

Book Review

The Constitution of Kenya, 2010: An Introductory Commentary

by PLO Lumumba & L Franceschi,
Strathmore University Press, Nairobi, 2014

*Reviewed by Eric Kibet**

Lumumba and Franceschi's *The Constitution of Kenya, 2010: An Introductory Commentary* is an indispensable handbook for readers striving for an exhaustive mastery of Kenya's Constitution, and anyone wishing for a quick reference. It is carefully analysed, well annotated and presented in an easy-to-read fashion. Authored by two distinguished legal scholars, the tone of the book demonstrates a thorough understanding of the socio-political situation in Kenya, the aspirations of its people as well as the vision and purposes of the 2010 Constitution.

Kenya's Constitution is transformative as the Supreme Court and other superior courts of record have frequently acknowledged.¹ It seeks to ordain a transition from past ethical crises, repression, despotism and highly centralized governance to renewed ethical values, democracy, respect for human rights, revitalized institutions, devolution and accountability in government.² In short, it mandates social and political transformation through law.

Karl Klare, writing about transformative constitutionalism in the South African context identifies legal culture as a threat to law-mandated social and politi-

¹ See for instance *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others* [2013] eKLR. (SCK).

² Kibet E, 'Transformative Constitutionalism and the Constitution of Kenya' (unpublished).

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cal transformation.³ He defines legal culture as ‘a lawyer’s professional sensibilities, habits of mind, and intellectual reflexes.’⁴ Simply put, legal culture is what determines how lawyers (be they judges, practitioners, or scholars) think about the law and conceptualize it in practical situations. In Kenya’s context, legal culture will determine how the Constitution is understood and the extent to which its aspirations will be realized. Many factors affect legal culture; among them legal education, legal scholarship and constraints that legal decision makers face.

Lumumba and Franceschi’s book offers an excellent companion in the study of Kenya’s Constitution. It sets out the contents of the Constitution article by article followed by a detailed commentary and apt illustrations. Chief Justice Dr. Mutunga posits that ‘progressive jurisprudence’ is, among other things, patriotic and indigenous.⁵ Patriotic in the sense of being motivated by a genuine national interest; indigenous for respecting and learning from jurisprudence emerging from Kenyan courts and analyses by local scholars.⁶ He sees the development of ‘progressive jurisprudence’ as a partnership of the Judiciary, the legal profession and scholars.⁷ The book advances this joint enterprise in the quest for transformative jurisprudence. It analyzes decisions of superior courts, cites the works of local scholars and uses illustrations of everyday happenings in Kenya; a feat which gives the book a taste that is truly Kenyan.

Since the collapse of the Soviet Union and end of the Cold War in 1989, there has been an emerging globalization of constitutional and political ideology.⁸ Constitutions are becoming more and more similar.⁹ Concepts such as separation of powers, free and regular elections, constitutional supremacy, apex courts with judicial and legislative review powers and enforceable Bills of Rights have become almost universal ingredients of constitutions in democratic societies. While there are still wide variations in contents of constitutions around the world, there is

³ Klare KE, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 150-151.

⁴ Klare KE, ‘Legal Culture and Transformative Constitutionalism’.

⁵ Mutunga M, ‘Elements of Progressive Jurisprudence in Kenya: A Reflection,’ speech delivered on 31st May 2012, available on <http://www.judiciary.go.ke/portal/assets/downloads/speeches/Elements%20of%20Progressive%20Jurisprudence%20in%20Kenya-%20A%20Reflection.pdf> <Accessed 31 May 2015>.

⁶ Mutunga M, ‘Elements of Progressive Jurisprudence in Kenya: A Reflection.’

⁷ Mutunga M, ‘Elements of Progressive Jurisprudence in Kenya: A Reflection.’

⁸ Klug H, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction*. Cambridge Studies in Law and Society (2000), 7.

