Kenya's New Constitution: a Transforming Document or Less than Meets the Eye?

By *Cornelia Glinz*, Heidelberg*

A. Introduction

The Kenyans endorsed a new Constitution in a referendum on the 4th of August.[1] This Constitution is claimed to be the most important political development since independence from Great Britain in 1963. Since the introduction of the Independence Constitution, which led to the formation of the new State, no comprehensive constitutional reform has taken place. As the Independence Constitution was drafted through negotiations with the colonial power this is the first reform which detaches the Constitution from its colonial origin and puts it on a new basis. Therefore the new document is a genuine Constitution of the Kenyan people. The reform was long awaited as it comes more than 20 years after the constitutional reform project was first begun. The initiative for the production of the latest draft was the violence and unrest following the 2007 elections. These events, which led to more than 1000 dead and 300 000 internally displaced persons, made the necessity of structural reforms very obvious.[2]

The new Constitution can be appraised as a very modern document, particularly through its Bill of Rights which includes a wide array of socio-economic rights. In this respect, it can be seen from the mere content of the text – alongside the South African Constitution – as one of the most progressive documents on the continent and some provisions in the Bill of Rights develop the South African example even further. However, the text seems in some parts bloated because special protection clauses were repeatedly empha-

* *Cornelia Glinz*, Ass. iur., former Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (MPIL), Heidelberg; PhD-candidate at the University of Bremen with Prof. M.O. Hinz. E-mail:cglinz@mpil.de. I especially wish to thank Jan Schmidt, Research Fellow at the MPIL in the Africa Team, for his comments and insights and Lydia F. Müller, Research Fellow at the MPIL (Minerva Research Group "Independence of the Judiciary") for sharing her thoughts on the independence of the judiciary.

1 The document (the Proposed Constitution of Kenya as published by the Attorney-General, 6.5.2010) can be found under: http://www.nation.co.ke/blob/view/-/913208/data/157983/-/l8do0kz/-/published+draft.pdf; a first appraisal on the new Constitution provides: *Hendrike Wulfert-Markert / Anke Lerch*, Das Verfassungsreferndum in Kenia – ein Gebot der Stunde, Konrad Adenauer Stiftung Länderberichte 7.2010, http://www.kas.de/wf/doc/kas_20186-1522-1-30.pdf?100722141727; Stefan Jansen / Anke Lerch, Die Verfassung Kenias "auf einen Blick", ibid 10.2010, http://www.kas.de/kenia/de/publications/20977/ (all online references in this article checked on 4.11.2010).

2 *International Crisis Group*, Africa Report No. 137, 21.2.2008, p. i, to find under: http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya.aspx .

sised.[3] Additionally, as political developments over the last few decades have created one of the most corrupt political systems on the continent, there is considerable doubt whether the *political will* exists to realise this ambitious text in all aspects. Thus from a more sceptical perspective one could argue that it would have been more valuable to concentrate on those issues, particularly with respect to the protection of rights, which can realistically be realised and make their judicial enforcement as strong as possible. Reading the new State structure, the document contains further transformational potential with the reduction of presidential power and the strengthening of democratic legitimacy. The future will show how far the political elite will go in the implementation process and whether the Constitution can fulfil the high expectations and serve as the country's turning point towards good governance, democracy, stability and peace.

This Article is structured in two parts. Firstly, to provide an understanding of the background to the new developments, Kenya's constitutional history is outlined, whilst also commenting on the recent campaign preceding the constitutional referendum (B.). In the main part (C.) the key changes of the extensive new Constitution will be explained with special emphasis on the Bill of Rights. The final part outlining conclusions will return to a critical evaluation and contain some thoughts on the way forward.

B. Kenya's Constitutional History

When Kenya gained independence from British colonial rule in 1963 it introduced its *Independence Constitution* in the same year.[4] This resulted from difficult negotiations between the British Colonial Office and Kenyan political leaders between 1960 and 1963 in London, the so called Lancaster Conferences. The outcome was a Constitution with a Bill of Rights, a multi-party system and a Westminster-style parliamentary government, lead by a Prime Minister whilst the Queen remained formally the Head of State.[5] In order to overcome potential conflicts between different ethnic groups within the new State a system of regionalism was introduced which distributed power between the centre and regions. Additionally, a bicameral federal legislature was created containing a House of Representatives and a Senate in which the regions were represented. Therefore it produced a system of separation of powers on the vertical and on the horizontal level.

3 It is an extensive document that contains 264 Articles altogether.

4 A comprehensive analysis of Kenya's troubled constitutional history is provided by: *Rainer Grote*, The Republic of Kenya, Introductory Note, in: Albert P. Blaustein / Gisbert H. Flanz (eds.), Constitutions of the countries of the word, New York permanent edition; a short overview delivers: *Gerhard Brehme*, Kenia, Zur Verfassungsentwicklung des Landes, in: Herbert Baumann / idem / Matthias Ebert (eds.), Die Verfassungen der anglophonen Staaten des subsaharischen Afrika, Berlin 2002.

5 The Kenya Independence Order in Council 1963 (1963 No. 1968), where The Constitution of Kenya can be found in schedule 2.

However, in the years following independence, Kenya failed to establish democracy and the rule of law based on this Constitution. The system of checks and balances provided for by the Independence Constitution was undermined through numerous reforms.[6] Through the first constitutional amendment in 1964, the office of the President was created who became both Head of State and Head of Government,[7] whereas the function of the Prime Minister was abolished. In the following years, the President gradually became more and more powerful. Secondly, as there had never been serious political will to implement the system of regional power, constitutional reform was used to dismantle the regional features of government. Soon, the exclusive legislative competences of the regions were taken over by the central Parliament.[8] Later, in order to strengthen central power, the Senate, which represented the regions, was merged with the second parliamentary chamber into one legislature, the National Assembly.[9] Thus Kenya was transformed into a *centralised unitary State*. Finally, in 1968, these major changes amongst others were integrated in a revised version of the Constitution.[10] As a further development, since the end of the 1960s Kenya was effectively transformed into a *single party State* which was then formally consolidated under the government of Kenya's second President Daniel Arap Moi in the 1980s.[11]

Eventually, in the early 1990s, there were increasing demands for a return to a multi-party system, from both opposition groups and the influential western donor community, and it was finally re-established in 1991.[12] Later, in 1997, under continuing public pressure, a formal constitutional review process was initiated with the enactment of the *Constitution of Kenya Review Act*. Under this newly established process, it needed three attempts before a draft constitution was finally approved in 2010: (1) the "Ghai draft" in 2002, (2) the "Bomas draft" in 2005 and finally (3) the "Wako Bill" which had fallen far short of promised institutional reform and thus failed in a first referendum held in 2005.

