Constitutional guardianship in Kenya's bicameral legislature: An assessment of judicial intervention in inter-cameral disputes over the enactment of the Division of Revenue Bill

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Abstract

The Constitution of Kenya of 2010 adopts a bicameral legislative structure, within a devolved system of governance, consisting of the National Assembly and the Senate. In keeping with the devolved structure of government, the Senate's legislative mandate is to a large extent confined to considering, debating and approving Bills concerning counties as well as determining the allocation of national revenue among counties and providing oversight over the national revenue allocated to the 47 county governments. Over the last ten years, Kenya has witnessed a great consolidation of power by the National Assembly at the expense of the Senate especially with regards to the roles of the chambers over the process of enacting the Division of Revenue Bill. Such consolidation of power attempts to relegate the Senate to a peripheral role within the bicameral legislative institutional structure. Consequently, the Supreme Court has asserted its advisory power and the High Court its judicial review power to mete out this inter-institutional conflict between the National Assembly and the Senate. This paper interrogates the manner Kenyan courts have discharged the contested role of serving as guardians of a legislative institution in a conflict within the bicameral legislative system. It makes the point that while courts have the authority to intervene in inter-cameral conflicts, judicial intervention should be exercised as an option of last resort, only utilised after exhaustion of the constitutionally ordained intra-parliament mediation process.

Keywords

Revenue Bill, Judicial Intervention, Senate, National Assembly, Legislature

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1 Introduction

The debate as to which arm of government ought to be the guardian of a constitution goes back to the 20th Century, mostly in the 1920s and 1930s. Particularly, the debate between the jurists Hans Kelsen and Carl Schmitt on the subject of constitutional guardianship in the German context stands out.[1] Schmitt argued that the Executive is the proper constitutional guardian, while Kelsen contended that a constitutional court should be recognised as such. For Schmitt, if the core of the constitution expresses the people's self-chosen political identity, authoritative interpretations of basic constitutional principles must be provided by the constituent power itself or by a political authority speaking in its name, not by a court.[2] Consequently, Schmitt argued that the role of the guardian of the constitution ought to fall to the popularly- elected president, or more generally, to the head of an executive endowed with plebiscitary legitimacy. In contrast, a sufficient guarantee of constitutional legality, in Kelsen's view, can only be provided by a court endowed with the power to annul unconstitutional legislation as well as unconstitutional actions of government.[3]

Of relevance to this paper, Kelsen argued that quasi-federal and federal states need a court to play a 'guardianship' role over the constitutional system, since they are to be understood as systems in which two mutually independent authorities are legally co-ordinated on the basis of a constitutional division of competences. Such co-ordination requires impartial arbitration of conflicts of competence between the central and the local authorities (and institutions created to protect the local authority like a senate in a federal or quasi-federal system) that can only be offered by a court with an authoritative mandate over the interpretation and enforcement of the constitution.[4]

In the long run, or at least, at the moment, Kelsen seems to have won out, and not just in the German context. The number of constitutional courts or ordinary courts vested with the final mandate over the interpretation and enforcement of constitutions throughout the world has risen dramatically.[5] In Africa, following

1 *See* Lars Vinx, *The guardian of the constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law,* Cambridge University Press, Cambridge, 2015. *See also* David Dyzenhaus, *Legality and legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar,* Oxford University Press, New York, 1997.

2 Lars Vinx, *The guardian of the constitution*, 7.

3 Lars Vinx, *The guardian of the constitution*, 7.

4 Lars Vinx, *The guardian of the constitution*, 9.

5 *See* Ran Hirschl, *Towards juristocracy: The origins and consequences of the new constitutionalism,* Harvard University Press, Cambridge, 2007. *See also* Alec Sweet, *Governing with judges: Constitutional politics in Europe,* Oxford University Press, Oxford, 2000, for a discussion of the trend of proliferation of courts vested with jurisdiction over resolution of constitutional conflicts.

the post-1989 wave of democratisation and constitutional reforms, most countries in the continent have either created specialist constitutional courts or vested ordinary courts with the power of judicial review of legislation and the actions of other arms of government.[6]

The increased recognition of the role of courts as 'guardians' of constitutions has been linked to the texts of recent post-war written constitutions, which seem to grant judiciaries this pre-eminent status.[7] In the post-war period, nations have tended to reconstitute themselves under new constitutions. In the process, these nations create new courts charged with ensuring that their nations' new constitutions would in fact be followed.[8]

This general approach is evident with the 2010 Constitution of Kenya (the Constitution). The Constitution establishes an independent judiciary and endows the superior courts with an oversight mandate over the executive and legislative arms of government.[9] The High Court (against whose decisions litigants may appeal to the Court of Appeal and the Supreme Court) has original jurisdiction over allegations of infringement of rights, and the legality and constitutionality of any act or omission by any person or state organ.[10] Most portentous of all, the Supreme Court wields exclusive jurisdiction over the validity of presidential elections and exercises advisory jurisdiction over controversies related to the system of devolved government.[11]

When taken together, these provisions confer immense oversight authority over other arms of government to the judiciary. In effect, the courts have the mandate to determine questions over the boundaries of constitutional authority between the chambers of parliament; between the executive and the legislature;

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6 See in this regard: Kwasi Prempeh, 'Marbury in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa' 80(4) *Tulane Law Review*, 2006. See also Charles Fombad (ed), *Constitutional adjudication in Africa,* Oxford University Press, Oxford, 2017.

7 Brian Jones, 'Constitutional paternalism: The rise and (problematic) use of constitutional 'guardian' rhetoric' 51 *New York University Journal of International Law & Politics,* 2019, 773, 782. See also Brian Jones, *Constitutional idolatry and democracy: Challenging the infatuation with writtenness,* Edgar Elgar Publishing, Northampton, 2020.

8 Kim Scheppele, 'Guardians of the constitution: Constitutional court presidents and the struggle for rule of law in Post-Soviet Europe' 154 *University of Pennsylvania Law Review,* 2006, 1757-1851.

9 For a historical account of the evolution and empowerment of the Kenyan judiciary see James Gathii, *The contested empowerment of Kenya's judiciary, 2010-2015: A historical institutional analysis*, Sheria Publishing House, Nairobi, 2016. *See also* Walter Khobe, 'The judicial-executive relations in post-2010 Kenya: Emerging judicial supremacy?' in Charles Fombad (ed) *Separation of powers in African constitutionalism*, Oxford University Press, Oxford, 2016, 286.

10 Article 165, *Constitution of Kenya* (2010).

11 Article 163, *Constitution of Kenya* (2010).

between the national government and the county governments; and within/among individual county governments. The Kenya's Judiciary thus bears all the trappings of an authorised interpreter and enforcer of the Constitution.[12]

One particular area where the Supreme Court and the High Court have asserted themselves is in the area of inter-institutional conflicts between the National Assembly and the Senate within Kenya's bicameral legislative system. The courts have played a decisive role in resolving the recurrent stalemate between the Senate and the National Assembly with respect to the institutional mandate of the two chambers in the process of enacting the Division of Revenue Bills (DORBs). When invited to exercise either the advisory opinion jurisdiction[13] or the judicial review jurisdiction,[14] the courts have affirmed the importance of the Senate in Kenya's quasi-federal (devolved) post-2010 constitutional order. This resolution of the conflicts between the two chambers over the processing of the DORBs is the subject of critique in the subsequent sections of this paper.

This introductory part has brought up the notion of the 'guardianship' role exercised by courts over the constitutional system. The second part of this study offers a historical analysis of the place of the Senate within Kenya's bicameral legislative system and the special authority of this legislative chamber with respect to Kenya's devolved system of government. Part three of the study examines how the Supreme Court and the High Court have played a 'guardianship' role over the Senate within the context of inter-cameral power struggle between the National Assembly and the Senate over the enactment of the DORBs. Part four critically assesses the Kenyan courts' approach to the resolution of inter-cameral conflicts. Part five concludes the study.

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[12] See the assessment of the judiciary's role in the interpretation and enforcement of the Constitution in Conrad Bosire, 'The courts and devolution: The Kenyan experience' in Yonatan Fessha and Karl Kössler K (eds), *Federalism in the courts in Africa: Design and impact in comparative perspective*, Taylor and Francis, London, 2020, 123. *See also* Willy Mutunga, 'The 2010 constitution of Kenya and its interpretation: Reflections from the supreme court's decisions' 1 *Speculum Juris*, 2015, 1-20.

