

Kenya's Constitutional Journey: Taking Stock of Achievements and Challenges

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A. Historical Overview and Background

Kenya is a former British colony that attained internal self- rule on 1st June, 1963 following negotiations between Kenyan leaders and the then British colonial government at Lancaster House. Negotiations had taken place for a period of three years, between 1960 and 1963, with Kenyan representatives being drawn from the two major political parties then, the Kenya African national Union (KANU) and the Kenya African Democratic Union (KADU). Full independence was achieved on 12th December, 1963. Since independence, Kenya has had three constitutions namely; the Independence Constitution, the 1964 Constitution and the 2010 Constitution, which is currently in force.¹

At independence, the parliamentary structure was bi-cameral, with checks and balances over executive power. The independence constitution was well crafted and fitted with safeguards, checks and balances that fully embraced democracy, rule of law and the concept of separation of powers. Salient features of this constitution included; the distribution of power between the centre and the regions arising from the creation of a semi-federal system of government, a bi-cameral parliament consisting of a fully elected House of Representatives and a Senate, clear provisions separating power between the three arms of government, provisions allowing political pluralism, a judiciary that was fully competent and independent and provisions regarding the Bill of Rights.

Ideological differences on how the country should be run began to emerge, and so in 1964, Kenya began the perilous path that corroded the very principles the independence constitution stood for. The path that tore the concept of democracy to pieces through 38 hasty, self-propagating amendments aimed almost solely at centralising and consolidating power in the executive. So drastic and numerous were these amendments that the independence constitution completely lost its identity and became known, for over 40 years, as the 1964 constitution. The first amendment in 1964 repealed the position of Prime Minister and created the office of the Executive President who became Head of State, replacing the Queen and Head of Government, in place of the Prime Minister. This was the first in a se-

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1 Kenya Constitution, A Short History of the 2010 Kenya Constitution; <http://www.kenyaconstitution.org> (accessed on 19 October 2015).

ries of amendments that led to the concentration of power in the Presidency. KADU dissolved and merged with KANU and Kenya became a *de facto* one party state.

Concentrating power in the executive gave the President power to appoint the Cabinet without consultation or parliamentary approval. It also gave him the power to appoint the Chief Justice,² Judges as well as the Attorney General³ (who held office at his pleasure). Puisne judges were appointed on the recommendation of the Judicial Service Commission, whose members comprised of purely presidential appointees.⁴ To further compound the issue, it was the responsibility of the President to appoint the chairperson and other commissioners to the Electoral Commission.⁵

In 1968 the electoral legislation was amended such that political parties could no longer put forward candidates either at the national or local level if they did not have registered branches in the areas concerned.⁶ It was disastrous that although the independence government considered national unity and national development as over-riding goals to be pursued, the Kenyatta government set in motion a series of constitutional amendments that altered all the democratic safety-valves leading to the emergence of an imperial presidency at its best.⁷

The Constitution of Kenya Amendment Act (Act No 7 of 1982) was enacted in June 1982 and it introduced the notorious Section 2A which turned Kenya into a *de jure* one-party state. Barely two months later in August a section of the military attempted to overthrow the government by staging a coup d'état. The years following the coup up until 1991 were characterised by government crackdowns on political 'dissidents', political assassinations, detention and torture of activists crusading for constitutional reform, as well as the flight of pro-reform academics, students and politicians.

2 Section 61 (1) of the retired constitution stated that 'The Chief Justice shall be appointed by the President.'

3 Section 109 (1) of the 1964 constitution stated thus; 'The Attorney-General shall be appointed by the President'.

4 Section 68(1) of the 1964 constitution established a Judicial Service Commission consisting of the Chief Justice as chairman; the Attorney General; two persons for the time-being designated by the President from among the puisne judges of the High Court and the judges of the Court of Appeal, and the Chairman of the Public Service Commission.

5 Section 41 of the 1964 Constitution stated that; 'There shall be an Electoral Commission, which shall consist of a chairman and not less than four other members appointed by the President.'