After this unsuccessful constitutional revision, the events following the 2007 elections revealed again the necessity of constitutional reform.[13] In this year, parliamentary and presidential elections were held which confirmed Mr. Kibaki, President since 2002, in office, with a narrow majority of votes The result of the elections was widely disputed with

6 Between 1964 and 1969 ten amendment acts were adopted; for an overview: *Grote*, note 4, p. 3.

7 Act No. 28 of 1964.

8 Act No. 14 of 1965.

9 Act No. 40 of 1966.

10 Act No. 5 of 1969.

11 With the incorporation of Sec. 2 (a) in the Constitution, Act No. 7 of 1982 which prohibited the establishment of new political parties.

12 Act No. 12 of 1991.

13 On the events and their background see the report by the *International Crisis Group*, note 2.

claims that they were unduly influenced in favour of Mr. Kibaki's ruling party.[14] This resulted in severe violence along the ethnic lines and led to the worst political crisis in the country since independence.[15] To bring about peace Mr. Kibaki and the opposition leader Mr. Odinga eventually concluded a power-sharing agreement in February 2008, the so called *National Accord and Reconciliation Act*.[16] According to this compromise, a coalition government was established and Mr. Kibaki stayed in power. In return, the opposition leader, Mr. Odinga, became Prime Minister, a post newly created for the purpose of sharing power.

As a consequence, bearing in mind the recent dramatic events within the country, the topic of constitutional reform was put anew on the agenda. For this purpose, Parliament provided the legal framework for the re-establishment of the review process through the enactment of the *Constitution of Kenya Review Act of 2008*.[17] In February 2009, under the latter Act, an independent *Committee of Experts* (CoE) started work on the draft constitution.[18] It comprised nine experts of which six were Kenyans and three from other African countries, South Africa, Zambia and Uganda.[19] Its mandate was to build on previous work in the longstanding review process, especially the three formerly produced draft constitutions (see above). Based on them the CoE identified three contentious issues: (1) the system of government (should it be presidential, parliamentary or draw elements of both?), (2) the level of devolution and (3) transition to the new constitution.[20] Ultimately, the CoE presented a first draft in November 2009.[21] After the CoE had considered proposed changes by the Parliamentary Select Committee, a modified draft was introduced in the National Assembly and finally approved on the 1st of April 2010. A final version was published by the Attorney General on the 6th of May and put to a referendum on the 4th of August.[22]

The *pre-referendum period* was accompanied by a huge public debate. The Constitution was widely supported by both political parts of the power-sharing government, including President Kibaki, Prime Minister Odinga and their deputies. The opposition campaign was led by William Ruto, Minister for Higher Education, and former President

14 In fact the rigging appears to have been twofold, ibid, p. 2.

15 The Pre-Trail Chamber II of the International Criminal Court decided on the 31.3.2010 to authorise investigations into crimes against humanity allegedly committed during the post election violence: ICC-01/09.

16 Act No. 4 of 2008, adopted on the 18.3.2008.

17 Act No. 9 of 2008.

18 See on the Committee: http://www.coekenya.go.ke/ .

19 Ibid.

20 *Christina Murray*, Beginner's guide to the Proposed Constitution: Chapter by chapter, The background, ibid.

21 This first draft is the so called Harmonised Draft, published on 17.11.2009, ibid.

22 See note 1, for the document; on the referendum: *Jeffrey Gettleman*, Overwhelming approval for Kenya's new Constitution, African Chronicle, August 1-14 (2010), p. 3303 ff.

Daniel Arap Moi, both representing the Kalenjin ethnic group and both fearing that the stated land reform process could adversely affect their vast landholdings in the Rift Valley. Besides land reform, a couple of other issues was highly controversial, leading to a No campaign by the Christian churches, such as a new provision which allows for abortion for maternal health reasons. Finally, 67 percent of voters endorsed the new Constitution on a turnout of 72 percent.[23] Shortly afterwards, Minister Ruto admitted defeat for the opposition campaign. The referendum process was peaceful despite fears that ethnic violence could arise again.[24] However, the separation along the ethnic lines which stoked the violence in 2007 was still obvious because it widely determined the voters' decisions. The influence of the leaders of the No campaign, both Ruto and Moi on their ethnic group, was shown by the fact that in the Kalenjin dominated Rift Valley a majority was in support for the No campaign.

Subsequently, on the 27th of August, President Kibaki signed the new Constitution, in a public ceremony attended by thousands of Kenyans and several African leaders, an event which resulted in an atmosphere of great celebration. Kenyans are full of hope and optimism that the Constitution is a starting point for a new era. Amongst newspapers and public voices the events were viewed as a historic day for Kenya and the rebirth of a nation.[25] As the country struggles from a huge variety of problems including an arbitrary judicial system, corruption, nepotism and ethnic rivalries which have led to unjust distribution of land and resources, many Kenyans hope that the new Constitution will help to overcome these difficulties.

C. The Main Innovations of the New Constitution

The new Constitution provides a completely new comprehensive text, both concerning the order of the Chapters and its respective content. Moreover, there are some subjects which are newly added to the Constitution. Consequently it is detached from the old post-colonial Constitution. Besides, one can notice that a change in the perception was intended: the Constitution shall be regarded as belonging to the Kenyans and thus be brought closer to the citizens – a fact which is obvious from many examples in the text.

23 It needed a simple majority and 25 % of the votes in five of Kenya's eight provinces.

24 Therefore thousands of policemen secured the voting process especially in the Rift Valley where ethnic clashes in 2008 were most severe.

25 *Susan Anyangu-Amu*, Resounding Yes to Kenya's New Constitution, Terraviva United Nations 6.8.2010, http://ipsterraviva.net/UN/currentNew.aspx?new=8009 .

I. The Preamble

Right at the beginning of the text stands an essential innovation in so far as a Preamble is added.[26] It states:

> "We, the people of Kenya […] adopt, enact and give this Constitution to ourselves and to our future generations."

These words emphasise the aforementioned new understanding of the Constitution as a document of the Kenyan people.[27]

II. The Bill of Rights

Particularly remarkable is Chapter 4 on the Bill of Rights.[28] This Chapter, along with that on citizenship (Chapter 3), was moved to the front of the Constitution. Within the Bill of Rights there are two fundamental changes: firstly, the Chapter was systematically reordered and secondly, the scope of existing fundamental rights was extended with several new rights added to the existing list, including socio-economic rights. On the first point, the reordering, an introductory part, entitled "General provisions relating to the Bill of Rights", was added. It contains provisions on the application, enforcement and limits of rights. This general part is followed by the second on fundamental rights and freedoms. A third part is dedicated to the application of these rights to specific groups of society like youth, disabled persons, minorities and marginalised groups.[29]

1. Rights and Freedoms

Besides the new structure, fundamental rights were largely amplified. The first mentioned right, the *right to life* in Art. 26, was put on a new basis, including, for the first time, the right to life before birth in Sec. 2 followed by the highly controversial Sec. 4 on abortion. In Sec. 2, the Article states that life begins at conception. Under Sec. 4, abortion is generally not permitted, apart from cases of a threat to the health of the mother when indicated so by a doctor, or "if permitted by any other written law". This last part contributed to the fears of the Christian churches that abortion could be extensively permitted in future. However, from the aforementioned concrete restrictions it is obvious that abortion shall be carried out only in exceptional circumstances.