[13] Article 163(6), *Constitution of Kenya* (2010). The provision states: 'The Supreme Court may give an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government.' See for analysis Adem Abebe and Charles Fombad, 'The advisory jurisdiction of constitutional courts in Sub- Saharan Africa' 46(1) *The George Washington International Law Review*, 2013, 55-117.

[14] Article 165(3)(d), *Constitution of Kenya* (2010). The provision states: 'the High Court shall have jurisdiction to hear any question respecting the interpretation of this Constitution'.

2 Bicameralism and the Senate in Kenya's constitutional history

By way of historical background, when Kenya attained independence in 1963 from colonial rule, the Independence Constitution provided for a quasi-federal system of government (with regions commonly called *majimbo*) and a bicameral legislature consisting of the House of Representatives and the Senate.[15] The House of Representatives and the Senate shared the legislative power of the national government in all but one respect: while all Bills required the approval of both houses, financial matters were exclusively reserved for the House of Representatives.[16]

The Senate's primary role was to protect the quasi-federal system of government and protect the interests of the peoples of the various regions.[17] The candidates for Senate seats had to have an interest in the constituencies for which they were seeking to be voted, or be rateable owners or occupiers of property, or ordinarily resided in those districts for the past five years.[18] Jackton Boma Ojwang' noted that the Senate acted as a balancing device between the more flexible and progressive 'public will' as represented in the House of Representatives, and the more settled economic and social interests of particular localities as represented by the senators.[19]

In this respect, the Senate, as an organ tied to the interests of sub-national governments, had as a source of its inherent strength, the property interests of the individual senators. Because the senator had a stake in a particular region, they had to ensure it developed and that any legislation passed, was to the benefit of their constituents. Their property interests acted as a motivation for senators and their abilities to air the concerns of their constituents.[20]

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15 *See generally* Yash Ghai and Patrick McAuslan, *Public law and political change in Kenya: A study of the legal framework government from colonial times to present*, Oxford University Press, Oxford, 1975. *See also* Robert Maxon, *Majimbo in Kenya's past: Federalism in the 1940s and 1950s*, Cambria Press, Amherst, 2017.

16 Sections 49 to Section 51, *Constitution of Kenya* (1963).

17 JB Ojwang, *Constitutional development in Kenya: Institutional adaptation and social change*, ACTS Press, Nairobi, 1990, 114.

18 Schedule 5, Section 1, *Constitution of Kenya* (1963). *For analysis, see* Kenya Human Rights Commission, 'Independence without freedom: The legitimization of repressive laws and practices in Kenya' in Kivutha Kibwana (ed), *Constitutional law and politics in Africa: A case study of Kenya*, Claripress, Nairobi, 1998, 113 and 122.

19 JB Ojwang, *Constitutional development in Kenya*, 115.

20 See Kipkemoi Kirui and Kipchumba Murkomen, *The legislature: Bi-cameralism under the new constitution*, Society for International Development, Constitutional Working Paper Number 8, 2011, <https://www.sidint.net/sites/www.sidint.net/files/docs/WP8.pdf > on 25 December 2020.

However, the discharge of this role of protecting the autonomy and interests of the regions by the Senate was hampered by many challenges.[21] The Executive and the House of Representatives frustrated the Senate.[22] The Senate was denied adequate financial resources to carry out its functions.[23] The then ruling party, used its members in the Senate to frustrate its functioning and depict it as an unnecessary duplicate of the House of Representatives. Lack of political support for the bicameral legislative system led to the dismantling of the Senate through the Constitutional Amendment Act (No. 4) of 1966, which was assented to on 3 January 1967.[24] Thus, through constitutional amendments aimed at centralising powers in the hands of an 'imperial' president, both the quasi-federal system of government and Senate were abolished in 1967.[25] This led to Kenya operating under a unicameral legislative system up to the re-introduction of a second legislative chamber with the enactment of a new constitution in 2010.

This historical context depicting the hostility of Kenya's political elite to the project of devolution of government and the institution of the Senate calls for cautious optimism as to whether the Senate will succeed in discharging its mandate in the post-2010 constitutional dispensation. The lesson to learn from this background is that the impulse for centralisation is the driving force for Kenya's political and institutional culture hence, there is an ever-looming possibility that there will be attempts to thwart the Senate's mandate as the custodian of the powers and autonomy of county governments. Indeed, as Conrad Bosire pointed out, a system of centralised powers and resources tends to operate more easily in a unicameral legislative setting where control over legislative affairs can

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21 Oginga Odinga, *Not yet uhuru: An autobiography,* Heinemann Educational Books, Nairobi, 1968.

22 Gibson Kuria, *Majimboism, ethnic cleansing and constitutionalism in Kenya,* Kenya Human Rights Commission, Nairobi, 1994.

23 JH Proctor Jr, 'The role of the senate in the Kenyan political system' XVIII(4) *Parliamentary Affairs*, 1964, 389-415.

24 *See* PH Okondo, *A commentary on the constitution of Kenya*, Phoenix Publishers, Nairobi, 1995, vi.

25 *See* Kivutha Kibwana, 'The people and the constitution: Kenya's experience' in Kivutha Kibwana, Chris Peter, and Joseph Oloka-Onyango (eds) *In search of freedom and prosperity: Constitutional reform in East Africa*, Claripress, Nairobi, 1996, 345. *See also* Michael Burgess, 'Success and failure in federation: Comparative perspectives, in Thomas Courchene, John Allan, Christian Leuprecht and Nadia Verrelli (eds) *The federal idea: Essays in honour of Ronald L. Watts*, McGill-Queen's University Press, Montreal, 2011, 194–204. *See also* Richard Simeon, 'Preconditions and prerequisites: Can anyone make federalism work?' in Thomas Courchene, John Allan, Christian Leuprecht and Nadia Verrelli (eds), *The federal idea*, 213-222 who assert that the success, longevity, or durability of (quasi) federal state arrangements mainly depend on the commitment of the citizenry and the political class to the (quasi) federal system, the practice of constitutionalism according to the federal spirit, and the existence of liberal democracy.

be exerted more effectively.[26] The concern now is that the nature of the mandate and role of the Senate may end up, just like its independence-era predecessor, as an inconvenient check to the powers of national government which the political elite may want to side-step.

The bicameral structure of Kenya's post-2010 legislature has resulted in the splitting of Parliament into two chambers: National Assembly and Senate. On the one hand, the National Assembly represents the people and special interests;[27] deliberates on and resolves issues of concern to the people;[28] participates in the enactment of legislation;[29] participates in determining the allocation of national revenue between the levels of government;[30] appropriates funds for expenditure by the national government and other national state organs;[31] exercises oversight over national revenue and its expenditure;[32] reviews the conduct of state officers and initiates the process of removing them from office;[33] exercises oversight over state organs;[34] and approves declarations of war and extensions of states of emergency.[35] On the other hand, the Senate's legislative mandate is limited to matters affecting counties, a role which it shares with the National Assembly. The Constitution specifies the mandate of the Senate as: representing the counties and protecting the interests of the counties and their governments;[36] participating in the law-making function of Parliament by considering, debating and approving bills concerning counties;[37] determining the allocation of national revenue among counties, and exercising oversight over national revenue allocated to the county governments;[38] and participating in the oversight of state officers by considering and determining any resolution to remove the president or deputy president from office.[39]

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26 Conrad Bosire, 'Kenya's budding bicameralism and legislative-executive relations,' in Charles Fombad (ed) *Separation of powers in African constitutionalism*, Oxford University Press, Oxford, 2016, 116 and 118.

27 Article 95(1), *Constitution of Kenya* (2010).

28 Article 95(2), *Constitution of Kenya* (2010).

29 Article 95(3), *Constitution of Kenya* (2010).

30 Article 95(4)(a), *Constitution of Kenya* (2010).

31 Article 95(4)(b), *Constitution of Kenya* (2010).

32 Article 95(4)(c), *Constitution of Kenya* (2010).

33 Article 95(5)(a), *Constitution of Kenya* (2010).

34 Article 95(5)(b), *Constitution of Kenya* (2010).

35 Article 95(6), *Constitution of Kenya* (2010).

36 Article 96(1), *Constitution of Kenya* (2010).

37 Article 96(2), *Constitution of Kenya* (2010).

38 Article 96(3), *Constitution of Kenya* (2010). *See for critique* Bosire CM, 'Interpreting the power of the Kenyan senate to oversee national revenue allocated to the county governments: Building a constitutionally tenable approach' (1) *Africa Journal of Comparative Constitutional Law*, 2017, 35-66.

