

Kenya's New Constitution

By *Cornelia Glinz**

I. Introduction:

The Kenyans endorsed a new Constitution in a referendum on the 4th of August.¹ This Constitution is claimed to be the most important political development since independence from Great Britain in 1963. Since the introduction of the Independence Constitution, which led to the formation of the new State, no comprehensive constitutional reform has taken place. As the Independence Constitution was drafted through negotiations with the colonial power this is the first reform which detaches the Constitution from its colonial origin and puts it on a new basis. Therefore the new document is a genuine Constitution of the Kenyan people. The reform was long awaited as it comes more than 20 years after the constitutional reform project was first begun. The initiative for the production of the latest draft was the violence and unrest following the 2007 elections. These events led to more than 1000 dead and several hundred thousand internally displaced persons and made the necessity of structural reforms very obvious. The new Constitution has been hailed by many as a very modern document, guaranteeing socio-economic rights such as the right to housing and food. In this respect, it can be seen – alongside the South African Constitution - as one of the most progressive documents on the continent.

II. Kenya's Constitutional History

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¹ The document (the Proposed Constitution of Kenya as published by the Attorney-General, 6.5.2010) can be found under: <http://www.nation.co.ke/blob/view/-/913208/data/157983/-/18do0kz/-/published+draft.pdf>; Quod vide: *Hendrike Wulfert-Markert / Anke Christine Lerch*, Das Verfassungsreferendum in Kenia - ein Gebot der Stunde, Konrad Adenauer Stiftung Länderberichte 7.2010, http://www.kas.de/wf/doc/kas_20186-1522-1-30.pdf?100722141727; *Stefan Jansen / Anke Christine Lerch*, Die Verfassung Kenias "auf einen Blick", *ibid* 10.2010, <http://www.kas.de/kenia/de/publications/20977/>.

When Kenya gained independence from British colonial rule in 1963 it introduced its Independence Constitution in the same year. It resulted from difficult negotiations between the British Colonial Office and Kenyan political leaders between 1960 and 1963 in the so called Lancaster Conferences. The outcome was a Constitution with a Bill of Rights, a multi-party system and a Westminster-style parliamentary government, lead by a Prime Minister whilst the Queen remained formally the Head of State. In order to overcome potential conflicts between different ethnic groups within the new State a system of regionalism was chosen. Thus a structure distributing power between the center and regions was implemented. Additionally, a bicameral federal legislature was created: besides a House of Representatives there was the Senate as a second chamber in which the regions were represented. Therefore it produced a system of separation of powers on the vertical and on the horizontal level.

However, in the years following independence, Kenya failed to establish democracy and the rule of law based on this Constitution. The system of checks and balances provided for by the Independence Constitution was undermined through numerous reforms. Through the first constitutional amendment in 1964, the office of the President was created who became both Head of State and Head of Government, whereas the function of the Prime Minister was abolished. In the following years, the President gradually became more and more powerful. Secondly, from the first government on, there was never serious political will to implement the system of regional power. Thus constitutional reform was used to dismantle the regional features of the system of government. Soon, the exclusive legislative competences of the regions were taken over by the central Parliament. Later, in order to strengthen central power, the Senate, which represented the regions, was merged with the second parliamentary chamber into one legislature, the National Assembly. Finally, under the government of Kenya's second President Daniel Arap Moi in the 1980s, Kenya was formally transformed into a single party state. A constitutional provision was added which prohibited the establishment of new political parties.

In the early 1990s, there were increasing demands for a return to a multi-party system. Thus, in 1991 the provision prohibiting the creation of political parties was abolished. In the following years, under public pressure, a formal constitutional review process was initiated. Finally, in 2005, a constitutional referendum was held for the first time, but by then the Kenyans voted against.

In 2007 parliamentary and presidential elections took place. The result of the elections was disputed and culminated in severe violence between the ethnic groups. To bring about peace the presidential candidate Mr. Kibaki and the opposition leader Mr. Odinga concluded a power-sharing agreement in February 2008, the so called National Accord and Reconciliation Act. According to it, President Kibaki stayed in power. In return, the opposition leader, Mr. Odinga, became Prime Minister, a post newly created for the purpose of sharing power. Bearing in mind the recent dramatic events within the country, the topic of constitutional reform became part of the Accord, stipulating an obligation to begin drafting a fundamentally new document. In February 2008 an independent Committee of Experts started work on the draft constitution, which was finally put to a referendum on the 4th of August 2010.² The pre-referendum period was accompanied by a huge public debate. Amongst others the question of land reform as part of the new Constitution was particularly controversial. Finally 67 percent of voters endorsed the new Constitution on a turnout of 72 percent in a peaceful process.