26 By contrast, there was no Preamble under the old Constitution. The Constitution as it was in force before the referendum can be found in: the Constitution of the Republic of Kenya 1963 (as amended to 2008), in: Constitutions of the countries of the word, note 4.

27 *Murray*, note 20, The Preamble and Chapters 1 and 2.

28 *Murray*, ibid, Chapter 4 Bill of Rights – In general.

29 Finally, there is part 4 on the state of emergency and part 5 on the establishment of a National Human Rights and Equality Commission.

The subsequent Art. 27 provides, in contrast to the previous Constitution, an extensive *equality clause* which was intended to be a *key provision* against the background of inequalities in Kenya's past.[30] This special focus is also demonstrated by the fact that the principle of equality is restated in many other parts of the Constitution (see below, 4; III. 2). The equality of men and women is specially emphasised in Sec. 3, whereas Sec. 4 states the right to freedom from discrimination on several further grounds. The protection from discrimination shall also be applicable on the horizontal level, meaning between private entities (Sec. 5). Taking particularly into account inequalities in the society over the last decades, Sec. 6 allows for special measures to be taken to work proactively in order to achieve equality, such as *affirmative action*. This is taken further with Sec. 8 that requires that not more than two thirds of the members of elected or appointed bodies are of the same gender, which means that at least one third must be women. Equally remarkable is the general commitment to *human dignity* in Art. 28, whereas under the previous Constitution there was only a protection from inhumane treatment (Art. 74).

Moreover, the Bill of Rights protects many new rights which can be broadly classified in several groups: (1) personal rights such as a general right to privacy under Art. 31; (2) several important democratic rights, for example the freedom of the media and access to information in Art. 34 and 35; (3) the so called "political rights", stipulated in Art. 38 which include the right to establish a political party, the right to vote and the right to stand as a candidate; (4) social and economic rights (see below, 3.) and (5) some further rights such as the right to a clean and healthy environment (Art. 42) and consumer rights (Art. 46).

2. *General Provisions*

With respect to the *application* of the Bill of Rights which is laid down in Art. 20, it is particularly striking that Sec. 1 states that it binds not only the State organs but all persons. This strong emphasis of the binding nature on a horizontal level is revealed in the wording of some of the rights themselves, for example Art. 41 on labour relations. The horizontal nature is expressly highlighted with consumer rights under Art. 46: therein Sec. 3 states that this Article is equally applicable to public bodies and private persons. According to Art. 24 on the *limitation* of rights, they can be restricted by a law that is reasonable and justifiable, thus stipulating a "general limitation clause".[31] By contrast four rights are excluded from limitation in general under Art. 25. On the *enforcement* side, every person can seek court protection of their rights and freedoms (Art. 22). This provision is particularly wide: (1) it is not necessary that a person is acting in his/her own interest. To act in the public interest or on behalf of a group of persons is sufficient. An association can even act in the interest

30 *Murray*, note 20, Chapter 4 Bill of Rights – Equality.

31 Following the examples of Canada, Uganda, South Africa and other countries: *Murray*, note 28.

of only one of its members; (2) the respective right does not have to be violated, it is sufficient to be threatened. Furthermore, to initiate such proceedings must be free of charges.

3. Socio-Economic Rights and their Special Provisions

Particularly remarkable are the newly added economic and social rights under Art. 43.[32] These include the right to health, to housing, to food, to water and sanitation, to social security and to education. The general provisions in part 1 of the Bill of Rights contain some special provisions with respect to these rights. Art. 20 on the application of the Bill of Rights states in Sec. 5 that the socio-economic rights are limited to the availability of State resources. In court proceedings, it is up to the State to show that resources are not available (Subsec. a). However, when it comes to policy decisions, the State holds a margin of discretion concerning the allocation of resources for these purposes vis-à-vis the court (Subsec. c). Nevertheless, the State must give priority to the realisation of these rights (Subsec. b). Another specific provision is Art. 21 Sec. 2 regarding implementation: it states that the State must take measures to "achieve the progressive realisation of the rights". By choosing these words, it was intended to vest the State with the obligation to establish programmes for implementing the rights.[33]

4. Specific Applications

Taking into account that some groups of society have very special needs or have been disadvantaged in the past, part 3 on "Specific application of rights" is dedicated to them and thus particularly emphasises the right to equality.[34] The protected groups comprise children, persons with disabilities, youth, minorities or marginalised groups and older members of society. Despite the spirit of giving special protection to these groups, this part of the Bill of Rights raises many questions and its additional value is doubtful.[35] Right from the beginning, Art. 52 on the interpretation states that this part does not aim at limiting or qualifying any right: it intends to ensure greater certainty as to the application of the rights to those groups. This exclusion of qualification of rights stands in contrast to the very detailed provisions that follow and which are in parts concrete as for example stipulating a 5 % quota for disabled persons in elected and appointed bodies. Thus, it seems also to be without an additional meaning in that two of these provisions require of the State to take affirmative action programmes, especially as the need for affirmative action is *generally*

32 *Murray*, note 20, Chapter 4 Bill of Rights – Social, economic and cultural rights.

33 *Murray*, ibid.

34 Murray, note 30.

35 It was controversial in the legislative process: Final Report of the Committee of Experts on Constitutional Review [hereinafter Final Report of the CoE], issued on the submission of the proposed constitution of Kenya, 23.10.2010, note 18, p. 12. This seems to have contributed to the confusion in this part.

laid down in Sec. 6 of the equality clause. Dubiously the specific application clauses further postulate not only duties of the State but also of private citizens such as family members towards older people and children. This seems to be a rather optimistic approach.

5. The South African Influence

On its content, the Bill of Rights was obviously intended to be a very progressive document. Taking into account the status of the South African Bill of Rights as being so far the most advanced on the continent and the influence of the South African legal expert in the CoE, the new Kenyan Bill of Rights is clearly inspired by the South African example. From many Articles one can find close or even exactly the same wording, for example the protection of human dignity in Art. 28 of the Kenyan and Art. 10 of the South African Constitution are the same.[36] Besides, the Kenyan Bill of Rights has a similar extent of protected rights and, in some respects, goes even further, for example with the stipulation of consumer rights. With the structure of the Bill of Rights in 5 parts, stipulating general provisions in a first part separately from the list of rights, one can identify another approach to take the South African example further, through creating a comprehensive order within the Bill of Rights.[37] An example of a less far reaching provision is however the equality clause in Sec. 3, despite the integrative function of the Article (see above, 1.). Although the list of grounds for protection is very similar to the one in Art. 9 (3) of the South African Constitution it is striking that "gender" and "sexual orientation" are missing from the list. In line with all other African States (except South Africa) where sexual orientation is not constitutionally protected, it can be seen as a clear statement against the protection of persons with a same sex orientation.[38]

The South African role model is most obvious when it comes to socio-economic rights.[39] In this context, the South African example provides a particularly adequate model: the rights were stipulated against the background of huge socio-economic divides in South African society. From a very different history, major divides are also the reality in Kenyan society, as the country's resources are very unequally distributed (see above, B.). However,

[36] Also the following Art. 29 on freedom and security of the person and Art. 12 of the South African Constitution are a good example of being very similar.

