

Leadership and Political Corruption in Kenya: Analysis of the 2010 Constitutional Provisions on the Presidency

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This article is an attempt to establish a link between the abuse of power in the Presidency, and how this manipulation has been addressed by the new Constitution 2010 in Kenya. This study has reviewed available literature to interrogate this correlation. Rampant corruption that has contributed to a huge loss of resources in Kenya has been attributed to the arbitrary power vested in the executive. Following Independence in 1963, Jomo Kenyatta, the first president of the Republic of Kenya, concentrated on amassing political power under the control of the central government. Moi, his successor from 1978, continued this legacy by tightening the control of Kenyan public life in all spheres, including politics, administration, and management of public finance. The presidency took over control of almost all the sectors of the Kenyan economy. Moreover, it had control over the state's finances with little, if any, accountability. This study has found out that corruption in Kenya has notoriously revolved around the Presidency and those who demonstrated loyalty to the ruling elite. Consequently, this central control was evident in the imbalance in regional development. The abuse of power and inefficiency of the three presidencies of Kenyatta, Moi and Kibaki left Kenya susceptible to poor social, political and economic development. It is noteworthy that the Constitution 2010 has launched relevant institutions that have the potential of enhancing checks and balances in managing public resources. If these institutions deliver according to the mandate

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accorded them, there is a true promise in curbing corruption and maintaining good and accountable governance in Kenya.

Key Words: Kenya; Corruption; Power; Presidency; Kenyatta; Moi; Kibaki; Accountability, Kenyan Constitution 2010.

Introduction

Since Independence in 1963, the presidential regimes in Kenya were associated with grand corruption that favoured a small section of Kenyan society. According to Biau and Biau, corruption in public institutions in Kenya has been a telling indicator of wider governance-related problems, such as lack of democratic space for Kenyan citizens and insufficient government interest in political reform. Kenyatta consolidated governing powers in the Presidency through constitutional amendments. As noted by Kirui and Murkomen (2011: 7), the constitutional changes that took place between 1963 and 1967 had profound impacts on governance in Kenya, and these continue to reverberate to the present. The changes focused mainly on the transfer to the presidency of power from other arms or institutions of government. During this period, Parliament's ability to check the executive was eroded and Parliament was transformed into a puppet of the executive. The presidents used their powerful positions to advance their political interests that left many communities and groups marginalised. As pointed out by Kiai (2008: 163), the all-powerful Presidents made their major public-policy pronouncements in off-the-cuff roadside speeches. They made such proclamations during their political campaigns to garner patronage over the citizenry. The Presidency as a strategic office was used to loot from the public coffers.

Owing to this political topography in Kenya, there was very little, if any, accountability in the way public money was expended. Kiai (2008: 164) pointed out that corruption had become a way of life for the political and civil service elites. This explains why there was a high demand for the trading of ministerial offices and why beneficiaries of these positions used them to consolidate political patronage among loyalists. Therefore, those in positions of power in the government

had a significant influence in the mismanagement of public funds for the purpose of advancing particular political interests. They used public office as a vehicle to loot public resources with very little or no accountability. As argued by Akech (2011: 341), there was no clear law that was available in the Kenyan constitution that would check the abuse of powers by the executive as well as by the judiciary and the legislature. In fact, the available statutory order granted the executive, legislature, and judiciary broad powers without establishing effective procedural mechanisms to circumscribe their exercise. 'In the absence of effective regulation, law often aids the abuse of power and corruption' Akech (2011: 342). The vacuum created by the absence of effective law enforcing institutions is a cause for alarm.

Even though corruption and abuse of power cannot be solely attributed to the executive, the presidency has largely played that role either by engaging in acts of corruption and abuse of power, or by failing to act on those who were found guilty of the same, especially when they showed loyalty to the ruling elite. The imperial Presidency constructed under the Independence constitution became the centre for corruption in Kenya. Under the central government in Kenya, institutions that formed as checks and balances to the abuse of presidential powers were non-existent. To the contrary, institutions such as the Judiciary or the legislature acted as a rubber stamp for many, if not all, presidential decisions, including those that had huge negative social and economic implications to the citizenry. As argued by Amutabi (2009: 59), those who occupied the position of the president misused the opportunity and exploited this office to enrich themselves and their cronies. Political loyalty was rewarded while those who showed resistance were socially and economically marginalised and excluded. According to Kivuva (2011:10), the previous constitution allowed the president to represent a constituency whose members were allowed to sit and deliberate on parliamentary proceedings, had the control of the parliamentary calendar, appointed MPs to the cabinet and determined the size of the cabinet amongst other functions that were exercised uncontrolled by any institution.

On the contrary, the 2010 constitution has curtailed many of these presidential excesses of power and has legally withdrawn other powers altogether. According to Chapter nine of the 2010 constitution, the president cannot:

- a) Occupy both the presidency and another public office;
- b) Determine the size of the cabinet;
- c) Appoint an MP as a cabinet secretary; and,
- d) Decide when elections are to be held and/when to dissolve Parliament.