⁹ Law D and Versteeg M, ‘The Evolution and Ideology of Global Constitutionalism,’ 99 *California Law Review* 1163 (2011), 1170.

clearly an emerging ideological hegemony.¹⁰ Consequently, modern constitutions are anything but *sui generis*. Kenya's Constitution is an outstanding example of 'cross-fertilization' of constitutional ideas. In it, one can see Montesquieu's idea of separation of powers, American presidentialism embodied in the United States' Constitution; and a Bill of Rights that mirrors the South African and international Bill of Rights.¹¹ Moreover, it reflects the proportionality criteria for limitation of rights contained in the Canadian Charter on Rights and Freedoms and the South African Constitution.¹² It embraces sustainable development,¹³ the defining feature of modern environmentalism. Moreover, it establishes a central bank and a framework for a free market economy, which reflect the influence of Breton-Woods institutions.¹⁴ The book is mindful of these global constitutional ingredients. Thus, it incorporates suitable comparative analyses from South Africa, the United States, India, Canada, and the United Kingdom, among others. This not only puts the ideological concepts embodied in Kenya's Constitution in a global context but also aids and crystallizes their understandings. While conscious of global influences reflected in the Constitution, the book is also aware of situations that are uniquely Kenyan, and analyzes them meticulously. This is seen, for instance, in discussions around leadership and integrity, land and the Bill of Rights.

Organised in three preliminary topics and eighteen chapters whose titles correspond with those of the Constitution, the book is a well-researched piece of work that will prove useful especially at this time when the Constitution of Kenya is in its infancy. The three preliminary topics are foundational. Topic one is an introduction that sets out definitions and discusses fundamental constitutional principles such as the doctrine of separation of powers, democracy, constitutionalism, constitutional supremacy in contradistinction with parliamentary sovereignty, and the rule of law. This gives the reader a theoretical grounding on these essential principles.

Topic two gives a brief historical appraisal of the Constitution. Kenya's Constitution has been evolving over several decades in colonial and post-co-

¹⁰ Klug H, *Constituting Democracy: Law, op cit*, note 8 (2000), 11-15.

¹¹ The Bill of Rights borrows heavily from international instruments such as the *Universal Declaration of Human Rights*, *International Convention on Civil and Political Rights*, *International Convention on Economic Social and Cultural Rights*, *Convention Against Torture*, and *Convention on the Elimination of All Forms of Discrimination Against Women*, among others, among others.

¹² Article 1 of *Canadian Charter of Rights and Freedoms* 1982 and Section 36 of *Constitution of South Africa*, 1996. Compare with Article 24 of the *Constitution of Kenya*, 2010.

¹³ *Constitution of Kenya 2010, Article 10(2)(b)*. Chapter 5 also makes detailed provisions for the protection of the environment.

¹⁴ *Constitution of Kenya 2010, Article 231*.

lonial eras since the foundations of the state were established with the British declaration of protectorate status in 1895.¹⁵ The colonial era attempts focused on establishing a functional constitutional order for the colonial state. In the run-up to independence, focus shifted to creating a viable constitutional order for the soon-to-be-independent country so as to guarantee smooth transition to independence. The post-independence period was motivated by mixed objectives ranging from consolidation of political power by the ruling elite to desperate attempts to save the state from the brink of collapse during the 2007-08 post election violence.¹⁶ Lumumba and Franceschi's book briefly discusses constitutional review in both colonial and post colonial eras. It is significant that the book gives special attention to efforts that yielded the current Constitution. This historical appraisal contextualizes the book and, indeed, the Constitution.

Topic three espouses the value and importance of the Preamble to the Constitution. In constitutional discourse, preambles are often ignored by scholars, judges, and practitioners alike. The book departs from this tendency and dedicates space to discuss the place of the Preamble in Kenya's constitutional edifice. The preamble to Kenya's Constitution is an elaborate epic story featuring a supreme God 'of all creation,' past victims of oppression, heroes of liberation and justice, as well as present and future players and beneficiaries of the new order. It also embodies aspirations and deep commitments of a people wishing to work together for a common good. The book appreciates this and underscores the value and importance of the Preamble as (a) a spiritual bearing for the nation, (b) a testimonial of the country's historical struggle for genuine freedom and democracy, (c) a formal recognition of ethnic, religious and cultural diversity, (d) a chart of national values and principles, and (e) a proclamation of the people's involvement in the enactment process.¹⁷

The concept of sovereignty of the people is prominent in the Constitution.¹⁸ That is, that public power arises from the people and must be exercised

¹⁵ PLO Lumumba & L Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 25.

¹⁶ See generally, PLO Lumumba, MK Mbondenyi and SO Odero, (eds) *Constitution of Kenya, Contemporary Readings*: Nairobi, LawAfrica, 2013.