6 *Burke, Fred G.*, Public Administration in Africa: The Legacy of Inherited Colonial Institutions. Journal of Comparative Administration (Beverly Hills) November, 1969; p. 409.

7 *Amadi, Henry*, Persistence and Change of Neo-Patrimonialism in Post-Independence Kenya, 2009; [erepository.uonbi.ac.ke/bitstream/handle/11295/40279/Henry%20Amadi.pdf](https://doi.org/10.5771/2383-8270-2015-1-180) (accessed on 27 October 2015).

B. The Clamour for Constitutional Reform

The year 1991 saw the beginning of the clamour for constitutional reform. Violent demonstrations, protests, mass action and public rallies fired up the reform wave in the country. Parliamentary parties and civil societies formed forums to agitate constitutional change. It was in the same year that the single-party constitutional rule was repealed. 1992 witnessed the first multi-party elections being conducted even though power did not change hands. There was also the formation of the National Convention Assembly which was formed to lobby for comprehensive constitutional reform in Kenya.⁸

In 1994 the agitation heightened under the auspices of the Citizens Coalition for Constitutional Change Movement. The Constitution of Kenya Review Commission (CKRC) Act was passed in 1997, and later amended in 1998 to create a more people-driven review process. The CKRC began collecting the views of Kenyans in the year 2000, an exercise that lasted almost two years. It delivered the first draft constitution in 2004. It was referred to as the Bomas Draft (so named after the venue where deliberations were held by delegates during the drafting process).⁹ The government rejected it and instead prepared another draft constitution (the Wako draft, named after the then Attorney General)¹⁰ in 2005. It greatly watered down the Bomas draft. The people rejected it in a referendum in 2005.

Following the near-collapse of the state in 2007 due to an extremely flawed electoral process, it was agreed that constitutional reform was a long-pending issue that needed to be dealt with conclusively. In 2008, Parliament enacted the Constitution of Kenya (Amendment Act) 2008 and the Constitution of Kenya Review Act 2008, the latter of which established a Committee of Experts (COE) to oversee drafting of a new constitution. This was delivered in 2010.

The mandate of the COE was to harmonise the various constitutional drafts proposed over the years, identify issues agreed on and those which were not, solicit and receive memoranda on the contentious issues, undertake thematic consultations with interest groups, caucuses and experts and among others, to prepare a harmonised draft constitution for presentation to the National Assembly. The National Assembly approved the draft in April 2010 and on August 4th of the same year; Kenya had a second referendum in two years, this time one that saw the passing of a constitution that is different from any that Kenya has had.

8 *Kenya Human Rights Commission, Wanjiku's Journey; Tracing Kenya's Quest for a New Constitution and Reporting on the 2010 National Referendum*, Kenya Human Rights Commission, November 2010.

9 The deliberations for the Constitution took place at the Bomas of Kenya auditorium in Lang'ata, Nairobi.

10 *Amos Wako* was the serving Attorney General in 2005 and had the draft constitution named after him.

C. Highlights of the 2010 Constitution

The 2010 draft Constitution was approved by more than 67% of the population through a referendum conducted the same year. It was officially promulgated on the 27th August, 2010. Key highlights of this new constitution include, devolved government with 47 counties,¹¹ a bi-cameral Parliament with the National Assembly and Senate comprising elected and nominated members,¹² political pluralism with guidelines for political parties and provisions for democratic space,¹³ clear separation of powers; independent judicial appointments vetted by an independent Judicial Service Commission and Parliament,¹⁴ revised electoral procedures and redress mechanisms in case of electoral disputes,¹⁵ an Independent Electoral and Boundaries Commission approved by Parliament,¹⁶ a comprehensive and modern Bill of Rights covering first to third generation rights,¹⁷ monism, which recognises international instruments that Kenya has ratified as sources of law,¹⁸ provisions on public finance¹⁹ and sharing/devolution of resources²⁰ and provisions on leadership and integrity.²¹

D. Taking Stock: Where Are We?

Kenya was classified a middle-income country after a reassessment of its economy increased by 25.3%.²² The country therefore becomes Africa's ninth largest economy. This jump in the economy was driven by agriculture, which is the back-bone of the economy. Other factors included the manufacturing and real estate sectors.²³ Kenya has the biggest economy in the East African Community (EAC), the regional economic block comprising Burundi, Kenya, Rwanda, Tanzania and Uganda. Kenya is also a member of the Common

11 Constitution of Kenya 2010; Chapter Eleven.

12 *Ibid*; Chapter Eight.

