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The Constitution of Kenya 2010: Kenyans Give a Thumbs Up

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Introduction

The independence constitution of 1963 had been heavily mutilated by the time Kenyans adopted a new constitution on August 27, 2010. Although Kenya amended its constitution and returned to a multi-party political system in 1991, this change did not result in a liberal constitution. It would take Kenyans another 19 years before enacting a truly liberal constitution. Both the Moi regime and the Kibaki regime aborted the quest for a new constitution before the Grand Coalition Government, headed by President Mwai Kibaki and Prime Minister Raila Odinga, finally delivered the much heralded Constitution of Kenya, 2010.

This briefing paper provides an analytical view of the process of implementing the new constitution promulgated in 2010 and the subsequent impact it has had on the processes of democracy, governance and constitutionalism in the country. The analysis is based on the results of Round 5 Afrobarometer survey conducted in late 2011.

Afrobarometer Surveys

The Afrobarometer survey is a comparative series of national public opinion surveys that measure public attitudes on the social, political and economic atmosphere in Africa. The Afrobarometer's main goal is to produce scientifically reliable data on public opinion in Africa, strengthen institutional capacities for survey research, and provide research findings to inform development policy and practice. It also provides a body of knowledge to ordinary citizens to effectively engage in the development process.

During Round 5, Afrobarometer surveys will be conducted in up to 35 African countries using a common survey instrument and methodology. The instrument asks a standard set of questions that permits systematic comparison in public attitudes across countries and over time. The methodology is based on a national probability sample of 2400 adult Kenyans selected to represent all adult citizens of voting age, allowing for inferences with a sampling margin of error of +/-2 per cent at a confidence level of 95 per cent. The sample was drawn randomly based on Probability Proportionate to Population Size (PPPS), thus taking account of population distributions, gender as well as rural-urban divides. The sampling process ensured that every adult Kenyan citizen had an equal and known chance of being selected into the sample. All nine provinces were represented. Fieldwork was conducted by the Institute for Development Studies (IDS), University of Nairobi, between 4th November and 5th December 2012.

Promulgation of the Constitution and its aftermath

The period between August 27, 2010, when the constitution was promulgated, and March 4, 2013, when the next General Elections will be held, is deemed as the transition period in the implementation of the new Constitution. Although there are provisions in the new Constitution that are suspended until after the next General Election, others were operationalized immediately after the promulgation with clear

timelines. The survey therefore sought Kenyans' opinions on some of the provisions already implemented, including appointments to public office; the fight against corruption; respect for human rights; integrity of the judiciary and courts; and discipline within political parties.

