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KatibaNews

A new dawn for Kenya

There is work to be done

- * **Editorial**
- * **Countdown to 2012**
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- * **So the opinion polls were correct??**

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ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

The Media Development Association (MDA) is an alumnus of graduates of University of Nairobi's School of Journalism. It was formed in 1994 to provide journalists with a forum for exchanging ideas on how best to safeguard the integrity of their profession and to facilitate the training of media practitioners who play an increasingly crucial role in shaping the destiny of the country.

The MDA is dedicated to helping communicators come to terms with the issues that affect their profession and to respond to them as a group. The members believe in their ability to positively influence the conduct and thinking of their colleagues.

The MDA aims at:

- Bringing together journalists to entrench friendship and increase professional cohesion; Providing a forum through which journalists can discuss the problems they face in their world and find ways of solving them;
- Organising exhibitions in journalism-related areas such as photography;
- Organising seminars, workshops, lectures and other activities to discuss development

issues and their link to journalism;

- Carrying out research on issues relevant to journalism;
- Organizing tours and excursions in and outside Kenya to widen journalists' knowledge of their operating environment;
- Publishing magazines for journalists, and any other publications that are relevant to the promotion of quality journalism;
- Encouraging and assist members to join journalists' associations locally and internationally;
- Creating a forum through which visiting journalists from other countries can interact with their Kenyan counterparts;
- Helping to promote journalism in rural areas particularly through the training of rural-based correspondents;
- Advancing the training of journalists in specialised areas of communication;
- Create a resource centre for use by journalists;

- Reinforcing the values of peace, democracy and freedom in society through the press;

- Upholding the ideals of a free press.

Activities of MDA include:

- Advocacy and lobbying;
- Promoting journalism exchange programmes;
- Hosting dinner talks;
- Lobbying for support of journalism training institutions;
- Initiating the setting up of a Media Centre which will host research and recreation facilities;
- Working for the development of a news network;
- Providing incentives in terms of awards to outstanding journalists and journalism students;
- Inviting renowned journalists and other speakers to Kenya;
- Networking and linking up with other journalists' organisations locally and abroad.

AUGUST 2010

This newsletter is meant to:

- 1 Give critical analysis of democracy and governance issues in Kenya.
- 2 Inform and educate readers on the ongoing Constitution Review Process.

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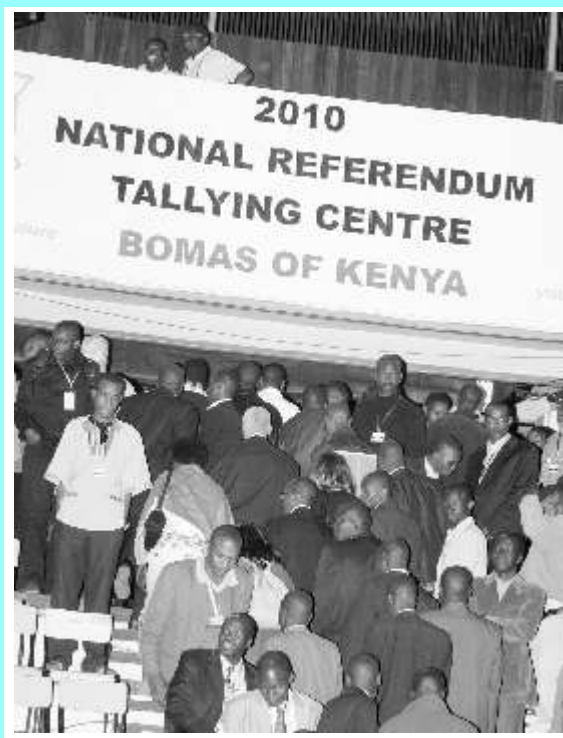
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All are welcomed to send their observations on the constitutional review process to be the Editorial Board.

Views expressed in this newsletter do not necessarily reflect those of MDA, KAS or partners. Reprinting of materials permitted provided the source is acknowledged.

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The jinx has been vanquished

There are days that seem to be engraved in stone. For the majority of Kenyans, August 27th, 2010 will forever be etched in their collective memory. The two-decade agony in search of a new constitutional dispensation has finally come to a clean end.

It is all about breaking from our pitiable past. For a start, Kenyans have just proven to themselves and to the world that we are matured as a democracy and can now conduct free, fair and peaceful elections. If the referendum results would have been contested beyond some losers grumbling, then we would not be this courageous. But that was excellent work by the Interim Independent Electoral Commission. We hope to see the same team in 2012!

As the holy book says, the race is not for the swift but for he who endures the most. And Kenyans have endured more than their fair share. I say this because we have lagged behind as a nation not because we are wanting in anything but visionary leadership. If President Mwai Kibaki and PM Raila Odinga had done what they did this year way back in 2005, the Asian tigers would by now start looking over their shoulders.

But maybe there is a reason for everything. Perhaps this was the time we would have our date with destiny. And like a date with a sweetheart, we should not lose this rare opportunity to seize the moment, not just for us but for progeny.

So we have no more excuses to make as to why we cannot become a newly industrialised nation by 2030. Our politicians should also search for a new chorus since we have crossed the proverbial river Jordan. We can now only pray that we have a Moses to take us to the promised land of national development.

Katiba News

Well, you will forgive us for blowing our own trumpet. The promulgation of the new Constitution makes us at *Katiba News* feel like we are one of the luckiest publications in Kenya. *Katiba News* was started in 2002 as a joint partnership with the then Constitution of Kenya Review Commission. The aim of the publication was to excite and sustain debate on the renewed quest for a new Constitution, including offering civic education on pertinent and emerging constitutional issues.

Since 2002, for almost every month, *Katiba News* has been published and distributed to members of parliament, civil society organisations, media houses, government institutions, universities, public libraries...the list is endless really.