13 *Ibid*; Chapter Seven, Part Three.

14 Constitution of Kenya 2010; Chapter Ten.

15 Constitution of Kenya 2010; Chapter Seven Part One.

16 *Ibid*; Chapter Seven Part Two.

17 *Ibid*; Chapter Four.

18 *Ibid*; Chapter One.

19 *Ibid*; Chapter Twelve.

20 *Ibid*; Chapter Twelve Part One.

21 *Ibid*; Chapter Six.

22 Each year in July, the World Bank revises the income classification of the world's economies based in estimates of GNI (Gross National Income) per capita for the previous year. In July 2015, World Bank confirmed the status of Kenya as a lower-middle income country following the change in the way the size of its economy is calculated, which showed it was 25% larger than previously estimated; www.businessdailyafrica.com/World-Bank-confirms-Kenya-lower-middle-income-status (accessed on 19th October, 2015).

23 <http://www.forbes.com/sites/faraigundan/2014/10/01/kenya-joins-africas-top-10-economies-after-rebasing-of-its-gross-domestic-product/>.

Market for East and Southern Africa (COMESA). The Kenyan economy has the largest GDP in Southeast and Central Africa. Kenya has a diverse population with an estimated 42 different communities. The country has a young population, with 73% of residents aged below 30 years because of rapid population growth, from 2.9 million to 40 million inhabitants over the last century.

Adoption of the new constitution brought with it a major paradigm shift in the way the country's administrative and other power was exercised. Though it has been five years since the Constitution became law, the transition process has not been without its shortcomings. Implementation has not been a simplistic progress, but one that has called for enactment of new legislation, alignment of existing legislation with the Constitution, restructuring of government organs and institutions, restructuring to devolution, development of new policies and re-directing old policies and the creation of commissions, institutions and independent bodies. All of these have had teething and prevailing problems.

The hallmark of the transition has been the introduction of devolved government, which has not been altogether a smooth process. It would however be dishonest and perhaps unfair however to classify the transition as bleak or fledgling. If anything, the World Bank recognises that Kenya's decentralisation is among the most rapid and ambitious devolution processes going on in the world, with new governance challenges and opportunities as the country sets up new county governments from scratch.²⁴

Devolution is indeed a transformative aspect of the Constitution, and it has seen the distribution and transfer of power, responsibilities and resources from central government to local units which are then vested with both functions and decision-making powers.²⁵ Further, devolution is classified as among the national values and principles of governance that are binding on all state organs, state officers and public officers whenever any of them applies or interprets the Constitution, any law or when they make or implement policy decisions.²⁶

According to the Constitution, the objects of the devolution of government are, to promote democratic and accountable exercise of power,²⁷ to foster national unity by recognising diversity,²⁸ to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them,²⁹ to recognise the right of communities to manage their own affairs and to further

24 The World Bank Group, www.worldbankgroup.org/en/country/Kenya/brief/Kenya's-devolution.

25 *Oundo, Fredrick*, Devolved Governance in Kenya: A Reflection on the Process and Structures. Paper presented at Policy and Legislative Drafting Training, Best Western Hotel, Nairobi, March 2014.

26 Constitution of Kenya 2010. Article 10(1), (2)(a).

27 *Ibid*; Article 174 (a).

28 *Ibid*; Article 174 (b).

