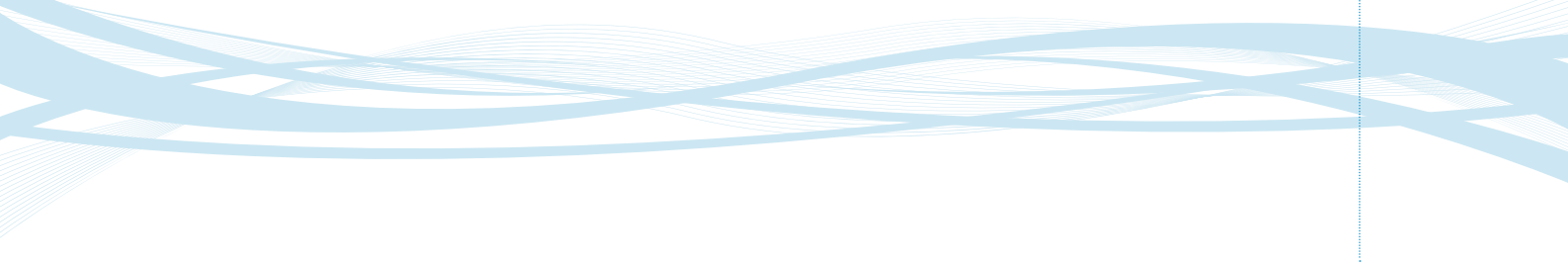


The Presidency and Public Authority in Kenya's new Constitutional Order



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Ben Sihanya



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Abstract

The role of the presidency in Kenya has animated and dominated popular and political discourses on constitution making, constitutional processes, and constitutional review and implementation, as well as political processes, since 1963. This study pursues a structured juridical-academic and policy discourse on the presidency in Kenya through four inter-related issues.

First, the study reviews the evolution of the office of the presidency in Kenya since 1963. This includes the Jomo Kenyatta regime (1963–1978) and the politics of power, resource distribution, and the rise of the imperial and populist presidency. Then came the Daniel arap Moi presidency (1978–2002), which sought to consolidate the imperial and populist tradition of the Kenyatta era. Mwai Kibaki's presidency in the pre-coalition phase (2002–2007) was largely a continuum of the Kenyatta–Moi administrations. Finally, precipitated by the urgent need to stem the violence following the 2007 presidential election, the Grand Coalition Government of Kibaki's Party of National Unity (PNU) and Raila Odinga's Orange Democratic Movement (ODM) (2008–) ushered in a semi-presidential system without parallel; in these years the exercise of presidential power became somewhat circumscribed.

Second, the paper explores the various types of bureaucracy based at State House or centred on the presidency. These include the Cabinet, the provincial administration and State House. Third, it assesses the impact of the presidency and the associated bureaucracy on public authority and public administration.

Finally, the study evaluates the impact of the Constitution of Kenya 2010 on the presidency, public authority and public administration. It reviews the normative, institutional and structural checks and balances, including the provisions of the Bill of Rights and decentralization (or 'devolution'), and their effect on the presidency and the exercise of public authority. Further, the study assesses other constitutional institutions like the Judiciary, Parliament and the restructured Executive. These are explored in light of the impact these institutions are likely to have on the presidency, as well as on the exercise of public power and public authority in Kenya generally.

Prof. Ben Sihanya holds a Juridical Science Doctorate (JSD) from Stanford Law School, USA. A scholar and public intellectual, he has 20 years of experience in teaching, research, consulting and inter-disciplinary public interest law, with a focus on intellectual property, constitutionalism, education law and ICT law. He has published and spoken on these topics in Africa, the USA, Europe and South America. He is the founder CEO of Innovative Lawyering and Sihanya Mentoring, Nairobi and Siaya. He teaches law and he is a former Dean at the University of Nairobi Law School, and a member of the national Task Force to Realign Education to the 2010 Constitution and Vision 2030.

The SID Constitution Working Paper Series

In 2010, on the cusp of Kenya's new constitutional dispensation, the Society for International Development (SID) embarked on a project called *'Thinking, Talking and Informing Kenya's Democratic Change Framework'*. Broadly stated, the objective of the project was both historical and contemporary: that is, to reflect on Kenyans struggles for a democratic order through a book project, and to examine the significance of a new constitutional order and its legal and policy imperatives, through a Working Paper Series.

Consequently, SID commissioned research on some of the chapters or aspects of the new constitution that require further policy and legislative intervention, culminating in ten Working Papers. These papers, mostly by Kenyan academics, are intended to help shape public discussions on the constitution and to build a stock of scholarly work on this subject.

These papers seek to contextualize some of the key changes brought about by the new constitutional order, if only to underscore the significance of the promulgation of the new constitution on August 27, 2010. The papers also seek to explore some policy, legislative and institutional reforms that may be necessary for Kenya's transition to a democratic order.

The Working Papers explore the extent to which the new constitution deconstructs the Kenyan post-colonial state: how it re-calibrates the balance of power amongst branches of government and reforms government's bureaucracy; redraws the nature of state-individual relations, state-economy relations, and state-society relations; and deconstructs the use of coercive arms of the government. Lastly, the papers examine some of the limitations of the new constitution and the challenges of constitutionalism.

In the first set of papers, **Dr Joshua Kivuva**, **Prof. Ben Sihanya** and **Dr. Obuya Bagaka**, separately examines how the new constitution has re-ordered nature of Kenya's post-colonial state, especially how it has deconstructed the logic of state power and rule, deconstructed the 'Imperial Presidency', and how it may re-constitute the notorious arm of post-independent Kenya's authoritarian rule: the provincial administration.

The next set of papers in this series, by **Dr. Othieno Nyanjom** and **Mr. Njeru Kirira**, separately looks at the administrative and fiscal consequences of Kenya's shift from a unitary-state to a quasi-federal state system. Whereas Dr. Nyanjom examines the anticipated administrative and development planning imperatives of devolving power; Mr. Kirira examines the anticipated revenue and expenditure concerns, which may arise in a state with two-tier levels of government. Both discussions take place within the context of a presidential system of government that the new constitution embraces.

The paper by **Dr. Musambayi Katumanga** examines the logic of security service provision in post-colonial Kenya. Dr. Katumanga argues that Kenya needs to shift the logic of security from regime-centred to citizen-centred security service provision. However, despite several attempts in the recent past, there are still several challenges and limitations which Kenya must redress. The new constitution offers some room for instituting a citizen-centric security reforms.

The paper by **Prof. Paul Syagga** examines the vexed question of public land and historical land injustices. It explores what public land is, its significance and how to redress the contention around its ownership or use. Similarly, the paper examines what constitutes historical land injustices and how to redress these injustices, drawing lessons from the experiences of

other states in Africa that have attempted to redress similar historical land and justice questions.

The papers by **Dr. Adams Oloo**, **Mr. Kipkemai arap Kirui** and **Mr. Kipchumba Murkomen**, separately examines how the new constitution has reconfigured representation and legislative processes. Whereas Dr. Oloo examines the nature of the Kenya's electoral systems, new provisions on representations and its limitations; arap Kirui and Murkomen look at the re-emergence of a bicameral house system and the challenges of legislation and superintending the executive.

If the other nine papers examine the structural changes wrought by the new constitution; the tenth paper, by **Mr. Steve Ouma**, examines the challenges and limitations of liberal constitutional order, especially the tensions between civic citizenship and cultural citizenship from an individual stand point. Perhaps Mr Ouma's paper underscores the possibility of a self-defined identity, the dangers of re-creating ethno-political identities based on old colonial border of the Native Reserves - the current 47 counties and the challenges of redressing social exclusion and the contemporary legacies of Kenya's ethno-centric politics.

The interpretation of the constitution is contested; so will be its implementation. We hope that this Working Paper Series will illuminate and inform

the public and academic discussions on Kenya's new social contract in a manner that secures the aspiration of the Kenyan people.

SID would like to sincerely thank all those who have made the publication of these papers possible, especially those who participated in the research conceptualization meeting and peer-reviewed the papers such as: **Dr. Godwin Murunga**, **Prof. Korwa Adar**, **Ms. Wanjiru Gikonyo**, **Dr. Joshua Kivuva**, **Dr. Richard Bosire**, **Dr. Tom Odhiambo**, **Ms. Miriam Omolo** and **Dr. Mutuma Ruteere**, for their invaluable input.

Lastly, we would like to acknowledge the invaluable support of the SID staff: Hulda Ouma, Irene Omari, Gladys Kirungi, Jackson Kitololo, Aidan Eyakuze, Edgar Masatu, Stefano Prato, and Arthur Muliro; as well as Board members Sam Mwale and Rasna Warah. Similarly, we would like to thank the Swedish International Development Cooperation Agency (Sida) for their financial support. Our gratitude also goes to the Swedish Ambassador to Kenya H. E. Ms. Ann Dismorr; and Ms. Annika Jayawardena and Ms. Josephine Mwangi of Sida for supporting this project.

