



THE KENYAN CONSTITUTIONAL REFERENDUM OF 4TH AUGUST 2010

- a case study -

Published by

Democracy International

www.democracacy-international.org

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28th April 2011

Introduction and background

Referendums the world over serve as the citizens' veto power: with their votes the voters can endorse an issue put to them or they can shoot it down by delivering a NO verdict.

Whereas referendums in the developed world are usually triggered by citizens via popular initiatives, most of the referendums in the third world and in emerging democracies are usually decided on and organised by governments i.e. issues/policies are formulated by the government and are only brought to the citizens at the last minute for endorsement in a referendum. The often illiterate, uneducated and ignorant voters merely vote YES or NO - depending on how they have been instructed by their tribal leaders - without necessarily understanding the policies/issues at stake.

The Kenyan referendum that was held on 4th August 2010 was the second referendum ever to occur since Kenya got her independence in 1963. The first referendum was held in 2005 and it sought the people's consent to a change in the constitution. The citizens totally rejected the proposed new constitution as their views had not been incorporated into it; rather it was the work of the executive via the attorney general. The attorney general had single-handedly drafted a constitution that disregarded the people's will by giving more powers to the presidency. It therefore came as no surprise when the citizens overwhelmingly voted NO.

The outgoing constitution could only be replaced via a referendum, so the Kenyan referendum was compulsory if it was a question of the constitution being changed. It was a national referendum, meaning that all citizens, all provinces, districts and villages participated in the vote.

For many years Kenyans have demanded a constitution made by themselves to replace the one inherited from the colonialists. Kenyans have been yearning for a constitution that promotes democracy and wealth creation, a constitution that tackles the issue of skewed land ownership as well as the marginalization of some areas for tribal and political reasons. The country was thus ripe for constitutional change.

The mediation and peace efforts by former United Nations secretary-general Mr. Kofi Annan immediately after the post-election violence of 2007/2008 sought to find a permanent solution to Kenya's problems. It was agreed that a new constitution was one of the sure ways of addressing inequality and ensuring long-lasting peace in the country. Constitutional change was thus made top priority for the power sharing government in 2008.

Kenyans therefore endorsed the new constitution with joy as it envisions prosperity for all and equality of all citizens irrespective of their tribal or political affiliation. Having been drawn up in the 21st century, it is overall a modern constitution that seeks to radically transform the Kenyan

political, social and economic landscape. Kenyans now look forward to a total overhaul of the government's attitude and working style as from August next year when the incoming constitution becomes fully operational (with the exit of the current power-sharing government).

The new Constitution, which was approved by 68% of the voters and promulgated on 27 August 2010, replaces the independence constitution which had been criticized for allowing widespread corruption, impunity for wrongdoers and tribalism. It is also expected to bring more political stability by removing the winner-take-all system of the past. This will guard against the occurrence of post-electoral violence that usually has an ethnic dimension.

The new constitution institutes radical changes that devolve power, hence strengthening local governance and rectifying regional resource imbalances. Further changes include the establishment of an independent electoral commission and the limiting of presidential powers by eliminating the president's power to dissolve parliament at will.

There is no doubt that the new constitution brings fundamental change to Kenya. It aims to address problems that have plagued the country since independence - such as rampant and institutionalized corruption, political patronage, land grabbing, impunity and tribalism.

All these positive changes will most likely drive up investor confidence in the country, hence fostering more growth and a more prosperous future for the populace.

The Referendum Process

The referendum process was largely transparent and all inclusive; first a committee of expert lawyers went round the country and collected views from the people on what kind of constitution they wanted.

The committee of experts took several months to visit all the 8 Provinces and the 170 districts, so that by the end of the exercise, the experts had visited all the towns and the villages. Venues were hotel rooms, chief's compounds and stadiums/football pitches and all citizens were allowed to come and give their views. In urban constituencies/districts the sessions would be held in hotel lounges/conference rooms or any other spacious rooms available. The meetings would of course be comprised of local politicians and government officials e.g. the area Member of Parliament, area councillor, area Chiefs, area Assistant Chiefs, village elders, area business persons and the citizens in general. Everyone (if interested) had a chance to participate and contribute his/her views.

The people's views were put together and used to compile a draft constitution which was then again taken to the people for more discussions and input.

Citizens presented views which were then harmonized and taken to parliament for endorsement. Due to political divisions members of parliament were not able to get agreement to make even a single alteration to the draft, and they therefore passed it as it was.

