



Anke Christine Lerch is Resident Representative of the Konrad-Adenauer-Stiftung in Kenya.



Iris Karanja is a programme employee in the Foreign Bureau in Nairobi.

KENYA DECIDES

CHALLENGES OF THE NEW CONSTITUTION AND 2013 ELECTIONS

Anke Christine Lerch / Iris Karanja

For many years Kenya was a politically stable country that notched up slow but steady economic progress. However, the extent to which the unvaryingly precarious economic and social situation of large sectors of the population is putting political stability at risk became clear after the December 2007 elections. In many cities across the country protests against election tampering degenerated into violent unrest, arson attacks and looting. The conflict, which ran along ethnic dividing lines, claimed hundreds of lives. A National Accord brought an end to the disturbances in February 2008. In addition to wide-ranging reforms to the public sector, the agreement envisaged the drafting of a new constitution. Debates around the new constitution, which was approved by almost 70 per cent of eligible Kenyan voters, continues to shape events. It will only be fully implemented come the elections in March next year.

Many questions regarding these elections remain unanswered. Even polling day, planned for 4 March 2013, could still change. Court proceedings contesting this date are currently pending. Furthermore, a decision must be taken on whether two candidates for president may stand despite being charged by the International Criminal Court (ICC) in The Hague. Additionally, the new constitution also presents challenges. On election day six partially new political offices will be filled. A new, decentralised government system, which will have to prove itself in practice, will be introduced. The population is politically ill-informed and many candidates are not aware of the tasks and duties of the offices they seek. Some necessary laws and reforms are not yet in force or implemented.

In the run up to the elections the omnipresent spectre of corruption has also become an issue. As in the past it remains one of the greatest obstacles to Kenya's development into a democratic country under the rule of law. The Kenyan Independent Electoral and Boundaries Commission (IEBC) is now being accused of not proceeding transparently in the awarding of contracts. Corruption also plays a role in increasing party membership and naturally in the fight for votes, too. In the face of these developments the question of whether the violent incidents following the previous elections will recur is almost unavoidable.

THE NEW CONSTITUTION¹

The 205-page-long new Kenyan constitution fundamentally reframes the competences and powers of the executive, legislative and judicial branches of government. Modifying the structures of the state is intended to establish a new, "more democratic" form of presidential republic. The core of the new constitution can be summarised in three main streams of thought, which the framers of the constitution considered essential: more democratic participation by the people, a reduction to the president's powers and decentralisation.

The core of the new constitution can be summarised in three main lines of thought: more democratic participation, a reduction to the president's powers and decentralisation.

The full implementation of the new constitution should be completed within five years, requiring parliament to pass many new laws. In this regard the constitution itself sets a precise timeframe. However, for diverse reasons, many difficulties persist in meeting the deadlines. On the one hand, it is comprehensible that under certain circumstances ministries do not have enough expert competences or staff to prepare the corresponding draft bills in a timely manner. On the other hand, it is clear that some necessary reform processes are being dragged out to the benefit of some politicians' individual interests. However, a whole raft of significant laws has been steered through parliament, even if partially using the "heave-ho procedure".

1 | Anke Christine Lerch and Hendrike Wulfert-Markert, "Das Verfassungsreferendum in Kenia – Ein Gebot der Stunde", KAS Länderbericht, Jul 2010, <http://kas.de/kenia/de/publications/20186> (accessed 10 Oct 2012).

The Commission for the Implementation of the Constitution has accused parliamentarians of inserting unconstitutional clauses into laws misleading the public.

The fact that many laws were passed in great haste and only just within the established timeframes raises doubts as to the lawfulness of the legislative process and the quality of the laws themselves. Even the Commission for the Implementation of the Constitution (CIC) has found fault with the legislative process in its reports. The CIC has accused parliamentarians of inserting unconstitutional clauses into laws, misleading the public, excluding the people from the legislative process and willingly delaying the passage of laws. For example, proposed bills that were met with great hope among the public have been watered down in parliament, benefitting serving politicians. In particular this affects the Leadership and Integrity Act 2012, the Political Parties Act 2011 and the Elections Act 2011. The filling of a number of public offices was also delayed. Thus the Registrar for Political Parties, for example, has not been appointed despite the incumbent's time in office expiring, generating doubts about the incumbent's legitimacy.

