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Constitutional law of Kenya on devolution

By John Mutakha Kangu
Strathmore University Press, Nairobi, 2015

*Reviewed by Tom Kabau**

The adoption of the 2010 Constitution represented a fundamental paradigm shift in the structures of governance in Kenya. It exemplified a constitutional, legal and institutional shift from a highly centralised, top-down and inequitable system of governance to a devolved government that has the objective of institutionalising bottom-up decision-making, equitable development and popular participation. Devolution has been the most fundamental pillar of the transition. Mutakha Kangu's book provides a succinct and credible analysis of the most appropriate interpretative approach to give full effect to the objectives and values of devolution under Kenya's new social contract.

In a sense, Kangu's book is a trailblazer in Kenya's devolution legal scholarship, since no other publication in existing literature has questioned the challenges and opportunities of the interpretation of the complex devolution provisions in the Constitution with such meticulousness, depth and intensity. Given that 'devolution is the most complex and least understood aspect of the Constitution',¹ the publication is a timely and essential reference material for legal scholars and practitioners, and law and policy-makers in national and county governments. In particular, it is anticipated that Kenya's Judiciary will find the book a comprehensive and well-argued interpretative guide that will be helpful in filling legal and policy lacunas with regard to devolved governance. In reality, the interpretation of constitutional provisions on devolution will present judicial officers with the finest of what Ronald Dworkin refers to as 'hard cases,' which are essentially

¹ Kangu JM, *Constitutional law of Kenya on devolution*, Strathmore University Press, Nairobi, 2015, 2.

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problematic matters that lack clear interpretative rules in the law.² They will find, in Kangu's exceptional book, a persuasive and convincing treatise on purposive interpretation as they seek to enforce, protect and promote constitutional provisions on devolved governance.

It may be queried why the case for a purposive interpretation of constitutional provisions on devolution is the central focus of Kangu's treatise on the legal, policy and institutional framework of devolution. As Kangu aptly points out, '[i]nterpretation in law has concrete consequences in the real world and lives of human beings as legal words normally have profound effects ... [and is, therefore, not] simply a playing with words.'³ In reality, as Conrad Bosire opines, the effectiveness of devolved governance is dependent upon 'the constitutional interpretation and implementation of the devolved government objectives and principles by the relevant agencies.'⁴

Given the complexity and novelty of Kenya's devolved system, which is likely to pose intergovernmental and institutional relation disputes, the book incorporates insightful comparative lessons from the jurisprudence and practice of other non-centralised jurisdictions, particularly South Africa. The comparative analysis offers significant theoretical and practical lessons for Kenyan courts in their exercise of the purposive interpretation that may give full effect to the devolution provisions of Kenya's new social contract.

Kangu's work is premised on the view that 'the Kenyan people adopted devolution as the central and most transformative aspect of the Constitution' in order to eradicate centralism and its associated problems completely, and fully institutionalise, amongst other governance objectives, citizen participation and 'equitable development, and the distribution of resources, opportunities and services.'⁵ On that basis, Kangu postulates the thesis that in order to give full effect to the devolved governance system, the interpretation of applicable constitutional provisions requires a purposive approach, which is a comprehensive and progressive interpretative method that 'draws on textual, structural, contextual, historical and comparative elements.'⁶ Kangu's thesis is explicitly clarified

² Dworkin R, *Taking rights seriously*, Harvard University Press, Cambridge, 1978, 81. See also, Blackstone WT, 'Justice and legal reasoning' 18 *William and Mary Law Review* (1976), 321.

³ Kangu, *Constitutional law of Kenya on devolution*, 6.

⁴ Bosire C, 'The constitutional and legal framework of devolved government and its relevance to development in Kenya' in Mbondenyi MK, Asaala EO, Kabau T and Waris A (eds), *Human rights and democratic governance in Kenya: A post-2007 appraisal*, Pretoria University Law Press, Pretoria, 2015, 212.

⁵ Kangu, *Constitutional law of Kenya on devolution*, 5.

⁶ Kangu, *Constitutional law of Kenya on devolution*, 5.

in chapter one of the book, which introduces the concept of a purposive interpretation to the constitutional provisions on devolution, an argument that is the common thread that runs through the subsequent sections.