Subsequently, on the 27th of August, President Kibaki signed the document in a public ceremony attended by thousands of Kenyans and several African leaders. At the ceremony there was another interesting attendee worth mentioning: the Sudanese President Omar al-Bashir who was given a place of honour along with the other African Heads of States. Amongst Kenyans the proclamation of the Constitution resulted in an atmosphere of great celebration. Kenyans are full of hope and optimism that the Constitution is a starting point for a new area. Newspapers commented on the event with exclamations such as “a historic day for Kenya” or “a nation is reborn”. The country struggles from a huge variety of problems including an arbitrary judicial system,

² See on the Committee and its work: <http://www.coekenya.go.ke/>.

corruption, nepotism and ethnic rivalries which have led to unjust distribution of land and resources. Thus many Kenyans hope that the new Constitution will help to overcome these difficulties.

III. Changes by the new Constitution

The overall intention of its authors was to bring the Constitution closer to the citizens – a fact which can be observed from many examples in the text.

1. The Preamble

Right at the beginning of the text stands an essential innovation in so far as a Preamble is added. It states:

“We, the people of Kenya [...] adopt, enact and give this Constitution to ourselves and to our future generations.”

Through these words it becomes clear, that there is a new understanding of the Constitution: It shall be a Constitution which Kenyans choose for themselves and which thereby shall be detached from the old post-colonial Constitution.

2. The Bill of Rights

Particularly remarkable is the Chapter on the Bill of Rights. This Chapter along with that on citizenship was moved to the front of the Constitution and is now to be found in Chapter 4. In the old version of the Constitution these Chapters were much further back, following the Chapters on the structure of the State. Within the Bill of Rights there are two fundamental changes: firstly, the Chapter was systematically reordered and secondly, the scope of existing fundamental rights was extended with several new rights added to the existing list. On the first point, the reordering, an introductory part, entitled “General provisions relating to the Bill of Rights”, was added. It contains provisions on the application, enforcement and the limits of the Bill of Rights. This general section is followed by a second on fundamental rights and freedoms. Finally, a third part is attached on the application of these rights to specific groups of society like youths, disabled persons, or older people.

Besides the new structure, fundamental rights were largely amplified. It is new that the Bill of Rights contains at the beginning, in Articles 27 and 28, the principle of equality and freedom from discrimination and the protection of human dignity. Furthermore personal rights were extended such as the right to privacy in Article 31. Likewise several important democratic rights were added, like for example, the freedom of the media and access to information in Article 34 and 35. Particularly remarkable is another group of newly added rights which shows the very modern character of the Constitution: Article 43 contains economic and social rights. These include the right to health care services, the right to housing, to food, to water and sanitation, to social security and to education. Furthermore it is worth to mention that the Constitution cares for the protection of the environment and introduces a right to a clean and healthy environment in Article 42. Another innovative Article is 46 which contains consumer rights.

What is striking is the obvious similarity of the text with that of the South African Constitution. The new Kenyan Constitution clearly seems to be inspired by it. This can be explained by the fact that the Committee of Experts which was in charge of the drafting process comprised a South African Professor whose expertise was apparently influential in the work.³ Compared to the South African Constitution, which was considered so far as the most progressive on the continent, the Kenyan Bill of Rights has a similar extension of protected rights and for example with the stipulation of consumer rights goes even further in some respects.

3. The Structure of the State

Coming to the next point, the new Constitution contains important changes concerning the structure of the State.

a. Firstly, in the *executive*, the function of Prime Minister, created following the elections of 2007 as a compromise to include the opposition leader in government will be

³ This is Christina Murray. She provided for background information for the public in the “Beginner’s guide to the Proposed Constitution” which can be downloaded from the Committee’s webpage, seen note 2.

abolished. Thus the presidential system will be re-established. However, the powers of the President, which were massively extended under former governments, will be drastically reduced. For example, from now on, the National Assembly will have to approve the nomination of the Members of Cabinet by the President. As to the structure of the executive power on the vertical level, there will be a major change: besides the national government, a second level will be reintroduced with the creation of 47 counties and related county governments. In an Annex, there is a list of responsibilities which are conferred on the counties. In conclusion, under the new Constitution, Kenya moves in the direction of a decentralised democracy.

b. In the *legislature*, a bicameral structure will be created, as was the case under the original Independence Constitution of 1963. From now on Parliament will consist of two chambers: the National Assembly, and the newly created Senate. The Senate will be composed of representatives of the newly established 47 counties. It is noteworthy, that there will be a special focus on the representation of women in Parliament. 47 special seats have been set aside for women in the National Assembly. Equally in the Senate, 16 seats out of the 68 are reserved for women. Moreover, in both chambers, representatives for youth and for disabled people are guaranteed.

c. There is also a major innovation with respect to the *judiciary*: under the new Constitution a Supreme Court shall be established. It will have original jurisdiction on disputes relating to the elections to the office of the President. Furthermore it will have the *final* jurisdiction in cases involving the interpretation or application of the Constitution. A special provision stipulates that people have the *right* to appeal to the Supreme Court in the latter cases, whereas in all other matters of appeal the Court is vested with the authority to determine which cases to hear. Under the former Constitution the High Court, more precisely a Constitutional Division of it, decided on constitutional matters. However, even under the new Constitution, the High Court will maintain its *original* jurisdiction in questions of interpretation of the Constitution.