29 *Ibid*; Article 174 (c).

their development,³⁰ to protect and promote the interests and rights of minorities and marginalised communities,³¹ to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya,³² to ensure equitable sharing of national and local resources throughout Kenya,³³ to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya,³⁴ and to enhance checks and balances and the separation of powers.³⁵

County governments first came into force following the 2013 election. Setting them up was not an easy process and the major issues that have come up include, resource distribution from central government; resource management at county level, audit reporting procedures and capacity building of county institutions, most notably the County Assemblies. Devolution is also plagued with the problem of regional inequalities and the need to put in place revenue-generating ventures that will enable the counties in some degree to be self-reliant. This necessarily calls for proper technical capacity and fiscal planning skills. Besides financial resources, there is need for human skills with which to identify county development bottlenecks, to transform national policy into local strategies and costed plans, and to implement the same.³⁶ The principal aim of devolution is to allow public participation. Unfortunately this has also been a great challenge partly due to insufficient civic education and awareness among members of the public on the elements of devolution, resource sharing and accountable government.

As with all matters governance, there is always a lesson to be learned, and if Kenya was to pick lessons concerning devolution, then the following would be key; that regardless of the motivation behind it, devolution must be undertaken with full understanding of cost implications, implications, risks as well as a good idea of can or cannot work.³⁷ Secondly, devolution may not be the answer to all of Kenya's economic growth problems, issues related to equitable distribution of wealth or redressing the ills of the past. If anything, in cases of unequal natural resource allocation, then devolution may only make things worse. Third, it may not be particularly wise to institute devolution units that adhere too closely to ethnic, language or religious lines. The sharing of economic output in a country that is endowed differently in different regions is a critical concern that should not be overlooked, and finally, sharing of revenues should be well thought out and structured.³⁸

30 *Ibid*; Article 174 (d).

31 *Ibid*; Article 174 (e).

32 *Ibid*; Article 174 (f).

33 Constitution of Kenya 2010. Article 174 (g).

34 *Ibid*; Article 174 (h).

35 *Ibid*; Article 174 (i).

36 *Society for International Development*, Devolution in Kenya's New Constitution, Constitution Working Paper No. 4. Society for International Development, 2011.

37 *Institute of Economic Affairs*, Devolution in Kenya: Prospects, Challenges and the Future. IEA Research Paper Series No. 24, 2010, at p 72.

38 *Ibid*, at p 68.

Major changes in the policy and legislative framework brought about the establishment of multiple Commissions and independent bodies to exercise functions and mandates necessary to bring into operation different elements of the Constitution. These include the Kenya National Human Rights and Equality Commission (now the National Gender and Equality Commission), the National Land Commission, the Independent Electoral and Boundaries Commission, the Parliamentary Service Commission, the Judicial Service Commission, the Commission on Revenue Allocation, the Public Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission and the National Police Service Commission.

Schedule 5 of the Constitution gives a five year timetable for the implementation of specific aspects of the Constitution. The Commission for Implementation of the Constitution (CIC)³⁹ is established with the mandate to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution. The Constitution also establishes the Constitutional Implementation Oversight Committee (CIOC),⁴⁰ which is a select committee of parliament responsible for overseeing the implementation of the Constitution. These bodies are expected to work with the Kenya Law Reform Commission, Parliament, the Ministry of Justice and the Attorney General's Chambers.

The Commission has been engaged in the monitoring and evaluation of Constitutional implementation at national and county level. Challenges in the overall implementation of the Constitution were identified as being, violation by parliament of the principle of Separation of Powers evidenced by parliamentary interference in the implementation of programs by the Executive and other State Organs, passing of legislation without consultation with the Senate, and threatening the constitutional capacity of the Judiciary. Other challenges identified included, partial compliance with the requirements of Chapter six of the constitution regarding leadership and integrity, persistent and widespread lack of public participation in review and development of policy and legislation, planning and budget formulation, delayed service delivery at county level due to delays on formulation and approval of county budgets, delay in the review and development of priority and legislation by some ministries and delay in the implementation of land reforms due to persistent conflict between the national Land Commission and the Ministry of Lands.⁴¹