Therefore, the Constitution 2010 has introduced significant changes in the Presidency that would make it extremely difficult to abuse public resources. The Constitution demonstrates efforts to bring fairness, transparency and accountability in managing the presidential office in Kenya and powers accrued to it. According to Kivuva (2011: 11), the executive office in Kenya has been constitutionally redesigned to make it more accountable to other arms of government, thus ensuring that functional separation of power exists.

The presidential term limit introduced in 1992 with the rise of multi-party democracy, and its reiteration in the 2010 Constitution has played a significant role in curbing presidential influence over public resources. This saw both Moi and Kibaki leave power at the end of their term limits in office without seeking constitutional amendments. For example, due to a united opposition and increasingly independent media, a vocal position from Kenyan religious groups, civil society groups and foreign international donors pressured Moi to leave office (Vencovsky 2008: 16). In addition, in post-2010 constitutional dispensations, the Presidency had to deal with resistance from constitutionally established independent bodies and public outcry challenging his pronouncements. On February 28, 2011, President Mwai Kibaki made some arbitrary appointments. This included Alnashir Visram as Chief Justice (CJ), Prof. Githu Mwigai as Attorney General (AG), Kioko Kilukumi as Director of Public

Prosecution (DPP), and William Kirwa as the Controller of Budget (COB) disregarding constitutional provisions under leadership and integrity. The President was forced to revoke and withdraw these appointments and allow them be made as provided by the Constitution 2010. In fact, the Presidency had a marginal role in these appointments: it was the responsibility of the Judicial Service Commission to make appointments for both the CJ and the Deputy CJ, while the DPP and the COB would be recruited by the Public Service Commission. These are practical signs that show the working of the constitution in taming presidential powers (KHRC, 2011: 12).

Corruption: A Conceptual Framework

According to Mondo (2013: 9), corruption is operationally defined as the misuse of entrusted power for private gain. Corruption is often linked with the embezzlement of public funds where a bribe is paid to receive preferential treatment for something that the bribe receiver is required to do by law, thus constituting corruption according to the rule. Corruption can range from small favours in anticipation of a future advantage to the payment of large sums of money or unreasonable gifts to senior members of governments. According to Amundsen (1997) (cited in Cherotich, n.d.: 6), corruption is traditionally associated with authoritarianism. The high levels of corruptions are attributable to authoritarian regimes enriching themselves with public resources, making corruption yield grave effects to social and economic developments.

The practice of representative democracy does not always guarantee that government powers are used for the protection of citizens' rights and the service of public goods, because those who govern are not always accountable to the governed. Accountability in this regard is understood as 'a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other' (Bovens 2007: 345). This definition implies a liaison in which some actors have the right to hold others to a set of standards, to assess whether they have satisfied their functions in accordance with these standards and to inflict sanctions if they determine that these duties have not been realized. In a nutshell,

accountability allows the public to hold public officials accountable, prevents abuse of power and corruption, keeps the agents of the public answerable, and legitimizes government in the opinion of the citizenry by promoting acceptance of government authority and confidence in the government.

The political experience in many countries has indicated that the monopoly of the executive in the management of the public domain has been marred with corruption and abuse. However, in a system where there is a dispersal of executive and legislative powers, the dispersal enables friction between the legislative and the executive branches of government, thereby facilitating the accountability of the executive. As argued by Barber (2001) (cited in Akech 2011: 349), this dispersal of power prevents corruption and abuse of power by enabling the legislature to contest actions of the executive.

Kenyatta's regime and corruption

Amutabi (2009: 55) argues that Kenyatta, the first President of the Republic of Kenya, had inherited the colonial structures that were designed to serve the British imperial and financial interests. These colonial structures were designed to benefit the minority white community. He perfected the reward system and 'divide and rule' policies which had been used by the colonial system. Thus, Kenyatta succeeded in consolidating powers around the presidency. For example, President Kenyatta championed the agenda of making a series of constitutional amendments that deepened the consolidation of presidential powers. According to the Article 59 (1), (2) of the 1963 constitution, some of the amendments awarded the president powers to suspend the proceedings of or dissolve the legislature. The President therefore had control and power over the legislature. He also succeeded in forming a *de facto* one-party rule that made sure that there was no political competition that challenged his rule. Additionally, as noted by Akech (2011: 366), the absence of political party competition enabled the president to control the appointment of the presiding officer, or the speaker, of the legislature. In addition, Akech highlights that this was a strategy by the President to control the agenda that was deliberated in the parliament. Therefore, he

made sure that appointments were made from among the individuals who were considered to be loyal to the President, in essence playing a vital role in facilitating the agenda of the executive in the legislature. By extension, these things advantaged a few, especially Kenyatta's own family. According to Chege (2008: 127) the closing years of Kenyatta's rule were marked by rising intolerance and high-level corruption. He concentrated on creating Kikuyu dominance in business and among senior political appointees. Over the years, due to pressure from opposition parties, it became increasingly difficult for the president to influence the parliamentary agenda. In the sixth schedule, the 2010 Constitution establishes a select committee to be known as the Constitutional Implementation Oversight Committee responsible for overseeing that agenda.