[37] As an innovation compared to the South African Constitution wherein rights and more general provisions are listed in one Chapter of 32 successive Articles. The wish to take the South African model further can be observed with other examples: on the enforcement of rights, Art. 22 follows the wide locus standi of Art. 38 of the South African Constitution with a similar wording. However, an association can appear before the court even if it is acting at least in the interest of one of its members only (See above, 2.).

[38] This has to be seen in line with the critique of the Christian Churches on the Harmonised Draft, which left the way open for same sex partners to found a family in Art. 42 (3) (but not to marry, Art. 42 [2]). Under their pressure, the Section was later removed.

[39] Which are laid down in Article 26 and 27 of the South African Constitution.

the Kenyan drafters again went beyond the South African example with respect to the general provisions on application, implementation and enforcement, taking into account the jurisprudence created by the South African Constitutional Court over the past 13 years and the problems or criticisms which arose from the latter. In order to provide the tools for effective implementation of the rights, additional clauses were added in the Kenyan Constitution, especially with respect to the application of rights. Initially, following the South African example, the rights are limited to the availability of resources.[40] However, Art. 20 goes further because, despite leaving a margin of discretion,[41] it imposes the duty on the State to give the rights a priority in the allocation of resources. In addition the State is vested with the burden of proof concerning a lack of resources. By contrast, in the South African experience, the lack of guidance on priorities from the Constitutional Court was criticised.[42] Equally, critics proposed to establish the burden of proof by the State in reaction to deficits of the jurisprudence.[43]

Although the provisions in the Kenyan Constitution are thus an innovation and provide the basis for effective implementation in order to overcome weaknesses experienced through the jurisprudence by the South African Constitutional Court, it will be up to the Kenyan courts to balance these new provisions. This could lead to a more robust method of enforcement (evaluating and limiting State policies even if it requires the reallocation of resources) or a softer one (leaving a relatively wide margin of discretion to the State).[44] It must be seen what concepts the courts will elaborate on the provided basis and if they are prepared to use the tools that they are given in a far reaching manner.[45]

6. Appraisal

Firstly, with respect to the structure of the Bill of Rights: the order in 5 parts as well as grouping some rights and considering them together such as socio-economic or political rights makes it generally a comprehensive document. This fits together with the intention to be easily approachable by citizens. However, the very ambitious attempt to take the rights particularly far overreaches this intention at some points and thus endangers its comprehen-

40 See the limitation clauses under Article 26 (2) and 27 (2) of the South African Constitution.

41 The South African Constitutional Court established the margin of discretion in the *Soobramoney* case (*Soobramoney v Minister of Health (KwaZulu-Natal)*, Case CCT 32/97, 1998 (1) SA 765 (CC).

42 *Mirja Trilsch*, What's the use of socio-economic rights in a constitution? – Taking a look at the South African experience, Verfassung und Recht in Übersee 42 (2009), p. 569.

43 *Trilsch*, ibid, p. 569.

44 *Navish Jheelan*, The Enforceability of Socio-Economic Rights, European Human Rights Law Review, 2 (2007), p. 151 ff.

45 See the consideration by *Trilsch*, note 42, p. 573, that "It cannot simply be assumed that other constitutional courts would take as bold a stance on the issue as did the South African judges […]".

sive nature. This partly leads to a very detailed text with some superfluous, unclear provisions. As shown above, this is the case with part 3 on specific applications. Bearing in mind the aim of a citizen-friendly Constitution, this part is confusing because it gives the impression of qualifying rights. Another example of a far reaching provision with a doubtful result is Art. 20 on the application of the Bill of Rights which binds "all persons". With this very general statement, the different nature of rights is not taken into account as it is obvious that not all rights are applicable in the private sphere, for example political rights.[46] Furthermore, the provision can be appreciated as a statement on a "horizontal" in contrast to an "indirect horizontal application" of the Bill of Rights. In comparison, the South African doctrine is in favour of the indirect application as held by the Constitutional Court despite the fact that the wording similarly suggests the horizontal one.[47] Its experience shows that a direct horizontal application is particularly controversial. It will be interesting to see if the Kenyan jurisprudence will meet the challenge and find a way to give the direct horizontal application a significant meaning.

On socio-economic rights, the South African Constitutional Court has created a multitude of jurisprudence, whereby "an immense potential impact on society was created".[48] Thus, as controversial as these judgments might be, they can be considered as successful at least to some extent.[49] Whether the new Kenyan Bill of Rights can have a similar impact is however questionable and will largely depend on many other factors than the constitutional text. Essentially it will depend on the role that the judiciary will play in the enforcement of rights. It will need a powerful judiciary that is anchored in a system of separation of powers. Given the historical background where this has not occurred previously, citizens do not have confidence in the courts with respect to the protection of their rights.[50] Therefore it will depend on whether the Constitution can also produce a change in this respect (see on the judiciary under the new Constitution and respective deficiencies below, III. 3. a und c).

46 Additionally, from the background of this general provision it is unnecessary to restate this binding nature in specific rights such as in Art. 46 on consumer rights.

47 By contrast to the opinions in academia: *Francois Venter*, The Republic of South Africa, Introductory Note, Constitutions of the countries of the world, note 4, p. 11,

48 *Francois Venter*, Country report South Africa, VII. KAS Conference on International Law, 2009, p. 28.

49 For the background and an assessment: *Trilsch*, note 42, p. 552 ff. For a very positive appraisal: *Jheelan*, note 44, p. 146 ff.

50 Under a strong executive which pressurised the judiciary, the judicial protection of fundamental rights has often been insufficient: *Grote*, note 4, p. 13 f.; *Florence Simbiri-Jaoko*, Country Report Kenya, note 47, p. 20 f.

