



# Referendum Without a Constitutional Moment: The Kenyan Story

By Ngala Chome



When they met and [shook hands](#) in March 2018, Uhuru Kenyatta and Raila Odinga pledged to address a number of issues that, to them, bedevil Kenya's politics. A plan, formally referred to as the [Building Bridges Initiative to a New Kenyan Nation](#)—or simply, BBI—was announced in front of an audience that had witnessed a rather chaotic turn of events in the preceding months.

Raila had successfully [contested](#) Uhuru's presidential victory at the Supreme Court and proceeded to [boycott](#) a repeat poll, citing lack of a competent and impartial electoral commission. Two months before the two leaders met, Raila had also made real his threat to take a symbolic presidential [oath](#) as the "people's president" in defiance of Uhuru. A [joint report](#) by Amnesty International and Human Rights Watch stated that the police had behaved appropriately in some instances but, in many others, had shot or beat protestors to death. Meanwhile, pressure from civil society organisations and the international community to find a political settlement was piling even as a debt-burdened economy was threatening to stall. Uhuru, like former president Mwai Kibaki before him, was probably worried about tarnishing his legacy.

Uhuru [appointed](#) an advisory committee in a matter of weeks. The members of the committee were instructed to make actionable proposals to address the BBI agenda, including proposals to review Kenya's now ten-year-old constitution. The BBI's [nine-point agenda](#) included ethnic antagonism, lack

of a national ethos, devolution, divisive elections, security, corruption, shared prosperity, responsibility and inclusivity, as the main areas requiring intervention. It didn't matter that protestors, including Raila himself, had singled out electoral malpractice as the main problem.

It wasn't lost on many that nine days prior to the 8 August poll, the body of [Chris Msando](#), the head of information, communication and technology at the Independent Electoral and Boundaries Commission (IEBC), had been found on the outskirts of Nairobi. Very few people, if any, thought that the Kenya 2010 constitution was the poisoned chalice.

Since then, the BBI bandwagon has threatened to change the constitution. It has taken particular issue with the winner-takes-all system, a feature that the 2010 constitution had actually been designed to dampen by diluting the powers of the presidency and distributing them across parliament, and devolving some responsibility to the 47 newly-established county governments.

Despite its pure presidential system, [some](#) supporters of the BBI have even argued that the 2010 constitution did not create an imperial presidency, that, in fact, it created a system of checks and balances on how the president should exercise his/her authority. In addition, the terms of reference for the Committee of Experts (CoE) who wrote the 2010 constitution were strikingly similar to those that, ten years later, were assigned to the BBI task force. Similar to BBI, the idea of building bridges and creating a national ethos had also been at the heart of the CoE's mandate.

The constitutional draft that the CoE proposed (now Kenya's constitution) not only received the popular vote during a referendum, but it also received the support of a broad section of the country's political leadership, Raila and Uhuru included. What the 2010 constitution has not received since its promulgation is fidelity and adherence to its spirit.

A key weakness of constitutions the world over is their dependence on traditions put in place by human beings, which often makes them vulnerable to prevailing political interests. In Kenya's case, the problem has never been a constitutional one in nature, but the result of deliberate efforts by Uhuru Kenyatta, and the Kibaki administration before him, to undermine the constitution and to reassert direct presidential control over devolution and over the other arms of government, the legislature and the judiciary.

I have written [elsewhere](#) about the significance of the reduction of the role of county governments by central government bureaucrats—the most significant structural change in Kenya since the 1960s—to simple units of administration and development, while minimising their political features. In this way, feelings of exclusion and marginalisation, underpinned by unaddressed historical injustices, have continued to exist despite constitutional change. Measures that would enable real participation in matters of governance and policy at the local level are frowned upon. Dismissed. Ignored.

