Towards a new constitutional order in Kenya: an introduction

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The decision by the Kenyan electorate in the 2010 referendum to support the proposed new constitution was the culmination of political work carried out over a generation. At least since the reintroduction of multiparty politics in 1991, struggles for democracy had centred on the twin aims of removing from power the Kenya African National Union (KANU) government under President Daniel arap Moi and effecting constitutional change. The latter demand intensified as it became evident, following repeated manipulated general elections in 1992 and 1997, that the mere tweaking of the constitution to reintroduce multiparty politics was insufficient to entrench and safeguard democracy. The architecture of power created by the pre-2010 constitution made the effective practice of plural politics impossible and prevented the country’s transition from an imperial presidency to a constitutional democracy (Kramon and Posner 2011; Mati 2013; Mutua 2008; Mutunga 1999). Moi and KANU left power following the 2002 elections, but constitutional reforms remained elusive for almost another decade after Mwai Kibaki, who came to power riding on the wave of democratisation, assumed the presidency.

This book explores the struggles around democratising the Kenyan state, and does so by taking as its point of departure the passing of the new constitution. The contributions to this book place the constitution within its historical and political context. Together, they interrogate its roots and implications. They explain why struggles for reforms were blocked in the past but were successful this time around, and they explore the scope for implementation of the constitution and associated reforms in the face of continued resistance by powerful groups. The contributors set out from the observation that the making and implementation of any constitution is about the organisation and exercise of power. The scope for institutional transformation is constituted by relations of domination, and these relations are partly structurally conditioned, partly politically negotiated. The promulgation of the constitution was, of course, only the starting point for new efforts to transform the Kenyan state: the new constitution created the possibilities for change but in no way did it guarantee that change. Just as the making of the constitution...
was a struggle between political forces resulting in mixed outcomes, so too will be the implementation. Once in place, however, the constitution reshapes the conditions for future political struggles. In this introductory chapter, we review the major issues in the debates on constitutional reform in Kenya as a way of framing the subsequent chapters in this study.

**Struggles for constitutional reform in Kenya: comparative and historical perspectives**

The Kenyan experience is of significance well past its borders. It informs debates on fundamental issues of the organisation and exercise of political power, and the scope for democracy, social justice and national cohesion all around the African continent and beyond. Kenya was not alone among African countries in transitioning to multiparty politics in the early 1990s: a great number of countries introduced political pluralism at the time. However, the expectations that first met these changes gradually faded away. Some countries fell back into military or one-party rule. In other cases, formal democratic institutions were established but came to be epitomised by their shallow character and limited reach (Diamond and Plattner 2010; Sandbrook 2000). Such setbacks suggest deeply rooted patterns of political authoritarianism enforced by the structural characteristics of many African social orders, including social and political inequalities; fragile and incapacitated state institutions controlled by elite coalitions; factional political parties without a solid social base; and weak civil societies, often typified by ethno-regional fragmentation and disrupted links between the urban and rural populations (Joseph 1997; Sandbrook 2000). Much of this applies to Kenya too.

The scope for citizens to make effective use of democratic institutions and rights differs markedly between societies; for a long time this has been captured by distinctions between electoral, liberal and social democracy. Over the last decade, however, academic debates relating to political regimes have shifted to conceptualising and theorising those regimes that are neither democratic nor fully authoritarian, a phenomenon discussed in terms of authoritarianism – either competitive (Levitsky and Way 2010) or electoral (Schedler 2006) – referring broadly to polities where elections are competitive but not free and fair, and where these elections are conducted in a broader context of authoritarianism.

Kenya during the 1990s fits the latter description. The elections in both 1992 (Barkan 1993) and 1997 (Barkan and Ng’ethe 1998) were seriously flawed as a result of the machinations by an authoritarian executive. It was against this background that demands for constitutional reforms were raised as a way of safeguarding and effectuating formal institutions and processes. Over the decade following the 1997 elections, such demands would continue to be voiced, albeit in dramatically shifting circumstances. While the victory of the opposition in the 2002 elections reignited Kenyans’ belief in change through
the formal political process, the 2007 elections fiasco (Gibson and Long 2009) almost wiped out such convictions. However, and turning the tables again, the negotiated settlement after the 2007–08 elections and violence was crucial in promoting constitutional change in 2010 (see Chapter 3 in this book).