The powers bestowed on the President were enormous. 'The President was above the law; he appointed and fired the cabinet, top civil servants, and the provincial administration at will, reigned over the bureaucracy, and determined judicial tenure and the parliamentary calendar' (Nasong'o and Murunga, 2007: 269). It is appalling how Kenyatta (with Moi and Kibaki after him) managed to maintain control all over the country. Kenyatta put in place a domineering network of loyal provincial and district officials who represented him at various local levels. He appointed loyalists to top positions in lucrative public enterprises including the major parastatals. The idea of a one-party system came into vogue with power centralised and intensely personalised (Nasong'o and Murunga, 2007: 269). Members of the provincial administration and the police understood that it was sometimes in the interest of their personal survival to follow what they understood to be the direction or inclinations of the President in their areas rather than to uphold the law. That such *modus operandi* negated public accountability in the exercise of power and bred human rights violations, corruption and impunity is no surprise (Bagaka, 2011: 3). As Amutabi (2009: 61) confirms, by 1978 when Kenyatta died, he left behind a government headed by 35 Kikuyu District Commissioners (DCs) of the 41 positions, 5 Kikuyu Provincial Commissioners (PCs) out of the 8 PCs,

and 13 Permanent Secretaries out of the 19 available. As argued by Amutabi (2009: 59), Kenyatta's strategy was to consolidate control of economic matters where his cronies were recruited in political and economic realms. With this effort, Kenyatta succeeded in creating a ruling class. He ensured that he recruited his loyalists into his ruling aristocracy. Anderson (2005) (cited in Amutabi, 2009: 59) points out that Kenyatta proceeded to reward his newly created loyalists with land, money and power and ensured that legitimate heroes (those who fought in the war of liberation, the Mau Mau) were isolated.

During his regime, Kenyatta grew very hostile to those who arrayed criticism against his governance policies. For example, one of his allies during the struggle for independence leading to the formation of the new government, J. M. Kariuki, was assassinated under very suspicious circumstances. He had become a critic of the official government corruption, including the injustices surrounding land redistribution among the landless in Kenya. Kenyatta chose to redistribute the land that was previously owned by the colonialists to his cronies. In an attempt to mitigate a potential revolt, Kenyatta had ordered an investigation into the murder. A list of government security officers was implicated, but none of them was ever punished. Other political figures who suffered the fate of J. M. Kariuki were the likes of Tom Mboya, Ronald Ngala, Karumba, Bruce MacKenzie, Pio Gama Pinto, and Argwings Kodhek. Others who faced the wrath of Kenyatta's presidency through torture and detention were Oginga Odinga, George Anyona, and Martin Shikuku, among others. As argued by Amutabi (2009: 60), Kenyatta liked to isolate and frustrate his opponents. He became very popular in silencing the voices of those who tended to be independent of him. These political tortures and killings executed under Kenyatta's presidency reveal his intolerance toward anyone who took a political stance other than what he decreed. His leadership had therefore no space for political freedom. This demonstrated a clear abuse of political power by those heading top positions in government.

Until his death in 1978, Kenyatta took control over almost all sectors of the Kenyan economy. Moreover, the presidency had control

over state finance, which was exercised with little, if any, accountability. As Amutabi and Gimonde (cited in Nasong'o and Murunga, 2007: 269) reveal, Kenyatta (and Moi after him) controlled the armed forces, the police, the civil service, (and) the provincial administration. Their hold on the key levers of governance put them in control over patronage resources and gave them unparalleled hold over the key sectors on the economy and politics.

Moi's Regime and the Escalation of Corruption

When Moi became president in 1978, he continued with Kenyatta's legacy of control and manipulation of government and public affairs. He did not seem to bring any commitment to addressing the corruption that had plagued the Kenyatta government. Instead, he further continued consolidating power within his office by constant constitutional amendments that ensured his immunity. His ruling party, KANU, aided him to centralise power around the executive personified by the President (Anderson, 2005: 551). Even though Moi had managed to contain emerging opposing voices, the 1982 coup came as a surprise to his authoritarian rule. Nevertheless, this resulted in even tighter restrictions on political competition (Smoke, 2007: 139) and effectively succeeded in the creation of a *de jure* one-party state. He openly created a safeguard against any possible adversary by empowering his cronies. Many Kalenjin loyalists became very wealthy courtesy of his patronage. Chege (2008: 127-128) argues, that despite a good start, by 1988 his regime had become extremely authoritarian. These acts only served to suppress any opposition. During this period, 'political competition was muzzled and civil society withered as it was increasingly intimidated, co-opted or banned by the state. Over time, the state occupied the entire public sphere, crowding out both political actors and the civil society' (Anderson, 2005: 551).

With the rise of multi-party politics in 1992, significant pressure was mounted upon Moi's government both locally (by political parties, religious groups and civil society organizations) and internationally (by the World Bank and the International Monetary Fund, as well as by the government of the United States of America).