Chapter two of the book focuses on justifications and components of a purposive interpretation of constitutional provisions on devolution, and discusses adeptly the theoretical and practical aspects and implications of such an approach. It summarises in the instructive Article 259 of the Constitution, on rules of its interpretation, as obligating a purposive construction of constitutional provisions, including those relating to devolution. The supremacy of constitutional provisions supersedes other laws and institutional systems within the State. However, since they are an expression of, and are derived from, the sovereignty of the Kenyan people, they are to be construed as subordinate to the constituent power of the people, a fact that the author appreciates. As pointed out in the chapter, Kenya subscribes to the principle of constitutional supremacy as opposed to parliamentary sovereignty. On that basis, the author clarifies that the Judiciary is vested with the final authority in interpreting, enforcing, protecting and promoting constitutional provisions on devolution, and can even, rightly, entertain questions of law that have political dimensions.

As justified in the chapter, a purposive interpretation of constitutional provisions on devolution is indispensable since it has been incorporated, explicitly, in Article 259(1) of the Constitution, in addition to being implied in other constitutional clauses. The book offers well-argued justifications for a purposive approach, which demonstrate that it is the method most appropriate for giving full effect to the purposes and values of the Constitution on devolution as a governance structure that exemplifies the aspirations of the Kenyan people. It then aptly describes how a purposive interpretation can be achieved, through the use of intra-textual and extra-textual materials and instruments, which are well discussed.

Serious tensions, between the national and county governments, have been emerging with regard to their functions and powers. The book proposes a decisive and unambiguous interpretative approach to the effect that ‘county-empowering provisions must be interpreted liberally, broadly and generously in favour of the counties’ while ‘devolution intervention and limitation provisions’ require a narrow and restrictive interpretation.⁷ As suggested by the author, this is necessary in order to facilitate and promote the full institutionalisation of a devolved system of governance.

⁷ Kangu, *Constitutional law of Kenya on devolution*, 64.

In particular, echoing Ronald Dworkin's interpretative theory, Kangu persuasively calls upon Kenyan courts to realise that legal interpretation is not 'a neutral concept but rather a utilitarian and egalitarian' duty in which a decisive judiciary should define and promote the social and public good.⁸ However, one of the apparent limitations of the chapter is the author's failure to critique other major theories and approaches to constitutional interpretation. The book would have been enriched even further with a concise outline and assessment of other theories and approaches, and, on that basis, pointed out the merits of a purposive approach in relation to other methods.

In chapter three, Kangu incorporates some of the ideas postulated by the historical school of legal theory when he undertakes a chronological analysis of the political, economic, social and cultural factors that contributed to the Kenyan system of devolution, and recognises that they are indispensable components of the extra-textual context that is required in a purposive interpretation of constitutional clauses on devolution. The historical school argues, in part, that law evolves from the experiences and spirit of the people.⁹

Chapter four espouses the values, objectives and principles that should not be subverted by the courts in their purposive interpretation of constitutional provisions on devolution. An interpretative approach that is protective of core constitutional national values and principles has already been endorsed by the Supreme Court of Kenya in the *Speaker of the Senate and Another v Attorney General and 4 Others* case.¹⁰ Kangu argues innovatively that devolution is part of the basic structure of the Constitution, and, through an analysis of the rationale of the concept of basic structure and its application in comparative jurisdictions, makes the bold and potentially controversial assertion that devolution is part of 'the "irrevocable" or "eternity clauses" of the Constitution.'¹¹ As such, Kangu seems to advance the questionable theory that, although the Constitution lacks any express clauses on non-amendable provisions, it is implied that devolution, as part of the basic structure, cannot be eliminated from the Constitution through amendments and alterations.

⁸ Kangu, *Constitutional law of Kenya on devolution*, 64. Dworkin argues that even in the United States, the courts are not neutral actors in interpreting the Constitution. He observes that 'a court that undertakes the burden of applying ... [constitutional] clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.' Dworkin, *Taking rights seriously*, 147.

⁹ See, for instance, Savigny FK, 'System of modern Roman law' (1840) in Freeman MDA, *Lloyd's introduction to jurisprudence*, 8ed, Sweet & Maxwell, London, 2008, 1096-1100.

¹⁰ *Speaker of the Senate and Another v Attorney General and 4 Others* [2013] eKLR, para 195.