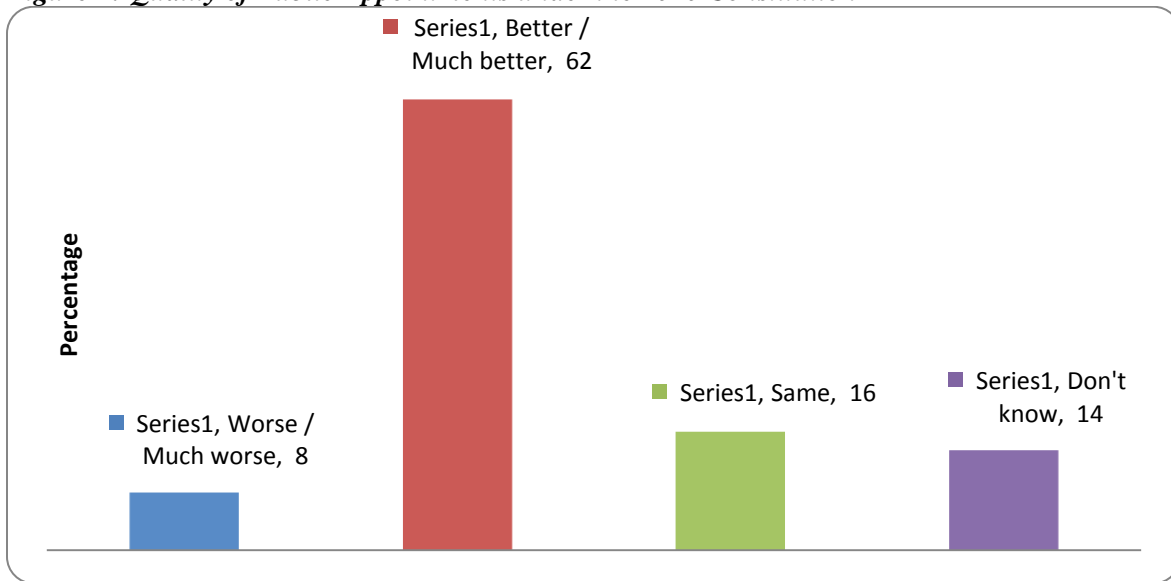
Quality of Appointments

The new Constitution provides that key public appointments have to be transparently vetted with the majority of the process occurring publicly. Kenyans appear to believe that implementation of these provisions has improved the quality of public appointments. Overall, most Kenyans (62 per cent) feel that under the new Constitution, appointments to public office are either better or much better than in the past, with only 5 per cent having the opinion that they are either worse or much worse (Figure 1). Fourteen per cent, however, responded that they did not know, which can be attributed to either their lack of knowledge or disinterest in the constitution implementation process.

The views of those who felt that the appointment process is much better can likely be attributed to several factors. First, under the National Accord¹ that still applies, presidential appointments have to be made in consultation between the two coalition principals. Second, nominees for key public positions have to undergo formal public interviews in addition to being vetted by Parliament. Third, Kenyans have avenues to petition executive decisions that they find unconstitutional. To this end, Kenyans appear to be alive to their rights under the new Constitution and willing to stand up for them. They have not hesitated to take on their president when they deem that he has violated its provisions. A landmark instance was in January 2011, when apart from Parliament, the Attorney General and the Judicial Service Commission, Kenyans acted through various civil society organs to force the president to rescind his decision to make key appointments without adhering to the new requirements. It proved to be a landmark event that the president has been cognizant of in making subsequent appointments.

¹ National Accord is the post-2007 General Election Coalition agreement that has provisions for the sharing of executive power between the President and the Prime Minister up to the next General Election.

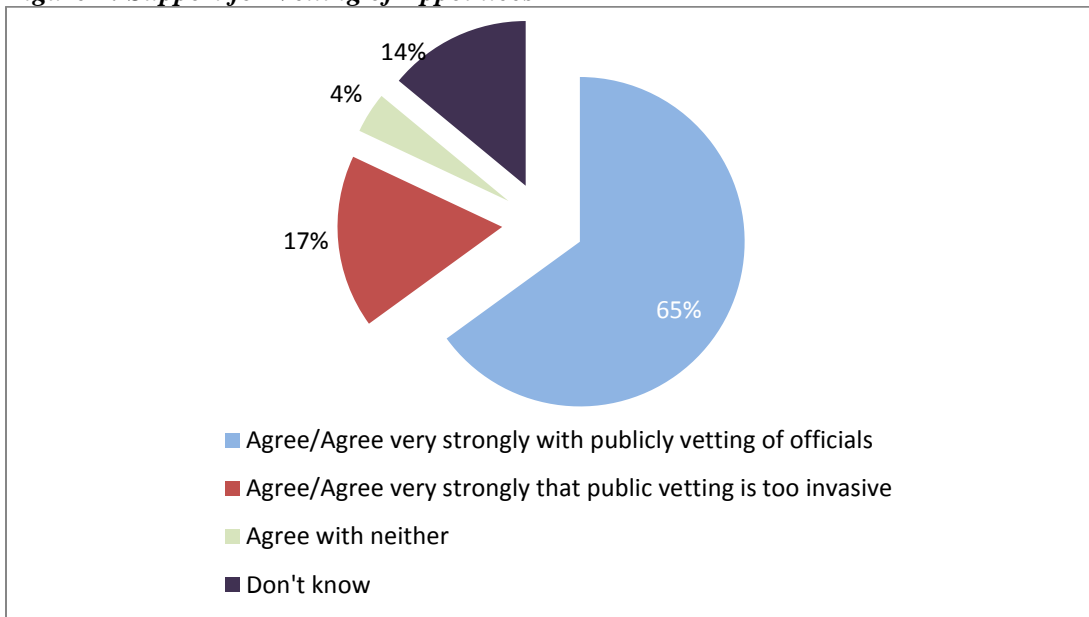
Figure 1: Quality of Public Appointments under the 2010 Constitution