These forces proposed the drafting of a new constitution. One of the main rationales behind the pressure for a new constitution in Kenya was to tame rampant corruption that was attributed to poor governance and slow social and economic development in Kenya. Corruption escalated as the regime methodically dodged economic and political reforms. Annual economic growth declined significantly between 1990 and 2000, and poverty levels soared. International pressure for reforms and calls to end corruption in Kenya heightened. For example, according to Francis, Nekesa, and Ndungu (2009: 2) aver that Kenya's economic performance dwindled from *per capita* income of US\$271 in 1990 to US\$239 in 2002. Criticisms were hurled against Moi and his government for corruption. Although it was not good news for Moi's administration, local politicians such as Ouko, who spoke against government corruption, were commended by the western powers, especially by monetary institutions such as the World Bank and the International Monetary Fund (IMF) to secure their capital interests. Barkan (2011: 6) notes that formal power attributed to the President was not enough to maintain his immunity; he continued to vest in patronage politics and repression as a means to maintain his authority. The level of corruption steadily rose⁴. Indeed, toleration of corruption by Moi became a major form of patronage during his presidency. And when patronage did not work to buy off his opponents, he resorted to repression (Barkan, 2011: 6). The political topography in Kenya became very tense and top officials in government instilled fear through intimidation, detention, and torture. 'In this environment, demands for multiparty democracy escalated, especially following the assassination in January 1990 of Foreign Minister Robert Ouko, a known opponent of official corruption' (Chege, 2008: 128). Domination of a one party politics intimidated calls for multi-party politics and a vibrant civil society. Even the religious groups, especially those that were deemed to be against the abuses of the ruling party, were suffocated with

⁴ As will be highlighted later, the Goldenberg scandal revealed one of Moi's most scandalous scams, which cost Kenya's taxpayers billions of Shillings, estimated to about 10% of its GDP (Cherotich, n.d.: 1).

intimidation and threats by powers surrounding the presidency.

When Presidents are voted into power in Kenya, there is an expectation that the tribe from which the President originates, including other tribes that show allegiance to the President, would enjoy favours from the ruling government. As Wrong (2009) (as cited in Akech, 2011: 343) points out, corruption is prevalent in Kenya because ethnic cabals believe that it is their 'turn to eat' once they assume the reins of government. Again, Wrong (2009) (cited in Akoth, 2011: 8) noted that Moi and the KANU regime were entangled in an ethno-economic model that opened an opportunity for the political class and economic patronage to work hand in hand and thus sustain corruption and misgovernance in Kenya. Barkan (2011: 6) notes that it was in 1981 that Moi changed the constitution to make Kenya a *de jure* one-party state. From that time onward, his presidency became a classic example of African "big man" rule.

When Moi took over the leadership of government in 1978, he succeeded in dismantling the Kikuyu dominance in administrative positions, a legacy from Kenyatta. Instead, he replaced Kikuyu dominance with that of the Kalenjin. As noted by Amutabi (1999: 8) by 1991, there were 17 Kalenjin Permanent Secretaries out of the 28 in the nation, 45 Kalenjin District Commissioners (DCs) out of 66 available positions and 4 out of 8 Provincial Commissioners (PCs). As Mulli writes (as cited in Amutabi, 2009: 61), Moi rewarded the Kalenjin with resources from the public sector. These included senior positions in parastatal organisations and the administrations, as well as actual monetary benefits in the form of government loans. Moreover, the ruling class, on many occasions with the full knowledge of the President, made deals to steal from the public coffers. For example, leading to the first multiparty elections in Kenya, the largest scandal which led to the loss of a large amount of public money in Kenya, commonly known as the Goldenberg Scandal, involved government officials who had very close ties with the President. As noted by Cherotich (n.d.: 1), it is estimated that the affair cost the country more than 10% of its GDP. It involved senior Moi-regime insiders who were determined to shore up the regime's election war

chest in readiness for the elections in 1992. The investigation into this loss would only be launched by Kibaki's administration a decade later, and yet, as it will be shown later, there was even then no political will to hold the culprits accountable, as they were still serving in strategic positions in the new government.

Although Parliament was to take an upper hand in the management of public finance, any Member of Parliament (MP) who dared question the government was reprimanded or detained. The executive made all decisions, including when to report and how much information was to be availed to both Parliament and the public (Kirira, 2011: 2). In order to create dependency, Moi rewarded his MP loyalists with lucrative positions in managing parastatals while others were made into ministers and assistant ministers, positions that were attached to the control of public finances. Those who showed opposition to the regime were marginalised and their regions were denied a share of the national revenue.