In so doing we believe that we have kept the fire burning even when hope seemed lost forever. We engaged opinion leaders, politicians, policy makers and many other influentials (sic) through this magazine.

On the home stretch prior to the August 4th referendum, we stuck out our necks and boldly stated that we were for a new Constitution. Which we think is what media houses should learn to do instead of pretending that they are always fair – although it's good for business!

Ultimately, we proudly stand to be counted on the right side of history. Even as journalists we cannot get enough words to pass our gratitude to the Konrad Adenauer Foundation who have supported, and continue to support *Katiba News*. With this new dawn, we have also repositioned ourselves to give Kenyans a blow by blow account of what should happen vis a vis what is happening.

We have conquered the ghosts of decades of misrule. With luck, *Katiba News* hopes still to be here when Kenya becomes the most democratic and best governed State in Africa. **KN**

There is work to be done

If you thought that it's now time to kick off your shoes and party, then sorry you have it all twisted! With the coming of the new Constitution into law, the long journey to national rebirth has just started. If anybody said it's going to be easy he or she lied. The truth of the matter is that it is now time to get down to business...

By Guandaru Thuita



Time out! Prime Minister Raila Odinga recuperates at the Nairobi Hospital after an operation done in the peak of the referendum campaigns.

On August 4, Kenyans ratified the Proposed Constitution by about two thirds majority of all votes cast in the referendum. The high voter turnout of about 72 per cent as well as the wide margin in favour of the new Constitution was largely unexpected.

Opinion polls had been showing the 'Yes' camp being in the lead, but later during the campaigns, the lead began to shrink and the threat of the 'No' camp swaying the undecided voters to cap a win was beginning to look real.

Multiple factors led to a 'Yes' win. Some factors were deliberate measures put up by

the 'Yes' secretariat while others were simply by default. Prior to and immediately after the start of the campaign, key presidential hopefuls, Vice President Kalonzo Musyoka and Deputy Prime Minister Uhuru Kenyatta gave the 'Yes' campaign lukewarm support. They were noted for lacking enthusiasm in supporting the Proposed Constitution and were even suspected of being 'water melons' — that is, wavering between the 'Green' and 'Red' camps.

Such lukewarm support was due to political competition within the Grand Coalition Government. Prime Minister Raila Odinga, having established himself early as the main driver of the 'Yes' campaign, was viewed jealously by other presidential contenders and their allies. They felt that a 'Yes' win would bring glory to Raila and accord him an advantage

over them in the future Presidential elections.

Strategies

When Raila was taken off the campaign due to illness, these contenders saw their moment to shine and took it with gusto, especially in their areas of influence leading to more 'Yes' support. Another unexpected event was the entry of former President Moi into the fray. Moi intensely campaigned for the rejection of the constitution, prompting a spat between him and President Kibaki at one time.

The 'Yes' campaigners took the opportunity and painted Moi and Higher Education Minister William Ruto as representations of the dark Kanu days while Kibaki, Raila and Rev Timothy Njoya were painted as representing the new dawn. Moi's entry into the picture was a blessing in disguise for the 'Yes' campaign, as more people flocked to their camp.

Besides the unintended occurrences, the 'Yes' campaigners devised other winning strategies. The problem of uncoordinated campaigns was addressed when President Kibaki took personal charge of

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the campaign after Raila's hospitalisation. The President's resolve helped to demonstrate the seriousness of the issues and consequently, many hearts were won over. The indecisive 'water melons', out of loyalty or respect, now immersed themselves wholly in support of the Proposed Constitution.

Endorsement

The President was also able to win hearts over by dishing out goodies such as new districts, promising the funding of projects and assuring the electorate that contentious clauses raised by the Church and those in the 'Red' camp would be amended after endorsement of the Constitution.

The release of adequate funds to the Committee of Experts (CoE) for civic education was a windfall for the 'Yes' camp as the more the people were enlightened about the merits of the Proposed Constitution, the more they tended to endorse it.

Another winning strategy, albeit controversial, was the Executive

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order directing all Permanent Secretaries, Departmental Heads and the Provincial Administration to hit the campaign trail and support of the Proposed Constitution as a Government project. These officers, being respected opinion shapers in their places of origin, gave the 'Yes' camp a much-needed boost.

The undertaking more or less of a last minute campaign rather than a prolonged one worked in favour of the 'Yes' team.

The 'No' camp had hit the campaign trail earlier and seemed to ran out of steam and even ideas by the time the 'Yes' camp's campaign was being intensified. The 'No' camp seemed to have no other issues

except those on land, counties, Kadhis' Courts and abortion. Conversely, the 'Yes' team had an endless flow of new provisions that could captivate and mesmerise the public.

This last minute ploy was also extended to the last weekend of the campaigns when using old Kanu type tricks, the 'Yes' team locked their opponents out of Nairobi by booking all significant venues the entire weekend.

The strategy of refraining from launching personal attacks on church or political leaders in the 'No' camp and concentrating on the promotion of the merits of the Proposed Constitution worked to win hearts for the

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Seeing Red! Some of the "No" campaign political leaders from right, Hon. Cyrus Jirongo, Hon. Kiema Kilonzo and Hon. William Ruto.

Back to the politics Countdown to 2012



Vice President Hon. Kalonzo Musyoka.
On which side of the political divide
does he stand?

As usual, we hate to this but the Kenyan reality leaves us with very few options for now. Even before the dust has settled after the promulgation of new Constitution, our politicians have started talking about the politics of realignments. Although it will not be business as usual, old habits die hard. We delve into the political ramifications post referendum and see how things have started shaping up.

By Clive Oduor and Peter Wendoh

of convenience and not necessarily unity of purpose. Consequently, the political calm that was witnessed during the referendum

campaign is expected to be short-lived and the usual political divisions will soon re-emerge if they have not emerged already.

