

Africa in Fact

The Journal of Good Governance Africa

Potemkin pluralism

Two elections and you're out?

Articles of faith

Writing out of the wreckage

Shaky foundations



Contents

- 4 About our contributors**
- 5 Potemkin pluralism**
by Will Jones
On paper, Rwanda's constitution appears inclusive; in practice, it reinforces the ruling party's power
- 9 Two elections and you're out**
by Brian Klaas
Several African leaders are seeking to bend their countries' constitutions to extend their stay in power
- 13 Articles of faith**
by François Misser
President Joseph Kabila's U-turn on elections is most likely just a strategic retreat in his battle to hold on to power in the Democratic Republic of Congo
- 17 A textbook case of contempt**
by Kate van Niekerk
By qualifying its ratification of an international treaty, the South African government reveals its reluctance to protect the right to education
- 21 Protecting patronage**
by Mike Pflanz
A divided Tanzania's draft constitution fails to right the wrongs of its predecessor
- 25 Now comes the hard part**
by Eileen Byrne
Tunisia's new parliament must adopt laws to translate a promising charter into reality
- 29 Campaign carrot**
by Victoria Kelly
Like previous presidents, Zambia's chief executive is promising a new constitution to win re-election in 2016
- 33 Writing out of the wreckage**
by Mary Fitzgerald
Can the drafters of Libya's first post-Qaddafi constitution rescue the country from itself?
- 36 Documents and blood**
by Kevin Bloom
New constitution stands little chance while the Central African Republic's civil war simmers
- 39 Let's talk about tax**
by Matthew S. Benson
Constitutional confusion around revenue roles is a recipe for conflict in South Sudan
- 43 Lip service to freedom**
by Kristen McTighe
Crackdown on dissent makes a mockery of Egypt's progressive new charter
- 47 Paper trick**
by Ray Ndlovu
Two years after Zimbabwean voters approved a progressive constitution, repressive laws remain on the books
- 50 Kaka Nguesso**
by Kamissa Camara
Republic of Congo's master rule-breaker is gearing up to change the game again
- 53 Overhaul**
by Karine G. Barzegar
After last year's uprising, all eyes are on Burkina Faso as the country's transitional custodians take the constitution in for repairs
- 55 County disquiet**
by Raphael Obonyo
Two years after Kenya transferred power to local counties, some governors want to amend the new constitution

About our contributors

KARINE G. BARZEGAR is a Paris-based journalist who covers Algeria, Egypt and Morocco. She has reported for TV5 Monde, *Al Jazeera English* and *Slate* news websites.

MATTHEW S. BENSON is completing his master's at Durham University, where he is researching South Sudan's history of tax and state formation. He has worked for the World Bank and the UN.

KEVIN BLOOM is a journalist and author. His 18-country investigative journey into Africa will be published in South Africa by Jonathan Ball in October 2015, and in the UK, by *Granta*, in early 2016.

EILEEN BYRNE is a journalist covering north Africa from Tunis. She contributes to *The Economist*, the *Guardian* and other media. She has a postgraduate degree in Middle Eastern history from Oxford University.

KAMISSA CAMARA is the senior programme officer for west and central Africa at the National Endowment for Democracy. She writes for *Africa in Fact* in her own capacity.

MARY FITZGERALD is a multi-media journalist and analyst based in Libya. She contributes to publications including *The Economist* and *The New Yorker*.

WILL JONES is a junior research fellow in politics at Balliol College, University of Oxford. His research is on illiberal states in Africa, particularly Rwanda and Zimbabwe.

VICTORIA KELLY is a journalist based in Lusaka, Zambia. She has written for several publications, including the *The Telegraph*, as well as Reuters.

BRIAN KLAAS is a Clarendon scholar and researcher at Oxford University. He focuses primarily on democracy building in Africa through the improvement of elections and the prevention of violent conflict.

KRISTEN McTIGHE is a Cairo-based journalist covering north Africa. Her work appears in the *International New York Times* and *GlobalPost*, an online news site.

FRANÇOIS MISSER is a Brussels-based journalist. He has covered central Africa since 1981 and European-African relations since 1984 for the BBC, *Afrique Asie* magazine and Germany's *Die Tageszeitung* newspaper, among others.

RAY NDLOVU is a journalist based in Zimbabwe. He writes for South Africa's *Business Day*, *Sunday Times* and *City Press* newspapers. In Zimbabwe, his work is published in the *Financial Gazette*, Zimbabwe's largest business weekly.

RAPHAEL OBONYO is Africa's representative at the World Bank's Global Coordination Body of the Global Youth Anti-Corruption Network. He holds a master's in public policy from Duke University. He is a Ford Foundation fellow.

MIKE PFLANZ is a British journalist based in Nairobi since 2004. Working mostly for *The Telegraph* in London and *The Christian Science Monitor* in Boston, he has reported from two dozen countries in Africa.

KATE VAN NIEKERK is a researcher at Good Governance Africa focusing on health and education. She has a master's degree in justice and transformation from the University of Cape Town.

Rwanda's exclusionary constitution

On paper, Rwanda's constitution appears inclusive. In practice, it reinforces the ruling party's power

Potemkin pluralism

Will Jones

Rwanda's 2003 constitution is considered one of Africa's most progressive. It calls for proportional representation, guarantees seats in its legislature to women, youth and the disabled, and transfers extensive power to local councils, among other broad-minded features. This east African nation is also home to one of the world's most tightly centralised ruling parties, the Rwandan Patriotic Front (RPF), headed by President Paul Kagame (pictured).

A liberal constitution and a single-party state do not sit comfortably together. Many observers brush aside this contradiction by claiming that constitutional rules and institutions do not matter in Rwanda. This is a cheap answer: it is not only false but relies on a willingness to accept dated and offensive stereotypes about African governance.

The RPF is not dominant despite its constitution, but in part, because of it.

Rwanda has held seven elections since the 2003 constitutional referendum, which officially terminated the country's transitional period after the 1994 genocide. The ruling party has easily won each election. Measured in technocratic terms, these polls have been punctual and organised competently. In contrast to other states with tarnished democratic reputations,



© ITU/C. Montesano Casillas

Lip-service liberalism

large-scale protest or violence has not marred Rwanda's election-day voting, ballot counting or aftermath.

While commentators disagree on the extent of electoral violence and malpractice, they agree that three factors delineate the assaults and misconduct. First, this violence is targeted against a comparatively tiny set of opposition activists and RPF defectors, rather than the general population. Second, the violence has never descended into wide-ranging lawlessness and chaos, such as followed Kenya's 2007 poll; and third, the RPF would have won by a crushing margin with or without manipulating the vote.

Like many democracies, Rwanda has a staggered electoral cycle. Members of Rwanda's Senate serve eight years while the president serves seven. National representatives of the bicameral parliament's Chamber of Deputies serve five-year terms.

But only the president and 53 of the 80-seat lower house legislators are elected by popular vote. Other groups select the 27 remaining deputies: the Electoral College of the provinces chooses 24 women, while the National Youth Council picks two; the Federation of the Associations of the Disabled selects one.

All 26 members of the Senate are appointed.

This complex system of direct and indirect national elections is meant to widen inclusion for different groups. Instead, this obscure and convoluted scheme narrows the prospects for ordinary citizens to monitor the government, in five ways.

First, Rwanda's 11 registered parties select their candidates for their national lists behind closed doors. The constitution does not require open-party competition. As a result, accusations of corruption and collusion taint this system.

This closely guarded candidate selection strips it of accountability or independence from ruling-party control. "The ability to manipulate the electoral college directly or indirectly, using political and social shrewdness coupled with government political 'godfathering', ensured that the right candidates obtained desired results," wrote Rwandan political scientist David Kiwuwa in his 2012 book, "Ethnic Politics and Democratic Transition in Rwanda".

Second, almost all legislators lack specific geographic constituencies. Regional conflict (classically, between the north and the south, and increasingly between Kigali, the capital, and everywhere else) has historically

undermined peace and stability in Rwanda. To ensure harmony, the constitution mandates that a majority of national parliamentarians do not represent regions. The only parliamentarians with geographical constituencies are 12 senators and 24 deputies, who are appointed by provincial and sectorial councils.

This proportionality makes the system appear pluralist, which serves the interest of the ruling elite. It is important for Mr Kagame that external supporters, donors and internal critics regard Rwanda as an inclusive democracy. Ironically, if a first-past-the-post electoral system were in place, it is almost certain that the RPF would have won 100% of the seats in all past legislative elections. This, though, would have revealed the reality of RPF hegemony and unmasked the state's democratic façade.

Third, this national system weakens small parties. If the system were based on clearly defined electoral districts, small parties could concentrate on building regional constituencies, which is cheaper and easier. This would have benefitted the Liberal and Social Democratic Parties (PL and PSD), which have traditional support bases in the educated middle classes of the south.

Instead, the current system mandates that any party must exceed 5% of the national vote to achieve representation in the lower house. This shuts out small parties and encourages them to cooperate rather than compete with the ruling party.

Fourth, the national-list centralised approach makes it easier to manipulate the vote on election day. For instance, during the 2008 vote count, the EU and *Umuseso*, a weekly newspaper, reported that observers at polling stations were certain that neither the PL nor the PSD had passed the 5% threshold. In the end, the parties received 7.5% and 13.1% respectively.

The RPF may even have reverse-rigged the results to make the vote tallies look more plural. Only national results, and not local vote counts, are published. This makes it onerous to verify deviations between the local count and the national totals.

This not only makes it difficult to detect fraud. It also grants small parties a limited place in the system, making them dependent on the RPF.

Only national results, and not local vote counts, are published. This makes it onerous to verify deviations between the local count and the national totals.

Fifth, appointed members to the parliament entrench incumbent supremacy. As mentioned earlier, only 53 of the lower house's 80 seats are elected by popular vote. Other groups select the remaining 27 women, youth and disabled deputies. Election to the 26-seat senate is even more complex: 12 represent provincial government councils and two represent academic institutions. The president nominates eight, while the official forum of political parties selects four.

In practice, these posts are rarely contested and the selecting groups follow the ruling party's dictates. Even where competition formally exists, it is doubtful that the contest is truly genuine.

This indirect and murky election process reduces the bicameral parliament's accountability and increases the central elite's power. The political parties' forum has the authority to dismiss parliamentarians, even elected ones, a right it has used to sack a significant proportion of legislators before their terms ended. Between the 2003 and 2008 elections, the forum replaced 14 deputies, approximately 25% of the lower house. This has the obvious effect of removing any dissenting voices and ensuring that as few as possible manifest in the first place, according to a July 2009 paper by the Global Institute of German and Area studies, a Hamburg-based research organisation.

The upshot is that Rwanda's parliament is not a viable check on the president's power. Far from being a country where the constitution is ignored to maintain the ruling party's dominance, here the legal charter reinforces this executive control.

Mr Kagame's second and last constitutionally mandated term is due to end in 2017. Many critics of Rwanda's authoritarian regime have pinned their hopes on his departure. Regime opponents are already trying to head off attempts to amend the constitution to allow him a third term, as Uganda's president, Yoweri Museveni, accomplished in 2005. This reflects an understandable tendency to focus on the personalities and actions of particular individuals, which are always more dramatic than the minutiae of constitutional rules. But to build a genuinely pluralist Rwanda, forget who occupies the government. Instead, fix the structure. 

Constitutional term limits

Several presidents in Africa are seeking to stay in power by abolishing constitutional term limits

Two elections and you're out?

Brian Klaas

When democracy swept across Africa in the 1990s, optimism spread that the era of “Big Man” politics had ended. It no longer seemed plausible that a president could stay in office indefinitely. Multi-party elections had arrived and soon became commonplace. Surely, elections and genuine democracy would prove to be the long-overdue antidote to power-hungry presidents hell-bent on staying in office, no matter the cost.

Unfortunately, two and a half decades later, the reality has not lived up to this dream. Elections are still commonplace, but the playbook of the “Big Men” of the one-party state era has simply been replaced by a similar script now couched in lofty references to democracy, electoral legitimacy and multi-party competition. Regrettably, the language is often rhetoric and little more.

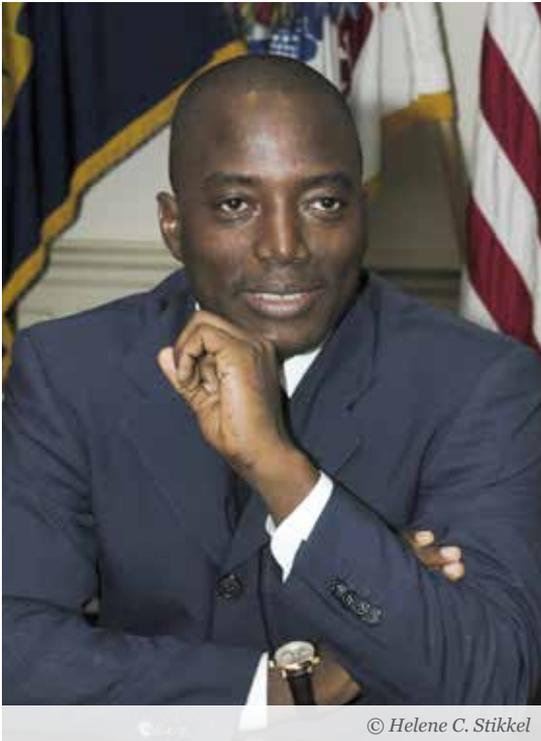
This has become blatantly obvious as several African countries yet again confront the seemingly exorcised demons of unending single-party rule. In Burkina Faso last year, and in the Democratic Republic of Congo (DRC), Nigeria and Togo this year, elected presidents have sought to stay in office beyond their allotted mandate by abolishing constitutional term limits—democratic checks put in place deliberately to avoid the unending rule of one person over a country.