Working Papers Series Coordinators

Jacob Akech
Duncan Okello

Contents

List of Abbreviations	viii
1.0 Conceptualizing the Presidency and Administrative Authority	1
1.1 Conceptual framework.....	1
1.2 The executive and administrative power in classical scholarship.....	2
1.3 Kenyan and African conceptualization of executive and administrative power.....	4
2.0 The Changing Presidency and Administrative Bureaucracy in Kenya, 1963–2011	4
2.1 Phase I (1963–1992): The Kenyatta and Moi presidencies	5
2.2 Phase II (1992–2002): The multi-party Moi presidency.....	7
2.3 Phase III (2002–2007): The Kibaki presidency in the NARC coalition government..	7
2.4 Phase IV (2008–2010): The semi-presidency in the PNU–ODM Grand Coalition Government	9
2.5 Phase V (2010–2012): The semi-presidency in the transitional period of the 2010 Constitution	10
2.6 Phase VI (Beyond the next general election): The presidency and public authority in the 2010 Constitution	11
2.7 Normative standards for the exercise of presidential and public authority.....	17
3.0 Juridical and Policy Reforms to the Presidency and the Exercise of Public Authority ...	18
3.1 Legislative reforms.....	18
3.2 Judicial enforcement and implementation of the Constitution 2010.....	19
3.3 Constitutional practice	19
4.0 Conclusion.....	20
References	21

List of Abbreviations

CDF	Constituency Development Fund	KADU	Kenya African Democratic Union
CEO	Chief Executive Officer	KANU	Kenya African National Union
CIC	Commission for the Implementation of the Constitution	KIPPRA	Kenya Institute of Public Policy Research and Analysis
CGD	Centre for Governance and Development	KLRC	Kenya Law Reform Commission
CKRC	Constitution of Kenya Review Commission	LDP	Liberal Democratic Party
CREAW	Centre for Rights Education and Awareness	MoU	Memorandum of Understanding
DC	District Commissioner	MUHURI	Muslims for Human Rights
DO	District Officer	NAK	National Alliance Party of Kenya
ECK	Electoral Commission of Kenya	NARA	National Accord and Reconciliation Act
ERS	Economic Recovery Strategy (for Wealth and Employment Creation 2003–2007)	NARC	National Rainbow Coalition
GEMA	Gikuyu, Embu, Meru Association	NCIC	National Cohesion and Integration Commission
GOK	Government of Kenya	NDP	National Democratic Party
ICC	International Criminal Court	NESC	National Economic and Social Council
ICJ-Kenya	International Commission of Jurists Kenya Chapter	NPK	National Party of Kenya
IEA	Institute of Economic Affairs	ODM	Orange Democratic Movement
IIBRC	Interim Independent Boundaries Review Commission	PC	Provincial Commissioner
IICDRC	Interim Independent Constitutional Dispute Resolution Court	PNU	Party of National Unity
IIEC	Interim Independent Electoral Commission	PSC	Parliamentary Service Commission
IPAR	Institute of Policy Analysis and Research	RBM	Results-Based Management
IPPG	Inter Parties Parliamentary Group	RRI	Rapid Results Initiative
JSC	Judicial Service Commission	SID	Society for International Development
		Sida	Swedish International Development Cooperation Agency
		TJRC	Truth, Justice and Reconciliation Commission

1.0 Conceptualizing the Presidency and Administrative Authority

Since 1963, when Kenya attained its independence, the presidency has animated and dominated the discourse on constitution making, the constitutional process, and constitutional review and implementation, as well as political processes. The preoccupation with the role and power of the presidency continued through the 2010 referendum on the adoption of a new Constitution, and remains an issue even as Kenya prepares for the transitional elections due in 2012.

The occupants of the presidency and the associated bureaucracy have fundamentally influenced the socio-economic, political, cultural and constitutional direction that Kenya has taken (Sihanya, 2009; Sang, 2008). This paper explores four closely related research issues:

- The rise of the Office of the President;
- The various types of bureaucracy based at State House or centred around the presidency;
- The impact of the presidency and associated bureaucracy on public authority and public administration; and
- The impact of the 2010 Constitution of Kenya on the presidency, public authority and public administration.

The transitional context of this study must be underscored. On 4 August 2010, Kenyans ratified a new Constitution through a referendum. The new Constitution came into effect three weeks later on 27 August. Under the transitional provisions of the new Constitution (which this study refers to as “the 2010 Constitution”), the chapters on the Executive and Parliament (save for the provisions relating to the next general and presidential elections) are suspended, and corresponding provisions in the “repealed” Constitution (which we refer to as “the 1969 Constitution”) continue to be in force. The

rest of the constitutional provisions in the 2010 Constitution, however, have had a fundamental impact on the executive and legislative provisions currently in force. These are discussed in detail in this paper.

1.1 Conceptual framework

A study of the Kenyan presidency is in effect a study of executive and administrative power in the Kenyan governance structure. That power permeates all the arms and organs of government¹ – indeed, the entire public sector. Presidential power extends to the private and non-governmental sector (or civil society), too.

The bureaucracy around, and including, the presidency, is a complex labyrinth, the science of which is difficult to pigeonhole. Its powers and functions can be studied and understood from three relatively distinct inter-disciplinary approaches, which we have adopted in this study: First, bureaucracy as a management endeavour, with a focus on the efficient management of public resources, power and affairs; second, bureaucracy as a political process, which focuses on representation and participation through parliamentary and related policy making processes; and lastly, the juridical or legal approach, which focuses on the government's adjudicatory function and fidelity to the Constitution and the rule of law.²

The analysis presented here adopts this three-pronged typology or approach in studying the

¹ In this particular context, I refer to the classical meaning of government, which includes the executive, the legislature and the judiciary. This is more significant in Kenya, where the administrative bureaucracy of the judiciary and the legislature was, for a long time, part of the executive. This is explored further below.

² For an excellent discussion of the management, politics and law of the public service, see Rosenbloom et al., (2009). Their approach is adopted in the study of public administration in this paper.

exercise of public authority in Kenya. The typology thus forms the basis for constructing a conceptual and theoretical framework for the study of the presidency and the administrative bureaucracy, and their exercise of public authority in Kenya.

1.2 The executive and administrative power in classical scholarship

Public bureaucracy is sometimes referred to as the "public service" or "public administration". While the three terms are sometimes used for slightly different concepts in different contexts, we use them in this case as having similar meaning, which may be best studied within an understanding of the role of the neo-liberal, neo-Marxist and developing state. The neo-liberal definition of the state has been dominant since the collapse of the Berlin Wall in 1989. It is largely captured by the 1933 Montevideo Convention on the Rights and Duties of States, which defines the state in terms of having the following four parameters: a permanent or stable population; defined territory boundaries that can be established or ascertained; an effective government; and capacity to engage in international exchange and relations with other states, e.g., to transact trade, incur debts, recognize other countries' passports, protect foreigners within its boundaries.

Relatively, Prof. Eugene Kamenka renders the definition, origin and dynamics of the neo-Marxist state as follows:

The political power of society separated from the rest of society and controlled by the ruling class of that society in its own interest. The complete obstruction of the state from society is the work of the bourgeoisie. The claim of the state bureaucracy to be a universal class serving the public interest and not sectional interests is false. Marx does not emphasize the independent power of the state, although his concept of the Asiatic

mode of production concedes that such independent power in certain conditions is possible. His analysis of the regime of Napoleon III suggests that a stalemate in the class struggle made it possible for an adventurer to capture and use the state (Kamenka, 1983: 525–55).

The neo-Marxist state is the manager or implementer of the development plan. But that state is usually captured by the hegemonic elite allied to various identity groups such as class or ethnicity. Contrary to the position held by critics of Marxism (and vulgar, unreconstructed and distortionist neo-Marxists), some evidence and scholarship suggest that even in the neo-Marxist state, the state is not necessarily a committee of the ruling class and may in fact be relatively autonomous from the dominant class (Corrigan and Sayer, 1981; Sihanya, 2010b). A constitution, as the basic law, or the grand-norm, is expected to capture these dynamics.

Public service in this context refers to the organization of the executive arm of the government, including the civil service, provincial administration, local government, parastatals, the disciplined forces and semi-autonomous government agencies, which aid the state in implementing its development plan.

But it was Max Weber, not Karl Marx, who developed a detailed structural and theoretical framework of the bureaucracy, including the argument that the bureaucracy is rational, predictable, efficient and fair (Weber, 1954). Of Weberian bureaucracy, Lachmann comments thus:

For Weber the rise of bureaucratic organization, not merely in state administration but also in business and in fact in all sections of society, was an outstanding characteristic of modern society. Its ineluctable nature stems from its efficiency. It creates uniformity and predictability in large-scale societies because the acts of thousands of officials

are all oriented to identical norms. It increases efficiency owing to the division of functions it makes possible. But as an institution it requires other complementary institutions to support it. It must be part of an institutional order if it is to function well (Lachmann, 1971: 114).