Looking back since the promulgation of the Kenya Constitution 2010, would you say it has made appointments to public office better, worse or remained the same?

Likewise, a large majority of Kenyans (65 per cent) agree with the current system of public vetting for individuals seeking senior positions in government (Figure 2). However, 17 per cent find it intrusive, and therefore, opine that it keeps qualified individuals from seeking government jobs. It appears that the Kenyan public approves of transparent and public recruitment as a method of curtailing past malpractices in the appointment process.

Figure 2: Support for Vetting of Appointees



Which of the following statements is closest to your view? Choose Statement 1 or Statement 2

Statement 1: The current system of public vetting for individuals seeking senior positions in government is necessary to ensure that government workers have the proper qualifications.

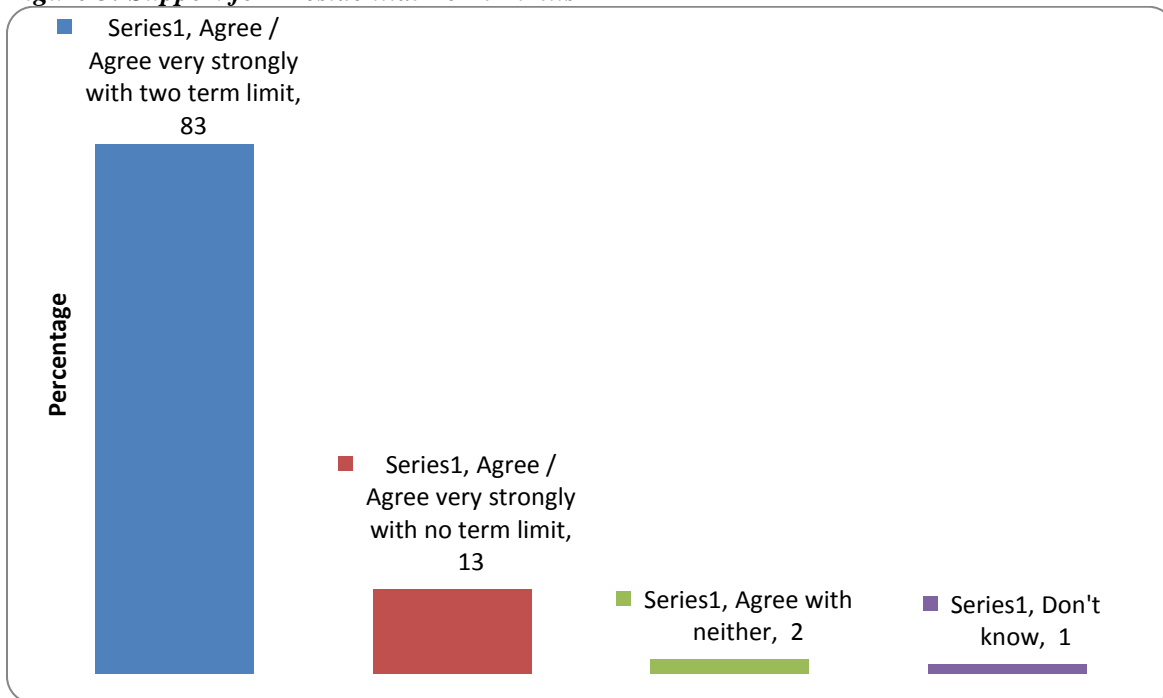
Statement 2: The current system of public vetting is too invasive and may be keeping qualified individuals from seeking government jobs.