Blaise Compaoré’s ill-fated attempt to extend his 27-year reign in Burkina Faso prompted volatility, protests, and ultimately, his ouster. Those calling for the removal of constitutional term limits cited stability and continuity as a key justification to prolong the reign of “Beau Blaise”. But the opposite occurred and the military took over. Africans are finally standing

up to this procedural manipulation that allows strongmen to continue the lengthy political dominance characteristic of one-party rule rather than multi-party political competition.

This is quickly becoming clear to the presidents of the DRC and Togo. Togo's election was due to take place on April 25th, as this magazine went to press; the DRC vote is tentatively slated for November 27th 2016.

In early 2015, rumours swirled that Joseph Kabila (pictured), DRC's president, intended to remove the country's term limits and run again, even though his second and last constitutionally mandated term ends in 2016 (see page 13). This incited protests, which spread from the DRC's capital, Kinshasa, to other parts of the country.



© Helene C. Stikkel

Are you gonna go?

In mid-March the government began to crack down on the pro-term limits movement. When a non-profit youth group held a press conference that was tangentially related to Mr Kabila's possible effort to repeal term limits, Congolese authorities arrested dozens of activists, several journalists, and even an American diplomat—risking a high-profile diplomatic standoff. Even though the official was soon released, the government's signal was clear: Mr Kabila views any attempt to oppose procedural changes as an attack on his authority. A government spokesman justified the arrests by claiming that the press conference was actually an appeal for insurrection. The youth

group's political dissent marked them as traitors, he claimed.

Although the DRC's term-limit debate has changed, foreign governments and international organisations still have time to pressure Mr Kabila to respect the constitution.

Togo is also embroiled in widespread protests and political intrigue over term limits. But in this country's case, the proposed change runs in the opposite direction. Protesters are demanding term limits, which currently do

not exist in this tiny west African nation. They want to bar Faure Gnassingbé (pictured) from running for a third presidential term.

The president's family has been in charge of this narrow country sandwiched between Benin and Ghana since 1967. Mr Gnassingbé came to power shortly after his father's death in a palace coup and a subsequent election, which the international community condemned. Togo is notorious for violent elections. Instituting term limits and opening the political space to figures outside the family dynasty would be a step in the right direction.

Imposing term limits to restrain tyranny is an idea as old as democracy itself. Peisistratos, a master of ancient Athens, was the first recognised tyrant—beguiling the lower classes into supporting him with one of the earliest forms of populism. This strategy allowed him to reign for nearly 34 years. The democracies of Athens and Rome instituted term limits to contain the likelihood of tyranny and allow good leaders to rotate new blood into power.

According to Afrobarometer public opinion surveys conducted in 35 countries between 2011 and September 2013, 74% of Africans (including those in north Africa) do not support presidents serving more than two consecutive terms. In other words, three out of four people across the continent recognise the value of rotating leadership backed by constitutional constraints. But three out of four Africans may be disappointed if power-hungry presidents continue to press for “reforms” to term-limit legislation (or oppose its introduction if not already in place). Submissive parliaments across the continent are too often accomplices in this subversion of a baseline democratic constraint.

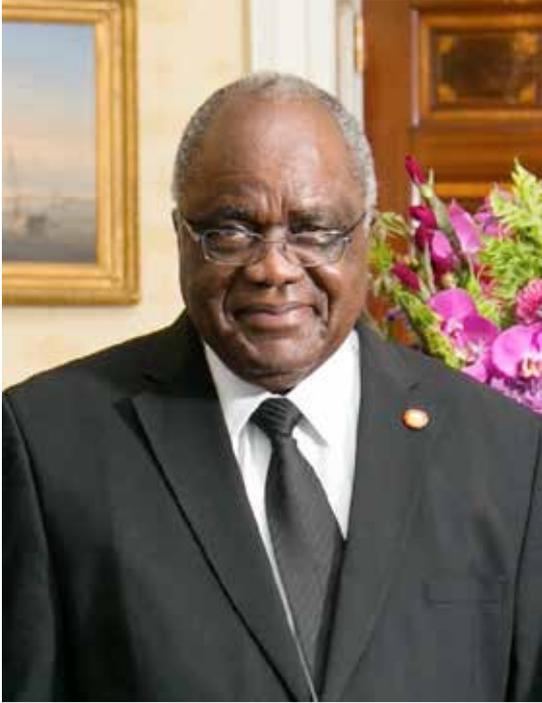
The demise of Mr Campaoré's regime in Burkina Faso is proof that the scales are tipping in favour of those who support term limits, at least in



Letting Togo go

© Agência Brasil

some places. There is no guarantee, however, that they will win their battle to uphold or impose constitutional term limits. Although the protests are sometimes violent and destabilising, they are sending a clear signal: Africans are no longer willing to accept the façade of multi-party competition that manages to tighten and prolong the incumbent regime's grip on power.



© Amanda Lucidon

Stepping up by stepping down

Other glimmers of hope can be found in the recent awarding of the Mo Ibrahim prize, an honour reserved for heads of state who govern well, raise living standards and then leave office when their terms end. In early March, Hifikepunye Pohamba (pictured), president of Namibia, accepted the \$5m prize. It is telling that the prize has been conferred only three times in the last eight years because no other African leaders were deemed suitable.

In the development of Athenian democracy, the demise of the tyranny of Peisistratos and his immediate successors ushered in a resurgence of democratic reforms that limited the

concentration of power in any one person. We can only hope that Africans across the continent, like Athenians 2,500 years ago, forge strong term limits that cannot be bent or broken. 

Democratic Republic of Congo

The president's U-turn on elections is likely a strategic retreat to hold onto power

Articles of faith

François Misser

Joseph Kabila is a crafty man who does not give up. After months of wrangling to delay presidential and parliamentary elections scheduled for November 2016, Mr Kabila, president of the Democratic Republic of Congo, decided earlier this year to reverse course and respect the constitution. His about-face was met with much suspicion.

Since winning a second and last constitutionally mandated term in November 2011, Mr Kabila has spent almost four years trying to revise the country's legal charter so that he can stay in office, maybe indefinitely. Months of jockeying to postpone the election sparked nationwide protests in January that left at least 40 dead, according to human rights groups, and more than 350 people behind bars, according to the government. Finally, in February, Mr Kabila agreed to abide by the constitutionally mandated election schedule.

But this has not stymied the president. He now may have something

else up his sleeve. Last March Mr Kabila decided to enact a long-awaited law to replace the DRC's 11 provinces with 26 new ones, as required by the constitution's Article 2. He is enacting this law, however, five years after the constitution said it should have come into force.

Mr Kabila has a hidden agenda, suggests Baudouin Wetshi Amba, the editor of *Congo Indépendant*, a Brussels-based online publication. Implementing this law will split mineral-rich Katanga, in the DRC's south-east, into four smaller provinces. Prominent government critics, including Katanga governor Moïse Katumbi, who is considered a potential presidential rival, and provincial assembly speaker Gabriel Kyungu wa Kumwanza, will conveniently lose their jobs.

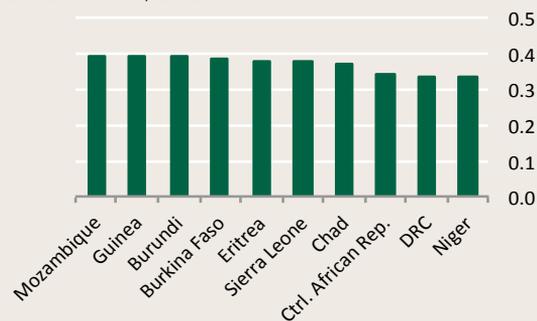
In addition, creating the new provinces and upholding the electoral agenda will be financially impossible, according to a March 9th column headlined, "New Provinces: a Dangerous Distraction", on the Congolese online news site *7sur7.cd*.

Elections are expensive, particularly

The worst ten

Human development index 2013

Scores: 0=worst; 1=best



Source: UNDP

for a huge country that is usually at the bottom of human development indicators. The elections cycle—starting with local polls in October 2015 and ending with the presidential vote in November 2016—could cost \$1.2 billion, according to the national electoral commission. Foreign aid is expected to finance 21% of the DRC’s 2015 \$9 billion budget, according to the government. Many are sceptical that the international community will come to the table with even more funds.

The DRC’s foreign partners will have trouble financing an electoral process that denies the rights of 10m Congolese citizens who reached the voting age of 18 after 2011 because the electoral commission has not registered them. The commission’s failure violates the constitution, complained Vital Kamerhe, an opposition party leader, in March.

The creation of new provinces is expected to happen before the end of June 2015, after this magazine went

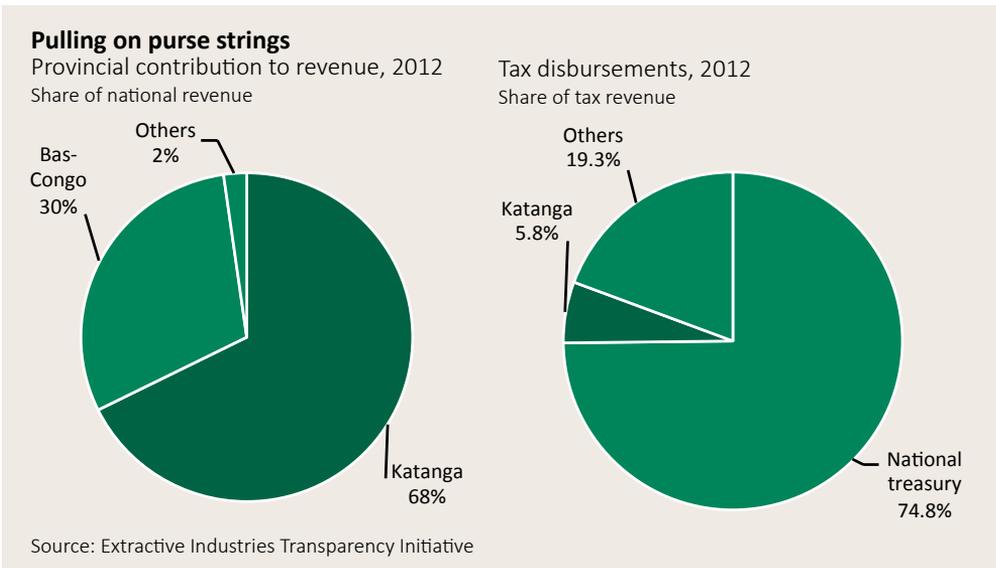
to press. These new districts are likely to siphon much-needed government funds. Infrastructure is lacking and the costs to build new provincial capitals to accommodate future governors, legislators and civil servants will be considerable.

The simultaneous implementation of the territorial reform and the electoral agenda could lead to bankruptcy, according to *7sur7.cd*. If that happens, the electoral commission would have to postpone the polls for budgetary reasons.

Observers are left with the irony that Mr Kabila seems to have implemented one constitutional provision with the intention of delaying or dodging the implementation of another.

There is reason for scepticism. Since the constitution was adopted in 2006, Mr Kabila has controlled DRC politics through his recurring habit of ignoring the charter or changing key provisions.

For example, the government has not distributed 40% of national tax



revenues to the provinces, as stipulated in Article 175, fuelling frustrations in Lower Congo and Katanga provinces. Mineral-rich Katanga is the major contributor of revenues to the national purse, providing about \$1 billion, or 68% of the country's total in 2012, according to a 2014 report from the Oslo-based Extractive Industries Transparency Initiative. In 2012 Katanga received just 5.8% (or \$88.4m) of total disbursements, according to the report.

The current constitution allows change after a petition of 100,000 citizens is submitted to the Senate and National Assembly. Both bodies of this bicameral legislature either approve it by a simple majority and submit it to a national referendum, or they can pass the proposal with a three-fifths vote.

Mr Kabila and his allies used the three-fifths vote option in January 2011 to amend Article 71, which stipulated that a candidate needed to win more than 50% to avoid a run-off election. Now the electoral law allows a candidate to win with a simple majority. This suits a powerful incumbent since it forestalls the possibility of two or more losing candidates forming a coalition in the second round.

Still Mr Kabila was not able to win the presidential election in 2011 without incident. The election, which Mr Kabila won with 49% of the vote, was marred by allegations of fraud. The US-based Carter Center found the poll "to lack credibility". The EU observer mission reached similar conclusions.

In January 2011 the legislature also amended the constitution's Article 198 to give Mr Kabila the power to sack

elected governors. Before the change, provincial assemblies elected the country's governors and had the sole power to fire them. Now the president can dismiss governors by decree should a "serious crisis" threaten the functioning of provincial institutions.

With his hand strengthened, Mr Kabila began testing the waters for two other constitutional revisions: Article

Constitutions need to be changed periodically to avoid "sclerosis", Évariste Boshab wrote, creating speculation that the ruling party was preparing citizens for a revision of Article 220.

70, which limits presidential terms to two; and Article 220, which stipulates that the number and the duration of presidential terms cannot be subject to a constitutional revision.

The secretary-general of Mr Kabila's People's Party for Reconstruction and Development first floated this idea in a June 2013 book, "Between the Revision of the Constitution and the Starvation of the Nation". Constitutions need to be changed periodically to avoid "sclerosis", Évariste Boshab wrote, creating speculation that the ruling party was preparing citizens for a revision of Article 220.