39 Article 96(4), *Constitution of Kenya* (2010).

In sum, the prime place occupied by the Senate within the devolved system of government is evident in the fact that the institution is constitutionally vested with the mandate of representing the interests of the county governments and safeguarding the autonomy of the devolved structures of government. Also important is that the Senate has been vested with the role of providing oversight and exercising checks and balances over the Executive on matters that affect county governments' autonomy and functions.[40]

Inter-cameral balance of power between the National Assembly and the Senate

Typically, the principle behind bicameralism is that 'second chambers' are expected to be '*demos –constraining*,'[41] which means that the decisions of the majority or the *demos* represented in the 'first chamber' ought to be tempered by the particular preferences of sub-national units represented in the second chamber. The implication is that the more the 'competences' of the second chamber, the more it is capable of constraining the *demos* in the first chamber.[42]

In addition, second chambers are always viewed as providing 'second opinion' to legislative outputs given that they are expected to shape policy and legislative directions as they review and revise legislative proposals from the first chambers.[43] In this understanding, second chambers are meant to multiply the possible veto players who are able to block or at least influence legislative outcomes.[44] Thus, as Malavika Prasad and Gaurav Mukherjee argued, a second chamber is usually designed to be a reactive *demos-constraining* chamber, that acts as a 'cooling chamber' for and a check on the majoritarian first chamber.[45]

However, the Kenyan Senate does not qualify for the label *demos –constraining* chamber given the limited scope of its legislative competence compared to those constitutionally vested in the National Assembly. This state of affairs is blamed

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40 Under Article 190(3) of the Constitution, the Senate can terminate an intervention by the national government in a county government. In addition, the Senate can terminate the suspension of a county government by the President.

41 *See in this regard* Alfred Stepan, 'Federalism and democracy: Beyond the US model' 10(4) *Journal of Democracy*, 1999, 19.

42 Alfred Stepan, 'Federalism and democracy', 22.

43 Kenneth Wheare, *Legislatures*, 2ed, Oxford University Press, Oxford, 1967, 140.

44 Daniel Diermeier and Roger Myerson, 'Bicameralism and its consequences for the internal organization of legislatures' 89(5) *American Economic Review,* 1999, 1182.

45 See Malavika Prasad and Gaurav Mukherjee, 'Reinvigorating bicameralism in India' 3(2) *University of Oxford Human Rights Hub Journal*, 2020, 96 and 99.

on the constitution-making process, particularly the changes made to the draft at the 'Naivasha Talks' which aimed at building consensus on several drafts of the constitution by the political class during the constitution-making process. Nzamba Kitonga, the chair of the Committee of Experts that was charged with the drafting of the constitution, specifically the Harmonised Draft, has observed:

> the greatest tragedy from Naivasha was the mutilation of the Senate. For the first time in the history of the architecture of constitutions in the world, a Senate was designated as a 'lower house.' This had never happened anywhere else in the world. Even during the Roman Empire, the Senate was designed as the ultimate stamp of the people's authority. The Committee of Experts had drafted a seamless legislative system where Bills and oversight reports would originate from the National Assembly and proceed to the Senate for approval, amendment or rejection. The Bills would then proceed to the presidency for assent. It was envisaged that the system would provide quality legislation and microscopic oversight. We tried to repair the damage done to the Senate by giving it some powers, particularly in relation to devolved governance. We also created mediation committees to avoid constant confrontation between the two houses. However, even this has not worked. [46]

The constrained role of the Senate emerges when one interrogates the legislative process under Kenya's bicameral system. In the Constitution, the legislative power of the two chambers is exercised through bills. Bills concerning counties have to be considered in both chambers[47] while those not concerning the counties are exclusively dealt with in the National Assembly.[48] In all other bills the Senate is involved through its Speaker at the filtering stage, in the decision whether or not the bill concerns counties. Article 110 identifies three categories of a Bill concerning county governments, namely, one which affects the powers of county governments which are listed under the Fourth Schedule to the Constitution. The powers vested on the county governments under the said Fourth Schedule are limited to the following functional areas: county health services, agricultural services, county transport and infrastructure, county planning and development, electricity and energy reticulation, trade and development regulation, pre-primary education and tertiary learning institutions (excluding higher education).

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[46] Nzamba Kitonga, 'Correcting constitutional mistakes of Naivasha' Nation, 5 October 2019, <https://nation.africa/kenya/blogs-opinion/opinion/correcting-constitutional-mistakes -of-naivasha-210504?fbclid=IwAR1V8K-PEQx62b3J_9joojVZkia96_wzwxR0DBYFkVHnko2ZgEndlVPzQaw#> on 25 December 2020. See also Christina Murray, 'Political elites and the people: Kenya's decade-long constitution-making process' in Gabriel Negretto (ed) *Redrafting constitutions in democratic regimes: Theoretical and comparative perspectives*, Cambridge University Press, Cambridge, 2020, 190-216.

[47] Articles 109(4), 110, 111, 112, 113, 122, and 123, *Constitution of Kenya* (2010).

[48] Articles 109(3) and 122, *Constitution of Kenya* (2010).

The second category is a bill relating to the election of members of a county assembly or a county executive,[49] and the third comprises a bill affecting the finances of county governments.[50] Although a bill must satisfy any one of these three elements for it to be classified as concerning counties, some bills may contain more than one element. The three categories of bills must be interpreted purposively and generously, in order to enable the Senate to play a role in the consideration, debate and passage of more laws so as to enable devolution, which is identified as one of the values of the Constitution, to take root.[51] This is because participation by the Senate is meant to represent the counties and protect their interests and those of their governments, and is envisaged by the Constitution as empowering the counties.[52]

Article 110 (3) of the Constitution, the Standing Order No. 122 of the National Assembly[53] and Standing Order No.116 of the Senate require that after publishing a bill and before the first reading, the Speaker of each house must communicate to the other Speaker for concurrence on whether it is a bill concerning county governments. The essence of such communication is to ensure that both houses play a participatory role in the legislative process of any bill dealing with county governments. It promotes consultations, negotiations and harmony. It is not the unilateral act of the National Assembly's Speaker to solely determine if a bill concerns the county government. Given the reality that many governmental functions are concurrent functions[54] of both levels of government, most bills that might at first blush appear to be exclusively concerned with functions of the national government actually affect counties (for example health, education, transport, public works and infrastructure development, planning, agriculture, water and environment) though it depends on a good faith engagement by the two Speakers in terms of Article 110(3) of the Constitution to ensure that county interests are promoted.[55]

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49 Article 110(1)(b), *Constitution of Kenya* (2010).

50 Article 110(1)(c), *Constitution of Kenya* (2010).

51 Article 10(2) (a), *Constitution of Kenya* (2010).

52 The High Court of Kenya in *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR.

53 Upon publication of a Bill, and before the First Reading, the Speaker shall determine whether- (a) it is a Bill concerning county governments and, if it is, whether it is a special or an ordinary Bill, or (b) it is not a Bill not concerning county governments. The Speaker shall communicate the determination under paragraph (1) to the Speaker of the Senate for concurrence.

54 See in this regard Conrad Bosire, 'Concurrency in the 2010 Kenya constitution' in Nico Steytler (ed), *Concurrent powers in federal systems*, Brill Nijhoff, Leiden, 2017, 261 and 272.

55 See Mutakha Kangu, *Constitutional law of Kenya on devolution*, Strathmore University Press, Nairobi, 2015.

Determining whether a particular bill affects counties has in some cases led to attempts to exclude the Senate from participating in the law-making processes. This exclusion has taken the form of the Speaker of the National Assembly unilaterally determining whether a bill concerns county governments without getting the input and concurrence of the Speaker of the Senate as envisaged in Article 110(3). For instance, at the end of the 11th Parliament, the National Assembly amended its Standing Order 121(2), which reflected the spirit of Article 110(3) that the Speaker of the National Assembly and the Speaker of the Senate 'shall jointly resolve any question as to whether' a bill concerned county governments 'before either House considers a bill.' The amended Standing Order 121(2) deviated from this legislative pathway by making the determination of whether a bill concerned county governments the sole prerogative of the Speaker of the National Assembly.[56]

The National Assembly's dominance in the legislative process is also evident in the processing of 'Money Bills.' These are bills related to taxation, loans and appropriations (spending).[57] Given the importance of financial legislation for the day-to-day functioning of the state, Money Bills are subject to a special legislative procedure, intended to prevent conflicts between the chambers over matters finance. Therefore, a Money Bill can only be introduced in the National Assembly.[58] In practice, the claim that a bill is a Money Bill has been the ruse used by the National Assembly to preclude the Senate's involvement in the enactment of a significant number of bills. In September 2020, senators protested the rejection of at least 13 bills by the members of the National Assembly on the basis that the Senate cannot originate a Money Bill.[59]

The process of resolving inter-cameral differences with respect to the contents of a bill which is before both chambers is the only instance when the two chambers have parity of legislative say. When there is a deadlock between the two chambers, the Constitution provides for the formation of a mediation committee to come up with an amended version of the bill.[60] This is in line with the common practice in many bicameral states, which more often than not tend to establish mechanisms for resolving disputes between the houses. Such mechanisms are

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56 See *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)* [2020] eKLR, paras. 124 -130.

