



## Will Kenya's 2010 Constitution work for women and children?

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### Key points

- Kenya's 2010 Constitution has paved the way for progress on equity – including the rights of women and children
- A constitutional text alone cannot guarantee change – what matters is how implementation translates commitments to rights into policy and practice
- While there are challenges and pockets of resistance, some concrete actions can support the realisation of newly enshrined rights.

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The year 2010 saw a moment of real transformative change for Kenya, with its people voting to adopt a new Constitution. This contains far reaching commitments to a wide range of rights and an ambitious vision of social equity and has the real potential to address historical injustices and grievances. According to one survey, almost 70% of Kenyan respondents believe that the new Constitution is likely to make the country more democratic and just over three-quarters believe it is likely to prevent violence in the 2012 elections (cited in Kramer and Posner, 2011). However a constitutional text alone does not lead to change – what matters is *how* these commitments are put into policy and practice.

The implementation schedule set out in the Constitution got underway in 2011. This Project Briefing draws on recent research for UNICEF to take stock of what has been achieved in the first year of implementation, and what still needs to be done to realise constitutional commitments to the rights of children and women.

### The run up to the new Constitution

Social and political tensions escalated in Kenya during the 2007 elections, erupting into post-election violence that left around 1,500 people dead and some 300,000 displaced. The scale of the violence caught many by surprise but it reflected deep historical grievances and tensions over ethnicity, equity and land.

The legacies of colonialism had established a tradition of a state that served the interests of particular groups (ethnic and regional) who have dominated the political system and benefited from privileged access to land and public resources. This tradition was reinforced by the concentration of executive power in the Presidency, and the cumulative

and deliberate weakening of the separation of powers, as well as checks and balances. The result has been a political system in which there is no effective horizontal accountability, (i.e. accountability across state institutions, often overseen by parliament or the judiciary) (Sundet et al., 2010).

These dynamics only added to increasingly volatile social, ethnic and regional cleavages, and entrenched patterns of social exclusion. This means that for this Constitution – and the new institutions it creates – to be effective, it must generate tangible progress on equity issues. This includes protection for particularly marginalised groups, such as women and children who face particular challenges (Box 1).

Constitutional reform was seen as a way to address these historical patterns of exclusion and marginalisation. Successive past attempts at reform, however, had failed to overcome political divisions (Akech, 2010).

Following the 2007/8 post-election conflict, there was enough political will to support a new Constitution. Yet, while there is a strong sense of popular support for this Constitution – with two thirds of Kenyans voting in favour of it – there are serious doubts about whether the political divisions that have fuelled past conflicts have been resolved. This has resulted in a deep sense of fragility and unease about the Constitution's prospects.

### The 2010 Constitution

The vision of social equity enshrined in the 2010 Constitution marks a break with the past. It aims to resolve practices and patterns of social exclusion and establishes the basis for a different narrative of state-society relations. Those who drafted it aimed to unpack the previous concentration of political power and improve mechanisms of accountability, to create

## Box 1. The social exclusion of women and children in Kenya

### Challenges for women:

- Discriminatory practices that bar their access to land and property through inheritance.
- The widespread practice of female genital mutilation (FGM), despite its prohibition by law.
- The prevalence of domestic and sexual violence, which affects both women and children, spilling over into heightened vulnerability during the post-electoral conflict.
- Poorer human development indicators, often as a result of discriminatory traditions, including less access to education, despite free and compulsory primary education.
- High rates of early and forced marriage (affecting an estimated 80,000 girls and women each year).
- The under-representation of women in public and political life prior to the 2010 Constitution.

### Challenges for children:

- Inequalities in access to services, such as education, food, health and housing.
- Discrimination against children with disabilities.
- Unequal treatment of children born out of wedlock.
- Widespread practice of FGM and early marriage.
- The vulnerability of children who live or work on the street to violence by law enforcement officials.
- The ill-treatment of children in the juvenile justice system and the lack of children's courts.
- Their vulnerability to security problems that undermine their access to education.

an environment that would allow more inclusive state-society relations and more equitable development outcomes.

Two key dimensions of the Constitution are of particular relevance: the realisation of social justice enshrined through an expanded Bill of Rights that can be reinforced by court rulings; and a range of institutional reforms to enable greater accountability (Box 2). In addition, the new Bill of Rights has a strong focus on the needs and entitlements of children and women – a step change from the previous situation.