In the late 1990s, in preparation for the 2002 elections, the people were already tired of the institutions of political power in Kenya. Even though Moi had served his two terms and was not eligible for a re-election, a majority of the Kenyan people favoured a new government (National Alliance Rainbow Coalition, NARC) that campaigned on the promise of delivering a new constitution and bring to an end the grand corruption that had plagued the country for all its independence lifetime. The new constitution was intended to establish an independent judiciary, legislature, and other commissions such as those that check on electoral and human rights practices. This was a moment driven by hope for a better future rather than taste for a real change. As it has been argued by Kimenyi and Shughart (2008: 2), the rejection of KANU was the culmination of many years of frustration with leadership characterised by nepotism, corruption, poor economic management and widespread violations of human rights. Moi and KANU regime had failed to demonstrate leadership, and instead consolidated too much power and control in the presidency. Odhiambo (2004) (cited in Kimenyi and Shughart, 2008: 2) maintains that president Moi had used his executive powers to

marginalise some ethnic groups and to redistribute the country's resources to reward their political supporters, thereby exacerbating regional and ethnic disparities and undermining investment incentives.

The distribution of power in Kenya has remained a bone of contention, as well as Kenya's highly debated policy issue, since independence. Centralisation of power in the presidency encouraged state intervention in the economy that benefited a few political actors, while gradually eliminating political and economic competition (Nasong'o and Murunga, 2007: 263). Ostensibly, as has been noted by Ochieng' (1995) (in Nasong'o and Murunga, 2007: 263), the political problems that affected Kenya's social and economic performance in the 1980s must be located in the history of personalised rule initiated by Kenyatta and inherited by the Moi regime. In 2005, Ogot and Ochieng' (cited in Bannon, 2007: 1831) attested to the fact that although Kenya had been at peace since achieving independence, it has been a repressive one-party state throughout most of its history.

Kibaki's Regime and the Taint of Corruption

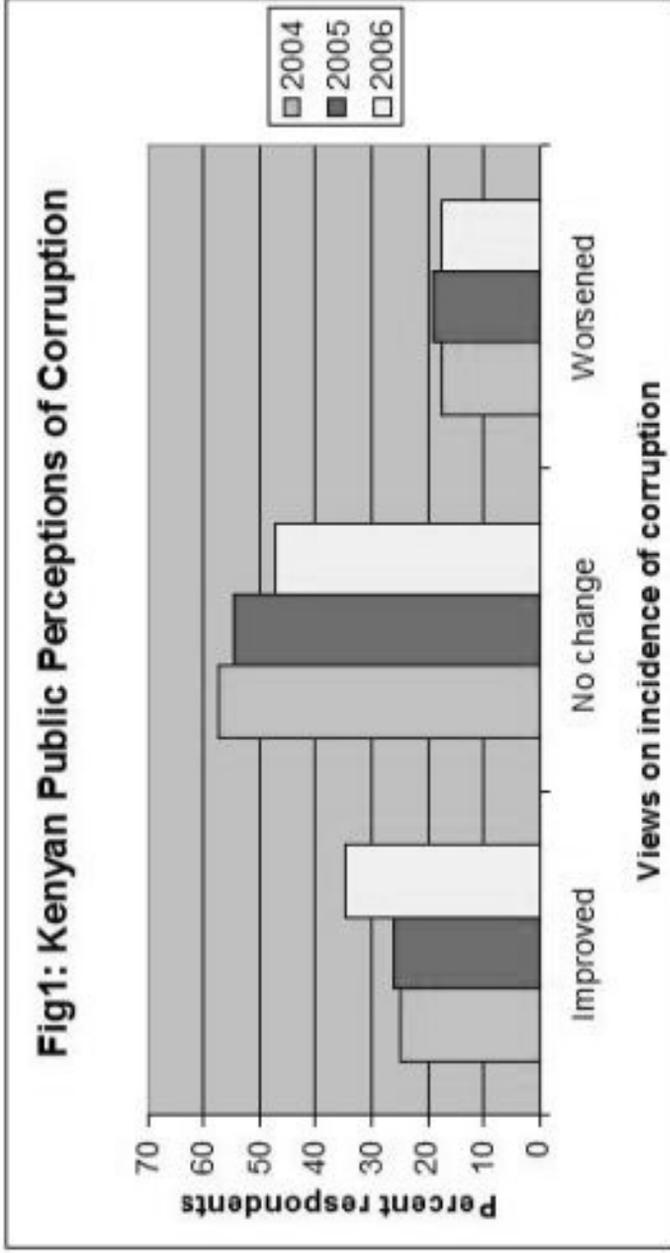
In December 2002, Kibaki came in to the scene with a promise of a new constitution in 100 days. The expected constitution was largely expected to address the power disparities that had hampered Kenya's social and economic development since independence. In 2002, the Kibaki presidency was ushered in through the euphoria of a Coalition Government, the National Rainbow Coalition Government (NARC). It was hoped by many Kenyans that Kibaki's regime would part ways with Moi's authoritarian governance. Although the new rules that bound the NARC coalition were politically significant, they were not reflected in the constitution. The governing administration was expected to be more consultative due to the nature of the parties that had united to form the government. In part, as argued by Ndegwa (2003: 154), there was hope that the new government could deliver the country from the malaise of economic mismanagement and extreme corruption. The 2002 general elections in Kenya saw 67 per cent of voters seeking regime change from an incumbent KANU led to a new and responsive government. KANU had ruled the country

for nearly four decades but had shown no positive commitment in addressing corruption, but only perpetrated it. Due to this, a majority of Kenyan voters expected an end to the culture of impunity and corruption that was significantly tied to the person of the president. As Chege (2008: 128) claims, there was hope among the Kenyan people that the Kibaki regime would end the era of corruption.

