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# KENYA'S NEW CONSTITUTION: TRIUMPH IN HAND, TESTING TIMES AHEAD?

*Tom Wolf*

Following a tortuous path of some two decades, Kenya finally obtained a new constitution when on August 4, 2010 two-thirds of Kenyans who participated in the national referendum voted to adopt it, and President Mwai Kibaki promulgated it at a festive ceremony in Nairobi three weeks later.

Yet even prior to its actual implementation, it should be stressed that from global perspective, adopting a new constitution, or even just substantially revising an existing one is not something that very often happens in a country – or even in the whole world. Moreover, such transformations occur in a quite limited set of circumstances, most accompanied by violence: when a section of an existing state breaks away and declares its independence; when a revolt or rebellion results in the overthrow or replacement of an existing order, or leads to a 'compromise' agreement that accommodates at least the principal demands of the various parties.

By contrast, in Kenya this sort of 'tectonic shift' was largely lacking. Moreover, the main impetus for reform has come over the years not so much from within the political class as from outside, led by prominent individuals from the religious sector and various civic organizations, even if particular political leaders periodically championed proposals of one sort or another for a complex mixture of motives.

These very long, drawn-out and often met-with-violence efforts reflected a growing body of opinion regarding flaws in the country's constitutional order in terms of both content and practice. These included especially the following:

1. a concentration of largely unchecked power in the executive,
2. a concentration of power in Nairobi at the expense of the regions,
3. frequent (if geographically specific) electoral violence (often orchestrated by those in power) and other (violent and non-violent) forms of victimization of political opponents, including torture and several high-profile assassinations other 'mysterious' deaths,
4. large-scale if periodic extra-judicial killings and minimal protection of human rights,
5. an absence of any compensatory guarantees for women, 'marginalized groups', and people with disabilities , reflecting deeply entrenched cultural biases against them.

Three main factors account for the new constitution's remarkable success. First, the length and frequent turmoil of the period during which such (if largely fruitless) efforts were made produced considerable 'reform-fatigue', so that even many public figures who had never been personally committed to or involved in 'the struggle' now associated themselves with it if only to enable the nation to finally put this milestone behind it, giving space for innumerable other pressing issues. In particular, the failure of the preceding effort during Kibaki's first term – resulting from a major schism that emerged within the assemblage that was responsible for his electoral triumph in 2002 – when a draft constitution was defeated 57 to 43 per cent in the referendum of November, 2005, energized important players in both the political class and the wider society to 'get it right' this time.

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Second, the election crisis in the years 2007 and 2008, easily the gravest threat to the country's integrity in terms of the scale and geographic distribution of violence since independence, had three main positive reform-effects.

First, it demonstrated, especially to key political and private sector actors, the fragile nature of social cohesion in the country, and the now-manifest dangers of holding national elections under existing rules and institutions. Second, it allowed for the robust entrance of international players (especially certain Western governments through their diplomatic representatives, the UN, and the African Union) in an effort to end the violence and achieve a short-term political settlement, as well as lay out a longer-term reform agenda (known as "Agenda Four") that included major constitutional reform. Third and closely related to the previous two factors, it encouraged those subsequently tasked with authoring the Review Act itself to insulate the process from 'late-hour sabotage' by the political class and the members of parliament (MPs), even if it did allow for their substantive input at particular stages.

A third and more immediate factor was that many individual political careers stood to gain by 'riding the wave' of popular support for any new constitution. Specifically, considering the early wide winning-margins predicted by various opinion polls, several leading figures who were reported to have serious misgivings about it considered it best to conceal these. For his part, and in view of his performance during his first term, President Kibaki was seen by some as a quite reluctant 'convert' to the cause of reform.

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Whatever the accuracy of such a characterization, the fact is that, devoid of any 2012 presidential ambitions, Kibaki was encouraged by many to leave a "positive legacy" by leading from the front, which he eventually did, and he earned considerable credit for doing so. These three broad realities, whatever their relative contributions to reform success, will have profound implications for the course of the new constitution's implementation and future operation.

## THE NEW CONSTITUTIONAL ORDER: MAIN FEATURES

A brief listing of several central features of Kenya's new constitution will demonstrate the major departure that it represents.

