

**REPORT OF THE CONSTITUTION  
OF KENYA REVIEW  
COMMISSION**

**VOLUME FIVE  
TECHNICAL APPENDICES**

**PART ONE**

**APPROVED FOR ISSUE AT THE 68<sup>TH</sup> MEETING OF THE COMMISSION HELD  
ON 10<sup>TH</sup> APRIL, 2003**

**PART ONE:**

**SECTION ONE: INTERPRETATION OF CKRC'S  
MANDATE SEMINAR**

**SECTION TWO: INDEPENDENCE CONSTITUTION  
SEMINAR**



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## **FOREWORD**

The Constitution of Kenya Review Commission is pleased to publish this volume of the Commission's report, comprising the technical appendices to the Commission's main report. The contents of this volume are a reproduction of the proceedings of technical seminars held by the Commission. It is presented in five parts as follows:

### **Part One**

Interpretation of the Constitution of Kenya Review Commission's Mandate Seminar  
Independence Constitution Seminar

### **Part Two**

Culture, Ethics and Ideology Seminar  
Gender Question Seminar  
National Convention for Persons with Disabilities  
Human Rights Seminar

### **Part Three**

Devolution Seminar  
Electoral Systems and Political Parties Seminar  
Legislative Reforms Seminar  
Judiciary Seminar

### **Part Four**

Economic Sensitisation Seminar  
Land Seminar  
Constitutional Reform to Fight Corruption Seminar

### **Part Five**

Expert Review of the Draft Bill Seminar

This volume is one of a number, which the Commission has published. It has produced a main report on its work and its recommendations for a new Constitution, a short version of it, a series of reports for each of Kenya's 210 constituencies, and a volume on the Commission's method of work. The authority to prepare and publish these documents is derived from Sections 26 (2) and (7) and 27 (1) of the Constitution of Kenya Review Act (Cap. 3A).

This particular volume has been prepared by the Commission working through the Research, Drafting and Technical Support Committee. The Chair of the Commission, Prof. Y. P. Ghai, and the Chair of the Research, Drafting and Technical Support Committee of the Commission, Prof. H. W. O. Okoth-Ogendo, co-ordinated the work of these seminars. Backstopping assistance by way of research and logistical support was provided by the Technical Staff of the Research, Drafting and Technical Support Department of the Commission.

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We wish to acknowledge and thank the local and international experts and professional groups and institutions, who offered their views, opinions and comments freely and sincerely during the Commission's seminars. We also want to thank the individuals and organisations who gave their material and moral support during the exercise. We as Commissioners are pleased to release this volume to the public for perusal and discussion.

1. Prof. Yash Pal Ghai, Chairman
  2. Prof. Ahmed Idha Salim, 1<sup>st</sup> Vice-Chair
  3. Mrs. Abida Ali-Aroni, Vice-Chair
  4. Prof. H. W.O. Okoth-Ogendo, Vice- Chair
  5. Dr. Mohammed A. Swazuri
  6. Dr. Charles Maranga Bagwasi
  7. Ms. Salome Wairimu Muigai
  8. Hon. Phoebe Asiyo
  9. Mrs. Alice Yano
  10. Prof. Wanjiku Kabira
  11. Bishop Bernard Njoroge Kariuki
  12. Dr. Abdirizak Arale Nunow
  13. Pastor Zablun Ayonga
  14. Ms. Nancy Makokha Baraza
  15. Mr. John Mutakha Kangu
  16. Ms. Kavetsa Adagala
  17. Mr. Paul Musili Wambua
  18. Mr. Abubakar Zein Abubakar
  19. Mr. Ahmed Issack Hassan
  20. Mr. Riunga Raiji
  21. Mr. Ibrahim Lethome
  22. Mr. Keriako Tobiko
  23. Dr. Githu Muigai
  24. Mr. Isaac Lenaola
  25. Dr. K. Mosonik arap Korir
  26. Mr. Domiziano Ratanya
  27. Dr. Andronico O. Adede
  28. Hon. Amos Wako, Attorney-General – *ex officio*
  29. PLO-Lumumba, Secretary – *ex officio*
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## **SECTION ONE**

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### **SEMINAR ON THE INTERPRETATION OF CKRC'S MANDATE: 9<sup>TH</sup> – 15<sup>TH</sup> SEPTEMBER, 2001 AT THE MOMBASA BEACH HOTEL, MOMBASA**

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1. Opening Address by Hon. Raila Odinga;
  2. “Constitutional Reform in Kenya: Basic Constitutional Issues and Concepts” by Prof. J. B. Ojwang;
  3. “Holdings of Kenya’s Constitutional History at the Kenya National Archives and Documentation Services” by Mr. M. Musembi;
  4. “Territory, Citizenry and National Philosophy in a Constitution” by P.L.O. Lumumba;
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**ADDRESS ON THE OCCASION OF OPENING OF THE  
CONSTITUTION OF KENYA REVIEW COMMISSION WORKSHOP  
ON THE INTERPRETATION OF ITS MANDATE**

**Hon. Raila Odinga, MP,  
Chairman of the Parliamentary Select Committee on Constitutional  
Review**

I am pleased to have been invited to participate at the opening of the workshop on the interpretation of the Commission's mandate. It is important that the Commission's mandate including Terms of Reference are fully understood by everyone concerned in order to avoid any future misunderstanding.

The making of a new constitution for any country marks an important watershed in its history. It demonstrates the desire of the people to fundamentally change their system of governance. The process gives the people an opportunity to make a fresh start by reviewing their past experiences, identifying the root-causes of their problems, learning lessons from past mistakes and making genuine efforts to provide solutions for their better governance and future development.

The decision to review the constitution has given a challenge to all sections/groups and individuals in Kenya to participate as fully and freely as possible in the exercise so that the new constitution thereby produced will be truly theirs.

In my view, the mandate of the commission is to consult the people and make proposals for a popular and lasting constitution based on national consensus. The challenge to the commission is to do your work 'without fear or favour' and to use all means at your disposal to encourage people's participation in the exercise.

The challenge to the government is to create an atmosphere of peace, security and freedom necessary for fruitful discussion and debate of all aspects of constitutional issues.

From my experience as the Chairman of the Parliamentary Select Committee on Constitutional Review, I see the following as the theoretical or philosophical bases for your recommendations:

- (a) The new constitutional order should be responsive to Kenya's potentially vulnerable geographical position. The objective is to safeguard our national independence, sovereignty and territorial integrity. The means should include strengthening our nation-state and fostering policies of cooperation, understanding and friendliness at the regional, African and international levels.
  - (b) The new constitutional order should come to terms with Kenya's multi-ethnic and cultural diversities. The objective is to promote nation building and national unity while fully respecting our cultural diversities and ethnic identities. One of the means of achieving that is to adopt a form of government that can best respond to the above principle.
  - (c) The new constitutional order should come to terms with Kenya's past and present and should be sufficiently flexible to meet internal and external challenges and people's aspirations for the future. The aim is to avoid the pitfalls
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of the past, which have caused much suffering while building on values of the past, which have proved workable and have survived all odds. The present should also be taken into account critically in order to identify both values that are permanent and those, which seem transitory. The aspirations for the future indicate the direction which people want the country to take. They can be responded to by making a constitution that is sufficiently flexible to meet those challenges as they come.

- (d) The new constitutional order should be so devised as to enable Government to govern effectively and democratically. The objective is to avoid both anarchy and tyranny. One of the effective remedies is to distribute power and responsibility in such a way that no loopholes are left for agitators to cause anarchy and for dictators to impose their will.
- (e) There should be such a balance of forces in the new constitutional order that no one single social force or group should be able to establish its hegemony to the extent of flouting the established democratic principles. The objective is to eliminate the politics of exclusion, sectarianism and unconstitutionality. To remedy such a situation, there is need to control all social forces within the constitutional order and to put in place institutions that can effectively resolve conflicts fairly and peacefully.
- (f) No social force or group should be politically marginalized as evidenced by Kenya's historical experience. The aim is

to establish solid foundations of equality, equity and social justice. One of the ways to achieve this is to give clear constitutional support to the rights of women, children, handicapped persons and minorities.

- (g) The established institutional frameworks should be capable of creating conditions for peaceful transfer of power. The objective is to entirely eliminate the practice of capturing power through sheer force or other unconstitutional methods. This aim can be partly achieved through the constitutional subordination of the military to civilian authority and the establishment of independent institutions to supervise the transfer of power.
  - (h) The new constitutional order should ensure that major controversial issues are resolved through democratic discussion and where necessary national referenda. The objective is to ensure that controversial issues do not lead to polarization of the nation into hostile camps. One of the ways to achieve this may be through use of national referenda to resolve issues democratically.
  - (i) The new constitutional order should ensure that constitutional structures are viable and flexible, coherent and integrated to promote a culture of constitutionalism. The aim is to safeguard the constitutional arrangements as suggested by the people and approved by them or by their elected delegates. The means would include clear procedures for amending the constitution, making the constitution widely known and studied and empowering people to defend it.
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# CONSTITUTIONAL REFORM IN KENYA: BASIC CONSTITUTIONAL ISSUES AND CONCEPTS

**Prof. J. B. Ojwang**  
**Professor of Law & Dean,**  
**Faculty of Law, University of Nairobi**

## 1. Introduction

The significance of the present constitutional reform initiative lies at two levels:

a) the ordinary one, that applies to law reform in general, and which dictates that the somewhat rigid shape of the operative law be reviewed from time to time to keep in tune with real life as expressed in changing social, economic and political trends; and

(b) the special level that responds to Kenya's unique history, marked by several decades of single-party government, and by the attendant restrictions to broad-based participation in the governmental process. This second level also entails the need to respond to the call of a more globalised world, in which international law and broader world developments have established new governance standards that, today, demand incorporation in national governance systems. This international call upon national constitutional systems today introduces into the agenda of good governance, matters of great concern for human welfare everywhere, such as observance of human rights; giving fulfillment to the rights and welfare of the child; prudent stewardship over natural resources; environmental rights and sustainable development; popular participation and consent in the governmental process; etc.

As Kenya seeks a more progressive dispensation in its governance set-up, and to consolidate the new order in a firm

constitutional arrangement, we are inevitably involved in a new learning process; a process of consultation among ourselves; a process of fundamental reflection; a process of identification of and dedication to new values. The sanctity of such values has, ultimately, to be reduced to the print of the law, to the formulation of a new constitutional instrument.

The aim of this paper is to attempt to map out the broad terrain of constitutional reform in Kenya, addressing relevant concepts, raising pertinent issues, and focusing attention on the cardinal points that should lie at the centre of our search for a new Constitution and that should be placed, in a proper case, before the people of Kenya for attention, consideration and expression of preference.

The guidance gained from such consultation should help the Constitution of Kenya Review Commission to formulate a practical, sensible and potentially viable new Constitution for Kenya.

## 2. Glimpses at the Constitution of Kenya Review Act (Cap. 3A, Laws of Kenya)

The Constitution of Kenya Review Commission (referred to hereafter as "the Commission") is created by the Constitution of Kenya Review Act (Cap. 3A) and derives its whole mandate from this Act. The broad task of the Commission is to serve as an instrument for "the comprehensive review of the Constitution by the people of Kenya" (Long Title to the Act). The Act is set out in six Parts, namely; (a) the preliminary Part

which contains a definition of terms; empowers particular bodies to play a role in the review process; and sets out the governing principles to guide the constitutional review process; (b) the second Part which establishes the Commission; (c) the third Part which specifies the functions, powers and privileges of the Commission and Commissioners; (d) the fourth Part which defines modalities relating to the Report to be eventually formulated by the Commission; (e) the fifth Part which makes provisions for the expenses of the review process; and (f) the sixth Part which provides for the conclusion of the review process and the dissolution of the various organs participating in the review process.

Several elements in this setting for the review process are outstanding and deserve to be remarked here;

a) informed and expert collection, collation and assessment of evidence and opinions is required, and this task is entrusted to the Commission which is expected to operate professionally and with integrity (S.4 of the Act);

(b) the development of a new constitutional document is required to be conducted in the context of popular participation, and of consultation with the National Assembly, which is the principal representative constitutional forum in the country (S.4 of the Act);

(c) the constitutional review process is required to be open to public participation, transparent and accountable to the people, as well as inclusive of and accommodating to the diverse categories of Kenyan people and their peculiarities such as those relating to faith, ethnicity, gender, race, occupation, etc. (S.5 of the Act);

(d) the primary task in the conduct of the constitutional review process and in

ensuring that the objects of the Act are fulfilled, rests upon the Commission. This is quite clear from basic facts such as: out of the 35 sections of the Act, 23 are squarely devoted to the Commission – its establishment, functions and powers, its output in the form of a report, etc. The prominence of the Commission in the review process is not at all novel. A new Constitution must take the form of a sound legal document once all the people have made the political and other related inputs in their diverse vocations. As practice in most countries of Africa shows, a constitutional commission is a most appropriate device for eliciting from the people their broad opinions on desirable paths of governance, and crystallizing these into constitutional instruments based on a wide consensus;

(e) the functions of the Commission are set out in detail (Section 17 of Act). They include -

i) stimulating public awareness for useful participation in the review process, through the conduct of civic education;

ii) eliciting and processing the views of the Kenyan people at large, towards the formulation of a realistic Constitution founded on the needs, feelings and inclinations of the people;

iii). researching into general constitutional issues and into comparative constitutional experience, for the purpose of enriching Kenya's constitution-making process;

iv). making specific recommendation for ensuring the incorporation of the principle of constitutionalism in Kenya's constitutional document - this entailing a careful balancing of the mutual powers and operation of the Executive, the Legislative and the Judiciary;

v). considering the practicality and appropriateness of unitarian as well as decentralist modes of national government;

vi) making appropriate recommendations for constitutional reform aimed at enhancing human rights and gender equality;

vii) making recommendations for an improved electoral process in Kenya;

viii) taking views and making recommendations regarding property rights;

ix). re-examining the nationality laws and making appropriate recommendations;

x). considering the interplay between cultural practices and modern notions of rights and opportunity, and making suitable recommendations that favour individual liberty;

xi) considering current legal arrangements regarding accession to public office, and recommending more efficient and more progressive constitutional procedures;

xii) re-considering the working of the foreign affairs power and recommending appropriate constitutional adjustments for the democratisation of this area of public power;

xiii) considering the need for setting the requirements of a new Constitution in a context of defined directive principles of state policy; etc;

f) the Act entrusts the Commission with certain powers to ensure the fulfillment of the specified functions (S 18). There is a

general empowerment for the performance of these functions, but it is specifically stated that -

i). the Commission shall visit every parliamentary constituency in Kenya, for the purpose of receiving the views of the people regarding the Constitution;

ii) the Commission shall receive memoranda and hold public or private hearing throughout Kenya, for the purpose of recording and synthesizing the views and opinions of the people, and to this end it may summon public meetings anywhere etc.