## Implementing the Constitution

Expectations for the Constitution remain very high. Yet the implementation process, scheduled to take place over five years, will require the effective management of these expectations as well as engagement at many levels to ensure that institutional and legislative reforms follow a coherent and effective trajectory.

Fundamentally, the viability of the vision of social equity enshrined in the Constitution may well depend on three issues:

- how resources are allocated: a key factor in whether the equity principles set out in the Constitution can be realised (particularly in terms of issues of regional and ethnic disparities)

- the degree to which more vulnerable groups are enabled to claim their rights – an important test of the Constitution's ability to protect those who were previously marginalised
- the acceptance by key political elites to be bound – fundamentally – by the new rules of the game.

A range of key dynamics underpin the way in which different stakeholders approach these reform issues.

- At national level there are tensions over the weakening of key power bases, within the political sphere but also within the bureaucracy. Changes in the budget process, for example, mean significant shifts of decision-making from the Presidency and from the Treasury towards Parliament, the Ministry of Planning, the Auditor General and others.
- There is uneven non-state and civil society capacity to act as a watchdog on these issues. Some aspects are well covered – women's rights, for example – but there are real risks that other crucial issues will be sidelined. This may be the case in relation to access to land for women, or children's rights, which lack visibility on the public agenda.
- There are still potential constraints at the social and local levels. Prevailing cultural attitudes – particularly in relation to women – clash with the new rights set out in the Constitution. This means that in practice there is a gap between the progressive rights commitments in the Constitution and the realities of many vulnerable groups, including women and children on the ground.

At present, these issues are leading to fragmented and ad hoc approaches. Budget and finance reforms, for example, are being led by Treasury officials, and parallel communities are working on decentralisation, social policy and equity issues, and on legal empowerment around rights. But it is not clear that these groupings are working together enough in the process of implementing the Constitution and drafting new legislation. Unless these separate policy communities are brought together, there are dangers of parallel reform tracks and diverging agendas.

The principle of progressive realisation of rights may be one way to bridge these processes. This depends on the degree to which this can provide a space for constructive dialogue between different stakeholders and communities of practice, including economists (in budgetary processes) and rights activists (engaging with judicial review of rights). The new commitment of the State to the progressive realisation of social and economic rights enshrined in Art. 43 has heightened

## Box 2. Key features of the 2010 Constitution

### A new narrative for social justice:

- *The Declaration of national values and principles* (Art. 10) of governance and state-society relations based on unity, evolution of power, the rule of law, democracy and participation (Art. 10.2.a). This provides a new narrative of unity and justice that embraces ethnic, cultural and religious diversity, but is based on a universalist notion of citizenship and entitlements.
- *The Bill of Rights*: Chapter 4 of the Constitution establishes a long list of rights that gives a new tone to what is expected from the State. In addition to an explicit listing of both civil and political, as well as social and economic rights, the Bill of Rights establishes clear guidelines on the progressive realisation of, and the justiciability of rights, giving all citizens the right to hold the State to account before the courts, (Art. 24).
  - ◆ Specific consideration is given to the rights of women, children and youth and the principles of equality and non-discrimination as applied to them. For women, the principles of gender equality and non-discrimination are reiterated and reinforced, including through quota mechanisms that ensure that neither gender shall occupy more than two thirds of public or elected offices. Youth are granted special representation rights. Affirmative action is prescribed to ensure equity for minority or marginalised groups. Finally, concrete entitlements are enshrined for children and youth (Arts. 53 and 55 respectively), addressing their rights to be protected from harm and to education, food, health and shelter.