Why has constitutional reform been regarded as so important for democratisation in Kenya and in many other places in Africa? During the early years after independence, a gap developed between the content of the constitutions and the actual practice of constitutionalism, or the lack of it (see Chapter 6). This gap was a consequence of and central to the logic of the struggles for democracy, as it illuminated the need for open and legitimate modes of governance.

The African experience of diluted constitutionalism was anchored in statism, an ideology that sprung directly from discredited notions of colonial developmentalism and was justified and practised by postcolonial African leadership as a trade-off between democracy and development. Consequently, and as the late Joseph Ki-Zerbo quipped, all across the continent the mantra of developmentalism became ‘silence, development in progress’. In this trade-off, Kwame Nkrumah’s admonition to ‘seek ye first the political kingdom’ easily translated into a suspension of the constitution in some countries and the mutilation of some of its provisions in others. The cumulative effect of this was that the culture of constitutionalism was undermined in most countries. Three decades later, there was silence in Africa, but also no development. Authoritarianism had flourished while development floundered. As discussed by Zeleza in Chapter 1, overall, neither statist nor neoliberal authoritarianism has succeeded in creating transformative development in Africa.

In Kenya, discomfort with this record initially expressed itself through the demand for plural politics and eventually for constitutional reforms. There were both immediate tactical reasons and long-term general explanations for the latter demand. In the short term, in a country where elections had become a high-stakes zero-sum game, the old constitution made possible their manipulation. In the absence of constitutional reforms guaranteeing fair competition, the opposition feared that it would be very difficult, if not impossible, to remove the ruling party from power through the ballot. The underlying reason why the constitution allowed for electoral rigging was that, over time, it had been changed from a document for democratic governance into an instrument of highly concentrated and authoritarian executive power (Nyong’o 1989). With the provision of a president who was effectively above the law, the constitution could be overridden through presidential fiat, something that was experienced repeatedly under President Kenyatta and President Moi.

According to the government’s critics, the problems that plagued Kenya – poverty, inequality and exclusion along lines of region, ethnicity, class and gender – were rooted in the social order but vouchsafed and promoted by
the constitution and by state power in general. Thus, the problems, as well as the perceived solutions to them, pointed to the importance of transforming the exercise of state power – and, by extension, political control more broadly – from impunity and exclusion to accountability and inclusion. To grasp the feasibility of this transformation requires an understanding of the history of control and resistance in Kenya since independence as this has been entrenched, constitutionally or otherwise, in the nature of the state.

The postcolonial state in Kenya was transformed from a relatively open multiparty system whose structures were devolved to the regions in 1963 to a de facto single party state in 1978, when Kenya's first president, Mzee Jomo Kenyatta, died. During this time, the basis of an authoritarian state was created, largely following the outlines of similar developments in many other African countries, such as Ghana, Tanzania and Uganda. This pattern was based on the centralisation of power in the presidency and the elimination of any potential foci of organised opposition (Tamarkin 1978). This centralisation was initially a constitutional act, involving changes to the constitution to entrench powers in the presidency, and a concomitant process of building an authoritarian structure through the provincial administration that radiated from the presidency outwards into the regions (see Chapter 7). Together with development of this network of provincial administration, there was a concentration of the security powers – the military, paramilitary and police – within the office of the president and their transformation into a key lever of power through repeated public displays to intimidate, silence and instil fear, as Ruteere shows in his contribution to this volume (Chapter 8). The preferred means of securing the loyalty of security agencies was to ethnicise their leadership by appointing into their command structures trusted people from the president's own ethnic group. The enforced disbanding of the Kenya African Democratic Union and, a few years later, the Kenya People's Union (Mueller 1984) meant that KANU emerged as the sole political party and the presidency became the core of any political activity. When the presidency encountered resistance to its centralising agenda in parliament, not only were the dissenting voices hounded out of parliament, others were detained, assassinated or fled into exile, leaving behind a system of politics that reproduced exclusion and impunity (Odhiambo 1987).