Four months later, in October 2013, the government organised a month-long round of talks in Kinshasa, the capital. Politicians and civil society were invited on the pretext of strengthening national

cohesion, which had been harmed by the controversy over the allegedly rigged 2011 election. In reality, the talks were held to gather consensus to hold a referendum to amend the constitution to allow Mr Kabila to run for a third term.

Countervailing pressure came from all sides. Etienne Tshisekedi's Union for Democracy and Social Progress, the largest opposition party, boycotted

Human Rights Watch has said that bodies went missing during the protests over the proposed electoral law changes.

the talks, as did other opposition groups and civil society organisations, which spoke out against the proposed referendum.

The influential Roman Catholic Church added its voice to the chorus. The powerful Congolese Bishops National Conference has on several occasions expressed its formal objection to the removal of Article 220.

Several of Mr Kabila's former political allies—including Mr Katumbi and Mwenze Kongolo, the former interior minister—also called for respecting the constitution.

Opposition was so widespread and fierce that holding the referendum would have created serious trouble. The government considered removing Article 220 by a three-fifths majority of both legislative houses, but divisions within the parties allied to Mr Kabila eliminated this option.

Frustrated by his failed past efforts, Mr Kabila and his allies adopted a new tactic this year. On January 17th, the National Assembly amended the electoral law to require that a national census be held before the next election. A census would have significantly delayed the presidential and parliamentary elections scheduled for 2016 and kept Mr Kabila in power.

Again, mass demonstrations and diplomatic pressure forced the president to abandon the plan. On January 23rd, after a week of protests, the Senate adopted an amended version of the law, which made elections not conditional on completing a census and upheld the constitution's electoral schedule.

Although the opposition claimed victory, it came at a high cost. Since the deaths and arrests in January, at least 421 bodies were found in March in an unmarked burial ground in Kinshasa. Human Rights Watch has said that bodies went missing during the protests over the proposed electoral law changes and government crackdowns on gangs last year and in 2013. The government disputes this and says it has opened an inquiry. 

South Africa: read between the lines

A little-known international declaration reveals the government's reluctance to protect the right to education

A textbook case of contempt

Kate van Niekerk

When the infamous textbook delivery case goes back to court later this year, the government may hide behind an obscure declaration, appended to a treaty that is the backbone of international human rights law and the major source of South Africa's constitution.

The schoolbook lawsuit has been central in exposing the government's violation of the right to basic education. The Department of Basic Education (DBE) appealed a May 2014 North Gauteng High Court ruling prescribing strict deadlines for textbook delivery to schools. The Supreme Court of Appeal (SCA) will hear the case at an unscheduled date later this year.

The lawsuit began in May 2012, when Section 27, a public interest law centre, and Basic Education for All (BEFA), a community-based organisation in South Africa's northern Limpopo province, launched an urgent application to force the government to deliver textbooks to schools in the province. Learners had already gone without the learning materials for the first five months of that school year.

A North Gauteng High Court judgment that year stressed that the government was violating the right to basic education because it was not providing textbooks, which it deemed an "essential component" of this right.

This litigation "has directed public attention to a component of the difficult conditions under which teachers teach, and learners learn", wrote Mary Metcalfe, an education professor at Wits University, in an independent report on the progress of court-ordered textbook delivery.

During these many public court hearings, the government quietly, and perhaps conveniently, ratified the International Covenant on Economic,



Social and Cultural rights (ICESCR), in January 2014. This was more than 20 years after Nelson Mandela signed it in October 1994.

This UN treaty forms the cornerstone of international human rights law. In ratifying this agreement, South Africa joined over 160 states that are legally obliged to work towards the realisation of these rights.

Few noticed, however, that the South African government slipped a suspicious declaration into its ratification. The government “will give progressive effect to the right to education...within the framework of its National Education Policy and available resources”, the addendum said.

This declaration, qualifying the government’s obligations to provide education, is at odds with the country’s constitution, which guarantees and affords exceptional status to this right.

Section 29(1)(a) of South Africa’s constitution states: “Everyone has the right to a basic education.” In the 2011 Juma Masjid case, the constitutional court confirmed that the right to education is “immediately realisable”, and “there is no internal limitation requiring that the right be ‘progressively realised’”.

While the constitution protects other socio-economic rights, such as housing and health care, it does so with less vigour and immediacy. “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these

rights,” according to the constitution.

The landmark Grootboom Constitutional Court judgment in 2000 clarified “progressive realisation” by explaining that “accessibility must be progressively facilitated” and that “hurdles should be examined and, where possible, lowered over time.”

In response to the ICESCR’s ratification, several South African non-profit organisations issued a joint statement calling the appended declaration “a deliberate intention by the South African government to misinterpret the right to basic education as enshrined in our constitution”.

The other obvious question that arises is: why the two-decade lag? Ratification should have been fast and easy. South Africa’s constitution is one of just a few in the world that protects socio-economic rights in the same way that civil and political rights are usually safeguarded.

The government claims it took 20 years to ratify the convention because the constitution already protected these rights. This explanation is “disingenuous”, said Salim Vally, a professor at the University of Johannesburg’s education department. “Just because the rights are already in the constitution doesn’t mean we mustn’t [ratify the treaty]”, he said.

The government also claims it could not identify a single department to oversee the treaty’s implementation because the ICESCR’s scope went beyond the individual mandates of government units, Mr Vally said.

This appears to still be the case. A spokesperson for the DBE declined to comment on this story and suggested asking the Department of International Relations and Cooperation (DIRCO). Despite repeated attempts to obtain a comment, DIRCO never responded.

Without official explanation, one is left to speculate about the reasons for the delay. Maybe the government postponed the ratification because the covenant includes an optional protocol that allows individuals to seek remedy in the UN human rights system when justice at the national level has been denied or does not exist.

Or perhaps the government delayed because at least two rights in the treaty are not found in the South African constitution: the right to decent work and the right to an adequate standard of living. The government may be aware that they would have difficulty delivering on those obligations, Mr Vally said.

While it is hard to prove intent, the government’s delayed ratification may be tied to a more expedient political motive: the pending textbook

litigation. This explanation becomes convincing when one considers the inserted declaration that limits the right to education.

The government undoubtedly knows the difference between “progressively realisable” and “immediately realisable”. By appending the declaration, it is attempting to qualify the right—an action “the constitutional court has expressly rejected in its binding interpretation of the constitution”, said the joint statement from the NGOs.

Section 27 and BEFA have filed suit several times because the education department has failed to follow court orders to provide textbooks.

In the case under appeal, Judge Neil Tuchten ruled that the department had violated the right to education by failing to provide textbooks to 39 schools by the first day of school.

He refused, however, to issue an order to deliver or exercise the court’s power of supervision because “political issues require political solutions” and Parliament was the more appropriate venue.

The department of education nevertheless filed a motion to appeal. Angie Motshekga, South Africa’s basic education minister, said that ensuring every pupil had every textbook by the first day of school amounts to a level of “perfection” that “is not the standard requirement from [government]”, according to various media reports. In November 2014, the North Gauteng High Court granted the department leave to appeal.

It is indeed difficult to say definitively what “immediately realisable” means. Yet it seems suspiciously convenient that, while it was fighting this battle in the courts, the government should have quietly ratified the ICESCR and added an unconstitutional declaration limiting the right to education.

In theory, a qualification that undermines the constitution—the supreme law of the land—is ultimately meaningless, as no court will apply it.

In practice, however, the government may try to use this limitation to escape legal accountability. If it does, it will reveal the education department’s apparent readiness to contravene the constitution and several court judgments. It should raise concerns about its commitment to protect this country’s exceptional right to education. **GGV**

Tanzania: a nation divided

Draft constitution fails to right the wrongs of its predecessor

Protecting patronage

Mike Pflanz

Amid the excitement and promise of April 1964 it seemed feasible that Tanzania, a new country born of the union of just-independent Tanganyika and Zanzibar, could have a constitution within a year.

That was the demand stipulated in Article VII of the eight Articles of Union signed between the combined nation's founding fathers, Julius Nyerere of Tanganyika and Zanzibar's Amani Abeid Karume.

That document was short, running to barely 800 words, not enough on which to base the governing of a new country. It was designed as an interim measure. It stated bluntly that a commission must be formed immediately to pen a new constitution to rule the nation, and that it should be adopted "within one year of the commencement of the union", meaning by mid-1965.

In the end, it took 13 years. The 1977 constitution, with its legally mandated single-party state, imperial presidency and other amendments, still governs the country today.

That was due to change. A new constitution has been drafted, and was to go to a national referendum on April 30th. But in early April, President Jakaya Kikwete announced that the vote would be postponed because biometric voter registration was taking longer than expected. At the time this magazine went to print, no one,



© Matthew Jordaan / Mediapix

Jakaya Kikwete: looking for a legacy?

including the national electoral commission, was sure when the referendum would be held.

What is certain is that Mr Kikwete, who stands down after his second term expires this year, wants to leave the new constitution as his legacy. His ruling Party of the Revolution (CCM) is also desperate for voters to approve the draft, because it favours this faction.

But this latest draft has changed considerably from the one that sprang from a national consultation process conducted under the watch of Joseph Warioba, a former prime minister and attorney-general. It was seen as reflecting the will of most Tanzanians. But the Constituent Assembly has amended it, creating much controversy. This body, a gathering of 640 politicians and civil society delegates, was supposedly balanced between government and opposition, but in reality it favoured the CCM.

Mr Warioba's draft, unveiled in December 2013, appeared ready to right the wrongs of its predecessor and leave one of Africa's most important emerging resource-rich states with a modern structure of governance. His Constitutional Review Commission spent the second half of 2012 touring every district in Tanzania, holding 1,773 meetings and canvassing the thoughts of 1.4m of the nation's 49m citizens.

That led to a draft that separated the arms of legislature and executive by banning the appointment of lawmakers to ministerial posts. It mandated equal representation of men and women in parliament. It severely cut back the number of legislators from 357 to 65, and proposed limiting them to three five-year terms. The list went on.

Most controversially, however, it repeated earlier failed constitutional reforms that tried to change Tanzania from a two-tier to a three-tier system of government. This is where Mr Warioba's charter foundered.

Currently, Zanzibar, the island archipelago in the Indian Ocean off the mainland, has its own president, parliament and judiciary and manages most of its domestic affairs. That is the first tier.

A second tier governs the mainland—what was formerly Tanganyika. It has an executive, a unicameral National Assembly and judiciary sitting in Dodoma, the national capital. It governs the mainland half of the federation in affairs that stand separate from Zanzibar's, for example school curricula, agricultural policies and taxation. It also manages an increasing number of joint matters for both Zanzibar and mainland Tanzania, including national security and finance.

Judge Warioba's and other previous drafts suggested instead that both Zanzibar and the mainland should each have their own legislatures, executives and judiciaries. Added to this was a new, third tier: an over-arching parliament and executive that would sit separately, with its responsibilities limited but covering genuinely national interests, such as approving international treaties.

By virtue of the ruling party's majority on the mainland, the CCM currently controls the Na-

tional Assembly and thus holds sway over many important national decisions, leaving both opposition parties and Zanzibaris feeling like bit players.

With oil and gas exploration reporting promising early findings, including in the waters between Zanzibar and the mainland, deciding the real level of autonomy between the devolved branches and the centre is of increasing importance. Confusion could drive away investors.

"Warioba's draft was a legally sound shopping list of the best ideas, including completing the idea of devolution of power across a three-tier system that most Tanzanians feel is the most equitable," says Nick Branson, a senior researcher at the Africa Research Institute in London. "What the Tanzanians will in the end have before them to vote on will not quite be that."

Instead, the Constituent Assembly, driven by the ruling party's near majority of its 640 members drawn from the national assembly, Zanzibar's own parliament, a cohort chosen by the president, and others, began dismantling Mr Warioba's recommendations. They bulldozed any proposals that appeared to curtail the power of the mainland over national matters, or the power of the ruling party.

In the words of one analyst who is not authorised to speak freely, "the views of Tanzanians and legal experts were no longer the priority; it was short-term political expediency that ruled."

Frustrated opposition delegates eventually walked away from the process in April 2014. Even Mr Kikwete intervened and tried to suspend the Constituent Assembly's deliberations, worried that his own party's hijacking of the otherwise "impeccable" Warioba draft, in the words of the analyst, would stain his legacy.

"The views of Tanzanians and legal experts were no longer the priority; it was short-term political expediency that ruled."

The assembly's chairman, Samuel Sitta, a CCM stalwart, cried foul, saying he was immune from presidential influence. He made sure the draft was amended according to the ruling party's wishes.

"The people's constitution...was rejected," says Lutgard Kagaruki, executive director of the Tanzania Tobacco Control Forum, an influential civil society group. "The constitution as it is now proposed is their own property as leaders. It protects their rights and privileges and not ours."

Under the amended draft favoured by the ruling party, members of the national parliament swelled in number once more, to 390, as did cabinet ministers, from 15 to 40. Measures to allow citizens to recall their representatives disappeared. Strict eligibility requirements for legislators and civil servants were loosened. Taken together, it was easy to conclude that the amended constitution was set up to perpetuate political patronage and reward.

Debate over the constitution also allowed for politically-driven religious divisionism. Christians, dominant on the mainland, argued that Muslims from Zanzibar were given too many seats on the Constitutional Review Commission, which drew up the initial Warioba draft. Muslims, for their part, complained that they hold fewer than 6% of National Assembly seats, despite comprising perhaps 45% of the population.

