environment
 - * Article 69: State obligations in respect of the environment; Public participation
 - * Article 70: Personal right to seek enforcement of environmental rights; No need to show locus standi



Constitutional implementation and transnational legal process (TLP)



Generic Human rights-

- * Chapter four(4): Bill of Rights (Articles 19-59)
- * Article 21: State's obligation to implement rights and fundamental freedoms
- * Article 22: Personal right to institute court proceedings to seek promotion and protection of rights and fundamental freedoms.
- * Court's authority to uphold and enforce Bill of rights

Education-

- * Art. 41 – labour
- * Article 43(1)(f): Right to education for all
- * Article 53(1)(b): Right to free and compulsory basic education for all children
- * Article 54(1)(b): Right to access educational institutions and facilities for persons with disabilities (PWDs)
- * Also health, food, shelter

Elections and Governance- the question of participation



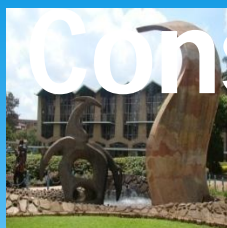
- * National elections, institutional elections – Deanship, Unions, Pension Fund, CHUNA, Article 10: National values and principles of governance
- * Article 38: Political rights of all citizens
- * Art. 118
- * Art. 196
- * Cf. Chapter 6;
- * Art. 129
- * Art. 232



Constitutional Stress, crises and breakdown



- * Most citizens and constitutional lawyers focus on normal politics... What of Constitutional challenges? Who is in charge? How is “governmental” conduct to be treated?
- * Assassination (cf can right to life and criminal justice help – Art 26) etc
- * Massacre
- * Coup attempt – sudden, unconstitutional change not anticipated; can doctrines of expediency and necessity address sudden change?...
- * Coup – civilian v. military...
- * Emergency – insurrection, insurgency, floods, war,...
- * Revolution – cf Nwabueze’s Nigeria; Egypt...
- * Economic or financial crises (eg global financial meltdown...)
- * Civil war
- * 2007/08 showed the inadequacy of the 1969 Constitution Hence reforms.



Constitutional reconstruction or renewal



- * The Constitution shall endure challenges and supply opportunities...
- * Like Americans after the civil war or the civil rights revolution, Kenyans have a duty to implement the Constitution to guarantee reconstruction and renewal...