As already pointed out, President Kibaki was elected in 2002 on a platform of zero-tolerance for corruption. However, Kibaki's Presidency turned out to show reluctance in addressing major corruption scandals involving high ranking officials. In 2004, the Kibaki administration created a commission of inquiry over the Goldenberg Scandal (a multi-million Moi-era scam involving government's rebates for fake diamond exports) with an aim of naming and convicting those implicated in these embezzlements. As noted by Chege (2008: 129), the findings of the commission were released, implicating top leaders in government and in the opposition, including the late Minister, George Saitoti – and yet nobody was convicted or jailed.

According to Biau and Biau 2008, the election of President Mwai Kibaki of the National Rainbow Coalition (NARC) in 2002 restored hopes of political reform. However, the NARC government did not live up to this expectation regarding corruption. In fact, the Transparency International's Kenya Bribery Index of 2007 (cited in Biau and Biau 2008) found out that there was little improvement in the public's perception of corruption over the recent years as illustrated in figure 1 below.

Arguably, Biau and Biau (2008) note that Moi received from his predecessor a relatively healthy government with strong institutional framework in 1978, but in 2002, when his term ended as President, he left behind a government that was rife with corruption and a weak economy. Poor fiscal management limited effective government investment, and public distrust of the executive hindered private investment. Principally due to weak governance, corruption, and inadequately coordinated government actions, the economy's 2001 growth rate was the lowest of the post- independence era, at 0.3%



Data Source: TI Kenya Bribery Index 2007 (cited in Biau and Biau 2008)

(Kiringai, 2001:1; Mutizwa-Mangiza, 2006: 15) (cited in Biau and Biau 2008). Moreover, more incidents of grand corruption infiltrated Kibaki's regime, climaxing with the Anglo Leasing Scandals in 2005. According to Chege (2008: 129), the Anglo Leasing Scandal involved a series of security contracts with official payoffs that were in part intended to finance the 2005 constitutional referendum and 2007 Party of National Unity's (PNU) campaign. He proceeds to point out that John Githongo, permanent secretary for governance and ethics, conducted an exhaustive investigation and concluded that top members of the government were involved. As a result, two cabinet ministers were forced to resign, but were then reappointed. Even now, no convictions have resulted. Instead, as argued by Glinz (2010: 8), within a short period, corruption found its way back into government and Mr. Githongo left for Britain, saying that some of those who were mentioned in his report had threatened his life. Thereafter, corruption and malpractice continued unhindered within a short period of Kibaki's election. The unwillingness of the Kibaki regime to address the outcome of the above grand scandals indicates the lack of significant political will by the regime to reform Kenya's governance.

The Constitution of Kenya 2010 and the Regulation of Presidential Powers

The crucial institution addressed by the 2010 Constitution of Kenya is the Presidency. According to Article 130 (1), the National Executive shall comprise the President, the Deputy President and the rest of the Cabinet. Accordingly, the composition of the National Executive shall reflect the regional and ethnic diversity of the peoples of Kenya. This will avoid the presidential discretionary elements that were in existence in the previous regimes where the President could select the Cabinet from among his circle of political affiliates. Chapter 9 of the Constitution 2010 defines the principles and the structure of the National Executive. The members elected to the Executive are therefore mandated by the people of Kenya and may not exercise

their powers and functions for their personal or any exclusive benefit. Article 129 (2) outlines that the Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well being.

The new political configuration in Kenya consists of five offices that are elected by registered voters in accordance with the Constitution. These are:

- 1) The Office of the President;
- 2) The Office of the County Governor;
- 3) The Office of the Member of Parliament;
- 4) The Office of Woman representative to the National Assembly; as well as
- 5) The County Ward representative.

They are aimed to maximise representation of Kenya's citizens in public matters. Other State organs like special commissions and independent offices have been established to balance the exercise of power by the Presidency and for the protection and benefit of all Kenyans. For example, 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 Service Commission; and the Public Service Commission. These commissions are independent and free from the interference of the presidency, and protected by law to ensure that checks and balances are put in place against the abuse of power and human rights by political elites. They are meant to guarantee and protect citizens from unfair treatment. Article 249 defines the objects and authority of these independent commissions so as to protect the sovereignty of the people; to secure the observance by all State organs of democratic values and principles; and to promote constitutionalism. The commissioners who head the respective