Prior to the referendum, the 'big three', namely Orange Democratic Movement (ODM), Party of National Unity (PNU) and ODM-Kenya were barely holding together. Several camps were evident in all these parties. Of great significance though, was the Kikuyu-Kalenjin-Kamba alliance otherwise known as 'KKK' led by Deputy Prime Minister Uhuru Kenyatta, Vice-President Kalonzo Musyoka and Higher Education Minister William Ruto that seemed to be gaining momentum in a bid to

counter Prime Minister Raila Odinga.

KKK

However, this momentum slowed down when Uhuru and Kalonzo chose to campaign for 'Yes' while Ruto chose to campaign for 'No' during the referendum, even though many pundits had cast doubts on the future of the alliance for various reasons. In the light of the referendum results, some re-strategising is inevitable for the political heavyweights.

Revisiting the 'KKK' alliance, whereas Uhuru and Ruto delivered their votes to their respective sides, Kalonzo failed to deliver not only in the larger Eastern Province, but also of particular concern, those of his own Ukambani backyard. If the

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On August 4, 2010, Kenyans overwhelmingly endorsed the new Constitution with over six million registered voters voting 'Yes' and 2.7 million voting 'No' thereby bringing to an end two decades long search for a new dispensation. As expected, at least in the political arena, the referendum vote was more than an endorsement of the new Constitution.

To many politicians this was a preview of 2012 General Election. Whereas some wanted to use the referendum as a launch pad and generally test the waters, others wanted to make sure they were on the right side of history to boost their own chances in 2012.

In the run-up to the referendum, Kenyans witnessed rare unity among leading political players particularly on the 'Yes' side of the campaign. Nevertheless, critical analysis and past experience suggest that this was simply unity

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future of the alliance was in doubt, these results effectively put it to rest.

Already, political elite from Mt Kenya region would like to see Uhuru drift away from Kalonzo because they do not think he will offer much to their son's quest to occupy the house on the hill.

As it stands today, ODM has at least two factions — one led by Ruto and the other by Raila, the Prime Minister and party leader. On the evidence of the referendum results, Raila may have lost out to Ruto as far as the Rift Valley bloc is concerned, with the former emerging as the de facto leader of the region. For both men to make it to State House or at least settle for the number two slot, they will need to form new alliances.

Succession

The jury is out on who will be their ideal allies in the run-up to the 2012 General Election. PNU is in no better position. The party does not seem to have any clear direction and in the face of potential fierce tussle in the Kibaki succession, it is only a matter of time before the unity collapses completely. The same can be said of ODM-Kenya that is led by Kalonzo. This is a party that cannot stand on its own

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unless it coalesces with others to remain relevant.

As the Kibaki succession gains momentum, at least four factions are likely to emerge from the PNU-ODM Kenya alliance, as is currently constituted. Kalonzo will definitely want to contest the presidency again on the account that he is the most senior politician on this side by virtue of holding the number two slot and his vast national political experience that spans over two decades.

On the other hand, Uhuru will be harbouring the same ambition, especially having been recently endorsed by both the council of elders and a section of legislators from Mt Kenya region as Kibaki's automatic successor and the region's torch bearer.

Others in this alliance who will not let go without a fight include Prof

George Saitoti, Ms Martha Karua, the leader of Nard-Kenya and Peter Kenneth, the Gatanga MP, all of who have expressed interest in the presidency in 2012. In the foregoing, PNU-ODM-Kenya alliance is definitely headed for a split whose magnitude is dependent on the next move by the key players in the alliance.

Possible scenarios to 2012

The scenarios under review are narrowed down to the presidency and are based on the assumption that there will be an outright winner in the first round and, therefore, does not consider likely scenarios should a second round be required.

We explore the scenarios from the premise that a crowded alliance may not survive in the new Kenya because the new Constitution has effectively

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Political heavyweights of the "Yes" campaign, from right, PM Hon. Raila Odinga, Deputy PM Hon. Uhuru Kenyatta, Hon. ministers Henry Kosgei and Peter Anyang Nyong'o at Uhuru Park during the referendum campaign.



Deputy Prime Minister
Hon. Uhuru Kenyatta

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limited top positions to that of the President and his/her running mate and, therefore, candidates will endeavour to form lean, but effective alliances that will marshal enough votes and pose the least challenges possible insofar as political balance is concerned.

Judging from the present politics in the larger Mt Kenya region, Uhuru is emerging as the de facto leader. This definitely gives him mileage ahead of Karua and Kenneth from the same region. Going by the number of votes in the region and assuming they all rally behind 'their' candidate, as has always been the case, Uhuru will start as a strong contender for the presidency in 2012 and if any one wishes to form an alliance with him, that person must be prepared to play second fiddle to him.

His experience, having contested the presidency in 2002, stands him in good stead and no one can risk underrating his political connections and prowess in the political arena. The Prime Minister is certainly one of the frontrunners in 2012 on an ODM ticket. 2012 is seen as his last realistic chance to occupy State House and he will, therefore, give it all to get there.

Contest

In order for both Uhuru and Raila to get to State House, they will need to look out for new allies. Raila seems to have lost out on Rift Valley courtesy of Ruto's growing influence in the region and he will thus try to make up for the loss. It

is likely that he will maintain his trusted allies with Charity Ngilu, being a key player in Ukambani and for whatever it is worth, he is likely to cooperate with the Kalenjin MPs who supported the 'Yes' campaign during the referendum.

Depending on how things shape up in the coming months we will either have a Uhuru-Raila contest in 2012 with the rest as supporting casts or we could have Uhuru and Raila on one side against the rest, especially if President Kibaki comes into play. With the successful implementation of the Free Primary Education and the passage of the new Constitution during his tenure, the president may already be leaving office with an enduring legacy.

