



Institute of
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Kenya's Constitution at 14

A Legal and Economic Assessment

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Outline

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Role of Constitutions in Economic Policy

- **Constrain political powers & reduce states Monopoly powers to violence and coercion (essential to allow market oriented economy)**
- **Creates a set of rules (Institutions) that reduces transactional costs and allows efficiency in the Economy**
- **Define Economic Freedoms:**
 - Guarantee property rights, fostering investment and innovation.
 - Establish frameworks for contract enforcement, ensuring stability and trust.
 - Protect economic liberties, such as freedom of trade and profession.
- **Shape Government's Economic Role:**
 - Outline fiscal powers (taxation, spending), influencing government's economic footprint
 - Provide legal basis for market regulation, balancing economic freedom with public goods.
 - Address social welfare and redistribution, reflecting societal values and impacting income distribution.
- **Promote Long-Term Economic Performance:**
 - Foster Macroeconomic stability and predictability, creating a reliable environment for economic activity.
 - Ensure accountability and transparency, promoting responsible and effective economic governance.
 - Allow for adaptability and reform, enabling adjustments to evolving economic landscapes.

PEA; What led to CoK 2010?

- Unconstrained Constitutional Powers
- Abuse of Amendment Power
- Imperial Presidency
- Abuse of Executive & Judicial Authority
- Excesses of Security Services
- Problems of pretrial detention i.e. bail/bond
- Unethical conduct of Political leadership

PEA; What led to CoK 2010?... Cont.

- Detention without trial
- Few Rights...i.e fewer economic liberties
- Citizens didn't have say on state public affairs
- Misuse of Public Finances
- Lack of Equity considerations in Public Affairs
- Ineffective Judicial system
- No doctrine of separation of powers
- Pre and Post colonial issues in distribution of factor endowments i.e land
- Problems with ethnic entrenchment in public service

What are some of the Key Outstanding Things in CoK 2010..

- **Supremacy of the Constitution**

- A supreme constitution is the highest legal authority in a country.
- The Constitution of Kenya 2010 is the supreme law of the land.
- **What This Means:** All other laws, institutions, and individuals are bound by its principles.
- **Safeguarding Rights:** Ensures no law can contradict the constitution, protecting fundamental freedoms.

- **Separation of Powers**

- **Preventing Tyranny:** Power is divided to prevent any one person or body from becoming too powerful.
- **Branches**
 - **Executive:** The President and the government, responsible for implementing laws.
 - **Legislature:** Parliament, responsible for making laws.
 - **Judiciary:** The courts, responsible for interpreting laws.
 - **Checks and Balances:** Each branch has ways to limit the power of the others, ensuring accountability.
 - **Example:** Parliament can impeach the President, the President can veto laws, and the Judiciary can declare laws unconstitutional.

What are some of the Key Outstanding Things in CoK 2010..

1. Bill of Rights

- A core part of the Constitution- guaranteeing fundamental rights & freedoms to ALL.
- Chapter Four is extensive, reflecting a commitment to human dignity.
- **Key Rights Protected:**
- **Right to Life:** Every person has the right to life, and this right is protected by law.
- **Freedom from Torture:** No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment.
- **Right to a Fair Trial:** Everyone is entitled to a fair and public hearing by an independent and impartial court.
- **Freedom of Expression:** Every person has the right to hold opinions without interference and to seek, receive and impart information.
- **Freedom of Assembly:** Every citizen has the right to assemble, demonstrate, picket, and present petitions peacefully.
- **Right to Education:** Every child has the right to free and compulsory basic education.
- **Right to Healthcare:** Every person has the right to the highest attainable standard of health.
- **Right to Housing:** The State shall take measures to achieve the progressive realization of the right to adequate housing.
- **Right to Food and Water:** Every person has the right to be free from hunger, and to have adequate food of acceptable quality.
- **More Than a List: These rights are justiciable, meaning citizens can seek enforcement in court. Forms a basis of Fiscal Framework in Chapter 12**

2. Independent Judiciary

- **Why It Matters:** An independent judiciary is crucial for upholding the rule of law and protecting individual rights. **Public Good**
- Judiciary roles: Added the issue Judicial Oversight (Review of any issue)
- **Key Feature: The Judicial Service Commission**
 - **Independent Body:** Responsible for appointing, disciplining, and removing judges.
 - **Composition:** Includes members from different branches of government and Citizens, ensuring a balance of power.
 - **Transparency:** Selection and appointment processes are designed to be open and accountable.
- **Impact of an Independent JSC:**
 - **Protects Judges from Interference:** Judges can make decisions based on the law and evidence, without fear of reprisal.
 - **Ensures Impartiality:** Citizens can trust that the courts will treat everyone fairly and equally.
 - **Strengthens the Rule of Law:** Upholds the principle that everyone is subject to the same laws, regardless of their position or power.