There was proper dissemination of information; this was done by both the government (Ministry of Justice and Constitutional Affairs) and civil society (NGOs). International agencies such as the European Union and the United States Agency for International Development (USAID) sponsored the printing of millions of copies of the constitution that were then distributed to the people all over the country.

Civic education was also done by politicians as they showed support for the draft to boost their (re)election in next year's general election.

The new constitution was treated as a government project, hence awareness raising as well as its publicity and promotion became the government's top priority.

After the draft was published, the committee of experts did not return to the people in villages and in towns; rather the people were given copies of the draft constitution to read and then a one month period was set for the citizens to bring in suggestions via email, postal mail or simply by hand delivered letters, petitions, views, objections etc. Communities, churches, NGOs and individuals thus sent their objections and suggestions – these were all looked at and some were incorporated into the final draft that we eventually voted for.

The new constitution elicited lots of reactions: more so due to fear of change - some politicians made a lot of noise about the introduction of a recall clause; they wanted it removed from the constitution. They also made noise about the limitations on the maximum size of land ownership. However they could not get the people's support as most citizens are landless squatters as their land had been grabbed by the same politicians.

The churches made a lot of noise, saying the new constitution would elevate Islam above other religions. They were angered by the fact that Khadhi courts had been allowed; they thus saw this as the introduction of sharia law into the country. Kenya being a country with a dominantly Christian population (86% of Kenyans are Christians), this was a major threat to the passing of the proposed constitution. The citizens were however assured that the courts would not affect

them in any way as they handled disputes among Muslims only; moreover, they were subordinate to the appeal court as well as the supreme court.

The churches also argued that the proposed constitution left loopholes via which abortion could be legalized. They also cited other loopholes that would have allowed same sex/gay marriages. This led to heated arguments, since Kenyans are generally traditional and conservative; even the old/outgoing constitution had criminalized same sex unions or gaysim. The new constitution still criminalises homosexual behaviour, which can incur jail terms of 5-14 years. The people were however urged to just go on and vote YES with the assurance that the loopholes would be sealed via amendments in parliament immediately thereafter.

The issue of devolution also became a hot subject; a majority of Kenyans wanted a federal system while the ruling class insisted on the current centralized system. The communities were equally divided on the issue. A compromise was reached in the establishment of 47 counties headed by popularly elected governors yet still attached to the central government. For example, the central government retains the power to suspend any county government.

The new constitution also touched raw nerves by stating that women ought to receive an equal inheritance as their brothers, including land. This is still a sensitive issue, as in most Kenyan cultures women/daughters do not inherit land as they are expected to get married and get land from their husbands.

The referendum process was widely peaceful, followed due process and was accepted as free and fair by a huge percentage of the populace. In a country where major decisions take a tribal angle, the new constitution was sure to succeed as all the major tribes supported it. The Luhya, Kikuyu, the Luo, the Kisii, and the Kamba all endorsed it; there was no separate tribal position this time, hence it was a true Kenyan Constitution. No major political party opposed the constitution. The major boost to the campaign was the fact that all former rivals were now reading from the same script and speaking with one voice in support of the new constitution. The President (Party of National Unity-PNU), The Prime Minister (Orange Democratic Movement-ODM), The Vice President (ODM-K), Deputy Prime Minister (KANU – Kenya African National Union), Water Minister (NARC – National Rainbow Coalition) – all these members of the power sharing/coalition government supported the constitution, hence there was no major opposition. The citizens also voted YES so that they didn't embarrass their kinsmen who are in leadership positions. For example, even if the Kikuyu people would have wanted to vote NO, they couldn't do that since that would bring embarrassment to their son who is the president; it was the same for the Luos – they could not vote against the constitution as this would be quite embarrassing to their tribesman who is the prime minister.

The NO side was further weakened by the fact that their leaders were the same ones who had been involved in the drafting of the very constitution they were now rejecting. The leader of the NO team, Honorable William Ruto, was one of those who participated in compiling the draft constitution; he was therefore hard pressed to explain how and why he had changed his mind and begun opposing the constitution.

The people also had no choice but to vote YES; the only alternative they had was to remain with the old constitution, which promoted tribalism and tolerated corruption, discrimination and impunity. All citizens were tired of the old constitution so that even those in the NO team were also calling for another new constitution.

The fact that the referendum was prepared and conducted by a new electoral body also made it be accepted as fair and trustworthy. The Electoral Commission of Kenya (ECK) that was responsible for the rigged election of 2007 was dismantled and all its officers fired; a new one - the Interim Independent Electoral Commission (IIEC) - was formed to oversee the referendum process.

