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## 20 years of “sweat and blood”: lessons from the constitutional review process in Kenya

Surrounded by conflict-ridden countries, Kenya was considered a model of political stability in East Africa. The 2002 elections saw the defeat of Moi, president for 24 years, and of the party in power since independence; the peaceful transition created hopes that Kenya would grow prosperous in its new democratic environment. However, the 2007 elections were by far the most deadly and destructive violence ever experienced in Kenya<sup>1</sup>. Foreign diplomatic mediation led to the formation of a Grand Coalition Government to stabilise the country.

On the 1<sup>st</sup> of April 2010, Parliament passed the final draft of the new proposed Constitution. The people of Kenya will have the last word on the Constitution by approving or rejecting it through a referendum. Will this new Constitution contribute to increase political stability and strengthen Kenyan democracy? How will this Constitution help to prevent future conflicts?

We cannot appreciate the relevance and implications of

the new Constitution without understanding the history of the constitutional reform process and how this process has been intertwined with the political life of Kenya and the post-election violence. In particular, it will be important to analyse how since 2001 the key issues and conflicts relating to constitutional reforms are directly linked with the complex relationship between the President Mwai Kibaki and the Prime Minister Raila Odinga, the two main contestants in the presidential elections of December 2007 which led to the violent post-election conflict.

This paper will outline the steps of this constitutional reform and the political context in which it is located. It will also explore the implication of the reform in enabling institutions to deliver growth and development. Kenya is a very interesting example because it represents the experience of an emerging democracy undertaking a popular constitutional reform process, a situation that other countries may face in the coming years.

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### Abstract

The process of drafting a new Constitution represents somewhat a landmark in the Kenyan political context.

The new Constitution, that should substitute the old one, deriving from colonialism and autocracy, has been at the centre of the political debate of Kenya since the '90s. Its design process has been sparked some of the most important political innovations in Kenyan politics of the last 10 years.

The Policy Brief will analyze the steps of the constitutional reform and will try to draw meaningful policy lessons concerning the implication of the reform in enabling institutions to deliver growth and development.

Moreover, this analysis is useful in so far as it explores the experience of an emerging democracy undertaking a popular constitutional reform process, a situation that other countries may face in the coming years.

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<sup>1</sup> Commission of Inquiry into the Post Election Violence (CIPEV), *Final Report*, 2008.

## From the colonial Constitution to the current draft

When the British understood that they could no longer delay the independence of Kenya, they convened the Lancaster House Conferences in Britain to ensure a smooth transition and craft a Constitution for the new country. The result was a mix of British law and colonial laws already enforced in Kenya. That Constitution was then amended several times to further concentrate executive power into the hands of the President<sup>2</sup>.

Kenyatta, the first President, created a one-party state in 1969 to curb dissent; his successor, Moi, after a failed *coup d'état* in 1982, changed the Constitution to legally ban opposing political parties. Therefore, up to the present many Kenyans see in the current Constitution the legacy of colonialism and despotic political oppression, while they associate a new Constitution with democratisation and political participation.

Popular mobilisation for constitutional reforms began in 1990 in the attempt to obtain multiparty elections and greater political freedom. Under strong foreign and domestic pressure, Moi allowed the necessary constitutional changes to make possible the first multiparty elections in 1992. In 2001, the Constitution of Kenya Review Act marked the beginning of the project to rewrite the Constitution entirely. The key demands of the

reformers were to reduce the powers of the President and to grant political freedom.

A national conference composed of 629 delegates including all the MPs, representatives from each district and political party in Kenya, as well as from religious, professional, and other civil organizations was in charge of preparing a draft.

While this process was going on, the 2002 elections approached and Kibaki, the candidate opposing Moi's designated successor, promised to give Kenya a new Constitution that would limit presidential powers within the first 100 days of his mandate. Kibaki built a wide-ranging alliance by publicly promising his main ally, Raila Odinga, the new position of Prime Minister, to be created under the new Constitution.