The concept of the executive has its origins in the doctrine of separation of powers, and checks and balances as a theory of organization of government. The “pure” doctrine of separation of powers can be formulated as follows: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or arms: the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable government function legislative, executive or judicial, respectively. Each branch of government must be confined to the exercise of its own function and not allowed to (unduly) encroach upon the functions of the other branches. Furthermore, the persons who compose these three branches of government must be kept separate and distinct, with no individual allowed to be at the same time a member of more than one branch. In this way, each of the branches will be a check on the others and no single group of people will be able to control the machinery of state (Vile, 1998).

This doctrine finds its root in the ancient world, where the concepts of government functions and the theories of mixed and balanced governments evolved. Modern conceptions of the doctrine can be traced to seventeenth-century England, where it emerged for the first time as a coherent theory of government, explicitly set out, and urged as ‘the grand secret of liberty and good government’ (Vile, 1998: 3).

John Locke (1632–1704), the first political theorist to define and distinguish state powers in his *Second Treatise of Government* (written in 1690), introduced three governmental powers: legislative, executive and federative (Locke, 1965). He underscored the core meaning of executive power as the power

to execute the laws, which power predated civil society. Locke’s executive, aside from being an executor of the law, had other powers, such as the veto and the right to convene and dissolve the legislature (Prakash, 2003).

Charles Louis de Secondat (1689–1755), Baron de Montesquieu, in his *Spirit of the Laws* (Baron de Montesquieu, 1798: 37), argued that executive power still meant the power to execute the laws, but maintained that it did not encompass the power to issue judgments in judicial cases. He argued for a single unitary executive. And Sir William Blackstone (1723–1780), in his *Commentaries on the Laws of England* (Blackstone, 1769: 50), which were a follow-up to Montesquieu’s work and were treated as authoritative in America, argued that the supreme executive power of these kingdoms is vested by the law in a single person, the king or queen. While Blackstone did not separately define executive power here, the rest of his commentary was replete with references to the executive’s necessary role in law execution. He also seemed to support a unitary, one-person executive through his claim that ‘were the executive power in “many hands” it would be subject to many wills; many wills can create weaknesses in a government’ (Prakash, 2003: 748).

Another theorist, though less known, was Jean-Louis de Lolme (1740–1806), who, in his *Constitution of England* (see Prakash, 2003: 750), also argued for a unitary executive. He stated that ‘the Executive Power is more easily confined when it is one’ and that in contrast, ‘in those states where the execution of the laws is entrusted into several hands, and to each with different titles and prerogatives, such division and the changeableness of measures... constantly hide the true causes of the evils of the state’.

The persons who compose these three branches of government must be kept separate and distinct, with no individual allowed to be at the same time a member of more than one branch.

1.3 Kenyan and African conceptualization of executive and administrative power

The foregoing discussion among the classical writers on the character or nature of the executive betrays the tensions in the true nature of executive and administrative power, beyond the common thread of law execution. Indeed, these tensions still exist, especially in presidential systems of government, where the office holders and their affiliates (especially bureaucrats, politicians or handlers) have attempted to expand the exercise of executive power beyond the conventional scope (Lessig and Sunstein, 1994). Leading Nigerian constitutional scholar Prof. Ben Obi Nwabueze, observes:

the functions involved in legislation and adjudication are easily delineable. The one is concerned with the making of laws and the other with its (sic) interpretation and adjudication. With the function of execution, however, such precise delineation is difficult. Executive power is indeed a term of uncertain meaning. Perhaps no other term in the science of government is so much taken for granted and yet so difficult of precise delineation. Does executive power embrace all functions that are neither legislative nor judicial? More importantly, can executive power be exercised independently of a law a provision of the constitution or statute or other law? (Nwabueze, 1974: 1).

Nwabueze then explores the three views of the two questions he poses: the residual power theory, the inherent power theory and the specific grant theory.³ The residual power theory is the widest view of executive power, and holds that it embraces every power that is by nature neither legislative

³ This three-pronged typology of executive and administrative power is also commonly applied in American constitutionalism. See Jackson and Tushnet (2006), Sullivan and Gunther (2010), and Jencks and Philips (1998).

nor judicial. The inherent power theory posits that executive power confers an inherent authority to exercise any function that is inherently executive in nature. More specifically, it asserts that within its proper field, the executive has an inherent authority to act without prior authority conferred in every case by the constitution, a specific legislation or other law. Lastly, the specific grant theory states that executive power is simply power to execute the laws.

Some scholars, policy makers and lawyers take the perspective that the specific grant (or enumerated power) theory best captures the meaning of executive power within the principles of constitutionalism, including checks and balances and other safeguards. Most of this paper focuses on the change in meaning, nature and extent of executive power within the framework of the specific grant theory. That has been the dominant discourse in the quest to control or limit the imperial presidency in Kenya and Africa. But we also discuss the residual and inherent power theories because many academics and bureaucrats rely on them (Gledhill, 1967).

2.0 The Changing Presidency and Administrative Bureaucracy in Kenya, 1963–2011

Over the last 48 years the office of President in Kenya has undergone fundamental change in its character or nature and the extent of its powers. This has had tremendous effect on, first, public authority and administration and, second, the socio-economic and political progression in Kenya. The rise, decline or fall, and rise of the office of President in Kenya can be studied, and measured, against the sources of presidential power.

Max Weber, the influential legal sociologist, proposed three sources of authority: charismatic, traditional

and legal-rational (Weber, 1954; 1958). According to Weber, authority is power accepted as legitimate by those subjected to it. These three forms of authority appear in a hierarchical development order (Trubek, 1972). States progress from charismatic authority to traditional authority and finally reach the state of rational-legal authority, which is characteristic of a modern democracy. Charismatic authority grows out of the personal charm or strength of a leader whose vision and mission inspire others. Traditional authority, on the other hand, is legitimized by the sanctity of tradition or custom, and is embodied in feudalism and patrimonialism. In this type of authority, the traditional rights of a powerful individual or group are accepted by the subordinate, or at least not challenged. Weber also argues that traditional authority tends to be irrational or inconsistent, and creates and preserves class and other inequalities. Legal-rational authority, on the other hand, is empowered by a formalistic belief in the content of the law (legal) or natural law (rationality), through which an individual or institution exerts power by virtue of their legal office. These three sources of authority have been instrumental in developing the nature of the presidency and its shaping of public authority in Kenya.

Two competing notions of the nature of the presidency have evolved significantly over the last 48 years. The first is the all-powerful President whose role is to lead in building the nation, but who also has the power to promote or undermine constitutional values like justice, fairness and inclusion. The second notion is that of the chief executive officer whose powers are hedged in by constitutional and juridical norms and institutions, by way of checks and balances. There is an emerging third perspective: an ambivalent presidency with a powerful, yet counter-balanced chief executive, whose main role is to assist the people to realize their principles, values and aspirations. These three important phases in the evolution of the presidency since independence are traced below.

2.1 Phase I (1963–1992): The Kenyatta and Moi presidencies

This phase began with the Independence Constitution of 1963, in which the Prime Minister was the head of government. The office was soon amalgamated with that of the outgoing colonial Governor to create a powerful head of state and government. Between 1966 and 1992, the presidency was beefed up by systematic constitutional amendments and constitutional practice that created what Arthur Schlesinger, Jr. (1973:x) and H.W.O. Okoth-Ogendo (1991) have called the “imperial presidency”, to the emasculation of other arms of government, including Parliament, the judiciary, and other constitutional or public offices. These amendments included the abolition of constitutional safeguards in presidential systems of government such as devolved governments, the bicameral parliament, parliamentary and judicial independence, and tenure of office for judicial officers and constitutional office holders.⁴

Against the backdrop of the repressive colonial legacy, the presidency was also equated with chiefly authority in traditional societies, which authority was often intertwined with religious authority.

In addition, President Jomo Kenyatta (in office from 1964 to 1978) and President Daniel Toroitich arap Moi (1978–2002) wielded extra-legal authority constructed from tradition. Against the backdrop of the repressive colonial legacy, the presidency was also equated with chiefly authority in traditional societies, which authority was often intertwined with religious authority. President Kenyatta is perhaps the best embodiment of traditional authority in post-independence Kenya. With the help of constitutional changes, he managed to create a larger-than-life profile, as most African presidents did. In addition, he used certain Gikuyu traditional institutions to posture himself as a political, tribal and even religious leader (of the Gikuyu), especially when his presidency was

⁴ For a sympathetic review of some of these constitutional amendments, see Okoth-Ogendo (1988: 27–35).

increasingly threatened by the opposition led by Jaramogi Oginga Odinga, Kenya's Vice-President. These institutions included oath-taking (Muigai, 2004; Ogot, 1995; Atieno-Odhiambo, 1988).