III. The Structure of the State

1. Devolution or Steps towards Federalism?

The new Constitution contains some major changes regarding the structure of the State. Particularly noteworthy is Chapter 11 on "devolved government" with its 26 Articles.[51] Given the constitutional history (see above, B.), with the dismantlement of the features of regionalism shortly after independence which produced a centralised unitary State, this is a remarkable move towards balancing power on a vertical level.[52] Besides the national government, a second level will be reintroduced with the creation of 47 *counties* and related county governments, each consisting of a county assembly and a county executive (Art. 176).[53] The powers which will be transferred to county level are listed in the Fourth Schedule on the distribution of functions (in the Annex of the Constitution). Particularly significant in this respect is the power to deal with the county health services, an aspect which is expected to improve public health delivery services. Art. 186 (2) and Art. 191 deal with conflict of laws in the case of concurrent jurisdiction. However, the transferred powers are generally rather limited and from a comparative perspective closely correspond to the powers vested in South African local government. The establishment of the county level will have also consequences on the distribution of the public budget: national revenue will be equitably shared between national and county levels (Art. 202).[54] Furthermore the Constitution lays the ground for a local level through the recognition of the existing local authorities in Art. 18 of the Sixth Schedule. However its status and functions are not elaborated by the Constitution but left to parliamentary legislation. Summing up the content of these provisions, Kenya is moving in the direction of a decentralised democracy.[55]

On the level of the national legislature, devolution is pursued through the establishment of a *bicameral structure*, as was the case under the original Independence Constitution of 1963. Parliament will now consist of two chambers: the National Assembly, and the newly created Senate which will be composed of county representatives. The Senate is given an important role in the system of legislation: particularly remarkable is its influence when it comes to amendments of the Constitution. A two thirds majority is needed in the Senate and the National Assembly, Art. 256 (1) (d). This means that the powers vested in the counties by Schedule 4 cannot be revoked without their approval. This aspect leads in the direction of a system of federalism rather than devolution despite its clear reference to the latter system. Admittedly, the limited powers of the counties contradict the intention of

51 On this Chapter: *Murray*, note 20, Chapter 11 Devolved government.

52 See Art. 174 on the objects of devolution which mentions in (i) the separation of powers.

53 The county boundaries will be the same as those of the districts created by the 1992 District and Provinces Act (the counties are listed in the First Schedule). However, Art. 188 provides for the alteration of the boundaries at a later stage.

54 This equitable share shall be at least 15 % of the national budget, Art. 203 (2).

55 Stipulating decentralisation is one of the objectives of devolution in Art. 174 (h).

creating a federal system although this is, in fact, not a criterion for the theoretical classification of a system of decentralisation.

2. *The Legislature and the Special Focus on the Representation of Women*

Besides the aforementioned creation of a bicameral system, another aspect concerning the legislature is worth mentioning: the special focus on the representation of women in Parliament. In accordance with the commitment to affirmative action through quotas in favour of women in other parts of the Constitution, most prominently the equality clause in Art. 27 (3), (6) and (8) according to which at least one third of members of elected or appointed bodies shall be women,[56] the Constitution *reserves special seats* for women in both chambers of the legislature: 47 special seats out of 350 have been set aside for women in the National Assembly, Art. 97 (2). In the Senate, 16 out of the 68 seats are reserved for women, Art. 98 (1) (b).[57] In both cases these form additional seats allocated to women on top of the regular number of seats. With this kind of affirmative action to promote the participation of women in the decision-making process, Kenya is following a trend which has emerged in many African Constitutions in conformance with international frameworks which request women's political empowerment.[58] The quotas have proven in the last years to be an instrument of significantly increasing the number of women in parliaments and are therefore a preferred instrument of developing nations.[59] The solution of having reserved seats for women is usually implemented in majority electoral systems – in contrast to proportional representation systems where the tool is candidate quotas for the party lists.[60] However, the participation of women in politics through quotas is generally controversial.[61] It is doubtful whether these special seats will have a real impact on Kenyan politics, espe-

56 Further examples of special protective provisions are: Art. 81 (b) which stipulates the one third requirement as a general principle of the electoral system; Art. 175 (c), 177 (1) (b), 197 (1) concerning the county government; and Art. 250 (11) on the chair- and vice-chairpersons of a Commission.

57 Moreover, in both chambers, representatives for youth and for disabled people are guaranteed.

58 In recent years the debate was enhanced by the Millenium Development Goals: amongst them the third goal is on gender equality which sets the proportion of seats held by women in national parliaments as one of the key indicators. Other international instruments are CEDAW, the Beijing Platform of Action (of 1995) and the Nairobi Strategy (1985). Finally there is an African regional instrument, the African Protocol on the Rights of Women (2003/2005), with particular relevance of Art. 9 on the right to participation in the political and decision-making process which provides for affirmative action to ensure the equal participation of women in political life. However, Kenya is not a State party of the latter.

59 *Mariz Tadros*, Quotas – Add Women and Stir?, IDS Bulletin, 41 (2010), No. 5, p. 2; *Julie Ballington*, Implementing Affirmative Action: Global Trends, ibid, p. 12.

60 Three countries which have reserved seats for women and are amongst the top ranking countries for women representation are Rwanda, Uganda and Tanzania; *Ballington*, ibid, p. 12 ff.

61 *Tadros*, note 59, p. 1 ff.

cially in the Senate where a county delegation will have one vote only that is determined by the county representative who won his seat under the general scheme, Art. 123. This means that in the Senate the 16 women will have only a consultative function. Finally, cautionary voices state that it is generally not enough to focus only on quotas. They must be complemented by the necessary political will and with other strategies of enhancing access to political power, such as the support for civil society women's movements.[62] Thus, despite laying the ground for ambitious actions under the Constitution, time will tell what other strategies the government will develop to empower women and thus if the constitutional provisions can bring about success in advancing gender equality.

Besides the focus on women, the Constitution stipulates special provisions to ensure that the work of Parliament is linked to the needs of citizens: for example Art. 104 provides for the right of voters to recall the Member of Parliament of their constituency before the end of his/her term.

3. The Executive

a. The President and the Cabinet

In the executive, the function of Prime Minister, created following the elections of 2007, as a compromise to include the opposition leader in government, will be abolished. Thus the presidential system will be re-established (Art. 131) as it was before the coming into force of the National Accord and Reconciliation Act of 2008. However, the powers of the President, which were massively extended under former governments, will be drastically reduced in many fields. For example, from now on, the National Assembly will have to approve his/her nomination of Cabinet members (Art. 132 [2] [a], 152 [2]); additionally the Constitution sets out a process for the National Assembly to remove them.[63] Furthermore, the powers of the executive will be combined: the number of Ministers (the so called Cabinet Secretaries) will be drastically reduced to a limit of not more than 22 (Art. 152 [1] [d]), instead of more than 40 previously.[64] Special attention is drawn to the representation of

62 *Ballington*, note 59, p. 15 f.; *Tadros*, ibid, p. 6 f.; *Ana Alice Alcântara Costa*, Quotas as a Path to Parity: Challenges to Women's Participation in Politics, ibid, p. 118.