¹¹ Kangu, *Constitutional law of Kenya on devolution*, 108.

The view by Kangu can be challenged on the basis of the constituent power of the people, which implies that their power to amend, alter and replace even the entire Constitution, or any of its provisions, cannot be limited, even constitutionally. This is a view that was endorsed in the *Njoya and Others v Attorney-General and Others* case,¹² and has also been postulated by eminent legal theorists such as Carl Schmitt.¹³ It is arguable that a constitutional amendment, alteration or replacement that incorporates a referendum by the Kenyan people, the custodians of the constituent power, may eliminate the devolution clauses from the Constitution, or vary them to any extent.

The chapter proceeds to discuss instructively how constitutional devolution provisions should be interpreted to promote democratic governance, accountability, popular participation and self-governance. The manner in which the Constitution, through devolution, entrenches the concept of equity and distributive justice in Kenya's development process, and the interpretative approaches that should be adopted to promote such objectives, is also scrutinised and clarified. The author specifically endorses full realisation, through devolution, of the constitutional affirmative action for disadvantaged areas and groups for purposes of equity and social justice, a concern that courts and policy-makers should be alive to. Such affirmative action is appropriate and is consistent with John Rawls *difference principle*, articulated as an integral concept of distributive justice, in which opportunities of the least advantaged are improved by those that are more advantaged within the society.¹⁴

Chapter five clarifies the composition of county governments and their institutions, in addition to the powers and functions of such governments. While so doing, Kangu makes a case for purposive interpretation that promotes the institutional autonomy of the counties, in addition to the enhancement of democratic governance, equitable representation and greater public participation in the affairs of county governments. Since there is inherent uncertainty in the distribution of functions and powers between the national and county governments, chapter six prescribes purposive interpretation as the most appropriate mecha-

¹² Emphasising the unlimited capacity of the Kenyan people to replace the previous Constitution, the High Court observed that '[t]he most important attribute of a sovereign people is their possession of the constituent power ... The Constitution is supreme because it is made by them in whom the sovereign power is reposed, the people themselves.' *Njoya and 6 Others v Attorney-General and 3 Others* [2008] 2 KLR (EP) 680.

¹³ See, Schmitt C, *Constitutional theory*, Seitzer J (trans and ed), Duke University Press, Durham, 2008, 64-65 and 132.

¹⁴ Rawls J, *A Theory of justice*, Harvard University Press, Cambridge, 1971, 95.

nism of clarifying the exclusive, concurrent and residual functions and powers of the two levels of government on a case-by-case basis. The author deviates from the traditional Hohfeldian conceptualisation of rights as correlating with duties when pointing out, correctly, that the ‘intersection of powers and functions with the Bill of Rights provisions’ transforms them into binding and justiciable duties of both the national and county governments.¹⁵ However, there is no analysis of emerging realities such as continued incapacity, misplaced priorities and rampant corruption within the county governments, which may negate the case for an interpretative approach tilted in favour of the powers and functions of such governments.

In this chapter, Kangu also aptly points out that any interpretation of the fiscal devolution provisions has to consider that the counties must be sufficiently and equitably financed, and have relative monetary autonomy, in order to fulfil their developmental responsibilities. The nature, extent and justification of the politicised, controversial and divisive obligation incumbent upon the national government to share nationally raised revenue with the counties is credibly examined, including its vertical and horizontal dimensions. Despite the national and county governments being distinct, the justification, extent and practicality of the indispensable supervision mandate of county governments by the national one is discussed and appreciated in chapter eight. By appreciating that limited supervision of the county governments by the national government is necessary, in some circumstances such as to ensure efficient service delivery, to establish sound fiscal management systems, and to preserve national security, Kangu comes out as not being uncritically biased in favour of county governments while prescribing the purposive interpretative approach.