But one can dare say that he may not be leaving with a clear and peaceful conscience in the aftermath of the 2007 disputed elections that shook the foundation of the nation. With this in mind, the president may want to show that he never meant evil, that he is a good leader and a gentleman, and therefore endorse Raila as his successor and prevail upon Uhuru and his "Mt Kenya people" to back the Prime Minister with Uhuru as his running mate.

Such an alliance may seem unrealistic due to the longstanding mistrust that dates back to the 1960s, but if Raila backed Kibaki in 2002, who dare think Kibaki won't reciprocate in 2012?

Betrayal

With the 50+1 threshold being so important in the next elections, a Raila-Uhuru alliance will guarantee the team substantive votes because they will certainly be assured of overwhelming support in Nyanza and Central provinces and sizeable

support to balance the regional threshold in Eastern (Meru and Embu regions) and Nairobi.

The battle will then be for Coast and North Eastern provinces. Nonetheless, a Raila-Uhuru alliance can forget about the Rift Valley, especially the Kalenjin-dominated areas and Western provinces. Western Province will certainly turn against Raila for what they will perceive as betrayal and snubbing of their 'son' Musalia Mudavadi, the current Deputy Prime Minister and Deputy Leader of ODM. Right there, another ODM faction comprising of Luhya leaders could emerge.

All pointers suggest that the key players in the next General Election are Raila and Uhuru. In the Rift Valley Province, Ruto and the likes of Saitoti will have to work extra hard to dislodge him. From the referendum results, it is clear that Ruto commands strong support in North and South Rift, and sizeable support in Central Rift, especially in the Kalenjin-dominated areas.

However, the same cannot be said of his appeal to the other regions of the country. For this reason and factors remaining constant, Ruto himself may not succeed to get to State House, but he can play an important role of a kingmaker.

Backyards

If Uhuru coalesces with Ruto, this will be a reunion of the 2002 Kanu allies that lost to Kibaki. Weighing the chances of realising such an alliance, one needs to look at three critical issues. One, how will they sell this to their respective communities in view of the atrocities that both communities suffered after the 2007 disputed

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'Yes' team. The case was not so for the 'No' camp, which was seen in bad light especially after three political leaders were taken to court for publishing hate speech.

These strategies, the political goodwill, high powered grassroots campaigns, the rare support of the civil society, the positive media coverage and editorials and the unwavering international support enabled the 'Yes' camp to emerge victorious.

Analysis

The official tally by the Interim Independent Electoral Commission (IIEC) showed a 'Yes' win of 6,092,593 votes equivalent to 66.9 per cent while the 'No' camp garnered 2,795,059 votes equivalent to 30.69 per cent of all the votes cast. This was a resounding victory for the 'Yes' camp and it demonstrated that Kenyans overwhelmingly desired change and not even their trusted pastors could stand between them and that change.

The results per province were intriguing, as they had a co-relation between the level of marginalisation of an area by the past regimes and the desire for change. The 'Yes' camp won in each province save for the Rift Valley.

The arid North Eastern Province, which has all along been relegated to the periphery of development, registered the highest percentage of a 'Yes' win at 96 per cent. The pre-dominant Muslim population boosted the 'Yes' votes due to the desire for retention of Kadhi Courts.

Nyanza a Province, which had been given a wide berth by both Kenyatta and Moi regimes, registered a 92 per cent 'Yes'

The significance of the legal vis-à-vis a political win is in regard to the question of legitimacy. Unless the win is political rather than legal or technical, a Constitution would likely suffer a legitimacy crisis.

win. Raila Odinga's cult like influence on this area played a major role in catapulting this region to a strong 'Yes' vote.

The central region obtained 83 per cent 'Yes' votes due to the influence of senior political figures such as President Kibaki, Uhuru and Narc-Kenya chairperson Martha Karua. The combined forces of these three leaders neutralised the Church, which was the only serious threat in the region.

Coast and Western provinces received 77 per cent and 81 per cent 'Yes' votes, mainly due to the influence of key figures such as Najib Balala and Musalia Mudavadi. The majority Muslim population in the Coastal area boosted the 'Yes' camp.

The enlightened population in Nairobi and the fact that all MPs save for Starehe's Margaret Wanjiru were solidly in support of the new laws worked in favour of the new Constitution by enabling it to register a 74 per cent win. In the Rift Valley, the influence of former President Moi and Ruto solely led to the overwhelming rejection of the Constitution in this area.

Political or legal win?

A legal win may be said to be one where only the minimum legal and technical requirements have been met. A political win, on the other hand, encompasses a situation where the win is by such a wide

margin that it can be termed solid.

The significance of the legal vis-à-vis a political win is in regard to the question of legitimacy. Unless the win is political rather than legal or technical, a Constitution would likely suffer a legitimacy crisis. The 'Yes' win by which it collected more than double the votes of the opponents was solid and by far exceeded all the parameters set by the law. Accordingly, the win was not only legal, but also political.

Required changes

The new Constitution introduces earth-shaking changes to all spheres of life in Kenya, be they legal, social, political or economic. The same Constitution prescribes the manner in which the changes are to be effected. The Sixth Schedule of the New Constitution makes provision for the establishment of two entities tasked with the implementation of all encompassed changes.

The first entity is the Parliamentary Select Committee of the National Assembly otherwise known as the Constitutional Implementation Oversight Committee. This committee shall oversee the implementation of the Constitution by liaising with the all other relevant entities. The second entity is the Commission for the Implementation of the

Still on the warpath

In spite of the resounding victory at the referendum where the new Constitution was endorsed by a landslide majority of 66.9 per cent, the vanquished side does not seem to believe that the results settled the question on the so-called contentious issues. Of course, we need people who will keep us on the straight and the narrow path to national recovery. But how possible is it to go back to the drawing board and make fundamental changes to this document? Is there any possibility for amending the draft as per the wishes and timeframe of the "No" proponents?