### **3. The People: A New Presence in Kenya's Constitution -Making**

Kenya's current Constitution dates back to independence in 1963, except that it has been repeatedly amended over the years. Its essential character today is quite different from what it was in 1963. Most of the amendments, and especially those of the 1960s, had a purely governmental - cum - ruling - party origin and sought in the first place to consolidate the authority of the Executive, almost at the expense of the other organs of government. To this extent, the people were strangers to the process of constitutional change- besides; the general profile of constitutional change was unprogressive, seen from the standpoint of constitutionalism.

Rather than promote checks - and - balances, the changes of that time tended, in effect, to relegate both the Legislature and the Judiciary to positions of subordination, as compared to the meteorically ascendant Executive. Essentially, the 1960s, 70s and 80s decades witnessed an Executive -centred Constitution made by the Executive, with hardly any informed participation by the people. It is indeed arguable that the very



popular demand for constitutional reform today, is a reaction to that Executive - centred constitutional order.

Growing enlightenment on the part of the people, the thrust of global development upon the national scene, and the increased apprehension of the dialectics of public power and individual rights, have led most Kenyans to a realization that constitutional change is desirable; that the centralized power of government ought to be subjected to more checks and balances; and that greater governmental accountability can only be realized with the operation of a greater plurality of decision - making centres.

Thus, this round of constitution - making belongs to the people, as is clearly reflected in the Act. Let us consider the role of the people in constitution making, as we must expect that our new Constitution will have a much clearer imprint of the people than has in the past been the case.

A Constitution carries the most basic principles of law that relate to a nation's main political arrangements. Such political situations include governance patterns, as well as the public power schemes that the people have accepted, or acquiesced in, or been subjected to.

Where such public power arrangements have broadly been accepted, the outstanding problems of politics then become mainly ones of a technical and rather limited kind.

Where the people have acquiesced in such arrangements, again the unresolved issues of politics are in essence limited - because there is no major quarrel with the power dispensations.

Where the people have been subjected to an unpopular public power dispensation, a major problem of politics comes to exist,

which persistently cries out for new political dispensations - and these must be given effect by new constitutional dispensations.

To understand which one of the three foregoing scenarios exists, we must address one basic issue. Are there a united people, politically aware and knowledgeable of its rights, which has by an overwhelming voice expressed its support for, or opposition to the operative governance arrangements?

It is quite easy to answer the above question in the affirmative, in the case of a largely secular national community that has been homogenized through urban living, through universal education, through shared working conditions in a market - driven economy, etc. In such a situation, the dominant values are largely agreed and, in the circumstances, common attitudes to governance largely prevail. Therefore, in such a condition it can easily be said whether the constitutional order is "good" or "bad", judging by its level of contribution to social welfare. In such a condition, constitution making will be a straightforward exercise.

By contrast, where a country lacks social homogeneity as is the case with most developing countries which have not fully become part of the market economy built around the production of standard goods and services, around urban living and international trade, with their attendant cultures nurtured by access to universal education and association with political modernism - the factor of one people passing judgment on crucial government options will tend to be in short supply. In these conditions, the crucial issue in constitution-making may not exactly reflect what "the people" may think or want. This entails the risk that a constitutional order may be put in place that is not truly informed by the social or economic needs of "the people". A Constitution made in such

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circumstances is likely to be a reflection of the interests of elite groups.

The lessons for Kenya as well as for other developing countries, is that elite groups who play a fundamental role in bringing about a new Constitution should ensure, the existence of an open procedure for incorporating the genuine expectations of the people. The scope for bringing about a new Constitution for Kenya that fully responds to the expectations of the whole Kenyan people will largely depend on the Commission, and the extent to which all its members genuinely attempt to understand and to accommodate the country's social reality. The legal framework for the Commission to achieve this end is abundantly provided in the Act (Sections 17 and 18 of the Act).

#### **4. Certain Key Features of Kenya's Post-Independence Constitution - and the Question of Reform**

Most African countries attaining independence in the late 1950's, in the 1960s and 1970s adopted what may loosely be termed "revolutionary constitutions", as the foundation of their governance systems in the decades following. The making of such constitutions took place in largely elite type ceremonies involving the participation of nationalist leaders and representatives of the departing colonial power.

If one asked the question: who was responsible for the creation of these Constitutions, the correct answer would be: numerically limited elite groups of nationalist men and women nurtured in the colonial era and largely carrying a legitimacy resting on the overall goodwill of largely illiterate populations. The nationalist elites were, of course, working together with the representatives of the colonial powers. During this earlier period, literacy and levels of education in Africa were extremely low; and quite naturally, only a puny elite could

have been effectively involved in the complex business of constitution making. The nationalist elites, thus, did have clear popular mandates founded on trust and goodwill.

The constitutional dispensation that came with independence, in its essential features, was by no means the brainchild of the African elites alone. In the case of the former British colonies, most of the Independence Constitutions were modeled on the British Constitution - the model then known as the British Export Model Constitution. For the African leaders then, and for their peoples as well, the primary political concern of the time was attainment of independence, and it did not matter so much what constitutional or juridical instruments expressed and delivered that independence. There was no major concern to secure any kind of "original" constitutional document - not to mention that the intellectual and research resource base for such a pre-occupation would have been rather short.

Indeed, governance arrangements, given their overwhelmingly practical concerns and the premium placed on their inclusivity, are rarely founded on abstract notions; they are, in virtually all cases, founded instead on experience, the dominant social pressures and needs, pragmatics, and political reality. The Westminster Export Model, in the circumstances of the time, offered, the most practical framework for the transfer of power to Kenyan nationals. Thus the 1963 Constitution was the handiwork of the British government working with the Kenyan political elite. And as was to be expected, Kenya's independence Constitution was substantially shaped by the well-worn constitutional principles, concepts and theories of Western democracy and constitutionalism.

Kenyan's independence Constitution rested on three firm pillars that have always taken expression with only minor modifications in the older members of the Commonwealth: a Parliament - centred governance system; a dual Executive structure intimately linked to the control systems of Parliament; and an aloof judicial edifice guided by the principles of the common law and by evidence, and with a full mandate to interpret and pronounce on the law- a Judiciary that is the key purveyor of the free play of the general law.

The merits of such a constitution cannot be gainsaid, as Kenya takes a new look at its Constitution. Whether, on the whole, it was a "good" or a "bad" Constitution for this country, at this point in Kenya's constitutional development, is of little relevance. It is more important to recognize that the 1963 Constitution represented a vital step in the country's evolution as an independent state. It indeed provided the crucial institutions that set the country afoot in independent statehood and, on this account, has become a historical heritage and a critical reference point in any current and future reform initiatives.

In 1964 Kenya moved the next logical step in its constitutional dispensation, by shedding off the "Dominion" link with the British Crown and becoming an African Republic.

Kenya's original post-independence Constitution provided for a complex set of institutions. The most significant such institution was the semi-federal (or Majimbo) system which took the form of seven Regions, each with a Regional Assembly and a separate public service. Attendant upon this federalist element was a bi-cameral legislature at the national level. Provision was also made for several staff commissions, for different aspects of the public service.

The multiplicity of public institutions under the 1963 and 1964 Constitutions was clearly intended to serve the cause of controlled government, with minimal abuse of power. . Such control was seen to inhere not only in the design of the legal and administrative arrangements, but also in the political dimension of public life as manifested by the interplay of political parties inside and outside the National Assembly.

Today it is readily appreciated that limitation to governmental power is a desirable thing as it checks abuse and enlarges the scope for individual self-fulfillment and the enjoyment of human rights. The limitations placed on public power by the original Constitution can readily be associated with the goals of Constitutionalism and the Rule of law, which most will agree, ought to feature prominently in a reformed Kenyan Constitution. The early post-independence history, therefore, is a vital reference point for the ongoing work of the Commission.

The Commission may need, however, to consider also the resource-cost factor that must be confronted. It is not immediately clear whether the financial implications of such overlapping institutional arrangements had been taken into account at independence; but it would appear that the national economic status was not at the time so robust as to be able to support an infinite proliferation in governance bodies.

Numerous changes to the Constitution subsequently took place, especially after 1964. The result was that by 1970, Kenya no longer had a Westminster Model Constitution - founded on multipartyism, the central role of Parliament, the Executive's accountability to Parliament, the autonomy of the Judiciary. By 1970 the controlling environment for the functioning of constitutionalism and power checks - and -

balances, namely the buoyant play of a multi-party political system, had vanished. Kenya was now a settled one-party system with a unicameral Parliament and a much scaled-down institutional base for autonomous constitutional agencies.

The 1965-1970 period may be regarded as the watershed period in the flowering of power concentration in the hands of the Executive in post-independence Kenya's entire historical profile. Thereafter and up to 1992, Kenya's history was marked by a constriction in space for political activity - and thus for the exercise of civil rights linked to political activity. In the whole time-span running from 1965 to 1997, there have been piece-meal changes to the Constitution, providing for momentary power-shift demands; and these have emanated mainly from government although sometimes also from Parliament or from civil society.

The effect is that the Kenya Constitution, today, is in an essentially patchwork form. In this form it carries only somewhat truncated principles; rather inchoate lines of political inspiration; and in a number of cases, apparent contradictions (e.g., cf Sections 23-25 on the one hand and Sections 107-108 on the other, on the subject of the exercise of Presidential prerogatives). This is likely to undermine the Constitution as a dependable legal instrument for the protection of the individual, and for assuring the decisive conduct of governmental business.

There is thus a manifest case for a professionally conducted review of the Constitution, leading to the enactment of a reformed instrument benefiting from the lessons of history, incorporating the needs and priorities of the people, and incorporating the more progressive developments on the international scene.

The Kenya Constitution ought to be subjected to a reform initiative - that is, the rectification of those aspects of the governance scheme, which 38 years of experience have shown to be unsatisfactory. In this process a more professional assessment of the Constitution would also be done, to the intent that the document be freed of any potential contradictions. A more rational and coherent constitutional document would lend itself better to the tasks of interpretation by the courts and by the Speaker of the National Assembly. This professional task should run alongside a substantive review process which relates the Constitution's power allocation scheme to governance lessons received over the years.

## **5. Proposing a Constitutional Reform Terrain**

### *(a) Broad Reform Issues*

It is to be assumed that the primary interest of the Kenyan people in securing a reformed Constitution will rest upon certain broad social welfare issues. In any country, citizens do expect governance systems to secure values such as equity, justice, peace and tranquility. The attainment of these ends is intimately linked to the management of public welfare issues - in particular economic and social issues. Therefore, the critical issues underlying the-procedural arrangements and juridical logistics of the constitutional order are:(i) access to economic sustenance; (ii) equity in the distribution of economic resources; and (iii) social empowerment for a better quality of life.

The realization of the above-mentioned attributes is a function of power allocation and power management. These, therefore, are at bottom, the ultimate concerns of a Constitution. Hence a Constitution establishes the most crucial public institutions, defines their functions, and

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assigns them powers. The Constitution, then, must address the issue of the relationships among the various organs thus established, and must deal with checks and balances. There are, perhaps, no idea and specific checks and balances that apply to all countries. Appropriate checks and balances, in their precise details, for any particular country will depend on the social and political experiences of that country; the broad outlook of its people; that country's moral ethos, and its fundamental policy goals.

Is it possible to identify Kenya's primary policy goals? The exercise would have to be undertaken in the context of the country's essential survival and welfare needs, and in particular in relation to its economic status. Kenya's largely agricultural economy cannot attract more than a limited amount of value - added, as the international markets of exchange have placed much higher value on industrial products, services, scientific technology and all kinds of invisible earnings. It is unavoidable that the country cannot, in these circumstances, fully meet the economic welfare needs of all its 30 million people.

Kenya must work towards industrialization, greater trade, and the development of marketable services. The country's desirable governance system, therefore, must be one that frees the national capacity of unnecessary impediments i.e. the capacity for the conception of policy and programming, in the interest of industrial and related development. Constitutional reform should be guided by such practical concerns, as it addresses current constitutional and power arrangements. In this regard the Constitution in its reformed character, should underline such values as prudent utilization of resources, technological growth, professional management of institutions, public participation in major decisions affecting

public interests, openness and accountability.

These values are not only conducive to the enhancement of social welfare and for the achievement of development goals, but they also coincide with well-recognized principles of democratic empowerment, constitutionalism and good governance. There is thus an important meeting-point between what must be regarded as Kenya's constitutional ideals, on the one hand, and the common principles of legality, accountability and good governance which now enjoy distinguished international status as represented by the many Conventions on matters such as human rights, children's rights, gender equality, etc.

Such broader background issues should inspire the terrain of constitutional reform in Kenya. In that context, the Commission should address certain specific matters, reflect and consult upon them, adopt any emerging consensus in relation to them, and ultimately formulate a report and draft Constitution that addresses them squarely.

### ***(b) Identifying Areas of the Constitution for Reform***

#### *i) General Comments*

As the Commission visits the different parts of the country, it can expect to receive indications on the direction of reform in relation to particular issues. However, it is more likely that the responsibility of identifying the most critical public issues, so that the people may make suggestions for reform in relation to these, will fall on the Commission. This is because issues of law and the development of constitutional

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principles tend to be rather too professional and technical in character to be fully knowable to the ordinary person.

It must, therefore, be one of the primary objects of the Mombasa Workshop to provide an opportunity for brain -storming on the key constitutional reform issues of the day. Since this workshop is, on that account, in many ways unique, its proceedings should be regarded as the seed for the reform process. It is thus to be expected that the points of agreement emerging from the Workshop deliberations will be carefully recorded, and made the conceptual reference-point for formulating issues and questionnaires, in very simple terms, to be placed before the people for opinions and recommendations as the Commission visits the various parts of the country.

None of the many papers to be presented at the Workshop can claim to identify all the critical constitutional reform issues. Indeed, not even all of them put together will constitute the exhaustive constitutional reform agenda. And this paper can make no pretence of comprehensiveness in its identification of the crucial constitutional reform issues. It will, however, set out with conviction, those areas of the Kenyan constitutional domain which do claim the Commission's attention. The expectation is that the Commission will anchor its work upon such issues and make them, in addition to others, a point of full-scale consultation with the Kenyan people, prior to the preparation of its report and the drafting of a new Constitution.

#### *ii) Articulating the Spirit of the Constitution*

Kenya's Constitution in its present form reads like an ordinary legal document. Apart from establishing governmental agencies and describing their procedures and modes of operation, it provides for certain

individual rights (e.g. in Chapter V (fundamental rights and freedoms) and Chapter VI (citizenship)). Where specific rights are thus provided for, the responsibility for interpretation rests with the judiciary, which, it is clear, is expected to use its traditional common law methods, without any particular policy guidance. This character of the Constitution makes it, in almost every respect, a juridical document and an instrument in the operation of the conventional legal process. It will be necessary for the Commission to consider whether or not the Constitution should be given a stronger political character - i.e., that it should also contain directive principles of state policy to guide and condition the professional work of the lawyers.