After Kibaki's victory in the presidential elections, the hot issues discussed at the national conference became the limits to the president's power by introducing a Prime Minister (by far the major issue at stake); devolution, increasing the power of regional and local authorities; and the Khadis courts, a system granted in the current Constitution that allows Muslims to solve civil suits through their religious courts if both parties agree. The discussion on the Prime Minister was not an institutional debate on the merits of a government system with a President and a Prime Minister, but rather on the support or opposition of Odinga as a Prime Minister.

While Odinga pretended to have the new position of ex-

ecutive Prime Minister, the President opposed the position's creation and did not accept the so-called Bomas Draft proposed by the national conference. Odinga boycotted the following steps of the review process and the President proceeded to amend the reformist draft until it lost its prerogative of reducing presidential powers.

After Parliament's ratification, the new proposal called the Wako Draft had to undergo a popular referendum introduced by a High Court's ruling. Odinga gathered together a broad and diversified coalition of actors to reject the referendum. To promote the popular participation of illiterate adults, Kenyans opposed to the new Constitution were invited to make a cross on an orange and those supporting it on a banana. In November 2005, a relatively peaceful and fair vote proclaimed the victory of the Oranges (the no-coalition voters) with 57% of the votes.

Several analysts read the results as a referendum on the presidential performance rather than on the Constitution itself. Many expressed concerns that the referendum vote followed ethnic lines. However, all the commentators acknowledged that the fairness of the referendum and the President's recognition of the defeat was a milestone in the consolidation of Kenya's democracy. Despite the rejection, everyone agreed on the need for continuing the reform process; an editorial of the *Daily Nation*, the main Kenya newspaper, expressed this feeling well: «It seems difficult to imagine that

<sup>2</sup> From the independence up to 1990, 42 amendments were passed.

the people will want to continue with the Lancaster House Constitution – one imposed on them by the outgoing colonial regime in its own exploitative interests and then systematically ruined by the post-independence governments in their own tyrannical interests»<sup>3</sup>.

The President reacted by suspending Parliament and changing the Cabinet in an attempt to create an executive more representative of the new political situation. He also postponed indefinitely the hot topic of constitutional reform. The winning coalition formed the Orange Democratic Movement which, despite being a heterogeneous and conflict-filled group, agreed to support Odinga as the candidate for the 2007 presidential elections.

To understand the political situation, it is important to note that Mwai Kibaki is a Kikuyu, the main ethnicity in Kenya and the ethnicity of the first president, and most of the Mau Mau rebels who fought the British in the '50s. Since independence, the patronage politics of Kenyatta favoured the Kikuyu who are still occupying the majority of the political and economically powerful positions. Raila Odinga is a Luo, the second largest ethnicity, his father was the main representative of the Luo in the national movement and was the Vice-President of Kenyatta, and when he disagreed with the President and resigned, he was jailed. The public agreement between

Kibaki and Odinga reconciled the two parties and led to the electoral victory in 2002, but the refusal of Kibaki to respect the agreement and nominate Odinga as a Prime Minister through the new ad-hoc Constitution was perceived by the Luo as a further frustration to their ambitions after what they perceived as 40 years of Kikuyu's dominance<sup>4</sup>. Kibaki's political defeat in the referendum was seen as Luo's victory, and Odinga's presidential campaign had the implicit discourse that the time has come for Luo to be in power. When people saw that the results of the presidential elections of 2007 announcing Odinga's victory where suddenly changed and withdrew until the electoral commission announced Kibaki's victory, the violence allegedly promoted by the political leadership exploded, killing more than 1,100 people and displacing more than 350,000<sup>5</sup>.