**1. A presidential system, with much clearer separation of powers, with checks on the executive especially by a significantly empowered (and enlarged) legislative branch**

Relevant here are such provisions that:

1. Cabinet members can neither be officials of political parties nor (as they must be at present) MPs,
2. the parliament would have a fixed, five-year term, with a specified election date,
3. the deputy-president must be formally identified as a presidential running-mate,
4. the Senate may impeach a president by a two-thirds vote, following a similar vote by the National Assembly,
5. all major executive appointments are either vetted by the National Assembly or stem from the decisions of a number of commissions that are largely independent of presidential influence, and
6. the size of the Cabinet is limited to 22 ministers and 44 assistant ministers.

Regarding the re-fashioned National Assembly itself, beyond the 80 additional regular constituencies, there will be a female representative from each of the 47 counties and another twelve nominated MPs by political parties based on their proportion of MPs (as now) but only "to represent the interests of youth, persons with disabilities and workers", making a total of 349 compared to 222 at present (of whom 210 are elected). The Upper House (Senate), concerned exclusively with county-level issues, will be comprised of: 47 regularly elected members, 16 nominated by political parties based on their shares of the elected Senators, and two members representing the youth and disabled, respectively (of each gender).

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Other examples of the legislature's enhanced stature are that:

1. a bill passed a second time (with a two-thirds majority) by parliament becomes law after two weeks even without presidential assent,

2. a declaration of war requires National Assembly assent, as does
3. an extension of a state of emergency (declared by the president) beyond two weeks.

At the same time, in terms of 'in-house' accountability, several features seek to 'tame' MPs as well. Among these is that an independent Salaries and Remuneration Commission will set their terms of service (as it will for all public officials), so that they no longer (through the Parliamentary Service Commission) can determine their own salaries and benefits, which have made them among the highest-paid elected officials in the world. And at the individual level, a recall provision (initiated by a public petition at the constituency level) could encourage them to be more careful about such matters as campaign promises, adherence to party policy, and general constituency service than they have in the past.

**2. New presidential election rules to mitigate conflict**

The 'toxic' nature of presidential election contests is somewhat reduced by means of a requirement for a second round, run-off, contest between the top two candidates unless one of them obtains more than half of all votes cast on the first round including at least 25 per cent in at least half of the counties. In addition, the role of the new Supreme Court in resolving any presidential election petitions within two weeks should also help to ease potential tensions, as should the provision that no winner needs to be sworn in for seven days following the official declaration of the results. Finally, here, the credibility of the (to be established) Election and Boundaries Commission seems assured, based on its insulation from the influence of any particular office – in marked contrast to the Electoral Commission that oversaw the disastrous 2007 election. This should boost public confidence in its decisions.

**3. Three other aspects of limited/more accountable executive power**

In connection with 'taming' executive power, three other important provisions of the new constitution should be

briefly mentioned. One is the significant dilution of the Treasury's powers, in that the control of public finance will be split between two offices – Controller of Budget and Auditor General – both enjoying institutional independence from the Office of the President.

Next, the police are subject to certain restrictions in their powers. Among these is the requirement that criminal suspects must be released on bail if the maximum sentence for the offense in question is a sentence of less than six months. More generally, any suspect should be released on bail or bond, pending being charged or taken to trial, "unless there are compelling reasons" for not doing so.

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More broadly, the regular and Administration Police are to be merged, with both responsible to an Inspector General who, while appointed by the president, must be confirmed by parliament, and who shall take direction from a (supposedly) independent National Police Service Commission. Just how these various branches of the central government will perform, both in relation to each other and to the lower (devolved) level of government, however, will require a considerable period to observe, following the next election when they are all in place.

**4. A more robust system of devolved government**

The 47 local government units – counties, representing the first districts established under the British – will have a guaranteed allocation of 15 per cent of the total budget, apportioned on the basis of a formula (to be worked out) that combines population with area-size. While some have argued that the powers assigned to such units do not go far enough, the fact that a successful presidential candidate (as noted above) must win at least 25 per cent of the vote in at least half of them does accord them some political recognition. So, too, does the fact that they will be run by a popularly-elected Governor who will be leading a similarly elected council.

A related issue is the fate of the current 175 local government councils, since the new constitution makes

no mention of them. Hence they were not included in the post-promulgation swearing-in ceremonies of their national official counterparts (MPs, judicial officials, etc.), leaving their fate to the post-2012 election parliament. As with the executive, however, there remain a number of imponderables as to how these county governments will actually function, starting, perhaps, with their capacity to raise revenue (beyond the mandated allocations from Treasury) and properly account for its use.

