

“Even if they are going to fail, we are going to fail with them”: The hopes and realities of women’s suffrage under the 2010 Constitution

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Introduction

One of the greatest hopes of the 2010 Kenyan Constitution was that the extensive provisions for the promotion and protection of women’s rights would be successful in breaking the vicious grip of patriarchal politics and promote a new generation of women parliamentarians and local government officials. As well as mentioning women in a list of groups identified as marginalised and in need of institutional and structural support, quotas were entrenched to ensure women’s representation in parliament. In spite of these safeguards, the first elections under the new constitution in 2013 returned very few women to elected positions other than those designated as women only positions.¹

Grounded in field work interviews I conducted in the lead up to the 2013 Kenyan general elections with women around Nyanza, this paper examines Kenyan women’s expectations of the Constitution, and its ability to affect tangible change in their own lives and communities.² I set these expectations against the history of constitutional

¹ 16 women of 290 constituency members of National Assembly; 82 women elected of the total 1,450 County Assembly Ward Representatives; 6 women of 47 deputy governors; no women elected governor; no women elected senator, see, Federation of Women Lawyers Kenya (FIDA), 2013, *Key Gains and challenges – a gender audit of Kenya’s 2013 Election process*, <https://www.ndi.org/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf> - last accessed 31 October 2015, pg 47.

² This field work was undertaken as part of my doctoral research at the Australian National University and was supported by the Australian Federation of Graduate Women’s Georgina Sweet Fellowship, and the institutional support and generous collegiality of the Kenya Human Rights Commission.

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reform in Kenya from the late colonial and early post-colonial periods. The comparison does not encourage optimism – the hope of constitutional renewal tied to national progress has a long, and disappointing history.

The 2010 constitution was developed in response to the 2007 – 08 post-election violence that shook the foundations of Kenya's democracy. Acknowledging that inequitable resource allocation and unresolved land tenure disputes were key drivers of the violence, the 2010 constitution aims to guarantee all communities receive adequate resources and infrastructure support, as well as to protect the rights of minorities and other marginalised groups through an extensive and explicit Bill of Rights.

Rather than only critiquing the usefulness of human rights discourses in overcoming violent, local politics, I argue here that Kenya is subject to (at least) two, key recurring themes – constitutional renewal as a panacea for a failing democracy; and the protection of vulnerable communities, and national cohesion through constitutional amendment. In order to better understand these phenomena, I focus on this latest constitutional dispensation within the context of local cultural memory of constitution making and nation building. This history illustrates the colonial preoccupation with identifying, representing and 'protecting' racial and ethnic groups in the colony. This approach also allows us to examine the conversation about women's constitutional rights in the context of the Kenya's experience of constitution making and remaking within the colony and the post-colony, rather than discussing this constitution as a product of a fraught international dialogue or a test of the reception of human rights principles in non-western, post-colonial contexts.

My approach deliberately steps outside dominant understandings of the 2010 Constitution as primarily a response to the violence surrounding the 2007 general elections and the subsequent international intervention; as a product of human rights discourse; or as an expedient tool for peacemaking and/or power-sharing. Of course, the 2010 constitution is a product of all these motivations, but the constitution has not had the revolutionary effect on Kenyan political life and rights access for which many

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

had hoped and I use this alternate analytical frame to further investigate the reasons for the unfulfilled constitutional promises.

I begin with an overview of this recent history, and go on to examine what Kenyan women expected of the 2010 constitution in the lead-up to the first elections under the new constitution in 2013. These recent events will be set against an examination of early constitution making in the late colonial period.

The origins of the 2010 Constitution: the 2007 General Elections and the Post Election Violence³

Although polling day itself was generally peaceful, a significant delay in announcing the successful presidential candidate raised doubts about the overall conduct of the election. The incumbent, Mwai Kibaki won a contested and extremely narrow majority, and declared victory before significant anomalies had been resolved.⁴ Riots erupted across the country, dominated by violence targeting Kikuyus who were thought to have benefitted from the fraudulent result.⁵ Police and specialist military personnel the General Service Unit were deployed across the country.⁶ Women reported being targeted in physical and sexual assaults designed to scare their families from particular areas.⁷ The report by the Kriegler Commission investigating the post-

³ I discuss these events in more detail in Christina Kenny 2013, ‘“She grows to be just a woman, not a leader”: Gendered citizenship and the 2007 General election in Kenya’, *Intersections: Gender and Sexuality in Asia and the Pacific*, Issue 33, December 2013,

<http://intersections.anu.edu.au/issue33/kenny.htm> - last accessed 1 November 2015.