When President Moi assumed power in 1978, the stage was set for further constitutional amendments and extrajudicial repression. He transformed the political system into a de jure one-party state controlled by the presidency through a constitutional amendment moved by Mwai Kibaki. Moi channelled this control via the party, KANU, which he used to control or sidestep parliament and to embed a network of provincial administrators whose unquestioning loyalty spread fear, despondency and exclusion in the countryside. The security agencies backed up this system; the spying agencies acquired
notoriety not only for conducting surveillance in the interest of state security but in using the excuse of state security to harass, apprehend, detain and torture real or perceived enemies of the Moi state. The levels of suspicion grew to alarming heights, with special branch officers spreading across all spaces of civic engagement in Kenya, spying in every nook and cranny. The greatest effect of this network of spies was felt in the few remaining sites of resistance, especially the universities (Amutabi 2002). The prominent place that the Nyayo House torture chambers and Nyati House, the headquarters of the special branch, acquired in the 1980s is a reflection of how often extrajudicial means were adopted to asphyxiate civil society discourse.

It did not help matters that judicial means of addressing the situation were undermined or closed. The Moi regime removed the security of tenure of judges in 1988, operated an opaque system of appointments of judges that engendered loyalty, and began a pattern of intimidating judges who displayed any streak of independence. But, where this did not happen, ‘judicial subservience’, as Makau Mutua (2001) describes it, peppered the growing authoritarianism, with judges taking openly partisan positions that undermined the democratic struggle and often referring to the constitution to back up their claims. Institutionally, the judiciary was emasculated by the executive. In the structure and organisation of government, the judiciary was listed as a mere department under the office of the attorney general, grossly underfunded and understaffed. The bench itself was feeble at best and hostile at worst in the validation of rights. In one prominent case, Justice Dugdale declared Kenya’s bill of rights inoperative and unenforceable, setting the stage for what has been described as the rise of delinquent jurisprudence on rights in the Kenyan courts.

Like Kenyatta, Moi developed a network of trusted leaders whom he appointed into positions of authority, both in government and within the party. Their key function was to protect the presidency and they usually unleashed a chorus of condemnation of any leaders whose loyalty they perceived to be below the desired level. By 1988, the Moi regime was at its authoritarian worst and felt confident enough to mercilessly rig the 1988 elections through a mlolongo (queuing) system of voting. This ensured that KANU got rid of most of the unwanted politicians in a way that left no means for appeals through the court. This direct assault on parliament, together with the fact that all spaces for civic engagement had been constricted completely, generated a new logic of struggle, one that had to operate outside the constitution and away from formal spaces of civic engagement to achieve its goals. It is precisely because of this logic that the focus on democratic struggle moved quickly, especially in the run-up to the 1997 elections, emphasising constitutional reform as the only way in which the political interests of those outside KANU could be liberated and exercised. Clearly, the old constitution, inherited from colonial times and repeatedly amended to further concentrate power in the presidency,
had served Kenya poorly. By 1992, all key institutions – the judiciary, public services, security forces, provincial administration and parliament – had been reduced to instruments of authoritarian domination. Thus, when the struggle for the reintroduction of political pluralism peaked in the early 1990s, all of the fundamental issues that shaped the Kenyan state and society – struggles over accountability in the exercise of power and respect for human rights; the distribution of resources; and the politics of ethnic relations and the national question, to name but a few – had, in one way or another, a constitutional dimension. If the struggle for democracy were to succeed, it had to insist on restructuring the state and the political system and to place a premium on sharing and checking power, both at the centre and between the centre and the regions.