Presidents Kenyatta and Moi used charisma as a tool of authority more than President Mwai Kibaki. Kenyatta's charisma emanated from his perceived role in the independence struggle, giving him the title, "Father of the Nation".⁵ He was also referred to as *Mzee*,⁶ which implied respect and strength. After independence, Kenyatta's charisma was enhanced by his role in rallying Kenyans in the nationalist movement with the stirring call *uhuru na kazi*⁷ that aimed to tackle poverty, illiteracy and disease by nationalizing the economy.⁸

When President Moi was Vice-President (1967–1978), he did not exhibit much charisma in the national sphere, and in fact stayed largely in Kenyatta's shadow.⁹ In an effort to consolidate his presidency, Moi used ethnic integration. He coined the Nyayo philosophy of Peace, Love and Unity (Moi, 1986) in an attempt to assure the Gikuyu, Embu, Meru Association (GEMA) that he would follow Kenyatta's footsteps. In an attempt to strengthen his national support, Moi, during the Third Leaders Conference of July 1980, proscribed all ethnic organizations and called for their dissolution (Throup and Hornsby, 1998; Ogot, 1995). A critical event that enhanced Moi's charisma was his survival in the attempted military coup of 1 August 1982, which, it is argued, convinced him to take an even firmer and more autocratic grip of the state. This was in addition

to entrenching his despotism by, among others, leading the amendment of the Kenyan constitution through the infamous "Section 2A" to make the Kenya African National Union (KANU) the only political party (in June 1982) (cf. Widner, 1992). He also detained or arrested academics, pluralists and politicians (Atieno-Odhiambo, 2004).

During this era, presidents Kenyatta and Moi appeared to exercise a mixture of enumerated inherent and residual executive powers (Ojwang, 1990).¹⁰ Despite the immense constitutional and statutory powers embodied in those offices, the Constitution did not construct a presidency within the inherent or residual power theories. This was largely a result of the extension of traditional and charismatic authority embodied by the occupants of the offices (Ghai, 1986: 179–208). The impact on the exercise of public authority was profound. First, the rationale for the exercise of public authority by state officers was neither managerial nor political nor legal; it became patrimonial and patriarchal. The public service became an appendage of the executive through which presidents, their families, handlers and close political associates amassed wealth through rent-seeking, including illegitimate and primitive accumulation of the resources of the state.

The result of the patrimonial exercise of public authority by both the presidency and the public service was deep ethnic, racial, gender, regional and other geographical inequities, inequalities and marginalization. In addition, public authority was used by the President and other public officials to disenfranchise citizens of their constitutionally guaranteed rights. This fomented dissent in the form of political party opposition, emergence of a civil society and an increasingly insistent international community, all of which pushed for political and legal reforms. This set the stage for the emergence of the second presidency.

5 Prof. Githu Muigai has critiqued the historical account of Kenyatta's role in the independence struggle, and suggests that there were other, better-placed leaders of the independence struggle to become President (Muigai, 2004).

6 *Mzee* is Kiswahili for elder.

7 Freedom and hard work.

8 Other elements that enhanced Kenyatta's charisma were the newness of the state, the citizens' need for a unifying factor, especially in light of ethnic heterogeneity, and the tensions of modernization that came with independence.

9 He said he would follow Kenyatta's footsteps (*fuata nyayo* in Kiswahili). In fact, when he was sworn in as acting President, Kenyatta's inner circle was confident that Moi was just a "passing cloud". Moi proceeded to win the KANU national executive party elections held on 4 October 1978 and was sworn in as the second President of independent Kenya on 14 October.

10 Such para-judicial powers are partly attributed to the President's claim to a historical role in the struggle for independence, his charisma, or his role in the sole or dominant political party. There are echoes of the classical Weberian legitimate sources of power in this schema (See also Weber, 1954; Ghai, 1986: 179–208).

2.2 Phase II (1992–2002): The multi-party Moi presidency

By 1988, there was concerted pressure from the single-party opposition, civil society, academia and the international community for reforms, especially the repeal of section 2A of the Constitution to allow multi-party politics. This finally paid off in 1988 with the restoration of security of tenure to superior court judges, the Attorney-General and other constitutional office holders, and, ultimately, the repeal of section 2A in 1991. The repeal allowed for the introduction of multi-party politics in Kenya. Moi and KANU, which by then was dominated by the Kalenjin ethnic group, could no longer maintain a stranglehold on Kenyan politics and the allocation of economic resources. Between 1992 and 2002, there were other constitutional, statutory and political reforms that had a significant impact on the nature of the presidency and the exercise of public authority. These were limitation of the President's tenure to two five-year terms, repeal of presidential powers over security and declaration of emergency, the creation of an "independent" Electoral Commission of Kenya (ECK), and empowerment of Parliament by the establishment of the Parliamentary Service Commission (PSC).

On the political front, a legitimated opposition found voice and upped the clamour for comprehensive constitutional reforms against a recalcitrant KANU regime that had lost considerable credibility compared with the immediate post-independence state. One outcome of this was the Ufungamano Initiative, a people-driven constitutional review process that was run parallel to the Constitution of Kenya Review Commission (CKRC) appointed by President Moi. The two processes were ultimately amalgamated in 2001.

The presidency and the state also lost considerable political and administrative power as a result of the market liberalization programmes advocated by the Bretton Woods institutions from the mid 1980s. The state's, and by extension the President's, traditional role as the custodian of the development

plan was clawed back by the gradual privatization of parastatals and the increasing participation of the private sector, civil society and multinational institutions in a liberalized market economy and in governance.

Thus, the increasing political and economic liberalization of the state created space for state and non-state actors. This enabled them to politically, legislatively and judicially question and attempt to constrain the exercise of executive and public authority by the President and public officers, respectively (Okoth-Ogendo, 1996, 1999). An example is the unprecedented institution of criminal trials against Kamlesh Pattni and close associates of President Moi in what came to be known as the Goldenberg scam.

The imperial presidency and its appendages fought back. As the 2002 general election approached, President Moi and his close advisers sought to control the Moi succession politically, administratively and constitutionally through the manipulation of the constitutional review process that looked to be on its home stretch. This presidential power play galvanized the political opposition within and without Parliament to come together under the National Rainbow Coalition (NARC), which would successfully challenge the ruling party KANU and bring to an end its 40-year rule.

2.3 Phase III (2002–2007): The Kibaki presidency in the NARC coalition government

In the run-up to the 2002 general election, two factors were significant in the final push by the erstwhile splintered opposition to end the KANU rule. First, the main opposition figures, led by the

The state's, and by extension the President's, traditional role as the custodian of the development plan was clawed back by the gradual privatization of parastatals and the increasing participation of the private sector.

Leader of Official Opposition Mwai Kibaki, Ford Kenya Chairperson Wamalwa Kijana and National Party of Kenya (NPK) Party Leader Charity Ngilu, agreed to unite under the umbrella of NAK – the National Alliance Party of Kenya (see Badejo, 2006). In addition, President Moi's attempt to control his succession by anointing Uhuru Kenyatta as his successor precipitated a walkout of New KANU's Liberal Democratic Party (LDP) faction, together with such ruling party stalwarts as Kalonzo Musyoka, George Saitoti, William ole Ntimama and Joseph Kamotho. NAK and the break-away KANU faction – now styled Rainbow Coalition Alliance – entered a memorandum of understanding (MoU) and united to form the National Rainbow Coalition (NARC) and front Mwai Kibaki as the presidential candidate. Kijana Wamalwa would be (and was) the running mate, and hence V-P (Mbai, 2003).

The Kibaki presidency was born out of political arrangements between NAK and LDP. Among the political class, the body politic and the electorate, there was a sense of power-sharing established by the context of the constitutional reform movement and the MOU between NAK and LDP. While the constitutional text had not changed, the Kibaki presidency was expected to depart from the Moi approach because of the collegial nature established by such coalition organs as the NARC Summit.¹¹ During this phase, the checks and balances on the presidency were within the framework of traditional constitutional principles like separation of powers. The coalition arrangements were politically significant to the extent that major government programmes demanded consultation and concurrence between the two coalition members, with the threat of public disapproval or sabotage in case there was no concurrence (for example, debates on major economic policy blueprints like the Economic Recovery Strategy for Wealth and Employment Creation 2003–2007 [ERS]).

¹¹ The NARC Summit initially consisted of Raila Odinga, Kipruto Kirwa, Moody Awori, George Saitoti, Kalonzo Musyoka, Charity Ngilu, Mwai Kibaki and Wamalwa Kijana. There were attempts to expand it, in recognition of its role. Popular opinion and commentators expressed the view that Kenya had a collegial or co-presidency; in other words, a semi-presidential system.

Indeed, when the NAK wing of the coalition dishonoured the MOU, one result was a bitter contest for the implementation or dismantling of the MOU through the anticipated new constitution, with LDP taking the former position and NAK the latter. Consequently, the political contests for control of the constitutional review process resulted in the rejection of the proposed Constitution in the 2005 referendum (Oloo and Sihanya, 2006). The renewed sense of rule of law in Kenya re-established the specific grant (or enumerated powers) theory of executive power as the operational doctrine of the exercise of executive authority.