commissions and the holders of independent offices are subject only to the constitution and the law; and more importantly, they are independent and not subject to direction or control by any person or authority. In this regard, the constitution has opened spaces where Kenyans are protected from the manipulation by other state organs, such as the Executive. Under the previous Kenyatta and Moi centralised regimes, members of commissions were appointed by the President for indefinite periods of time. As such, they became susceptible to being used and controlled by those in power for their own political gain. Those in such commissions could not resist these pressures as long as they wanted to retain their jobs. The Judiciary, for example, as noted by Akech (2011: 342), was equally culpable due to allegations of abuse of power and corruption. A significant segment of the citizenry perceived the judiciary as having lost its legitimacy as a dispute resolution forum. In fact, Akech (2011: 342) notes that the breakdown of law and order in the aftermath of the results of the 2007 presidential election was partly attributable to the public's perception of the Judiciary as partisan. Now, Article 250 defines the limits to which members of commissions and holders of the Independent Commissions may remain in office. A member of a commission, or holder of an independent office (unless *ex officio*) shall be appointed for a single term of six years and is not eligible for re-appointment; and (unless *ex officio* or part time), shall not hold any other office or employment for profit, whether public or private. Similarly, Sihanya (2011: 12) outlines that these commissions differ from commissions set up by the Independence 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.

There had been a monopoly of decision-making over public coffers. The executive had an upper hand in determining how these resources would be expended. In the new constitution, Article 79 determines that the Parliament shall enact legislation

to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under chapter fifteen, for purposes of ensuring compliance with, and enforcement of, the provision of the constitution. The commission provides services and facilities to ensure that Parliament does its work efficiently and effectively, to constitute offices in the Parliamentary Service, and to appoint and supervise office holders (Akech 2007:388). Chapter fifteen provides for the establishment of independent offices and commissions that are expected to protect the citizenry from abuse by those occupying top offices in government. Such commissions and independent offices include: the Kenya National Human Rights and Equality Commission; the National Land Commission; the Independent Electoral and Boundaries Commission; the Parliamentary Service Commission; and the Judicial Service Commission.

The provisions of the 2010 constitution dealing with leadership and integrity, including those governing conflicts of interest, provide a much-needed framework for regulating the conduct of legislators. In regards to the judiciary, the failure to regulate the President and Chief Justice's powers of appointment and dismissal and the administrative powers of the latter, often aided corruption and undermined the legitimacy of the judiciary. These powers were exercised in ways that undermined the institutional autonomy of the judiciary and the decisional independence of judicial officers, respectively. While Article 166 vests the President with the authority to appoint the Chief Justice and the Deputy Chief Justice based on the recommendation of the Judicial Service Commission, and subject to approval of the national Assembly, Article 168 permits that '(1) A judge of a superior court may be removed from office only on the grounds of (a) inability to perform the functions of office arising from mental or physical incapacity; (b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament; (c) bankruptcy; (d) incompetence; or (e) gross

misconduct or misbehavior.’ For the sake of fair procedure, the removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.

The political climate in Kenya reflected that those loyalists close to the presidency always went free in the area of criminal justice and public money laundering. However, the new constitution enhances objectivity and accountability in investigations and prosecutions. Article 157 (4) states that ‘the Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.’ In this regard, the Attorney General only gives legal advice to the government and represents it in legal proceedings. Hence, the Director of Public Prosecutions only takes over a criminal suit with the recommendation of the person or authority who instituted it. Akech (2007: 388) makes it clear that the DPP can only discontinue a prosecution with the permission of the court to preclude the abuse of the power to prosecute, the new constitution requires that DPP’s exercise of this power shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

Overall, the guiding principles of leadership and integrity are outlined in Chapter Six of the 2010 Constitution. Article 73 lays down attitudes expected of public officers such as respect for the people, acting in a way that brings honour to the nation, among others. In selection of public officers, Article 73 (2) points out that this has to be done ‘(a) on the basis of personal integrity, competence and suitability, or election in free and fair elections; (b) objectivity and impartiality in decision making and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives of corrupt practices....’ Therefore, those who

hold public offices are expected to conduct themselves with honesty in the execution of public duties, and to declare any personal interest that may conflict with public duties, accountability, discipline, and commitment.

Just how the incoming government of Kenya, which was elected in March 2013, is going to address corruption within its own ranks remains to be seen. If the government of Kenya fails to act on corruption, says Palmer (2011: 34), the culture of corruption will be allowed to continue; but if it prosecutes crimes of corruption vigorously, there is no telling how far scandals will go, which have the potential of destabilising and delegitimising the institutions of government in Kenya.

Conclusion

Since the introduction of democratic reforms in the beginning of the 1990s, there have been considerable regulations of the exercise of presidential powers. Despite these significant developments in the regulation of presidential powers, corruption linked to the presidency has continued to thrive. So far, Kenya's top leaders have failed, or rather have been reluctant, to address and confront deep-seated grievances and historical injustices that have contributed significantly to social-economic crises faced in Kenya to date. For example, as mentioned by Kiai (2008: 165), since independence, there have been issues of land ownership, and it has been apparent that those communities that have had greater access to presidential powers and its attendant patronage are seen as beneficiaries of favouritism.