The new generation of African Constitutions (e.g. the Constitution of the Republic of Namibia (1991), the Constitution of the Republic of South Africa (1996); the Constitution of the Federal Democratic Republic of Ethiopia (1994); the Constitution of the Republic of Uganda (1995); the Constitution of Burkina Faso (1991), which maybe said to be quite progressive in many respects, have invariably set out national guiding principles to serve as the reference point in the implementation of the specific provisions of the Constitution.

For example, the Namibian Constitution commences with a Preamble, which runs as follows:

"WHEREAS recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace; and WHEREAS the said rights include the right of the individual to life, liberty and to the pursuit of happiness, regardless of race, colour, ethnic origin, sex or religion, creed or social or economic status; and

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WHEREAS the said rights are most effectively maintained and protected in a democratic society where the Government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary,

WHEREAS these rights have for so long been denied to the people of Namibia by apartheid, racism and colonialism;

NOW THEREFORE, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic".

On similar lines, the Constitution of Burkina Faso commences with a Preamble in the following terms;

"We, the Sovereign People of Burkina Faso; Being conscious of our responsibilities and our obligations towards history and humanity; COMMITTED to the preservation of our democratic gains; DEVOTED to the preservation of these gains and having the will to build a State that guarantees the enjoyment of collective and individual rights, liberties, dignity, safety, welfare, development, equality and justice as fundamental values of a pluralist society

APPROVE and ADOPT the present Constitution with this Preamble forming an integral part thereof

The Constitution of the Republic of South Africa contains a Preamble, which states in part:

"...We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place in the family of nations...."

The Ethiopian people, in the Preamble to the Constitution of the Federal Democratic Republic of Ethiopia, are -

"Strongly committed, in full and free exercise of our right of self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic, order, and advancing our economic and social development;

Firmly convinced that the fulfillment of this objective requires full respect of individual and people's fundamental freedoms and rights to live together on the basis of equality and without any religious or cultural discrimination....."

In the African Constitutions considered above, the Preamble serves not just as an entry-point into the text of the Constitution, but as a set of declarations recalling a nation's past historical experience and committing it to a new life in which past errors are eschewed. These declarations are intended to set the tone for the nation's constitutional practice, and to inspire the people and their public servants to be guided in certain approved directions.

The Constitution of the Republic of Uganda has adopted a slightly different approach in

its entry-point into the text. Apart from its short Preamble, it devotes as many as 29 separate articles to "National Objectives and Directive Principles of State Policy".

In its Preamble the Ugandan Constitution, as is to be expected, recounts its exceptionable history of "tyranny, oppression and exploitation", and restates the people's commitment to "building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress."

The Uganda Constitution's "National Objectives and Directive Principles of State Policy" are quite detailed and provide for political objectives (such as democratic principles, national unity and stability, national sovereignty, independence and territorial integrity); the protection and promotion of fundamental and other human rights and freedoms (e.g. gender balance, rights of the aged, management of national resources, right to development, role of the people in development); social and economic objectives (e.g. social and economic objectives, the role of women in society, the dignity of persons with disabilities, recreation and sport, education, protection of the family, medical services, clean and safe water, food security, natural disasters); cultural objectives; accountability of office-holders; the environment; foreign policy objectives; and duties of the citizen.

It is, perhaps, right that Kenya's constitutional development should borrow a leaf from the new generation of African Constitutions such as those considered above. If this proposition is accepted, then our new constitution should ideally, have an entry point marked by a clear and focused statement of directive principles of state policy. The purpose would be to

acknowledge the broad social context in which Kenya's Constitution must operate, to identify the ideal social policy choices that should guide the constitutional and legal process, and to provide inspiring beacons for the people in their political life, and controls and accounting and responsibility trajectories for officials in whom public power is reposed.

### *iii) The Unitary versus the Decentralized Governance Structure*

The Unitarian and the federalist themes are ingrained in Kenya's post-independence history and, even on this account alone, the Commission needs to address the question. In addition, this theme has already been recurrent in Kenyan Constitutional talk. Therefore, the Commission should formulate specific queries regarding the two alternatives in governance structure, to be put to the people throughout the county.

The issue is still somewhat blurred in the minds of the interlocutors, and more certainly so, as regards the understanding of ordinary Kenyan people. Since government in Kenya has been conducted on the basis of a unitary constitutional structure since the mid -1960s, most citizens alive today have known no other practice. It can thus be concluded that the vast majority of Kenyans have had a feel of the unitary Constitution. But they know little about federalist systems. Therefore, the current debate regarding majimbo is not yet fully understood by the people of Kenya and they will be unable to make any useful contribution about it during the forthcoming consultations with the Commission -i.e., in the absence of effective civic education on majimboism.

It should be made clear that majimboism is neither a term of art, nor a subject already made conceptually clear by any scholar or writer at any time. It should be understood



that majimbo essentially looks towards the decentralized system of government. Decentralized governmental structures work well in many countries of the world - the U.S.A., Switzerland, Belgium, etc. But in those countries national integrity is by no means compromised; there are more than sufficient resources to keep the decentralized units permanently running; all the people in the nation have full freedoms of movement residence and work throughout the federal units; and the rule of law and democracy are in full play to protect the dignity of all the people wherever they are in those countries.

For Kenya, it will be relevant to consider the political psychology and the social behaviour that would be evoked by the subdivision of the country into semi-federalized units; the human, material and institutional capacity in place to ensure the efficient running of the decentralized units, the need to ensure the freedom and dignity as well as the right to work of all Kenyans where they may choose within the Republic; etc. All such issues should be identified and the people of Kenya asked, in simple language, whether they would prefer the unitary or the semi-federalized constitutional order.

*iv) The Executive and its Impacts upon and Implications for the Entire Governmental Process*

Kenya set off at independence with the dual Executive: the Queen (represented by the Governor-General as Head of State and Commander-in-Chief of the Armed Forces), and the Prime Minister (Head of Government and leader of the largest political party in the National Assembly). This contained an element of check-and-balance; the Head of State held a ceremonial position while the Head of Government was the "efficient" Executive organ. Yet the instruments of constitutional action were in

the custody of the Head of State. Therefore, the real power-holder had to work in consultation with the constitutional Head (the Head of State).

All the thirty-some constitutional changes that took place from the date of inauguration of Republican Status (December 12, 1963) boil down to one reality in terms of governmental power: the pluralistic check-and-balance constitutional model of 1963 was debunked, and replaced with a monolithic constitutional structure in which Head of Government merged with Head of State, in the person of an Executive President with the fullest control over government, and very substantial influence and control over Parliament, in addition to constitutional authority over the make-up of the Judiciary. This scenario is indeed the very kernel of the agenda of Kenya's current process of constitutional reform.

The Commission will need to undertake a careful study of the several possible executive leadership scenarios: (i) the single leadership vested in an Executive President elected by the people and essentially accountable to the voters; (ii) a diverse executive leadership, with President and Prime Minister, with executive powers either remaining with the President (e.g. Uganda, Zambia, etc) or with the Prime Minister (e.g. India, Ethiopia-, Germany, etc); (iii) a French-style Presidency with a fixed Septennat, with a Prime Minister responsible to Parliament; (iv) a South African type - of Presidency in which election is by Parliament, but the President is an executive President; (v) an enlarged team at the top, with a President, one or more Vice-Presidents, a Prime Minister with one or more Deputy Prime Ministers.

These possibilities should be carefully considered and expressed in simple language, so as to facilitate the enlightened

expression of opinion by the people as the Commission consults with them. The explanations should set out both strengths and weaknesses of the several alternatives, and the people should be given abundant opportunity to indicate their preferences. They should be encouraged to give reasons for their preferences.

The Constitution as it stands today carries potential conflicts regarding, firstly, the mandate to establish Government Ministries, and secondly, the prerogative to hire and fire in the civil service. Should it be for the Executive to determine the number, name and remit of Government Ministries, or should this be done by parliamentary enactment? Should the Executive Head have the fullest freedom in hiring and firing, or should this matter be handled by independent agencies established by the constitution?

*v) Constitutional Interpretation and the Judicial Hierarchy*

It is not clear today, under the Constitution, whether the highest court, namely the Court of appeal, has a final authority in constitutional interpretation. The term "constitutional court " is used loosely and largely informally to refer exclusively to the High Court of Kenya, which falls at the second level in the hierarchy. This confusion must be removed. The task should involve an inquiry into the concept of a Supreme Court. Should there be one? What should be its size? What volume of work is it likely to have? How should it relate to the other courts? Should there then be a Court of Appeal? What should be its size? How should it conduct its operations? What should be the size of the High Court Bench?

*vi) The Foreign Affairs Power*

As the globalization process proceeds apace, Kenya has to deal with numerous states, International Organizations and other international bodies, largely within the framework of treaty law. Such law must be negotiated, signed and adopted, ratified, and implemented within the national jurisdiction. This means that the acts done with regard to treaty law "out there" have implications for Kenyan constitutional processes involving her Executive; her Parliament and her Judiciary. Now although the exercise of the foreign affairs power is so intrinsically constitutional in character, up till now this subject has virtually been left entirely in the hands of the Executive, without any substantial constitutional provision nor any detailed scheme of legal regulation. The Commission should now consider whether or not certain clear procedures regarding the foreign affairs power should be set out in the Constitution. Specific questionnaires may be formulated for eliciting public opinion on this matter.

*vii) Emergencies - Natural and Human - Originated*

Ever since the wave of political reform set in, in the early 1990s, the position of emergencies have been thrown into disarray. No country can permanently exclude the occurrence of emergencies, and particularly natural-disaster emergencies - such as earthquakes, crippling droughts, large - scale flooding, outbreak of epidemics and pandemics, etc. Whenever such things occur, Government must take quick protective action. To some extent the Executive can work closely with Parliament in such situations; but most of the time the Executive must take responsibility for decision-making. Of course, the danger of abuse of power in those situations is ever present.

Therefore, the Commission should work towards incorporating in a new Constitution

a progressive, workable and effective law on natural disaster emergencies. This must be expected to give certain definite empowerment to the Executive, subject to well-designed control devices.

But we should note that the kind of progressive and people-oriented constitution that we contemplate which is to be the purveyor and reinforcer of democratic principles on account of its openness, visibility and predictability, always opens the door to the "bad guy" who wants to defeat it and to steal the power of governmental control. We are all familiar with military coups, large-scale political insurrections and secessions in Africa (e.g. Republic of Congo; Republic of Somalia, etc). Such developments create human-originated emergencies, in the course of which serious harm to life and limb may come about, to the grave detriment of the people who are, by a new Constitution, seeking to achieve democratic governance in the context of constitutionalism and the rule of law.

The Commission will need to provide in their report for clear procedures, for dealing with such emergency situations. The guiding principle should be to ensure that any special empowerment reposed in the Executive is counter-balanced by responsible consultation procedures involving the National Assembly, and leaving room for judicial adjudication.

#### *viii) Multipartyism and Collective Cabinet Responsibility*

Parliamentarianism is now an essential element in Kenya's constitutional heritage. But this system, traditionally, has been integrally lodged into the multiparty system. The multiparty system may, perhaps, now be regarded as an evolving fixed principle of Kenyan constitutional practice. Yet, considering that we have at the moment

more than 40 registered political parties, we must recognize that virtually none of them could have the desired constitutional impact and functioning. Unless the number of these parties falls to two or three or four or five only, the essential political environment for Kenya's parliamentarianism could only be provided by the coalition system, in which constellations of parties could claim legitimacy as the basis of control and exercise of executive power subject to parliamentary control.

The Commission, therefore, needs to consult with the people on the subject of party coalitions, and to have suitable provisions on the subject made in their final report for constitutional reform. .

The concept of collective cabinet responsibility, which is provided for in sections 16 and 17 of the present Constitution needs to be re-visited by the Commission. For parliamentary government to function properly, the cabinet must stand or fall together, but its binding formula cannot be the prescription of the Constitution, as this will defeat the voluntariness of party formation and party alignments in and outside Parliament. A party in government, or any constellation of parties in government, should recognize that their unity purpose of holding the reins of power is a political and not juridical act. Only this recognition will enable the National Assembly as a constitutional entity to play its check-and-balance role in relation to the Executive's exercise of power.

Linked to this question are the no-confidence vote and the censure vote. Some have argued in Kenya's media that the calendar of Parliament should be determined by law, and that there should be no occasion for a sudden dissolution; or even prorogation. If we adhere to the recognized parliamentary tradition, then we cannot abolish Parliament's power to bring a no-

confidence or censure vote against the Executive and to terminate the life of the Executive any time. Yet if this position prevails, then the Executive's power to prorogue or dissolve Parliament cannot also be abolished.

The Commission should consult with the people of Kenya, on whether we want to keep the parliamentary heritage, or whether we want to go the American style of separation of powers in which Congress runs through its full term and the President and his Vice-President remain office assuredly up to the end of their four year terms.

#### *ix) Second Chamber*

Generally, second parliamentary chambers are an inseparable concomitant of federal constitutional structures. This is because the disparate interests to be protected in the federal states, must also have a forum of expression at the national level, hence the Senate to represent the federal units or the provinces, etc. Such was also the case under Kenya's Independence Constitution which provided for semi-federal Regions. However, second chambers can be adopted independently of federal systems - as is the case, for different historical reasons, with Great Britain's House of Lords. It will be in order for the Commission to canvass with the Kenyan people the need for a second parliamentary chamber. There may be a good case for it, dependent on the social vitality of such interests as it may come to represent.

#### *x) The Law of Citizenship and the Issue of Sex Discrimination*

The Commission will need to address the law of citizenship, as contained both in the Constitution and the Kenya Citizenship Act. Although the Constitution gives protection against sex discrimination, it (and the Kenya Citizenship Act) results in discrimination

against Kenyan mothers who, while abroad, have a child with foreign fathers as their issue, are not regarded as Kenya citizens. This does not apply where the child is born of a Kenyan father who is a broad and a foreign mother.

One other area of the citizenship law calls for the Commission's attention. Section 94 of the Constitution empowers the minister to deprive a person of citizenship, in those cases where citizenship was obtained through registration or naturalization. In this case the Minister acts on his or her own judgment as to whether the person in question "has shown himself by act or speech to be disloyal or disaffected towards Kenya", *inter alia*.

The Commission should consider the full meaning and effect of the concept of citizenship. Should any citizen be exposed to the risk of loss of citizenship, just on account of the category of his or her citizenship? Should the categorization of citizenship be a constitutionally relevant matter in the people's access to the State's protection? Or in relation to occupancy of particular public offices, etc? The Commission should deliberate upon this question and should, if possible, seek the people's opinions on it.

#### *xi) The Fundamental Rights Provision of the Constitution*

In the last decade or so, a number of international legal instruments have been adopted (to some of which Kenya is a Party) which introduce new fundamental rights. Relevant examples are the United Nations Convention on the Rights of the Child (1989); and the African Charter on the Rights and Welfare of the Child (1990). The Commission Will need to identify such Conventions and to endeavour to draw from them such elements as would serve to enrich

our constitutional law on the fundamental rights of the individual.