**5. Greatly enhanced human rights guarantees**

While the new constitution includes the most familiar rights such as freedom of expression, assembly, association, movement, right to property and to a fair trial, there are many others also recognized, including: a wider right to privacy, information, media freedom, the right to vote and to fair working practices, including the right to strike, to use the language of one's choice, consumer rights, to fair administrative action, and to a clean environment.

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But the Bill of Rights goes considerably beyond these, offering an expansive 'platter' of socio-economic rights, including those to basic welfare such as housing, sanitation, water, and freedom from hunger, while protecting children and the aged from "neglect." Moreover, the state has judicially enforceable obligations to the progressive realization of such rights, even on behalf of groups or individuals who are unable to demand them, and which must not involve undue complexity or excessive (and in some cases, any) costs. These may be applied especially to particular "disadvantaged groups" – children, youth, persons with disability, the elderly, and to the "marginalized" in general. Further, the constitution commits the Government to carry out its human rights obligations under international law. Indeed, the inclusion of all the above, together with such enforcement provisions, makes this constitution only the world's fourth of this nature.

**6. A re-invented judiciary**

It is widely acknowledged that corruption and vulnerability to political interference have plagued Kenya's judiciary for

years. As such, reform of the 'bench' was seen as essential ever since the momentum for a new constitution began.

The overall structure of the judiciary remains largely the same – with the notable exception of the creation of a Supreme Court that shall issue final judgments on cases coming from the Court of Appeal, resolve constitutional disagreements, and have sole jurisdiction over presidential election disputes (as noted). Still, a number of other changes are viewed as positive, if still short of the ideal. These include the following:

- The mandatory resignation of the current Chief Justice within six months. Future holders of this critical office will be selected by the Judicial Service Commission and approved by the National Assembly (their appointment by the president being only ceremonial). They will serve a maximum of ten years. The Attorney-General, though actually part of the Executive, also has to resign, in his case within a year.
- A much more independent/professional Judicial Service Commission;
- A higher level of security of tenure and remuneration without any possibility of judges' salaries being cut during service or in retirement; and
- The use of a vetting process for all current judges who wish to continue in office to ensure that those serving under the new constitution meet its stringent ethical standards. This does not apply for magistrates, who handle far more cases that affect the general public.

### 7. Various forms of compensatory treatment for women and other 'marginalized' categories

The position of women has been elevated in various ways. One regards citizenship, in that a foreign man who marries a Kenyan woman will now (like a foreign woman who is married by a Kenyan man) be eligible for Kenyan citizenship. It also provides for a woman's equal rights to marital property in the case of divorce, as well as rights regarding land issues more generally. Next, with regard to representation, 16 seats are set aside for women in the Senate. Each of the 47

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counties shall have a female MP in the National Assembly. Moreover, no less than one third of the county assembly seats will be held by women. Other bodies (e.g., commissions) must also have a certain minimum proportion of women – generally, one-third). "Equal opportunities" in terms of gender must be provided in the public service as a whole. Beyond these mandated requirements, parliament is obliged to pass legislation within five years to "promote" (though not to guarantee) "the representation of women" more generally.

Just how much the combined impact of such measures will reduce gender inequality remains to be seen, but they do appear to offer significant gains in terms of the status of women.

**8. A two-track (if more arduous) amendment process**

As noted earlier, Kenya's independence constitution was radically altered after 1963 (especially during its first half-decade), many of the changes serving narrow purposes. These required the endorsement of 65 per cent of all 222 MPs.

To make such short-term, self-serving alterations more difficult, the bar has been raised substantially. It allows for two methods. The first requires the proposed amendment to be introduced in the Lower House of parliament where it must stay for 90 days, and then win approval from at least two-thirds of the members of both Houses. Moreover, amendments to certain provisions – including all those contained in the Bill of Rights, certain of those concerning land, and the structure of devolved government – will also require obtaining a majority in a referendum, which must include getting at least 20 per cent approval in at least half of the 47 counties. The second method involves obtaining at least one million signatures from the public, after which it is submitted to parliament, which then initiates the first method.