In addition, the NARC Government, in its formative years, sought to introduce a three-pronged approach to the exercise of public authority: First, the new public management was characterized by the initiation of performance contracting, institutional service charters and strategic plans. Second, there was emphasis on broader political representation in governance, characterized by inclusion of civil society, academia and other non-state actors in the governance process, e.g., in the initiation of the ERS. Elements of Kenya Vision 2030 (GOK, 2007), the newer blueprint on social, economic and political policy, were initiated in this period. Third, the juridical or adjudicatory approach ushered in increased recognition of fundamental rights and fidelity to the law in the governance process. Arguably, during this phase there was a renewed neo-liberal sense of the character of executive and public authority in the affairs of the state.

However, the failed constitutional review process left intact the extensive powers of the President, as well as the constitutional, legislative and socio-cultural structures of society that propped up patrimonialism in the exercise of public authority. For example, in the period that preceded the 2007 general election, the President unilaterally appointed ECK commissioners in contravention of the 1997 Inter Party Parliamentary Group (IPPG) compromise providing that political parties would nominate members to the ECK according to political

party strength. In addition, the President's wing of the coalition entrenched a renewed ethnic and patrimonial system in public service. This resulted in the socio-economic, political and administrative marginalization of communities seen as anti-Kibaki. One major result was the bitterly contested high-stakes general election in 2007 with its consequent political and humanitarian crisis, the outcome of which was the Grand Coalition Government made up of the Party of National Unity (PNU) and the Orange Democratic Movement (ODM).

2.4 Phase IV (2008–2010): The semi-presidency in the PNU–ODM Grand Coalition Government

This phase of the presidency was ushered in by the passing of the 2008 National Accord and Reconciliation Act (NARA) as part of the constitutional text. NARA created the office of the Prime Minister in the context of a power-sharing agreement on the basis of portfolio balance. It thus created or contextualized the contested idea of a dual or semi-presidency (Sihanya and Okello, 2010). While it had been there at independence, such sharing of power had not materialized until after the post-election violence.¹² Consequently, the institution of the presidency was qualified, at least juridically, by the power-sharing agreement in two ways: First, the power-sharing between the President and the Prime Minister, or between PNU and ODM. This is in the share and allocation of executive responsibilities within the executive structure.

Second, power-sharing between the Executive and Parliament. This has been manifested in the following ways: first, creation of the post of Prime Minister who is answerable to Parliament and who can be removed from office by a simple majority vote in Parliament. Second, in the spirit of the Accord and

the other mediation agreements, Parliament, through parliamentary committees, has enacted legislation giving it powers of appointment of members of executive bodies and commissions, e.g., the Interim Independent Electoral Commission (IIEC), the Interim Independent Boundaries Review Commission (IIBRC), the Truth, Justice and Reconciliation Commission (TJRC), and the Interim Independent Constitutional Dispute Resolution Court (IICDRC).¹³

The enactment of the NARA had contradictory implications for the exercise of public authority in Kenya. As part of the NARA under the auspices of the Panel of Eminent Persons, the Grand Coalition Government committed to a timetable of constitutional, legislative, socio-economic and political reforms. These reform goals were translated into service charters and institutional strategic plans in the higher echelons of governmental institutions.

The political antagonism between ODM and PNU spilled into the rank and file of the public administration, where the President re-asserted unitary executive control of the administrative bureaucracy.

Despite the constitutional provision for power-sharing, the political antagonism between ODM and PNU spilled into the rank and file of the public administration, where the President re-asserted unitary executive control of the administrative bureaucracy, and hence government implementation machinery.¹⁴ For example, the division of ministerial portfolios secured a measure of power-sharing and consultations at cabinet level. Policy execution remained in the hands of the Permanent Secretaries, however, and they remained presidential appointees who were answerable to the President through the Permanent Secretary in the Office of the President

¹² The formation of a coalition government was not itself a new constitutional and political development. Coalition governments have been formed at least thrice before: in 1964, when Kenya African Democratic Union (KADU) dissolved and its members joined government; in 1999, when the opposition National Democratic Party (NDP) was swallowed up by the ruling party KANU; and in 2003 with the formation of the NARC Coalition government.

¹³ On numerous occasions in 2008, the Head of Public Service, Ambassador Francis Muthaura, bemoaned the legislature's encroachment onto the Executive's turf and infringement of the doctrine of separation of powers through its new role in the nomination of persons to hold executive offices.

¹⁴ In fact, at the instance of any turf war between the President and Prime Minister, the President's handlers and supporters would point out that executive power was vested by the constitution in the President, and that this power was not shared. This raises the question of the concept of "power" as captured in the NARA, which continues to operate during the transitional phase discussed hereunder.

and the Head of Civil Service, and Secretary to the Cabinet, Ambassador Francis Muthaura. The text and spirit of the NARA would only be authoritatively clarified three years later, after the adoption of the 2010 Constitution, when the presidential nominations to constitutional offices would be questioned.

In addition, both wings of the coalition government adopted a crude political approach to public administration by using ministerial authority to appease the partisan constituencies they represented. Despite the enactment of the National Cohesion and Integration Act in December 2008, ministries and parastatals still reflected the ethnic and patrimonial state of public administration (NCIC, 2011).

under the 2010 Constitution the President could not recall Members, as technically, because of the omission from the 2010 Constitution, the President also did not have the power to wind up the last session.

The incessant political and administrative disagreements between the PNU and ODM wings of the coalition created governance gridlock and politicized the civil service. This informed the ongoing Constitution Review debate and had a profound effect on the design of the 2010 Constitution in two ways. First, Kenyans appreciated the reality of a constitutionally, legislatively and politically checked Chief Executive. Second,

in their submissions to the Committee of Experts on the draft Constitution, Kenyans asked for a clearer line of accountable exercise of the executive authority of government. The result was that the Westminster executive was abandoned in favour of a pure presidential system of government, hence ushering in a new presidential phase.

2.5 Phase V (2010–2012): The semi-presidency in the transitional period of the 2010 Constitution

Because of the transitional provisions under the 2010 Constitution, the fifth phase actually overlaps with the fourth phase. This is the stage of unparalleled

presidential ambivalence. The ambivalence is rooted in the constitutional text, structure and history, as well as the practice of actors such as the occupant of the office, state bureaucrats, advisors and politicians. While the presidency enjoys the traditional presidential powers under the 1969 Constitution and its administrative structures, some of the 2010 Constitution's provisions, e.g., on parliamentary independence, have been put into operation.

For example, in March 2011, some members of the House Business Committee, some MPs and some Kenyans reportedly expected President Kibaki to recall Parliament, which was then in recess. However, the Speaker of the National Assembly, Kenneth Marende, indicated to President Kibaki that under the 2010 Constitution the President could not recall Members, as technically, because of the omission from the 2010 Constitution, the President also did not have the power to wind up the last session. The Speaker then relied on the Parliamentary Standing Orders to recall Members by way of a Gazette Notice (Shiundu, 2011).

Constitutional ambivalence in this phase was well illustrated by the different shades of authoritative opinions that were elicited by Prime Minister Raila Odinga's rejection of President Kibaki's nomination of Justice Alnasir Visram as the new Chief Justice, on 29 January 2011, without involving the PM and the Judicial Service Commission (JSC).¹⁵ House Speaker Kenneth Marende, the Commission for the Implementation of the Constitution (CIC) and the JSC (which included Attorney-General Amos Wako and the then Chief Justice Evan Gicheru) rejected the nomination and advised that their interpretation of Section 24 of Schedule 6 of the Constitution, which the President had relied on, did not envisage the JSC's role. While the President, for political reasons, finally deferred to the JSC, the matter is pending before the Supreme Court for the Court's interpretation. Meanwhile, at least two High Court Justices, the Speaker and academic opinion indicate that officials and the relevant organs were correct

¹⁵ The President also nominated other officers. See 2.6.1. below.

in questioning the President's decision on the nominations.¹⁶

2.6 Phase VI (beyond the next general election): The presidency and public authority in the 2010 Constitution

The historical and then current context of the constitutional review process resulted in a thoroughly negotiated presidential system of government. The 2010 Constitution departs from the dual executive of the power-sharing Grand Coalition Government and establishes what has been called an American presidency. Under Articles 131 and 132, the President exercises, among other powers, executive authority of the Republic¹⁷ as the Head of State and Government; is the Commander-in-Chief of the Kenya Defence Forces; chairs the National Security Council; appoints high ranking state officers; and directs and coordinates the functions of government ministries.

In contrast to the imperial presidency under the 1969 Constitution, however, this presidency has been subjected to horizontal, vertical and normative checks and balances. Horizontal checks are in the form of an independent and empowered bicameral Parliament, an independent and juridically and administratively empowered judiciary, and commissions and independent offices. Vertical checks are in the form of a devolved system of county governments, a restructured public service and an empowered civil society. Normatively, the

¹⁶ See *Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General*, Petition No. 16 of 2011 [2011] eKLR (Justice Daniel Musinga's decision); *Muslims for Human Rights (Muhuri) & 2 Others v. Attorney General & 2 Others* [2011] Eklr (per Justice Mohammed Ibrahim). Sihanya (2011a) and other academics have commented on the consultation, appointment and related issues addressed in these cases.