The religious aspect to the debate has raised temperatures, with newspaper editorials and faith leaders voicing fears that tensions could spark pockets of violence during or following the referendum, when it is finally held.

Diplomats and security analysts reported that the chance of serious problems was low, and the anticipated disruptions were part of political efforts by each side to galvanise their supporters.

In large measure, violence is unlikely because the majority of ordinary Tanzanians seem tired of the process, and certain that its outcome will have little bearing on their day-to-day lives. Turnout to the referendum is likely to be below 40%, analysts predict.

"This country belongs to the politicians, especially from CCM, who can do whatever they want," says Eliza Guti, 19, a mobile money transfer agent in Dar es Salaam, the country's commercial capital. "I will not register to vote because it's a waste of time. The ruling party will never concede defeat." 

Tunisia: implementing a new constitution

The country's new parliament must adopt laws to translate a promising text into reality

Now comes the hard part

Eileen Byrne

Tunisia's new constitution is a major step along the road to building a stable parliamentary system.

This blueprint for its young democracy guarantees a range of civil liberties that have been hailed as groundbreaking in the Arab world. Adopted three years after the country's citizens chased out its authoritarian ruler, Zine el-Abidine Ben Ali, the document dilutes the power of what was once an overweening executive presidency by boosting the prerogatives of elected lawmakers and the prime minister.

Tunisia's constituent assembly adopted the new charter in January 2014. Under the new constitution, parliamentary and presidential elections followed, from October to December 2014.

Much of the spadework for implementing it now falls to the 217 newly elected members of parliament, many of whom have experience in the previous assembly. Their first task will be to hammer out legislation to create several bodies specified in the constitution.

Much of the constitution's content represents a compromise between the leftist opposition and the moderate Islamist party, Nahda ("Awakening"), which along with two smaller parties controlled a governing majority in the constituent assembly.

The influence of leftist opposition parties punching above their weight is seen in articles that guarantee equality between the sexes and eventual "parity between men and women in elected assemblies".

Two articles guarantee "freedom of creative expression" while committing the state to "the protection of the sacred and the prohibition of all violations thereof". These clauses could give rise to stimulating legal debates down the line.



© Magharebia

Old man, new tricks

Nidaa Tounes (“Tunisian Call”), a centrist party founded in 2012 by veteran politician Beji Caid Sebti (pictured), is now the new parliament’s largest party, with Nahda in second place. Many Nidaa Tounes activists were supporters of Mr Ben Ali’s ruling party, the Democratic Constitutional Rally (RCD), and are hostile to Nahda’s moderate Islamism.

However, the 88-year-old Mr Caid Sebti portrays himself as a conciliatory figure. After winning the presidential election last December he resigned from the party, as the constitution decrees. The head of state, a “symbol of national unity”, is above the political-party fray, the constitution says.

However, intended merely to map out broad outlines, the document has left some grey areas surrounding the chief executive’s role. The president defines the “general orientations” of security, defence and foreign policy, it says, without going into details.

Mr Caid Sebti is already trying to give more form to his post. In a television interview last April, he made indirect references to diplomatic relations between Tunisia and Syria, which were suspended in 2012. When asked whether a Syrian ambassador would return to Tunis shortly, as the foreign minister had suggested, Mr Caid Sebti replied firmly, “I don’t think so.” He added that the president had responsibility for defining foreign policy while the minister merely “implements” that policy.

During the presidential campaign late last year, the opposition argued that it would be dangerous for democracy to have a president whose party was also the strongest in parliament. The next few years will be crucial in determining how this balance of power plays out.

Using its parliamentary majority, Nidaa Tounes in January named Habib Essid as prime minister. A non-partisan figure and previously a junior minister under Mr Ben Ali, Mr Essid's coalition government includes one minister and three junior ministers from Nahda ranks.

Mr Caid Sebsi maintains he was not involved in choosing ministers and will respect the constitutional limitations on his role. However, his association with Habib Bourguiba, the country's first post-independence president, who is still widely revered, combined with the strength of his personality, has enhanced his political influence.

Lack of detail in the constitution also triggered fierce debate in parliament in April

over the draft law creating a new supreme judicial council. This body is responsible for ensuring judicial independence as well as investigating allegations of judicial misconduct.

For decades, judges have been seen as pliable to presidential instructions. Under Ben Ali and Mr Bourguiba, many handed down heavy prison sentences to silence political dissent. In non-political cases, some judges were seen to be swayed by bribes. In contrast, lawyers see themselves as more combative and independent than most judges. The contentious parliamentary debate underscores the tensions that continue to divide the two professional groups after the revolution.

The constitution stipulates that two-thirds of the judicial council's seats should go to judges while the remaining third should be filled by "independent, specialised persons".

The lawyers lobbied for all these seats to be filled from their ranks.

The two judges' associations, ever attentive to what they see as attempts by lawyers to encroach on their domain, resisted such a strong presence of lawyers on the council. They argued for the inclusion of

In non-political cases, some judges were seen to be swayed by bribes. In contrast, lawyers see themselves as more combative and independent than most judges.

non-lawyer specialists.

This issue was unresolved at the time of writing. A transparent and efficient legal system remains a high priority for many ordinary Tunisians, not least as cases concerning alleged Islamist extremists come to court.

The constitution also calls for the supreme judicial council to appoint four judges to sit on the new 12-member constitutional court. This key body will rule on whether laws violate or conform to the constitution. Par-

liament is still carving out a legal framework for this court and a good governance and anti-corruption commission. The constituent assembly had already established a communications commission, responsible for regulating and guar-

Tens of thousands of new jobs for the restless youth have yet to materialise, as investors remain cautious, especially in the interior regions.

anteeing media freedom.

In addition to existing town councils, the constitution envisages another layer of local democracy in the form of elected regional councils. Local elections are planned for 2016, once the enabling legislation has been passed.

Independent Tunisia's first constitution, adopted nearly 60 years ago in 1959 and modified several times, guaranteed civil liberties and the separation of powers. But two authoritarian presidents spurned these provisions. The risk of sliding back towards authoritarianism remains, especially as many Tunisian are preoccupied with day-to-day concerns. The economy is struggling to recover from the disruption brought by the revolution. Tens of thousands of new jobs for the restless youth have yet to materialise, as investors remain cautious, especially in the interior regions.

The difficult security situation, with armed Islamist groups ratcheting up violence against the state, lends further urgency to the task of consolidating this still-fragile republic. Over the next few years, lawmakers will need to continue to work in a spirit of compromise as they lay the foundations for strong independent institutions to underpin the country's emerging democracy. 

Zambia's draft constitution

Several presidents have promised a new legal charter to win votes

Campaign carrot

Victoria Kelly

With Zambia's presidential election scheduled for September next year, its current chief executive is already campaigning and making promises.

"I want to hand you a new constitution," Edgar Lungu, Zambia's president, told expectant crowds attending his inauguration ceremony at National Heroes Stadium in Lusaka on January 25th.

Dressed in a dapper blue suit and crimson tie, the 58-year-old former lawyer promised to "definitely deliver" a "people-driven" constitution in line with a roadmap that Mr Lungu released a few days before the January 20th presidential by-election.

Like his Patriotic Front (PF) predecessor, Michael Sata, whose death in October had prompted the January by-election, Mr Lungu is using the prospect of a new constitution as a campaign carrot.

Mr Sata was not the first to try this. For two decades, successive presidents, including Mr Sata's predecessors, Rupiah Banda, Levy Mwanawasa and Frederick Chiluba, all of the Movement for Multiparty Democracy (MMD), have promised Zambians a new constitution to win votes.

Zambians want the existing constitution revamped because it vests too much power in the president. They also want the bill of rights to include additional entitlements for women and children, among other revisions. Yet despite verbal intent and numerous costly constitutional review committees, each has failed to deliver—much to the chagrin of the people.

Unlike his predecessors, will Mr Lungu keep his promise?

With a general election looming in September 2016, Mr Lungu has a small window of opportunity to consolidate support among an increasingly apathetic electorate. His PF party won the January by-election by an extremely narrow margin. Mr Lungu beat his closest rival Hakainde Hichilema, of the United Party for National Development, by just 28,000

votes, or 3.5%, according to the Electoral Commission of Zambia (ECZ). This leaves little room for error.

This pressure appears to have prompted some action. Since entering office, Mr Lungu has taken several steps to advance the constitution-making

process. Most notably, his first appointment was to name Ngosa Simbyakula as justice minister and to charge him with passing the draft constitution into law. After 20 years of scrutiny, including the recent technical review committee set up by Mr Sata in 2011, Zambia now has a draft document that is generally seen as good to go. Mr Lungu released the draft on the eve of the country's

independence anniversary last October, when he was still justice minister.

Mr Lungu's government has also announced plans to amend the Referendum Act to bring it in line with the existing constitution. Certain constitutional clauses, in particular concerning the bill of rights, must be put to a public vote via a referendum before they can be amended, according to the current constitution. The law states that a referendum needs 50% of registered voters to vote "yes" for a motion to pass, while the existing constitution stipulates 50% of eligible voters. In March, cabinet ministers approved a bill to be submitted to parliament that aligns the act with the constitution.

Government plans to piggyback a referendum to change the constitution on next year's general election. Not everyone is confident, however, that Mr Lungu will deliver on his promise. Constitution lobbying groups believe government may use technical issues like amending the act to delay a referendum.

Other obstacles may block the road to a referendum next year. A census must be carried out to calculate eligible voters. Whether this is practical, time-wise or financially, before the 2016 election is questionable. Lawyers are currently debating possible ways around this, including using

Zambia 2015 presidential by-election

Top five parties

	Total votes	Share
1. Patriotic Front	807,860	48.8%
2. The United Party for National Development	779,753	47.1%
3. Forum for Democracy and Development	15,276	0.9%
4. Movement for Multiparty Democracy	15,028	0.9%
5. United National Independence Party	10,548	0.6%
6. Others	26,558	1.7%

Source: Transparency International Zambia

the last 2010 census, or projecting figures based on Zambia's population growth rate.

Even if a referendum is held next year, it is uncertain whether it will succeed. If the act is amended to line up with the constitution, over 3m people would need to vote "yes" for the draft constitution to pass. Zambia has 6.2m eligible voters, according to the 2010 census. Yet in January's presidential by-election just 1.7m people voted.

To sidestep a referendum flop, Mr Simbyakula has suggested that parliament amend "non-contentious" clauses not legally required to go to a referendum. These include the presidential running mate and the 50%-plus-one rules. The former would allow voters, rather than the president, to choose a vice-president. The latter would require the president to receive 50% plus one vote to win an election. Currently Zambia uses a first-past-the-post system.

With the 50%-plus-one rule, the top two candidates are forced into a run-off if a presidential candidate does not win a majority. This means that in the recent by-election, voting would have gone to a second round as Mr Lungu won only 48.3% of the votes. Previous presidents have also failed to win over 50% of the vote. Mr Sata won the 2011 election with 42.2% of the vote, while the MMD's Mr Banda won the 2008 presidential by-election with just 40%.

In March, the justice minister proposed submitting these clauses to the National Assembly as early as June. If the entire draft constitution is put to a referendum that fails, Mr Simbyakula argues, the people will have lost everything; this way at least some changes can be made.

Not everyone, however, is comfortable with this option. Campaigners believe government could use this route to throw out clauses less favourable to those in power.

"The people will not have a final say" if this happens, said Goodwell Lungu (unrelated to the president), executive director of Transparency International Zambia (TIZ), one of several civil society groups lobbying



© US Embassy Addis Ababa

Edgar Lungu's gap of opportunity

for a new constitution. “The suspicion has always been that if we agree to say it goes via parliament, some of these clauses can be tampered with,” he warned.

Reducing the power of the executive by making political appointments more democratic—as is the intent of the running mate clause—is a core thrust of the draft constitution.

Under the current constitution, the president has far-reaching powers, particularly in appointments. He can hire and fire the management of various institutions and parastatals as he wishes. He also selects cabinet ministers, judges and senior

To reduce the president’s powers, the draft constitution stipulates establishing independent commissions to propose, scrutinise and appoint potential candidates.

management within the ministries. This calls into question the independence of these institutions and the suitability of these appointees.

This approach “doesn’t work,” said Father Cleophas Lungu (also not related to Messrs Lungu), chair of the Oasis Forum, an alliance of Zambia’s Christian churches, NGOs and the Law Association of Zambia. “Right now, we have a lot of unskilled and uneducated people who are overseeing the technocrats,” he said.

To reduce the president’s powers, the draft constitution stipulates establishing independent commissions to propose, scrutinise and appoint potential candidates. It also requires the president to appoint “a prescribed number” of cabinet members, without specifying how many, from outside the legislature. The goal is to create checks and balances and to keep the executive branch separate from the legislature. Currently, the president can only appoint members of the National Assembly as ministers, who then hold two posts.

Whether government has the will to put such clauses to a public vote remains to be seen. But time is ticking. In 15 months, crowds will gather once again at National Heroes Stadium to usher in a president who will govern Zambia until 2021.

Whether Mr Lungu makes a repeat appearance may depend on his ability to provide the people with a new constitution. They have waited a long time. 

Libya's draft constitution

Can the drafters of the country's first post-Qaddafi charter rescue Libya from itself?