There has also been judicial pronouncement on the modalities of enforcement of fundamental rights under the Constitution. The Commission should consider whether such rights should be "self-executing", or whether their enforcement should be contingent on certain decisions and acts taken or done by particular officers of the State.

*xii) Nomination of Members of Parliament*

The rationale of Parliament as a constitutional organ is that it is representative of the people. Election, therefore, ought to be the sole path leading to membership of Parliament. However, in Kenya's constitutional history right from the later years of the colonial period, a certain number of legislators have earned their membership through some mode of appointment.

The Commission will need to return to this question and to take the people's opinion about it. The nomination of some parliamentarians obviously compromises the elective principle and, furthermore, Kenyan's experience has not yet raised a rational and generally - agreed basis for the nominations that have been made in the post-independence period.

*xiii) Should the Attorney General be a Public Officer Holding a Constitutional Office, or should he be an Elected Member of Parliament?*

Kenya's Constitution has held on to certain well-established principles of the British Constitution. One of these is the regular parliamentary elections. Another is the centrality of Parliament in relation to law making and to financial approvals. But one

clear departure from the British tradition has been the protection of the office of Attorney General by the Constitution rather than treating this office as a purely political office to be occupied by a "minister" appointed by the Prime Minister from the government party team that wins election at the polls. In Britain, both the Attorney General and the Solicitor-General are MPs and are assigned these responsibilities on the basis of their known competence and their potential resourcefulness within the Government-ruling party team.

Now although Kenya's Attorneys-General are accorded constitutional tenure and are members of Parliament and chief legal advisers for Government at Cabinet level, they were not candidates for election and they have attained their positions purely by appointment. This means they sit astride the political stall and the professional public service stall. Experience has shown that this duplicity is not readily understood by most people, apart from standing potential risks of compromising either the constitutional, public service mandate or the political expectations. The Commission needs to give further thought to this issue, and to elicit the people's opinions on the matter.

The integrity of the electoral process is fundamental to the success of parliamentary democracy. A critical organ in the conduct of national and local elections is the Electoral Commission, which is provided for in Section 41 of the Constitution. It is possible that this Commission is far too large for efficient operations, quite apart from the fact that the criteria for service as an Electoral Commissioner may need to be carefully considered. So many times during elections, accusations have been made against the Commission, with charges that free and fair elections were not realized. It will be necessary for the Commission to reconsider the composition and functioning of the Electoral Commission, and

consultations with the people on this subject will be necessary.

*xiv) Public Finance*

Virtually every year the Controller and Auditor-General has made critical reports on the management of public funds. But any "control" through such reports has been too late, because misappropriations or over-expenditures had already taken place quite a while back. It will be necessary for the Commission to have another look at Chapter VII of the Constitution, which provides for parliamentary control over public finance. The people should have an opportunity to make their contribution in this matter.

*xv) Land and Other Natural Resources*

The broad natural resource question should be taken together with environment and environmental rights. The environment not only provides essential life's amenities, but also gives vital resources for the social welfare of the human being. Kenya is already party to a large number of international environment conventions, which impose a duty to protect the environment and its resources. The Commission should give attention to the subject "environmental rights", and consult with the people to the intent that certain provisions be included in the reformed Constitution regarding right to environment. It should be noted, in this regard, that every one of the new-generation African Constitutions has made provisions for environmental protection and the quest for sustainable development.

As regards land specifically, Chapter IX of the present Constitution is devoted to "Trust Land", to the exclusion of other categories of land. The Commission needs to consider whether land as such should be provided for at all, in such detail, in the Constitution. Would it not be appropriate to deal only

with fundamental juridical issues such as property rights in general, but leave the details of land law to ordinal statutes? The Commission will need to take the views of the public on this issue.

*xvi) Public Office Holding and Transitional Arrangements*

In the relatively monolithic constitutional order of the 1960s, 1970s and 1980s, there was an apparent reluctance to make free-flowing power-change arrangements within the Constitution. On this account, the element of luck has been depended on, to secure that opportunistic disruptions do not occur at times of change of leadership. Older countries such as the USA, the U.K. and others have practically fail-safe arrangements for orderly power transfers. The Commission should draw lessons from these countries, consult with the Kenyan people, and propose sound power - transfer arrangements that will guarantee stability and continuity in existing democratic structures.

*xvii) Possible Creation of a New Check - and - Balance Institution - Ombudsman*

Several commissions or committees have since the early 1970s recommended the establishment of an Ombudsman institution in Kenya. However, the play of politics throughout this period has not favoured the Ombudsman idea, and indeed all debates on the subject have not been conducted with the advantage of the full facts regarding the merits or demerits of the institution.

The Commission needs to conduct and facilitate an open debate on this matter. It should take the people's opinion and make appropriate recommendations.

The Ombudsman institution has existed in the older nations for many years: in the Scandinavian countries; in Great Britain; in

New Zealand, etc. Even in the countries of Africa the Ombudsman has been generally accepted, and this public institution is well established in Tanzania, Uganda, Zambia, etc.

The essential purpose of the Ombudsman is to check administrative abuses which take many forms, including incompetence, discourtesy, dilatoriness, rudeness, denial of service, corruption in public office, etc. In most developing countries such as Kenya, the ordinary person finds himself or herself completely helpless before the powerful, secretive and faceless bureaucrats. Indeed, most of the injustice the common person ever comes across is at the hands of administrators. Unfortunately, there is no ready access to the judicial process for these wrongs.

The institution of Ombudsman is a clear option in any scheme for remedying the sufferings of the common person who has to deal with administration. In the event that the Commission finds it to be the view of most people that the Ombudsman institution be set up, consideration will have to be given to the best way of providing for it in

the Constitution. The structure of this institution would have to be formulated in such a manner as would give effectiveness; and a decision would have to be taken as to the reporting procedure for the Ombudsman, and the sanctions to be attached to the decisions of the Ombudsman.

## **6. Concluding Remarks**

The object of this paper has been to contribute to the Commission's definition of its work agenda as it discusses the path of reform with the people, in accordance with its mandate. Some of the potential matters of reform are rather technical in nature, and soliciting the public's view on them may prove problematic. It will be desirable that the Commission formulates simple questionnaires addressing the various areas of concern, and it should then communicate the specific questions to members of the public who will state their preferences in clear, specific responses. On the basis of such consultations it will be possible to determine the more popular position on the respective constitutional issues. The popular opinion should then guide the Commission in the formulation of a draft constitution.

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## **HOLDINGS ON KENYA'S CONSTITUTIONAL HISTORY AT THE KENYA NATIONAL ARCHIVES AND DOCUMENTATION SERVICE**

**M. Musembi**

### **1. Introduction**

The Kenya National Archives and Documentation Service was established by an Act of Parliament in 1965. Before that time, it had existed as a small section of the Chief Secretary's Office since 1956. The main function of this Department is to "take all practicable steps for the proper housing, control and preservation of all (valuable) public archives and public records." The records are preserved for reference by the Government itself, and for use by researchers. In the course of time, we have acquired and preserved an immense documentation on this Country. The records cover a very wide range of subjects, including matters relating to the constitutional history of Kenya.

For many years, archives/records have been recognized as a most important source of history. Their "superiority" over other sources especially in preserving data and statistics is already very well known to all of us. They provide the means through which historians evaluate past events and controversies. They also provide the means through which society is able to appreciate its past successes and failures. Professor Edward H. Carr was attempting to emphasize this strong relationship between the past and the present when he observed that the "past is intelligible to us only in the light of the present; and that we can fully understand the present only in the light of the past"<sup>1</sup>. This is quite true for the constitutional history of Kenya. If we want to positively contribute to the current debate

on the constitutional review process, we should attempt to understand the

constitutional history of this country, and especially from 1960 onwards.

The Kenya National Archives and Documentation Service has very few records specifically on constitutional history of this country up to about 1960. We do not, for example, have much materials on the Lyttelton and Lennox-Boyd Constitutions. But as would be expected, the situation is much different from 1960 onwards. We have many records from that time onwards. My presentation will therefore focus on the period 1960-1999.

### **2. From Lancaster House Conferences to Independence**

Towards the end of 1950's, it was clear that Kenya was going to get independence in the next few years. Then, as it is now, Kenyans were concerned about the kind of constitution which the country was going to have. In the course of time, many records were created to document these concerns and anxieties. The records of the Lancaster House Conferences of 1960 and 1962 are the most comprehensive. Below are few examples of these records:-

1. Kenya Constitutional Conference, Lancaster House, London, 1960, *Committee on Safeguards, 2nd-17th February 1960.*
2. Kenya Constitutional Conference, Lancaster House, London, 1960, *Constitutional Proposals, 4th February 1960.*

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<sup>1</sup> E.H. Carr, *What is History*, Penguin Books, London 1961; page 55



3. Kenya Constitutional Conference, Lancaster House, London, 1960, *Second Plenary Session*.
4. Kenya Constitutional Conference, Lancaster House, London, 1960, *Third to Fourteenth Plenary Sessions*.
5. Kenya Constitutional Conference, Lancaster House, London, 1960, *Committee on the Executive*.
6. Kenya Constitutional Conference, Lancaster House, London, 1960, *Historical Survey of the Asian Community in Kenya*.
7. Kenya, Constitutional Reforms, 1960 Constitutional Conference. *This file also contains the report of the 1960 Constitutional Conference*.
8. Kenya Constitutional Talks, KANU Delegation in London.
9. Kenya Constitutional Talks, Joint KANU/KADU Committee.
10. Kenya Constitutional Conference, Lancaster House, London, 1962, *Committee on Bill of Rights*.
11. Kenya Constitutional Conference, Lancaster House, London, 1962, *Committee on the Structure of Government: Sub-Committee on Central Government*.
12. Kenya Constitutional Conference, Lancaster House, London, 1962, *Committee on the Structure of Government: Sub-Committee on Governing Authorities*.
13. Kenya Constitutional Conference, Lancaster House, London, 1962, *KANU Delegation*.
14. Kenya Constitutional Conference, Lancaster House, London, 1962, *KADU Delegation*.
15. Kenya Constitutional Conference, Lancaster House, London, 1962, *The Maasai Delegation*.
16. Kenya Constitutional Conference, Lancaster House, London, 1962, *Kenya Coalition*.
17. Kenya Constitutional Conference, Lancaster House, London, 1962, *The Working Party*.
18. Kenya Constitutional Conference, Lancaster House, London, 1962, *The Report of the Conference*.

Now, while the Lancaster House Conferences were going on, the Colonial Government in Nairobi developed contingency plans for the purpose of being ready. The Council of Ministers, the equivalent of today's Cabinet discussed in great detail plans for a central government with regional administration just in case this was going to be the outcome of the Lancaster House Conferences. Available evidence clearly indicates that very elaborate plans had been made well in advance to establish a decentralized system of government (Majimbo). Almost all ministries and major departments, including the Public Service Commission were covered by these advance plans. There are two files detailing these contingency plans as follows:-

- (a) Constitutional Meetings 1962, Papers - U.SEC.1
- (b) Constitutional Meetings, Minutes and Agenda -U.SEC.2

The Kenya Constitutional Conferences in London are very well documented. We have

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about one hundred (100) files on the subject in our custody. To this immense documentation must be added a few publications, as well as press coverage by the Standard and the Daily Nation Newspapers. The newspapers are available in microfilm. All these materials are available for consultation.

The final product of the lengthy Lancaster House Conferences was the landmark document titled "The Kenya Independence Order in Council 1963". It was published in the Kenya Gazette Supplement No. 105 of 10th December 1963.

### **3. The Kenya Independence Order in Council 1963 and Subsequent Amendments**

The Kenya Independence Order in Council 1963 came into operation immediately before 12th December 1963, the date Kenya became independent. Among other things, it provided for:-

- Executive Powers.
- Establishment of Regions.
- Legislative Powers of Regional Assemblies.
- Procedure of Regional Assemblies.
- Executive Authority of Regions.
- Financial Procedure of Regional Assemblies.
- Financial Relations between Centre and Regions.

As we all know, the Kenya Independence Order in Council 1963 and the Kenya Independence Act 1963 were not in force for a long time. Available evidence clearly indicate that the transition from a centralized administration to one with a strong regional structure was not as smooth as expected. Minutes of Cabinet meeting held on 4th June 1964 state in part as follows:-

"Apart from the fact that the first months after Independence are a period of transition, the Kenya Constitution provides for one year of transition both in the transfer of responsibilities to Regions and in the financial arrangements governing the Regional and Central Governments' revenues and budgets".

It was also conceded at the time of Independence that Kenya had acquired one of the most complicated Constitutions ever given to a newly independent State.

"My Government has therefore been watching very closely the working of the Constitution as well as all the developments associated with this transitional period. In this regard it is proposed to complete the general review of the Constitution later this year. Under the present Constitution we are experiencing difficulties and problems which must by now be obvious to all.

In view of all the changing circumstances of the present time, and in particular of the review now being made of Kenya's Constitution, the Government felt it necessary in the national interests to extend the period of transition in respect of the financing of regional services, for a further six months, namely from 1st July to 31st December 1964. The Government is convinced that the transitional period provided for before Independence has proved too short, ... and it is expected that this decision will be loyally accepted as an inevitable consequence of the transitional phase in our national

fortunes in which we now find ourselves."<sup>2</sup>

The above legal instruments (The Kenya Independence Order in Council 1963 and the Kenya Independence Act 1963) were amended just a year or so later through the Constitution of Kenya (Amendment) Act, 1964. For the purposes of this paper, it is enough to state that the national experiences of this period are also fairly well documented. However, the records are generally scattered in various records groups. A serious researcher should have no problem to access them.

Since 1964, the Constitution of Kenya has undergone through a number of amendments as indicated in the Appendix. The reasons why the amendments were introduced were given when the bills were being introduced in the Parliament. The diverse views of Members of Parliament for each amendment were captured in the Hansard and are also available - so long as a researcher knows the dates in which a particular amendment was introduced and debated in Parliament. The Kenya National Archives and Documentation Service has kept a record of almost all Parliamentary debates in hard (paper) copies or microfilms.

#### 4. Access

Generally, public archives which have been in existence for a period of not less than thirty (30) years may be made available for public inspection. Most of the files described in this paper have already attained thirty years and are already available to researchers. The Constitution of Kenya (Amendment) Acts, the Parliament debates, and publications on the subject have all along been available for public inspection. Interested persons are encouraged to come

and consult them. Those with Internet connectivity can also visit our website and sample the indexes on the constitutional history of Kenya.

Recently, there has been increased interest on the Kenya Independence Order in Council 1963, the so called "Majimbo" Constitution. We have considered the possibility of scanning the whole document, as well as subsequent amendments, and then making them available in our website (<http://www.kenyarchives.go.ke>). The results have not been very encouraging. The available scanning technology in Nairobi is not accurate. A lot of editing would be required. Subject to availability of funds, we are determined to achieve this objective.