The push for constitutional reform that began in earnest in the mid-1990s was beset by a series of subversions and manipulations. The National Rainbow Coalition (NARC) government came to power in 2002 after campaigning on a platform for a new constitution. This promise was to be betrayed too. After a popular-driven draft was torpedoed, the diluted proposal of the conservative wing of the divided government was rejected resoundingly in a referendum in 2005 (Cottrell and Ghai 2006). The resistance of this conservative wing was all the more frustrating as it had previously supported the same provisions of de-concentrating powers from the presidency that they now rejected. The popular frustration with the failed promises of the NARC government, the re-emergence of political privilege organised around what came to be popularly called the Mount Kenya Mafia and the corresponding exclusion of key constituencies that constituted NARC (Murunga and Nasong’o 2006) fed into, as Gachigua argues (Chapter 2), the hardened positions that characterised the 2007 campaigns, reinforced by key institutions including the media. The urge to remove from power the conservative wing of NARC – led by Mwai Kibaki and which reconstituted itself in the run-up to the 2007 general elections as the Party of National Unity – was as strong among the Orange Democratic Movement opponents led by Raila Odinga as was the desire on the part of this conservative wing to retain power at all costs. The result was the 2007 bungled elections and the post-election violence (Berman et al. 2011; Githinji and Holmquist 2008; Mueller 2011; Murunga 2011).

The making of the 2010 constitution

One outstanding trait about the 2010 constitution is the widely recognised progressive character of some of its content, such as the bill of rights and the checks on power. Given the strong resistance by large sections of the Kenyan ruling elite to political demands seeking to improve and secure freedom and justice, through the constitution or otherwise, this begs the question of how such a constitution was possible.
The contributions to this book bring out the range of factors and actors involved in the process, from the long-term struggles discussed by Zeleza (Chapter 1) to the immediate shock of 2007–08 highlighted by Wamai (Chapter 3); from people-driven processes spearheaded by civil society that Nasong’o expounds (Chapter 5) to the elite pacts emphasised by Muhula and Ndegwa (Chapter 4). The referendum and the constitution would not have come about without longstanding demands for democracy. But they were also the outcome of the National Accord of 2008, negotiated in the wake of the bungled 2007 elections and their violent aftermath. The crisis brought into focus enduring and deep-running problems of the Kenyan state and society. The agreement, and the mandate for the Grand Coalition Government that it entailed, included a wide range of accompanying reform processes (such as land policy, electoral and security sector reforms) and set off a number of commissions (the Independent Review Commission; the Commission of Investigation of Post-Election Violence; the Truth, Justice and Reconciliation Commission, to mention just some of the most significant). These reform processes and commissions are more or less closely connected to the constitution, being affected by it as well as shaping its implementation (Kanyinga and Long 2012).

How important will the constitution prove to be? How strong will it be, in view of the hostile and powerful forces operating within and outside the political system and the weak individuals and weakened institutions that were meant to strengthen the practice of constitutionalism? The history of Kenya has been marked by false dawns. Conservative forces hijacked earlier achievements, such as independence in 1963, the transition to multiparty politics in 1991 and the ousting of KANU from power in 2002. The vested interests opposing a democratised state and policies for social justice remain extremely powerful. Constant and sustained vigilance by democratic forces in political parties and civil society will be needed to prevent a repetition of that pattern, by blocking attempts to subvert the intentions of the constitution and by realising its potential through giving effect to its words. While longstanding popular struggles laid the foundations for a progressive document, and the immediate post-2008 circumstances triggered the reactivation of the process in a context that conspired against elite manipulation, at least in its crudest sense, one must not be naïve regarding either the document itself or the scope for realising its potential. The tensions revealed by the uncharacteristically strong popular influence on the document are evident and significant, and there are clear signs that powerful interests are busy trying to undercut the democratic advances of the constitution. The 2013 general elections illustrate this with fine clarity.

The 2013 general elections have been the biggest test ever for operationalising the provisions of the constitution. Unlike previous elections, there was a new elite consensus around the new rules of the game and their ability to
guarantee a fair electoral process. Not only was there a new electoral management board in place – the Independent Electoral and Boundaries Commission (IEBC), headed by a commissioner who had been publicly and competitively vetted – there were also public institutions designed to oversee elements of politics considered critical for free and fair elections. These institutions included constitutional commissions and a reformed judiciary with the mandate to adjudicate on election disputes. In fact, the IEBC took the initiative early on to determine independently the date for the general elections almost one year in advance.