Writing out of the wreckage

Mary Fitzgerald

As Libya tips further into chaos, the continuing work of its Constitution Drafting Assembly (CDA) represents one of the last hopes of this country's shattered transition.

Elected in a national ballot in February 2014, the assembly is tasked with writing Libya's first post-Qaddafi constitution and the country's first since 1951. But with Libya showing many signs of falling into what might be a protracted civil war, the CDA has taken on an even greater significance.

Most of Libya's fledgling state institutions have been torn apart in the political power struggle that has engulfed the country since August 2014. With competing claims to legitimacy made by rival governments in Tripoli and eastern Libya, the CDA is one of a handful of institutions whose legitimacy is largely uncontested. As such, the CDA is ideally placed to help steer Libya back onto the transitional path after a year of conflict.

During Muammar Qaddafi's 42 years in power, Libya had no formal

constitution. Finding constitutional solutions to the country's myriad challenges, the prickliest of which include managing oil wealth, decentralisation, the role of religion and minority rights, will be no easy task.

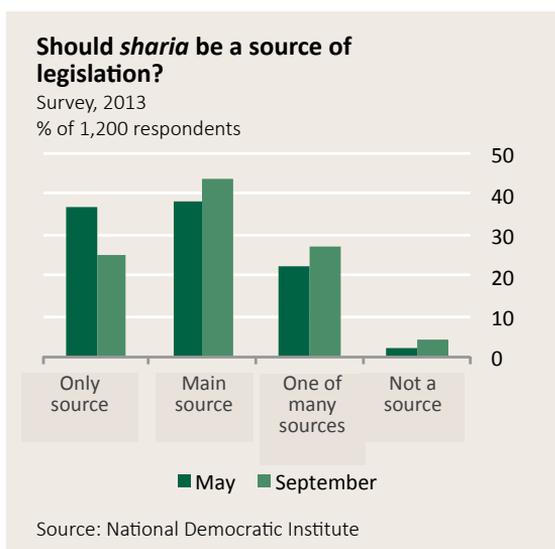
The CDA's path has not been smooth: just under 500,000 of Libya's 3.4m eligible voters took part in the assembly elections, raising questions from the outset about its legitimacy and the document it was commissioned to draft. Boycotts by the Amazigh and Tebu minorities along with security problems on polling day left empty 13 of the CDA's 60 seats, which are divided equally between the three historic regions of Tripolitania, Cyrenaica and Fezzan. Eight of these were later filled in additional ballots. Ali Tarhouni, a liberal-leaning economist who lived in the United States for many years, was selected by his fellow members to head the CDA.

Having begun its deliberations in late April 2014, the assembly is now well past the 120-day time limit it was



© NordNordWest; Yug; Burmesedays

granted to present a draft constitution to parliament and then have it put up for a public referendum. The CDA is based in the eastern town of Baida, also the seat of Prime Minister Abdullah al-Thinni's internationally recognised government. Competing parliaments and the public are watching its moves. The bitter polarisation that has seeped into Libyan society over the past year has also affected the CDA, with members divided into the different camps in the broader political crisis.



The CDA must deal with two major issues: *sharia* (Islamic) law and decentralisation. Under Colonel Qaddafi, official documents declared Libya an Islamic nation and the Maliki school of Sunni Islam informed much legislation, with *sharia* governing most personal status matters. There is a broad consensus in Libya that *sharia* should remain a reference point. But debate has raged since 2011 whether it should be the only source, the principal

source, or one of many sources for laws in post-Qaddafi Libya.

As of September 2013, 44% of Libyans want *sharia* to be the main source of legislation in the constitution while 25% want it to be the only source, according to a public opinion survey published in November 2013 by the National Democratic Institute, an American think-tank.

The parliament elected in 2012 adopted a law that made *sharia* the basis of all legislation, which could limit the CDA's room for manoeuvre on the matter. Furthermore, several armed groups, including the UN-designated terrorist organisation Ansar al-Sharia, have made it clear they will accept only *sharia* as the source of legislation.

The question of decentralisation and the related issue of how to share oil resources is possibly even more fraught. Since 2012 a federalist movement has grown in eastern Libya, demanding greater autonomy for the region following decades of marginalisation under Colonel Qaddafi. The movement includes militant currents and has inspired similar sentiment in Libya's south. It has prompted tensions with those who see federalism as a possible pathway to the state's disintegration. More separatist-minded elements have gained ground in recent months, seeing opportunity in the country's crisis.

According to an October 2013 University of Benghazi poll, only 8% of all Libyans surveyed and 15% of people in eastern Libya favour a federal state over a unitary state. There is, however, considerable support for a more decentralised style of government, in which regions would have their

ministries based in Tripoli. This would make sense in a country with Libya's geography—where the majority of the population is confined to urban centres strung along its lengthy northern coastline, with smaller towns in the vast interior and south.

Linked to this is the question of how to distribute oil revenues.

Oil accounts for 80% of Libya's GDP. The country's oil fields are located primarily in the east. This has bolstered demands by vocal if not necessarily representative interest groups in this region, some armed, for federalism and even independence. The University of Benghazi survey found that 60% of Libyans favour a system where all oil revenues go directly to the central government, which then distributes to the regions.

Sharing revenues is a sensitive issue. For now, it is unclear how or if the CDA will address it. Some in Libya believe that reaching consensus on these issues would be easier if the 1951 constitution were used as a basis. That document created a federal constitutional monarchy that granted considerable authority to the three historical provinces. It divided the federal government into three branches and shared power with the provincial governments.

But a 1963 constitutional amendment repealed the federal nature of post-independence Libya. The 1951 constitution is touted by more moderate federalists and those nostalgic for what they believe was a golden age under King Idris, whom Colonel Qaddafi ousted in his 1969 coup.

Others argue that the 1951

constitution, while an important frame of reference, was suited to a different era and a very different Libya.

Without a legitimate constitution, the country will remain locked in the zero-sum politics that has defined the post-Qaddafi period.

Given Libya's unravelling over the past year, much is riding on the assembly. It is unlikely to produce a document that pleases everyone. But the process could set an example in overcoming differences through negotiation and consensus.

If it fails, however, the powers of the patchwork of militias that have undermined Libya's fragile transition may become even more entrenched. Without a legitimate constitution, the country will remain locked in the zero-sum politics that has defined the post-Qaddafi period. 

Central African Republic: between two lines

New constitution stands little chance while CAR's civil war simmers

Documents and blood

Kevin Bloom

On a Monday in late March 2013, after his Séléka rebels had seized control of Bangui, capital of the Central African Republic (CAR), Michel Djotodia made his first public address.

In a recorded radio statement, he told the nation that deposed President Francois Bozizé, who had been in power for ten years, had turned the republic into a dictatorship. “I have decided that it is therefore necessary,” Mr Djotodia declared, “to dissolve the constitution of December 27, 2004, as well as the parliament and the government.”

It was Mr Djotodia’s contention that Mr Bozizé’s misrule had violated the central principles underpinning the 2004 constitution. Chief among these was the tenet of *zo kwe zo* (“every human being is a person”). This Sango phrase was coined by the nation’s founding father Barthélemy Boganda, who sought equal treatment and civil rights for black people before CAR’s independence from France.

In dissolving the constitution, Mr Djotodia recalled the broken peace deal

signed in January 2013 with Mr Bozizé in Libreville, the capital of nearby Gabon. This pact called for CAR to enter into a three-year power-sharing agreement with a prime minister drawn from the opposition. But the rebels maintained that the government had violated the accord’s terms that called for releasing political prisoners and removing foreign troops.

Due to Mr Bozizé’s intransigence, the rebel leader reminded the nation, the Séléka had been left with no option but to resume fighting. On the eve of his victory, Mr Djotodia released a terse statement that illuminated how he would govern: “During [the] transition period which will lead us to free, credible and transparent elections, I will legislate by decree.”

In the two years since that announcement, CAR, one of the poorest countries in the world, has not seen a single month of stability. A rapid escalation in sectarian violence between the largely Muslim Séléka and a hastily convened Christian rebel group known as the anti-Balaka (Sango for “anti-machete”), forced Mr Djotodia to resign as interim president in January 2014.

Despite the intervention of troops from France, the European Union and the African Union, and the arrival of the UN blue helmets in September 2014, Mr Djotodia’s replacement, Catherine Samba-Panza, has hardly fared better.

An interim legislative council (CNT) adopted a transitional constitution and then elected Mrs Samba-Panza, the former mayor of Bangui.

She was selected from a list of eight candidates, each of whom had to prove that they had no links to either the

Séléka or anti-Balaka.

While her reluctance to reinstitute the 2004 constitution is directly tied to the tainted legacy of the Bozizé regime, Mrs Samba-Panza has stated that the conflict—which has displaced almost 1m people, or a quarter of CAR’s population—is a result of a “failure of governance”.

Does the new draft constitution, submitted for discussion to the transitional assembly’s 135 councillors in February 2015, herald the end of the bloodshed?

International observers are not hopeful. The actions of foreign governments with troops in CAR are “inconsistent” with their avowed aims to bring peace, suggested Thierry Vircoulon, the project director for central Africa for the International Crisis Group (ICG), in an interview with Paris-based news magazine *Courrier International* published on March 8th.

As Mr Vircoulon reminded readers, the international community claims to be in favour of a political process that includes the disarmament of all rebel groups, discussions around the draft constitution and a referendum leading up to general elections in mid-2015. But in early March the French defence minister announced that Operation Sangaris (the official name for the French military force in CAR) would be reduced by 300 troops, while EU forces would be pulling out entirely by March 15th.

The maths, according to the ICG, a Brussels-based think-tank, is as disheartening as it is simple: the rebels are showing no signs of disarming themselves; and the Western powers, for all their firepower and statements

of intent, have not disarmed the rebels. While the draft constitution may bear the hallmarks of respect for diversity and basic human rights, the transitional government has little hope of applying it in a war zone.

In early February 2015, Alexandre-Ferdinand Nguendet, who heads the transitional assembly, said the document was “in line with the



Agent of change? Catherine Samba-Panza

requirements of the international community, which insists on speeding up of transition”.

Shortly thereafter the document was released to the public. Its text enshrines CAR’s national motto, “unity, dignity and work”, while declaring that every citizen is “equal before the law regardless of race, ethnicity, region, sex, religion, political and social position”.

CAR’s citizens should vote on it in a referendum scheduled for June, just as this magazine was going to press. Parliamentary, presidential and local

elections are due to take place in two rounds, in July and August, but delays are likely.

Of course, for CAR to move from this transitional phase to a properly elected and fully accountable government, the country's two main rebel groups must subscribe to the vision.

RICKETY FRAMEWORK

This writer, who was in CAR in August 2014, sees little reason for optimism: since then the criminal activities of the anti-Balaka in Bangui have become more entrenched, according to the ICG and other independent observers. In the meantime, the Séléka are confined to their barracks as per the policies of the foreign peacekeepers. Nonetheless these rebels remain fully armed, thus providing the anti-Balaka with an excuse for their unlawful raids on civilian targets.

Meanwhile, Lieutenant-Colonel Pierre-Yves Sarzaud, spokesman for Operation Sangaris, informed this reporter last August that disarmament was “not part of his mission”. This attitude seems to have rubbed off on the UN. The blue helmets outnumber the French: 9,285, including 1,196 police, against 1,700, as of February 28th. But the UN troops, contrary to the wording of their own resolution, act as though they are not mandated to disarm the rebels, Mr Vircoulon pointed out.

In light of these inconsistencies, the new constitution, even if it is adopted after the national referendum in June, will have a negligible effect.

Those familiar with CAR's brutal post-independence history know that a progressive legal framework has never

been more than a sop to neoliberal sensibilities. The 2004 constitution was ratified a year after Mr Bozizé ousted Ange-Félix Patassé in a coup. That document was also conceived during a transitional government. It too was “[convinced] of the urgent necessity to preserve national unity and peace”. Its preamble boasted of a “pluralistic democracy” that guaranteed “the security of persons and of property, the protection of the most weak, notably vulnerable persons, the minorities”.

But such phrases were clearly worth less than the paper on which they were written. Mr Bozizé, it will be remembered, was briefly detained at a German airport in 2004 with a briefcase full of diamonds. Reports are rife of his looting of the country's resources from those areas richest in minerals and poorest in infrastructure. Shortly after his ousting in 2013, human skeletons were discovered beneath the tiled garage flooring of his Bangui home. Few CAR citizens were surprised.

While Mr Bozizé's 2004 constitution may have highlighted the principle of *zo kwe zo*, this principle perished with Mr Boganda in a mysterious plane crash in 1959. To break this cycle, the new constitution will need to do more than acknowledge that “every human being is a person”. It will need to demonstrate the reality of this standard via legislative (and punitive) interventions. **GGV**

South Sudan

Constitutional confusion around revenue roles is a recipe for conflict

Let's talk about tax

Matthew S. Benson

South Sudan, the world's newest state, is also one of its most fragile. Repeated international attempts to end the country's civil war, which broke out in December 2013, have failed with predictable regularity. Meanwhile, ongoing violence has forced nearly 2m people to flee their homes, according to March 2015 estimates from the Economist Intelligence Unit.

Against this backdrop—of seemingly never-ending violence and political posturing—unresolved questions about intra-governmental relationships and constitutional fine print are easily ignored.

Yet these questions will need to be addressed if a peaceful South Sudanese state, accountable and responsive to its citizens, is ever to arise.

A series of disputes between state governors and South Sudan's central finance ministry since independence in 2011 are indicative of a larger constitutional challenge—confusion around fiscal decentralisation.