⁴ Guled Mohamed, ‘Kenyan Police fight protestors, 2 dead’ in *ReliefWeb*, (16 January 2008), <http://reliefweb.int/node/254523>, site accessed 25 September 2011; see also Lynne Muthoni Wanyeki, ‘Lessons from Kenya: Women and the Post-Election violence’ in *Feminist Africa*, no. 10 (2008): 91-98, pg. 91.

⁵ For a detailed explanation of the escalation of violence, and its inter-ethnic nature see Lynne Muthoni Wanyeki, ‘Lessons from Kenya: Women and the Post-Election violence’ in *Feminist Africa*, no. 10 (2008): 91-98.

⁶ For example, “[b]etween late December and early January 44 people had died of bullet wounds in Kisumu alone”, as reported ‘KENYA: Police Under fire over live rounds’ in *IRIN Humanitarian news and analysis*, (17 January 2008), <http://www.irinnews.org/report.aspx?reportid=76297>, site accessed 5 January 2012.

⁷ Wanyeki ‘Lessons from Kenya: Women and the Post-Election violence,’ p. 94; ‘Report of the Commission of Inquiry into Post-Election Violence (CIPEV)’ in *The Kenya Dialogue and Reconciliation* website, (15 October 2008), <http://www.dialoguekenya.org/docs/PEV%20Report.pdf>, site accessed 5 January 2012; ‘[other areas severely affected by the violence in other parts of the

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

election violence subsequently found that electoral fraud had saturated every element of the voting process. The malfeasance was so great, it was ‘impossible to reconstruct from the formal record who in fact won the presidential contest.’⁸

Kofi Annan was invited by the African Union to lead a panel of Eminent African Personalities with Condoleezza Rice and African Union chairman and Tanzanian President Jakaya Kikwete to help negotiate a power-sharing deal between opposition leader Raila Odinga and Kibaki.⁹ Subsequently, President Kibaki announced a new cabinet to cement a power sharing deal with Odinga as Prime Minister.¹⁰ Cabinet positions were divided equally¹¹ between ODM (Odinga) and the PNU (Kibaki) and the parliament would work on framing a new constitution and ‘tackle long-standing grievances over land, wealth and power.’¹²

Women’s expectations of the 2010 constitution

This new constitution had a galvanising effect on many NGOs dealing with women’s rights, and also invigorated grass-roots women human rights defenders, who felt that they finally had a document that was capable of supporting their work. In December 2012, eighteen months after the ratification of the 2010 constitution and in the lead up to the 2013 general elections (held in April 2013), I spoke with several grassroots women human rights activists working outside Ahero town near the provincial capital, Kisumu about their understandings and expectations of the new constitution. Although their own work focused on addressing the high levels of serious intimate

country were areas in the Rift Valley] Eldoret, Timboroa, Nakkuru, Burnt Forest and Limuru and the cities of Kisumu and Mombasa. Integrated Regional Information Networks (IRIN), ‘Kenya: Health workers grappling with conflict-related sexual violence’ in *IRIN*, (28 January 2008), <http://www.irinnews.org/report.aspx?ReportId=76247>, site accessed 6 January 2012.

⁸ Judge Johan Kriegler, et al., *Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007* (Nairobi: Government Printer, Government of Kenya, 17 September 2008). See also Department for International Development, *Elections in Kenya 2007*, <http://www.dfid.gov.uk/Documents/publications1/elections/elections-ke-2007.pdf> site accessed 22 February 2013.

⁹ UK Home Office, ‘Operational Guidance Note: Kenya,’ in UK Border Agency website, (25 February 2011), <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/kenya/previous/report-0211.pdf?view=Binary> site accessed 10 December 2012.

¹⁰ BBC News, 2008 ‘Q&A Kenya peace deal’ in *BBC News online*, (13 April), <http://news.bbc.co.uk/2/hi/africa/7165962.stm> site accessed 5 January 2012.

¹¹ BBC News, ‘Q&A Kenya peace deal,’ paragraph 6.

¹² BBC News, ‘Q&A Kenya peace deal,’ paragraph 9.

partner violence, child molestation and other serious human rights violations occurring in their communities, these women were overwhelmingly optimistic both about the constitution's potential to assist them in their work; and its ability to promote the representation of women in public office across Kenya. Martha explained "the constitution has really tried to empower women. By supporting women in leadership and in positions." Evelyn understood the predominance of men in public office would be challenging, but felt that at least women would now have a seat at the decision-making tables for the first time:

"the women [sic] gains in the constitution. The constitution favours us. ... there will be many men. But at least the constitution favours women in one way or another. We are seeing these big positions now, some are being given to women...we are now happy, because men can not sit somewhere are pass something and then bring to us".¹³

Their optimism came from the acknowledgment through particular provisions which identified women as a special category of person in need of constitutional protection. These women felt that this formal recognition would materially, positively affect their situation.¹⁴ But provisions for the representation of particular categories of persons have a long history within Kenyan constitution-making.