As elections approached, the show of fairness and transparency crumbled, however, amid the failure of the IEBC to conduct a transparent process of selecting a company to supply the electronic voting machines, with rumours of infighting within the commission. This soon gave way to the Grand Coalition Government’s single-supplier sourcing of electronic voting equipment in a way that illustrated the IEBC’s inability to operate independently from government. The electronic equipment was eventually sourced through government, but the process of configuring it to secure efficient balloting, counting and tallying remains one of the major scandals of the 2013 general elections. In some cases, the equipment was never fully configured on time to be used for voting. In others, the laptops either malfunctioned or their batteries were not properly charged to ensure a smooth voting process. The result was that the expected electronic record of the results, against which the paper versions would be confirmed, was abandoned midway as the IEBC reverted to manual methods of tallying, the very method that was widely condemned by the Kriegler-led Independent Review Commission that investigated the 2007 election.

A few weeks before voting, the company contracted to facilitate the transmission of voting data warned that the IEBC was unprepared and unresponsive to key concerns relating to the electronic system. A review of the vote tallies has consequently shown many cases of impropriety, including a significant number of missing balloting forms that should have formed the basis of a proper count and consistent data issued by the IEBC. Worse, by the day voting took place, the IEBC did not have a single register against which vote tallies would be gauged. On the contrary, it had four separate registers, including the Provisional Register, the Gazetted Register, the March Register and the Green Book, each with a slightly different tally of voters. Detailed examinations of the problems that marred the 2013 elections have been undertaken by Barkan (2013), Long et al. (2013) and Ferree et al. (2014). The fact that the supreme court of Kenya legitimised the existence of many voter registers remains one of the key dilemmas facing the future of electoral politics. These election-related problems carried immense consequences. The constitution provides that, in order to avoid a run-off, the winner in the first round must get 50 per cent plus one vote. In other words, any slight gaps in the voter data are
of great significance. Uhuru Kenyatta surpassed this requirement by fewer than 10,000 votes.

The legitimacy of any election results in a liberal democratic setting rests with the assumption that there is certainty in the process leading up to balloting and uncertainty with regard to the eventual winner (Mozaffar and Schedler 2002: 11). The overall question for Kenya is whether the challenges affecting the process exceeded the threshold of acceptable error, thereby compromising the possibility of a free and fair process and outcome. For many Kenyan voters, the process leading to the March elections was carefully choreographed to achieve a predetermined outcome, an outcome that left more questions than answers as the media retreated into a mode of operation that silenced voices critical of the conduct of officials and politicians and foregrounded those of peace activists. When Raila Odinga and sections of civil society led by the Africa Centre for Open Governance petitioned the supreme court against the result, the expectation was therefore very high that the court would provide a better means of resolving the silenced and outstanding issues surrounding the elections.

If, in 2007, few thought the judiciary had sufficient credibility for handling the disputes, in 2013 most people easily submitted to the court’s discretion. However, the ruling was appalling in its standard of jurisprudence as well as in its public presentation. Reviewing the ruling of the court with respect to its key finding, Wachira Maina described the judgment as ‘both detailed and important, but the parts that are detailed are not important and those that are important are not detailed’ (Maina 2013). For instance, the court rejected on a technicality voluminous evidence that might have illustrated that the threshold of error was significant enough as to close the 10,000-vote gap between the winner and the constitutional threshold of 50 per cent plus one vote. Further, the court made the aforementioned problematic ruling regarding the voter registers, thereby allowing the IEBC to continue with diverse numbers of registers and total voter tallies. Also significant was the decision of the court to dismiss ‘spoilt votes’ in calculating the overall percentage. As Maina argues, in dismissing the spoilt votes, the court elevated ‘the right to vote’ to being ‘equal to the right to choose one of the candidates on [the] ballot’. He contends that the right to vote has three elements:

The right to make a choice from among the candidates on the ballot; the right to refuse to participate in the election by abstaining and the right to cast a protest vote by rejecting all the candidates on the ballot. The right to cast a protest vote can be expressed by deliberately spoiling a ballot.

