



# BBI and the Referendum: Another False Start?

By Dauti Kahura



As the Building Bridges Initiative (BBI) comes to a close (the last town hall meeting is slated for July 28, 2019, in Nairobi County) the spotlight on the initiative has shifted to its mandate, and has been heightened up by a section of Kenyans who are already anticipating its probable outcome. This directed interest and anticipation of the process led to two widely circulated documents on social media on July 15, which the BBI team, led by its chairman, Senator Yusuf Haji, promptly denied. The documents, titled *BBI Technical Team Proposals* and *Proposed Changes to The Constitution* were declared “fake” by Senator Haji.

BBI was constituted after President Uhuru Kenyatta and Raila Odinga, his chief political opponent, shook hands on March 9, 2018. On May 24, 2018, BBI was gazetted and soon commenced its countrywide solicitations of public opinion.

Paul Mwangi, one of the joint secretaries to BBI (the other one is Ambassador Martin Kimani), in an [interview conducted by The Elephant](#), said that the BBI team was shocked to see the documents, purportedly authored by BBI, being posted on the Internet. “We were surprised to see these documents. Like everyone else, the team saw them for the first time on social media. It is to be expected that as we conclude our town hall county meetings, interest in BBI’s work has risen in all quarters of the Kenyan society,” said Mwangi. “BBI hopes to wrap up its county participation on or

around August 9 and, therefore, any report purporting to second-guess the committee's work that is not from the BBI's team is to be disregarded."

The initiative's terms of reference were extended to October from May, 2019, after it fell behind its schedule. Once through with the Nairobi meeting, Mwangi said the team will immediately start compiling the deliberations with the help of a team of researchers, each of whom has been assigned the nine thematic areas: corruption, ethnic antagonism and competition, devolution, divisive elections, inclusivity, lack of national ethos, safety and security, shared prosperity, responsibilities and rights. "We should be done by October 24," he said.

I asked Mwangi whether a referendum was one of the issues that the BBI deliberated upon, to which he quickly retorted, "I don't wish to preempt anything at this time of the process. BBI will suggest solutions and it's these solutions that will determine whether there will be a referendum or not."

But an inside source, who cannot be named because he is officially not authorised to speak on behalf of BBI, said: "The issue of a referendum is a foregone conclusion - the question is not if, but when the referendum will be held. That is the climax of the process."

The source said the town hall meetings have been a process of setting the ground for an eventual referendum. "We will not go to the next general election without a constitutional change, that is why the issue of a referendum has gripped the nation, and you can see that is what currently is preoccupying Kenyans."

The source told me Ekuru Aukot's referendum efforts are meant to be a distraction to BBI's own referendum project: "Whoever is funding him wants to steal the thunder from BBI, dilute and make nonsense of the BBI's forthcoming referendum."

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The people behind Aukot's referendum hope to argue "why have another referendum and there is already one at hand that is actually addressing the fundamental issues in the constitution that are troubling Kenyans?" observed the source. Nicknamed *Punguza Mzigo* (reduce the load) one of the biggest issues that the Aukot's referendum wants to deal with is the issue of "over-representation", hence, a need to reduce some of the political seats, such as MPs' seats. Aukot is the party leader of The Third Way Alliance Party.

"Were Ekuru's referendum to be held, he would only need the consent of 24 counties, as per the 2010 constitution. He would then take his finding to Parliament, which as currently constituted, is presumably controlled by Deputy President William Ruto's supporters in the Jubilee Party," said the source. "Although Aukot's referendum issues sound right and would easily resonate with a majority of Kenyans, the proposed constitutional changes he is seeking are meant to blind Kenyans, that indeed he cares about their plight. Truth be said, those changes would be difficult to implement and in any case, they would not be implemented immediately."

As a pointer to the coming BBI referendum, Senator James Orengo, Ugunja MP Opiyo Wandayi, Alego Usonga MP Samwel Atandi and Rarieda MP Otiende Amollo, faulted the *Punguza Mzigo* initiative and counselled the Third Way Alliance party boss to be patient and wait for BBI, which, ostensibly according to them, will deal with all the issues pertaining to Kenyans.

Said Orengo on July 21: “We are waiting for the BBI report that has all the issues of the people. The questions in Aukot’s proposal have not undergone stakeholders consultations, let’s wait for October when we will have the BBI report and thereafter a referendum that will decide on the fate of Kenyans.”