International pressure and the intervention of foreign mediators, in particular Kofi Annan, contributed to reach a National Accord to reinstate stability. The accord established the nomination of Odinga as Prime Minister with supposedly equal powers to the President and the distribution of government position to all the parties creating the biggest and most expensive government in the history of

Kenya. Ninety-two out of 222 MPs were part of the executive, creating a mastodontic and paralysed government unable to take any significant decision<sup>6</sup>. Moreover, since the rivalry between the President and the Prime Minister is still strong, it happens that the Cabinet does not meet for several months.

It is in this context that in 2008, through the Constitution of Kenya Review Act, the project for a new Constitution was revived. A small committee of experts composed of 12 members, including three foreigners, was mandated to analyze the existing draft Constitutions, identify contentious issues, invite proposals from Kenyans on those issues and then draft a harmonized Constitution which was published in November last year. This document was distributed widely across the country together with the main newspaper and many copies were made freely available to whoever wanted to distribute them nationwide. People were given 21 days to submit their comments and views; the committee of experts had another 21 days to amend its draft according to citizens' views. Different civil society and interest groups bought conspicuous amounts of space in the main newspapers to express their views and concerns, and the experts incorporated some of these views and sent the new draft to the Parliament Selected Commit-

<sup>3</sup> Editorial, *Heed the People's Wishes*, in «Daily Nation», November 23, 2005.

<sup>4</sup> The second President, Moi, was not a Kiyuyu but a Kalenjin and he bestowed many privileges on his ethnic group. However, the Kikuyu group remained in power, for instance, his Vice-President for 11 years was Kibaki.

<sup>5</sup> Commission of Inquiry into the Post-Election Violence (CIPEV), *Final Report*, cit.

<sup>6</sup> The new government cost 800 million US dollars more than the previous one. A. EHRENKRANZ, Kenya, *Where It Pays to be a Politician*, in «Newsweek», April 18, 2008.

tee which included prominent government ministers. There, the draft remained stacked amongst issues for political debate, but finally a strongly revised version found consensus. The figure of the Prime Minister was eliminated and the President maintained major powers; however, in those days, an opinion poll showed the incredible popularity of Odinga if presidential elections were to happen soon. Perceiving himself as the most probable future President, he had no problem with the revised chart.

When the Constitution reached the Parliament, the President banned MPs from foreign trips and pushed to maintain the strict deadline of 30 days for the discussion. More than 150 amendments were presented by the MPs and political parties, but strategically the government put pressure on individuals to withdraw amendments and the quorum to pass amendments was never reached with MPs stepping in and out of Parliament. With the great satisfaction of the President and the Prime Minister, the Constitution passed without amendments. On the 6<sup>th</sup> of May, the attorney general published the draft and now the Interim Independent Electoral Commission should announce the date for the referendum, which should take place by early August.

The day before the Parliament vote on the new draft, the *Daily Nation*, the major newspaper in Kenya, stated that this Constitution was «the product of 20 years of sweat

and blood»<sup>7</sup>. And after its approval the front-page headline was «Kenya will never be the same again»<sup>8</sup>. However, the road to the referendum is not so smooth.

The first to express his refusal of the new Constitution was former President Moi, declaring that «it appears as if the country is being treated like a testing ground for foreign ideas, some of which are weird»<sup>9</sup>. A couple of weeks later he clarified his opposition to the section on land, which gives the power to limit the size of privately-owned land to the National Land Commission<sup>10</sup>.

Shortly after the Parliament's approval, the National Council of Churches of Kenya, which represents many protestant Churches, announced their «no» to the new Constitution on the grounds that the Constitution did not state that life starts at conception, and therefore the article on abortion may have allowed Parliament to legalise it in future. Moreover, they opposed the Kadhis courts accusing the Constitution of giving Muslims privileged status, despite the fact that Kadhis courts have always been there. The Catholic Church immediately made the same declaration, inviting its faithful to oppose the Constitution on the same two points.