Continuing Presidential Term Limits

A major relic that characterized the old constitution was the suffocating “Imperial Presidency” (where the executive is dominant and is not sufficiently checked by the other arms of the government, i.e., the legislature and the judiciary). The quest to curtail the “Imperial Presidency” began in 1991 when the two term limit was constitutionally imposed on the holder of the Office of the President. This provision has been retained in the Constitution of Kenya, 2010.

The 2011 Afrobarometer survey in Kenya sought the views of citizens on this provision. As reflected in Figure 3, the survey clearly shows that Kenyans are in favor of the two term limit. An overwhelming 83 per cent either agree or agree very strongly with the statement that “the constitution should limit the president to serving a maximum of two term limits in office”, compared to only 13 per cent who would like the term limit provision done away with. Kenyans appear to be saying that responsible leadership at the presidential level can be sustained through tenure limits. Kenyans may hope that tenure limits can promote accountability from presidents. Clearly they are diametrically opposed to the unlimited tenure that prolonged the “misrule” of Moi, and Kenyatta before him.

Figure 3: Support for Presidential Term Limits

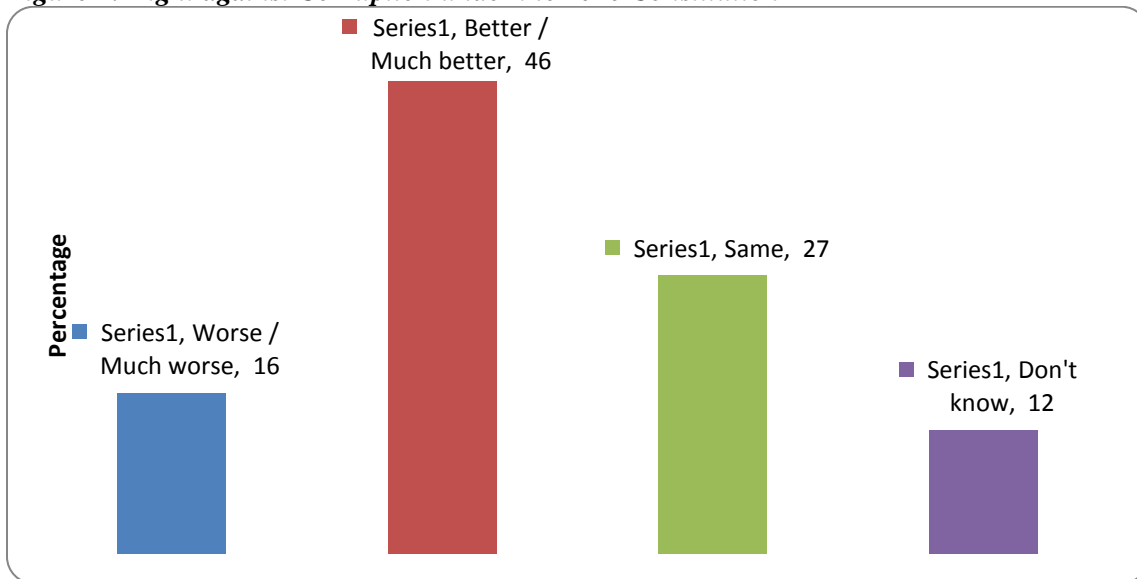


Which of the following statements is closest to your view? Choose Statement 1 or Statement 2
 Statement 1: The Constitution should limit the president to serving a maximum of two terms in office.
 Statement 2: There should be no constitutional limit on how long the president can serve.

Fighting Corruption

Another perennial problem in Kenya has been the high incidence of corruption. The 2010 Constitution therefore included clauses aimed at curing this vice. The survey therefore sought Kenyans’ perceptions on the fight against corruption since the promulgation of the new Constitution. Unlike other sectors, however, Kenyans are not yet convinced that the new Constitution has put the fight against corruption on the right track. Less than half of Kenyans (46 per cent) agree that the fight against corruption has gotten better or much better. Twenty-seven per cent feel nothing has changed, while 16 per cent feel it is either worse or much worse, and another 12 per cent do not know. The positive perception of 46 per cent of Kenyans on the fight against corruption probably can be attributed to the enhanced independence of several anti-corruption commissions now anchored in the constitution, including the Ethics and Anti-Corruption Commission (EACC). Some may also be encouraged by the increased prosecution of economic crimes since the promulgation of the new Constitution, which has seen cabinet ministers and senior civil servants being compelled to step aside from their offices until they are cleared of the said charges.