The eventual result of all this is that the supreme court, like the IEBC before it, bungled its constitutional mandate to ensure free and fair elections by ensuring that the level of error did not exceed the threshold of acceptable error.
The management of the 2013 elections casts serious doubts on the independence and capacity of these important institutional bodies created by electoral and judicial reform. Furthermore, as demonstrated by Ruteere and Ghai in their chapters in this book (Chapters 8 and 6 respectively), there are serious concerns regarding the pace and direction of security sector reforms and devolution – and, one might add, land reforms. Together, this reaffirms the apprehensions about the possibilities of upholding the letter and spirit of the progressive constitution in a society and a political order characterised by inequality and the concentration of power and resources.

The contributions to this volume

The first part of the book discusses how the process of constitution-making has been shaped both by longstanding struggles and by the dramatic rupture caused by the violence in 2008 that followed the 2007 elections. It examines the role of actors in political parties and civil society as they operate in the contexts conditioned by political institutions and socio-economic structures.

Chapter 1, by Paul Tiyambe Zeleza, is a broad-ranging chapter locating the constitutional changes in Kenya within the context of Kenya’s history. He examines the different epochs in Kenya’s constitutional struggle, from independence to the constitutional reform moments from 1992 to 2010. The struggle for constitutional reform in Kenya has been a long one. The first government of independent Kenya emasculated the provisions of the independence constitution and set the stage for the emergence of an imperial presidency. This generated the struggle for the ‘Second Liberation’, of which the enactment of a new and democratic constitution was a large part. Whereas a number of post-independence struggles did not openly bear the tag of ‘constitutional reforms’, they were, in substance and essence, of a constitutional nature. The chapter examines the bases for these struggles, their consistency and divergences, and to what extent the new constitution upholds or betrays them.

Chapter 2, by Sammy Gakero Gachigua, discusses a particular dimension of the 2007 post-election violence – the role of the print media. This aspect is important for understanding how key actors in Kenya’s struggle for democracy, in this case the media, misjudged the tenor of the electoral debates going into the 2007 elections. In failing to fulfil their mandate of informing the citizenry, the media played into the divisive and ultimately catastrophic manipulation both of the content of news and in the manner in which the news presented the election as a do-or-die struggle. Gachigua analyses the media’s role in the public sphere, illustrating how a retreat into the hard news genre not only compromised the media’s ability to be objective interlocutors in the range of electoral debates but also presented the media as partisans in the unfolding drama that ended in violence. Although the chapter does not draw a direct link between this model of reporting and the constitutional moment, one can
easily infer the connection when thinking about the opportunities to inform and critically engage when news is presented in the hard news genre.

Chapter 3, by E. Njoki Wamai, examines how the post-election violence and the subsequent negotiated settlement created a ‘constitutional moment’. In other words, the chapter illustrates how the deep crisis was turned into a possibility for substantive change in a way that previous attempts had failed to realise. Focusing its attention on the pre-negotiation and negotiation efforts led by Kofi Annan, the chapter discusses how the mediation approach was built around a strategy that removed all possible competing avenues for the protagonists to sidestep the Annan process, thereby ensuring that items on the agenda were given their undivided attention. The chapter then explores the numerous agenda items, and in particular how the agenda of long-term reforms ensured that constitutional review remained the priority. From the mediation process, Wamai draws three important lessons. One is the need to keep mediation separate from constitution-making; the second is about understanding when the time is ripe for a constitutional moment; and the third is about the relationship between the composition of the mediation team and the outcomes of the process, including, of course, the constitutional review itself.

The last two chapters of the first part of the book address the role of actors at elite and popular levels of politics. Chapter 4, by Raymond Muhula and Stephen Ndegwa, analyses the role of pact-making by political elites. The authors examine the interplay between elite manoeuvring and the context in which these actors operate, and demonstrate that, while instrumentalist pacts blocked constitutional reforms for many years, they nevertheless, under different circumstances following the post-election violence and the National Accord in 2008, made possible the new constitution. This contextual analysis of the content of pacts calls into question the routine critique of political elites as being inherently hostile to democratic reform.