¹⁷ This proclamation about the involvement of the people is a statement of legitimacy. Constitutions as legal and political instruments often derive legitimacy from popular enactment. See generally James Thuo Gathii, 'Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya,' 49 *William & Mary Law Review* 1109: <http://scholarship.law.wm.edu/wmlr/vol49/iss4/4> <accessed 30th May 2015>.

¹⁸ References to 'sovereignty of the people' appear more than eight times in the Constitution.

in their name and interest.¹⁹ Chapter one demystifies this legal-political concept. Although the concept is much older in democratic theory, the chapter traces it in Kenya's constitutional and political discourse to *Njoya & 6 others- v- Attorney General & 3 others*,²⁰ decided by the High Court a decade ago.

The chapter also discusses the supremacy of the Constitution and how the doctrine is firmly secured. Additionally, it briefly discusses Kenya's commitment to international law as a source of law and clarifies the implications of article 2(5) (6).²¹ Chapter two discusses certain grounding concepts such as culture, national symbols and holidays, and national values and principles. The chapter dedicates space to discuss the separation of state and religion and the controversies surrounding the inclusion of Kadhi's courts. The book is sympathetic to the inclusion of Kadhi's courts and argues that this does not violate the separation of the state and religion embodied in article 8. It justifies the inclusion on historical grounds and the fact that Kadhi's courts and Muslim law are both subject to broader state laws.

In Chapter three, the book comments on the law relating to citizenship. It specifically highlights the new developments under the 2010 Constitution, such as dual citizenship.

The Bill of Rights is the longest chapter of the Constitution. Similarly the book dedicates generous space under chapter four to rights discourse. The chapter situates the Bill of Rights in the broader context of international human rights law. Additionally, it gives an article by article commentary of rights illustrated using numerous relevant local and foreign case law. It is significant that the chapter demonstrates how litigation on fundamental rights and freedoms has changed radically through reforms on rules of *locus standi* and ripeness of disputes. These reforms on preliminary procedural technicalities have contributed to an upsurge in constitutional disputes generally, and rights litigation in particular. The fact that the chapter features the highest number of case law illustrations in the book augments this point.

While chapter four entails good analyses on fundamental rights and freedoms, it gives undeserved praises to the Court of Appeal's decision in *Joseph*

¹⁹ PLO Lumumba & L Franceschi, *An Introductory Commentary, op cit*, note 15, 65.

²⁰ [2004] eKLR; (2008) 2 KLR (EP) 658, High Court of Kenya sitting as a constitutional court. See the judgment of Ringera, J especially.

²¹ Article 2(5), *Constitution of Kenya*, "The general rules of international law form part of the law of Kenya." Article 2(6), "Any treaty or convention ratified by Kenya forms part of the law of Kenya under this Constitution."

*Njuguna Mvaura and others v. Republic.*²² In seeking to overturn its earlier decision in *Godfrey Ngotho Mutiso v. Republic*,²³ the Court made certain observations that should have attracted greater scrutiny on its soundness in the post-2010 constitutional dispensation. For instance, the Court in *Mvaura* affirmed the constitutionality of death penalty for robbery with violence as prescribed under section 296 (2) of the Penal Code.²⁴ Death penalty limits the right to life guaranteed under article 26. Such an affirmation of a limitation of a fundamental right, at the very least, should have been preceded by a strict scrutiny under the proportional criteria set out under article 24.²⁵ The Court did not engage in article 24 scrutiny at all.²⁶ Secondly, the Court took the position that interfering with death penalty would be to usurp the legislative mandate of Parliament contrary to the doctrine of separation of powers. It simply ruled that it had no jurisdiction to interfere with death penalty. The Court however omitted to demonstrate how this position sits in view of its constitutional mandate to also develop the law so as to conform it to the demands of the Bill of Rights,²⁷ or to invalidate laws that offend the letter and spirit of the Constitution.²⁸ This judicial power to review and strike down unconstitutional laws is an incidence (not a contradiction) of the doctrine of separation of powers. As a commentary, the book should perhaps have discussed the *Mvaura* decision in greater depth for the reasons raised above²⁹ in light of the Constitution read as a whole, and trends in international human rights law on death penalty generally.³⁰

²² [2013] eKLR.

²³ [2010] eKLR.

²⁴ Chapter 63, Laws of Kenya.