By Dorothy Momanyi



In the twilight of his troubled tenure - Attorney General Amos Wako.

There have been widespread calls from Church and some political leaders that those contentious issues should be addressed. The calls have also been made on the basis that President Kibaki and Prime Minister Raila Odinga had during the campaigns publicly promised changes on the "contentious" issues upon the passage of the Constitution. Consequently, the first agenda in

the minds of those who opposed the document is to amend those areas of the Constitution that they deem contentious.

In the run up to the referendum, those opposed to the Proposed Constitution focused their energies on four issues, which they deemed highly contentious. It is still these issues that those proposing amendments are clinging onto. The four issues relate to Kadhis' courts, abortion, land and devolution of power/counties.

Those opposed to Kadhis' courts state that their inclusion in the new Constitution under Articles 169, 170 and the waiver of some provisions of the Constitution in respect to Muslims is tantamount to elevating one religion over the rest, and goes against the principle of separating matters of religion and the State.

Provisions

On land, the contention has been that the new Constitution gives the Government the right to forcefully acquire private land, reduces leasehold interest on some property from 999 years to 99 without compensation, and likely prescription on minimum and maximum acreage of land may amount to deprivation of property. In fact, they argue that those in power may use these provisions against their opponents.

On devolution, some people like former President Moi were totally against the idea, calling it a foreign experiment. Others, especially Eastern Province leaders, argued that the number of counties provided and their demarcations failed to factor in the present demography and expanse. Finally, the voices now calling for amendments have hitherto stated that Article 26 (4) as drafted is permissive enough of abortions and may be abused.

Political will

Of importance is the question of whether those in power are enthusiastic about introducing changes to the new Constitution. This is because if there is no political will, then it would be in vain to keep on calling for amendments.

Presently, there has been no formal or official answer from the President or the Prime Minister to

calls for amendments. However, Raila has been quoted on the same. In an interview with the *Daily Nation*, he was asked: "During the campaign, both you and the President committed yourselves to addressing the contentious issues raised by the 'No' team after the new Constitution won the day. Have you now given thought to the mechanism under which those issues can be revisited?"

The Prime Minister is said to have responded thus: "We will be discussing, but as you know we now have a new Constitution, and that Constitution outlines clearly how such issues can be raised and how it can be amended. We hope that the people who want amendments know that."

From the tenor of that answer, it can be implied that the Prime Minister does not oppose any amendments *per se*, but seems to be throwing the ball to the court of the clergy to initiate the process of amendment themselves, instead of expecting the Coalition principals to do it.

Allies

Perhaps this is also the attitude by Kibaki. In his past mode of operation, the President would be expected to ask those intending to have the amendments to follow the procedure as outlined in the Constitution.

However, the political allies of the two principals have vehemently and publicly opposed any form of amendments. They have reiterated that the resounding victory in favour of the Constitution was convincing enough and determined that the "contentious" issues were no longer contentious.

The minister in charge of Justice and Constitutional Affairs Mutula Kilonzo has himself been cited as saying that it is ridiculous to make amendments the first business instead of focusing on implementation.

Some core institutions like the

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Committee of Experts have also dismissed calls to amend the new Constitution before its full implementation. The foregoing shows that the significant political forces have no will to initiate amendments and their concern will likely be to effect the implementation of the new Constitution first.

The 2012 General Election is also likely to take centre stage, making politicians in both camps to push the amendment issues to the periphery. In fact, it may be the case that Church leaders will find themselves launching a lone ranger battle for amendments after the politicians desert them to focus on key political matters.

Procedures and alternatives

In light of the calls to amend the new Constitution, it is imperative to examine the requirements and procedures for introducing those amendments. The entire Chapter 16 of the new laws is dedicated to outlining the procedures and methods of obtaining amendments.

According to the chapter, an amendment can be initiated by Parliament or by a popular initiative of the people. In a Parliamentary initiative, what is required is a Bill to amend the Constitution, which must be passed by at least two thirds of all members of both the National Assembly and the Senate.

In a popular initiative, at least one million registered voters are required to endorse their signatures on a draft Bill, which must be submitted to each county assembly for debate and passage. It

is only upon the approval by every county assembly that the Bill can be introduced to Parliament and the President for assent.

However, whether by a Parliamentary or by a popular initiative, if the Bill to amend the Constitution relates to matters pertaining to the Supremacy of the Constitution, the Kenyan territory, the Sovereignty of the people, National values, Bill of Rights, term of office of the President, independence of the Judiciary and Commissions, functions of Parliament, devolved government or amendments, then the amendment must be by way of a referendum approved by at least 20 per cent of the registered voters in each of the 47 counties and supported by a simple majority of voters.

Difficult

Based on these requirements, it appears that unlike the old Constitution, the new one is relatively difficult to amend, as it involves elaborate procedures, great costs and in some instances a referendum.

In relation to the contentious issues, the only ones that do not require the lengthy process of a referendum are those pertaining to Kadhis' courts and land. However, since abortion is covered in the Bill of Right, then a referendum must be held.

Similarly, any change in the structure of the counties must receive an endorsement in a referendum. Indeed, the process of amending the new Constitution, though achievable, is a tall order. The alternative would be to

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exercise other options of securing their interests in respect to the contentious issues.

On abortion, since the main problem was on the ambiguity of the term “trained health professional” and the blank permission to Parliament to pass legislation that may permit abortions in certain circumstances, it would be better if attention can be shifted to the likely legislation to clear the alleged ambiguity.