Assertive County Governors are viewed as a nuisance that should go away. Responsibility over land administration, education, mega-infrastructure and parastatals has remained in the hands of the central government, and as such, under the direction of the presidency. In fact, matters of devolution have been domiciled within a national government ministry. Despite the establishment of a National Police Service Commission and an Independent Police Oversight Authority, police officers have continued to function outside the law with the express direction and support of higher-ups, with some [shooting suspects dead](#) in broad day light. President Uhuru Kenyatta has [violated](#) the constitution he wants to amend by refusing to swear in 41 judges appointed by the Judicial Service Commission. A resolution to the land question remains as distant as ever, despite the establishment of a National Land Commission.

These multiple assaults on the constitution and the law by executive fiat mean that it would be very difficult to remove an incumbent president from office through an electoral process, and in 2017 many paid the price of attempting to do so with their lives.

The question is, what has changed since then? Why has it become necessary to review or change a document that was written to avert the very conflict that the BBI task force was assigned to address? Also, should constitutional reform be prioritised when it's not clear that the country is facing a constitutional moment but is in fact grappling with a global pandemic, an ailing economy, and a political leadership that has a penchant for behaving badly?

## **The theory**

The [theory](#) of the “constitutional moment” refers to lasting constitutional arrangements that result from specific, emotionally shared responses to shared fundamental political experiences, or when there are unusually high levels of sustained popular attention to questions of constitutional significance. The constitutions of the United States, nineteenth-century Belgium, post-apartheid South Africa, and the Kenya 2010 constitution come closest to demonstrating this theory.

In the absence of a constitutional moment, a constitutional review usually serves other—more technical—goals and cannot be considered to be a fundamental choice regarding the political design of a country. One of the [drawbacks](#) of a constitution that emerges without the blessing of a constitutional moment is that it does not contribute to a sense of union, or the formation of identity, among the members of the society to which it applies.

In short, absent of a constitutional moment, the BBI is beginning to look, feel and behave like no more than a mere pact between the elite.

It is unlikely that the BBI will constitutionalise ordinary politics. Without popular enthusiasm for a new constitution, many Kenyans will perceive the plan to be no more than a pragmatic form of protection of the interests of the elite.

And this, since the handshake in 2018, is what has been taking place.

## **The problem**

For Raila's supporters, the BBI promises their leader a place in a future government. Uhuru's supporters continue to be divided over the plan, as some remain suspicious of Raila's intentions, and others believe that the BBI will consolidate Uhuru's legacy at the end of his second term in office. For the supporters of the Deputy President, William Ruto, the BBI is meant to frustrate his efforts to succeed his boss come the next elections in 2022.

In an environment devoid of political trust, it is unlikely that the BBI will put an end to political tensions and instability in the country. In fact, a cursory survey of social media language during the COVID-19 pandemic reveals that extreme views and divisive political rhetoric are on the rise.

It is therefore more likely that the BBI will amplify the country's ethnically polarised politics, setting the stage for future conflict. In this way, the BBI has quickly moved from building bridges to becoming the agent of their imminent destruction.

Kenya's political class is yet again employing constitutional change as a tool to fight its traditional factional wars.

The results can only be disastrous.

## The outcome

Raila Odinga, now BBI's primary mover, has [insisted](#) that it is time to proceed to a referendum. Together with Uhuru Kenyatta, Raila has declared a second BBI report released on 21 October 2020 (the first was published on November 2019) to be [final](#).

In his address to the Siaya County Assembly, Dr Adams Oloo, the BBI Steering Committee Vice-Chairperson and a close Odinga ally, [intimated](#) that only Uhuru Kenyatta and Raila Odinga have the final say on any further amendments to the document.

It is not clear whether it will be possible to complete the constitutional process in time for the embattled IEBC to effect the necessary changes ahead of the August 2021 referendum—which the IEBC [estimates](#) will cost Sh14 billion.

The electoral commission, whose term the BBI report has reduced from six to four years, has itself expressed [reservations](#) over the document.