4. Land Reform

Another matter of extensive reform, which some observers even conceived as the most important one, is the question of land rights. The significance of the topic is revealed by the fact that a Chapter with the title “land and environment” is moved to the front, now following directly the Bill of Rights. Under the former Constitution there was only one form of land tenureship that the Constitution expressly determined in Chapter 8: so called trust land (which consisted of the formerly native areas under colonial rule). Private land ownership was however broadly protected under Art. 75 of the Bill of Rights which dealt with property rights. A third category of land, not directly mentioned in the Constitution but of great importance was *government land*, which was formerly held by the British crown and handed over to the Kenyan State with independence. The new Constitution creates with Chapter 5 one comprehensive part that classifies the land in three categories and provides for further provisions on each of them: public land, community land (in which the old trust land merges) and private land, Art. 61.

Highly significant with respect to land reform will be the establishment of a *National Land Commission*. It can initiate investigations into present or historical land injustices, and recommend appropriate redress. Completely new is the provision that foreign nationals cannot hold property rights on land. By contrast, a person who is not a citizen may hold land on the basis of leasehold tenure only and such lease shall not exceed 99 years.

To give effect to this immense land reform, Parliament is vested with the obligation to enact legislation on land. What is striking concerning this mandate is that it includes the drafting of provisions to prescribe minimum and maximum land holding levels with respect to private land. This last point was especially controversial. By giving the possibility to set restrictions on the extent of land ownership, the Constitution aims to redress the balance of ownership upset by years of dominance by influential families and tribal cronyism. Foremost there is former President Daniel Arap Moi whose family owns large amounts of land, a fact which saw him conducting an opposition campaign against the new Constitution.

5. The Fight Against Corruption

In the context of the fight against corruption a whole Chapter is dedicated to “leadership and integrity”. Besides setting standards for the conduct of State officers it provides for the establishment of a new independent *ethics and anti-corruption commission*, Art. 79. Since corruption is one of the major problems in the country, the new commission will face immense challenges. Bearing in mind the events of the last few years there are serious doubts whether a new commission can bring the needed change. Already in 2002 a great deal of hope was vested in the new government of Mr. Kibaki to break with the corrupt methods of his predecessors and indeed the President set an example with the appointment of the former activist John Githongo as permanent secretary for ethics and governance in the Office of the President. However, within only a short period corruption found its way back into government and Mr. Githongo left for exile in Britain.

6. Transition

The transition to the new constitutional order was a particularly controversial issue throughout the drafting process. The final outcome is found in the annexed Schedule 6. A first question to decide was whether the new system of government should come into effect immediately. In order to prevent disruption, it was decided that the provisions on the executive and legislature will be delayed until the next elections in 2012 and correspondingly the application of provisions under the former Constitution and the National Accord and Reconciliation Act will be extended.

Another question was the effect for *office holders*. The necessity for reform of the judiciary was obvious, but how to deal with the sitting judges and magistrates? The result was that a form of *vetting* of current judges and magistrates will take place. In this respect, Parliament shall enact legislation within one year establishing mechanisms and procedures for the review of suitability of the office holders. Considering the special role

of the Chief Justice, he will be replaced within six months.⁴ Equally, the Attorney-General will have to leave office some time in the next 12 months.⁵

All of the major changes under the new Constitution will need further implementation through legislation by act of Parliament. Several provisions of the Constitution mandate Parliament to enact such legislation in specific fields. A timetable is attached in Schedule 5 which determines a timescale within which a particular piece of legislation is due. The implementation process through parliamentary legislative acts will be one of the key challenges for the future success of the Constitution.

IV. Reactions

With respect to reactions from the international community Kenya was congratulated for this historic step. However, cautionary voices, amongst them the German ambassador to Kenya, warned that one should first of all wait for serious steps to be taken by the Kenyan government with respect to implementation.

V. Appraisal

An evaluation of the document reveals that a modern and citizen-friendly text was created both from the covered subjects and its structure. This is obviously shown by the new Bill of Rights with its clear structure and the inclusion of a wide array of rights such as socio-economic rights. Concerning the new structure of State it is crucial that the power of the President is reduced to reverse the increase from the last decades. With the topic of the land reform a sensitive subject was addressed which, with the help of the National Land Commission and upcoming legislation can provide a basis to rebalance the unjust distribution of land in the past.

⁴ A new Chief Justice was named in the end of January.

⁵ This is a notable signal for a new start: Attorney-General Amos Wako has been in office nearly 20 years and is known for his inactivity. Likewise the Chief Justice, a new person was nominated for the post of Attorney-General in the end of January.

However, the actual success of the Constitution is still awaited. Much will depend on what the expected implementing legislation will look like and if the constitutionally agreed time schedule is met. Furthermore it has to be seen how some of the newly created bodies work, foremost the ethics and anti-corruption commission. Above all the Kenyan political elite will have to prove its serious will to change its previous attitude. Already in the past there have been some events which were accompanied by hopes for political change like the coming into power of the actual President Kibaki in 2002. However it soon became obvious that he was equally unwilling to confront the problems of the country. Corruption and malpractice continued unhindered within a short period of his election. It can be only hoped that the ambitions of the Kenyan people won't be disappointed another time.