South Sudan is divided into ten states, carved from three historic former provinces and contemporary regions—Bahr el Ghazal in the north-west, Equatoria in the south, and Greater Upper Nile in the north-east.

The disagreements have featured state governors and finance ministers, especially those from states that produce oil or host trade routes, refusing to remit funds to the central government.

Oil is the backbone of the country's economy. Even with war curbing oil production, petroleum accounted for approximately 50% of the country's GDP in 2014, according to the latest IMF estimates.

Clement Wani Konga, governor of Central Equatoria, has been one of the loudest voices critical of South Sudan's tax collection system. Mr Konga's disaffection dates back to October 2012, when he made public

statements—picked up by local newspapers—blaming a corrupt central revenue-collection system for financial losses in his state.

In turn, the central finance ministry has harboured suspicions about state-level corruption. Revenue collection at state level is crooked “across the board”, James Wani Igga, South Sudan’s vice-president told local media last year.

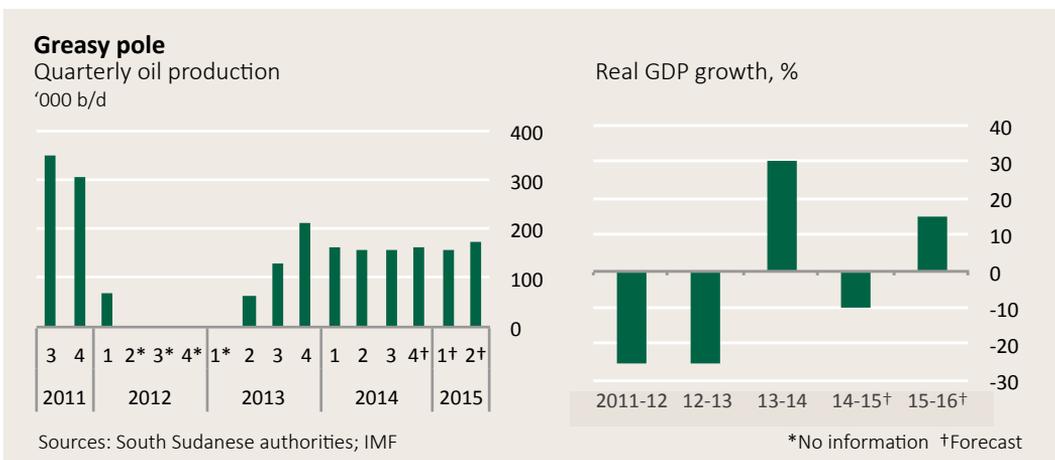
The central government cited state-level sleaze as a reason for any remittance delays and used this pretext in May 2012 to centralise revenue collection, taking this power away from states.

The problem lies partly in South Sudan’s 2011 transitional constitution, which does not clearly delineate fiscal decentralisation obligations.

South Sudan’s transitional constitution was fostered under the provisions of the 2005 Comprehensive Peace Agreement (CPA), which helped pave the way for the country’s 2011 independence. This interim document calls for a constitutional commission to draft a permanent constitution through a consultative process initially scheduled to end roughly a year after independence. This process has stalled and a permanent constitution is yet to be ratified.

According to part 12, chapter 4 of the transitional constitution, both states and the national government have the right to levy taxes in South Sudan. Additional national and state-level taxation powers are laid out in the Tax Act and the Local Governance Act, which both date back to 2009.

Clashes over tax revenues are woven in the region’s history. Before the CPA, as Douglas Johnson explains in his 2014 book “Federalism in the History of South Sudanese Political Thought”, the Khartoum government



maintained power in part by granting the southern region the autonomy to deliver public services while simultaneously maintaining a stranglehold on the fiscal levers.

Both the central and state governments have a lot to lose. Central Equatoria benefits from the trade that flows from Uganda to the capital Juba, whereas commerce from Sudan has historically flowed into northern Bahr el-Ghazal.

In the midst of the constitutional confusion, poorly trained tax administrators have been knowingly or unwittingly breaking the country's tax laws. The problem lies with the interim constitution, the Local Government Act and the Tax Act, which do not clearly define which level of government has the power to collect different types of taxes. Moreover, budget-squeezed law enforcement officers are also infamous for collecting illicit taxes from traders within states.

In November traders protested in Wau, a city in western Bahr el-Ghazal, claiming that taxes are levied unfairly or ad hoc at multiple collection points, according to the UNICEF-linked Catholic Radio Network, based in Juba. Similar protests also erupted in Eastern Equatoria's Torit shortly after independence.

The region's shifting history accounts for much of the confusion. While South Sudan may be the world's newest country, state-building attempts are taking place within the confining legacy of previous efforts.

These include Khartoum's endeavours before South Sudan's independence in 2011 as well as those of British colonial officials when then-unified Sudan was known as the Anglo-Egyptian Condominium. Before oil was discovered in the southern territory that is now South Sudan in the early 1970s, the region was neither profitable for the British nor the Khartoum regime that followed.

Moreover, given the legacy of economic underdevelopment that southern Sudan experienced under both the British and the northern Sudanese, the country's persistent reliance on oil and imports for revenue is understandable.

As a result, there are simply too few, if any, domestic sectors to tax other than oil. And while some communities pay "in-kind" taxes through grain, the formal tax system does not capture most citizens. According to a 2011 World Bank report, 80% of southern Sudanese work in the informal economy.

Administrative confusion, particularly around the quasi-military operations that continue to collect illicit taxes, also makes historical sense. Rebel groups demanded payments during the civil wars that led to South Sudan's independence, as Mr Johnson spells out in his book, "The Root Causes of Sudan's Civil Wars".

Following the outbreak of violence in December 2013, debates around federalism—and the most effective way to structure power between the central government and the states—have captured the hearts and minds of many in South Sudan.

Unfortunately, these debates focus too narrowly on political considerations and neglect broader questions about continuing revenue disputes and fiscal decentralisation.

This omission is logical because southern Sudan has historically depended on limited tax revenue, and ending violence between warring parties is an obvious priority. But taxes are the lynchpin to forging a social contract between citizens and the state and also critical to maintaining a healthy balance of power. This oversight needs to be rectified.

Other African constitutions such as those of Kenya, Rwanda and South Africa have tackled fiscal decentralisation. These charters might hold answers for South Sudan, argues Biong Kual Deng, a former representative with the International Institute for Democracy and Electoral Assistance, an inter-governmental body helping to draft a permanent constitution.

The enduring conflict has drastically reduced oil production and the subsequent much-needed government revenue. An unseen benefit may arise as the debate shifts to ending this reliance and exploring how to generate other sources of revenue, particularly from the informal economy.

Moreover, emergent research argues that when firms in the informal economy pay taxes, a greater share of the population engages with the state, which in turn increases political accountability and responsiveness.

Buyers of South Sudan's oil and debt—which notably include China, and international donors such as Norway, the UK and the US, are the country's remaining fiscal lifelines. The tensions are unlikely to subside unless all parties—including the state, citizens, international donors and the creditors and buyers of South Sudan's oil—bring tax into the conversation. This means clarifying its role within the constitution and ensuring that tax policy is accurately reflected on the ground. 

Egypt: three constitutions in four years

Crackdown on dissent makes a mockery of Egypt's progressive constitution

Lip service to freedom

Kristen McTighe

For nearly two years, Egyptian photojournalist Mahmoud Abou Zeid (pictured)—known professionally as Shawkan—has been stuck in a dark, three-metre by four-metre cell with 12 other men in Cairo's Tora prison, according to his older brother Mohammed.

Security forces arrested the 27-year-old Shawkan—a contributor to publications such as *Time* magazine and Germany's *Die Zeit* newspaper—while he was photographing the bloody dispersal of a protest camp in Cairo's Rabaa al-Adawiya Square on August 14th 2013. He has never been formally charged with any crime.

As the weeks and months have dragged on and Shawkan's pre-trial detention has repeatedly been renewed, Mr Abou Zeid says he has watched his brother's physical and mental health deteriorate. His family, he says, is overwhelmed by feelings of helplessness.

When asked about provisions in Egypt's new constitution guaranteeing the right to a speedy trial and calling for detainees to be treated with dignity, Mr Abou Zeid responds with apathy: "It doesn't matter. Why is [Shawkan] still there? There is no reason. My family doesn't understand and the authorities



© Freedom of Shawkan campaign.

Happier days

can't give us an answer.”

Egyptians voted in a referendum in January 2014 to approve the country's third constitution since its 2011 revolution. The document's progressive wording, however, clashes with the reality of a harsh crackdown on dissent, activists say.

“Do you think we've never had a constitution before that said good things, that talked about freedoms or human rights?” asked Tamer Fouad, a 28-year-old owner of a uniform manufacturing company in Cairo. “All the constitutions we've had talked about rights and freedoms, but they've never [been applied].”

Following the July 2013 military ouster of former Islamist president Muhammad Morsi, the revision of the country's 2012 constitution marked the first step of a transitional roadmap laid out by then army commander—now president—Abdel Fattah al-Sisi.

A government-appointed committee that excluded Islamist opposition drafted the 2014 constitution in just two months. A sweeping 98.1% of voters elected to adopt the charter, according to Egypt's High Elections Commission.

Longer than any other constitution in Egypt's history, the charter's 247 articles explicitly ban torture and recognise the rights of women, children and minorities, including the Nubian people of southern Egypt, who were never mentioned in previous documents.

“If you look at the constitution superficially, and you do a keyword search, you will find all the good words you'd want to find,” said Mai El-Sadany, a fellow at the Tahrir Institute for Middle East Policy in Washington, DC. “But there are really a lot of loopholes [and] vague language when talking about civil and human rights, and it's really left up to the legislation to determine...how these rights are implemented.”

While the text is imprecise on civil and human rights, language concerning institutions such as the military, judiciary and police clearly entrenches state powers.

The absence of an elected parliament to check executive authority leaves the president with the power to issue laws by decree. Historically, Egypt's judiciary has been the source of reform and was one of the only bodies that challenged longtime autocrat Hosni Mubarak. But now, amid unceasing complaints of the violation of rights by the courts, many see the judiciary as increasingly politicised.

Egypt's judicial branch has handed down death penalties to hundreds of Muslim Brotherhood supporters in trials that last just minutes, and sentenced Mr Morsi to 20 years in prison, while dropping murder charges against former president, Hosni Mubarak.



© The Atlantic

Lone defiance in Cairo

“Most of the members of the judiciary are very much likely to interpret the constitution in a way that upholds the state, because it’s a carrot-and-stick system,” Ms El-Sadany said. “If they continue to interpret legal language that continues to entrench the power of the state, those verdicts will not be forgotten and those judges will likely stay in power and will enjoy the authority that they continue to have.”

The leader of the April 6th movement, a revolutionary youth group that helped spearhead the country’s 2011 revolution, has been serving a three-year prison sentence since December 2013 for organising a protest without official permission. “If we followed the constitution, Ahmed Maher would be free,” Mr Fouad said.

But not all are pessimistic. “Egyptians definitely know these are their rights. That’s why 20m Egyptians went out [to vote on the constitution],” said Sherif Adeeb, a Cairo lawyer. Mr Adeeb represents Fatima Naoot, a prominent female poet currently on trial, charged with contempt of religion after she criticised the slaughter of animals at a Muslim festival in a

Facebook post.

The constitution states “freedom of belief is absolute,” he said. This bolsters his conviction that the case against his client will be ruled in her favour. Yet despite Mr Adeeb’s confidence, the Egyptian media rarely discusses the constitution. Only activists and human rights advocates debate its contents.

“A lot of people wanted to vote because they were told they will have a vote on the constitution, then presidential elections, then parliamentary elections, and then...things would get better,” Ms El-Sadany said. “They voted for the constitution to move the process along. I don’t think many people read it and I don’t think people look back and say, ‘This is my constitutional right you are violating.’”

Despite the constitution’s flaws, others lay the blame elsewhere for the absence of freedoms.

“The problem is...with the entire legal order,” said Nathan Brown, a scholar of Middle Eastern law and politics at George Washington University in Washington, DC. “Most Egyptian laws were written by authoritarian regimes,” he said. “That shows in their text and in the way they have been implemented over the years, with so many things that Egyptians normally do potentially deemed illegal.”

To apply the constitution requires a “comprehensive review of Egyptian legislation to offer firmer definitions, official accountability and reap protections”, Mr Brown said. Such a review does not seem likely, he added.

Despite the crackdown on dissent and the failure of constitutional rights to materialise, others say it may be too early to judge the 2014 constitution.

“We will see when the parliament is finally elected if the opposition uses articles in the constitution to question the state,” said Hussein Magdy, projects coordinator at the Cairo-based Egyptian Commission for Rights and Freedoms. “That is when we will see if it is really a constitution or just a piece of paper.”

In the meantime, photojournalist Shawkan will wait in a dark cell surrounded by Islamist supporters of a president he vehemently opposed. On February 26th, a judge renewed his pre-trial detention and refused to review evidence that he was a journalist. 

Zimbabwe: the con

Two years after voters approved a progressive constitution, repressive laws remain on the books

Paper trick

Ray Ndllovu

In March this year, police in eastern Zimbabwe arrested Samson Jackson for mocking the country's 91-year-old president.