Figure 4: Fight against Corruption under the 2010 Constitution



Looking back since the promulgation of the Kenya Constitution 2010, would you say it has made the fight against corruption better, worse or remained the same?

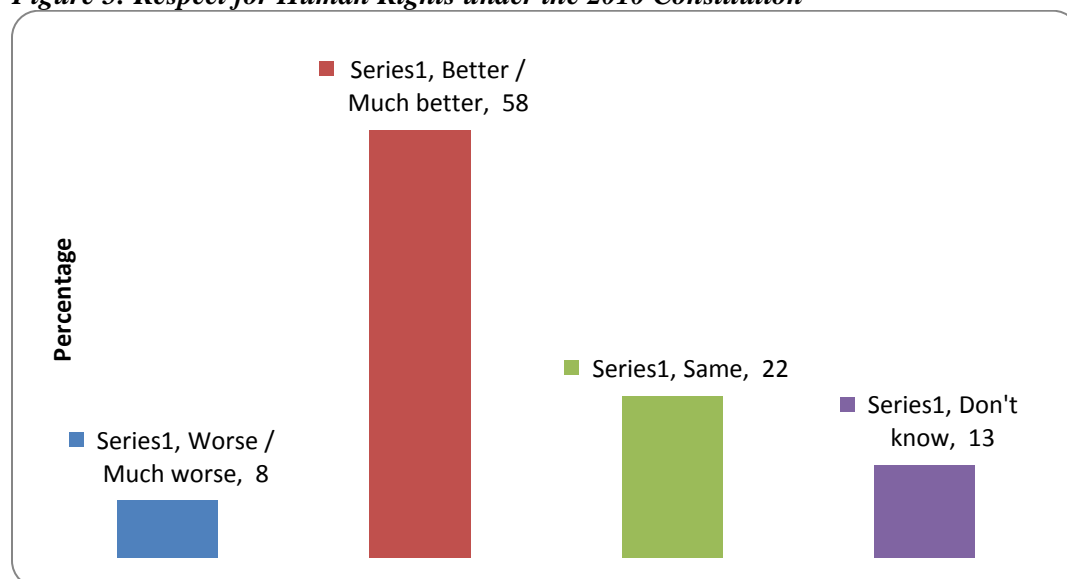
Those who, on the contrary, feel that nothing has changed or that the situation is worse since the promulgation of the 2010 Constitution could have been influenced by the several factors. First is the protracted transition from the Kenya Anti-Corruption Commission to the EACC that saw the former Director and his fellow Commissioners thrown out of office by parliamentarians in an acrimonious manner. Second is the subsequent lacuna created after the names of the new nominees were challenged in parliament and also by the courts. The court has recently found the chairman, Mumo Matemu, not fit to hold that office based on integrity issues. Third is the perennial lack of “big fish” being brought before the corridors of justice even as corruption cases still abound.

Protecting Human Rights

The promotion of human rights by the Kenyan government has gotten a boost since the promulgation of the new Constitution. Kenya is now judged as one of the countries with the most progressive Bills of Rights in the world. These gains are also reflected in the perceptions of Kenyans; a total of 58 per cent opine that respect for human rights is better or much better since the promulgation of the constitution, while only a paltry eight per cent feel that it is either worse or much worse. The optimism can perhaps be attributed to the fact that since the promulgation Kenya has become a litigant nation where the low and mighty are now treated equally before the law. The case of security guard Rebecca Kerubo and Deputy Chief Justice Nancy Baraza² attests to this, among other cases.

