



## **ORGANIZING A REFERENDUM AS A MEANS TO ADOPT A NEW CONSTITUTION: LESSONS FROM THE KENYAN EXPERIENCE**

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**At the**

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The late Prof. H.W.O Okoth Ogendo, described Constitution making as “the Continuation of Politics by other means”. This means that though the referendum process is a legal one, it is never far removed from Politics. There is always a danger of the Politicization of the referendum process to settle political scores, build political careers or use it as a momentum for political change in the Country.

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If not handled well, it can further divide and polarize the nation and breed division and animosity among communities.

The most familiar form of democratic governance is where an Election Management Body (EMB) organizes an institutional framework that offers an opportunity for citizens to choose their representatives in institutions of governance through voting in elections. However, there is a growing trend where EMB's organize a similar institutional framework this time offering citizens an opportunity to exercise power on institutions of governance through referenda originating from government, citizen initiatives or recalls termed as *direct democracy*. In the latter, the EMB frames a question or questions originating from a draft bill drafted by either citizen's elected representatives in institutions of governance or through the citizen's popular initiatives or recalls. Subsequently, the Elections Management Body organizes a referendum to give an opportunity to all eligible voters to support or oppose the question through voting.

This document provides insights on Lessons from Organizing a constitutional Referendum as a means to adopt a new Constitution in Kenya in 2010.

Although a Constitutional referendum appears to be citizens directly exercising decision over the constitution, call for referendum are in real sense driven by political leadership driving political transitions. For instance, Southern Sudan had a Constitutional referendum on whether to remain in the bigger Sudan or separate. A similar referendum was held in England on whether Scotland remained or separated from United Kingdom. Egypt organized a referendum to amend its constitution. A common characteristic in all these countries is the prominent role of political leadership in shaping the referendum vote. Outcomes range from the overwhelming voting outcomes in Sudan and Egypt (over 90 percent in support) to

the closely contested outcome in England (55 percent opposing). The critical role of political leadership in referendum requires elections management bodies to work closely with political leadership across divides to ensure that the referendum is conducted in a free, fair and credible environment devoid on violence or intimidation. Failure to work together may lead to crises that undermine efforts to enhance democracy, sense of nationhood as well as economic development.

### **Kenya's First Constitution Referenda in 2005**

It has been said that “all major breakthroughs are preceded by breakdowns”.

The adoption of a new Constitution for Kenya in 2010 was certainly a major breakthrough preceded by many breakdowns such as the rejection of the Constitution in 2005 and the Post-Election Violence that followed the 2007 Presidential Elections.

After decades of strongman rule, there was a national clamor for a new constitution to address excessive executive power, redistribute resources through devolution and address other injustices. The sitting government in 2005 gave in and initiated a “people driven” process of rewriting the constitution .Views were gathered across the country and consolidated by constitutional experts and subjected to stakeholder's dialogue.

Though well intentioned ,the timing of this referendum coincided with a period of a fledgling ruling coalition facing imminent collapse due to what was felt by some of the coalition partners as betrayal by the other partners.

The term people driven Constitution is popularly used in Kenya to imply that citizens initiated the process. However, the referendum of 2005 became a weapon for bitter political opponents to fight and thus interpreted the constitutional change

bill to fit them. Citizens were galvanized to either vote or reject the constitutional change bill. One side of the sitting coalition government fought to have the bill passed while the other fought to have it rejected. The referendum process was characterized by animosity as both camps interpreted the document in a manner that suited their views thereby undermining the process through false propaganda and intimidation. These totally overshadowed the civic education process that was supposed to enlighten Kenyans on the contents of the draft constitution.

For the first time Ministers in the same government were on opposing sides based on Political Persuasion. Politics took center stage and no amount of civic education would convince the supporters of the Political leaders opposed to the draft Constitution. There was also a walk out by delegates allied to President Kibaki at the National Constitutional Conference and later the opposition walked out of Parliament when the government side pushed through amendments that were perceived to be watering down the Bomas draft Constitution. The campaigns were characterized by high voltage political rhetoric, divisive language and outrageous distortion of some of the Provisions of the draft Constitution (e.g. gay marriage and Sharia Law claims).

The symbol for Yes was a Banana and that for No was an Orange. After the referendum was rejected in November 2005, the President fired all the Cabinet ministers who were opposed to it. These politicians then came together and formed the Orange Democratic Movement which would later take on the government side in the 2007 Elections. This was the beginning of a major political fallout which culminated in the post-election violence in 2007-2008.

## **Kenya's Second Constitutional Referendum in 2010**

Bruised from the damage and setbacks the country suffered following the December 2007 General Elections, there was almost uniform consensus amongst citizens and the political leadership on the urgent need for a new constitution to improve governance and the rule of law. The new Constitution was to actualize the dream of equity measures in resource distribution, ensure that the safety and security of Kenyans was guaranteed at all times and that Kenyans from all walks of life have equal access to justice and that disputes would be resolved through non-violent, amicable and legally sanctioned mechanisms.