3. Devolution

- Fiscal Decentralization: The Constitution of Kenya 2010 established 47 counties, each with its own elected government and significant autonomy.
- Definition: The transfer of financial responsibilities and revenue-generating powers from the central government to counties.
- Importance: Allows counties to fund their own services and tailor spending to local needs.
- Kenya's Model: Includes a mix of national grants, locally generated revenue, and borrowing powers for counties.
- Goals
 - **Local Needs, Local Solutions:** Decisions reflect the unique priorities of each county.
 - **Better Services, Delivered Locally:** Counties manage key services like healthcare and education.
 - **A More Engaged Citizenry:** Devolution creates more opportunities for participation in governance.

4. Public Participation

1. **Article 10: National Values and Principles of Governance:** Explicitly includes "participation of the people" as a fundamental value underpinning governance.
 2. **Article 174: Objects of Devolution:** Emphasizes citizen participation in the exercise of devolved power, ensuring local voices are heard.
 3. **Article 201: Public Finance:** Mandates public participation in financial matters, including budgeting and spending at both national and county levels.
 4. **Article 232: Values and Principles of Public Service:** Highlights public participation in policymaking and service delivery, ensuring services are responsive to citizen needs.
 5. **Specific Provisions for Participation:**
 1. **Article 118:** Requires public participation before Parliament debates bills.
 2. **Article 119:** Grants citizens the right to petition Parliament on any matter.
 3. **Article 257:** Allows for popular initiative to amend the Constitution, empowering citizens to propose changes directly.
- **Beyond Explicit Provisions:** The Constitution's emphasis on transparency and accountability further strengthens public participation by ensuring access to information and holding officials responsible.
 - **Impact:** While challenges remain in fully realizing public participation, the Constitution has created a framework for a more inclusive and responsive democracy in Kenya.

5. PFM Reforms

- Gave Parliament Powers of the Purse (Form, Timing & Content of Budgets), and oversight of all actors in economic policy space.
- Main Principle: Constrained powers of Executive Branch, provided powers for other Institution
- Distinguished Fiscal & Monetary Policy Institutions. National Treasury, Ministry of Finance, Central Bank, Independent Offices
- Provide 3 pathways on how budgets for arms of Govt are prepared, improving operational independence
- **Created Independent Oversight Institutions**
 - **Controller of Budget:** This office oversees the implementation of budgets by all government entities, ensuring funds are used as intended and in line with the law.
 - **Auditor General:** This office conducts independent audits of all government entities to ensure financial accountability and transparency. They then present their findings to Parliament, which can take action if necessary.
 - **Commission on Revenue Allocation:** This body determines the basis for equitable sharing of revenue between the national and county governments
- **Guiding Principles for a Responsible & Equitable Fiscal System in Kenya**
 - **Transparency & Accountability:** Open financial processes with public participation.
 - **Fairness & Equity:** Equitable tax burden, revenue sharing, and development spending.
 - **Intergenerational Responsibility:** Sustainable resource use and borrowing practices.
 - **Prudent Financial Management:** Responsible use of public funds and transparent reporting.

6. Power of Amendment Process

Two Paths, High Thresholds

1. **Parliamentary Initiative:** Requires a supermajority—two-thirds vote—in BOTH the National Assembly and the Senate. This ensures broad consensus across political divides.
2. **Popular Initiative:** It begins with a high signature threshold, requiring one million registered voters to endorse the proposed change. Next, the amendment must garner approval from a majority of Kenya's 47 county assemblies, ensuring representation from across the nation. The amendment then proceeds to the national Parliament, where it must pass through both houses. If either house fails to pass it, or if the amendment concerns key issues like the Bill of Rights, a national referendum is required. Even then, a simple majority is insufficient; the amendment needs at least 20% support from registered voters in at least half of Kenya's counties.