The media offered a platform for the NO and YES teams to air their views, their fears, aspirations and the reasons for their positions. However the Kenyan media was overall not neutral – it had read the public mood and since the people wanted a new constitution, the media was to a large extent supportive of the YES side. There were a lot of critical and sarcastic comments towards the NO side.

The media in Kenya is largely owned and run by the majority tribes e.g. the Kikuyu, Luhya and Luo. Since these communities were 100% in favour of a YES vote, the radio and TV stations also inevitably had to lean towards the YES side. The media was largely a campaign tool for the passing of the constitution.

Changes brought about by the new constitution

The new constitution introduces a totally new look legislature, replacing the current unicameral National Assembly with a bi-cameral one, where the senate becomes an upper house, while the current national assembly becomes the lower house. The upper house shall consist of elected senators representing the 47 counties; the lower house shall be made up of members of parliament representing the 290 constituencies.

In the judiciary, the new constitution introduces a new court, the Supreme Court. This new court shall be the highest judiciary organ in the country and it shall consist of the Chief Justice, the Deputy Chief Justice and five other judges. This court will handle appeals from the

Court of Appeal; it will also be the one to preside over Presidential impeachment proceedings. The court shall also be charged with the responsibility of hearing presidential election petitions and all objections relating to the validity of the presidential election. The new constitution also calls for the vetting of all current judges so that corrupt ones can be weeded out.

The new law has many radical proposals aimed at trimming the massive powers of the presidency; it redistributes some of the president's powers to parliament and others to executive governors of 47 counties. Chapter Eleven on devolution establishes two levels of government: power is shared between the central government and devolved units known as counties. It recognizes that there is a considerable amount of diversity in respect of language, religion and culture among Kenyans and seeks to promote democracy, equity and national unity among regions with varying characteristics.

County Assemblies and Executives will make it easier for marginalized groups and individuals to seek and access state power. The devolved governments will also replace the unelected, unresponsive and unaccountable provincial administration which has been an oppressive colonial relic. This will give people in the villages a taste of real power.

Responsibility for basic health services, agriculture, county roads and water will therefore be devolved to the counties.

Land has always been a sensitive issue in Kenya and has been the cause of numerous ethnic clashes over the years; the outgoing constitution allowed the head of state to allocate public land to influential individuals, hence the families of former Presidents as well as those of prominent politicians are well known to be among Kenya's largest landowners.

Chapter Five of the new/incoming constitution establishes a framework to ensure that the process of allocation, adjudication, consolidation and registration of land is done equitably, transparently and sustainably. Section 68 seeks to regulate the minimum and maximum land holding acreages, thus promoting sustainable use of land resources and conservation. It will prevent a few individuals from hoarding arable land to the exclusion of the majority. Young Kenyans who had been disinherited and made landless by the current ruling elite are most enthusiastic about this clause because it guarantees them and the future generations of Kenyans access to a place they can call home.

Maximum leases on land would be reduced, retroactively, to 99 years from 999 years, making ownership accessible to more Kenyans, and property handed out by politicians to their supporters will become public land. An Independent National Land Commission shall be created to maintain oversight and manage all public land among other related duties.

Chapter Nine of the new constitution fundamentally changes the way state power is exercised in Kenya. The Cabinet will be composed of professionals who owe their allegiance to the people. Currently, elected politicians appointed on the basis of perceived loyalty to the

president serve in the Cabinet. They are not accountable to the people and their judgments are often blurred by the interests of their ethnic and geographical constituencies. Parliament (the Senate and the National Assembly) has been granted the power to vet and approve Cabinet and virtually all other state appointments. Currently Parliamentary Standing Committees merely audit the process of the exercise of power by the Executive and their perfunctory interventions are often a “mere act after the fact”.

Apart from the fact that the Cabinet will be appointed from outside parliament, its size will be limited to 22 members. The current Cabinet has 41 ministers, all of them appointed from among prominent politicians. The post of Prime Minister will also cease to exist.

Chapter Seven, section 85 allows independent candidates to run for office in both national and county governments, hence the current dictatorship in political parties will wither as those locked out of party primaries will have the option of running as independents. Article 137(b) removes the minimum age limit of 35 for one to run as President; the new law allows people to run as long as they are adults.

Chapter One of the draft entrenches popular sovereignty and for the first time decrees that the three arms of government - the Executive, the Parliament and the Judiciary - are all subordinate to the sovereign will of the citizens. Officers and organs of the State at national and county level will henceforth exercise delegated authority for and on behalf of the people.