The role of the Interim Independent Electoral Commission(IIEC) created a year earlier was to mid-wife the process starting with setting up of the Commission secretariat, registration of voters, developing of referendum rules and procedures, framing the referendum question and ultimately conducting a constitutional referendum. The national mood was of changing the constitution which brought together all political divides. The adoption of a new constitution was part of the agenda items agreed to by the protagonists in the National Reconciliation and Unity Accord and it was supported greatly by the International Community. The media played a key role in helping in civic education by ensuring people understood the contents of the draft constitution. They made sure the debates were issue-based and put to task opponents who made false allegations. The major political leadership was in support though initially some ministers in government were thought to have been opposing it for political reasons, but they (the ministers) denied the allegations. This earned them the name *Watermelons* and only came out to fully support the draft constitution when the President and the Prime-minister took the lead in campaigning for the adoption of the new constitution. The

National Cohesion and Integration Commission helped in taming the language used during campaigns when it charged several political leaders for hate speech.

### **Referendum Preparations**

The first reform agenda of the IIEC was to set up a new professional secretariat to enable better performance of its functions. This was followed by a 45 day nation-wide voter registration which culminated in creation a new register of voters with 12.4 million voters. Enrollment of voters for registration was mainly through Optical Mark Reader forms but the Commission also piloted electronic voter registration in 22 constituencies. The Commission made daily public reports on progress which kept the citizens fully informed of the process. Meanwhile, the Commission worked with key stakeholders across political divides in development of Referendum Rules.

By registering 12.4 million voters, the Commission was able to silence some critiques who were concerned that there will be few voters to give any legitimacy to a new Constitution based on the International best practice on referendums encapsulated in the Cummingham amendment rule which requires 60% of the eligible voters to be registered before the conduct of a referendum. The Commission adopted the regulations governing the conduct of the general elections to apply to the referendum with necessary modifications. The Commission framed the question (which must not be a leading question) and with the involvement of the people, approved the colour *Green* to be the symbol for Yes and the colour *Red* to be the symbol for No. The IIEC conducted Voter education while the Committee of Experts (COE) conducted civic education. The Commission also registered two Referendum Committees for the two sides and accredited Chief Agents who in turn appointed their agents to the polling stations. The Chief Agents

signed a code of Conduct committing themselves to a fair conduct of the Campaigns. The special court set up by the Law to deal with disputes arising from the referendum was petitioned by Human rights organizations and ordered the Commission to register Prisoners to vote in the referendum but although it found Kenyans in Diaspora also had the right to vote in the referendum, it declined to order the Commission to register them due to time and resource constraints.

It has been said that a Landslide victory is an Election's Managers best friend. On 4<sup>th</sup> August 2010, Kenyans voted peacefully in the referendum. By 3pm on the afternoon of 5<sup>th</sup> August 2010, thanks to the use of sms technology for provisional results transmission, the results from 20,655 polling stations showed that the Constitution was approved by a margin of 66.9%. Despite initial resistance caused by misunderstanding of the provisional results transmission system, the No team officially conceded defeat on 5<sup>th</sup> August 2010 at 2pm. However official results could only be announced 2 days later on 7<sup>th</sup> August 2010 and on 27<sup>th</sup> August 2010, the new Constitution was promulgated.

### **Lessons learnt**

1. Referendum is an election which must be conducted within very short legal and administrative deadlines
2. Notwithstanding the rigid legal and administrative deadlines, the elections management body is still required to deliver a free, fair, credible election with demonstrated high level of professionalism and integrity.
3. Timing of a Constitutional referendum determines whether proposed changes will be adopted or rejected. An environment of political mistrust and hate overshadows the civic education process which is supposed to

enlighten citizens on the constitutional change bill and may lead to a well-intentioned initiative being rejected.

4. A referendum objective can be undermined as much by political stakeholders as it can be undermined by government and there is therefore need for these considerations when trying to secure referendum outcome that matches the objective for which it was intended to achieve.
5. Where technology in elections work, it helps to boost public confidence in the institutions of governance especially the elections management body
6. The less political drama before the referendum the better. No walkouts or political designs that want to use the referendum as a platform to settle political scores or build a political power base
7. A strong civic education program is critical to ensure that people understand the new draft constitution
8. Co-opting the support and cooperation of the media is very critical in ensuring that the debate is not politicized unduly and that it is issue-based
9. A firm implementation of a code of conduct by the Commission to ensure that the Campaigns are not driven by emotions and divisive politics.
10. There must be a strong and effective Election Dispute Resolution mechanism that allows anyone aggrieved by the conduct of the referendum or the results to lodge a petition which must be heard and determined expeditiously.