Constitutional History of Kenya

In this current period of human rights infused constitutional development, it is tempting to focus on the transformative potential of external human rights discourses, rather than the history of national constitutional politics. While the ideals in the

¹³ Christina Kenny and Ahero human rights network interview 2 December, 2012, Ahero town, transcription. All names have been changed to protect the anonymity of interviewees.

¹⁴ Specifically s97(1)(b) "(1) The National Assembly consists of— (a) two hundred and ninety members, each elected by the registered voters of single member constituencies; (b) forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency"; and s98(b) "98. (1) The Senate consists of— (a) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency; (b) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90; (c) two members, being one man and one woman, representing the youth; (d) two members, being one man and one woman, representing persons with disabilities". *Constitution of Kenya* (2010), National Council for Law Reporting, Government of Kenya.

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

current 2010 Kenyan constitution certainly have a philosophical and instrumental history in international organisations and western political philosophy, the physical territory we now understand as Kenya also has a local constitutional and regulatory history driven by local, territorial, colonial and burgeoning national concerns. The constitutional history of Kenya is not, as one might expect, primarily grounded in expanding the franchise, or building the democratic foundations of the latent Kenyan nation. In fact, it is more fruitful to understand these histories – the struggle for independence; the expansion of suffrage and other citizenship rights of local struggles for representation; and the influence of human rights principles as driven by different dominant forces at different times, as frequently colliding rather than mutually supportive.

The British had established a controlling commercial presence in East Africa in the 1880s, and by an Order in Council dated 11 June 1920, the East Africa Protectorate was annexed to the British Dominions under the name of the Colony of Kenya.¹⁵ In the face of massive forcible appropriations of land and labour, and crippling taxation, local African organisations formed rapidly to agitate for independence.¹⁶ The conservative Kikuyu Association, established in 1920 by chiefs and headmen – men who owed their positions of authority to the colonial government¹⁷ was quickly overtaken in popularity by the radical Young Kikuyu Association (which was renamed the East African Association (EAA) shortly after its establishment in a bid to appeal to a broader African constituency).¹⁸

¹⁵ *Papers Relating to Native Disturbances in Kenya*, Kenya Colony and Protectorate, 1922:7, Letter from the governor to the Secretary of State

¹⁶ Buell, R. L., 1928, 'The Destiny of East Africa', *Foreign Affairs*, Vol. 6, No. 3 (April), pg 409; Mungeam, G. H., 1970, 'Masai and Kikuyu Responses to the Establishment of British Administration in the East Africa Protectorate', *the Journal of Africa History*, Vol. 11, No. 1, pg. 127; see also Wipper, A., 1989, 'Kikuyu women and the Harry Thuku Disturbances: Some Uniformities of Female Militancy', *Africa*, Vol. 59, No. 3, pg 302).

¹⁷ Ingham, K., *A History of East Africa*, 2nd Ed., Longmans, London, pg. 280

¹⁸ Mungeam, G. H., 1970, 'Masai and Kikuyu Responses to the Establishment of British Administration in the East Africa Protectorate', *the Journal of Africa History*, Vol. 11, No. 1, pg 127; Ingham, K., *A History of East Africa*, 2nd Ed., Longmans, London pg. 280; Wipper, A., 1989, 'Kikuyu women and the Harry Thuku Disturbances: Some Uniformities of Female Militancy', *Africa*, Vol. 59, No. 3 pg. 301).

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

The 1921 Census recorded 3,000,000 Africans; 22,822 Indians; Arabs 10,102; and Europeans 9,651.¹⁹ Prior to this political agitation in the late 1910's and early 1920's, white settlers and the British colonial government officials had enjoyed complete control over the regulation and development of the colony.²⁰ As a result, the colonial government treated the introduction and development of local representation in Kenya as a series of shields against the threat of African political dominance in the dying days of the Colony of Kenya. The most salient features of these early constitutional debates centred around the distribution and focus of African labour; the allocation or re-allocation of forcibly alienated African land²¹; and the formal representation, and political influence of the three races living in the Colony at the time – the Anglo British settlers; the Indian population (known as Asians) and of course, the easily numerically superior, and indigenous African population.²²

Constitutional negotiation between the four represented racial groups in Kenya continued into the 1950s, although during this period constitutional development and racial representation was complicated by the emergence of Mau Mau. Beginning as a predominantly Kikuyu cultural and political independence movement, and developing into an organised rebel force whose role and contribution to the 'granting' of independence to Kenya in 1962 is still hotly debated in Kenya today.²³ Nevertheless, the fact of Mau Mau and their commitment to violent action to overthrow the British colonial government split already and constantly fracturing African alliances, most critically within the Kikuyu community, from whose ranks came the majority of the movement's guerrilla fighters as well as a number of key moderate Kenyan nationalists against violent action.²⁴ Due to a ban imposed on national level African