A further sign of some serving politicians' disinterest in implementing reforms swiftly is the decision to delay the election date. Kenya's new constitution clearly stipulates that election day is the second Tuesday in August every five years. Because it would have been almost impossible to hold elections on this date due to many delays in implementing the constitution and the current ministers' and parliamentarians' insistence on serving out their full five year terms, a major debate broke out on possible election dates. In the end the High Court resolved the dispute by deciding that the current government should complete its five year term before being dissolved and that fresh elections must be held within 60 days following parliament's dissolution. Following this decision, the IEBC announced 4 March 2013 as the date of the next election.

On the subject of elections, a major obstacle to implementing the constitution is the rule prescribed in Article 81(b) governing gender quotas. It states that no more than two thirds of the members of any elected or appointed body may be of a single gender. As women remain significantly underrepresented in the country's political life this requirement is causing major headaches in all areas. Some are currently considering whether this article of the constitution

should be amended or whether a new provision should be created to permit the appointment of additional women to elected bodies in order to meet the required quorum. However this would presumably increase the total membership of the various parliamentary and governmental bodies considerably, thus incurring significant additional costs. Furthermore such a move would raise questions as to the democratic legitimacy of these appointed additional women. There is no foreseeable resolution to this issue that can accommodate all sides.

DECENTRALISING GOVERNMENT STRUCTURES

The new constitution envisages the introduction of a new decentralised system of government instead of being governed centrally from Nairobi, as has been the practice to date. Forty-seven counties are to be created, each with a decentralised government which, in predetermined areas, will be able to act independently and access their own financial resources. Consequently, at the elections each county will elect its own parliament (county-assembly) and government, formed of a county executive committee and county governor, and their deputies. At the national level, in addition to the national assembly, the constitution sets out the establishment of a senate, principally to represent the counties' interests. Fifteen per cent of the overall national budget is to be distributed according to predetermined criteria and made available to the counties to fulfil their duties.

The introduction of county governments is intended to increase development and self-determination in Kenya's regions. Above all there is hope that infrastructure will be improved and jobs created in the individual counties. But despite the positive expectations of county governments, there remain concerns that as the government is decentralised so too will corruption be decentralised, and thus increased. The constitution does provide for a large number of control mechanisms, but it also requires that decentralisation be implemented by capable people in the individual county governments.

Despite the positive expectations of county governments, there remain concerns that as the government is decentralised so too will corruption be decentralised, and thus increased.

The restructuring of the whole government and the introduction of decentralised government structures will, in particular, lead to challenges managing the elections. Until now three people have been elected in national elections: the president, a member of parliament per constituency and a representative for the district or town council. In the future eight people are to be elected by means of six votes. The president is to be elected along with a deputy, as before a member of parliament per constituency, a senator from each county and a female member of parliament, the county governor and his deputy and, at the local level, a county assembly member.

Many Kenyans can neither read nor write and some do not understand English or Kiswahili. This has led to long queues to vote in the past.

To understand the difficulties this will cause you must realise that many Kenyans can neither read nor write and some do not understand English or Kiswahili. Thus the ballot paper must be produced so that illiterate people can also cast their vote. Added to all of this is the stark lack of polling places. This has already led to very long queues at polls in the past. Given that the entire voting process is to become more complicated, voters will presumably also take longer in the booth, further increasing waiting times. It is still unclear how these time-related challenges will be overcome.

A lack of political knowledge on the elections and the political offices to be filled will make running free and fair elections even more difficult. While it is true that many Kenyans have read the new constitution, numbers of them did not understand it. In many cases that also applies to candidates who are standing for county governor or senator without knowing the tasks and duties they are assuming.