The Bill of Rights is very innovative. It elevates the basic freedoms and rights of a citizen above the interests of the state and or government. Section 23(2) spreads the jurisdiction for determining cases relating to violation of rights and freedoms to subordinate courts. This will ease the search for justice by economically disadvantaged people in rural villages. The bill of rights also recognizes the socio-economic rights of the Kenyan citizens.

Chapter Three permits dual citizenship, thus allowing a Kenyan who is a citizen by birth to lawfully acquire the citizenship of another country. This will solve the problems faced by many Kenyans in the diaspora and the pastoralist communities such as the Gabra and the Maasai shall thus be free to move their livestock across borders where they reside.

Apart from guaranteeing media freedom in article 34, the new law caters for an advanced Human Rights and Equality Commission that will also have power to investigate and summon people involved in human rights abuses within the government and with the public. (Article 252)

The new constitution brings about changes that show that Kenyans want a radical way. For example, Kenyans will now enjoy the right of recall (Chapter Eight); section 104 gives the people the right to sanction senators and Members of Parliament who act against the wishes of their constituents. Voters will have the power to recall legislators who prove inadequate in their role as representatives of their counties and constituencies.

The new constitution includes an Integrity Chapter (Chapter Six). This requires an Independent Ethics Commission to be set up that will monitor compliance with Integrity in all government institutions and make investigations and recommendations to the appropriate authorities i.e. the Kenya Anti Corruption Authority. Most Kenyans therefore believe that the new constitution will help end the culture of impunity and fight corruption.

The new constitution reduces the power of politicians and keeps a check on presidential powers, making the president accountable to the people. Independent bodies will also audit public finances and review land rights. Due to all these provisions, the new constitution is hailed as the blueprint for the expulsion of the culture of impunity and corruption and a road-map towards the realization of Kenya's strategic plan (vision 2030)

Since the new constitution was a politically negotiated constitution coming on the heels of tribal violence resulting from the disputed 2007 general elections, it is expected to unite the Nation and help in ending negative ethnicity. It shall ensure there is a fair representation of people from different ethnic backgrounds in the cabinet and the civil service. It is thus expected to rid Kenya of all its ills and allow its citizens, no matter what their tribe or colour, to join hands in building Kenya into a peaceful and prosperous nation. The goal of nipping ethnic tensions in the bud shall be realized as the new constitution aims to spread political power among dozens of ethnic groups, therefore creating a sense of the equality of all citizens.

Chapter 12, Part 4 focuses on the equitable sharing of resources between the National government and the County governments through a resolution of Parliament. Article 204 sets up an Equalization Fund to improve access to basic needs for the marginalized communities. This move is aimed at remedying the current imbalance in wealth and infrastructure where some regions are in dire want of roads, schools and hospitals while others have them in plenty due to favoritism by successive governments.

One change that will bring a sigh of relief to many road users in Kenya is the construction of better roads and the provision of health and water services to all in the poorer areas. These will be funded through the 15 percent of the national budget that will go to the regional counties. Kenyan politicians will also for the first time have to start paying taxes on their salaries and allowances like all other citizens.

The new constitution will definitely change the way the country has been run since colonial times. Scholars have also argued that through the new devolved counties, economic development in the rural areas will take off and inequality among regions made a thing of the past.

Marginalized communities such as the indigenous pastoralist tribes have reason to smile under the new constitution as they are given special recognition and attention. The new law provides several avenues for the pursuit and strengthening of indigenous peoples' rights: it obliges the state to provide for adequate representation of "marginalized groups" at all levels of

government, execute affirmative action on behalf of these groups, and promote the use of indigenous languages and the free expression of traditional cultures (Article 7).

The state is also further compelled to recognize the role of indigenous technologies in the development of the nation. Not only shall the state promote the intellectual property rights of the people of Kenya, Parliament is also required to enact legislations that will ensure communities receive compensation or royalties for the use of their cultures and cultural heritage. Proper representation of the marginalized communities via affirmative action is also catered for in the new law.

The way forward

Whereas no constitution in the world is perfect, the new constitution still needs to be beefed up so that it can better cater for the interests and aspirations of the citizens. At the top of the “to do” list ought to be proper and meaningful devolution: the size and responsibilities of devolved units ought to be increased, the devolved units ought not be more than 18 as this greatly dilutes the concept of devolution.

Proper devolution ought to entail semi-autonomous units which have the capacity to manage their affairs politically, socially and economically. The idea of devolution most appealing

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