¹⁷ Article 129 (1) states that 'Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution'. Article 131 (2) states that 'The President shall (a) respect, uphold and safeguard this Constitution; (b) safeguard the sovereignty of the Republic; (c) promote and enhance the unity of the nation; (d) promote respect for the diversity of the people and communities of Kenya; and (e) ensure the protection of human rights and fundamental freedoms and the rule of law'. This is in contradiction to s.23 (1) of the 1969 Constitution, which was more expansive and stated 'The executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him'.

President and the entire public service have been subjected to normative standards in their exercise of constitutional, statutory and administrative public authority as discussed in this paper (see Sihanya, 2011c).

2.6.1 Parliament, the president and public authority

Unlike the Parliament in the 1969 Constitution, the bicameral Parliament has been delinked from executive control and given powers to vet all presidential appointees, impeach the President, and oversee and investigate cabinet secretaries and other state officers. Parliament also has its own administrative bureaucracy to facilitate its daily operations. The transitional provisions require Parliament to enact at least 49 pieces of legislation to operationalise the Constitution. Thus, as an organ of the state, Parliament's legislative role is fundamental to defining the powers and limits of the presidency and other state officials exercising public authority. In addition, its powers to amend the statutes will have significant impact on the relations with the executive and other organs of the state.

The constitutional provisions on principles and values of governance, for example, and also provisions on policy making, will require legislation to put them into operation across national and devolved levels of government. Parliament's role in interpreting, applying, enforcing and implementing the Constitution, legislation and policies will play an important role in checking presidential and public authority.

Thus, as an organ of the state, Parliament's legislative role is fundamental to defining the powers and limits of the presidency and other state officials exercising public authority.

Moreover, the House Speaker and parliamentary committees such as the Legal Affairs Committee and the Finance Committee were instrumental in stamping parliamentary authority during the stand-off created by President Kibaki's contested nomination of persons to the offices of Chief Justice,

Attorney-General, Director of Public Prosecution and Controller of Budget. Indeed, Speaker Marende's ruling set a precedent in defining the new relations between the Presidency and Parliament under the 2010 Constitution, and especially because fresh nominations ensued.

2.6.2 The judiciary, the presidency and public authority

The 2010 Constitution constructs an administratively, politically and juridically empowered and independent judiciary that is to implement, enforce and offer an authoritative interpretation of the Constitution. In this role, the judiciary will be instrumental in adjudicating the constitutionality and legality of the exercise of presidential and public authority in Kenya. The constitutional provisions creating normative benchmarks for the exercise of state power, for example, require interpretation by the courts, as the process of implementing the Constitution unfolds. Currently, the CIC has filed cases in the Supreme Court asking the Court to render its advisory opinion on the powers of the President in making appointments to constitutional offices, and also the dates the Constitution stipulates for the next general elections. The limits to the role of the judiciary in this respect are fundamental. This is partly because there will be need for a balance between sufficient judicial involvement in the exercise of public authority, on the one hand, and judicial activism, on the other, which may encroach on the exercise of the powers of other arms of government.

Administrative independence of the judiciary has been partially achieved through the Judicial Service Commission (JSC), the related administrative bureaucracy in the judiciary and the financial autonomy of the judiciary from the executive. Political autonomy has been partly achieved by vesting in a reconstituted and empowered JSC the power to nominate judicial appointees. For example, in April 2011, after the President withdrew his nomination of Justice Alnasir Visram as the Chief Justice, and deferred to the JSC, the Commission conducted public interviews of the candidates short-listed for

the office of Chief Justice, and nominated Dr. Willy Mutunga and Ms. Nancy Baraza to the posts of Chief Justice and Deputy Chief Justice, respectively (see Gekara and Ogemba, 2011).¹⁸ Juridical independence of the judiciary has been achieved by empowering any court at any level to hear and determine constitutional questions.¹⁹ Moreover, the threshold for determining constitutional questions has been lowered by integrating many facets of governance, e.g., policy making, into the Constitution. Even so, certain judicial powers are ambiguous. For example, opinion is divided on whether the 'advisory opinions' delivered by the Supreme Courts under Article 163(6) are actually binding or merely advisory.²⁰

2.6.3 Independent constitutional commissions, the presidency and public authority

While classical proponents of division of powers had envisioned a neat typology of three arms of government, a fourth arm is emerging in Kenya's constitutional framework. Article 248 of the 2010 Constitution establishes nine commissions and independent offices, including the Kenya National Human Rights and Equality Commission, the Independent Electoral and Boundaries Commission, the Commission for Revenue Allocation, the Parliamentary Service Commission, the Judicial

¹⁸ The substantive and procedural aspects of the JSC vetting process raised important constitutional, juridical, policy, ethical and administrative questions. Some of the questions relate to the following: the scope of juridical and administrative innovation (e.g., open interviews as a basis for recommendations, approval and appointment of senior judicial officers under Article 166); the proper limits of judicial independence (Articles 160 and 161); and the relevance of personal status, socio-cultural preferences or character under Chapter 6 (on leadership and integrity). The second set of questions relates to the tension between judicial ideology and competence (Cf. US Senate process), on the one hand, and the fact that section 129 of the Evidence Act, Cap. 80, stipulates that judges and magistrates should not be subjected to processes that may undermine the confidentiality of the judicial function and their judicial offices before the public. Lessons have been learnt through the process.

¹⁹ An enduring constitutional and administrative problem has been the creation of the Constitutional and Judicial Review Court (as a High Court Bench). While this might facilitate specialization and 'efficiency', it has been regarded as unconstitutionally limiting the jurisdiction of other judges to non-constitutional cases. Cf. sections 60 and 60A of the 1969 Constitution.

²⁰ The US Supreme Court, for example, has on numerous occasions ruled that it only makes advisory opinions in relation to cases or controversies at hand, and therefore its opinions are binding.

Service Commission, and the Public Service Commission. These commissions differ from commissions in the 1969 Constitution because they have an express provision outlining their independence from other arms of government and they are administratively and financially delinked from the executive.

The commissions and independent offices check presidential and public authority at two levels. The first is that the general constitutional mandates of all commissions under Article 249 are to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles, and promote constitutionalism. Second, the constitutional commissions have been mandated with specific constitutional powers that under the 1969 Constitution were presidential powers, or were statutory powers commandeered, usurped or abrogated by the President. These include powers on revenue allocation, powers to alter administrative boundaries,²¹ powers to constitute and abolish offices in the public service, and financial and administrative powers over Parliament and the judiciary. Indeed, the CIC, chaired by Charles Nyachae, and the JSC, chaired by Prof. Christine Mungo, which were the first commissions to be constituted when the 2010 Constitution came into force, have exercised their mandates forcefully, in providing crucial direction in constitutional implementation, and asserting judicial independence, respectively.

Significantly, the 2010 Constitution seems to create constitutional commissions that are not sufficiently checked by the other arms of government, hence failing to model these commissions according to principles of separation of powers.

²¹ See Justice Daniel Musinga's ruling on boundaries in *Job Nyasimi Momanyi & 2 others v AG & another* [2009] eKLR, in which he stated, 'It would be a mockery of our country's Constitution for the executive to sidestep the I.B.R.C. and Parliament to create any new district. In our nascent democracy, the Constitutional concept of separation of powers must be respected so that all the arms of Government operate and function in accordance with the law.'

2.6.4 Devolved governments, the presidency and public authority

Despite the unitary nature of government under the 1969 Constitution, various attempts were made at decentralization of government through the establishment of the Provincial Administration,²² the system of local governments and the Constituencies Development Fund (CDF). The new Constitution, under Articles 6 and 176, establishes a system of devolved government consisting of county governments. The objects of devolved government under Article 174 include democracy, national unity, participatory governance, self-determination, protection of minorities and marginalized communities, equity and equitable sharing of national and local resources, decentralization of government, and separation of powers.

Devolved government has had an impact on the traditional powers of the President in a number of ways, including reducing the power to determine the distribution of resources to different geographical and ethnic constituencies in Kenya, a power previously used to prop up patrimonial rule. In addition, because the executive power in a county government is vested in the Governor, the President's influence over the county executive officials will be minimal.

To be sure, despite the title, Chapter Eleven's provisions on devolved government, and the overarching constitutional framework, appear to establish three concepts of decentralization: de-concentration, delegation and devolution. The Constitution seems to have created space for presidential interference, e.g., in determining whether a county government is able to undertake its constitutional role sufficiently. In addition, the

²² This consists of Provincial Commissioners (PCs), District Commissioners (DCs), District Officers (DOs), Chiefs and Assistant Chiefs. The provincial administration was created by a presidential circular in 1965.

Significantly, the 2010 Constitution seems to create constitutional commissions that are not sufficiently checked by the other arms of government

constitutional framework of devolved government as a functioning edifice will be constructed by way of national legislation and policy to be enacted as provided for in the Sixth Schedule to the Constitution. These pieces of legislation and policies will therefore have a significant impact on the definition and operation of the actual constitutional parameters of devolved government in Kenya and its relationship with the presidency at the national level. Hence it is imperative that the technical implications of constitutional provisions be appreciated in enacting the legislative and policy instruments to activate the devolved governments.