#### 5. Conclusion

A national archives is expected to act as a "Memory of the Nation". Such a memory is obviously critical at a time like this when we wish to reflect on the history of our constitution. We need to have historical facts in order to be able to reflect on such issues. In my view, a person who wishes to positively contribute to the constitutional review process will often be impaired in his/her judgements if he/she does not have the "minimum" background information. The Kenya National Archives and Documentation Service has a very substantial amount of this background information. The Department now wishes to invite interested persons, of course including the Commissioners of the Constitutional Review Commission, to make use of this vital resource as we prepare to give our views on our Constitution.

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<sup>2</sup> Constitution: The New Regions (Ministry of Legal Affairs, Ref. No.CONF/CON/100/3)

**APPENDIX****CONSTITUTIONAL AMENDMENTS SINCE INDEPENDENCE**

1. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 28 OF 1964
2. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 14 OF 1965
3. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 16 OF 1966
4. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 17 OF 1966
5. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 18 OF 1966
6. THE CONSTITUTION OF KENYA (AMENDMENT) NO. 4 ACT NO. 40 OF 1966\*
7. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 4 OF 1967
8. THE CONSTITUTION OF KENYA (AMENDMENT) NO. 2 ACT NO. 45 OF 1968
9. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 5 OF 1969
10. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 2 OF 1974
11. THE CONSTITUTION OF KENYA (AMENDMENT) NO. 2 ACT NO. 10 OF 1974
12. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 1 OF 1975
13. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 14 OF 1975
14. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 1 OF 1979
15. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 5 OF 1979
16. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 7 OF 1982
17. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 7 OF 1984
18. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 6 OF 1985
19. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 14 OF 1986
20. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 20 OF 1987
21. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 4 OF 1988
22. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 17 OF 1990
23. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 10 OF 1991
24. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 12 OF 1991
25. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 6 OF 1992
26. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 7 OF 1997
27. THE CONSTITUTION OF KENYA REVIEW ACT NO. 13 OF 1997
28. THE CONSTITUTION OF KENYA REVIEW COMMISSION (AMENDMENT) ACT NO. 6 OF 1998
29. THE CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 3 OF 1999

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\* Not available in the Archives

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# CONSTITUTING THE STATE TERRITORY, CITIZENRY AND NATIONAL PHILOSOPHY IN A CONSTITUTION

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**"When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to separation [change]...." (The American Declaration of Independence)**

## 1. Introduction

The Constitution of Kenya Review Commission established under Section 6 of the Constitution of Kenya Review Act<sup>1</sup> (hereinafter referred to as "CKRC") is the principal organ through which the Constitutional review process<sup>2</sup> is being conducted.

The process of reviewing the Constitution has started from the premise that the existing Constitutional framework, despite having served the country for some thirty odd years needs alterations and changes. This is to ensure that the Constitutional framework guarantees freedom and democracy and is in tune with modern realities.

<sup>1</sup> Chapter 3A of the Laws of Kenya

<sup>2</sup> See the Constitution of Kenya Review Act Chapter 3A of the Laws of Kenya which provides thus at section 4;

- (1) The organs through which the review process shall be conducted shall be-
  - (a) the Commission; and
  - (b) the National Conference
- (2) The organs specified in subsection (1) shall not be dissolved except in accordance with section 32

Section 3 of the Act provides that the object and purpose of the review and eventual alteration of the constitution is to secure the following:-

- (a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
- (b) establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;
- (c) recognizing and demarcating divisions of responsibility among the state organs of the executive, the legislature, and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;
- (d) promoting the people's participation in the governance of the country through democratic free and fair

- elections and the devolution and exercise of power;
- (e) respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities;
- (f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources; and
- (g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights.

Section 5 of the same Act then spells out principles that shall operate as a guide to the organs through which the review process shall be conducted. It provides thus:

- (5) In the exercise of the powers or the performance of the functions conferred by this Act, the organs specified in section 4 shall-
  - (a) be accountable to the people of Kenya;
  - (b) ensure that the process-
    - (i) accommodates the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;
    - (ii) provides the people of Kenya an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution.

- (iii) is, subject to this Act, conducted in an open manner;
- (iv) is guided by respect for the universal principles of basic human rights, gender equity and democracy; and ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya.

Conscious of the objectives and guiding principles, this paper attempts to deal with the issue of territory, citizenry and national philosophy. This is done from the premise that for any meaningful review to be realized, a clear understanding of the basic constitutional structure is mandatory to allow for a careful and thorough analysis of the advantages and disadvantages of the Kenyan Constitutional system and an evaluation of the issues related to the design and purposes of the Kenyan Constitution. Such clarity then lays a basis for viable suggestions and/or recommendations for change and improvement. The presentation briefly discusses each of the aspects of territory, citizens and philosophy separately within the context of the workshop's aims and objectives. These three issues are not only important but also basic as they form the bedrock upon which the rest of the Constitution springs. We commence the presentation by dealing with territory.

## 2. Territory

On the 24th day of May, 1963, while addressing the African Heads of State Summit in Addis Ababa, Ethiopia the Late Kwame Nkurumah speaking on the potential territorial disputes among the emerging African nations observed:-

"There is hardly any African state without a frontier problem with its adjacent neighbours. It would be futile for me to

enumerate them because they are already familiar to us all. But let me suggest that this fatal relic of colonialism will drive us to war against one another ... Unless we succeed in arresting the danger through mutual understanding on fundamental issues and through African unity.... We shall have fought in vain for independence."

Nkurumah's words remain true today as they were when they were spoken. Indeed, owing to the significance of territorial delimitation it (territory) inevitably is an important center piece in the jigsaw of Constitution.

Because territorial sovereignty is exercised within a given geographical area, a defined territory is one of the attributes of a State<sup>3</sup>. There are however no prescribed minimum geographical sizes. Besides, the requirements of territory may be satisfied even if the entity's territorial boundaries are not precisely defined or are to some extent disputed<sup>4</sup>.

Kenya is characterized by a defined territory. The development of the Kenyan territory, formally the East Africa Protectorate, can be traced back to the instruments signed by the colonial masters in the process of delimiting spheres of influence in East Africa<sup>5</sup>. Each of the Kenyan territorial boundaries is as a result of agreements signed during the delimitation exercise. For example, the Kenya-Tanzania

boundary is the result of a series of Anglo-German Agreements<sup>6</sup>. The region constituting the Kenya-Uganda border was recognized as a British Sphere and the boundary description results from the boundary description in the Order in Council of 1926 supplemented by other descriptions which can be found in modern Kenyan and Ugandan legislation.

Territory is also important because in International law, jurisdiction which is an attribute of state sovereignty is exercised primarily on a territorial basis. The 'territorial principle' is also important because of a state's jurisdictional competence. This principle confirms the position that events occurring within a state's territorial boundary and persons within that territory-even if temporarily -are as a rule subject to the application of the local law of the state.

It is noteworthy that one of the key steps taken by African states on attaining political independence was to recognize the inviolability of colonially defined boundaries. This action was taken despite the fact that boundaries were drawn arbitrarily. The justification for this was to preclude conflict that would be generated if a redrawing of boundaries was attempted.

While it is true that the inherited boundaries have given birth to problems particularly ethnic tension, the territories have remained largely unchallenged. In implementing its mandate, CKRC should take a leaf from the Uganda Constitution which pursuant to Article 5 (3) and the 2nd Schedule of the

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<sup>3</sup> The attributes of a State were specified in the 1933 *Montevideo Convention on Rights and Duties of States*, 164 *League of Nations Treaty Series* (LNTS) 19.

<sup>4</sup> For example when Israel became a State in 1948 it had boundaries disputed by Arab States. Similarly, Guyana boundaries were disputed by Venezuela when it became an independent State.

<sup>5</sup> For a reading on the historical development of Kenyan territory, see Ian Brownlie, "African Boundaries", *A Legal and Diplomatic Encyclopedia*; pp 923-955

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<sup>6</sup> e.g. The Anglo-German Agreement of July 1 1890; the 1893 Agreement between Great Britain respecting boundaries in East Africa from the mouth of the Uмба River to Lake Jipe and Kilimanjaro; The Protocol of February 14, 1900 among others. Kenya is also bordered by Ethiopia, Somalia and the Sudan.



Constitution defines the boundary of Uganda in comprehensive detail.

### 3. Sovereignty

Closely related to the issue of territory is the concept of sovereignty. Sovereignty *simpliciter* may be defined as the exclusive right of a state to govern the affairs of its inhabitants and to be free from external control.<sup>7</sup> One writer correctly defines sovereignty as follows:-

"...the power of modern states, the power of their governments to decide and to act without consulting others and without concern for any thing but their own interests as they themselves conceive those interests..."<sup>8</sup>

Sovereignty is the quality of supremacy and authority over others and/or in respect of certain things.

In legal theory sovereignty is an important dimension of the international relations of states. Each state in international law is sovereign and relates to others as such. Sovereignty has two perspectives to it. Sovereignty in its internal aspects is concerned with the bearer of supreme authority within the state. This may be an individual or a collective unit. It refers to the quality of supremacy in respect to certain competences e.g. making the law etc.

In contemporary politico-legal lexicon sovereignty is seen as the supremacy of the state, the totality of supreme rights

belonging to the state as embodied in its supreme organs within the state and abroad.

The notion of state sovereignty has developed in juxtaposition with that of the basic rights of the human person. The state as a collection of individuals, must possess certain legal capacity rights competence and immunity. On analogy with individual, states participate in the society of nations on condition that their autonomy is not impaired. Consequently, the idea of state competence and autonomy has since the 19<sup>th</sup> century been summed up in two principles, namely;

- (i) Principle of Independence,
- (ii) Principle of Equality

#### (i) *Independence*

Independence is a fundamental principle of International Law which implies that a State has the plenary competence to conduct its internal and international affairs without being subject to the authority or dominion of other states and no restrictions upon its competence are to be presumed whatsoever. However, the state is free to restrict its independence through treaty relationships including state communities such as the European Community (EC) or East African Community (EAC).

The principle of state independence is entrenched in the UN Charter by that of non-intervention in the domestic affairs of states, and the inviolability of the territorial integrity and political independence of states as follows:-

#### Article 2

- 4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner

<sup>7</sup> There are however exceptions, for example diplomats within the territory will become immune from jurisdiction. See the Privileges and Immunities Act Chapter 179 of the Laws of Kenya.

<sup>8</sup> Brierly L. "The Sovereign State Today", *61 Jurid. Rev.* (1949); p.3

inconsistent with the Purposes of the United Nations.”

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but his principle shall not prejudice the application of enforcement measures under Chapter VII.

(ii) *Equality*

All states whether big or small, rich or poor, are equal in their international personality and each enjoys the rights inherent in full sovereignty and each is free to choose and develop its political, social, economic and cultural systems. It results from this equality that no state can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.

Sovereignty therefore exists when a state effectively governs its territory and populace. Jurisdiction is thus an aspect of State sovereignty. State sovereignty refers to the power or authority of the state to regulate the conduct of affairs within its territory.

A state will therefore be considered sovereign if it is able and has control over acts within its boundaries, be they acts of its citizens or of non-citizens.

However, even as we confine our presentation to the classical meaning of the word sovereign, it must be remembered that sovereignty, particularly in African states is constantly under assault leading some Afrophobics to observe that;

"when we speak of the state in Africa today, we are up to create an illusion.. Many so called African states are seriously lacking in the essentials of nationalism. They are ramshackle regimes... deficient in institutional authority and organisational capability"<sup>9</sup>.

While I do not share the views expressed by Jackson and Roseberg above, it cannot be denied that many African countries are today treated like the backyards of erstwhile colonisers. Multilateral institutions like the IMF and the World Bank in the quest to instill fiscal discipline in the management of African economies also appear to assault the sovereignty of many countries, Kenya included.

Because sovereign authority is ultimately tied to population, the concept of citizenship is our next focus.

#### 4. Citizenship

The concept of citizenship has been defined as follows<sup>10</sup> :-

"...a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by law or as the result of an act or acts of authorities, is in fact more closely connected with the population of the

<sup>9</sup> Robert Jackson and Carl Roseberg, "Sovereignty and Underdevelopment : Juridical Statehood in the African Crisis" in *Journal of Modern African Studies*" Vol. 24 No. 1 (1980); pp 1-2

<sup>10</sup> Nottenbohm Case, Second Phase I.C.J. Rep (1955), p.4 at 23

state conferring nationality than with that of any other state."

The term citizen has often been used interchangeably with the term national. This is despite the fine distinction between the two in law<sup>11</sup>.

Granting of nationality/citizenship is exclusively a matter of domestic law. Nationality may be acquired in a variety of ways but the two most common ways of acquiring nationality are:-

- (i) by descent from parents - "*jus sanguinis*" or
- (ii) birth in the territory of the state - "*jus soli*."

Nationality may also be acquired by naturalization and hence the terms and conditions may differ from state to state. When dealing with the question of citizenship one must consider the following:-

- the meaning of citizenship in a state
- a description of the process of becoming a citizen (e.g. by the process of naturalization).
- The significant characteristic of an effective citizen for example civic virtue, common courtesy, respect for person and property, civic and personal responsibility and honest and fair dealing).
- The rights and obligations of a state's citizen.
- A comparison and analysis of the rights and responsibilities of citizens and non-citizens in a state.
- Civic responsibilities of citizens and non-citizens of a state.

- Civic responsibilities (e.g. voting, serving in the armed forces, paying taxes).
- The implications of not fulfilling citizen responsibility.
- Identifying important economic, personal and political rights and the scope and limit of these rights.
- The distinction between personal and political rights.

The relationship of citizens and the state and the relationship of a state's citizens to other nations and world affairs is of paramount importance.

Realizing the importance of the nationality/citizenship concept the international community gives it further impetus. Article 15 of the Universal Declaration of Human Rights provides that "everyone has the right to a nationality," while Article 24 (3) of the 1966 International Covenant on Civil and Political Rights declares that "every child has the right to acquire a nationality". This is because statelessness has the effect of placing one person in a civic void with no authority to look up to with regard to possible civil, social, economic or political claims.

The upshot is to wipe out the essential basic environment for the exercise of the fundamental rights of the individual. Such rights, in operational terms have no existence in the absence of a superintending and implementing state authority. This is the reason underlying the 1951 Convention relating to the status of refugees, to which Kenya is a signatory. The Convention provides thus:-

"The contracting states shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in

<sup>11</sup> See Ojwang J. B., *Constitutional Development in Kenya: Institutional Adaptation and Social Change*, ACTS Press, Nairobi, 1990.

particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

This is a commitment in principle but is subject to individual-state discretion, exercised in the light of local circumstances.

What the foregoing discussion shows is the importance of citizenship in constitution making. There are legitimate concerns that current constitutional provisions dealing with acquisition of Kenyan citizenship are anachronistic and discriminatory against women<sup>12</sup>.