In this case, it would be trite if the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya or the Penal Code, Chapter 63 of the Laws of Kenya are amended in order to define what the term “trained health professional” stands for. Those calling for amendments can also use their influence to lobby Parliament to refrain from passing a law that permits abortions in instances other than those provided for under the Constitution.

Policies

No alternative is available on the Kadhis' courts since their removal must be sanctioned by an amendment to the Constitution. However, the issue of land can be addressed by lobbying for friendly legislations and policies. With regard to counties, there may be no need at all to increase or remove them. The setting up of increased administrative structures in some areas may fulfill the same purpose



The battle has now shifted to the August house.

that would be fulfilled by the extra counties.

There is no time frame or restriction on the time that the proposed amendments may be laid down. A popular initiative for amendments may be started immediately upon the new Constitution coming into force. A Bill for the amendment of the Constitution can also be presented in Parliament at any time after the effective date. It does not matter that the Senate shall not have come into existence until 2013 because the National Assembly under the 6th Schedule is mandated to

exercise the functions of the senate so long as there is no senate yet.

Practically, it may not be possible to effect the amendment earlier than two years. This is because the Bill must be drafted, the Motion introduced to Parliament, the public must be granted an opportunity and facilities for public discussion of the Bill, the Bill must go for first reading and then wait at least 90 days before the second reading is done and thereafter await the third reading and if it passes, a certificate will then be issued. If there is a requirement for a referendum, then one is to be held within 90 days. All these processes require time that may not take less than two years.

Potential conflicts

The contentions raised prior to the referendum were not wholly without merit. If not handled with caution, some issues are delicate and may lead to conflict. The abortion issue and that of the Kadhis' courts, if left untouched, may not raise any temperatures at all. But the county governments, if not implemented properly especially in cosmopolitan areas such as the Rift Valley, may lead to problems of representation, campaigning and discriminatory and ethnicised distribution of local resources.

Similarly, a blind application of Article 68 relating to reviews of grants or dispositions of public land to establish their propriety or legality and the conversion of private land to community land may lead to conflicts such as those witnessed in settlement schemes like Cheyuk in Mt Elgon, and in Molo and Mau Forest.

It is thus imperative that as we endeavour to solve land disputes and other issues through the Constitution, the same must be done reasonably and with all factors having been taken into account. **KN**

However, the political allies of the two principals have vehemently and publicly opposed any form of amendments. They have reiterated that the resounding victory in favour of the Constitution was convincing enough and determined that the “contentious” issues were no longer contentious.

So, the opinion polls were correct? And the media fair?



Mr Tom Wolf of the Synovate Group. Who pays for all these polls?

When it comes to the media and pollsters, most Kenyans have been skeptics. Depending on which way the popularity pendulum swings, people have either rejected or welcome results from opinion polls particularly in the political arena. As for the media, they are perennially on the cross for bias, misreporting, misrepresentation of facts ad infinitum. But this time round something changed. Both the media and pollsters were uncannily close to reality than many of us could believe. We take a look at this delicate industry and how they covered the Constitution.

By Albert Irungu

It has been a long journey in the search of a new constitutional dispensation to bring change in the way Kenyans are governed. The recently concluded referendum was a big and convincing win for the supporters of the proposed Constitution. What remains now is the promulgation to make it the official Constitution of the Republic of Kenya. This will be in "compliance with the *Constitution of Kenya Review Act, 2008 and the Constitution of Kenya (Amendment) Act, 2008*".

One important aspect of the any electoral process in periods

prior to voting day is opinion polls. According to the online encyclopedia, Wikipedia, opinion polls have been defined as "a survey of public opinion from a particular sample...usually designed to represent the opinions of a population by conducting a series of questions and then extrapolating generalities in ratio or within confidence intervals."

Opinion polls have been used the world over to predict the outcome of an election. The constitutional referendum in Kenya saw various research firms conduct similar polls.

In the 2007 General Election, the use of opinion polls was blamed as one of the contributing factors to post election violence. After the Committee of Experts released the first proposed constitutional draft, pollsters were able to predict correctly the mood of Kenyans, majority of who did not approve of power-sharing system of Government.

Indeed, with the successful prediction of the referendum, opinion pollsters have apparently come of age. And, although research firms have been under intense scrutiny on how they do their work, it can be anticipated that in the future, research firms will gain more trust as more institutions use their findings.

Test of veracity

Months before the referendum opinion polls came in hard and fast as various research organisations tried to capture

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the mood of how voters would cast their vote, the issues that would make or break the referendum and the numbers that the proposing “Yes” side and the opposing “No” side would get.

As with every opinion poll, the potentially losing side always complains of manipulation of the polls. For example, leading No light Hon MP William Ruto alleged days before the referendum that two of the leading research firms, Infotrak and Synovate, had been paid by the United States Agency for International Development to manipulate the results in favour of the Yes side. Ultimately, however, the poll results were not far of from the final referendum tally.

Polls prediction

Eleven days to the referendum, the two popular pollsters predicted a Yes win, indicating that more than half of the voters would assent to the proposed Constitution. But the numbers were then unbelievable to the No side who believed they had more than a fighting chance at rejecting the draft law.

Synovate predicted a Yes win with 58 percent of voters polling for the proposed Constitution while Infotrak put it at 65 percent. According to Synovate, 22 percent would have voted No while Infotrak put the number at 25 percent.

Another poll by Strategic Research six days before the referendum showed the Yes vote would garner 62 percent while the No vote would be 20 percent of the total. The Government itself commissioned a poll showing a convincing 65 percent win by the Yes team and a 31 percent vote for the No team.

Another pollster, TNS Research International released its results of a poll they carried out a day before the referendum, showing that most Kenyans would vote for the proposed Constitution - with 68 percent saying Yes and 25 percent saying No.