¹⁹ Gregory, Robert 1962, *Sidney Webb and East Africa: Labour's experiment with the Doctrine of Native Paramountcy*, Berkley and Los Angeles, p. 5, as quoted in Christopher P. Youe 1986, *Robert Thorn Coryndon: Proconsular Imperialism in Southern and Eastern Africa, 1897 – 1925*, Wilfrid Laurier University Press, p. 160

²⁰ Mungeam, G. H., 1970, 'Masai and Kikuyu Responses to the Establishment of British Administration in the East Africa Protectorate', *the Journal of Africa History*, Vol. 11, No. 1

²¹ Wipper, A., 1989, 'Kikuyu women and the Harry Thuku Disturbances: Some Uniformities of Female Militancy', *Africa*, Vol. 59, No. 3, pg. 305.

²² See Elkins, Caroline 2005, *Imperial Reckoning – The Untold Story of Britain's Gulag in Kenya*, Owl Books, New York, pp. xi – 61.

²³ See for instance 2015 'Mau Mau memorial set to open in Nairobi's Uhuru Park in rare colonial apology', *Daily Nation Newspaper* (online), 11 September, <http://www.nation.co.ke/news/British-funded-Mau-Mau-memorial-set-to-open-Uhuru-Park/-/1056/2866564/-/jmccjzjz/-/index.html> - last accessed 31 October 2015

²⁴ Elkins, Caroline 2005, *Imperial Reckoning*, pp. 62 – 91.

political organisation between 1953 -55, Africans were left to organise locally.

Forbidden from developing larger geographic and tribal coalitions:

“[e]very kind of local separatism was encouraged. Instead of finding useful and desirable outlets in cultural and welfare activities, tribalism was entrenched as the basis of political organization and thinking. ... Kenya’s particular form of indirect rule, the demarcation of tribal land units and the administration’s hostility to African nationalism, had already encouraged tribal politics.”²⁵

So great was the objection to a more equitable franchise in Kenya, that a request by the newly independent Indian government’s that all British subjects with an educational qualification be enfranchised (granting “10 percent of the Indian population of Kenya the vote”²⁶) provoked white settlers to form a Vigilance Committee and seriously contemplate armed revolt. Although, as A. J. Hughes explains:

“the treatment of the seditious [white settlers] was in marked contrast to that shown to the most minor signs of disaffection among the African population. Not one European was arrested, charged, deported, or detained as a result of the preparations for revolution. Not surprisingly, the readiness of the British government to make concessions in the face of violence or threats of violence, was noted by those in the African community who would later use similar pressures in pursuit of constitutional advance.”²⁷

This initial preoccupation with racial representation or, more broadly, the concern that the constitution was a document that would, by it’s provisions alone, protect defined groups from exploitation from other groups has persisted throughout Kenya’s history.

Racial representation was a primary concern of these early constitutions, which were accepted or rejected by interested parties on the basis of the representation of their group in comparison to others, and the perceived ‘fairness’ of the racial allocation of

²⁵ Hughes, A. J., 1963, *East Africa: The search for Unity*, Penguin Books, Baltimore Merryland, p. 123.

²⁶ Hughes, A. J., 1963, *East Africa: The search for Unity*, p. 99.

²⁷ Hughes, A. J., 1963, *East Africa: The search for Unity*, p. 99.

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

seats. The Lyttleton constitution, proposed by Colonial Secretary Oliver Lyttleton in 1954 was “designed to produce a multi-racial Council of Ministers containing, in addition to civil servants, six unofficial members, three Europeans, two Asians, and one African.”²⁸ The African lobby rejected the proposals and demanded at least parity with the Asians. The Europeans also protested, objecting to any participation in government by Asians or Africans. In 1956, Lennox-Boyd proposed slightly increased African representation, but the new elected African representatives all protested African levels of representation on the Legislative Council by refusing ministerial positions and opposing the Lennox-Boyd constitution in its entirety, demanding an overall majority of seats be allocated to African representatives.²⁹

Constitutional ‘reform’ in pursuit of representation of particular marginalised groups was thus a feature of even the nascent Kenyan nation. In this period, those groups were exclusively racially organised. Indeed, George Bennet noted in 1963 that, “[t]he rapid succession of Constitutions – 1954, 1957, and 1960 – had given many of [the primary Kenyan African political organisation, the Kenya African National Union’s] leaders a feeling that Constitutions could be as easily broken as made.”³⁰