NEW ELECTORAL AND POLITICAL PARTY LAWS

To guarantee free and fair elections in accordance with democratic standards and in the spirit of the new constitution a new Political Parties Act 2011 was approved and came into force on 2 November 2011. It contains guidelines for parties' internal structures and financing. In order to combat the ethnicisation of political parties, the Political Parties Act requires parties to be national in character by proving they have at least 1,000 members in half of the 47

counties. A recently introduced electronic system should prevent individuals registering as members of multiple parties.

Furthermore, to be registered a party must now submit a party programme in accordance with the principles of good governance and the national unity of Kenya. All parties must be easily identifiable by party name and logo. In the past it was common for parties to splinter, leading to an unmanageably high number of party names.²

In Kenya parties are not differentiated from each other by political beliefs, but rather by ethnic group. They are often founded as political vehicles for individual politicians. This has turned “party hopping” into a widespread practice. Another phenomenon in Kenyan politics is the formation of party coalitions in the run-up to elections in order to win over as many ethnic groups as possible for a candidate. However, this causes unstable and fragile governments. An example of this is the NARC government as recently as the 2005 constitutional referendum.

Parties are often founded as political vehicles for individual politicians. This has turned “hopping” into a widespread practice.

Since 2007 parties have had access to public money distributed in accordance with share of the vote at the previous elections. In order to encourage transparency within political parties, the Political Parties Act 2011 requires them to publish their accounts at the end of the financial year and no later than 90 days before national elections. Furthermore parties must operate democratic internal decision-making processes and no more than two thirds of any management body may be of a single gender.

In addition to the Political Parties Act 2011, the Elections Act 2011 was also passed. It, too, is intended to guarantee democratic and transparent elections. In addition to setting out rules for election organisation and electoral dispute resolution the electoral law establishes deadlines for political parties.

2 | A list of political parties registered in Kenya can be found here: <http://iebc.or.ke/index.php/political-parties/registered-political-parties> (accessed 10 Oct 2012).

But whether the new electoral legislation will bring about a positive change will only become apparent after the elections. Some timing guidelines were already shortened and others changed as early as July 2012. According to another law passed by parliament in October potential candidates

The new Kenyan constitution provides that transferring to another party while in office results in parliamentarians losing their seats and associated offices.

have until 4 January to declare for which party they will be running. However, the new Kenyan constitution provides that transferring to another party while in office results in parliamentarians losing their seats and associated offices. Approximately 100 current members of parliament (including six candidates for president and at least 20 cabinet members) have transferred to another party since the last set of elections. According to the constitution, they should be stripped of their seats and offices. However, these politicians have simply never officially announced their resignation from their original party. This causes confusion and contradicts the new constitution.

CHANGELINGS FACING THE ELECTORAL COMMISSION

The public's attention is turned towards the IEBC for the coming elections. According to article 88 of the new constitution, this body is responsible for drawing constituency boundaries, registering voters, voter education and managing the elections – all tasks that must be accomplished in a relatively short space of time. The IEBC originally requested a budget of 41 billion Kenyan shillings (approximately 410 million euros), but was granted only 17 billion Kenyan shillings (170 million euros). This is expected to lead to a lower number of polling places and limited voter education. The IEBC also argued that it effectively had to start from scratch and that just registering voters and acquiring vehicles would consume a large proportion of its budget. However, many criticise the body's budget as too high: The Electoral Commission of Kenya (ECK) spent approximately seven billion Kenyan shillings (70 million euros) to run the 2007 elections. However, a number of donor countries have promised support totalling 2.2 billion Kenyan shillings (22 million euros). This is a clear sign that the international community is paying attention to the coming elections and is keen to prevent a repeat of the events following the last elections.