57 Article 114, *Constitution of Kenya* (2010).

58 Article 109(5), *Constitution of Kenya* (2010).

59 See Julius Otieno, 'Senators protest rejection of their 13 bills by Muturi-led house' The Star, 23 September 2020, <https://www.the-star.co.ke/news/2020-09-22-senators-protest-rejection-of-their-13-bills-by-muturi-led-house/> on 25 December 2020.

60 Article 113, *Constitution of Kenya* (2010).

typically intended to ensure government stability, and prevent deadlocks.[61] In the context of the DORB legislative process, the delayed enactment of the DORB due to deadlocks between the Senate and the National Assembly has often led to the failure to remit money to the county governments and their consequent inability to pay county employees and fund general operations.[62] This has been a major cause of instability in the operations of the county governments.

The mediation committee consists of an equal number of members from each chamber, which may, in case of a disagreement between the chambers, be convened to agree on a jointly approved text. The bill emerging from the mediation committee is then voted on by both chambers. The chambers in the plenary session have the final say on approval of the bill, but to facilitate negotiation and agreement it is usual for mediation committees to be closed to the public, and for the chambers to vote for or against the agreed text without amendment. If the amended version of the bill is not passed by both chambers, the proposed legislation is defeated. If any bill on a matter concerning counties is passed by both chambers or by the National Assembly (if the bill does not affect counties), the bill is referred to the president for assent before it becomes law.

The law-making process manifests a concentration of legislative power in the National Assembly. Drawing from Arend Lijphart's study on bicameral legislatures, the Kenyan Senate is a weak chamber because the disparities in power range from full symmetry, where agreement of the two houses is necessary to enact a law, to total asymmetry, where one house is granted decision-making power.[63] Put differently, symmetry refers to the extent of equality in legal powers between the chambers.[64] In symmetrical bicameralism, the two chambers have equal or nearly equal powers: the consent of both houses is usually needed for the enactment of laws, and the lower house cannot unilaterally override vetoes or amendments adopted by the upper house, or can do so only with difficulty (for example, by a supermajority). Bicameralism is asymmetrical when the upper house is constitutionally restricted like in the Kenyan context where the Senate is confined to legislating in matters concerning county governments. This speaks to the reality that territorial second chambers, like the Kenyan Senate, often have weak powers over some areas of legislation and stronger powers over issues

61 George Tsebelis and Jeannette Money, *Bicameralism,* Cambridge University Press, Cambridge, 1997, 5.

62 Benson Amadala, 'Revenue stalemate causes delay for county staff salaries' Business Daily, 1 August 2019 https://www.businessdailyafrica.com/bd/news/counties/revenue-stalemate-causes-delay-for-county-staff-salaries-2259528 on 25 December 2020.

63 Arend Lijphart, *Democracies: Patterns of majoritarian and consensus government in twenty-one countries*, Yale University Press, New Haven, 1984.

64 Elliot Bulmer, *Bicameralism*, International IDEA, Stockholm, 2014, 13.

concerning sub-national units, reflecting their particular concern for protecting and promoting the interests of sub-national governments.[65]

The characterisation of the Kenyan Senate as weak is due to the fact that its legislative mandate is restricted to issues concerning counties and county governments, while the legislative mandate of the National Assembly is not as restricted.[66] The Constitution grants the Senate the mandate as a safeguard of the interests of the counties to participate in the enactment of bills affecting the counties.[67] However, the authority of the Senate to make law on any matter concerning county government is not exclusive and will always be subject to that of the National Assembly. Article 111(2) of the Constitution gives the National Assembly the authority to amend or veto a special bill that has been passed by the Senate if a resolution is supported by at least two-thirds of the members of the National Assembly. This means that although for example, it is the responsibility of the Senate to determine the allocation of the revenue to the counties, the National Assembly can amend or even veto the said resolutions.[68] In addition, the asymmetrical way in which the introduction of Money Bills is restricted to the National Assembly indicates the limited capacity of the Senate to influence such an important legislative device.

Pointedly, with regard to the inter-cameral conflicts over the DORB, the National Assembly has been of the view that the Senate has no role in the processing of the DORB, while the Senate has taken the opposite stance that the DORB implicates the functions of the county governments, thus, it must be involved in the passage of this crucial bill. The next section assesses the implications of excluding the Senate, the custodian of county interests, from the enactment of the DORB, which is the legislative instrument for dividing the revenue raised nationally between the national and county governments.

Senate as the custodian of devolution: Senate's role in the enactment of the DORB

Article 202(1) of the Constitution provides for the constitutional framework for the equitable sharing of the revenue raised nationally between the two levels of government as well as factors for consideration in determining

[65] Yonatan Fessha, 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' *Regional & Federal Studies*, 2019, 1 and 6.

[66] Migai Akech, 'Building a democratic legislature in Kenya' (100) *East African Law Journal*, 2015, 25 -28.

[67] Article 94, *Constitution of Kenya* (2010).

[68] Article 217 (5), *Constitution of Kenya* (2010).

the equitable shares between the levels of government. These factors include: national interest; public debt and other national obligations; the needs of the national government; the need to ensure that county governments are able to perform the functions allocated to them; fiscal capacity and efficiency of county governments; developmental and other needs of counties; economic disparities within and among counties and the need to remedy them; affirmative action in respect of disadvantaged areas and groups; economic optimisation of each county; the desirability of stable and predictable allocations of revenue; and the need for flexibility in responding to emergencies and other temporary needs.[69] Furthermore, the equitable share of the revenue raised nationally that is allocated to county governments should not be less than fifteen per cent of all the revenue collected by the national government.[70]

To facilitate the process of division of revenue between the two levels of government, Article 218(1)(a) of the Constitution provides for the DORB. The DORB is introduced in Parliament at least two months before the end of each financial year. Owing to the devolution of significant functions to the county governments, for example, health, water and sanitation, and agriculture, adequate funding of the county governments is crucial. This brings to the fore the significance of the DORB as the key resource-mobilisation measure for the counties.[71] The success of the project of devolved governance in efficiently delivering services to citizens is, therefore, to a large extent pegged on the DORB allocating adequate resources to the county governments.

How the allocations have panned out since the advent of devolution can be observed from the following tabulation of the allocations between the two levels of government in the Division of Revenue Acts (DORA) of 2013 to 2020.

Year	*DORA allocation to county governments (Kshs)*	*DORA allocation to the National Government (Kshs)*
FY 2013/14	190,000,000,000	730,375,441,286
FY 2014/15	226,660,000,000	799,650,000,000
FY 2015/16	259,714,500,000	916,925,500,000

69 Article 203(1), *Constitution of Kenya* (2010).

70 Article 203(2), *Constitution of Kenya* (2010).

71 On the inadequacy of local revenues generated by county governments, see Lewis Njoka,'Counties fail to meet local revenue targets' People Daily, 28 October 2020 <https://www.icpak.com/inthenews/counties-fail-to-meet-local-revenue-targets/> on 25 December 2020.