So integral was this idea of racial and ethnic representation to the perceived success of an independent territory of Kenya, in his opening remarks at the 1959 Lancaster House Conference, the Colonial Secretary, Iain Macleod

“declared that the aim of the conference should be to build a nation based upon parliamentary institutions, of the Westminster type, and to achieve a general acceptance by all of the right of each community to remain in Kenya and to play a part in public life. Kenya would eventually be independent of United Kingdom control, provided the Africans, as well as other communities in Kenya, took a share in the government of the country. For a time the interests of minorities might have to be guaranteed by constitutional safeguards.”³¹

²⁸ Hughes, A. J., 1963, *East Africa: The search for Unity*, p. 120.

²⁹ Hughes, A. J., 1963, *East Africa: The search for Unity*, p. 122.

³⁰ Bennett, George, 1963, ‘Political Realities in Kenya’, *The World Today*, Vol. 19, No. 7, July, 296.

³¹ Hughes, A. J., 1963, *East Africa: The search for Unity*, p. 129.

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

The third and final Lancaster House Conference in 1963 had been marked by significant disagreement over the procedure for amending the independence Constitution. The Constitution (1963) deliberately included significant barriers to its amendment which were expressly designed to protect the negotiated constitutional guarantees. In his biography of Kenyatta, Jeremy Murray-Brown rather generously recounts the President's belief in a one-party state, as 'the expression of the people's new found unity.'³² But in order to modify the constitution, Kenyatta would need the support of his own party KANU, and the support of the major opposition party, the Kenya African Democratic Union (KADU). Among other provisions, KADU had consistently advocated for the prohibitive majorities required in both houses to achieve constitutional change.³³ As the opposition were unlikely to vote against their hard won gains at Lancaster house, Kenyatta quickly came to see multipartyism as an impediment to his presidential vision. Indeed, Kenyatta explicitly rejected the idea that there exists, 'a special connection between the democratic form of government and the party system, such that one cannot exist without the other'.³⁴

Kenyatta justified his resistance to the uncritical uptake of the Westminster system in Kenya by characterising the British push to implement a Westminster system as a neo-colonial British impulse to control the newly independent state through its institutions. In an interview during his exile in Maralal in 1961, Kenyatta explained simply, 'we want to rule ourselves... I shall always remain an African nationalist to the end.'³⁵ His conception of the 'absolute right' to self-government 'did not depend on any political theories originating in Moscow or Westminster.'³⁶

After forming the first independent parliament in 1963, Kenyatta and his Kenya African National Union (KANU) party had inherited a governance system of which they fundamentally disapproved.³⁷ Kenyatta's drive toward autocracy swiftly eroded the promise of the new government, and he swiftly began a campaign of coercive

³² Murray-Brown, Jeremy 1972, *Kenyatta*, George Allen and Unwin, London, pp. 313-314.

³³ Media Development Association 2012, *The History of Constitution Making in Kenya*, Konrad Adenauer Foundation, http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057 - last accessed 31 October 2015

³⁴ Mboya, Tom J. 1963, 'The Party System and Democracy', *Foreign Affairs*, July, pg. 650.

³⁵ Murray-Brown, Jeremy 1972, *Kenyatta*, George Allen and Unwin, London, pg. 305.

³⁶ Murray-Brown, *Kenyatta*, 312.

³⁷ Maxon, Robert, *Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century*, Kenya Studies Review Volume 1 (2009) pg 14- 15

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

persuasion, luring members of the KADU opposition by offering government positions to defectors, while making it increasingly difficult for the party to conduct its affairs.³⁸ Once KADU had ‘bowed to the inevitable’³⁹, dissolved itself and joined KANU, the government seized the opportunity to effect a reduction of the amendment threshold through the *Amendment Act* (1965)⁴⁰ providing a 65% majority threshold in both the lower and upper houses to effect an amendment to the constitution.⁴¹

This culture of strategic constitutional modification became a recurring feature of post-colonial Kenyan politics. These modifications were accompanied by strident justifications – always for the national ‘good’. In the last days of the colony, Tom Mboya complained the constitution Kenya had been given to take the territory from colony to republic was ‘rigid... perhaps the most inflexible anywhere in the Commonwealth.’⁴² Citing costly, parallel administrative requirements and the prohibitive 90 per cent majority required for constitutional amendment to pass the Senate, Mboya argued the constitution was in fact an impediment to the ‘unity and stability in the country’.⁴³

Disparaging of both the British inclination for multiparty democracy as a ‘good’ in its own right, and the need for minority tribes to be protected through such political organisation, Mboya poured scorn on the ‘traditional regard shown by British politicians and the press for the interests of the so-called downtrodden minority tribes or communities.’⁴⁴ In a strident speech on the cusp of independence in July 1963, Mboya asserted:

the countries of Africa emerging from political subjection are entitled to modify, to suit their own needs, the institutions of democracy as developed in the West. No one has the right to cavil at this so long as

³⁸ Goldsworthy, David, 1982, *Tom Mboya: The Man Kenya Wanted to Forget*, Holmes and Meier Publishers, London

³⁹ Murray-Brown, *Kenyatta*, pp. 313-314.