Due to the strong political influence of the churches, the government had no alternative than to change the road map to the new Constitution and open negotiations with the churches. The failure of this negotiation led the churches to stick to their opposition campaign and launch a «no» campaign. At the same time, some ministers opposed the new draft (despite having being among the key drafters), and opened their «no» campaign by giving misleading information such as that the new Constitution will deprive people of their land.

### Lesson learnt

Constitutional reforms will remain an important process throughout the world, in particular in Africa where new democracies emerge and people demand institutions that correspond to their desires. Therefore, this case study is not only important as an explanation of the complicated relationship between politics and constitutional review, but as an example of constitutional design processes.

Kenya's experience could be even more significant, since African countries which may need a constitutional reform are coming out from strong political and social conflicts, and Kenya can provide some useful lessons in the attempt to design such reform processes adequately in order to prevent conflicts and possibly mitigate ongoing ones. However, the first Kenyan lesson is that since such process and related potential conflicts are so interlinked with the political, historical, social and cul-

<sup>7</sup> In «Daily Nation», March 30, 2010.

<sup>8</sup> In «Daily Nation», April 2, 2010.

<sup>9</sup> In «Daily Nation», April 6, 2010.

<sup>10</sup> Together with Kenyatta family, Moi is one of the largest landowners in Kenya. Same reaction from minister Michuki one of the richest men due to his large tea plantations.

tural context, every reform project has to be tailored to the country. Moreover, the Kenyan constitutional reform has been a popular process intertwined with the political life of the country for over 20 years, other countries may face a quicker process within the context of a more drastic regime's transition, which will entail different challenges.

### **Need for a process independent from political competition**

The Kenya experience shows how the constitutional reform has been hijacked for political competition; it has been used as an electoral promise to the voters and as a promise of a reward to the ally through the institution of a Prime Minister. The coalition constructed against the proposed Constitution in 2005 has thus become a political formation, the Orange Democratic Movement, which has played a fundamental role in the following elections.

The constitutional review process and political competition have overlapped in an unproductive way, prioritising the creation of a Constitution that fits the current political struggle rather than the design of sustainable institutions in the long-term. The change of the political situation has led to the loss of the initial motivations for the reform, namely to reduce presidential power.

In her study of the Kenyan constitutional design process, Bannon argued that «well-designed procedural rules can increase the cost of altering the status quo and thereby

constrain behaviour. [...] Such measures would help ensure that politically motivated deviations from the rules were public and could not be justified on pre-textual grounds»<sup>11</sup>. The review process cannot exclude Parliament or government, but the case study demonstrated that a small committee of experts, without political interests, in charge of harmonising different inputs designed a good draft that was the base for political negotiations. Another tool that would help the separation of constitutional drafting from political competition is to have new Constitutions enforced after new elections, so that politicians are not designing it knowing who will benefit from it, as in the case of the creation of the Prime Minister position under Kibaki's first mandate.

### **Consistency and cohesiveness**

With its multiple drafting stages, the incredibly high number of actors involved and the need to accommodate all the different interests, the institutional design lacks coherence and the draft appears as a patchwork of the requests of the different interest groups rather than a carefully-crafted project where different powers are balanced through cohesive institutions. The draft is a detailed document of over 200 pages; probably a lighter draft, which would have left to the legislator the competence on details, would

have reduced conflicts and speeded up the process. Small regulatory details in the draft will now need a constitutional review process to be amended.

### **Participation and education**

In Kenya, despite foreign support for the change<sup>12</sup>, the reform has come out of an internal popular desire and the process took over 20 years. There was strong public interest in Kenya's constitutional review process. Every development has always been on the first pages of all the main newspapers and highly followed by citizens. Radio programmes organised debates and every type of media was urging citizens to read the draft. However, the entire debate was monopolised by secondary issues such as abortion and the start of life, and the issue of the Kadhis courts<sup>13</sup>. Other fundamental issues such as institutional design of devolution or the issue of land – which is the single-most important political issue in Kenya<sup>14</sup> – have been

<sup>12</sup> In a call to Kibaki, Obama pledged economic support for the referendum. Editorial, *Obama pledges funds for referendum*, in «Sunday Nation», January 24, 2010.