Year	*DORA allocation to county governments (Kshs)*	*DORA allocation to the National Government (Kshs)*
FY 2016/17	280,300,000,000	1,099,899,000,000
FY 2017/18	314,205,000,000	1,238,343,840,000
FY 2018/19	314,000,000,000	1,369,792,000,000
FY 2019/20	316,500,000,000	1,554,916,497,191
FY 2020/21	316,500,000,000	1,533,411,510,000

With significant resources trickling to county governments from the equitable revenue raised nationally since the advent of devolution, this has created new opportunities for employment and investments with most county governments implementing projects aimed at improving the living standards of their people.[72] A report by Kenya Institute for Public Policy Research and Analysis on the performance of the healthcare sector in Kenya under the devolved system noted significant improvement in the performance of the health sector under county governments.[73] The 2018 report pointed out improved child survival with reduction of under-five, infant, neonatal and maternal mortality. The nutrition status of children also improved. The report further revealed that county governments had significantly invested in increasing the number of health facilities especially those at lower levels. They were also working towards enhancing provision of medical supplies and maintenance of equipment. Thus, due to devolution, most people including the marginalised and minorities can reap the benefits of self-governance and manage their development and affairs. This includes members of smaller ethnic groups who had never had significant access to national resources who now do so through their home counties.[74]

Therefore, the revenue-generating mechanisms for devolution, especially the equitable share of revenue raised nationally, have strong effects on economic growth and service delivery by the county governments.[75] However, decision-

[72] Samuel Ngigi and Doreen Busolo, 'Devolution in Kenya: the good, the bad and the ugly' 9(6) *Public Policy and Administration Research*, 2019, 9, 10.

[73] Phares Mugo, Eldah Onsomu, Boaz Munga, Nancy Nafula, Juliana Mbithi and Esther Owino, 'An assessment of healthcare delivery in Kenya under the devolved system' Kenya Institute for Public Policy Research and Analysis, Special Paper Number 19, 2018.

[74] Agnes Cornell and Michelle D'Arcy, *Devolution democracy and development in Kenya*, Swedish International Centre for Local Democracy, 2016 <https://icld.se/app/uploads/files/forskningspublikationer/devolution-democracy-and-development-in-kenya-report-5-low.pdf> on 25 December 2020.

[75] See James Gathii and Harrison Otieno, 'Assessing Kenya's cooperative model of devolution: A situation-specific analysis' 46 *Federal Law Review*, 2018, 595 and 604.

makers within the national government (including at the National Treasury) perceive the transfer of resources and powers from the national level to the counties (a constitutional requirement) as a loss of power and control over resources. Thus, implementation has seen some shades of resistance in the transfer and management of resources and functions, and this can be attributed partly to the desire by some persons at the national level not to let go of control over resources and functions that have been devolved to the counties.[76] Alive to this reality, the Council of Governors, through its Strategic Plan 2017-2022, pledged to 'intensify its commitment to promoting adequate financing for devolved functions as a matter of common interest for consideration by the county governments.'[77]

While the Constitution elaborates on the specific role the Senate has over the County Allocation of Revenue Bill which divides the county share of national revenue among counties, the Senate's role over the DORB that divides revenue between the national and county levels is not as explicit.[78] Accordingly, Mutakha Kangu proffers a holistic and purposive reading of the Constitution that views the DORB as crucial to the functioning of the devolved system of governance and thus, the Senate must have a say in the enactment of the bill.[79] Further, a bill that deals with the equitable sharing of revenue vertically within the meaning of Articles 202 and 203 is a bill concerning counties in whose consideration, debate and approval the Senate has a role to play.[80] As persuasively argued by Kangu, the DORB should be classified as a Bill concerning counties because of two overlapping elements. First, it is a bill referred to in Chapter 12 of the Constitution affecting the finances of county governments,[81] of which Article 218 forms a part. Second, the bill contains provisions affecting the functions and powers of the county governments.[82]

Despite this purposive reading of the Constitution that makes the Senate's involvement in the enactment of the DORB inevitable, the National Assembly insists that the Senate has no role in the enactment of the DORB. One of the

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76 Thomas Tödtling, Conrad Bosire and Ursula Eysin, *Devolution in Kenya: Driving forces and future scenarios*, Strathmore University Press, Nairobi, 2018, 20.

77 Council of Governors, *Strategic plan 2017-2022*, 20, available at https://cog.go.ke/phocadownload/reports/Council%20of%20Governors%20%20Strategic%20Plan%202017%20%E2%80%93%202022.pdf on 25 December 2020.

78 See Article 217 and 218, *Constitution of Kenya* (2010).

79 Mutakha Kangu, *Constitutional law of Kenya on devolution*, 360.

80 Mutakha Kangu, *Constitutional law of Kenya on devolution*, 361.

81 Mutakha Kangu, *Constitutional law of Kenya on devolution*, 361.

82 Mutakha Kangu, *Constitutional law of Kenya on devolution*, 361.

driving forces of such insistence can be appreciated within the context of the implication of the DORB for allocation of funds to the National Government Constituencies Development Fund (NGCDF), which is controlled by members of the National Assembly.[83] The NGCDF is a statutorily decentralised fund that caters for the implementation of the national government's functions at the constituency level, thus, running parallel to the structure of devolved governments.[84] Significantly, in terms of its funding, the NGCDF consists of 'monies of an amount of not less than 2.5% of all the national government's share of revenue as divided by the annual DORA enacted pursuant to Article 218 of the Constitution.'[85] Therefore, the DORB allocations to the counties affects the amount of monies allocated to the NGCDF, leading to attempts by the members of the National Assembly to ensure that they are in control of the DORB process to the exclusion of Senators, and, ultimately, that DORB allocations to the county governments do not reduce the amount of monies that will be allocated to the NGCDF.[86]

Given the context of conflict between the two chambers, which is rooted in a struggle over the allocation of funds between the two levels of government, it is important that courts intervene when legislative principles on bicameralism are threatened. This is necessary when one takes into account the Senate's special place in the Kenyan constitutional system as the political custodian of the devolved system of government and given Kenya's constitutional history where the *Majimbo* system of government and the Senate were disbanded shortly after independence by the country's political elites in their quest for centralisation of power in an 'imperial' president.

3 The Judiciary as the guardian of the legislative mandate of the Senate

Kenya has adopted a constitutional system model based on constitutional supremacy, which implies the concept of parliamentary subordination to the constitution as well as its own self-determined norms, thus, providing the theoretical grounding for judicial review of the legislative process. Since

83 *National Government Constituencies Development Fund Act* (Act No. 30 of 2015).

84 *See generally* Section 3, *NGCDF Act*.

85 Section 4 (1) (a), *NGCDF Act*.

86 *See generally* Nic Cheeseman, Gabrielle Lynch, and Justin Willis, 'Decentralisation in Kenya: The governance of governors' 54(1) *Journal of Modern African Studies*, 2016, 16-23.

Parliament is bound by the Constitution,[87] it follows that a violation of a constitutional principle or rule prescribed therein, even if pertaining to the legislative process, renders parliament amenable to judicial review.[88] Through judicial review of the legislative process, courts determine the validity of statutes based on an examination of the procedure leading to their enactment.

Further, judicial review grants the courts the power to examine the legislative process regardless of the constitutionality of a statute's content and to invalidate an otherwise constitutional statute based solely on defects in the enactment process. In addition, judicial review of the legislative process does not preclude legislative re-enactment; it simply remits the invalidated statute to the legislature, which is free to re-enact the exact same legislation, provided that a proper legislative process is followed.

Moreover, it is a truism that constitutional provisions are deliberately broad, often ambiguous, at times contradictory and inevitably incomplete.[89] Gerald Baier observed that constitutional provisions are 'never precise enough to cover all eventualities....The authors cannot foresee all the contingencies that an effective system of governance must confront.'[90] The problem of incompleteness is particularly acute in constitutions that establish quasi-federal and federal structures of government that are often political compromises. Indeed, the 'precise content of the federal bargain will necessarily be incomplete.'[91] Similarly, '[c]onstitutions often fail to address crucial issues of federalism.'[92] As Adem Abebe argued, 'the establishment of mechanisms to facilitate the peaceful resolution of inevitable intergovernmental disputes is, therefore, imperative to any quasi-federal and federal construction.'[93] Given these realities, the need for judicial intervention to settle constitutional controversies related to the system of devolved governance cannot be gainsaid.

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87 See the supremacy clause, Article 2(1), *Constitution of Kenya* (2010).

88 Suzie Navot, 'Judicial review of the legislative process' 39(2) *Israeli Law Review,* 2006, 182 and 201.

89 James Brudney, 'Recalibrating federal judicial independence' 64 *Ohio State Law Journal,* 2003, 149 and 175 (James comments that 'constitutional language is often imprecise or inconclusive, and the circumstances of its application often unanticipated or unforeseeable by its authors').

90 Gerald Baier, *Courts and federalism: Judicial doctrine in the United States, Australia and Canada*, University of British Columbia Press, Vancouver, 2006, 11.

