

KENYA: Focus on the uncertain future of constitutional review

NAIROBI, 8 November (IRIN) - The future of Kenya's constitutional reform process, which has cost the country huge amounts of money, appears to be hanging in the balance as a result of confusion brought about by the early dissolution of parliament, paving the way for general elections on 27 December.

Outgoing President Daniel arap Moi dissolved parliament on 25 October, and subsequently declared that he was disbanding the Constitution of Kenya Review Commission (CKRC), the body set up in 2000 to collect public views and draft a new constitution.

Moi, who is constitutionally barred from seeking another term, said the contents of the draft constitution the commission compiled in September did not reflect the views of Kenyans, but those of the opposition. He stated that a new commission, "headed by a Kenyan", would be set up soon after the elections, thereby implying that the current CKRC chairman, Yash Pal Ghai, a Kenyan of Asian origin, was foreigner.

Opposition politicians and legal activists have dismissed Moi's move to disband the CKRC as illegal and one aimed at frustrating the review process, which has so far cost about US \$50 million.

They argue that the commission was established by an act of parliament and can only be terminated if the act is repealed by parliament, as opposed to the executive. Amos Wako, the attorney-general, who also is the government's chief legal adviser, has concurred with this view, saying only parliament had the power to dissolve the CKRC.

"He [the president] has hardly come out in clear terms to say why he is opposed to a new constitution," Raychelle Omamo, the chairwoman of the Law Society of Kenya, told the independent Sunday Nation newspaper. "I can hardly guess why he has taken that stand - sincerely."

Some analysts argue that Moi's opposition to the review commission and its chairman, reflects his reluctance to countenance a new constitution which might trim the sweeping executive powers he currently enjoys. They argue that although he is retiring, Moi still needs the old constitution in place to enable him to rule by proxy after the end of his term, a possibility which was implied when he described Uhuru Kenyatta, his preferred successor, as a young man who could be "guided".

According to Haron Ndubi, who runs the Kituo Cha Sheria (Kiswahili for legal centre), Moi's move is a deliberate ploy aimed at "confusing" and "misleading ignorant" Kenyans. "The president is misconducting himself. His behaviour is below that of a head of state. He sees himself as the KANU [ruling party Kenya African National Union] head, activist and campaigner," Ndubi told IRIN. "But that would have been 20 years ago. Now we have a learned population, which is not easily misled," he said.

Moi is opposed to the new draft constitution, because it proposes a system of checks and balances devolving power away from the centre and minimising corruption, according to Ndubi. "I feel the new constitution will have checks

and balances in the country's institutions, and those in power will be forced to respect the country's laws," he said.

The commission's work has faced a number of obstacles since its inception, with initial claims that some of its members had been secretly visiting the presidential residence, at Moi's invitation, something seen as attempts by the executive to compromise the independence of the reform process.

In October, hundreds of lawyers sporting yellow ribbons marched on the streets of the capital, Nairobi, to protest against a lawsuit brought by some high court judges against the CKRC, seeking to stop public debate on the draft constitution.

Moi's move to dissolve parliament forced Ghai to call off the National Constitutional Conference to ratify the draft constitution, set for 28 October. Police in anti-riot gear sealed off the conference venue, Bomas of Kenya. Members of Parliament would by law have been delegates to the conference.

Ghai, however, has insisted that the dissolution of parliament is only a temporary setback, and that the commission will continue with its work as soon as the next parliament is in place. But this remains uncertain, depending on the results of the poll.

Oduor Ong'wen, a leading activist, projects three scenarios for the future of the new constitution.

In the first, Kenyatta, wins. The new government "rubbishes" the constitution, depending on KANU's strength in parliament, and begins a new process altogether that would maintain the status quo or further enhance executive powers.

The second scenario is that the opposition wins and jump-starts the constitutional review process, while undermining some of the draft's provisions. "I sense some degree of discomfort with the opposition on some of the proposals," Ong'wen remarked.

The National Rainbow Coalition, the biggest opposition party, has, however, committed itself to enact a new constitution if it takes over power.

In the third scenario, democratic forces outside mainstream politics - mainly the civil society - advance the constitutional review process, through mass action, from where it was left, so as to produce a constitution which "Kenyans want". According to Ong'wen, this process has already begun with the launch of a campaign seeking a million signatures, and a planned one-million-strong march to bring pressure to bear on the political forces in the country to commit themselves to the constitutional review process.

According to Ndubi, the drive towards a new constitution is unstoppable and that it is only a matter of time before the new government sets a new timetable for the review process, which would ensure that the review commission got enough time to produce a constitution reflecting the wishes of the majority of Kenyans. The current timetable ends the life of the review commission on 3 January.

"No politician should cheat himself that if he frustrates the constitutional process, then the people will stop. We have lost resources, lives and property for a new constitution. You can't frustrate people now that things are beginning to move," Ndubi added.

Ndubi admits that the draft is not flawless, "but it should not be impossible to improve upon [it]. People should look at the constitution with the population of 100 years from now in mind," he said.

Concerns are also being raised in the local media over the lack a clear constitutional mechanism to ensure a smooth handover of power, with fears that Moi might refuse to hand over power should Kenyatta lose, or in the event of the results of the polls being disputed.

Suspicious that Moi might refuse to step down due to loopholes in the current constitution have further been fuelled by reports that a thick stone wall is currently being built around State House, the presidential palace, less than two months before the elections.

Ong'wen told IRIN that the construction of the wall was a "very worrying" development and "not something that Kenyans should take lightly". "If you look at the history of the country, there have been a number of crises, but no one thought of building a wall around State House. So why, when he only has one month to retire, does he begin to build the wall?" he posed.

According to Ong'wen, who has been intimately involved in the constitutional review campaigns, the lack of a clear framework in the constitution providing for a transfer of power constitutes a disturbing aspect, which could easily lead to a crisis on 4 January when Moi is expected to vacate his office.

However, the current constitution contains provisions entitling him to stay in power under certain circumstances, especially if the results of the polls are disputed - and the legal procedures to resolve such disputes take a long time to complete. "There is a grey area there. Even more worrying is the way he has been behaving," Ong'wen said.

"He [Moi] has disregard for the laws of the land, including the constitution. Even the appointment of a vice-president was unconstitutional," he added.

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