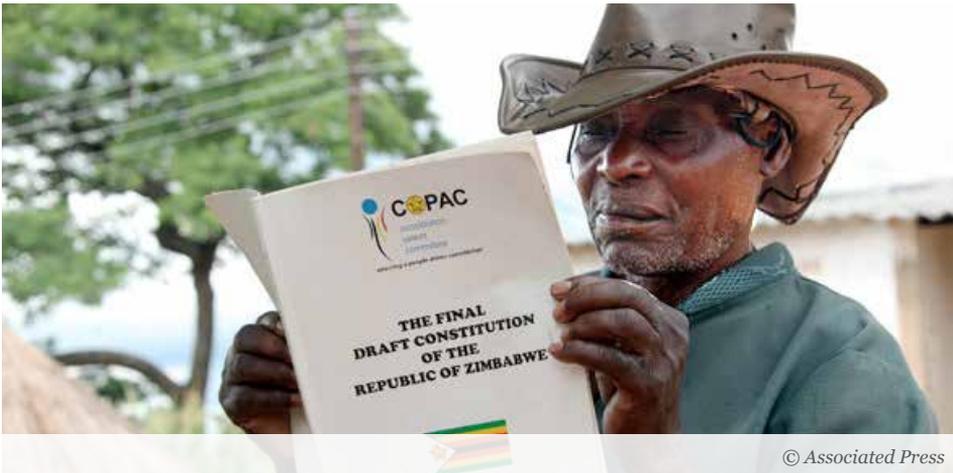
“Robert Mugabe is about to die, so why do you waste your time following his party?” Mr Jackson is alleged to have asked a public meeting of the ruling party in Manicaland province. Police charged him with contravening what is commonly referred to as the “insult law” that makes disrupting a public gathering a crime. If found guilty, he faces up to 20 years in prison.

The 35-year-old is just one of 80 people arrested for insulting the president in the past five years, according to Zimbabwe Lawyers for Human Rights. Now citizens are challenging the law because they say it contravenes the country's new constitution—which protects freedom of speech.

Zimbabweans adopted a new constitution in March 2013, the first since the country's independence in 1980. The new charter places a limit of two five-year terms on the president, includes a bill of rights, dual citizenship and guarantees—among other entitlements—freedom of expression.

But the anticipation that greeted that new document has faded as Mr Mugabe's ruling Zimbabwe African National Union-Patriotic Front (Zanu-PF) drags its feet calibrating the country's laws to the new constitution. “There are certain new features in the new constitution and the laws must now be adjusted accordingly,” said Chris Mhike, a lawyer based in Harare, the capital. “The attorney-general's office has put the figure at over 400 laws that need to be aligned to the new constitution,” he said.

Aside from the “insult law”, the Criminal Procedure and Evidence Act (CPEA) is another law seen as anti-constitutional. Legal observers said the law needs to reflect the provisions of the new constitution, which stipulate



Change ignored

that arrested persons are entitled to appear in court within 48 hours, including weekends. Under the old constitution, arrested persons appeared in court only during working days, and could be kept in jail for up to seven days, even after a judge had granted bail. This section must be amended to coincide with the new constitution's two-day limit.

The electoral laws are another sore spot. The new constitution mandates the Zimbabwe Electoral Commission to register voters and compile the voters' roll. Yet the Electoral Amendment Act, still in force, gives these crucial responsibilities to the registrar-general, Tobaiwa Mudede. Mr Mudede has held this post since independence in 1980. Opposition parties and others have repeatedly accused him of manipulating the voters' list to keep Mr Mugabe in power.

The government blames scarce financial resources for the slow pace of realignment. Nearly 92% of monthly revenue goes to paying public servants and consequently the government has little left for administrative purposes, explained Patrick Chinamasa, Zimbabwe's finance minister in his budget presentation last November. The civil service has swelled from employing 315,000 in 2009 to 554,000 in 2014, he said.

But others blame Zanu-PF's lack of political will. "What we have been told is that the government does not have capacity to do it [realign laws] in one go...but the same government buys vehicles and other trinkets," said Beatrice Mtetwa, a prominent human rights lawyer.

Calibrating the 400 outstanding laws with the new constitution could have taken six months, Ms Mtetwa said. This two-year procrastination

“benefits the government”, she added. Members of the ruling party “can do as they please in the absence of laws” that limit their power, “while the rest of the population does not enjoy the rights they approved”.

To expedite the realignment process, the European Union in March promised \$1.3m to help the justice ministry with the legal overhaul.

Yet for many Zimbabweans these funds do not inspire hope. “There never was sincerity on the part of Zanu-PF from the onset to usher in a new constitutional order...as long as it threatened the status quo,” Ms Mtetwa said. “Zimbabweans were tricked.”

Controversial laws such as the “insult”, criminal procedure and Electoral Amendment Act are likely to remain in place in the near future.

This will become increasingly relevant in the lead-up to the 2018 presidential and parliamentary elections. The “insult law” makes vigorous campaigning against the incumbent a risky exercise since any statements viewed as denigrating the president could lead to incarceration. The electoral law in its current form makes it easier for the government to manipulate the voters’ roll in its favour because it remains unavailable for inspection by the opposition and the public.

Meanwhile, political observers fear that Zanu-PF could use its two-thirds parliamentary majority to amend sections of the new constitution it does not favour.

This would include scrapping statutory bodies such as the electoral, human rights, gender, media and anti-corruption commissions mandated by the new constitution. These independent agencies are expensive, Mr Chinamasa said last March.

The ruling party is “talking about amending the constitution before they have even implemented it”, said Charles Mangongera, a senior researcher at the Southern African Political Economy Series Trust, a think-tank based in Harare. Citizens’ anger is mounting because they have not enjoyed their new constitutional rights, he added.

By not realigning old laws with the new constitution, the party has clearly demonstrated that it will not embrace meaningful change. Zanu-PF sold voters a dummy constitution in 2013. What will it pull out of its bag of tricks at the 2018 poll? 

Republic of Congo's puppet master

A master rule-breaker is preparing to change the rules again

Kaka Nguesso

Kamissa Camara

While elections in the Republic of Congo are a year away, Brazzaville, its riverside capital, is awash with rumours that the president will amend the constitution, again, to remain in power.

Denis Sassou-Nguesso, 72, has ruled over the oil-rich state for nearly 35 years, against a backdrop of coups, civil wars and repeated constitutional revisions. He first came to power after a military takeover in 1979 and ruled until 1992, when he lost a presidential election to Pascal Lissouba in the nation's first multi-party elections. He took the reins again in 1997 at the end of a period of bloody civil war. He won two disputed elections in 2002 and 2009.

Often referred to as Congo-Brazzaville (to distinguish it from neighbouring Democratic Republic of Congo), this nation's first constitution was replaced by a second one in 2002, which, ironically, Mr Sassou-Nguesso himself helped to draft. Article 57 limits consecutive presidential terms to two; and Article 58 forbids candidates over the age of 70 from running. The president should be excluded on both counts.

While Mr Sassou-Nguesso has made no public statement regarding his potential candidacy, opposition leaders and other observers are convinced that the president will try to change the constitution to run again. Few forget his late 1970s campaign slogan *Kaka Nguesso* ("Nguesso one more time" in the Lingala language).

The president is consulting constitutional experts to modify "the constitution to his advantage", said Mathias Dzon, president of the opposition Patriotic Union for National Revival. This information is "not a secret", he added.

The ruling Congolese Labour Party (PCT) has only encouraged these perceptions. In December 2014 the PCT's steering committee approved

plans to modify Articles 57 and 58, according to several newspaper reports.

But Article 185 remains a major obstacle: it prohibits revising the restrictions on presidential terms. The only way to remove the term limits is to scrap the constitution entirely.

The country's first post-colonial constitution was adopted in 1963. After 29



One more term?

© Voice of Congo

years of one-party rule, the constitution adopted in 1992 paved the way for multi-party elections. But Mr Sassou-Nguesso abolished it when he overthrew Mr Lissouba and replaced it with a transitional charter in October 1997.

A civil war, fought between partisans of the two men, continued on and off until December 1999, when Mr Sassou-Nguesso, with the help of the Angolan army, finally won a decisive victory. He led a transitional regime until elections in 2002, when a new constitution was adopted.

But even with these limits, the 2002 constitution still gives the president imperial powers. The president is both chief of state and head of government. He appoints ministers, councillors and directors-general. In addition, he is commander-in-chief of the army and president of the superior council of magistrates. "In Congo, the president does everything," said Vivien Manangou, a law professor at the University of La Rochelle in France.

The 2002 constitution was drafted to restore the state's authority, weakened by years of civil war. By extending powers to the executive, it sought to break away from the 1992 constitution's French semi-presidential system, in which parliament played a counterbalancing role.

But what Mr Manangou qualifies as a "paternalistic" constitution nevertheless had one important caveat: Article 185.

Those in favour of removing Article 185 argue that the constitution has done its job. "The historical role played by the [2002 constitution] has ended," said Thierry Mougalla, minister of telecommunications.

“The constitution is not the bible. [It] was drafted by men in a specific political, social and economic context. What has been drafted by men at that period in time, influenced by major political circumstances, can be modified by these same men.”

If Mr Sassou-Nguesso succeeds in scrapping the old constitution and drafting a new one, it will not be the first time he has changed the rules to suit his needs. He may need to remain in power to avoid prosecution and protect his patronage networks.

For instance, he could face charges for his involvement in the murder of Marien Ngouabi, Congo’s president who was assassinated in 1977. Mr Sassou-Nguesso was defence minister and head of intelligence at the time and became president two years later. In 2013 several independent newspapers dared to link Mr Sassou-Nguesso to Mr Ngouabi’s murder. The national agency responsible for regulating the media suspended the news outlets for inciting “violence, defamation and dishonouring certain high authorities of the state”.

The president could also face charges of crimes against humanity. Commentators have linked him to various political crimes, not least the infamous Brazzaville Beach incident in May 1999 in which over 300 Congolese refugees, returning from exile at the Kinshasa port, were allegedly tortured and murdered.

The president’s family, close friends and his Mbochi ethnic group dominate the media, state business and key government agencies. General Jean-François Ndenge, a close friend, heads the national police force. The president’s nephew, Jean-Dominique Okemba, is in charge of the national security council.

If there is a constitutional referendum, it will most likely take place before presidential elections scheduled for July 2016. Aside from the legal hurdle, Mr Sassou-Nguesso faces an increasingly mobilised and vocal opposition. In the last election in 2009, opposition candidates called for a boycott. They released a statement on election day asserting that turnout was only 10%, a claim disputed by the government.

The PCT’s support for an extension of the president’s rule is creating the ingredients of a “very grave” crisis, Mr Dzon said. The president’s “unpopularity is established,” he added. Yet still “he wants to move mountains...to offer himself an additional term he is not allowed to have. The Congolese people are not going to let that happen.” 

Burkina Faso: beyond bodywork

After last year's uprising, all eyes are on Burkina Faso as the country's transitional custodians take the constitution in for repairs

Overhaul

Karine G. Barzegar

When Burkina Faso holds elections this October, as expected, it will mark the first time in 24 years that the same incumbent will not be defending his position.

After a popular uprising last October, Blaise Compaoré fled this west African nation that he hijacked for 27 years, first in a military coup in 1987 and then four subsequent elections.

Following his fiery ouster, army officials, opposition and civil society leaders, plus religious and tribal heads united and eventually established a transitional government. They chose Michel Kafando, a former UN ambassador and foreign affairs minister, as the country's interim president.

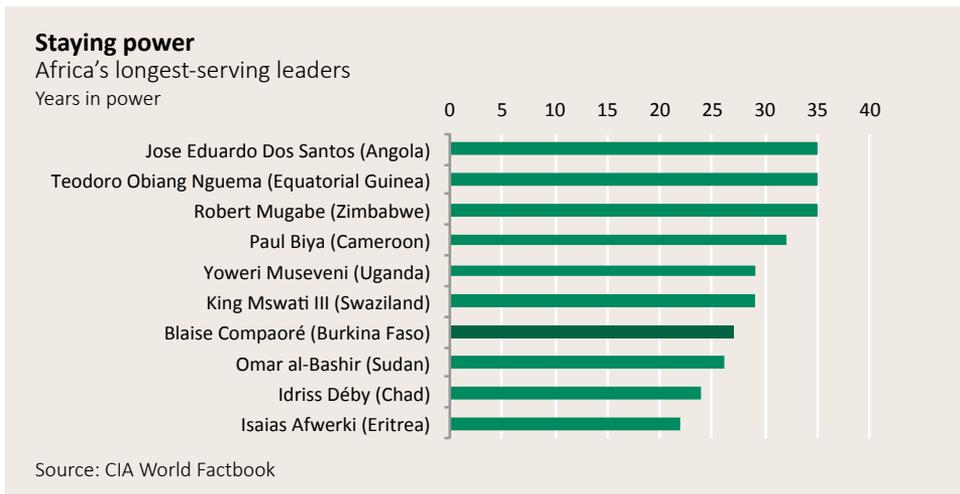
One of the first moves Mr Kafando's government made was to suspend the 1991 Burkinabe constitution, which was at the heart of the 2014 uprising: Mr Compaoré had sought to amend Article 37, which he himself introduced into the constitution. It limited a president to two terms, preventing him from running again.

Now a transitional charter is in place. It stipulates the holding of presidential and legislative elections by October 11th 2015, when an amended 1991 constitution will again become the country's supreme law.

Article 17 of the transitional document gives the job of retooling the constitution to the Commission on National Reconciliation and Reform, a body "responsible for restoring and strengthening social cohesion and national unity".