Chapter 5, by Wanjala Nasong’o, interrogates the role of civil society in the making of the new constitution. Organisations in civil society have played a significant part in the push for democratisation in general and constitutional reforms in particular. Civil society has been credited with being the instrument of intellectual and political mobilisation for the successful clamour for a new constitutional dispensation. However, civil society is encumbered by the social, economic and political cleavages that characterise Kenyan society at large. Viewing civil society as a diverse group, the chapter analyses the ways in which the balance of forces for and against constitutional reform played out on the level of society.

Read together, the chapters by Muhula and Ndegwa and by Nasong’o point to more general theoretical reflections about political projects. Political rule is exercised through institutional arrangements of political systems and state
structures, but in ways that are rooted in economy and society. Democracy, authoritarianism or hybrid variants of political regimes are promoted and resisted by competing coalitions of political forces, with their bases in both civil society and political parties, as well as in the state itself. Very rarely are lines of conflict drawn between civil society as a whole and the state or the political elite as a unified entity. One factor that needs to be underlined is that, compared with other countries in the region, Kenya has always had a relatively significant number of influential political leaders pushing for political reforms in a forceful way. During critical moments, these leaders have been indispensable in translating popular demands into organised politics, policy and law.

The second part turns to the document itself, and is devoted to an interrogation of the content of the constitution from legal, political and ideological points of view. The chapters in this part also examine the opportunities and challenges of the new constitutional order.

Chapter 6, by Yash Pal Ghai, analyses to what extent the structure and demarcation of power in the new constitution may engender a culture of accountability that will give meaning to the constitution. A major governance problem in Africa is the phenomenon of constitutions without constitutionalism. The difficulty is not so much the absence of good rules as the existence of bad habits: the disinclination to obey rules. Governments routinely ignore constitutional provisions and act capriciously whenever a constitutional provision becomes inconvenient in their exercise of power. This is why a number of constitutional amendments are undertaken with the intention of shifting power from the people to the state. A new constitution, however robust, will not cure the problem if the cultural deficit of obedience persists. Ghai poses the difficult questions of whether Kenya’s political economy is inherently antithetical to a constitutional architecture of power, and if the constitution can have a sufficiently restraining effect in the exercise of power.

Chapter 7, by Godwin R. Murunga, interrogates ideological divergences in the struggle surrounding the constitution and the implications they hold for its implementation. Kenya’s new constitution is a compromise document; the struggle for constitutional change has been fought against strong proponents of the status quo, organised mainly as competing groups of elites. The eventual victory by the progressives was, however, not achieved without compromises. Through vague phrasing, compounded drafting and deferred legislation, the two sides found ways of dealing with issues on which they could not agree; on others, the pre-eminence of one side or the other is clearly visible. The power relations between the two groups are reflected in different chapters of the constitution. The liberals’ greatest imprint can be seen in the bill of rights, while the conservatives are strongest in the system of government and security clauses. Further, cultural wars also emerged in the constitutional process, particularly with respect to women’s reproductive rights.
Chapter 8, by Mutuma Ruteere, examines the extent to which the new constitution has inverted the state-centric logic of security in Kenya. Security forces have been the leading abusers of human rights; civilian control of the security forces has been weak and accountability mechanisms absent. The training, culture and general orientation of the security apparatus has been decidedly pro-state and hostile to human rights. Whereas the conflict between security and human rights is a universal and old one, two developments have accentuated this problem: first, the ‘war on terror’, which many countries, including Kenya, have conveniently appropriated as a pretext for clamping down on human rights; and second, the upsurge of militia crimes, through which security forces have tapped into public fears to undermine human rights objectives. Ruteere examines whether the human rights regime adopted in the constitution provides a sufficient check to state excesses; and interrogates the future interplay between security, human rights and global politics within the context of such a liberal constitution.

References