In actual fact it appears the IEBC's budget will not be too tight. For example, it celebrated the launch of the new IEBC logo with 500 guests, an extensive entertainment programme and lunch at a five-star hotel in inner city Nairobi. The presentation of voter education materials was conducted in equally luxurious fashion. Far more challenging for the IEBC than is budget is that time is running out before the elections. Many processes were consciously delayed in order to postpone the elections. Even the finalising of constituency boundaries met with intense debate in parliament and the public, making the initial plan of holding elections in August 2012 impossible to fulfil because of statutory notification periods. Discussions to set a date for the election also sapped precious time that was needed for their preparation.

The finalising of constituency boundaries met with intense debate made the initial plan of holding elections in August 2012 impossible to fulfil.

Moreover, the IEBC has encountered problems acquiring the necessary equipment for digital voter registration. Consequently, the registration of approximately 18 million electors will only begin in November and must be completed within 30 days.

Digital voter registration was already tested in places for the 2010 constitutional referendum and should prevent individual voters from being registered in multiple constituencies. It should also prevent the dead from "rising" to vote. In 2007 approximately two million votes were cast under the names of already deceased persons.

According to the new constitution, Kenyans resident outside of the country will be able to vote for the first time. This very large group of voters had been disenfranchised until now. However, it will still not be possible for all Kenyans living abroad to cast their vote. According to the IEBC 120 polling places will be set up for Kenyan nationals abroad. In particular, this will make it possible for Kenyan voters in the USA and UK to participate in the elections. The situation for Kenyans elsewhere in Africa and in Asia looks far gloomier. Only five polling places will be available on the entire African continent (outside of Kenya) and only one in Asia (in Dubai). There is no postal voting option. This means it will only be possible for a small proportion of the

Kenyan Diaspora to vote, which could lead to the election results being contested.

THE CENTRAL FIGURES OF THE ELECTIONS

As it is almost impossible to define and differentiate Kenyan parties by their political content, Kenyans vote along ethnic lines as they feel more closely linked to candidates from their own ethnic group. Presidential elections often also depend on what ethnic groups' support candidates can win or with what other candidates alliances can be struck to attract as many voters as possible. Thus, in election campaigns, it is not unusual to hear slogans like "KKK Alliance", which stands for the alliance between the Kikuyu, the Kalenjin and the Kamba. A lack of issues in electoral campaigns also makes it difficult for voters to settle on a preferred candidate. Kenyan electoral campaigns are marked by handing out free T-shirts and hats, and by slandering your opponents.

Presidential elections often depend on what ethnic groups' support candidates can win or with what other candidates alliances can be struck.

In the run-up to the elections the public's interest has been focused on electing a new head of state even though his power will be greatly reduced under the new constitution. Many prominent personalities have already announced who they are supporting for the presidency.³ The favourites are:

ELECTION FAVOURITES

When he was in opposition, Raila Odinga,⁴ son of Kenya's first vice-president, was already fighting to build a multi-party system during President Daniel Arap Moi's term in office. In 1997 Raila Odinga stood for the presidency for the first time and came third in the popular vote. In 2007 he stood again and opinion polls showed him in the lead. But when the election results were published incumbent Mwai Kibaki was declared the winner by a small margin. Both sides accused the other of electoral fraud and violent disturbances broke out across the country. Only a peace

3 | Iris Karanja, Medina Sekandari and Natascha Moser, "Wer wird Kenias nächster Präsident?", KAS Länderbericht, Sep 2012, <http://kas.de/kenia/de/publications/32022> (accessed 10 Oct 2012).

4 | Official homepage: <http://raila-odinga.com> (accessed 10 Oct 2012).

agreement between Kibaki and Odinga, mediated by Kofi Annan, could put an end to the unrest and led to a grand coalition that ushered Raila Odinga in as prime minister, as had already been promised in 2002. From the media perspective, no other candidate is under the same intense pressure as Odinga, who is standing for the ODM party. He is now campaigning for the highest office in the land for the third time.