91 Daniel Halberstam, 'Comparative federalism and the role of the judiciary' in Gregory Caldeira, Daniel Kelemen and Keith Whittington (eds), *The Oxford handbook of law and politics,* Oxford University Press, Oxford, 2008, 142-143.

92 Keith Rosenn, 'Federalism in the Americas in comparative perspective' 26(1) *The University of Miami Inter-American Law Review*, 1994, 1 and 21.

93 Adem Abebe, 'Umpiring federalism in Africa: Institutional mosaic and innovations' 13(4) *African Studies Quarterly,* 2013, 53 and 55.

It is in this context that Retired Chief Justice Willy Mutunga adopted Kelsenian rhetoric on the role of the courts as guardians of the constitutional promise of devolved governance and made it clear in his Separate Opinion in *Speaker of the Senate Advisory Opinion* that:

> in interpreting the devolution [related constitutional] provisions, where contestations regarding power and resources arise, the Supreme Court should take a generous approach... by laying down the proper juridical structures consolidating the devolution-concept.[94]

Regarding the political role of the Senate in this 'commitment to protect' mandate, Mutunga added that:

> Article 96 of the Constitution represents the *raison d'etre* of the Senate as "to protect" *devolution*. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163(6) of the Constitution, the Court has a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular.[95]

As will be shown below, the Supreme Court and the High Court have discharged the duty 'to ward off the threat' to devolution and the Senate. The courts have done this in the context of the recurrent supremacy battles between the Senate and the National Assembly centring on the role of the National Assembly vis-à-vis the Senate in the origin, consideration, and enactment of the DORBs. The next section focuses on how the Supreme Court and the High Court have mediated the inter-cameral conflict over the processing of bills.

Resolution of inter-cameral conflict over the 2013 DORB

The first major dispute between the two chambers related to the manner in which the annual Division of Revenue Bill for the financial year 2013–14 was passed. In this case, the Speaker of the National Assembly, after passing the DORB of 2013–14, handed it over to the Speaker of the Senate. The Senate sought to alter the DORB passed by the National Assembly by increasing the county share. However, the Speaker of the National Assembly ignored the Senate amendments and passed on the bill (as initially passed by the National Assembly) to the President for assent.

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94 *In the Matter of the Speaker of the Senate & another* [2013] eKLR, para. 187 (*Advisory Opinion No. 2 of 2013*).

95 *Advisory Opinion No. 2 of 2013*, para. 190.

As aforementioned, the Constitution provides that when there is a legislative deadlock between the two houses, a mediation team composed of equal numbers from each chamber is supposed to be constituted in order to develop a consensus bill. However, in this case, the President assented to the bill on the grounds that any further delay with the bill would affect budget implementation. Consequently, the Senate took the matter to the Supreme Court (through an advisory opinion) and the Court ruled (with one judge dissenting) that the DORB is a bill affecting counties and the Senate has a role to debate and vote on the bill.[96]

The Supreme Court held that 'neither Speaker may to the exclusion of the other, determine the nature of the bill' for that would inevitably result in usurpations of jurisdictions, to the prejudice of the constitutional principle of harmonious interplay of state organs.[97] Further, the Supreme Court concluded that the enactment of the DORB and the County Allocation of Revenue Bill was a shared mandate between the two chambers.[98] In order for devolution to be realised there is need for cooperation and consultation between the two chambers. The Supreme Court held that the DORB 2013 was an instrument essential to the functioning of the county government, hence, was a bill concerning the county government.[99] It recommended that in future the two chambers should engage in mediation. The Supreme Court was categorical that the extent of the Senate's role in the legislative process begun immediately the two Speakers jointly communicated to each other for concurrence to determine whether the bill was one concerning county government.

Between 2014 and 2018, the Senate was involved in enacting the DORB in compliance with the Supreme Court's advisory opinion. However, attempts to by-pass the Senate in the processing of the DORB recurred in 2019.

Resolution of inter- cameral conflict over the 2019 DORB

On 15 July 2019, the Council of Governors and all the 47 county governments, approached the Supreme Court seeking an advisory opinion pursuant to Article 163(6) of the Constitution. The Supreme Court adjudicated two questions relevant to the issue of inter-cameral conflict between the two chambers of Parliament: first, what happens when the National Assembly and the Senate fail to agree over the DORB, thereby triggering an impasse? Secondly,

96 *Advisory Opinion No 2 of 2013*.

97 *Advisory Opinion No. 2 of 2013*, para. 143.

98 *Advisory Opinion No. 2 of 2013*, para. 87.

99 *Advisory Opinion No. 2 of 2013*, para. 148.

can the National Assembly enact an Appropriation Act prior to the enactment of a Division of Revenue Act?

On the first question, a brief recount of the factual context leading to impasse between the two Houses of Parliament is instructive. During the 2019 budgetary cycle, the Senate rejected the first DORB passed by the National Assembly on 26 March 2019. The mediation process that was triggered by the said rejection did not yield any concurrence between the houses, hence the impasse. This impasse lasted until July 2019, when both the National Assembly and Senate republished their versions of the bill. For good measure, the Senate's version of the bill was also rejected by the National Assembly on 8 August 2019, triggering another round of mediation. On 16 September 2019, the Supreme Court was informed that the two houses had finally agreed on a mediated version of the DORB, which was eventually passed into law.[100] By the time the impasse was resolved, the country was three months into the Financial Year of 2019/2020.[101] Needless to say, the stalemate not only led to delayed exchequer releases to the counties, but also seriously affected their budgetary and programme implementation cycles.[102]

In response to the arguments by both the Attorney General and the Speaker of the National Assembly, 'urging the Supreme Court to exercise restraint, and avoid delving into political and budgetary disputes,' the Majority held that it 'was not confronted with a case of judicial over-reach, but a real constitutional crisis, which if not resolved judicially, had the potential to cripple the operations of the entire system of devolved governance.'[103] Besides, when the case was initially presented to the Supreme Court it exercised 'extreme restraint by urging the two houses to undertake their constitutional responsibilities through mediation under Article 113 of the Constitution.'[104]

On the first question, the majority proceeded to hold that when an impasse occurs due to the failure of the mediation process, the National Assembly should authorise the withdrawal of money from the Consolidated Fund notwithstanding the failure to pass a Division of Revenue Act for purposes of meeting the expenditure necessary to carry on the services of the county governments.[105] Furthermore, the percentage of the money to be withdrawn should be based

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100 *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020]* eKLR, para. 65 (*Advisory Reference No. 3 of 2019*).

101 *Advisory Reference No. 3 of 2019*, para. 66.

102 *Advisory Reference No. 3 of 2019*, para. 66.

103 *Advisory Reference No. 3 of 2019*, para. 67.

104 *Advisory Reference No. 3 of 2019*, para. 67.

105 *Advisory Reference No. 3 of 2019*, para. 80.

on the equitable allocation to counties in the Division of Revenue Act of the preceding financial year. In keeping with the spirit of Article 222(2)(b) of the Constitution, the money withdrawn should be 50% of the total equitable share allocated to the counties in the Division of Revenue Act.[106]

Notably, the dissenting Judge, Justice Njoki Ndung'u, adopted the view that in most jurisdictions where a deadlock or impasse between the two houses exists, the house with veto powers, which is the house that originates the DORB makes the final determination. Also, in other democratic and bicameral jurisdictions, the DORB is considered to be a money bill and, therefore, the legislative processes that apply to money bills apply to it.[107] She took the position that the Supreme Court had overstepped its bounds by allocating to the Senate a role which the drafters of the Constitution had neither envisioned nor anticipated; the role of participating as an equal partner to the National Assembly in the legislative processes regarding the DORB.[108] It is noteworthy that, in the context of the inter-cameral conflicts between the houses of parliament, had the dissenting opinion been adopted by the court, the role of the Senate would have been greatly diminished as it would lead to a position where the National Assembly can ignore the views of the Senate in the process of division of revenue for the national and county governments.

Before the resolution of the impasse, the National Assembly enacted the Appropriation Bill, which had the potential of unlocking funds from the Consolidated Fund for expenditure by the national government while the counties remained in limbo as long as the impasse over the DORB persisted.[109] This was the basis of the second question on whether the National Assembly could enact an Appropriation Bill prior to the enactment of the DORB.