Chapter nine makes a case for purposive interpretation of the constitutional framework for cooperation between the two levels of government, including the mode of conducting intergovernmental relations and resolving disputes. This is necessary since, despite the national and county governments being relatively distinct, they are also extremely interdependent, and the nature of such an incongruous relationship is well clarified in the book. It is specifically explained that in order to minimise disputes, cooperative intergovernmental activities should be interpreted as requiring to be executed with respect for the functional and institutional integrity of each level of government. For instance, the author en-

¹⁵ Kangu, *Constitutional law of Kenya on devolution*, 213. For the correlation of rights with duties, and duties as implying a claim, see, Hohfeld WN, ‘Some fundamental legal conceptions as applied in judicial reasoning’ 23 *Yale Law Journal* (1913), 31-2.

dorses convincingly the view of the High Court in *International Legal Consultancy Group v Senate and Clerk of the Senate*,¹⁶ to the effect that the Senate should act with restraint while exercising its oversight powers over county governments, and particularly that it should not summon governors in an arbitrary and capricious manner.¹⁷ The view that the County Development Boards, chaired by Senators and established through an amendment to the County Government Act,¹⁸ are unconstitutional, undesirable and an obstacle to full devolution, as they encroach on county governments powers and functions, is accurate and informative on the manner in which oversight mandates should be undertaken in the future.

In chapter ten, it is clarified that the role of the Senate needs to be interpreted, consistently, as that of a chamber of Parliament that institutionalises the constitutional concept of shared rule, by offering a forum for the interests of the counties to be considered in legislative and policy-making activities executed at the national government level. In particular, the book explains convincingly that failure to follow the appropriate procedure while debating a bill concerning the counties, which is one that permits proper participation by the Senate, the courts have jurisdiction, in such a case, to declare the procedure as unconstitutional without violating the cardinal principle of separation of powers.

The interpretation of obligations and tasks in the management of the complex and problematic issue of transition to devolved government from the previous highly centralised one is examined in chapter eleven. As Kangu explains, the objective of the transitional clauses is to facilitate the full operation of the permanent devolution provisions. As such, the author informatively points out that the interpretation of transitional clauses should facilitate the operationalisation of permanent provisions, with the latter superseding the former in case of inconsistency. Since the transition can potentially disrupt governance and service delivery, the interpretation of transition clauses should avoid such problems. In addition, it is pointed out that laws under the previous constitutional order must be interpreted in a manner that allows them to conform to the 2010 Constitution.

The chapter also scrutinises the deeply contentious issue of the function of the provincial administration, a hallmark of the previous centralised system, in the new devolved government structure. As Kangu correctly points out, the provincial administration system was not to be phased out, but was to be restructured to conform to the devolved governance system and, therefore, its

¹⁶ [2014] eKLR.

¹⁷ *International Legal Consultancy Group v Senate and Clerk of the Senate* [2014] eKLR, para 67.

¹⁸ Act No. 13 of 2014.

functions must be interpreted as such. It is on that basis that the publication argues that any legislation or executive action that grants the restructured provincial administration powers inconsistent with those of the county government is unconstitutional and invalid. In that regard, the nature of the unconstitutionality of provisions of the National Government Co-ordination Act¹⁹ and the Chiefs' Act²⁰ is well enumerated.

While reading chapter twelve, the concluding section of the book, it is quite impossible to argue that Kangu has failed to address the objectives of the book. In the preceding sections, the author has convincingly justified that a purposive interpretation of the constitutional provisions on devolution provides the most comprehensive and coherent interpretative approach necessary to give full effect to the transformative agenda of devolved governance. The author undertakes an extensive analysis and critique of emerging Kenyan case law in the various chapters and, therefore, renders the book highly authoritative on the appropriate interpretative approach on constitutional devolution provisions. In addition, already aware of the limited local judicial precedents, as devolution is a relatively novel governance concept in Kenya, the book aptly demonstrates that foreign case law, particularly South African legal precedents, are useful in filling emerging jurisprudential lacunae.

In sum, there is the conviction that the author put immense effort to discuss comprehensively every constitutional clause on devolution that may require interpretation, and justify the basis for a purposive approach in the interpretative task. It is apparent that the publication benefits immensely from Kangu's practical experiences in his exceptional career as a distinguished constitutional law scholar and practitioner. The book has certainly not addressed all the probable interpretative challenges (on the nature and scope of devolution, and the powers and functions of devolved governments) that will keep on emerging. In addition, some views may be challenged from certain theoretical perspectives and political experiences. However, there is no doubt that the publication is a compelling and well-argued *magnum opus* on devolution that will be an indispensable reference for judicial officers, legal practitioners, policy makers, government officials, and students of law and governance in Kenya.

¹⁹ Act No. 1 of 2013.

²⁰ Chapter 128, Laws of Kenya.