A task force chaired by Moi University law lecturer Mutakha Kangu, and appointed by the Deputy Prime Minister and Minister for Local Government, Musalia Mudavadi, had submitted an interim report on the structure of the devolved government system and was in the process of preparing the final report at this writing (GOK, 2011; cf. Ndulo, 2006).

Does the Cabinet, therefore, share the President's executive power? This should be read with the President's powers, under Articles 132(2)(b)

2.6.5 The executive arm of government and the presidency

Perhaps the relationship that best influences the nature of presidential executive powers is that between the President and the entire executive arm of government. The latter consists of executive state officers, e.g., the Cabinet, the Secretary to the Cabinet and the principal secretaries, on the one hand, and the public service, consisting of all other individuals except state officers performing functions within state organs, on the other. This is because state offices and the public service are the effective facet of presidential executive power (Cohen and Atieno-Odhiambo, 2004). The fundamental question here is whether the controlling or operative executive theory is the inherent power theory or the specific grant (or enumerated power) theory, and the impact on the exercise of public authority by public officers.

The Cabinet. The Cabinet consists of the President, the Deputy President, cabinet secretaries and the Attorney-General. The Deputy President, under Article 147, holds a more substantive office than the Vice-President under the 1969 Constitution. The President's relationship with the Cabinet is key. While the President exercises the executive authority of the government, Article 132(1)(b) of the Constitution provides that this shall be done with the assistance of the Deputy President and the Cabinet. Does the Cabinet, therefore, share the President's executive power? This should be read with the President's powers, under Articles 132(2)(b), which include the mandate to direct and coordinate the functions of ministries and government departments, and to assign the responsibility for the implementation and administration of any Act of Parliament to a cabinet secretary.

It is not clear whether the President can, for example, commandeer or usurp the statutory powers of a cabinet secretary, or direct the cabinet secretary on how to exercise discretionary powers under a statute. As discussed earlier in this paper, the current and former presidents, and their handlers (popularly known as "kitchen cabinets"), arrogated to themselves Cabinet and civil service powers for purposes of patrimonial appropriation of state resources. Chapter Six of the 2010 Constitution, however, which deals with leadership and integrity, seems to delink the ministerial power from executive control by emphasizing the individual accountability of state officers.

The Public Service. The relationship between the President and the public service proper raises more critical issues regarding the impact of presidential executive power on public authority. Aside from principal secretaries, classified as state officers, the public service consists of officers in government ministries, the provincial administration, parastatals and semi-autonomous government agencies that are not mentioned directly in the Constitution.

In principle, the Kenyan public service was modelled on the British Whitehall tradition of political neutrality, as compared with the higher echelons of the US public service, which are essentially political. However, the Kenyan public service has historically failed the test of political neutrality for the following reasons, among others: first, an extremely powerful executive presidency has always influenced and polarized the functions of the public service to achieve political ends (Ojwang, 1978; Anangwe, 1994). Second, since independence, the political class has systematically politicized and ethnicized the public service (NCIC, 2011). A parliamentary executive with members of Parliament doubling as heads of ministries essentially politicized the public service. In addition, section 25 of the 1969 Constitution provided that every person holding office in the service of the Republic of Kenya held that office at the pleasure of the President.²³

The fundamental question regarding the presidency vis-à-vis the public service is the extent of a public officer's juridical and administrative independence and deference to technical expertise, rather than presidential executive orders (Bruff, 2010). This is significant in light of Article 232(1)(e), which provides for accountability of administrative acts as a principle and value of public service. It has come into the spotlight, especially since the prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, has proposed the prosecution of Ambassador Francis Muthaura, the Permanent Secretary in the Office of the President, who is also the Head of Civil Service and Secretary to the Cabinet, and the former Commissioner of Police, Hussein Ali, for allegedly perpetrating crimes against humanity in the course of their public service.²⁴ The

Head of Civil Service has a specific administrative mandate and also carries out functions delegated by the President.

2.6.6 Civil society and the exercise of presidential and public authority

A prominent, albeit subtle, check and balance on the exercise of presidential and public authority in Kenya is the sovereignty of the people as proclaimed in the opening phrase of the Preamble to the 2010 Constitution, 'We, the people...'. The Constitution then clearly lays out the people's sovereignty in Article 1, which vests all sovereign power in the people of Kenya, and in Articles 10, 129 and 232, which provide for the participation of the people in all facets of law execution, including in policy making (Krasner, 2004). This is a departure from the emphasis on the sovereignty of the state under the 1969 Constitution.

"The people" in the 2010 Constitution is largely embodied in civil society. A modern (liberal) definition of civil society regards it as the set of intermediate associations consisting of voluntary groups. It excludes the state and commercial enterprises or trade associations (Sihanya, 2009).

Significantly, society, or civil society, is itself contested especially between liberal and neo-Marxist scholars. Prof. Eugene Kamenka presents a Marxian definition of civil society as follows:

Marx follows the usage of Adam Ferguson rather than the more complex discussion in Hegel in treating civil society as the world of industry and trade, the pre- or extra political world of the egoistic self-seeking individual standing in a relationship of competition and antagonism to all other individuals. Civil society, which displays Hobbes' war of all against all, is contrasted by Marx with the pretended universalism of the state: the two require each other but stand in fundamental conflict. (Kamenka, 1983: 525).

²³ S. 25 of the 1969 Constitution is subject to other provisions of that Constitution and to 'any other law'. That means that presidential authority vis-à-vis public servants is not absolute. The Public Service Commission (PSC) and other organs of Government may be vested with powers of appointment, promotion, discipline or dismissal, and not the President (Mwangi Stephen Muriithi v. The Attorney-General 1983 KLR 1-50; cf. Mwangi Stephen Muriithi v. Daniel Toroitich Arap Moi [2011] eKLR).

²⁴ Under the ICC framework and relevant conventional as well as customary international law, criminal accountability is personal, and does not take into account the fact that a state officer acted under the orders of a superior officer.

Following the gradual “liberalization” of governance in Kenya, and the subsequent recognition of civil society as an indispensable partner in the country’s governance, the 2010 Constitution has opened space for civil society and for the exercise of popular sovereignty in governance. This has been done at three levels: first, legislative activity, whereby Articles 118 and 119 require Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

Previously, participatory lawmaking was achieved at a minimal level by the involvement of consultative statutory and “executive” legislative organs such as the Kenya Law Reform Commission (KLRC), which routinely collects views from the public before drafting bills, and various legislative task forces mandated to collect views from the public and draft bills. The 2010 Constitution now requires participatory legislative processes at all legislative levels, including the Senate, the National Assembly, county assemblies, KLRC, the Attorney-General’s office (for government bills), ministerial offices, and constitutional as well as statutory commissions with legislative mandates, e.g., the Commission on Revenue Allocation (Articles 215–219, 248).

The second is law execution and policy making, whereby Articles 10, 43, 129(2) and 232 of the Constitution provide that the exercise of executive and public authority, and public policy making, should be undertaken with popular participation and for the wellbeing of the people. Third, Article 159, among others, opens up the judicial adjudicatory process for the people, in terms of access to justice through broader capacity to sue (or *locus standi*),²⁵ etc.

²⁵ Meaning ‘legal standing’.

The entrenchment of the sovereignty of the people in executive functions has been best captured in the constitutional framework for policy making. Under the 1969 Constitution, there is no mention of the word “policy” in the constitutional text. In contrast, the 2010 Constitution uses the word “policy” at least 23 times (Sihanya, 2011f).

Policy making has been integrated into the Constitution in at least three main ways: first, Article 10 articulates a set of comprehensive national values and principles of governance to bind all state organs, state officers, public officers and all persons in making or implementing public policy decisions. Second, Article 21 tasks the government with a mandatory duty of taking policy measures to achieve the progressive realization of the comprehensive economic and social rights guaranteed under Article 43. Third, Article 232 provides that the values and principles of the public service include the involvement of the people in the process of policy making (Sihanya, 2011f).

The impact of these constitutional provisions can be readily demonstrated through a full appreciation of the policy process. The policy making cycle conventionally entails policy initiation, formulation, debate, implementation and review. These activities will be conducted by a number of organs and persons at different governance levels, including the President, Deputy President, Cabinet, cabinet secretaries, principal secretaries, constitutional office holders, constitutional commissions, devolved governments, individual state officers in the national and county governments, parastatals, and state agencies. While previously, the Kenya Parliament was involved in policy making by way of passing sessional papers, among others, the 2010 Constitution, which emphasizes separation of powers and checks and balances, may render this role unconstitutional or constitutionally suspect, as policy making is deemed an executive function.