[Religious leaders](#) and [internally displaced people](#) have also weighed in: the possibility of creating an imperial presidency and the fact that their concerns have not been addressed are, to them, key concerns. After promising the [Pastoralist Parliamentary Group](#) (PPG) that their concerns would be included in the document to be put to a referendum vote, Raila has backtracked, [insisting](#) that no changes will be introduced to the document after all.

The political struggles undergirding the BBI process have been laid bare. All language regarding consensus building has been thrown out. The main protagonists, in the wider race to succeed Uhuru Kenyatta in 2022, are Raila Odinga and William Ruto.

For the Ruto camp, a "Yes" vote in the referendum would be a disappointing measure of their popularity. For the Odinga camp, a delayed referendum would not leave them with much time to gauge Ruto's and their own strength in the run-up to the 2022 polls.

Caught haplessly in the midst of these struggles, of course, are Kenyan citizens. They are now meant to forget that the Jubilee Administration had promised to tackle four big agendas - affordable universal health care, food security, manufacturing and affordable housing - now a near laughable prospect, given the ravages of the COVID-19 pandemic and the disastrous economic record that preceded it. A Jubilee politician has [bragged](#) that the BBI is a clever innovation to save the Big Four Agenda from completely turning to ash.

Broadly, the proposals of the second BBI report seem to have tightened control around the presidency. If successful, the president gets to appoint a prime minister from parliament who will also be the leader of the largest political party or the largest coalition of political parties. The president will also appoint two deputy prime ministers and cabinet ministers drawn from within and outside of parliament. The report has also recommended the disbandment of the National Police Service Commission and the creation of a National Police Council to be chaired by a cabinet Secretary, that is, a presidential appointee. It has also established the office of an ombudsman within the judiciary, to be appointed by the president. A number of (early Christmas) gifts have been presented to various key players, perhaps as seductive (and useful) distractions from the proposed tyrannical changes.

Changing the 2010 constitution will not be easy given the high constitutional guardrails. It requires securing both a majority of the votes in a referendum and a majority of votes from members of the 47 county assemblies. In this way, the BBI report proposes an increase of the minimum revenue distributed to county governments from 15% to 35% of national revenue. Members of county

assemblies will be allocated 5% of county revenue for a newly-created Ward Development Fund, modelled on the Constituency Development Fund. Businesses set up by young Kenyans will be tax-exempt for the first seven years of operation. The number of members of parliament has been increased, with an additional 27 new senators and 10 new members of the national assembly. The second runner-up in a presidential contest will be named the Leader of the Official Opposition, with a shadow cabinet, technical support and a budget.

All this is in complete disregard of the [debt overhang](#) that Kenya has found itself in since 2013. In fact, the external [debt](#) has grown by 15.6 per cent to Sh3.7 trillion between March and August 2020. Over the same period local debt expanded by 9.7 per cent to Sh3.4 trillion. The overall cost of running parliament is already 2 per cent of the national budget, and that of running the Executive has increased by 20 per cent over the last two years alone. As the government [suspends](#) health insurance for COVID-19 patients in the midst of a second, spiking wave, no one is talking about the possibility of the proposed referendum facing funding shortfalls.

In their response to the first constitutional draft that was published by the Committee of Experts in 2009, Kenyans cautioned against the creation of a bloated government—a concern that is still close to their hearts. This also means that Kenyans are not opposed to the existence of an opposition, per se, but that the loser of an election needs to feel that they have lost fairly. The dispute during every electoral cycle is usually over the sloppy manner in which elections are conducted, coupled with a high trust deficit often cultivated by politicians.

The solution, in my view, is to respect the law and cultivate a culture of constitutionalism. The Kenya 2010 constitution is not perfect, but it is also true that the leadership has not adhered to its letter and spirit.

Reviewing the constitution less than a decade after it was first promulgated may be right and proper, but one may ask, what is the constitutional moment this time?

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