<sup>13</sup> The Constitution states that abortion is illegal but gives the Parliament the power to legislate on this matter. It also allows therapeutic abortion if the life of the mother is in danger. The Churches wanted an article that would state the right to life and that life starts at conception and ends with natural death in order to render any law on the matter unconstitutional.

<sup>14</sup> D. PORTER - J.A. BRYANT - G. THOMPSON, *Development in*

<sup>11</sup> A. BANNON, *Designing a Constitution-Drafting Process: Lessons from Kenya*, in «The Yale Law Journal», June, 2007.

discussed superficially often providing purposely false information to generate political support.

The information and education campaigns were undoubtedly a success, with hundreds of thousands of copies been distributed across the country and people reading them in every place for several weeks. On the experience of the failure of the first referendum, partly due to the changes imposed by Kibaki's supporters on the Bomas Draft, people were highly involved in the discussion and informed about the process.

Such high level of popular participation in the process was necessary because, as we have already explained at the beginning, the constitutional reform movement was born from the desire for democracy, participation and political freedom against a Constitution considered the product of colonialism and political oppression. The prompt publication of the different drafts and changes on the website of the committee of experts allowed journalists, commentators and citizens to access the text and discuss its contents, partly countering the diffusion of misinformation from political interest groups.

### Ethnic conflict

In a country where politics is strongly linked to ethnicity, the process of creating new political institutions will create ethnic tension, especially if it involves political conflict. Throughout the process eth-

nicity was involved in negotiations, and even though the first referendum was peaceful, tension generated there and the interpretation of results as a victory for the Luo group who was preparing its turn to govern contributed to prepare the environment that led to the post-election violence. Perception of ethnic and religious favouritism has been used by the opponents of the new draft to undermine its legitimacy.

### Devolution

One of the major problems of the current Kenyan institutional system is excessively centralised power; local governments have little authority and resources to respond to the needs of their territory with adequate services, thus any local development is linked to central government intervention.

The new proposed draft deals with this issue by creating county governments. Kenya is divided into 47 counties which will be given the power to legislate. While devolution, especially in terms of resource management, is a needed change, the proposed Constitution will create costly legislative structures which will render the country a possibly even more confused archipelago of different local legislations, increasing uncertainty and reducing incentives for private investment.

The proposed draft creates these new institutions, the county governments, without eliminating other forms of local government such as the Provincial Administration with Chiefs nominated by the gov-

ernment in every location. This will increase institutional conflict and confusion among the different levels of power rather than simplifying them.

Moreover, these new structures – together with the increase in the number of MPs and the institution of a senate – will dramatically increase the costs of the political system which is already one of the most expensive in Africa, with its politicians among the most highly paid in the world<sup>15</sup>.

The following points summarises the policy learning provided by the Kenya's experience:

- the importance of a **constitutional reform process independent from political competition**;
- **drafters should aim at crafting a cohesive text rather than a patchwork of different interests**. A shorter text outlining general principles and values may have been more easily consistent than an over-detailed one;
- **an effective public communication campaign** kept **citizens** fully aware and involved in the process. However, because of the high public interest in it, politicians have exploited the constitutional process for other political goals;
- in a country where ethnicity is a relevant co-factor of internal conflict, the constitutional process should consider seriously and **re-**

*practice: paved with good intentions*, Routledge, 1991.

<sup>15</sup> A. EHRENKRANZ, *Kenya, Where It Pays to be a Politician*, in «Newsweek», April 18, 2008.

respond adequately and promptly to any allegation, true or false, of ethnic favouritism;

- important principles such as **the decentralisation of important services and power, should be translated into an effective institutional design** and *not* into a multiplication of state bureaucracy and the creation of costly and unsustainable institution.

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