63 Under the previous Constitution, Ministers were completely dependent on the President since he did not only appoint them but could also dismiss them without parliamentary approval at any time, see *Grote*, note 4, p. 9. Likewise, the approval of the National Assembly is now necessary for the President's appointments of the Secretary to the Cabinet and the Principle Secretaries, Art. 154 (2) (a), 155 (3) (b); the Inspector-General, Art. 245 (2) (a); the Attorney-General, Art. 156 (2) and other key positions, see Art. 132 (2) (a) – (f). For the judges, see below, 4. a.

64 As the Ministers (and their respective representatives) remained Members of Parliament at the same time, the power of Parliament was undermined by the creation of large Cabinets; a fact that resulted in having more than 80 Members of Parliament out of 222 serving also as Cabinet members. See Grote, ibid, p. 11. By contrast under the new Constitution, a Minister must quit his position as a Member of Parliament when appointed as a Minister, see below, b.

different ethnic groups in the executive: Art. 130 (1) stipulates that ethnic diversity must be reflected in the composition of the national executive and thus ensures that Cabinet members cannot be drawn from a single tribe.

b. The Relationship between the Executive and the Legislature

The relationship between the President and Parliament was rebalanced, giving the latter a strong role in the constitutional system. Thus, in contrast to the old Constitution, which accumulated power in the executive and largely removed any possibility of control over the latter, the new Constitution allows Parliament to hold the executive accountable. Firstly, whereas under the old Constitution, the President could dissolve Parliament at any time, this right is removed from the President. Additionally, Parliament is vested with the power to impeach the President from office under Art. 145, a procedure which did not exist under the old Constitution.[65] In order to guarantee a clear separation of functions, Art. 152 (3) stipulates that a Minister cannot be a Member of Parliament at the same time.

Finally however, with respect to the legislative process, the new Constitution upholds the strong position of the President in so far as he/she will still hold a veto power over a new bill as was the case under the previous Constitution, which can only be overridden by Parliament with a two thirds majority, Art. 115 (4).

4. The Judiciary

Against the background of a judiciary which was largely controlled by the executive, it was obvious in the constitutional review process that extensive reform was necessary.[66] This contained two points: (1) the new structure of the judiciary and (2) transition (see on this contentious aspect under VI. below). Furthermore there was the request for laying down safeguards for establishing an independent judiciary to overcome the current situation.

a. The Appointment of Judges and the Independence of the Judiciary

In Chapter 10 on the judiciary,[67] Art. 160 lays down the commitment to the independence of the judiciary by stipulating special protections for the office of judges, especially with regard to their remuneration and pensions. This commitment for setting safeguards is also reflected in modifications concerning the appointment of judges. However, these changes have to be seen critically and it is doubtful if they are far reaching enough on all levels to overcome the prevailing grievances. The dominant problem under the previous Constitution was that the President was vested with a wide discretion in the appointment of judges. Whereas the Chief Justice was appointed by the sole discretion of the President, other

[65] On the situation under the old Constitution see *Grote*, ibid, p. 11.

[66] On the situation of the judiciary under the previous Constitution, *Grote*, ibid, p. 12 f.

[67] Murray, note 20, Chapter 10 The Judiciary.

judges were appointed on the advice of the Judicial Service Commission (Art. 61). While the composition of the Commission was largely influenced by the President, their advice was not legally binding to the President.[68] Compared to this situation, firstly, there will be a major change concerning the appointment of the Chief Justice and his/her Deputy. Their appointment by the President on the basis of the recommendation of the Judicial Service Commission (JSC) will now require the approval of the National Assembly, Art. 166 (1) (a). This will provide for control of the President's decision and advance democratic legitimacy of the appointment. By contrast, the appointment of other judges by the President will have to be in accordance with the recommendation of the Judicial Service Commission only, Art. 166 (1) (b). The question is whether this provision will bring any change to the previous situation. Firstly, the Judicial Service Commission (JSC) is newly composed, Art. 171,[69] with the aim of establishing an independent body and thus preventing the overwhelming influence of the President over the Commission which existed previously. Even if one presumes that this will be successfully the case in future, one must return to the wording that the judges are appointed "in accordance with the recommendation" of the JDC. Compared to the wording of the previous Constitution, the word "advice" is now replaced by "recommendation". Admittedly "recommendation" has a stronger connotation than "advice". However, it does not make a legally binding order either. It merely suggests that the President has to select a person amongst the candidates presented by the JSC. But on what basis can the President reject appropriate candidates and what happens if the President rejects proposed candidates one after the other? The new Constitution is silent on these questions. At least the possibility of a continued strong presidential influence prevails. Thus unfortunately the possibility was missed to set an example by laying down strong safeguards for the limitation of presidential influence on the majority of judges. During the legislative process, an alternative to the final Art. 166 (1) (b) was proposed by the Parliamentary Select Committee: it requested the approval by the National Assembly for all judicial appointments. This was refused by the CoE though.[70]

However, there will be a major change with respect to the election of *magistrates*. From now on, the JSC will be responsible for the appointment of magistrates and other judicial officers, Art. 172 (c). Here the newly composed JSC could play an important role and make a contribution to this long demanded judicial reform and thus help to change the situation of the magistrate courts which are seen as an extended arm of the executive so far.[71]

68 *Grote*, note 4, p. 12.

69 It will be composed of the Chief Justice, three further judges, a magistrate, the Attorney-General, two advocates, one person nominated by the Public Service Commission and two members of the public.

70 On the discussion: Final Report of the CoE, note 35, p. 122.

71 *Grote*, note 4, p. 12.

b. The Superior Courts

Under the previous Constitution, the superior courts consisted of two courts only: the High Court and the Court of Appeal. A major innovation under the new Constitution will be that a *Supreme Court* on top of them will be established, Art. 163. Besides hearing appeals from the Court of Appeal, it will have two special functions: (1) it has original jurisdiction on disputes relating to the election of the office of President, therewith creating an additional safeguard to prevent violent conflicts over presidential election results as was the case after the 2007 elections; (2) it can give advisory opinions on matters concerning county governments. Furthermore, the Constitution provides for the establishment of two special courts by act of Parliament, one on employment and labour relations, one on environment and land, with the status of the High Court.

c. Constitutional Protection and the discussion about the establishment of a Constitutional Court

Likewise under the old Constitution, the High Court will maintain its original jurisdiction for the protection of the Constitution. Against its decisions, there is the possibility to appeal to the Court of Appeal and finally to the Supreme Court. However, in cases involving the interpretation or application of the Constitution, Art. 163 (4) (a) stipulates a special provision: people have the *right* to appeal to the Supreme Court, whereas in all other cases of appeal the Court is vested with the authority to determine which cases to hear.