Direct Democracy for Key Issues:

- **Article 257:** Mandates a national referendum for amendments concerning: (a) the supremacy of the Constitution itself; (b) the territory of Kenya; (c) the sovereignty of the people; (d) the national values and principles of governance as outlined in Article 10 (a) to (d); (e) the Bill of Rights; (f) the term of office of the President; (g) the independence of the Judiciary, commissions, and independent offices as per Chapter Fifteen; (h) the functions of Parliament; (i) the objectives, principles, and structure of devolved government; and (j) the provisions of Chapter Four itself, which deals with the amendment process.
- This ensures fundamental changes have the explicit consent of the Kenyan people.

Stringent Referendum Requirements:

- **Double Threshold:** Requires both a simple majority vote AND at least 20% support from registered voters in at least half of Kenya's counties. This prevents amendments passing with only concentrated regional support.

The Kenyan Constitution's amendment process is designed to be deliberative, not driven by fleeting whims. It prioritizes consensus, public participation, and protection of core values.

7. CoK 2010 and Economic Liberties (Economic Freedoms)

- **Article 40: Property Rights:** Safeguards ownership, encouraging investment and growth. **Example:** Farmers can invest in land without fear of arbitrary seizure.
- **Article 46: Consumer Rights:** Ensures fair trade practices and a competitive marketplace. **Example:** Consumers can return faulty goods, preventing exploitation.
- **Article 47: Fair Administrative Action:** Promotes transparency and reduces corruption in government decisions. **Example:** Businesses can expect fair license application processes.
- **Article 48: Access to Justice:** Guarantees fair hearings for resolving economic disputes. **Example:** Small businesses can sue larger corporations with confidence.
- **Indirect Contributions:**
 - **Article 27: Equality:** Promotes an inclusive market free from discrimination.
 - **Article 33: Freedom of Expression:** Enables informed economic decision-making.
 - **Article 36: Freedom of Association:** Protects the right to form trade unions and advocate for economic interests.
- **Article 201:** Transparency and accountability for responsible spending and reduced corruption.
- **Article 209:** Fair, equitable, and predictable taxation for businesses and individuals.
- **Article 43:** Recognizes the importance of healthcare, housing, and social security for a productive workforce.
- **Article 60:** Aims for equitable land access and secure tenure, empowering individuals and communities economically.
- **Article 10:** Emphasizes good governance, integrity, and accountability for a stable economic environment.
- **Article 20:** Ensures any limitations on economic activities are justified and proportionate in a democratic society.

Challenges

- 1. Extension of the “norms”/arrangements of CoK 1969**
- 2. Confusions around Political Opposition in a Presidential System**
- 3. Failure of Independent Offices/Constitutional Commissions to assert operational & Constitutional Independence**
- 4. Weaknesses in Parliamentary Oversight**
- 5. Parliamentary Houses Design problem. Unequal Powers in a Bicameral Legislature**
- 6. Misapplication of Fiscal and Monetary Policy powers. Fiscal Dominance.**
- 7. Institutional Design issues i.e. SRC, CRA**

What to watch Going Forward- Evaluations of CoK 2010

1. **Uninformed common narratives i.e. CoK 2010 is expensive, Constitution is a living document (should be amended regularly)**
2. **Fewer studies that apply economic methods to understand and evaluate legal rules and institutions.**
3. **Does caselaw decided live up to how CoK 2010 has commanded to be construed?**
4. **More studies need to examines how provisions of CoK 2010 impact economic behaviour and outcomes, and how economic principles is informing legal decision-making.**
5. **Apply more economic analysis of law tools to CoK 2010**
 1. **Positive economic analysis: explaining and predict the *effects* of legal rules.**
 2. **Normative economic analysis: Using economic criteria, such as efficiency and social welfare, to evaluate and design legal rules.**
 3. **Use key concept in economic analysis of law is efficiency esp Pareto efficiency, which means that a legal rule is efficient if it makes at least one person better off without making anyone else worse off.**

Conclusion

1. **CoK 2010 that need to be given legs i.e. Public Participation**
2. **Unintended effects like case backlogs slowing CoK 2010 Judicial Oversight.**
3. **Place of Earmarks in Fiscal Irresponsibility**
4. **PEA of Sanctions in Chapter 6**
5. **Incentive Issues affecting CoK 2010 implementation**
 1. **Parliament Weaponizing Budgets**
 2. **Judiciary deferring to Executive on Law formulation. i.e. Remedy**
 3. **Reintroduction of concepts like interdependence in place of independence**
 4. **Failure by 4th arm to assert CoK 2010 authority**
 5. **NG- CDF Changing incentive structure in Separation of Powers**

References

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