⁴⁰ Media Development Association 2012, *The History of Constitution Making in Kenya*, Konrad Adenauer Foundation, pg. 13, http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057 - last accessed 31 October 2015

⁴¹ Hornsby, Charles, 2012, *Kenya – A History since Independence*, I. B. Taurus, London, pg.163.

⁴² Mboya, Tom J. 1964, ‘The Future of Kenya’, *African Affairs*, Vol. 63, No. 250, January, pg. 6.

⁴³ Mboya, Tom J. 1964, ‘The Future of Kenya’, pg. 6.

⁴⁴ Mboya, Tom J. 1963, ‘The Party System and Democracy’, *Foreign Affairs*, July, pg. 651

all citizens – irrespective of their racial, tribal or religious affiliations – are treated alike.⁴⁵

Addressing an issue which would come to haunt the political landscape of the independent state, Mboya stated categorically the following year, that:

“There is no alternative to the fact that when Kenya becomes independent in December this year, the only safeguard, the only protection that any minority tribe or community can enjoy in Kenya is that which comes out of the good will and understanding of the Kenya Government. ... It would be undesirable that anyone should insist ... on the false assumption that by merely writing some rigid provisions in the constitution you protect the minorities or the minority tribes. In the end, I believe you destroy their chances.”⁴⁶

At Kenyatta’s death in August 1978, he had ruled the nation for 15 years and had never been directly elected - he had been handed the KANU leadership in 1961, and run unopposed for the Presidency in 1962, 1963, 1969 and 1974.⁴⁷ During the Kenyatta regime, constitutional amendments were used as either an attempt to strengthen the president’s powers, or limit the opposition’s capability to effectively compete. The primary effect of these amendments was that the electorate’s ability to make a free, fair and informed decision was significantly curtailed.⁴⁸ Amadi argues the Kenyatta government’s extensive constitutional emendations ‘set in motion a series of constitutional amendments that had weakened the existing checks and balances leading to the emergence of an ‘imperial presidency.’’⁴⁹

Kenyatta’s successor, Daniel Toroitich arap Moi, the immediate vice president to Kenyatta prior to his death was unanimously endorsed as KANU’s presidential candidate at the National Delegates Conference in 1978. As Kenya was, by this stage, a *de jure* one party state, Moi followed in the steps of his predecessor, and was elected unopposed to the presidency the following year. Moi’s time in office is now

⁴⁵ Mboya, ‘The Party System and democracy’, pg. 658.

⁴⁶ Mboya, ‘The Future of Kenya’, pg. 7.

⁴⁷ Hornsby, Charles, 2012, *Kenya – A History since Independence*, I. B. Taurus, London, pp. 19 - 220

⁴⁸ For a more discussion of the effects of constitutional amendments under Kenyatta, see for instance Ahluwalia, D. Pal, 1996, *Post Colonialism and the Politics of Kenya*, Nova Science Publishers, New York, pg. 37.

⁴⁹ Amadi, Henry, 2009, ‘Kenya’s Grand Coalition Government – Another Obstacle to Urgent Constitutional Reform?’, *Africa Spectrum*, Dag Hammarskjold Foundation, Vol. 44, No. 3, pg. 151.

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

synonymous with electoral fraud, intimidation and state sponsored violence.⁵⁰ Moi continued the tradition of expedient constitutional modification, and buttressed his hold on state power through repression of opposition, state sponsored violence and an aggressively entrenched autocracy.⁵¹

The report of the Kriegler Commission on the 2007 election and post election violence aptly describes elections under Moi as ‘a charade, a form of national grand opera where everybody had to express their support for the Man.’⁵² Moi is also credited with creating an environment where these previously, relatively controlled forms of social and political violence seeped into the community in the form of politically aligned, ethnically derived gangs; and ever expanding networks of corruption.⁵³ By the time the Kenyan polity was demanding multiparty democracy in the late 1980s and early 1990s ‘disillusionment with the Moi government was widespread.’⁵⁴, and Kenya’s post-independence constitution had been amended more than 32 times.⁵⁵

Enacting a new constitution has not only become symbolic of a new, robust order, but is itself *the necessary and sufficient condition* for democratic renewal, the panacea for the ailing state. As the Kriegler Commission noted ‘at the public hearings and technical workshops IREC heard, time after time, cries for societal change by means of statutory amendment.’⁵⁶ The Commission described this impulse as a ‘temptation to play God and imagine that with the stroke of a pen what is defective will be made good.’⁵⁷

Conclusion

⁵⁰ Throup, David, 1993, ‘Elections and political legitimacy in Kenya’, *Africa: Journal of the International Africa Institute*, Vol. 63, No. 3, pp. 371 - 396.