² Ms Baraza, who has since resigned as Deputy Chief Justice over the matter, was also the Vice President of the Supreme Court of Kenya.

Figure 5: Respect for Human Rights under the 2010 Constitution



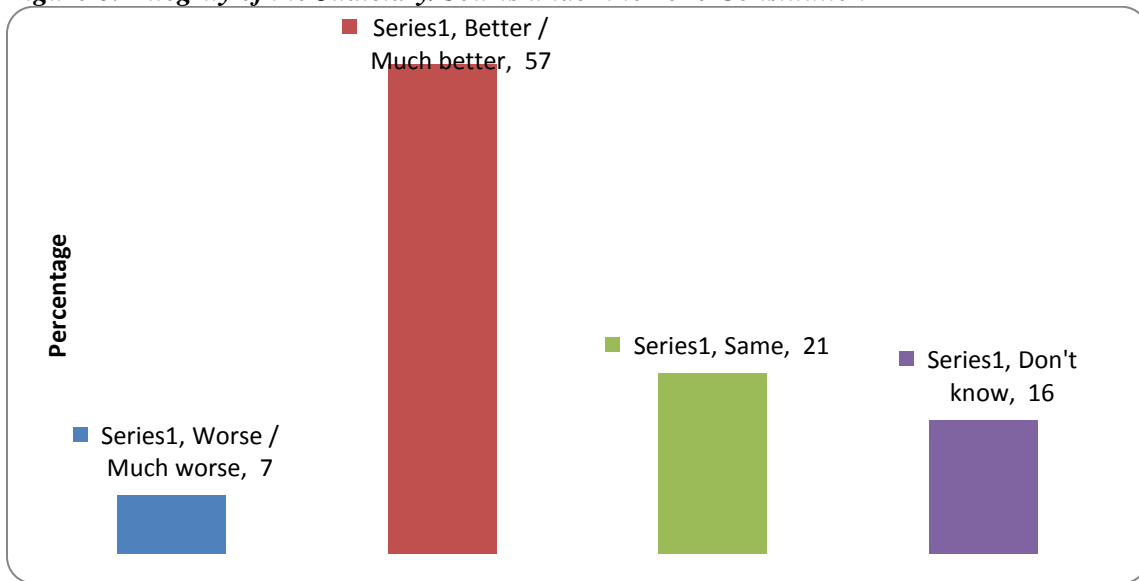
Looking back since the promulgation of the Kenya Constitution 2010, would you say it has made respect for human rights better, worse or remained the same?

Independence and Integrity of the Judiciary

Kenyan's confidence in the judicial institutions was at its lowest ebb before the promulgation of the new Constitution. In fact, the 2007/08 post-election violence may have been in part a result of a lack of confidence in the judiciary, as supporters of the Orange Democratic Movement (ODM) believed that they would not get justice in the courts. Many ODM supporters were of the view that the courts followed the whims of the executive, led by President Kibaki, who was then their adversary. This negative perception of the judiciary has, however, changed drastically since the promulgation of the 2010 Constitution.

According to the survey, a majority of 57 per cent of Kenyans opine that the integrity of the judiciary/courts is better or much better, while only a paltry 7 per cent feel that it is worse or much worse (Figure 6).