## **Succession politics**

Since 1992, when the country returned to multiparty elections, no presidential succession has not been preceded by a constitutional change, said my source. “That is why the elephant in the living room of the BBI’s unproclaimed core mission has been the referendum. A chronological understanding of the succession politics since 1992 to date should therefore locate the real reason behind BBI’s formation, its real agenda, bearing in mind the 2022 succession political perspective and its dynamics.”

Responding to Western countries’ pressure to liberalise the monolithic Kanu party politics, President Daniel arap Moi, in December 1991, orchestrated a political process that culminated in the removal of Section 2A of the old constitution that made Kenya a *de jure* single party system. And although the amendment to the constitution did not immediately transform the country into a democratic polity, it allowed for the introduction of pluralistic politics. That is how FORD, before it split into two (Ford-Asili and Ford Kenya), the Democratic Party of Kenya (DP) and the Kenya Social Congress (KSC), led by firebrand politician and ex-detainee, George Anyona, came into being. So, for the first time since independence, opposition parties were allowed to participate in the December 29, 1992 general election.

Faced with another election in five years, President Moi was again confronted with demands to expand the scope of the political space, as well as to institute constitutional and legal changes. Between 1992 and 1997, there were continuous demands from the opposition and civil society organisations to effect these changes, especially to level the tilted playing field. President Moi ignored these demands until a few months before the December 29, 1997 general election. Principally, to ease off the pressure that had been building and that had threatened to forestall the elections through a boycott under the clarion call of “no reforms, no elections”, he acquiesced to some minimum reforms.

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Inevitably, the question in 1997, as the country prepared for its second multiparty elections. was: Should we go to the elections with or without reforms? As the political temperatures gradually soared, it became imperative that the country needed some facilitative reforms.

The formation of the Inter-Parties Parliamentary Group (IPPG) allowed President Moi some breathing space, and afforded the opposition some minimum reforms to go to the elections with. Just a month before the election, in November, through the IPPG, a number of constitutional, legal and administrative changes were adopted. They included enlarging the Electoral Commission of Kenya (ECK) to accommodate representatives from the opposition, repealing the Public Order Act (which President Moi used to harass and scuttle the oppositions’ rallies), and allowing the registration of new political parties. At that time, the Safina Party, led by Paul Muite, was registered and more fundamentally, the Kenya Broadcasting Corporation (KBC) Act was amended to allow for more equal

air time for all political parties.

Aware that the facilitative reforms had allowed President Moi to hold a largely incident-free election in which once again he trounced his opponents, civil society, led by the National Convention Executive Committee (NCEC) – which was at the forefront of demands for a new constitution, and which was opposed to piecemeal constitutional reforms – was unrelenting in its push for a new constitution. The issue of a new constitution, just like the facilitative reforms, was one that President Moi did not want to deal with and therefore kept postponing the matter.

By the late 1990s, when faced with an election that he would not participate directly in as a presidential candidate since being elected in 1978 after the death of President Jomo Kenyatta, President Moi had already started planning his exit and successor. A new constitution did not feature in his plans because his hand-picked successor, Uhuru Kenyatta, went into the elections under the old constitution, fraught as it was with risks.

To deflect the NCEC's pressure and refusing to cave in to demands for a new constitution, President Moi suspended Parliament on October 25, 2002, and announced an election timetable, all in the name of forestalling *Katiba Tuitakayo*, a proposed new constitution model by NCEC. Under the old constitution, the President was bestowed with the powers to dissolve Parliament and call elections at his pleasure, and once Parliament was dissolved, a general election had to take place within 90 days.

On November 4, 1999, at a press conference, the NCEC spokesperson Prof Kivutha Kibwana pointed out that, "Kanu has demonstrated that it is unwilling and therefore incapable of ushering in constitutional and democratic change in Kenya."

The general election was held on December 27, 2002, and President Moi's project – the candidature of Uhuru Kenyatta running on a Kanu ticket – was defeated by Mwai Kibaki, formerly of the Democratic Party, but then running under the banner of the National Rainbow Coalition (Narc). The first thing that President Kibaki promised when he was sworn in at Uhuru Park on December 31, 2002 was a new constitution within a 100 days.