Notably, the constitutional framework for policy making affects the process and outcome of policy

Notably, the constitutional framework for policy making affects the process and outcome of policy making at all these levels.

making at all these levels. In terms of the process, it must be participatory, inclusive and transparent, and it must embody integrity and accountability. As mentioned earlier, since 2003, there has been a gradual integration of participatory governance into state affairs. Economic and development policies and programmes such as the 2003 Economic Recovery Strategy and the 2007 Kenya Vision 2030 were formulated through intense consultations with civil society partners, notably the Institute of Economic Affairs (IEA), the Centre for Governance and Development (CGD), the International Commission of Jurists Kenya Chapter (ICJ Kenya), and quasi-governmental and civil society organizations such as the Kenya Institute of Public Policy Research and Analysis (KIPPRA) and the Institute of Policy Analysis and Research (IPAR).

In addition, academia has been integrated into major governance organs such as the National Economic and Social Council (NESC) through the appointment of leading academics like professors Michael Chege, Peter Wanyande and Walter Oyugi. In terms of outcome, Article 10 and other provisions require that the process of policy making should secure patriotism, national unity, sharing and devolution of power, the rule of law, democracy, equity and equality, social justice, inclusiveness, non-discrimination, and sustainable development. The process of policy making has been gradually opened up to public scrutiny and criticism. For example, in February 2011, the Ministry of Education responsible for basic education formulated a policy that required Form One applicants from public primary schools to be given priority in placement at national schools, over pupils from private schools. Parents' associations vehemently criticized the Government and even threatened court action on grounds of discriminatory policy practices.

Anchoring the policy making framework in the Constitution is significant in at least three ways. First, it opens up the process of policy making for different kinds of participation by state organs and officers, and non-state actors such as academia, the civil society,

the general public, etc. (Sihanya, 2011f). This is noteworthy in terms of value addition in the process of governance in Kenya. Grassroots participation in policy making is therefore encouraged. Participation also increases the available competencies. Second, the constitutional provisions supply a framework for measuring the constitutionality or otherwise of the policy documents. They require that the policies secure such outcomes as equity, equality and social justice (Article 10). In this way, policy as a macro and micro management instrument brings to life the values and principles embodied in the Constitution. Third, the constitutional framework makes the policy making process and outcome justiciable, for instance, a contravention of the Constitution and statutes. This heralds a new space in the governance process in Kenya, in terms of civil society's impact on the exercise of presidential and public authority in Kenya, from managerial, representative and juridical perspectives.

2.7 Normative standards for the exercise of presidential and public authority

Presidential and public authority in Kenya has also been hemmed in by a comprehensive normative constitutional framework. The framework includes, first, the national values and principles of governance set out in Article 10, as noted above. The second set of normative standards or values entails leadership and integrity requirements for state officers, including trusteeship, respect for the people, safeguarding the integrity of state offices, competence, objectivity and impartiality, public interest and accountability. And the third encompasses the values and principles of public service delineated under Article 232, which include professional ethics, efficiency, equity, impartiality, accountability and transparency, as well as ethnic, gender and generational diversity, fair competition, and merit.

Presidential authority has been tested by the civil society's litigation of the President's constitutional nominations and appointments on grounds that the

exercise of power contravened gender provisions. Consequently, the court ordered the Attorney-General to conduct a gender and ethnic audit of the entire civil service and present the findings to the court. The matter is still pending in court at this writing.

These standards are an effective framework for excising patrimonial rule in Kenya and entrenching the values and best practices of all the three approaches to public administration, that is, managerial efficiency, political representation, and the juridical legitimacy or legality of the process and outcomes of governance. More significantly, these normative standards are embedded in the state's primary role, which is the distribution of the five classes of resources under the 2010 Constitution: public finance, natural resources, public service opportunities, public services, and public procurement and disposal of goods, services and works. Indeed, other state organs, like the National Cohesion and Integration Commission (NCIC), have been conducting audits to assess the extent to which such public resources as public jobs and appointments as well as contracts are equitably distributed by the Executive.

3.0 Juridical and Policy Reforms to the Presidency and the Exercise of Public Authority

The 2010 Constitution has comprehensively altered and restructured the power relations between the presidency and public administration. Nevertheless, the constitutional framework is inadequate for two reasons: first, the Constitution rightly defers to Parliament to make detailed legislation to bring the constitutional provisions into effect. Unfortunately, even though the Fifth

Schedule to the Constitution sets out a timetable for enacting these pieces of legislation, political power play and related contests, including contests for the control of crucial constitutional implementation organs such as the Parliamentary Legal Affairs Committee, have delayed the passing of the necessary legislation to make these provisions operational. Second, as a politically negotiated instrument, the Constitution has latent ambiguities and ambivalence, especially in constructing the executive powers of the President. These inadequacies can be dealt with in any (combination) of the three ways discussed below (Sihanya, 2010c/d; 2011b–f).

First, legislative enactments and amendments by Parliament can bring clarity to the ambivalent constitutional provisions, especially as provided under the transitional provisions of the Constitution. They can also provide a proper and detailed substantive and procedural framework for realizing, for example, the principles and values of governance under the Constitution.²⁶ Second, constitutional and public interest litigation can be a tool for realizing the juridical and judicial development of Kenya's constitutional law, through authoritative interpretation of contradictory, ambiguous and ambivalent constitutional provisions.²⁷ Third, constitutional practice through administrative processes, e.g., decision and policy making, can be used to establish Kenyan constitutionalism (or constitutional values) as sources and benchmarks of constitutional law on Kenya's presidency and administrative bureaucracy. Some of these are discussed briefly in the recommendations given below.

3.1 Legislative reforms

Legislation should clearly delineate presidential, ministerial and related administrative powers of state officers, in an effort to entrench the specific grant

²⁶ Article 10; Sixth Schedule, among others.

²⁷ The decisions by Justices Daniel Musinga and Mohamed Ibrahim in the Centre for Rights Education and Awareness (CREAW) and Muslims for Human Rights (MUHURI) cases, respectively, are examples.

(or enumerated powers) theory as the operational theory of executive power in Kenya. This should be by way of clear provisions of accountability of state officers for their conduct (Okoth-Ogendo, 1996, 1999, 2007).

Second, legislation enacted with respect to the four arms of government should consciously factor in, and preserve, the principle of separation of powers and, more specifically, the interdependence of state organs, rather than an absolute independence that creates rogue agencies. For example, there are insufficient constitutional safeguards against constitutional commissions emasculating other arms of government. The statutes making provision for these independent commissions should therefore provide checks and balances.

Third, policy and legislative reform is required to reduce practices associated with patrimonial governance and entrench a unique blend of managerial efficiency, political representation and juridical values in the exercise of public authority in Kenya. Managerial efficiency can be enhanced by entrenching performance contracting for state officers through management benchmarks like results-based management (RBM) and the rapid results initiatives (RRIs) in statutes. Examples are the anticipated legislation on the Cabinet, the State Corporations Act and other statutes that create parastatals.²⁸ Political representation should be structured in such a way that it is not given prominence at the expense of bureaucratic expertise and predictability, order or organization (Rosenbloom et al., 2009).

Additionally, political representation in governance should not give way to regulatory or administrative capture by special interests outside

of the state. Fidelity to the rule of law in public administration should be secured by sufficiently empowering (administratively and juridically) the agencies and commissions charged with enforcing the rule of law in public administration. This includes the judiciary, parliamentary committees, constitutional commissions and independent offices like the office of the ombudsman, etc. Statutes and regulatory provisions of oversight should not be a hindrance to efficient exercise of public authority.

3.2 Judicial enforcement and implementation of the Constitution 2010

The powers and limits of the judicature or the judiciary in interpreting, enforcing and implementing the Constitution are not obvious (Sihanya, 2010d, 2011d). The ultimate responsibility of delimiting these powers vests in the judiciary. Because of the ambivalent and ambiguous character or nature of the Constitution, especially in absence of statutes clarifying these texts, the judiciary will play an increasingly significant role in setting out the definitions to guide the operation of the Constitution. The judiciary should be conscious of its new and significant role in constitutional interpretation, construction, translation, implementation and development, and should then develop jurisprudence that does not fetter or overzealously surpass its mandate.

Political representation should be structured in such a way that it is not given prominence at the expense of bureaucratic expertise and predictability, order or organization.

3.3 Constitutional practice

Policy and administrative guidelines for state offices should be restructured to conform to the new constitutional benchmarks of public administration. Indeed, internal administrative pilot projects will

²⁸ For example, performance contracting for parastatal heads does not seem to have a clear legal framework, as was witnessed in the termination of the contract of the Director General of the Communication Commission of Kenya's by the Board in March 2011, on grounds of poor performance, only for the Minister for Information, Samuel Pogishio, to overrule the Board and reinstate the Director General.

promote legality and participation and can also save the Kenya government a lot of expense associated with forming task forces to implement these constitutional requirements administratively.²⁹

4.0 Conclusion

The presidency and administrative bureaucracy play a significant role in the exercise of public authority in Kenya. This matter requires further study especially in the context of implementing the constitution of Kenya 2010.

²⁹ A number of government ministries and departments have formed task forces to align their policies and structures with the new Constitution. These include the Local Government ministry and the twin ministries of Education. For a preliminary review of the constitutional implementation process see Sihanya (2010c/d, 2011b–f). See also the historical and emerging literature and materials in Sihanya (2011a).

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