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Inasmuch as so many provisions of this constitution appear more appropriately the content of ordinary legislation, making amendments so difficult to achieve may

eventually be the cause of regret. Various proposals to modify Kenya's 'first-past-the-post' electoral system failed to gain sufficient support for inclusion. But with this system now having constitutional rather than just ordinary legislative status, it will be that much harder to change, should national opinion shift in that direction. The same applies to all other provisions.

## IMPLEMENTATION CHALLENGES: NOW THE HARD PART

Whatever its margin of victory in the referendum, and however attractive many of its provisions may be, the constitution's actual future impact, even at this very early stage, cannot be accurately appreciated without noting some challenges of actually implementing it, especially with regard to particular sections as identified by various observers.

These are of two broad types:

1. those that stretch the capacity of the relevant institutions including that of the state as whole despite the best of intentions, and
2. those that threaten entrenched, status quo, interests (and which appear to have already met considerable resistance; see below). As anything approaching full treatment of such issues is impossible here, only a few examples of each are presented.

### 1. Capacity and Other Governance Weaknesses: Easier Said Than Done?

The promise of a vast array of socio-economic entitlements is likely to fall far short of fulfillment, however sincere the commitment to ensure this. Relevant here are the results of 2009 national census released, six months late, within days of the new constitution's ratification. It revealed an increase of eight million over the last decade, now amounting to nearly one million annually. Such an escalating population clearly has profound implications for the new constitution's promise of a broad array of socio-economic rights.

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Indeed, with 50 per cent of Kenyans still living below the poverty line, such figures provided a sobering 'reality-check' with regard to all such rights-guarantees, which include: universal medical care ("of a high standard"), compulsory and free basic education, shelter, nutrition, and employment for "youth", together with the necessary training to enable them to obtain it, as well as care of the aged. Beyond services and other prescribed benefits, costs appear set to massively escalate as a consequence of the numerous new public positions and bodies (elected offices, units of government, oversight commissions, etc.), amounting to an additional 2,441 such personnel.

Another major challenge concerns devolution, in particular, the financial capacity of these units to perform their assigned functions, regardless of the basic-minimum central government grants to which they are entitled, based especially on the local (potential) tax and natural resource-base. According to the Director-General of the Kenya National Bureau of Statistics, for example, "Once they start operating, you will see how others will drastically move very fast to great heights of economic growth while some will decline." At the same time, the leadership and technical capacity of these units to perform their assigned functions is also likely to vary widely, with those representing 'marginal' (i.e., especially pastoralist) communities at a distinct disadvantage reflecting both challenging natural environments and short-falls in suitable human capital.

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Perhaps even more serious, the mandated proportion of total revenue that is to be shared out to these units (15 per cent, as noted above) may simply be unsustainable. With Kenya's annual debt obligation at some 40 per cent of all such revenue, this allocation is likely to leave central government with a major expenditure shortfall, especially since counties themselves have no responsibility to contribute to such national debt obligations.

A further issue regarding financial capacity has to do with the entire implementation process itself. According to the just-established parliamentary Committee on the Implementation of the Constitution (CoIC), some KES 4b

will be required over the next two years to accomplish this. Yet, the Minister for Justice "was concerned that the government had not committed any cash to the process."

Next, regarding leadership, individuals with sufficient popularity to win positions of Governor may not possess the requisite leadership and managerial skills. A final and related implementation issue is corruption. In this regard, fears have been expressed that especially at the county level, oversight mechanisms may be inadequate, and considering the scale of resources involved, lead to greatly expanded opportunities for nepotism and graft.

**2. Resistance: On Your Marks, Get Set... Not So Fast!**

Given the history of governance abuses in Kenya – combined with the fact that the political elite that has so benefited from such abuses is still (as noted at the outset) largely in place – it is clear that many provisions in the new constitution, to say nothing of its stated underlying philosophy and principles, constitute a potent threat to deeply entrenched 'ways of doing things'.

As such, it should be expected that various strategies and tactics have been and will be made to thwart at least some of its intended impact. However, in light of the high level of public support for the constitution as expressed in the referendum, such efforts may take any (or all of) three main forms:

1. to ensure that officials sympathetic to those likely to be most threatened by its various provisions occupy certain critical offices,
2. to subvert the use of such powers through corrupt inducements, and
3. to prevent those whose ascent to power in 2012 and thereafter is considered threatening for those implicated in various abuses from doing so.