In the past, the protection of human rights by the courts was insufficiently realised, mainly due to the aforementioned lack of judicial independence.[72] In order to give constitutional protection a stronger emphasis, the establishment of a *Constitutional Court* was discussed throughout the drafting process. The CoE was in favour of such a Court,[73] arguing that a specialised Court could promote constitutionalism and the proper implementation of the Constitution, particularly the new expanded Bill of Rights and the large number of newly established constitutional institutions.[74] However it could not gain acceptance for this proposal. The creation of a Constitutional Court could have been an opportunity to stress the importance of the implementation and protection of the Constitution but the decision to leave the mandate with the High Court – which largely failed with this task previously – falls short of expectations.

5. Appraisal

The new State structure provides for a system of checks and balances, strengthens the role of Parliament and also, to some extent, the judiciary towards the executive. Presidential

72 *Grote*, ibid, p. 13 f.

73 See Art. 203 of the Harmonised Draft Constitution, note 21.

74 Final Report of the CoE, note 35, p. 55, 99, 122 ff.

power was extensively reduced. Even if the President remains in a key position through the manifestation of the presidential system, against the background of seeing him constantly accumulating power in the past, the changes must be appraised as major steps. Besides the office of President, many problems under the old system were identified and attempts were made to find adequate solutions, some of them quite innovative such as the creation of county governments. However, deficiencies remain within the independence of the judiciary when it comes to the appointment of judges and the decision not to establish a Constitutional Court can be seen as a missed opportunity for a strong statement in favour of constitutional protection. Finally, the implementation of these major changes to the State structure seems to be an oversized project for the two years reserved for this task,[75] considering the necessary buildup and resourcing of new institutions and the involved organisational challenges. Thus it is doubtful how successful this is going to be given the short time period.

IV. Land Reform

Another matter of extensive reform, which many observers even conceived as the most important one, is the question of land rights. The significance of the matter is revealed by the fact that a Chapter with the title "land and environment" is moved to the front of the Constitution, now directly following the Bill of Rights.[76] The issue of land reform has been part of the public debate since the emergence of the State and finds its roots in the division of land in colonial times. The longstanding call for reform has culminated now in an attempted comprehensive reform with the aim of paving the way for a more balanced land distribution policy. Under the former Constitution there was only one form of land tenureship that the Constitution expressly determined in Chapter 8: so called trust land (which consisted of the formerly native areas under colonial rule). Private land ownership was however broadly protected under Art. 75 of the Bill of Rights which dealt with property rights.[77] A third category of land, not directly mentioned in the Constitution but of great importance was *government land*, which was formerly held by the British crown and handed over to the Kenyan State with independence.[78] The new Constitution creates with Chapter 5 one comprehensive part that classifies the land in three categories and provides for further provisions on each of them: public land, community land (in which the old trust land merges) and private land, Art. 61.

75 *Jansen /Lerch*, note 1, p. 4; for the timeframe of two years to change the structure of the executive and the legislature, see below, V.

76 *Murray*, note 20, Chapter 5 Land and the Environment.

77 On the background of the extensive protection of property rights: *Grote*, note 4, p. 6 ff.

78 An overview of the land tenure system under the previous Constitution can be found in: *Patricia Kameri-Mbote*, land tenure and sustainable environmental management in Kenya, in: C.O. Okidi / P. Kameri-Mbote / Migai Akech (eds.), environmental governance in Kenya, Nairobi 2008, p. 260 ff.

One major problem of land distribution was the public land tenure management system which was fragmented and non-transparent. Thus it left room for misuse by the ruling elite, known as *land-grabbing*, through which a lot of governmental land has been converted to private land and given to politically influential individuals.[79] This unjust land distribution, in a country in which the majority of the population largely depends on land use,[80] contributed to the dissatisfaction which culminated in post electoral violence in the beginning of 2008. This situation is challenged in the new Constitution which demands the development of a national land policy through legislation, guided by a set of principles such as equitable access to land and transparent administration of land, Art. 60. Additionally, special protection is provided for the use of public land in Art. 62 (4) which determines that dispossession of land must be on the basis of an act of Parliament. Highly significant with respect to land reform will be the establishment of a *National Land Commission*, Art. 67. It will advise the government on land policy and can initiate investigations into present or historical land injustices, and recommend appropriate redress.

To give effect to this immense land reform, Parliament is vested with the obligation to enact land legislation, Art. 68. What is striking concerning this mandate is that it includes the drafting of provisions to prescribe minimum and maximum land holding levels with respect to private land. This last point was especially controversial. By giving the possibility to set restrictions on the extent of land ownership, the Constitution aims to redress the balance of ownership upset by years of dominance by influential families and tribal cronyism. Foremost there is former President Daniel Arap Moi whose family owns large amounts of land, a fact which saw him conducting an opposition campaign against the new Constitution (see above, B.).

Finally, completely new is the provision that foreign nationals cannot hold property rights on land. By contrast, a person who is not a citizen may hold land on the basis of leasehold tenure only and such lease shall not exceed 99 years. This applies immediately after the coming into force of the Constitution.[81]

This short overview of the land reform topic shows that it lays the ground for the development of a new land policy based on equal distribution and it is an attempt to rebalance and redress the misuse of the past. However, implementation will depend largely on the quality of this policy, the upcoming parliamentary legislation and the effective work of the National Land Commission. This leaves many opportunities for previous profiteers to exert influence and hinder extensive reforms. Some of them already demonstrated that they will defend their position by the campaign against the new Constitution.

79 *Kameri-Mbote*, ibid, p. 271; Kenya Land Alliance / Hakijamii Trust, public land tenure and management of public land in Kenya, policy brief, http://www.oxfam.org.uk/resources/learning/landrights/ downloads/ kla_public_land_brief.pdf .

80 *Kameri-Mbote*, ibid, p. 260 f.

81 Surprisingly, there were no prominent reactions by the international community or countries of affected nationals.

V. Transition

The transition to the new constitutional order was a particularly controversial issue throughout the drafting process.[82] The final outcome is found in Schedule 6. In order to prevent disruption, it was decided that the provisions on the executive and legislature will be delayed until the next elections in 2012 and correspondingly the application of provisions under the former Constitution and the National Accord and Reconciliation Act will be extended, Sec. 2, 3 Schedule 6. Besides, many of the major changes under the new Constitution will need further implementation through legislation by act of Parliament. With many aspects much clarification is needed and several provisions of the Constitution mandate Parliament to enact such legislation in specific fields.[83] A timetable is attached in Schedule 5 which determines a timescale within which a particular piece of legislation is due that ranges from one to five years. The implementation process through parliamentary legislative acts will be one of the *key challenges* for the future success of the Constitution.