The Institute for Education in Democracy a non-governmental organisation established to promote and further Kenya's evolving democracy also conducted its own online poll collecting views from 136,273 people. The tally added up to Yes garnering 64.7 percent and NO consisting of 31.4 percent. Strategic PR, in its last poll between July 26 and 28, predicted 66 per cent would vote Yes and 20 per cent would reject the document.

Error of margin

After the referendum, the results provided by the Interim Independent Electoral Commission put the YES side at 4,141,521 votes (67 percent) against the No side with 2,054,946 (33 percent). The less than 5 percent plus or minus margin of error has shown that opinion polls can be used to predict the outcome of an election.

Polling is not an exact science
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Ms Angela Ambitho of Infotrak Harris Group

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and since only samples of the population are interviewed, final figures are always subject to a margin of error. The method used to sample cannot produce exact figures like those found in a science laboratory. People of a community cannot be subjected to precise analytical measurements.

In any opinion poll, a plus or minus three is allowed between the polls and the actual results. In the case of the referendum, most of the pollsters were within this margin of error. When opinion polls are scientifically conducted, they always reflect the perception on the ground.

Media coverage

It is not a secret that opinion polls can contribute to a win or lose situation of a party in an election. By providing information on voting patterns, these polls can influence the behavior of voters. They are seen as a device of influencing public opinion. Months before the referendum, both the Yes and the No teams struggled to be seen as leading in the opinion polls.

Kenyans who participate in opinion polls base their perception of who will win



Nation House on Kimathi Street and home to the giant Nation Media Group.

according to media coverage. The more one side is given coverage, the more likely it will top in an opinion poll. Thus it was pertinent for the media to give fair coverage to both sides. Because the role the media plays in elections is crucial, providing fair coverage to each side is important in enhancing the democratic space for all to air their views.

Unlike in the past, the media this time was commended for its balanced coverage of both sides. Further, the media was given accolades for taking the leading role in civic education. The media engaged experts who were able to clearly dissect complex issues that many Kenyans would have had problems with. The media also

played its part by advocating for peace in the face of any outcome in such a defining moment in the country's history.

The quality of talks and interviews that were conducted in the media initiated more discussions and arguments, proving that the media was impartial. In reporting and analyzing results, the creative use of information and communication technologies and giving constant

updates in tandem with the IIEC results has made the media among the highly trusted institutions in the country.

The discipline displayed in accurate reporting and avoiding inflammatory or hateful speech, especially by vernacular FM stations, showed that responsible journalism had come of age.

Level of media influence

Unlike in the past when the media has always contributed in influencing the public to vote in a certain way, the impartiality witnessed from the media this time is laudable. They performed their duty in informing the public about the issues, dispelling myths half-truths and lies. Media ethics, which was previously non-existent, was taken to high standards. **KN**

The writer is an assistant communication officer, APHRC

The discipline displayed in accurate reporting and avoiding inflammatory or hateful speech, especially by vernacular FM stations, showed that responsible journalism had come of age.

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elections as a result of which some of their kinsmen are still living in IDP camps.

Two, will Uhuru be ready to risk being perceived as an anti-reformist by associating with Ruto, who vehemently opposed the new Constitution especially with Raila on the opposing side, who has widely been perceived as a reformist? Three, based on the 2002 results, will a Kikuyu-Kalenjin alliance be enough to guarantee a win?

Kalonzo and Saitoti seem to be the biggest losers post the referendum vote. With the two failing to deliver the votes in their respective backyards during the referendum, they fall off as strong contenders and the frontrunners may not be enthusiastic to have them on board. But assuming there is some form of an alliance with any of the leading contenders, the two leaders must be prepared to play second fiddle, which is not ideal for leaders of their stature vis-à-vis their ultimate political ambition.

Other than the politicians, the clergy is also likely to be a major force in the forthcoming elections and both Ruto and Kalonzo are the likely beneficiaries with the latter having sided with them in opposing the new Constitution and the former being largely perceived as their sympathiser in spite of being in the 'Yes' camp.

Churches

The widely held perception that the strong 'No' support in Ukambani was largely down to the clergy's influence more than the politicians may be proof enough that the Vice-President is in safe hands with the clergy. Whether the clergy's support will translate into churches' support will remain to be seen, but if the referendum results are anything to go by, this may not be the case. The latest opinion poll shows that the Church has lost its influence in the society with only about 19 per cent of the population trusting this important institution.

Kalonzo-Ruto-Clergy alliance is a possibility, but even then, they

may not have enough ammunition to challenge either Uhuru or Raila or the alliance between Uhuru and Raila.

We could also still have a Uhuru-Kalonzo alliance against Raila-Mudavadi alliance with Ruto as the deciding factor. These kinds of alliances, however, have the potential of polarising the nation with those on the East of Nairobi going against those on the West.

At this juncture it is difficult to place Karua, but one thing is certain, she will have to re-strategise and work extra hard, otherwise her ambition to run for the highest office may just remain that; an ambition.

Other than regional and ethnic alliances, generational change alliance may also come into play. The youthful leaders who may not necessarily have ethnic or

Nyanza will definitely go where Raila takes them and Central and the larger Mt Kenya region will go where Uhuru takes them, age gaps notwithstanding.

Equation

Depending on what Raila chooses to do with Mudavadi, Western Province could be up for grabs. Coast will also be close to call. But the province that will certainly be up for grabs as far as all the contenders are concerned will undoubtedly be Eastern. Even though North Eastern may not offer the numbers, it will still be crucial in ensuring that the requisite threshold per province is attained and, therefore, all candidates will endeavour to lure as many votes in the province as they can possibly manage.