It therefore behoves the Commission to examine these inadequacies and prescribe a regime that is in consonance with current thinking.

## 5. The Citizenry As A Sovereign

Constitutional debates have often posed the question whether the constitution is supreme as against the people. The popular position is that the people are the ultimate authority from which the constitution and all

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<sup>12</sup> See Section 91 of the Kenyan Constitution which provides as follows; "A woman who has been married to a citizen of Kenya shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya" [This provision does not grant a man who is married to a Kenyan woman the right to be registered as a Kenyan citizen and therefore offends Section 82 (3) of the Constitution which provides, "In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

governments and all organs of the state derive their authority. The people are therefore the makers of the constitution and *ipso facto* must retain the ultimate authority to repeal it and to replace it with a new one if they wish. As such, while the constitution is supreme over the three organs of state and the individuals acting in their individual capacities, the people are on the other hand supreme over the constitution and consequently over all the other organs of state. Otieno Odek argues that when Kenyan citizens act as a group, that is as the citizenry of this country, they are supreme and independent and take precedence over the constitution. He goes further to state that the citizenry can thus legitimately abrogate, annul, revise, or rescind the constitution or call for and hold a national convention<sup>13</sup>.

The understanding of the constitutional status of the citizenry as the sovereign has been accepted in constitutional theory for a long time. A number of constitutions have attempted to underscore this supremacy through preambles to their constitutions, for example, the preamble to the German Basic Law declares that:-

"Conscious of their responsibility before God and humankind, Animated by the resolve to serve world peace as an equal part of a united Europe, the German people have adopted, by virtue of their constituent power, this Basic Law.

The Germans in the Lander of Baden-Wurttemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Bremen, Hamburg, Hesse, Lowe Saxony, Mecklenburg-Western Pomerania, North-Rhine/Westphalia,

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<sup>13</sup> See page 2 of his paper titled "The Citizenship – The First Constitutional Organ : Independent and Supreme" presented on 1<sup>st</sup> March, 1997 at Naivasha, Kenya during the Law Society of Kenya Conference on Constitutional Issues

Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law is thus valid for the whole German nation."<sup>14</sup>

While acknowledgement of the citizens supremacy is a useful way of expressing the people's residual powers, it must be observed that in practical terms it is difficult to place mechanisms through which the people can ensure that their delegates do not usurp their power. The only effective tool is the referendum, hence the need to find a place for it in Kenya's new Constitutional regime.

Closely tied to sovereignty is a people's philosophy of life, their national

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<sup>14</sup>• See also the preamble to the Ugandan Constitution which in its preamble provides as follows,

"RECALLING our history which has been characterized by political and constitutional instability,;

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda;

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

See also the Constitution of the Republic of South Africa.

philosophy. This is our next point of discussion.

## 6. National Philosophy

The independence struggle in Africa was fought on the platform of intense nationalism, and in some cases clearly stated ideological positions. It must be remembered that the era of de-colonisation was in an environment of the intense post world war cold war. Many African nationalists gravitated towards socialism *simpliciter* and later its other nuanced forms. This was true of Kenneth Kaunda in Zambia, Julius Nyerere of Tanzania, Nnamdi Azikiwe in Nigeria, Patrice Lumumba in Congo, Jomo Kenyatta in Kenya, Apollo Milton Obote in Uganda, Amilcar Cabral in Guinea Bisau, Modibo Keita in Mali and later Agostino Neto in Angola, Samora Machel in Mozambique and Robert Mugabe in Zimbabwe.

It is the idealism articulated by the African leaders that gave prominence to the Pan-africanists movement in the sixties. But no sooner had political independence been attained than its leading torch bearers started exhibiting qualities purged of national philosophy. One such leader was Kwame Nkrumah who started off popular but soon became authoritarian and developed a personality cult, which gave birth to the title "Osagyefo" (the redeemer). Ali Mazrui and Michael Tidy, in their book "Nationalism and new States in Africa" observed as follows on this development;

"...The personality cult gradually made Nkrumah less and less accessible to frank advise. Presidential flatterers soon monopolized the business of advising the Osagyefo. This was bound to harm the level of decision-

making in the country. The Court of the Ghanaian Czar was soon intellectually impoverished - there were too few courtiers candid enough to warn the ruler against certain causes of action."

The ultimate fate of Nkurumah was the removal of his government by a military coup de etat while he was in Beijing in a Commonwealth meeting. While mission personality cultism was growing in different parts of Africa, more doctrinaire African leaders started the conduct of National Affairs on a clear national philosophy. One such leader was Tanzania's J. K. Nyerere. Through the Tanzania African National Union (TANU), Nyerere articulated a unique form of National philosophy of socialism which he christened 'Ujamaa' (familyhood). This brand of socialism was designed to create an egalitarian state which would be devoid of exploitation and which would ensure that Tanzania was self-reliant and economically stable. In the preface to a collection of his writings and speeches J, K. Nyerere explains the basis of the Arusha Declaration in the following terms;

"The Arusha Declaration adopted by TANU in February 1967, supplied the need for a definition of socialism in Tanzania terms, and provided the necessary signposts of the direction in which the nation must travel to achieve its goals.."

The Nyerereist approach was a clear testimony to the view that a country must have a clearly defined national philosophy.

A similar approach was also evident in Zambia where Kenneth Kaunda believed that Nation building could only be achieved through a clear philosophy. In his book *"A Humanist in Africa - Letters to Collin M,*

*Morris"* from Kenneth D. Kaunda, President of Zambia, published in 1966 Kaunda asked;

"What happens to nationalism as a movement of protest when the basic target of its protest - the colonial power has been removed? The withdrawal of colonial power whilst solving one great problem raises another, equally acute for the nationalist leader, the discipline and the solidarity of the national movement and impetus built upon during the freedom struggle are vital to the success and survival of the new nation. Yet, unless new existing and worthwhile goals can be proposed for nationalism there is danger of the movement of protest turning inwards upon itself and becoming destructive of the national goals."<sup>15</sup>

Kaunda answered the dilemma by articulating a national philosophy of humanism which placed the church and institutions of higher learning into the position of initiating and stimulating discussion.

Kenya was not to be left behind. As early as 1964 Kenya's philosophy of nation building was developed under the title "African socialism and its application to planning in Kenya." In its introduction, Jomo Kenyatta wrote;

"Our entire approach has been dominated by a desire to ensure Africanization of the economy and the public service. Our task remains to try and achieve these two goals without doing harm to the economy itself,

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<sup>15</sup> Kaunda, Kenneth D., *A Humanist in Africa, Letters to Collins Morris*, Longman, London, 1966; and Okullu Henry, *Church and State in Nation Building and Human Development*, Uzima, Nairobi, 1984; p.44

and within the declared aims of our society..."<sup>16</sup>

The above position was articulated through sessional paper No. 10 of 1965 which described Kenya's national philosophy of African socialism in the following terms:-

"Political democracy in the African tradition would not, therefore countenance a party of the elite, stand test or discriminatory criteria for party membership, degrees of party membership or first and second class citizens. In African socialism every member of society is important and equal; every mature citizen can belong to the party without restriction or discrimination; and the party will entertain and accommodate different points of view. African socialism rests on full, equal and unfettered democracy. Thus African socialism differs politically from communism because it ensures every mature citizen equal political rights and from capitalism because it prevents the exercise of disproportionate political influence by economic power groups"<sup>17</sup>.

What is implicit in the positions articulated by the first generation leaders was the realisation that a nation without a national philosophy is like a rudderless ship.

While Nyerere remained consistently and faithfully wedded to his ideological orientation other leaders wavered and soon the fond national philosophies were relegated to mere slogans.

## 7. Conclusions

On the eve of the re-introduction of multi-party politics in Kenya the late Jaramogi Oginga Odinga when launching the National Democratic Party (NDP)<sup>18</sup>, read the preamble to its manifesto which provided thus;

"a crisis has engulfed Africa. It is a crisis of governance. Everywhere established governments are being challenged from below to listen to the voices of people. Everywhere they are being challenged to deliver the fruits of independence where military dictatorships have held sway for decades, the masses have risen up to overthrow them, and to demand representative government. Where one party authoritarian regimes have survived on bankrupt ideologies, the multiparty democracy has demanded democracy. The one-party regime has been thoroughly discredited and only rear guard politicians with no new ideas to offer, and only ill-gotten wealth to protect, can continue to defend the one party system of mis-governance".

The above statement captures the essence of the changes that have led to the Constitutional review process in this country. As we have stated, such changes must be effected in a systematic manner that is all-inclusive and comprehensive. Because the focus of change is the basic law of the land, its critical components, such as the territory of the Kenyan State, the sovereignty of the people and the chosen national philosophy must receive proper attention and treatment.

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<sup>16</sup> The Government Printer, *Kenya Sessional Paper No. 10 of 1965, African Socialism and its Application to Planning in Kenya*, Nairobi

<sup>17</sup> Ibid at p.4

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<sup>18</sup> NDP was never registered by the Registrar of Societies

# INTERNAL AND EXTERNAL SECURITY AND NATIONAL BORDERS

**Lt. Col. (Rtd) Jan Kamenju**

**Director, Security Research and Information Centre (SRIC)**

## 1. Introduction

The concept of sovereignty is founded on the fundamentals of borders which in turn determine what is internal and what is external. The present borders of African countries are a result of the Berlin Conference of 1884-85 which was meant to settle European disputes arising from their imperial interests. This demarcation of borders was thus done purely for European interests and the domination of African peoples. While they may appear solid and rigid on the map, African borders are indeed very porous, unmarked on the ground and are a major cause of conflicts.

In partitioning Africa, the Europeans ignored ethnic and cultural dispensation, which, over two hundred years earlier, were major considerations in the partitioning of Europe. African governance, socio economy and the modes of societal organisation were also ignored and eventually scrapped to make way for European dominance.

Borders demarcate the physical limitations of a state and are fundamental considerations in shaping of the state as an entity and formulating foreign and defence policies and diplomatic relations. Borders are sensitive issues and inevitably cause conflicts in the international relations of Africa.

Internal borders of Kenya were founded on similar basis as those of territorial/international borders. They create resource conflicts, which, if not properly

diagnosed and attended to, may and do cause violent confrontations.

It is against this background that I will discuss internal and external security and national borders.

## 2. Security as a Concept

There is no generally accepted description of what security means and how it should be defined. Security is a broad, complex and vague concept. Questions always arise as to the definition of security; security for whom, what needs to be secured, what is enough security et cetera... Security is essentially about the protection of basic and innermost values of actors. These values differ from person to person, community to community, state to state and so on. Therefore, the concept of security is dependent on who defines security and in what context.

A logical concept of collectivities such as nation states has been made by Barry Buzan who conceptualizes that there are five major factors that affect national security: military, political, economic, societal and environmental.

- *Military security* concerns the two-level interplay of the armed offensive and defensive capabilities of states and states' perceptions of each other's intentions.
  - *Political security* involves the organizational stability of states, systems of government and the ideologies that give the legitimacy.
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- *Economic security* concerns access to resources, finance and markets necessary to sustain acceptable levels of welfare and state power.
- *Societal security* encompasses the sustainability of social systems, within acceptable conditions for evolution, of traditional patterns of language, culture and religious and national identity and custom.
- *Environmental security* concerns the maintenance of the ecosystem and planetary biosphere as the essential support system on which all other human enterprises depend.

It is well understood that these five sectors do not operate in isolation from each other. Each defines a focal point and a way of ordering priorities, but all are woven together in a strong web of linkages.

For our discussion, the most relevant definition of security which ties up all the five factors is that provided by Thomas Ohison in his article "Conflict and Conflict Resolution in South African Context" in which he argues that "a definition of security, then, ought to capture two central dimensions, both equally important for individuals and collectives. These are *freedom from danger*, meaning protection from physical, or direct violence, and *freedom from fear*, meaning a sense of safety and relative well-being in political, legal socio-economic and cultural terms; i.e. a measure of protection from structural violence.

### 3. Internal Security

The Kenyan internal security is as enunciated in Section 2 of the Preservation

of Public Security Act (Chapter 57 of the Laws of Kenya). The Preservation of Public Security of persons and property, prevention and suppression of rebellion, mutiny, violence, intimidation, disorder, crime, attempts to overthrow the government, maintenance of the administration of justice, provision of sufficient supplies and services and provision of administration and remedial measures during periods of national danger and calamity. The laws as stated here is quite clear.

What then are the dangers and fears we face in our nation today? They are many dangers and fears facing both the individual and collectives of the state. I intend to touch on a few that I think are serious and which, unless well managed will be sources of future conflicts and are security threats.

- *Small Arms and Light Weapons*: The presence and proliferation of small arms and light weapons in society especially amongst ordinary and unscrupulous offenders, criminals, terrorists and quasi-militia pose a dangerous threat to public safety, human security, conflicts and development. They are a hindrance to peacemaking, negotiations and reconciliation. The presence of small arms in African societies tempts one to choose the militant option which guarantees short term gains as opposed to the tedious and time consuming process of negotiation. The presence and the proliferation of small arms in Kenyan society is a cause for concern as it contravenes Article 3 of the Universal Declaration of Human Rights which (should) guarantee a person's right to life, liberty and security. The Kenyan scene depicts gross abuse of these rights, underdevelopment and

reduction of economic activity due to fear; especially at night. The reduction, control and management of small arms and light weapons must be a top priority for this country as they (arms) are a major threat to both internal and external security.

- *Declining Economy:* Poverty, unemployment, poor infrastructure, corruption, unchecked mushrooming of slums in urban areas, rising juvenile delinquency brought about by increasing population of street children are some of the serious threats facing our nation today. The increasing number of school dropouts due to lack of school fees and/or insecurity portends badly for the future. The ever increasing cases of HIV/AIDS pandemic and the resurgence of incurable/infectious diseases such as malaria and meningitis are indicators of decimated population, the loss of trained manpower and an increase of orphans and destitute persons which will put more pressure on available resources making the economy to decline further.
  - *Ethnicity and politics:* The Kenyan political landscape is made up of ethnically based political parties. Ethnicity is deep rooted in the political leadership. I risk to add that ethnicity is not as widespread in the greater society as we are made to believe. From my experience, ordinary Kenyans do not care who leads them as long as whoever does guarantees them security and leaves them alone to go about their business. At personal level, Kenyans do not succumb to ethnicity but our political leaders use ethnicity to rise to and to maintain their leadership.
  - *Resources and Corruption:* Public resources which come from taxation, licencing and other government revenue generating activities. These resources should be used strictly for the well-being of all citizens. Corruption, misuse and biased expenditure must be removed and perpetrators prosecuted. The culture of "our-time-to-eat" in the political leadership must end. Another aspect of resource use regards pastoral communities. Drought or general lack of rain means less pasture and water for pastoralists that lead into invasion of pasture across community borders. This creates violent conflicts which are now more lethal than before due to the presence of firearms. Again, some of those firearms are government property.
  - *Cattle rustling and banditry:* Cattle rustling is closely associated with cultural practices and habits. However, cattle-rustling has taken a commercial direction where thousands of cattle are stolen and trucked to slaughter houses. Cattle rustling should be criminalized. Banditry, on the other hand is outright lawlessness and should be treated thus. Cattle rustling and banditry are known to settle political scores amongst pastoralist communities.
  - *Enviromental degradation:* The Sahara desert is said to be encroaching into the equatorial Africa. Kenyans are encouraging this through the decimation of forests and allowing massive soil erosion. Our
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dams are going dry and power rationing will recur at all times of drought. Garbage disposal, especially plastics are a hallmark of many towns and villages. Water pollution is becoming uncontrollable.