To fulfil his promise, Kibaki supported the continuation of the work of the Constitution of Kenya Review Commission (CKRC), which had been constituted in November 2000 by a legal framework for reviewing the constitution. CKRC was headed by the renowned constitutional lawyer, Prof Yash Pal Ghai. After their lengthy deliberations at the Bomas of Kenya, CKRC, came up with a new draft constitution. The draft included a raft of constitutional proposals, such as a parliamentary system of government with 14 regions, and a hybrid presidential system with more or less ceremonial powers but with co-shared executive powers between the president and a prime minister. It was an experiment that borrowed from both the British (parliamentary) and the American (presidential) systems.

"But instead of presenting the Bomas Draft to Kenyans, President Kibaki gave them a 'skunk' in the name of the Wako Draft," said the source. "Amos Wako was the then Attorney General and instead of giving Kenyans the draft constitution that they had helped to come up with, he bastardised the Bomas Draft and edited the old constitution to cheat Kenyans that that was the new constitution that they had debated upon."

This Wako Draft was the basis of the Orange vs Banana referendum in 2005. The Orange proponents opposed the draft, while the Banana supporters proposed the implementation of the draft. "The outcome of that referendum had not been difficult to predict," said the source. "Clearly, what was being presented to Kenyans was not what they had proposed to CKRC and which had been adopted at Bomas of Kenya through the National Constitutional Conference (NCC)."

The Wako Draft was rejected by a majority of Kenyans and thereafter, President Kibaki fired all his cabinet ministers. Those who were aligned to the No (Orange) movement did not return to government. "Constitutional experts have always argued that it was at this point that President Kibaki ought to have resigned from government because the referendum had essentially passed a vote of no confidence in his government," said the source.

The critics of the Bomas Draft, mainly technical people and some political elites, argued that the draft was a mongrel kind of constitution that failed to locate state power and therefore was not bold enough to differentiate between the president and the prime minister, who wielded real power. The critics pointed out that in a politically fragile country like Kenya, this was a risky venture.

"After the government was defeated in the referendum, electioneering went into high gear and that is when the Orange Democratic Party (ODM) was formed by Raila after he was sacked as a cabinet minister," the source said. "The electorate was being prepped to go into the 2007 election without a new constitution and clearly this was a harbinger of things to come...the ominous signs were there...as sure as night follows day, there was going to be violence."

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After the devastating election of December 2007, after which violence indeed erupted, especially in the North Rift, the country was taken back to pre-2002 scenario: the country needed to have a new constitution if it was to hold the next general election in five years time.

In 2008, Ekuru Aukot became the chief executive officer (CEO) and secretary of the Committee of Experts (CoE) that was mandated to look afresh into the matter of processing a new constitution. Nzamba Kitonga became the CoE's chair. The CoE members included, among others, the current Supreme Court of Kenya judge Njoki Ndungú, Otiende Amollo, currently the MP for Rarieda, Atsango Chesoni, Prof Frederick Ssempebwa, a Ugandan, Chaloka Beyani, a Zambian, and Prof Christina Murrey from South Africa.

"The CoE came up with the Draft Proposed Constitution of Kenya, which it rolled out for people's comments and opinions just like BBI is doing, only that its methods were different," said the source. It printed the Draft in thousands, placed it as inserts in the mainstream newspapers, uploaded it online and also printed booklets which were distributed to the populace."

After reviewing the Draft as the law required, the CoE passed the document to the Parliamentary Select Committee (PSC) on constitutional review chaired by Abdikadir Mohamed. The PSC meeting held in Naivasha made a significant change: it removed the hybrid system and replaced it with a purely presidential system, the one that Kenya has now.

The PSC Draft is what was published by Wako - "and as the law required of him, he was not to tamper with the draft, as he had done in 2005 with the Bomas Draft. The Draft was taken to Parliament as is and it was passed as a consensus document."

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“With the foregoing, it is obvious that Kenya must have, at the very least, constitutional changes, if it is to face the 2022 general election” said the source. “After the 2017 general election, in which for the first time in the history of legal jurisprudence, a presidential election win was revoked by the judiciary, to be followed by a fresh presidential election, the country for a while seemed to teeter on the precipice.”

“It looks like the political elite logic has always been to play the election game of holding elections every five years, while all they do is tweak the constitution to create the impression that we have dealt with real constitutional changes. All this in the name of perpetuating themselves, putting the opposition in its place and ensuring there is no tumultuous revolt,” said the source.

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