⁵¹ Wanjala Nasong’o, S. & Murunga, G., “Women’s politics of Transition and Democratisation” in Murunga, G. R. & Nasong’o, S. W. (eds.), *Kenya: the Struggle for Democracy*, CODISRA Books, Dakar, 2007, pg. 171

⁵² Kriegler et al., *Report of the Independent Review Commission on the General Elections*, 23.

⁵³ Bratton, Michael & Mwangi S. Kimenyi, 2008, ‘Voting in Kenya: Putting Ethnicity in Perspective’, *Journal of Eastern African Studies*, Vol. 2, No. 2, pp. 275.

⁵⁴ Throup, David, 1993, ‘Elections and political legitimacy in Kenya’, *Africa: Journal of the International Africa Institute*, Vol. 63, No. 3, pg. 389.

⁵⁵ Amadi, Henry, 2009, ‘Kenya’s Grand Coalition Government – Another Obstacle to Urgent Constitutional Reform?’, *Africa Spectrum*, Dag Hammarskjold Foundation, Vol. 44, No. 3, pg. 151.

⁵⁶ Kriegler et al, *Report of the Independent Review Commission on the General Elections*, 22-23.

⁵⁷ Kriegler et al, *Report of the Independent Review Commission on the General Elections*, 23.

While there are obvious differences between the earliest constitutional negotiations in the colony of Kenya, and the 2010 African Union led process, I argue here that the focus on protection of particular groups through allocated seats and proportional representation has always been a central feature of the Kenyan constitutional dispensation. If there is a lesson in this history, it is that the dynamics of racial politics in the late colony, and the tense tribal politics of the post-colony have exposed the limitations of relying on constitutionally entrenched (or enforced) proportional representation to stimulate real cultural and political change. Where the identified groups were previously racial, the protections are now for disadvantaged groups of citizens – women, people living with disability, children and young people, the elderly, “members of marginalised communities” and members of “particular ethnic, religious or cultural communities”⁵⁸.

When I asked the human rights advocates in Ahero what they thought about women running for office, the potential of women’s representation to impact the lives of women was as boundless as it was abstract – “When we are represented there, and men are giving their opinions, then we also have one of our kind then we just feel at least we are heading somewhere”⁵⁹; “We feel great when there are women in power and are also contesting”; “we think it will work, if we follow the constitution, according to what it say, it has to be the way it is. Unless women don’t stand firm. Unless women don’t stand firm, you should know your rights. Women have to fight for your rights. To stand firm.”⁶⁰

Can this human rights infused constitution provide different outcomes for Kenyan women than those outcomes violently rejected by Kenyans in the late colony? Is it enough to mandate constitutional quotas and require the women in these new seats to rise to the task of fundamentally changing the quality of Kenyan politics? Or is Evelyn right to hope for change, but anticipate defeat?

⁵⁸ Constitution of Kenya 2010, s21(3)

⁵⁹ Martha, and Evelyn respectively, Christina Kenny and Ahero human rights network interview 2 December, 2012, Ahero town, transcription. All names have been changed to protect interviewees.

⁶⁰ Miriam, Christina Kenny and Ahero human rights network interview 2 December, 2012, Ahero town, transcription. All names have been changed to protect interviewees.

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

“They are going to fail, but we are going to vote for them. Even if they are going to fail, we are going to fail with them.”⁶¹

⁶¹ Evelyn, Christina Kenny and Ahero human rights network interview 2 December, 2012, Ahero town, transcription. All names have been changed to protect interviewees.