- *Insecurity and regional instability:* Insecurity in urban areas has affected the freedom of movement, changed trading patterns as many businesses have to close at sunset and is a cause of further economic decline. Regional instability due to lack of government in Somalia, war in Sudan, insurgency in Ethiopia and Uganda and the problems of the Great Lakes Region is exacerbating cross-border crime and banditry, the influx of refugees and the proliferation of arms and drugs.
- *Natural and man-made disasters:* Drought, famine, terrorist activities and other unpredictable calamities are bound to occur from time to time. Are we prepared for these?

#### 4. External Security

External security or security against external aggression is both a civil and military affair. It is military in execution but civil in design. Defense policy is derived from the foreign policy. Military action is the extreme end of failed diplomacy.

The foreign policy of a state is a combination of principles and norms, which guide or determine relations between that state with other states or bodies in the international system. Formulation of foreign policy depends on national interests, actual and potential capabilities and the realities of internal and external environment.

On the other hand, defence policy and posture are dependent on threat assessment, real and perceived threat. The military is an insurance for sovereignty based on national grand strategy. National grand strategy can be equated to the African stool which stands on three equal legs. The three legs are politics, economy and military. The stool then, exists within an environment and composition of society. Some schools of thought argue that the military is not necessary. I argue that it is essential.

The role of the military is basically defence against external aggression. Secondary roles include assistance to civil power in the maintenance of law and order and the show of national pride.

The military, in their support to civil authorities must have clear instructions on the exact activities they are expected to perform. Military role does not mix with law enforcement roles. What the military does is to facilitate agencies to perform their duties. For example, in extreme civil disorder the military can be used to enforce curfews, enhance the security of important state assets e.g. airports, state houses, etc. The military can also assist law enforcement agencies in cordoning areas for search and arrest but they have no competence or the power to search and arrest.

The military is a national flag carrier and a pride of a nation. The tradition of guards of honour, parades, flypasts and shows of power are a display of authority and a show of who is in control. For the purpose of this meeting, let me say that the Kenyan Armed Forces are not created by the Constitution which is, to me an anomaly. The Kenyan military are founded on an Act of Parliament - the Armed Forces Act (Chapter 199 of the Laws of Kenya).

Another issue that arises is whether the military should be involved in politics. Some countries e.g. Indonesia, Uganda and Rwanda have military constituencies that elect representatives into their national assemblies. Whether this is feasible in Kenya depends on you as commissioners. The pros and cons can be researched further.

## 5. National Borders:

The concept for Border Security can be termed as Border Safeguarding and consists of two elements; Border Protection and Border Control.

- *Border Protection* is primarily concerned with the Protection of National borders against all hostile action, including terrorist attacks, infiltration, border violation and conventional attack or threat or any related operational aspects resulting from such hostile action.
- *Border Control* is primarily concerned with those aspects which deals with the general application of legal and regulatory measures that apply to the efficient control of people and goods across national borders. Border control has got distinct functions: Borderline Control and Border Post Control.

In a pre-study to mapping of firearms related crime in Tanzania, Uganda and Kenya by Security Research and Information Centre (SRIC), titled “SaferAfrica and Saferworld”, significant preliminary findings have been found. These may help in formulating policy and activities for safeguarding borders. These findings are:

- Cross border crimes in a non organised manner are a daily

occurrence and organised crimes involving the smuggling of vehicles, drugs and firearms are happening on a very organised level, a level sometimes above those of the law enforcement agencies.

- Border posts across the region are under-staffed, not only in the police service but also by the other departments directly involved.
- There is a lack of the basic tools to do proper border policing functions such as fax machines, constant electricity, proper living quarters for police/customs/immigration officers, the lack of vehicles and proper search and storage facilities.
- There is a lack of communication between agencies working in the same field that results in the loss of valuable information on crime, crime syndicates and border security related issues.
- There is a lack of trust between agencies involved in border control at ground level which results in cross accusations of corruption.
- Corruption is a fact that needs to be dealt with immediately.
- There is a substantial interest in improving border controls in East Africa from a national perspective as well as from a regional perspective.
- Existing structures are in place for some time now on how all the governmental agencies involved in border control are working together to improve the situation on borders in the region. This collective

approach is a few years old but still experiences problems on all levels of deployment.

- Most East African Countries are losing income not collected through import and export taxes.
- Police officers on new detached duties believe they still can make a difference in conditions at border posts, improve service delivery and fight cross border crime.

## 6. Conclusion

In conclusion, I would like to raise five issues that require some strong thought by this Commission.

### *Use of traditional structures for governance.*

Our experience in dealing with communities in Isiolo District, the Peace and Conflict Resolution Committee shows that traditional structures work much better than the administrative setups. The Isiolo Committee has the trust of the community and receives current information on the social dynamics of the communities, including crime reports, on daily basis. Through this committee, the recovery of illegal firearms and return of stolen animals has increased many folds.

But this process, as successful as it may be creates conflicts between the committee chairmen at the location level and the chiefs on one hand, and between the police and the committee due to the committee's access to information. The Commission will need to look into the use of traditional structures where they exist, other than the continued use of chiefs as in the present set up. Where such traditional structures do not exist, the possibilities of elective offices should be explored.

### *Youth groups.*

Youth groups, party youth wingers and the emerging support groups generally referred to as "jeshi la mzee" "jeshi la ...." etc have been known to mete violence to opposing groups. These forces are a recipe for trouble. They are not disciplined, they are not trained on the use of force and they may not have a clear chain of command. When violence escalates these are the sort of people who can, with or without their knowledge cause loss of life and property beyond imagination. It is a recipe for extreme atrocities that may lead to genocide and must be addressed.

### *Civil-military relations:*

Civil military relations refer to the distribution of power and influence between the armed forces and the civilian authorities. The current constitution in Part I section 4 states "There shall be a President of Kenya who shall be the Head of State and Commander-in-Chief of the armed forces of the Republic." There is no mention of the type and mode of power, authority vested in the Commander-in-Chief or the devolution of such power and authority. To avoid grey areas in the exercise of military power and to ensure efficiency, the constitution must have a clear hierarchy of authority in defence matters and must guide the interrelationship between the Commander-in-Chief, the uniformed command structures, parliament and other state actors.

### *Role of civil society:*

Civil society is increasingly becoming a major player in search for peace and prosperity at all levels; international, regional, national and local non governmental organizations (NGOs) have large networks world over with vast

amounts of data, information and expertise which can assist/enhance governments' efforts for social development. Civil society has great potential to mediate between the government on one hand and the private sector and individuals on the other. Civil society has the voluntary role to unite the virtues of liberalized private sector with those of bureaucratic public sector for the general good. Civil society is a vital component of the Kenyan constitutional order and must be addressed.

*Borders.*

Our porous and undefined international borders are a future threat to the security of this country. Sovereignty, being partly a product of clear and marked borders, can only be guaranteed when and where the borders are clearly marked and agreed on between neighbouring states. The Ilemi

Triangle, for example, which forms Kenya's northwestern border with Sudan, has three different borderlines depending on which map you look at. This is a potential border-based external threat. Internal borders, eg Maasai Mara (read Maasai/Kisii), IsioIo/Garissa (read Boran/Somali), etc are recipes for internal insecurity and should be addressed.

Finally, Mr Chairman, I have raised a number of concerns on both internal and external security issues and issues to do with borders. This is not exhaustive but I hope they have given the Commission some useful information that may help to trigger more ideas on these issues. My organization, Security Research and Information Centre (SRIC), remains at your disposal for consultation, research or any other role that the Commission may want to be done.

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## POLITICAL PARTIES AS CONSTITUTIONAL ORGANS

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### 1. Introduction

It is common-place to state that a constitution is the supreme law of the land, a fundamental normative fountain from which all other secondary norms such as statutory law, executive orders and ordinances are derived (Encyclopedia of social sciences). But at the same time as one scholar has put it, it's a political manifesto and a "power map"(Duchachek 1973) which suggest therefore that the constitution is the source of legitimate power that various organs of the state exercise; which raises the question: what are the organs of the state? And would the party be one such organ regardless of the nature of societal setting.

Whether or not a political party is a constitutional category, and to what scope, remains a question of value, for political parties are creations of social-political environment within which they are embedded. Whether or not they become a constitutional category largely depends on the circumstances of their origin and socio-political conditions existing at the time of their formation. Whether a party becomes a constitutional organ would tend to be subject to the following conception of party:

1. The classical liberal view that a political party is a societal organisation fully separated from

the government and therefore an extra-governmental organisation.

2. Political party as an intermediate organisation existing in twilight zone i.e. semi-governmental and semi-societal.
3. Party as an organ of the government system itself as in the totalitarian one-party system (see also Thomas Meyer 1992, Oberreuter 1995).

Whatever the conception of what a party is, the fact remains that the constitution as the basic law of the land should only state in a nutshell the nature of the political system and concomitantly the place of political parties therein. Details about the operation of political parties should be assigned to special statutes.

However, for many centuries, the existence of political parties was treated with a sense of skepticism. As one writer has observed recently (Oberreuter) all states that are currently trying to realize the goal of a liberal and pluralist democracy have gone through historical phases in which parties were stigmatized as harmful to the unity, greatness and sovereignty of the nation. However, the degree of this skepticism varied from one country to another; which is why the political parties started to establish themselves early in some countries such as England and not in others such as France e.t.c.

And in the case of Africa, political parties emerged initially as protest movements before gradually being transformed into modern type parties especially in the post World War two period. As late as on the eve of independence in many African countries, the practice of multi-party politics was still at its incipient formation and therefore independence was achieved without the practice of multi-party competition having been fully accepted in many countries. Indeed, in some countries, the transition to independence was characterised by deep divisions among the political parties about what should be the nature of the state in the post independence-period. This was at the time when the world was polarized between the forces of liberalism and totalitarianism. With the attainment of independence, the struggle for the control of the state between the ruling party and the opposition ones assumed violent proportions in some countries which ultimately provided a conducive setting for the justification of the single-party phenomenon, either de-facto or de-jure.

The development would overtime influence the nature of the relationship between the ruling party and the state. And where the ruling party became in every sense of the concept the state party, the logical development was the entrenchment of the privileged position of the party into the constitution. Therefore, the party became a constitution category and an important organ, and in that sense, a major component of the "power map".

In a few countries (e.g. Ghana under Nkrumah and Guinea under Sekoutoure) the state and the party were

said to have symmetrical identity. In the circumstances, the political orientation implicitly criminalised the emergence of competing political formations. It was, however, a relationship in which the party as the weapon in the hands of those in power became an instrument of state power and not of popular will.

On the other hand, there were other states which went through similar experiences but under completely different institutional configuration. The emergence of praetorian states in sub-Saharan Africa especially from early sixties notably in West Africa (both Francophone and Anglophone) also introduced a political dispensation which completely removed political parties as actors in the political process and by implication as partners in the governance process. Thus, where the party had been a constitutional organ before a coup, the immediate suspension of the constitution rendered the party irrelevant.

Against the foregoing observation, one can now put the Kenyan situation within its proper context. As part of the global system, Kenya has been exposed to situations where at one point the political party was regarded as an extra-governmental organisation fully separated from it; which is why the independence constitution popularly referred to as the Majimbo constitution did not even make reference to political parties. But with the emergence of a *de facto* one-party state during 1964-1981 (except for a short period in the late sixties) the ruling party (KANU) emerged as the unchallenged party. But this did not necessitate the transformation of the party into an organ of the state. The situation would remain unchanged even during the period Kenya



was a *de-jure* one-party state (1982-1991).

It is important to note that the establishment of a single party system did not in any way enhance the role of the ruling party in the governance process in a way that might have possibly led to its being incorporated into the structure of power sharing and thereby making it an organ of the "power map". It's against this background that the question whether or not political parties in Kenya should be made organs of the constitution should be discussed.

## 2. On Constituting the Party (ies)

There are only a few countries in Africa or even in the whole world where the formation (read constitution) of political parties is a constitutional matter. Often there is reference to a political system in operation but beyond that, party matters, especially those relating to electoral process, are dealt with in special statutes.

In countries where the formation and functioning of political parties is extensively covered in the constitution, there are always some underlying reasons. In the case of Germany, the experience under Nazis did have direct bearing on the decision to regulate the conduct of the political parties (Oberreuter) even though the classical German theory of the state dating back to Hegel excluded the party from the state.

The state (as embodied in the monarchy) was that which only belonged to the sphere of the "general interest". Parties were confined to the spheres of the particular. Thus, the identification of the state with the

general interest denied the parties any theoretical basis or justification as organs of state and concomitantly as organs of the constitution (see Thesing and Hofmeister). Therefore the struggle to include the party in the constitution was not an easy one for there were defenders of the old order. Moreover, party politicians resisted their rooms for manoeuvre being subjected to tight legal restrictions.

And in Uganda, the constitution devotes eight articles (69-76) to the political system including the party system. The inclusion is not as elaborate as the German one. Nonetheless, the inclusion does, like the German one, have a history and rationale behind it: the problem of multi-party politics in Uganda between 1962-1970; 1980-1985 and the need to introduce a constitutional solution-at least of transitional nature-to the "problem".

Where does all this leave Kenya? The present Kenyan constitution including the relevant amendments since 1992 recognizes the country as a multiparty democratic state, but relegates other pertinent provisions about political parties to the relevant statutes such as the one on elections. Parties are required to operate according to the Societies Act and not according to detailed stipulations in the constitution. A number of pertinent questions come to mind readily:

1. What are the weaknesses of the current laws regarding the establishment and management of political parties?
  2. Do they necessarily require constitutional accommodation?
  3. If yes, how?
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The point has been made above, namely that the Kenyan constitution is silent on matters pertaining to political parties and that as of today political parties operate according to the provision of the Societies Act. There are a number of activities which exclusively belong to the domain of political parties and which have not been addressed in the Societies Act. Therefore there is a need to separate political parties from other societies which come under the purview of Societies Act, by enacting a law on political parties to address the following issues:

1. Limitation or not, on the number of political parties to be formed and why;
2. Whether or not the law should require political parties to put in place mechanisms for internal democratic change of leadership;
3. Structural requirements to be met as conditions for registration (e.g. requirement of regional/ethnic spread);
4. Circumstances under which a party may be denied registration or be deregistered;
5. Whether mechanisms should be established for the resolutions of inter-party conflicts; and
6. Formation of parties on exclusive criteria (e.g. religious parties, racial parties e.t.c).