²⁵ Article 24 reverses the presumption of constitutional legislation approach for a skeptic view. It creates a presumption that a limitation of a constitutional right is suspect and must be justified before it can be upheld. The burden of proving that a limitation is 'justifiable in an open and democratic society' is upon the state. See the reasoning in *Coalition for Reform & Democracy (CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another* [2015] eKLR.

²⁶ Questions about what the litigants argued or failed to argue before the Court aside, it is incumbent upon a court of law to justify its conclusions.

²⁷ See Article 20 (3) "In applying a provision of the Bill of Rights, a court must- (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favors the enforcement of a right or fundamental freedom."

²⁸ See Article 2 (4) and 165 (3) (b) (d). Appeals from the High Court lie with the Court of Appeals, article 164 (3) (a), which means the Court of Appeal exercises a similar mandate on appeals.

²⁹ *Mutiso* case was decided in August 2010 before the promulgation of the current Constitution. The upshot of the decision is that it invalidated mandatory death penalty rather than death penalty generally, principally for violating the right to fair trial as it denies convicts the benefit of any mitigating circumstances during sentencing. *Mvaura* sought to overrule *Mutiso* case which had become a frequently cited decision in death penalty adjudication. As a result, *Mvaura* created numerous orphans in the name of decisions that had followed *Mutiso* since August 2010.

³⁰ See for instance discussions in Eric Kibet, 'Death Penalty in Kenya: A Call for Compliance with International Human Rights Law and the Constitution', *Law Society of Kenya Journal* Vol 7(1), 2011.

Andrew Morton, in his biography of retired President Daniel arap Moi noted that land and tribe are the “two mighty rivers of Kenya’s political landscape.”³¹ Land is a central social, economic and political factor in Kenya.³² Chapter five of the book makes brief comments about the constitutional basis for land law and environmental management. Unlike the preceding chapter on the Bill of Rights that is rich in case law and analyses, this chapter is a very short overview.

Chapter six is on leadership and integrity. It gives a background of the need for this chapter and analyzes a few decisions on this theme since 2010. It however, omits discussion of some important cases on the same theme decided in the same period.³³

In chapter seven, the book comments on the theoretical basis for representation and electoral system in Kenya. It gives a good outline of the electoral system and processes, political parties and the Independent Electoral and Boundaries Commission.

In chapter eight, nine, ten, eleven, thirteen, fourteen and fifteen, the commentary discusses the organization of government under various heads namely, the legislature, the executive, judiciary, devolution, public service, national security, and commissions and independent offices. It weaves theoretical bases of these aspects of government with specific commentaries on relevant articles. Crucially, it gives comparative perspectives between pre-2010 positions and the present.

Chapter twelve comments on public finance management and the role of various players in the process.

The book also comments on general and transitional chapters such as sixteen, seventeen, and eighteen, and even the schedules. Instead of a concluding chapter, the book’s last chapter is called “in Lieu of a Conclusion.’ This, the book notes, is in recognition of the fact that the implementation of the Constitution is ongoing. Therefore, this leaves room for future development of the book as constitutional jurisprudence continues to grow.

On the whole, given that the book is a chapter by chapter commentary of the Constitution, it is not possible to comment on its overall thesis. For a long

³¹ Andrew Morton, (1999) *Moi: the Making of an African Statesman*: London, Michael O’Mara Publishers.

³² See Karuti Kanyinga (2009) ‘The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya,’ *Journal of Contemporary African Studies*, 27:3, 325-344.

³³ These cases include *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR (HCK); *Mumo Matemu –v- Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR (CAK); *Luka Angaiya Lubwayo & another v Gerald Otieno Kajwang & another* [2013] eKLR; *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* [2013] eKLR.

time legal education especially at university level has suffered from a general lack of textbooks written in a Kenyan context. The trend has improved remarkably in recent years. Lumumba and Franceschi's book adds to this progress.

Although the title of the book depicts it as an 'introductory commentary,' the book exhibits notable rigour, and is so far the most comprehensive scholarly work on the 2010 Constitution. With a relatively new (and radically transformative) Constitution, there is a dire need for resources to help in shaping future (and current) generation of lawyers in ways that will advance the aspirations of the Constitution. This book meets this present need. It is, no doubt, a requisite handbook for lawyers and law students alike, and a friend to constitutional law enthusiasts generally.