Premier minister Raila Odinga: No other candidate is under such intense pressure. | Source: Center for Strategic & International Studies (CC BY-NC-SA).

Kalonzo Musyoka⁵ began his political career in the Moi government. Between 1993 and 1998 he was foreign minister, an office he initially retained under president Kibaki before later becoming minister for the environment then joining the opposition ODM party in 2005. In preparation for the 2007 elections Musyoka founded the ODM-Kenya party, an ODM splinter group. Musyoka received the third largest share of the vote and was named vice-president by president Kibaki. To distance himself further from the ODM in the 2012 elections, ODM-K was renamed the Wiper Democratic Movement last year. Satirists have mocked the name “Wiper”, claiming that it is a symbol for Musyoka’s

5 | Official homepage: <http://mykalonzomusyoka.com> (accessed 10 Oct 2012).

fickle political allegiances, swaying backwards and forwards without ever settling on one side of the other. Indeed no clear political line can be discerned from his positions.



Presidency candidate Uhuru Kenyatta: Accused of crimes against humanity in Den Haag. Supreme Court of Justice has to decide if his candidacy is legitimate. | Source: Uhuru Kenyatta / flickr (CC BY-NC).

Uhuru Kenyatta,⁶ son of the first president Jomo Kenyatta, first took to the political stage in 1997 as the local leader in Gatundu of then governing party KANU. In 2001 he was appointed to parliament and shortly thereafter became minister for local government. In 2002, Moi named him as his preferred successor. But he lost the presidential election to Mwai Kibaki. For the 2007 elections Uhuru withdrew his candidacy for president and pledged his full support to the incumbent, president Kibaki. When the coalition government was formed Uhuru Kenyatta became acting prime minister and finance minister.

In preparation for the coming elections, Uhuru has founded his own party – The National Alliance (TNA) – and wishes to stand as their candidate. Consequently, according to article 103 of the constitution he must step down from his

6 | Official homepage: <http://tnakenya.com> (accessed 10 Oct 2012).

government offices as they are based on his membership of the KANU. However, the legitimacy of his candidacy is also questionable as the ICC has charged Kenyatta with crimes against humanity during the unrest in the aftermath of the 2007 elections. Consequently he resigned as finance minister on 26 January 2012. However, he remains a member of parliament and acting prime minister.

William Ruto⁷ began his political career in 1992 with YK'92 (Youth for KANU '92). He has been a member of parliament since 1997 and a cabinet minister since 2002. After the 2007 elections he was appointed minister for agriculture in the coalition government before becoming minister for higher education. He resigned as a minister because of a number of corruption allegations but remains a member of parliament. Ruto hopes to become president with the support of the party he founded, the United Republican Party. William Ruto has also been charged with crimes against humanity by the ICC in connection with the unrest in 2007.

In 2002 Martha Karua⁸ closed her legal practices to devote herself entirely to politics. She has made a significant contribution to developing family law in Kenya as both a lawyer and member of parliament. As an opposition politician, Karua was committed to the introduction of a multi-party system and, when its establishment in 1992, became the first woman elected to parliament. Between 2002 and her resignation in 2009 she was Minister of Justice. Being an intelligent and astute defender of the rule of law has both earned and cost her the support of many in the government. Although many hope she can win the election, as a woman in Kenya her chances are considered slim.

For a few months in 2002 Musalia Mudavadi⁹ was vice-president under president Moi. He continued his political career during the 2005 constitutional referendum. He was involved in the ODM against the proposed constitution. After Odinga was appointed prime minister in 2007, Mudavadi was named

After Odinga was appointed prime minister in 2007, Mudavadi was named vice-president along with Uhuru Kenyatta.

7 | Official homepage: <http://williamsamoeiruto.co.ke> (accessed 10 Oct 2012).

8 | Official homepage: <http://joinmarthakarua.com> (accessed 10 Oct 2012).