The majority held that the Appropriation Bill cannot be introduced in the National Assembly, unless the estimates of revenue and expenditure have been approved and passed. Secondly, the Appropriation Bill comes to life after the DORB since the latter would already have been introduced into Parliament at least two months before the end of the financial year. Thirdly, the estimates of revenue and expenditure must logically be based on or at the very least be in tandem with the equitable share of revenue due to the national government, as provided for in the DORB. Fourthly, the Appropriation Bill must be based on the equitable share of revenue due to the National Government as provided

106 *Advisory Reference No. 3 of 2019*, paras. 81 – 82.

107 *Advisory Reference No. 3 of 2019*, para. 168.

108 *Advisory Reference No. 3 of 2019*, para. 169.

109 *Advisory Reference No. 3 of 2019*, para. 96.

for in the Division of Revenue Act.[110] It follows that in an ideal situation, the enactment of an Appropriation Bill cannot precede the enactment of a Division of Revenue Act.[111]

This conclusion by the Supreme Court guaranteed that the National Assembly can never by-pass the Senate in the process of allocating revenue between the national and county governments. It means that the DORB is the anchor of the budgetary process and in that budgetary process, the input and concurrence of the Senate is mandatory. This finding significantly enhances the power of the Senate in the power balance between the two houses of Parliament. Yet still, besides the DORB, the exclusion of the Senate in the law-making process and the failure by the Speaker of the National Assembly to engage the Speaker of the Senate to determine whether a bill concerns county governments persists and such exclusion made for a High Court case in 2019 discussed in the next section.

Constitutional Petition No. 284 of 2019 (consolidated with 353 of 2019)

In this consolidated petition to the High Court filed by the Senate and the Council of Governors, the Senate alleged that on diverse dates between 2017 and 2019, the National Assembly passed a total of 23 Acts of Parliament without the Senate's input and unilaterally forwarded 15 others to the Senate without complying with Article 110(3) of the Constitution. The Council of Governors also alleged that the amendments by the National Assembly to Section 4 of the Kenya Medical Supplies Authority Act (2013) without the input of the Senate was unconstitutional. In addition to the contested statutes, the petitioners contended that an amendment by the National Assembly to Standing Orders No. 121 was inconsistent with Article 110(3).

The High Court found that the 23 legislations were unconstitutional on the basis that they were enacted by the National Assembly without the input of the Senate.[112] In addition, the High Court found that the 23 legislations and the amendments to Section 4 of the Kenya Medical Supplies Authority Act were enacted in violation of Article 110(3) of the Constitution, which obligates the Speakers of the National Assembly and Senate to jointly resolve any question as to whether a bill concerns counties, and if it is, whether it is a money bill or ordinary bill. Lastly, the High Court held that the National Assembly's Standing

110 *Advisory Reference No. 3 of 2019*, para. 99.

111 *Advisory Reference No. 3 of 2019*, para. 100.

112 *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)* [2020] eKLR (*Petitions Nos 284 and 353 of 2019*).

Order No. 121(2), which purported to give the Speaker of the National Assembly the sole prerogative of determining whether a bill concerns county governments, was not only mischievous but unconstitutional.[113]

The High Court affirmed the Supreme Court's position that the concurrence of the Speakers of the two houses on whether a bill concerns county governments is a mandatory preliminary step in the legislative process.[114] Notably, the High Court referred to the Supreme Court judgement on the resolution of the conflict on the 2013 DORB, where the Supreme Court averred:

> It is quite clear…that the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: What is the nature of the Bill in question. The two Speakers, in answering that question, must settle three sub-questions – before a Bill that has been published, goes through the motions of debate, passage, and final assent by the President. The sub-questions are:
>
> a. is this Bill concerning county government? And if it is, is it a special or an ordinary bill?
> b. is this a bill not concerning county government?
> c. is this a money Bill?

How do the two Speakers proceed, in answering those questions or sub-questions? They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise. And on this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions.[115]

Further, the High Court reiterated the Supreme Court's stance in the 2013 DORB case that 'any disagreement on the nature of a bill should be harmoniously settled through mediation.' In the 2013 DORB case, the Supreme Court, appreciating that although the Senate has been 'entrusted with a less expansive legislative role than the National Assembly,' stated that a broad purposive reading of the Constitution reveals that:

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113 *Petitions Nos 284 and 353 of 2019*, para. 128.

114 See Waikwa Wanyoike, 'The senate case: Why High Court nullified 23 laws' The Star, 15 November 2020, https://www.the-star.co.ke/siasa/2020-11-15-the-senate-case-why-high-court-nullified-23-laws/ on 25 December 2020.

115 *Petitions Nos 284 and 353 of 2019*, para. 116.

> An obligation was thus placed on the two Speakers, where they could not agree between themselves, to engage the mediation mechanism. They would each be required to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time. It was also possible for the two Chambers to establish a standing mediation committee, to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matters.[116]

In conclusion, both the Supreme Court and the High Court have intervened in inter-cameral conflicts and in so intervening affirmed the mandatory nature of the constitutional obligation imposed on the two Speakers to engage and come to an agreement on whether a bill concerns county governments. The courts have also pointed out the need for the two chambers to use the mediation process to resolve any conflicts between the two chambers.

4 An assessment of the courts' intervention in inter-cameral conflicts

The Kelsen-Schmitt debate pitted two divergent views on either political constitutionalism or legal constitutionalism as the ideal model for protecting constitutionalism in a polity. In the context of judicial intervention in the workings of the legislature, Schmittian political constitutionalism finds its support in representative democracy, which gives rise to institutional fidelity to parliament and the doctrine of parliamentary sovereignty.[117] Kelsenian legal constitutionalism, in contrast, identifies the primacy of the protection of constitutional rights and principles leading to the view that external limitations on parliament, must exist through judicial oversight of the legislature.[118]

This debate also plays out in the contrasting positions with respect to the application of separation of powers and the political question doctrine in the adjudication of inter-cameral conflicts in Kenya's bicameral legislature. Among the most important roles that courts play in political systems is that of determining boundaries of political power among various agencies of government as well as between government and private citizens. It is in fact a truism that framing or interpreting modern constitutions has been fascinated by the idea of splitting up political power under the doctrine of separation of powers.[119] In Kenya's case,

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116 *Petitions Nos 284 and 353 of 2019*, para. 116.

117 *See* Panu Minkkinen, 'Political constitutionalism versus political constitutional theory: Law, power, and politics' 11(3) *International Journal of Constitutional Law*, 2013, 585-610.

118 Erin Delaney, 'Judiciary rising: Constitutional Change in the United Kingdom' 108(2) *North-western University Law Review*, 2014, 543 and 545.

119 Murphy WF and Tanenhaus J, *Comparative constitutional law: Cases and commentaries*, St. Martin's Press, New York, 1977, 101.

it is this role of enforcing the horizontal separation of powers between two chambers of Parliament that the Supreme Court and the High Court have been invited to undertake in conflicts over the enactment of the DORBs. The choice between these two competing normative and descriptive theories animates the different stance taken by the Senate and courts on the one hand and the National Assembly and the dissenting judge at the Supreme Court (Justice Njoki Ndung'u) on the other hand.

The conferral of a novel advisory jurisdiction with respect to institutional conflicts related to the system of devolved governance on the Supreme Court[120] and an explicit judicial review mandate to the High Court with respect to questions 'relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between levels of government'[121] indicates an embrace of Kelsenian legal constitutionalism. This has accorded Kenyan courts a governance role, which has seen the courts gain power in resolving institutional tensions that are central to the workings of the constitutional order. The courts' exercise of this function with regards to determining the constitutional validity of attempts to by-pass the Senate in the processing of the DORBs, has affirmed the courts' 'guardianship mandate' in the Kelsenian sense over all state organs, including parliament.[122]

Kenyan courts have a textual basis for intervention in inter-cameral disputes contrary to the assertions by the dissenting judge in the Supreme Court's 2013 advisory reference. Justice Njoki argued that the Supreme Court should invoke the 'passive virtues' argument – as advocated by the American theorist Alexander Bickel–[123] to avoid resolving what she saw as political questions. However, the majority rightly viewed their duty as determining all constitutional questions brought before them, in order to achieve constitutional clarity and uphold the rule of law. Moreover, the majority's position was adopted by the High Court in 2019. Through this intervention in inter-cameral conflicts, the courts carved out a role as central actors in democratic governance. This means that its adjudication

120 Article 163(6), *Constitution of Kenya* (2010).

121 Article 165(d)(iii), *Constitution of Kenya* (2010).

122 Joseph Oloka-Onyango, *When courts do politics: Public interest law and litigation in East Africa*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2017, 7-8. *See also* Jutta Limbach, 'The concept of the supremacy of the constitution' 64(1) *Modern Law Review*, 2001, 1 (Joseph asserts that 'the scope of the principle [of supremacy of the constitution] becomes clear if we reformulate it thus: the supremacy of the constitution means the lower ranking of statute; and that at the same time implies the lower ranking of the legislature').