Abdikadir will be a key player in this equation. The fact that the referendum was largely peaceful

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regional clout may decide to coalesce to remove the veterans in line with the newly found spirit of 'Wakati ni Sasa' in the new Kenya.

Age gaps

Undoubtedly, this would be Kenneth's best platform, assuming the other key players in such an alliance such Saboti MP Eugene Wamalwa, Tourism minister Najib Balala, and the chairman of the Parliamentary Select Committee (PSC) Mohamed Abdikadir, to name but a few, decide to form the alliance and indeed back him.

Whether generational change will prevail over ethnic and regional interests remains to be seen; after all this is a new Kenya and everything is possible now. But a critical look at the previous and current trends suggest that

came as a sigh of relief to many Kenyans, most of whom had lost trust in the electoral process after the disputed 2007 elections. To many, the referendum did not only usher in a new constitutional order, but also helped in restoring faith in the electoral process.

It is undoubted that real and sustainable change in any society lies in the participatory power of the people who ordinarily exercise it through the ballot. The above political analysis will mean nothing unless Kenyans are guaranteed of their democratic rights. Consequently, it is incumbent upon whatever alliances or coalitions that are formed and those in charge of the electoral processes to ensure and be alive to the fact that ultimately, Kenyans want their choices to be respected. **KN**

What next?

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Constitution, which is the body that will fully take charge to ensure that the new Constitution is effectively implemented.

Besides the formation of those two entities, other changes include the taking of new oaths by the President and all other State officers who had taken oaths under the old constitution or who are required to take an oath under the new Constitution.

In respect to land holdings, all land held by non-citizens as freehold land shall revert to the State and the non-citizen proprietors shall have a right to acquire grants of those parcels, but only as leasehold interests. An unprecedented volume of applications by foreigners, foreign missions and foreign institutions and foreign companies seeking the grants shall take place. Still on the same, all those colonial leaseholds of 999 years shall on the effective date be converted to 99-year leases.

Rationalisation

All existing laws shall after the effective date be construed in a way that conforms to the Constitution and if the core of those laws is unconstitutional, then they will be deemed void. Still within the short term (0–one year), the Chief Justice shall leave office within six months while the Attorney General will leave within one year. All the new offices created shall be filled within one year.

Most legislation establishing Constitutional Commissions such as the Kenyan National Human Rights Commission, the Parliamentary Service Commission, the Teachers Service Commission and the



Use of transparent ballot boxes in the referendum created an air of transparency.

National Police Service Commission are required to be formed within one year.

However, the Commission on the Implementation of the Constitution and the Commission on Revenue Allocation are to be constituted within 90 days while The Salaries and Remuneration Commission is to be constituted within nine months. Other changes required within one year include legislations to give effect to citizenship, vacation from office by MPs, Political Parties, vetting of judges and magistrates and the establishment of the Contingency Fund.

Legislations

Medium term changes (1–4 years) include the setting up of the Senate and County Governments after the General Election of 2012 and the passing of legislations involving the Consolidation and Rationalisation of Land Laws, the establishment of the Independent Ethics and Anti-corruption Commission, the giving of functions to the National Security Organs, fulfilling the mandate of the Inspector-General of the

National Police Service, establishing the Judiciary fund and relating to operations of the County Assemblies.

In the long term (4–5 years), the legislations required shall include those meant to ensure that communities are compensated for use of their culture, those relating to regulation of land use, those relating to the promotion of representation of women and other marginalised groups and legislation touching on the auditing of Government accounts and procurement of public goods and services.

Notwithstanding all these legal changes, the most important change that ought to take place is in the minds of both the governors and the governed so that they may act in the spirit of a new Constitution. Otherwise we may end up having a new Constitution without constitutionalism. **KN**

The writer is an advocate with Murage and Mwangi Advocates.

THE KONRAD ADENAUER FOUNDATION IN KENYA

Konrad-Adenauer-Stiftung is a German political Foundation which was founded in 1955. The Foundation is named after the first Federal Chancellor, Prime Minister and Head of Federal Government of the then West Germany after World War II. Konrad Adenauer set the pace for peace, economic and social welfare and democratic development in Germany.

The ideals that guided its formation are also closely linked to our work in Germany as well as abroad. For 50 years, the Foundation has followed the principles of democracy, rule of law, human rights, sustainable development and social market economy.

In Kenya, the Foundation has been operating since 1974. The Foundation's work in this country is guided by the understanding that democracy and good governance should not only be viewed from a national level, but also the participation of people in political decisions as well as political progress from the grass roots level.

Our aims

Our main focus is to build and strengthen the institutions that are instrumental in sustaining democracy. This includes:

- Securing of the constitutional state and of free and fair elections;
- Protection of human rights;
- Supporting the development of stable and democratic political parties of the Centre;
- Decentralisation and delegation of power to lower levels;
- Further integration both inside (marginalised regions in the North/North Eastern parts) and outside the country (EAC, NEPAD); and
- Development of an active civil society

participating in the political, social and economic development of the country.

Our programmes

Among other activities we currently support:

Working with political parties to identify their aims and chart their development so that democratic institutions, including fair political competition and a parliamentary system, are regarded as the cornerstones for the future development in Kenya.

Dialogue and capacity building for young leaders for the development of the country. Therefore, we organise and arrange workshops and seminars in which we help young leaders to clarify their aims and strategies.

Reform of local governance and strengthening the activities of residents' associations. These voluntary associations of citizens seek to educate their members on their political rights and of opportunities for participation in local politics. They provide a bridge between the ordinary citizen and local authorities, and monitor the latter's activities with special focus on the utilisation of devolved funds.

Introduction of civic education to schools and colleges. We train teachers of history and government in civic education. In addition, we participate in the composition of a new curriculum on civic education.

Our principle is: Dialogue and Partnership for Freedom, Democracy and Justice.

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