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Prior to its ratification and promulgation, two incidents that went considerably beyond several (unsuccessful) technical-legal challenges to the referendum itself appeared to confirm such fears. One was the 'clandestine' insertion

of the words "national insecurity" into the Bill of Rights section of the proposed constitution, just before its official printing began, with the clear intention of effectively negating their guarantee, or at least leaving their promise to the discretion of relevant Government officials. Suspicions mounted when the Attorney-General, whose final mandate in the process had been to make only "editorial and grammatical corrections" before publication, revealed that he had been approached by "a senior official" from the National Security Intelligence Service (NSIS) who had asked him to do just that (and which he claimed he had refused to do). Yet while he assured the public that an investigation would be launched into the affair, no further progress was reported, including any identification by the Attorney-General himself as to just who had made the initial request to him.

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The other pre-referendum incident occurred near the close of an open-air Christian 'prayer meeting' in Nairobi's Uhuru Park, some two months before the referendum. Three hand-grenades were tossed into the crowd, killing six and injuring more than one hundred. Given the fact that this meeting was in reality part of the 'No' campaign, many assumed that the perpetrators' goal was to discredit its 'Yes' opponents. Moreover, given the nature of the weapons used, and the subsequent failure of the Police to make any progress in the investigation, some drew the conclusion that the NSIS itself must have been behind it, on instructions from 'above'.

Moving to the process of implementation itself, its basic outline should be noted. It requires two key bodies: an independent Commission of Implementation (CoI) and a Parliamentary Implementation Oversight Committee (PIOC). Relevant bills (49 are listed in the new constitution's Transition section) are then to be drafted by the Attorney-General with input and support from the CoI and the Kenya Law Reform Commission. The process then moves forward with oversight from the PIOC.

Yet various events suggested that full commitment to both the process and content of implementation may be wanting. On the basis of such events, observers have

identified three main tactics by which this may be done, depending upon the circumstances:

1. to populate the constitution's new structures with as many old-order loyalists as possible,
2. to rely on sympathetic forces within the judiciary to render favorable interpretations when relevant cases reach them; and perhaps even
3. to sponsor constitutional amendments that would undo various 'offending' provisions. The scene may thus be set for an increasingly dramatic struggle between these opposing forces.

## CONCLUSION: THE TOUGHER TEST OF CONSTITUTIONALISM

One striking feature of the new constitution is its length, with much of its content more commonly found in ordinary statutes. This seems to be the result of three reinforcing factors:

1. the vast scale of inequality in society so that without at least the promise of greater equity (if not equality) no substitute for the old constitution was likely to win sufficient public support for adoption,
2. a related widespread popular mistrust in government based on quite bitter experience of many Kenyans, and
3. a highly fractious political class that likewise tended to see most attempts at compromise only in terms of short-term partisan gains and losses, and thus unwilling to leave details to future interpretations of 'basic principles' – let alone to 'good faith' – so that much of the text constitutes the broadest (if not lowest) 'common denominator'.

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Yet whatever its weaknesses, Kenya's new constitution represents a radical break from the past in terms of significant improvements in all areas of governance. Yet its fate is likely to depend, above all, on political dynamics. The ultimate question for Kenya is thus: if the new constitution represents a genuine victory for the underprivileged and marginalized in threatening to deny the elite much of the self-serving, arbitrary power they have enjoyed in the

past, will the latter – still very much in place – allow this to happen? Or will the 'Kenyan people' be able to hang on to and thus confirm their referendum victory in its fullest sense?

As argued above, therefore, those with the most at stake in the status quo were out-flanked by the combination of local reformers and international actors whose clout was greatly enhanced by the 2008 crisis. As such, therefore, the country's national constitutional drama has, in many respects, only just begun. And this is so even if, perhaps remarkably, the two main protagonists in the ill-fated earlier attempt of 2005 – the current president and prime minister – were united on this occasion in support of ratification. For the basic fault-lines of Kenyan society and politics remain, and are bound to be activated as the country moves towards the 2012 elections. The possibility that this contest, or any early challenge to national integrity that may arise, including the outcome of the ICC investigations, could undermine the constitution's promise must not escape those who struggled so hard for this 'new dispensation', at such cost, for so long.