Its main mission is to strengthen the now-famous Article 37 as well as to forge a proper system of checks and balances between the executive, legislative and judicial branches of government.

For many Burkinabe the most important overhaul for the transitional authorities is to put a brake on the military's future participation in the



political arena. After citizens took to the streets to stop Mr Compaoré’s planned impounding of the constitution, the military staged a coup d’état, which led to even more demonstrations. After an internal power struggle, the army compromised and handed power to the transitional government, which includes Lieutenant-Colonel Yacouba Isaac Zida as prime minister.

Djibril Bassolé, a general and Mr Compaoré’s former foreign affairs minister, had expressed interest in running for the presidency. So had other senior army officials and former aides of the deposed president, such as former sports minister, Colonel Yacouba Ouédraogo, and General Gilbert Diendéré, Mr Compaoré’s chief of staff and one of the most powerful men in his regime.

“The worst are those who like Djibril Bassolé present themselves as the saviours of the youth,” said Ismaël Compaoré (no relation of the former president), a web-TV journalist. Military leaders “must return to their barracks if they think they are still useful for the country”, he said.

In early April, several allies of Mr Compaoré, including former interior minister Jerome Bougouma, were arrested for alleged embezzlement. Then on April 7th the interim council passed, with an overwhelming majority, a law that barred anyone associated with Mr Compaoré’s government from participating in the upcoming elections. Members of Mr Compaoré’s party and other allies immediately walked out of the interim government and the reconciliation and reform commission, dashing hopes of unity. 

Kenya: central versus local

Two years after this east African nation transferred power to local counties, some governors want to amend the new constitution

County disquiet

Raphael Obonyo

Billow Hassan stands in the parking lot behind the hospital building in Mandera, the capital of Mandera County in north-eastern Kenya.

“Ten years ago there was one ambulance in the whole region,” says the 24-year-old community organiser. “When people got sick, they often had to walk miles to a clinic.” Now, he says, pointing to a row of vehicles parked against the fence, “the county has six ambulances, always on stand-by.”

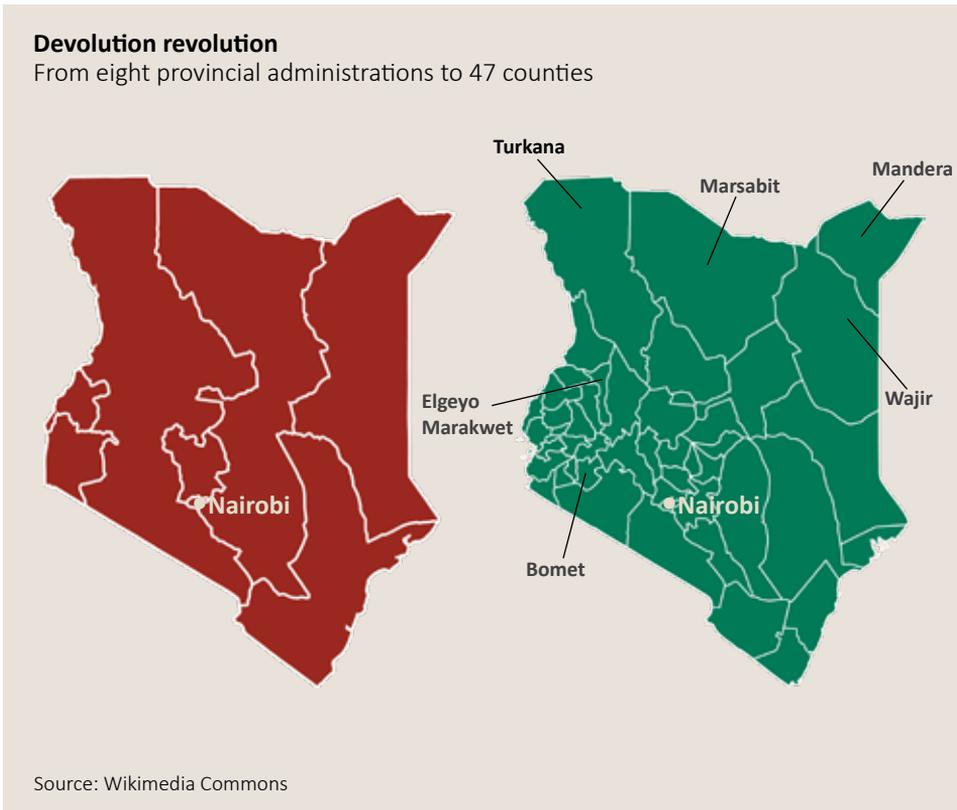
Mr Hassan credits the improvement to Kenya’s new devolved system of government, introduced in the 2010 constitution. While this new charter addressed other issues, including a bill of rights and land management, the most important transformation was the new power-sharing structure of government.

The constitution replaced eight provincial administrations with 47 new counties after the March 2013 general election. The system sought greater decentralisation, with the central government sharing more power with local administrations.

Some, however, contend that the central government is not sharing funds as called for in the constitution, which allocates 15% of Kenya’s revenue to the counties and the rest to the national government.

To rectify this wrong, Isaac Ruto, chairman of the council of governors, launched the *Pesa Mashinani* (“money to grassroots” in Swahili) petition last September. Led by Mr Ruto, governor of Bomet County in Kenya’s south-west, the campaign calls for a constitutional amendment to increase to 45% the proportion of revenue channelled to the counties. About 30 of 47 governors support this movement.

This increase is needed “for the counties to realise their potential and



for devolution to work,” Mr Ruto claims.

The campaign is trying to collect 1m signatures of registered voters, a first step to holding a referendum to amend the constitution. After the elections board verifies the signatures, 24 of the 47 county assemblies would need to approve the petition for it to become a referendum bill. If it passes at the local level, both houses of the national parliament must approve the bill with a simple majority. If parliament passes it, then the president must hold a referendum within 90 days.

The petition has split the country in two, spurring fiery debates about revenue allocation.

Some government officials, however, argue that the campaign’s organisers are less interested in the issues and more set on undermining the ruling Jubilee coalition.

Jubilee’s Kipchumba Murkomen, senator for Elgeyo Marakwet County in western Kenya, points out that just two months before the launch of *Pesa Mashinani*, the opposition Coalition for Reform and Democracy

(Cord) launched a campaign dubbed “*Okoa Kenya*” (Save Kenya) pushing for increased county allocations.

But the governors’ *Pesa Mashinani* is a one-issue campaign focusing solely on raising county allocations while Cord’s crusade also addresses insecurity, ethnicity and other issues. The governors have distanced themselves from Cord’s movement because they do not want to be dismissed as opposition sympathisers.

The 15% stipulated in the constitution is merely a baseline figure, says Kinuthia Wamwangi, head of the transition authority, the body mandated to oversee the shift to a devolved system of government. The actual allocation to counties is, on average, more than 30%, he says, pointing to 2014 figures collected by the authority.

Those who pushed for the new constitution—in the wake of the post-election violence of 2007 and 2008—saw devolution as the only way to end the historical marginalisation of the north-eastern provinces and the western Rift Valley. Wealth and power in the country have historically been concentrated in the capital, Nairobi, in the fertile south-west.

Since the counties took effect in 2013, the increase in funds to previously marginalised areas has been significant.

For example, in the 2013-14 financial year, the national government gave 7 billion Kenyan shillings (\$76m) to Mandera County, where Mr Hassan lives. This is more than the cumulative total the area received in the previous 50 years, according to the Commission on Revenue Allocation, a body established by the constitution to ensure equitable sharing of revenue between national and local administrations.

Similar increases were found throughout the north-east: in Marsabit, Turkana and Wajir counties, among other previously marginalised areas. Mr Ruto does not dispute these increases, but argues that these allocations are still not nearly enough.

The new constitution assigns management of health, local transport, early childhood education and public works to the counties. But the counties do not have enough money to cater for recurrent expenditure and

Those who pushed for the new constitution...saw devolution as the only way to end the historical marginalisation of the north-eastern provinces and the western Rift Valley.

development programmes in these areas, Mr Ruto argues.

Some constitutional experts see the debate around stipulated proportions as a red herring. “It would have been better to put more time in building the capacities of the counties and not just throwing money at them,” according to Winnie Mitullah, director of the Institute of Development Studies at the University of Nairobi.

Ms Mitullah believes the challenges in applying devolution—including understaffing and misuse of resources in the local units—would have been reduced had the transition been done in stages: first setting up sound structures and then developing the skills of the county administrations.

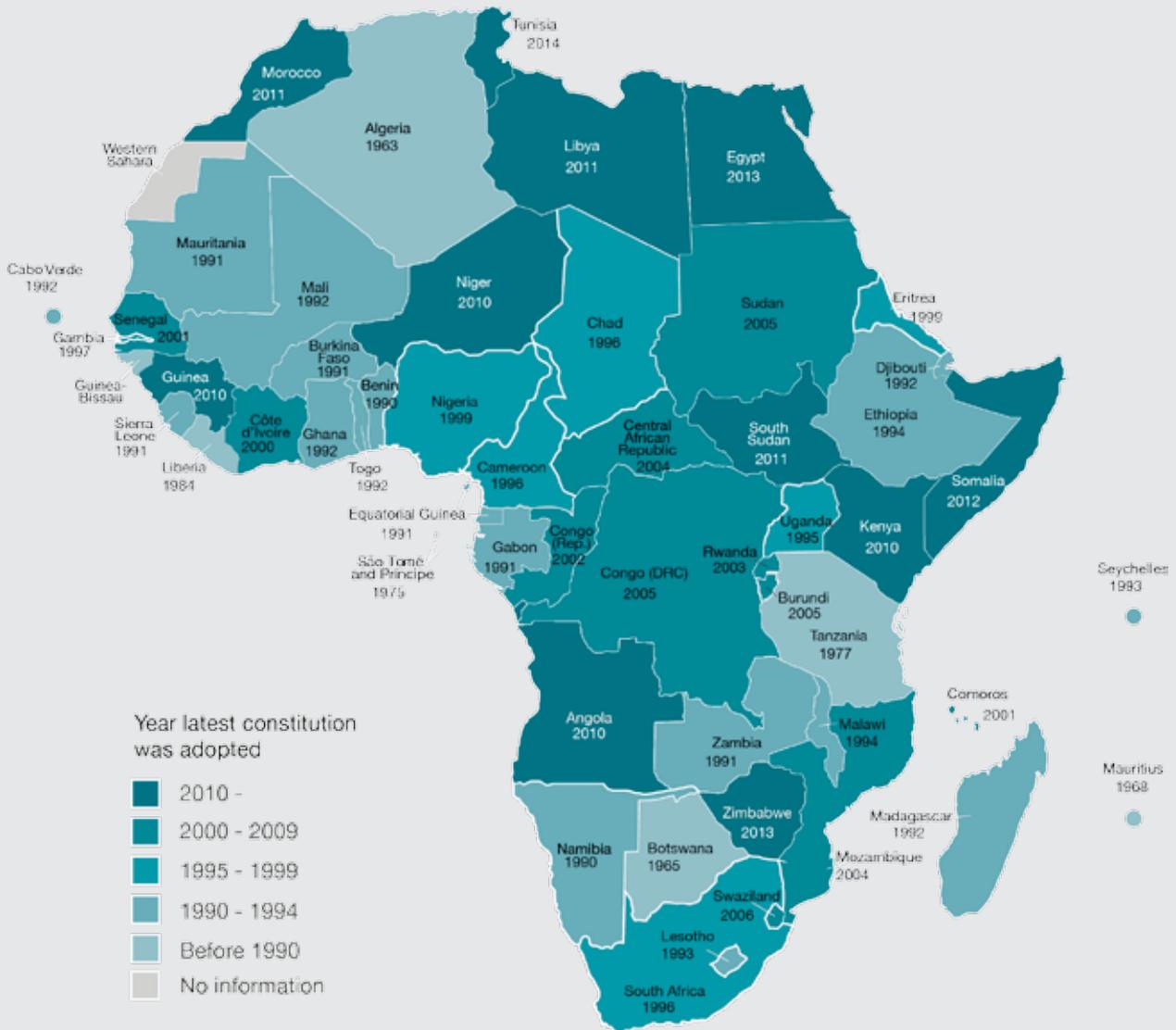
Mr Ruto disagrees. “After almost two years of implementing devolution, we have internalised the challenges and created better structures,” he says. “County governments have put in place systems to enhance people’s participation in resource allocation at the county level through budget debate forums. Citizens are able to hold their leaders accountable where they feel resources have been misused,” he adds.

Others argue that it is simply too early to amend the constitution. “We must first implement the constitution and afterwards see where things are turning out badly,” says Charles Nyachae, chairman of the official constitution implementation commission. “Then we might seek amendments.”

Amending the constitution now, he says, would be “disastrous” because a loss of faith in the charter could threaten the country’s stability.

The answer lies somewhere between the two camps. A 15% allocation is probably too little, even as a baseline figure. But changing the constitution will not solve the fundamental problem: mistrust between the county leaders and central government.

To solve this problem, Mr Nyachae suggests adding yet another layer of government: a “middleman” institution that would resolve disputes between the government and the county authorities. A respected intra-governmental body, he says, would ease the tensions that threaten to derail what is, overall, a successful and functioning programme of devolution. 



Constitutions rule

Source: CIA World Factbook

www.gga.org

Telephone: +27 11 268 0479

Email: info@gga.org

Physical Address: 4 Biermann Avenue, Rosebank, 2196

Postal Address: P.O. Box 2621, Saxonwold, 2132, South Africa