### Institutional reforms to strengthen accountability:

- *Devolution of political power*: The reintroduction of devolved government to county level, and the creation of a Senate, which will represent special interests as well as those of the devolved unit.
  - ◆ The intention of devolution is to enhance the equitable distribution of services at county level. However, how this will be rolled out remains to be seen. Education will remain more centralised, for instance, while decision-making on health provision will fall more to county level government.
- *Changed balance of power between the three branches of state*: Parliament's power of oversight over the executive branch has been enhanced, including the power to vet presidential appointments. The judicial branch is fundamentally restructured, and has stronger powers related to constitutional review and judicial oversight.
- *Improved legal standing for rights claims*: The creation of the new Supreme Court is especially important for this, as are new rules of standing that make it easier for citizens to take rights claims to court. The intention is to empower citizens to hold the State to account for the realisation of rights, and the expectation is increased levels of legal mobilisation and public interest litigation on rights.
  - ◆ For women and children, the two changes mentioned above have the potential to improve prospects for access to justice, and their legal standing to claim rights. In this respect, organisations such as Kenya's Federation of Women Lawyers (FIDA) have accumulated experience in litigation and lobbying for rights. But progress will also depend on capabilities to exercise legal voice, and on how courts respond to rights litigation (as yet untested).
- *Creation of constitutional commissions*: The establishment of constitutional office holders and commissions with fairly far-reaching functions and powers. These are intended as independent bodies, many of which will have watchdog functions over different aspects of state-society relations.
  - ◆ The Kenya National Human Rights Commission, and the Kenya National Gender and Equality Commission are now in place, following legislation in August 2011, to implement constitutional provisions. The separation into two bodies has been the subject of controversy and debate.
- *Changes to the budget process*: A stronger role for parliamentary oversight, greater transparency, and a new basis for more equitable revenue sharing between counties and with central government.
  - ◆ Resource allocation matters for the implementation of social and economic rights of women and children (as for social and economic rights in general) and equitable provision of resources should address ethnic, regional, and county level disparities and needs.
- *New rules for public appointments*: To reduce the scope for patronage appointments through new vetting procedures on public appointments.
  - ◆ There are high expectations about the provisions for greater gender equality in public office.

expectations of public interest litigation on rights. It remains to be seen how this will unfold, but test cases in court on the justiciability of these rights, may compel the State to at least make a case for how resource allocation decisions are made that affect social equity.

There are also some encouraging dynamics that could become building blocks for change. At the national level, for instance, the appointment of the new Chief Justice, known to be a champion for reforms to advance rights, is seen as a promising step towards strengthening the space for holding the State accountable for rights. At the level of

civil society, there appear to be some capabilities in place among some organisations to push for public interest litigation on rights. Finally, at the local level, there is evidence of attempts to nurture change in cultural attitudes, for instance on female genital mutilation, through engagement with key local actors such as religious leaders.

Such piecemeal dynamics in Kenya's political and social landscape are important and may contribute to incremental steps towards new accountability narratives and mechanisms to support the vision of social equity of the new Constitution.

## Next steps

While it is critical to recognise the gaps between the commitments laid out in the Kenyan Constitution and the existing realities for most Kenyans, there are also windows of opportunity for action.

There are four particular areas where efforts could be focused in the short to medium term.

- **Greater dialogue across sectors and policy spheres:** Greater connections need to be drawn between reforms on public financial management and budget processes, and reforms that aim for social equity and rights realisation at national and subnational levels. It is crucial to bring policy communities together and find shared spaces for collaboration.
- **More strategic deployment of information and data:** There are significant data gaps, particularly in understanding how inequity is manifested within and between the newly created counties. There should be a strong focus on the generation and dissemination of information at subnational and national levels about key service delivery

challenges, through forms of budgeting monitoring and transparency initiatives.

- **More support to coalitions of key actors** across civil society and in government, on equity and rights issues, including service delivery. Opportunities should be explored for greater collaboration and collective problem solving, including with non-state actors. A focus on areas that are under-represented (such as children's rights and child protection) could be particularly helpful.
- **Strategic recourse to the principle of 'progressive realisation':** Particular support is needed for forms of public interest litigation, with a focus on legal empowerment around newly enshrined social and economic rights. This can be combined with the promotion of the notion of progressive realisation within processes and policy spaces to support decisions on equitable resource allocation at national and county levels that take into account fiscal constraints.

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### Project information:

This project briefing draws on findings for research commissioned by UNICEF Kenya, on the implications of the new Constitution for women and children in Kenya. The research team included Pilar Domingo, Leni Wild, Bernadette Wanjala and Sir Richard Jolly. Desk-based research and field work were conducted between May and September 2011.

For more information, visit: <http://bit.ly/HdCxzx>