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

Bibliography

- 'KENYA: Police Under fire over live rounds' in IRIN Humanitarian news and analysis, (17 January 2008), <http://www.irinnews.org/report.aspx?reportid=76297>, site accessed 5 January 2012
- 'Report of the Commission of Inquiry into Post-Election Violence (CIPEV)' in The Kenya Dialogue and Reconciliation website, (15 October 2008), URL: <http://www.dialoguekenya.org/docs/PEV%20Report.pdf>, last accessed 5 January 2012
- 'Mau Mau memorial set to open in Nairobi's Uhuru Park in rare colonial apology, Daily Nation Newspaper (online), 11 September, <http://www.nation.co.ke/news/British-funded-Mau-Mau-memorial-set-to-open-Uhuru-Park/-/1056/2866564/-/jmccjoz/-/index.html>, last accessed 31 October 2015
- Ahluwalia, D. Pal, 1996, *Post Colonialism and the Politics of Kenya*, Nova Science Publishers, New York
- Amadi, Henry, 2009, 'Kenya's Grand Coalition Government – Another Obstacle to Urgent Constitutional Reform?', *Africa Spectrum*, Dag Hammarskjold Foundation, Vol. 44, No. 3
- Bennett, George, 1963, 'Political Realities in Kenya', *The World Today*, Vol. 19, No. 7, July
- Bratton, Michael & Mwangi S. Kimenyi, 2008, 'Voting in Kenya: Putting Ethnicity in Perspective', *Journal of Eastern African Studies*, Vol. 2, No. 2
- Buell, R. L., 1928, 'The Destiny of East Africa', *Foreign Affairs*, Vol. 6, No. 3 (April)
- Constitution of Kenya (2010), National Council for Law Reporting, Government of Kenya
- Department for International Development, Elections in Kenya 2007, <http://www.dfid.gov.uk/Documents/publications1/elections/elections-ke-2007.pdf>, site accessed 22 February 2013
- Elkins, Caroline 2005, *Imperial Reckoning – The Untold Story of Britain's Gulag in Kenya*, Owl Books, New York
- Federation of Women Lawyers Kenya (FIDA), 2013, Key Gains and challenges – a gender audit of Kenya's 2013 Election process, <https://www.ndi.org/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf> - last accessed 31 October 2015
- Goldsworthy, David, 1982, *Tom Mboya: The Man Kenya Wanted to Forget*, Holmes and Meier Publishers, London
- Guled Mohamed, 2008 'Kenyan Police fight protestors, 2 dead' in ReliefWeb, (16 January 2008), <http://reliefweb.int/node/254523>, last accessed 25 September 2011
- Hornsby, Charles, 2012, *Kenya – A History since Independence*, I. B. Taurus, London.

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

Hughes, A. J., 1963, *East Africa: The search for Unity*, Penguin Books, Baltimore Maryland

Ingham, K., 1962, *A History of East Africa*, 2nd Ed., Longmans, London

Integrated Regional Information Networks (IRIN), 'Kenya: Health workers grappling with conflict-related sexual violence' in IRIN, (28 January 2008), <http://www.irinnews.org/report.aspx?ReportId=76247>, last accessed 6 January 2012

Kenny, Christina 2013, ' "She grows to be just a woman, not a leader": Gendered citizenship and the 2007 General election in Kenya', *Intersections: Gender and Sexuality in Asia and the Pacific*, Issue 33, December 2013, <http://intersections.anu.edu.au/issue33/kenny.htm> - last accessed 1 November 2015

Kreigler, Judge Johan, et al., Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007 (Nairobi: Government Printer, Government of Kenya, 17 September 2008)

Maxon, Robert, 2009, 'Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century', *Kenya Studies Review*, Vol. 1

Mboya, Tom J. 1964, 'The Future of Kenya', *African Affairs*, Vol. 63, No. 250, January

Mboya, Tom J. 1963, 'The Party System and Democracy', *Foreign Affairs*, July.

Media Development Association 2012, *The History of Constitution Making in Kenya*, Konrad Adenauer Foundation, http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057 - last accessed 31 October 2015

Mungeam, G. H., 1970, 'Masai and Kikuyu Responses to the Establishment of British Administration in the East Africa Protectorate', *The Journal of Africa History*, Vol. 11, No. 1

Murray-Brown, Jeremy 1972, *Kenyatta*, George Allen and Unwin, London.

Murunga, G. R. & Nasong'o, S. W. (eds.), 2007, *Kenya: the Struggle for Democracy*, CODISRA Books, Dakar

Throup, David, 1993, 'Elections and political legitimacy in Kenya', *Africa: Journal of the International Africa Institute*, Vol. 63, No. 3

UK Home Office, 2011, 'Operational Guidance Note: Kenya,' in UK Border Agency website, (25 February) <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/kenya/pervious/report-0211.pdf?view=Binary> last accessed 10 December 2012.

Wanyeki, Lynne Muthoni , 2008 'Lessons from Kenya: Women and the Post-Election violence' in *Feminist Africa*, No. 10

Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015 (Published February 2016)

Wipper, A., 1989, 'Kikuyu women and the Harry Thuku Disturbances: Some Uniformities of Female Militancy', *Africa*, Vol. 59, No. 3

Youe, Christopher P. 1986, *Robert Thorn Coryndon: Proconsular Imperialism in Southern and Eastern Africa, 1897 – 1925*, Wilfrid Laurier University Press