123 For an illuminating recent analysis of Bickel's theory, see Erin Delaney, 'Analyzing avoidance: Judicial strategy in comparative perspective' 66(1) *Duke Law Journal*, 2016, 1.

extends into the political sphere, given that the enactment of the DORBs is a political process.[124]

The Constitution embraces a co-operative quasi-federalism model[125] raising the expectation that most devolution-related conflicts will be resolved through political means. This is akin to Schmittian political constitutionalism that avoids frequent judicial intervention in devolution-related disputes. To illustrate, Article 110 on determining bills concerning counties envisages that a good faith engagement by the two Speakers can mediate inter-cameral conflicts obviating the need for judicial intervention. Additionally, as shown above, the courts have stressed that even where the two Speakers fail to agree, Article 113 establishes an intra-legislature dispute resolution mechanism between the two chambers, namely, a mediation committee to resolve deadlocks over contentious bills between the two chambers.

The Senate's tendency over the years to seek judicial resolution has thwarted the Shmittian political constitutionalism expectation. The intra-legislature process has failed due to the Senators' view of an attempt at 'power grab' of its legislative mandate by the National Assembly and its Speaker. The tendency could stymie any hope of building the institutional capacity of the legislature to manage and resolve inter-cameral conflicts. Within this context, given that the legislative process is in essence a political process, it is not good practice for the Senate to seek judicial intervention whenever the National Assembly disregards the its view unduly. Judicial intervention, though permissible, should be a measure of last resort in the resolution of inter-cameral conflicts.

The recurring nature of the inter-cameral conflicts, despite previous judicial intervention setting out the constitutional pathway for engagement between the chambers, suggests that legal constitutionalism has not been fully embraced. In any case, it is a truism that the judiciary must accrue a certain amount of institutional and political credibility before legal constitutionalists can realistically expect that the National Assembly will accept any decision limiting its powers.[126]

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[124] Walter Khobe, 'Rebel without a cause? Justice Njoki Ndung'u's legacy of dissent and the doctrine of separation of powers' 41 *The Platform*, 2019, 24.

[125] Article 6(2) of the Constitution provides: 'The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation'.

[126] See, in this regard, that the US Supreme Court first established the Court's power of judicial review over Acts of Congress in 1803, see *Marbury v Madison* (1803), The Supreme Court of the United States. But this horizontal judicial review was contentious and debated well into the twentieth century. See Charles Haines, *The American doctrine of judicial supremacy*, 2ed, University of California Press, Berkeley, California, 1959, 1-19.

Thus, it would be wise for Kenyan legislative chambers (especially the Senate) to explore alternative dispute resolution as a means for settlement of inter-cameral conflicts.

Article 189(4) and Section 35 of the Intergovernmental Relations Act (2012) advocate alternative dispute resolution (including negotiation, mediation and arbitration) of devolution-related conflicts, hence, prioritising political settlement over judicial intervention with respect to disputes between the two levels of government. The implication is that 'political' institutions, including the Council of Governors, the Attorney General, the National Treasury, and the Intergovernmental Relations Technical Committee, need to be roped in when resolving the inter-cameral conflicts between the legislative chambers where the intra-legislature mediation process has failed. Thus, these 'political' institutions would serve as an alternative site for inter-cameral mediation. For example, a dispute between county governments and the national government over the constitutionality of the 2016 DORA was partly resolved through mediation under the aegis of the Intergovernmental Relations Technical Committee.[127]

Under the terms of the Constitution, the Supreme Court and the High Court have jurisdiction to police the boundaries of actions by state organs that implicate devolution. Thus, the Supreme Court and the High Court serve as quasi-federal courts. How the courts choose to exercise such powers affects their own position in the constitutional order and the ways that order can be considered to reflect a version of legal constitutionalism or political constitutionalism. Indeed, this is why Albert Venn Dicey, the great expositor of parliamentary sovereignty, was wary of (quasi) federalism.[128] He equated it with 'legalism' and worried that it would naturally lead to 'the predominance of the judiciary in the constitution.'[129] The Kenyan case suggests that adoption of a quasi-federal and a bicameral legislative system have played an important role in the rise of judicial power. The key aspect of quasi-federalist instinct that has led to the cementing of the courts' centrality in political processes is the invitation by the Senate for judicial intervention in inter-cameral conflicts over the enactment of the DORBs.

However, this study shows that the empowering of the courts is still a work in progress as judicial intervention in inter-cameral conflicts is still contested by the National Assembly. The recurrent inter-cameral conflicts may be contrasted with situations where the National Assembly might disagree with a reading

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127 See *Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR.

128 See AV Dicey, *England's case against home rule*, 3ed, John Murray, London, 1887, viii.

129 AV Dicey, *Introduction to the study of the law of the constitution*, 7ed, Macmillan, London, 1908, 170.

of the Constitution by the courts that empowers the Senate, but acquiesce to the courts' decisions. Such acquiescence can, over time, shift into a powerful convention supporting judicial power.[130] In such circumstances, judicial decisions to empower the Senate might increase the power and relevance of the courts in their horizontal relationships. Thus, due to judicial decisions empowering the Senate, power may ebb from the legislature and flow to the courts.

5 Conclusion

In discharging a guardianship role over the legislative mandate of the Senate, the Kenyan Supreme Court and High Court have been instrumental in consolidating Kenya's horizontal separation of power and deliberative legislation-making processes.[131] It is noteworthy that in new constitutional contexts, the justification for judicial intervention often gains added currency where the challenge is to rebalance a system that previously hoarded political power at one site.[132] In the analysis of the emerging approach by the Supreme Court and the High Court, one can see a pattern through which in light of the expanding power of the National Assembly vis-à-vis the Senate, judicial intervention seeks to prevent this aggrandisement of power by the National Assembly.[133] This is important in the context of inter-cameral relations given that it is arguable that entrenching the practice of judicial intervention in legislative processes puts the National Assembly on notice that a piece of legislation un-procedurally enacted without the input of the Senate would be struck down by the courts as unconstitutional.[134] This leads to the assessment that the courts have played a decisive albeit contested role that has ensured that the Senate is not rendered superfluous but is an active actor in the legislative process. This reflects an overall

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130 Keith Whittington, *Political foundations of judicial supremacy: The presidency, the supreme court, and constitutional leadership in US history,* Princeton University Press, Princeton, 2007.

131 For a similar argument with respect to a similar role played by the Israeli Supreme Court *see* Yaniv Roznai, 'Constitutional paternalism: The Israeli supreme court as guardian of the Knesset' 51 *Verfassung und Recht in* Übersee *(VRÜ)*, 2018, 415-436.

132 Tom Daly, *The alchemists: Questioning our faith in courts as democracy-builders*, Cambridge University Press, Cambridge, 2017, 149.

133 On the notion of aggrandisement *see* Nancy Bermeo, 'On democratic backsliding' 27(1) *Journal of Democracy*, 2016, 5-19 (Nancy views aggrandisement as institutional changes, which limit opposition to institutional preferences, with respect to the focus of this paper, the preferences of the National Assembly).

134 For a similar argument in the context of Brazil and Colombia *see* Santiago García-Jaramillo and Camilo Valdivieso-León, 'Transforming the legislative: A pending task of Brazilian and Colombian constitutionalism' 5(3) *Revista de Investigações Constitucionais, Curitiba,* 2018, 43.

pattern of the Supreme Court and the High Court playing a guardianship role in protecting institutional constitutionalism.[135] In discharging this role, the courts have focused, arguably, on facilitating the functioning of bicameralism. Despite this laudable role played by the courts, it would be prudent if judicial intervention in inter-cameral conflicts is exercised as a last resort after the exhaustion of intra-parliamentary mediation processes.

[135] On the conceptualisation of judicial role that facilitates the work of democratic institutions *see* David Landau, 'A dynamic theory of judicial role' 55 *Boston College Law Review*, 2014, 1501-1503. *See also* Samuel Issacharoff, *Fragile democracies: Contested power in the era of constitutional courts*, Cambridge University Press, Cambridge, 2015.