Figure 6: Integrity of the Judiciary/Courts under the 2010 Constitution



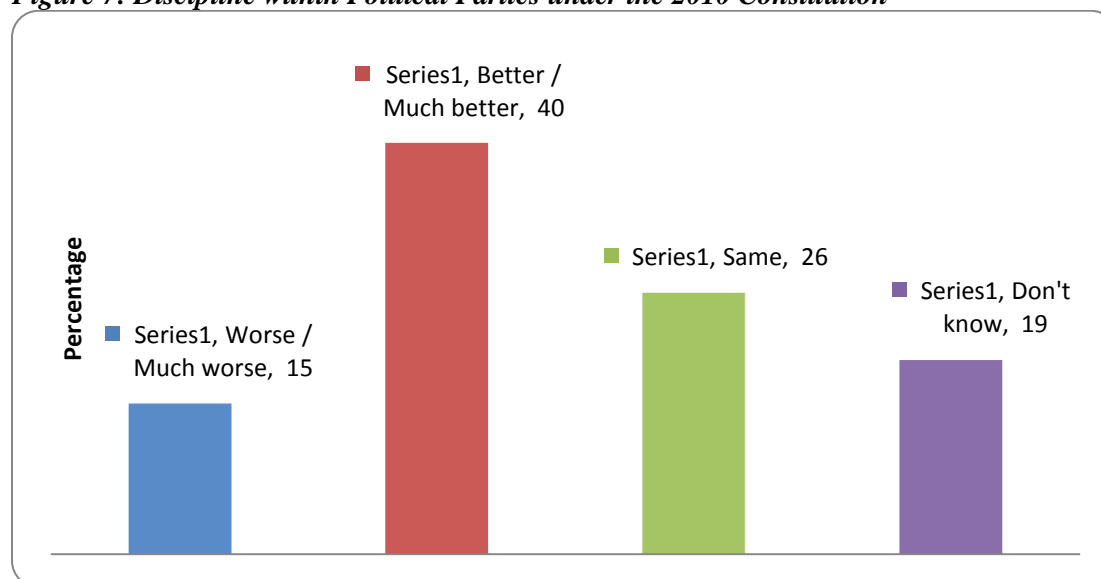
Looking back since the promulgation of the Kenya Constitution 2010, would you say it has made integrity of the judiciary / courts better, worse or remained the same?

The growing confidence in the judiciary and courts can likely be attributed to a number of judicial reforms that have been undertaken since 2010. First, as stipulated in the transitional clauses, the Chief Justice left office six months from the date of promulgation. A new Chief Justice was then recruited from civil society, which brought freshness to the judiciary and broke the old order of “business as usual”. Second, recruitment to the higher echelons of the judiciary, namely the Chief Justice and the Deputy, Supreme Court Justices and Appeals Court Judges, are now done in a more transparent and public manner, thus endowing the Judiciary with greater credibility. Third, the new Chief Justice and the Judicial Service Commission have enlightened the public about the reforms taking place in the Judiciary. Fourth, the vetting of judicial officers by the Judges and Magistrates Vetting Board has seen household names in the judiciary sent home for a number of varied reasons. This has sent the message that the judiciary is finally being cleaned. Finally, the hiring of new judges to help clear the backlog of cases has also improved the efficiency in the judiciary. All of these factors could also have contributed to the more positive perspective with which the courts are now regarded in Kenya.

Political Party Discipline

The new Constitution also sought to streamline the management and administration of political parties. To this end, the Political Parties Act of 2011 has been enacted as envisaged by the Constitution. The Act stipulates that individuals shall not be members of two political parties at any given time, parties are expected to make their returns to the Registrar of Political Parties within stipulated time; parties are expected to have offices across the country and to have a stipulated membership with a national outlook. Kenyans appear to have not, however, seen the fruits of the Political Parties Act. Those who are of the view that the discipline of political parties has improved and those of the contrary view are nearly in a stalemate, when you consider that those who think the status quo still stands comprise fully 26 per cent.