D. Conclusion

A mere reading of the document reveals that a modern and citizen-friendly text has been created both from the covered subjects and its structure. Apart from a minor critique for being over ambitious in some respects, this is obviously shown by the new Bill of Rights with its clear structure and the inclusion of a wide array of rights such as socio-economic rights. Concerning the new structure of the State it is crucial that the power of the President be reduced in order to reverse the increase from previous decades. At the same time the strengthening of Parliament provides for more democratic legitimacy. Decentralisation will potentially contribute to a more developed system of checks and balances through the distribution of powers in a vertical way. With the topic of land reform a sensitive subject was addressed which, with the help of the National Land Commission and upcoming legislation, can provide a basis to rebalance the unjust distribution of land in the past. This will do a great deal to reduce the potential for conflicts in the country. Even if the judicial changes move also in the right direction, deficiencies clearly stand out with regard to the independence of judges and thus on the enforcement side of the Constitution. This threatens particularly the innovative approaches in the Bill of Rights and relativises the significance of these provisions. In this context, the establishment of a Constitutional Court would have been an outstanding signal of seriousness in safeguarding the transformational potential of the Constitution.

However, the actual success of the Constitution is still awaited. Much will depend on what the expected implementing legislation will look like and if the constitutionally agreed time schedule is met. Likewise the buildup of the new structure of the State, especially with

82 Final Report of the CoE, note 35, p. 72 ff.

83 *Jansen / Lerch*, note 1, indicate in which respects problematical lack of clarity prevails in the Constitution.

the Senate, the introduced county level and the new Supreme Court, in the next couple of years is important. Above all the Kenyan political elite will have to prove its serious intention to change its previous attitude. Already in the past there have been events which were accompanied by hope for political change such as the coming into power of President Kibaki in 2002 which were disappointed within a short period of time. The Constitution holds the potential of providing the basis for fundamental change in the country and thereby of setting an example for a very innovative document on the African continent. Thus its enactment is accompanied by a great deal of hope. In contrast there is a real danger that these expectations will not be met and hence produce profound disappointment. Consequently it could become a victim of its own ambitiousness. It can only be hoped that this scenario does not become true and that the new spirit of optimism of the Kenyan people won't be destroyed. One reason for hope in this regard is the latest development of senior officials standing down, at least temporarily, like Minister Ruto because of allegedly selling public land as a private person.[84]

[84] Further Minister Moses Wantangula (Foreign Affairs) because of allegedly buying land for the Kenyan embassy in Japan on unreasonable and unacceptable conditions and Bethual Kiplagat (Chairman of the Kenyan Peace and Reconciliation Commission investigating the post election violence) because of allegedly not fulfilling his functions in an unbiased manner.

minimal impairment of the right or freedom in question. While several common-law jurisdictions, such as Namibia and New Zealand, have followed this approach, others, such as Israel, have ultimately followed the German three-pronged proportionality test. Alternatively, the South African Constitutional Court treats the concepts of proportionality and balancing as virtually interchangeable. Moreover, the article explores the failure of United States courts to explicitly engage in proportionality analysis, and argues that American constitutional doctrine effectively incorporates elements of the proportionality test, albeit employing different terminology. Even legal systems that do not provide for the judicial review of fundamental rights limitations, such as in China or Iran, they in fact incorporate aspects of the proportionality concept. The article identifies a substantial international convergence on the proportionality test as the main criterion to determine the legitimacy of fundamental rights limitations. Yet, the reception models of the proportionality test diverge considerably: For example, in Canada and South Korea, the proportionality test is a means to implement the rule-exception relationship between fundamental rights and their limitations. In contrast, in South Africa, Japan and Brazil, the proportionality test seems to serve merely as the vehicle to allow ad hoc rights balancing. Finally, because the reception of constitutional concepts and doctrines is a mutual process, the article identifies elements from the application of the proportionality principle globally that Europe could follow as well. For instance, European courts may benefit from considering the Canadian and South Korean courts' emphasis on the necessity prong of the proportionality test. In any event, while steering and rationalizing the balancing process, the proportionality test cannot guarantee absolute neutrality in fundamental rights adjudication.

Kenya's New Constitution: a Transforming Document or Less than Meets the Eye?

By *Cornelia Glinz*, Heidelberg

The Kenyans endorsed a new Constitution in a referendum on the 4th of August. This Constitution is claimed to be the most important political development since independence from Great Britain in 1963. The new Constitution is the result of a long-lasting constitutional reform process which was started more than 20 years ago. The initiative for the production of the latest draft was the violence and unrest following the 2007 elections. These dramatic events made the necessity of structural reforms very obvious. The new Constitution can be appraised as a very modern document, particularly through its Bill of Rights which includes a wide array of socio-economic rights. In this respect, it can be seen from the mere content of the text - alongside the South African Constitution - as one of the most progressive documents on the continent and some provisions in the Bill of Rights develop the South African example even further. The transformational potential of the Constitution is also revealed by many other parts. With regard to the new State structure, it is crucial that the power of the President be reduced and likewise democratic legitimacy strengthened, particularly through the empowerment of Parliament. With the topic of land

reform a sensitive subject was addressed. However, bearing in mind the troublesome political developments over the last few decades in the country there is considerable doubt about whether the political will exists to realise this ambitious text in all aspects. The Article will argue that from a more sceptical perspective it would have been more valuable to concentrate on those issues, especially with respect to the protection of rights, which can realistically be realised and make their judicial enforcement as strong as possible. In the end, the real success of the new Constitution will have to be awaited and will largely depend on how ambitiously the implementation process will proceed in the next few years. This will show whether the Constitution can fulfil the high expectations and serve as the country's turning point towards good governance, democracy, stability and peace.

Traditional Dispute Resolution Mechanisms in Afghanistan and their Relationship to the National Justice Sector

By *Julia Pfeiffer*, Heidelberg

Since the collapse of the Taliban regime in Afghanistan, the international community supports the Afghan government in building the rule of law in Afghanistan. The country faces the challenge of legal pluralism and the weakness of state authority in many areas. Hence, the non-state justice institutions still are more popular and reliable for most Afghans than the state justice institutions. The reasons for the bad reputation or rejection are inter alia corruption, long-lasting and expensive proceedings or lack of access to the public sector. Non-state dispute resolution mechanisms on the other hand mainly aim at reconciliation and restoration of peace and harmony within the community in order to maintain stability. They are thus considered fairer and are more accepted by the majority of the population. Non-state justice itself however varies between the different regions of the country, making it difficult to provide a comprehensive overview. The applied rules in the non-state sector are inter alia different customs and traditions of the various Afghan ethnic groups. Nearly every group has its own way to handle disputes, on the basis of own customs.

Since Afghan customs and traditions in some cases violate statutory law, the Shari'a or international human rights standards and the popularity of non-state justice weakens the influence of the state, this issue got more and more into the focus of the actors being involved in the state-building mission conducted in Afghanistan. New attempts for strengthening the rule of law aim at the creation of a linkage between the state and non-state sectors and at a clearer attribution of competencies between the particular dispute resolution institutions. Therefore, a "Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils" has been written, ruling on these topics. The discussion about the policy's implementation into national law is however still ongoing.

The following paper provides a short overview over customs and dispute resolution mechanisms in the Pashtun areas and in Bamyian province. It furthermore discusses the