Using Schedule 5 of the Constitution as the yardstick to measure compliance in terms of developing legislation to bring into operation different aspects of the Constitution, it is evident that very good progress has been made in terms of compliance. Based on a total of 57 Articles in the Constitution, different legislative Acts of parliament are at different levels of development or enactment to bring these provisions into operation. Of these Acts, 3 are

39 Schedule 6, Part 5.

40 Schedule 6, Part 4.

41 *Commission for Implementation of the Constitution*, Quarterly Report, October-December 2014.

under review by the CIC,⁴² four are yet to be developed,⁴³ five have been reviewed and recommendations submitted to the office of the Attorney General for final drafting,⁴⁴ one is in Parliament awaiting second reading,⁴⁵ one has been enacted but requires review to comprehensively give effect to the law⁴⁶ and 43 have been enacted since the inception of the Constitution.

E. Conclusion

Certainly, the path culminating in the 2010 Constitution was not an easy one. However, the strides made by Kenya as far as constitution making is concerned are commendable. The constitution has gone a long way in ensuring that the rights and obligations of citizens and government institutions are clearly set out and enforced. It is particularly worth noting that the inclusiveness and participatory approach adopted while drafting the constitution contributed significantly to the overwhelming vote in favour of adopting it. This is not to say that the implementation process has not experienced teething problems, but nonetheless, it is safe to conclude that the implementation process has by and large been successful.

The role of the constitution in upholding and promoting acceptable tenets of good governance can neither be ignored nor underestimated. The Kenya Constitution adopts a unique approach to this issue by having provisions on national values and principles of governance that are peculiar to the prevailing social, economic and political circumstances in Kenya. An entire chapter is also dedicated to handling leadership and integrity, and throughout the document the clear demarcations between the arms of government are evident. This not only promotes separation of powers but also establishes a firm ground for rule of law to be applied at all levels of government whether at national or at county level.

Political pluralism and devolved government structures are expected to not only bring government closer to the electorate, but also offer communities the opportunity to manage their own affairs and further their development. This is not only aimed at having counties

42 Legislation on Procurement of Public Goods and Services based on Article 227 of the Constitution.

43 Legislation on the Promotion of Representation of marginalized Groups based on Article 100 of the Constitution; Legislation on Agreements relating to Natural Resources (Environment, water and natural resources) based on Article 71 of the Constitution; Legislation on Community Land based on Article 63 of the Constitution and Legislation on Culture based on Article 11(3) of the Constitution.

44 Legislation on Values and Principles of Public Service based on Article 232 of the Constitution; Legislation on Accounts and Audit of Public Entities based on Article 226 of the Constitution and Legislation on the Environment based on Article 72 of the Constitution; Legislation on Rights of Persons Detained or Held in Custody based on Article 51 of the Constitution; Legislation on Fair Hearing based on Article 50 of the Constitution.

45 Legislation on Family (Protection Against Domestic Violence Bill) based on Article 47 of the Constitution.

46 The Consumer Protection Act, 2012.

tap into their unique economic strengths and make strides in achieving development, but it is also a forum through which to bring to life the principles of good governance relating to public participation, transparency and accountability by bringing government closer to those that are affected by its measures. Despite experiencing the difficulties set out earlier in this paper, it is expected that the county governments will live up to the expectation that they will be vehicles of economic development that will collectively steer the country forward in achieving its development agenda.

It is evident that the role of institutional capacity cannot afford to be undermined if any governance process and structure is to become meaningful or even successful. The implementation process has brought with it a wide array of precautionary lessons particularly with regards to devolution and the re-structuring of government bodies to accommodate the various commissions, offices and oversight bodies. There is certainly a lot left to be done in terms of building and strengthening institutional capacity particularly at county level and this should not in any way be a deterrent, but rather, one of the many lessons that should be drawn from the devolution process.

In conclusion, Kenya's democratisation and constitution making process offers many lessons for other countries struggling to forge democratic space or engage in constitutional reform. Though difficult, Kenya's process proves that it is indeed possible to bring about legal and governance reform, and it remains to be seen whether momentum will be gained and how well the devolved governments shall carry out their mandate particularly with promoting the country's overall development agenda.