Figure 7: Discipline within Political Parties under the 2010 Constitution



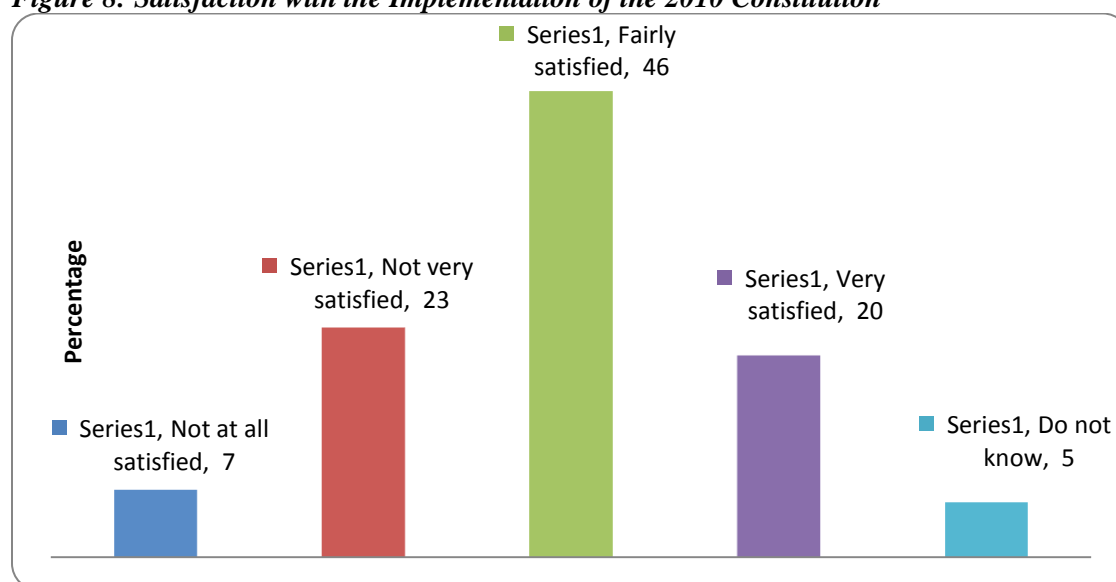
Looking back, since the promulgation of the Kenya Constitution 2010, would you say it has made discipline within political parties, better, worse or remained the same?

According to the survey, those who are of the opinion that discipline within political parties is better or much better after the promulgation of the constitution stand at 40 per cent, while those who think that indiscipline remains the same stand at 26 per cent. Furthermore, those who think that it is worse or much worse stand at 15 per cent, thus bringing the latter total to 41 per cent. One of the plausible reasons for this stalemate might be the fact that at the time of the survey the Act had just been passed and therefore it had not been operationalized. A more persuasive reason, however, could be that in spite of the existence of the Act, it is not being enforced, as most cases of indiscipline within political parties are still pending action in court. In any case, the Minister for Finance is on record saying that if the Political Parties Act was implemented to the letter, and 100 MPs who have hopped from the parties that sponsored them to parliament were declared vacant, treasury would not be in a position to foot the bill for the by-elections that would ensue. Those who deem that the Political Parties Act has improved the discipline amongst political parties might be taking cue from the fact that the number of briefcase political parties has declined drastically. Before the act came into operation, there were over 157 registered parties. This has now decreased to 54.

Implementation of the Constitution

The last question asked about the constitution was a general one; it sought Kenyans' views on how satisfied they were with the ongoing process of implementing the new Constitution. A substantial 66 per cent were either fairly satisfied or very satisfied with the process, compared to only 7 per cent who were not satisfied at all. These high levels of satisfaction with the implementation process can probably be attributed to several key factors. First, except for a few items, most new legislation has been enacted by parliament on time as per the Fifth Schedule of the Constitution of Kenya 2010. Second, although there have been some bottlenecks in the implementation process, overall Kenyans have been alert to challenges, and attempts by the executive to go against the spirit of the constitution have been countered by Kenyans who have often sought to redress the issues in court. Third, the Commission for the Implementation of the Constitution has effectively acted as the public watchdog and has sounded the alarm whenever the executive and parliament have violated either the letter or the spirit of the Constitution, and where need be, has sought to redress these violations in court on behalf of Kenyans.

Figure 8: Satisfaction with the Implementation of the 2010 Constitution



Overall, how satisfied are you with the implementation of the Kenya Constitution 2010?

Conclusion

Overall, the survey clearly shows that Kenyans approve the ongoing process of implementing the Constitution. On all the issues covered here, at least a plurality reports that the 2010 Constitution has brought about improvements, and in most cases majorities—sometimes large ones—feel this way. Likewise, those who give thumbs up to the implementation process far outstrip those who have a negative opinion. We can thus conclude that Kenyans themselves have helped in this process as they have become more vigilant and are ready to chime in on efforts geared towards determining their own destiny.

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