If Kenya is to start recording a positive social-economic trajectory, there is a need for all stakeholders to employ reformed governance structures strengthened by the new constitution. For example, sooner than later, independent and autonomous bodies that have been created by the new constitution 2010 such as the judiciary, independent electoral and boundaries commission, commission of ethics and anti-corruption, and parliament, should execute their duties without duress from the executive. Members of these bodies are therefore to use their

mandate to guarantee power checks and balances. They are to use these mechanisms and the already established institutions of justice to ensure that rich and poor have equal opportunities in accessing justice, and where the rule of law is respected. In addition, there is a need to use these empowered institutional mechanisms to employ punitive measures without fear or favour to those found guilty of looting from public coffers.

The 2010 Constitution is an attempt to close the gap that has existed between enormous power claimed by the Presidency and more accountable and transparent measures that are likely to hold public officials accountable for their decisions and actions. The powers and the supremacy of governance in Kenya under the 2010 Constitution belong to the people of Kenya rather than to those holding public offices. In fact, as pointed out by Akoth (2011: iii), the agitation for a new constitutional dispensation in Kenya, particularly by dissident politicians, civil society organizations and religious groups, was informed by the expectation that the new constitution would emancipate Kenya from its years of authoritarian Presidency. This move underscores the attempt of the Kenyan governance system to move from a top-down elite control to a bottom-up process where Kenyans have a stake in contributing to the growth and development of the country. However, as pointed out by Akech (2011: 341), although the new constitution establishes principles and mechanisms that may enhance government accountability, the statutory order must be aligned with the values and principles of this new constitution if power and corruption are to be curbed.

References

- Akech, M.
2010. *Institutional reform in the new Constitution of Kenya*. Nairobi: International Center for Transitional Justice.
- Akoth, S. O.
2011. *Challenges of nationhood: identities, citizenship and belonging under Kenya's new Constitution*. SID Constitution Working Paper No. 10.

Amutabi, M. N.

2009. Beyond imperial presidency in Kenya: Interrogating the Kenyatta, Moi and Kibaki regimes and implications for democracy and development. *Kenya Studies Review Vol. 1, No. 1*, pp. 55-84.

Bagaka, O.

2011. *Restructuring the provincial administration: An insider's view*. SID Constitution Working Paper No. 3.

Bannon, A. L.

2007. Designing a constitution-drafting process: lessons from Kenya. *The Yale Law Journal, Vol. 116, No. 8* , pp. 1824-1872.

Barkan, J. D.

2011. *Kenya: Assessing risks to stability*. Center for strategic and international studies.

Biau, C. and Biau, J.

2008. Governmental Reform in Developing Countries: External Conditionality versus Peer Pressure. The Case of Kenya, *Reinvention: a Journal of Undergraduate Research*, Volume 1, Issue 1.

Chege, M.

2008. Kenya: Back From the Brink? *Journal of Democracy. Vol. 9, No. 4*, pp. 125-139.

Cherotich, L. A.

- n.d. *Corruption and Democracy in Kenya*.

Constitution of Kenya.

2010. Nairobi: National Council for Law Reporting.

Glinz, C.

2010. Kenya's new Constitution.

Francis, K., Nekesa, P. & Ndungu, B.

2009. Best practices in Constituency Development Fund (CDF). Nairobi: Collaborative Centre for Gender and Development

KHRC,

2011. *Lest we forget: the faces of impunity in Kenya*. Nairobi: Kenya Human Rights Commission.

Kiai, M.

2008. The Crisis in Kenya. *Journal of Democracy, Vol. 9, No. 3*, pp. 162-168.

Kimenyi, M. S., and Shughart, W. F.,

2008. The political economy of constitutional choice: A study of the 2005 Kenyan Constitutional referendum. *Economics working papers*. Paper 200808.

Kirira, N.

2011. *Public finance under Kenya's new Constitution*. SID Constitutional Working Paper No. 5.

Kirui, K. and Murkomen, K.

2011. *The legislature: bi-cameralism under the new Constitution*. Constitution working paper series no. 8.

Kivuva, J. M.

2011. *Restructuring the Kenyan State*. SID Constitutional Working Paper No. 1.

Lonsdale, J.

2006. Ornamental constitutionalism in Africa: Kenyatta and the Two Queens. *The Journal of Imperial and Commonwealth History*, Volume 34, Issue 1 March 2006, 87 – 103.

Mondo, P.

2013. Corruption. *New People*. No. 142 January-February 2013.

Murunga, G. R. and Nasong'o, S. W.

2006. Bent on Self-destruction: The Kibaki Regime in Kenya. *Journal of Contemporary African Studies*. Vol. 24, No. 1, pp. 1-28.

Nasong'o, S. W., and Murunga, G. R.

2007. *Prospects for democracy in Kenya*. Dakar: CODESRIA.

Ndegwa, S. N.

2003. Kenya: third time lucky? *Journal of Democracy*, Vol. 14, No.3, pp. 145-158.

Palmer, A.

2011. *A new future for Kenya? Reforming a culture of corruption*. Harvard international Review. P. 33-35.

Vencovsky, D.

2007. Presidential Term Limits in Africa. *Center for Security Studies*. Issue 2, pp 15-21.