9 | Official homepage: <http://musali mudavadi.com> (accessed 10 Oct 2012).

vice-president along with Uhuru Kenyatta. Mudavadi has increasingly distanced himself from the ODM and now represents the United Democratic Front (UDF), which he founded as part of his presidential campaign. In order to fully dissociate himself from the ODM, he resigned from his post as minister for local government. However, he remained vice-president.

Eugene Wamalwa has been a FORD-Kenya member of parliament since 2003 and Minister of Justice since 2012. Wamalwa plans to effect change in Kenya if he is elected president. His campaign's main target groups are young people and Kenyans living abroad.

The number of candidates for president is expected to fall though coalition building before the election. The question of whether Uhuru Kenyatta and William Ruto are entitled to stand for election despite the ICC charges against them is currently being considered by the High Court.

CONCLUSION

The major question at this point in time is whether Kenya is capable of conducting transparent and free elections and whether an orderly election can prevent a repeat of violent rioting. Although implementation of the new constitution is only advancing very slowly and many necessary reforms are yet to be made, there have indeed been many positive changes. The legal basis has been established to reorganise the justice system. A new Chief Justice, Attorney General and Chief Prosecutor have all been appointed. At the same time, investigations of all judges were launched and the catching up on backlogged legal cases implemented. The fact that politicians too are now increasingly accountable before the courts should also be viewed positively. Furthermore, civil society organisations are taking their role as watchdogs seriously and, where the law is broken, seek redress in court.

Although the prevailing hopeful mood that greeted the constitution when it came into force has subsided somewhat, it can still be felt. Still, it has become clear that many serving politicians have no interest in implementing the new constitution and its associated reforms.



Police operation at riots in Nairobi: Ethnic dispute was purposefully stoked by local politicians. | Source: DEMOSCH / flickr (CC BY).

Violent disturbances, likely politically motivated, have already occurred in Mombasa, Tana River and Kisumu. The riots in Tana River cost many people their lives and were reminiscent of the unrest in 2007/2008. On the surface, the riots were sparked by differences in land use by nomadic and settled ethnic groups, but it was also reported that local politicians purposefully stoked the dispute to strengthen their influence in the run-up to the elections.

Only five months out from the elections many problems remain unresolved. For example, there is no definitive agreement on how the constitutionally mandated gender quotas on elected bodies should be handled. Plus, court proceedings remain ongoing regarding the contested election date and the re-drawing of constituency boundaries. No voters have yet been registered and there is no known official voter education programme. However, the daily newspapers are full of reports that show the presidential candidates have already begun their campaigns. Speculation is also rife about party coalitions. For instance, this week the Party of National Unity (PNU) announced its cooperation with the TNA and its support for the TNA's presidential candidate, Uhuru Kenyatta. In this regard, many parallels can be drawn with the situation prior to the 2007 elections.

Press reports are making no significant contribution to informing the public for the elections. Articles are often poorly thought out and lacking in background research. They frequently limit themselves to repeating what certain

politicians claim in their campaigns. In conjunction with insufficient voter education, this will result in large parts of the population going to the polls of 4 March 2013 without understanding the new constitution and election process.

Insufficient voter education, a lack of political content and the huge gulf between rich and poor make it easy for candidates to manipulate voters and to “buy” votes for small sums or gifts. To this must be added the high youth unemployment rate. Their dire lack of prospects leaves young jobseekers open to manipulation and makes them a potential flashpoint. Also of significance are the ethnic tensions between Kenya’s ethnic groups, which are intentionally harnessed by politicians’ election campaigns. On the one hand, coalitions are formed to reach out to as many ethnicities as possible and thus win their votes. But, on the other, the flames of ethnic tension are intentionally fanned to increase votes from candidates’ own ethnic groups. It must be feared that large parts of the population will once again be manipulated by politicians and that, in turn, this will lead to events similar to those in the wake of the 2007 elections. The only hope to guarantee free and fair democratic elections is intense voter political education efforts.