### 3. Regulating Activities Of The Parties

The defining characteristics of parties as political institutions is that they serve (or have candidates to serve) as mechanisms which link the institution of state to those of civil society. In many countries, either the constitution and/or the relevant

statute allows the parties to operate like representative organs by which society governs itself in a democratized state through-

- The right of parliament to control the running of the state;
- The interchange of communication between parliament and the public.

As one writer puts it, "they incorporate society and state in such a way that their feet are firmly planted in society but the heads are in state showing that they function as a multipurpose entity whereby they control the state and at the same time assist the society in solving their problems". (**Oberreuter 1995**)

Political parties, whether in parliament or not, engage in activities which could have either positive or negative effects on the well being of the state. It is for this reason that the state through its authoritative apparatus -the government- seeks to regulate by law party activities and conduct in a democratic/democratizing society. And in a pluralist democracy where there is rotation of political parties in government, due care is often taken to ensure that the party in power refrains from patronizing other state apparatus such as the Judiciary, bureaucracy e.tc.

While it is accepted that parties like other societal institutions must be subjected to the law governing their activities and conduct, the state through its various organs must refrain from involving itself in the competition between parties and must take a neutral position in party politics. This is an essential ingredient of a democratic polity.

Indeed, democracy is both a form of state and a way of life (Thesing 1995, Dahl 1982e.t.c.) Its success hinges, among other things, on the acceptance of the established rules of the game in every human endeavour. This is the challenge facing budding democracies in Africa.

Since the resurrection on multipartyism in Kenya about a decade ago, there has been a lot of hue and cry about the general conduct of political parties as well as the nature of their internal governance. As of now, there are well over forty registered political parties; and the majority of them exist only in name. And for those that are active, the problem of internal governance has persisted over the years which is why there has been a lot of agitation about the need to democratize their internal governance. Indeed, the observations made recently by an Indian NGO (LOK SATTA: Internet source) on the operation of political parties in India is quite reminiscent of the Kenyan situation. They observe:

1. Parties have become arbitrary, autocratic and unaccountable.
2. No healthy and democratic dissent are tolerated by the leadership of the party.
3. Leadership choices at various levels are rarely made by democratic voting. In most parties internal elections are rarely held, or when held are perfunctory. Even members' rolls are not available.
4. Party leadership is utterly unaccountable to its members as well as the public regarding contributions made and expenditure incurred.

On to these, one could add the following additional attributes of the Kenyan political parties:

- Party leaders behave as if the party is the property of the leader and therefore would not perceive of a situation in which they would ever cease to be the leaders of the party.
- Parties exist to serve the personal political interest of the leaders who use them as bargaining chips in the struggle for power and material benefit.
- Interference by the party leadership in the party electoral process especially in the nomination of candidates for elective positions at the national and local levels (i.e. nominations for parliamentary and civic elections.)

It would appear that there is urgent need for the problems referred to above to be addressed in the proposed law on political parties. Therefore the Constitution Review Commission in consultation with interested parties need to come up with modalities of addressing the said concerns.

#### **4. Financing Political Parties: The Legal Context**

The practical issue that this matter raises is: how should the cost of managing political parties in a democracy be financed if the existence of political parties is deemed to be critical to the institutionalization of democracy? This question has been widely discussed in the literature on political parties both in developed and developing countries. The debate has mainly hinged on whether the

state should provide financial subvention to political parties and on what criteria or principles.

The usual assumption is that parties on their own cannot manage to raise enough fund to enable them to resist the 'forces of evil' that try to capture them for selfish rather than for public interest. In many countries, political parties source their funds from-

- Members contribution/fees.
- Donations from "well wishers".
- Fundraising activities
- Sales from party documents, publications and souvenirs.

The existant literature suggests that these sources have been inadequate while donations from "well wishers" has been the subject of criticism. Its critics contend that it raises questions about the expectation of the donor and the freedom of the recipient(s). Whereas in the developed countries these donors are largely motivated by certain partisan, ideological interests, in the third world countries, their prime motive is to buy favour for one's business or other self-interests however defined.

Because of the central role political parties play in the organization of the legal process of political legitimization and the successful take-over of governmental functions in parliament and through parliament (Meyer modified), there has been pressure in many countries for the state to provide some form of party financing as a way of saving them from being subjected to undue influence of their donors which would be detrimental to their own operational freedom.

But the idea of state financing of parties has not been without its critics who contend that state financing of the party might lead or actually leads to undue influence of the state over the parties and vice-versa; that if the funds are channeled to the central organs of the party, it could lead to the central organization of the party ignoring grassroots support which is important for intra-party democratic governance and the cultivation of the democratic culture in the body politic.

Granted, many western democracies (and in more recent years even some African countries Uganda, Nigeria) have succumbed to the pressure to finance political parties, but have narrowed the area of support. The actual situation varies from one country to another as the examples given below illustrate.

#### *Germany*

Since 1966 the state reimburses political parties up to 50% of the total financial requirement for elections with mechanisms put in place to prevent diversion of funds.

#### *Greece*

Article 29(2) of the constitution specifically empowers parliament to give funds to political parties with the demand that costs of election campaign are revealed. A party must get 3% of the votes to benefit.

#### *Portugal*

Article 116(3d) gives parties specific slots for political broadcasts.

#### *Spain*

Funding is not a constitutional category but it's extended by the electoral law of 1985 which states that parties are

required to submit a list of expenses and this is used for subsequent auditing of party books relating to such support. But to qualify for reimbursement, a party must get 3% of votes cast in an election. Usually a 30% down payment based on previous performance is made.

#### *France*

Here too, funding of parties is not a constitutional provision, but is provided for in the electoral law. 5% of presidential election cost is reimbursable by the state, but if a party gets more than 5% of the votes, it is increased to 25%. In parliament, state pays 10% of allowable cost. For a party to benefit it must be represented in parliament.

#### *Belgium*

Only parties with representation in parliament benefit. Election costs are controlled and reimbursement mechanism is used.

#### *USA*

Electoral law is used which limits expenditure and contribution in federal elections. Candidates are required to disclose sources and to provide accountability for funds received for presidential campaigns. 5% of the votes cast is needed to qualify for support. This is available to presidential candidates only since an attempt to include congressional candidates failed three decades ago.

#### *Macedonia*

The law on political parties stipulates that party funding may come from membership fees, donations, grants, profits, gifts, credits, legacies and from the budget of the republic. The law prohibits financial support from foreign governments, international organisations,

organs and organisations of foreign states and other foreign persons; from domestic state bodies and local self-governments above the amount established by the government of the republic of Macedonia; and from companies in public or state ownership, including those that are in the state of privatization. The law limits the amount of individual gift and donations and endowments to no more than 100 average salaries in the republic. During the elections, they are limited to no more than 200 average salaries.

The funds from the budget are distributed on the basis of electoral support and the number of seats in the Sobranie. Thus, 30% of the total is equally shared between parties that have obtained at least 3% of the vote, and 70% is distributed to the number of seats. (Official gazette no.41/1994)

#### *Lessons for Kenya*

The question to ask at this point is: what lessons can Kenya learn from the European and other experiences? Considering how expensive electioneering has become, should Kenya consider introducing a law or a provision in the constitution, which would relieve pressure on parties deserving such support?

And considering that these "well wishers" are currently the major financiers of political campaigns in Kenya, what regulations should be introduced to reduce the degree of compromises inherent in such donations? Which lessons of experience from the West are worth adapting to the Kenyan situation? And should the change be incorporated into the

constitution or enacted into electoral law?

As matters stand now, the replication of the cases cited above in the Kenyan context tend to depend on the following key issues being addressed in the management of political parties in the country:

- Whether political leaders are prepared to manage their parties in a more transparent and democratic manner than has been the case so far.
- Whether the culture of accountability can be accepted as a normative value governing the operation of institutions of whatever kind.

Much, in the way of success, would ultimately depend on the success of the democratisation endeavours currently underway in the country.

## **5. Accountability Of Political Parties**

Accountability of political parties to the state, the electorate and to their members is the hallmark of democratic governance apart from accountability of the government itself. And in addition, the party should be accountable to financial supporters for any financial assistance it may receive. The problem in Kenya is that the Chief Executive of the state is above the law. This has also tended to influence the nature of the management of the ruling party KANU. And this has had the demonstration effect on the management of opposition parties, in that leaders of opposition parties have also tended to behave as if they are not accountable to anybody for

their various actions. Within the institutional context, the parties have not been accountable to the members as well as to the general electorate. Political parties have not been operating according to their own constitutions. Some have not held any leadership elections since their formation and those which have, have often not done so within the stipulated time.

Arising from the above, the suggested law on political parties should make provisions for ensuring that the political parties adhere to the provisions of their own constitutions as well as providing for mechanisms of accountability to the member and the electorate at large.

## **6. Final Observations**

The purpose of this last section of the write-up is to revisit in summary form some of the issues already discussed above by suggesting recommendation as indicated below-

1. The law on political parties should provide in some detail the conditions which a party seeking registration under the act should satisfy and in particular:
  - The proposed law on political parties should clearly indicate the sanctions associated with noncompliance with the provisions of the law.
  - The law should also indicate clearly what kind of institutions political activities should not be extended to (i.e. public institutions e.g. the armed forces, medical institutions, education institutions, except universities and institutes of higher learning.)

- The phenomenon of unofficial, dual “identification” with political parties has recently become a matter of public concern in Kenya. The proposed law on political parties must address this issue.
  - Circumstances under which a political party should dissolve itself or be proscribed, should be clearly indicated.
  - Should a new authority be created solely for the registration of political parties e.g. the office of the Registrar of political parties or should their registration come under the purview of the Electoral Commission?
  - What form should the inter-party co-operation inside and outside Parliament take in order to address the problem of dual loyalty especially on the part of elected representatives at the national and local levels?
2. Once formed, political parties must live up to the provisions of their own constitutions, assuming of course that the constitution does not contradict any state laws.
  3. The question regarding whether or not the state should finance political parties, especially during election time is an important issue that the proposed law should address.
    - Since many political parties in Kenya are receiving financial support from foreign sources, should the law prohibit political parties from receiving funds from such sources and if so what argument would be advanced in support of the action?

4. And with regard to accountability of political parties, the proposed law must provide for appropriate sanctions for noncompliance with the law.

We return where we started by asking: should the political party be a constitution organ? From the foregoing discussion the answer is yes and no; yes in the sense that the constitution should indicate what kind of political system is in operation in the state i.e. whether it is a one-party state, a multi-party state or a no-party state. And the "no" aspect of the answer suggest that the constitution cannot say all that need to be said about the conduct of a political party (ies) in a state. Therefore, there is a need for a specific law on political parties which should go into great details about the operation of the political party (ies) where the constitution so provides.

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# THEORY OF GOVERNMENT

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## 1. Introduction

Theorizing on government, governance, and the state -the basis of government instrumentality- goes back to the very beginning of theorizing on human activity in general. Systematized theorizing can be traced to the Greek philosophers, Plato and Aristotle. Such theorizing continues today and in all likelihood, will persist. This paper is divided into two parts. Part one defines and discusses the concepts state, nation and nation-state. These concepts set the foundation for and define the parameters of government instrumentality. Part two explores some basic issues in constituting and structuring government, which distinguish political systems.

## 2. The State

The concept state has two meanings. The first one is that it is a form of social organization with certain distinctive characteristics which differentiate it from the vast array of other forms of social organizations in both the primary and secondary voluntarist categories. Examples of such organizations are the family, an ethnic group, a church, a political party, a labor union, a professional or recreational organization etc.

The first distinctive characteristic of the state is territoriality. This has three dimensions. The first of these dimensions is that the boundaries of the state are impregnable and virtually sacrosanct.

Aliens/outsideers wishing to cross these boundaries into its territory are required to obtain the state's express permission, typically in the form of a visa or some other travel document. Those entering the territory illegally are subject to arrest, deportation, repatriation, or other types of punitive action by the state. The second dimension of the state's territoriality concerns its airspace. Like the boundaries the states airspace is inviolable. All aircraft entering such air space must obtain prior permission. Intruders are liable to punitive measures which may be quite drastic and arbitrary; recent history is replete with examples of this. The third dimension of the state's territoriality concerns littoral states. The territorial waters of such states are also inviolable; the traditional limit of the territorial waters has been three nautical miles. Again examples abound of ships that have been sunk impounded or otherwise punished in violation of this element of territoriality.

The second distinctive characteristic of the state is that it has monopoly over the physical means of compelling compliance. Although other social organizations can use physical means such as caning in schools, or in families, the state imposes limitation on such use for all social organizations within it. For instance, the school teacher, the parent or the husband who brutalizes the student, the child or the wife respectively is answerable to the state. As for the state itself, there is no limit, as it were, to its claim on this score. Of all social organizations, only the state can lay claim to

the legitimacy of taking the life or lives of some of its members in defense or furtherance of its interest; this is embodied in the death penalty which states exact for certain offenses.

The third distinctive characteristic of the state is a permanent population. There is no specified legal minimum, or for that matter, maximum, for this. The vague commonsensical guideline is that the number suffice to meet the needs of the state; very small numbers impose obvious problems.

The fourth distinctive characteristics is that methods used by the state to enforce its laws, rules or regulations typically have the backing of force as symbolized by the firearms the law enforcement officers bear. Many regulations such as income collections are enforced involuntarily, arrests can be made forcefully and compliance with court orders is typically based on compulsion.

The fifth distinctive characteristic is that the authority of the state normally applies to all individuals, groups and organizations within its territory. This is so despite diplomatic immunity which essentially is a *quid pro quo* based on reciprocity. Failing reciprocity a state can take certain steps to enforce its authority over even diplomats; examples of such steps are declaring the errant diplomat *persona non grata* and, in the extreme case, the severance of diplomatic relations.

Sovereignty is the sixth distinctive characteristic of the state. This means that the state has only peers and no superiors. The state theoretically, is not subject to the authority of any other social organization unless the state itself voluntarily submits to such authority. Recognition by peers is the seventh characteristic. Sheer recognition, however, is not a constitutive element as such; that is, it does not prevent a state from

coming into existence. Recognition legitimizes the state and facilitates its role vis a vis other states as well as non-state actors in the international system. A pariah state must have sufficiently strong elements of capability to wither international ostracism; this was the case with the Peoples Republic of China, for instance. It must be noted, however, that sheer de facto existence and endurance almost inevitably leads to de jure status and recognition.

The last distinctive characteristic of the state is that the state has become the standard form of social organization in terms of inclusivity. This is symbolized by the fact that the state is the entity of demarcation on world maps and not such entities as ethnic groups, political parties, or churches.

Before concluding the discussion on the state it is appropriate to touch on its origin, since it represents a revolution in the evolution of social organization in that it sets up a government inclusive of people not based on consanguinity. Various theories explain the origin of the state. The most important of these are: the social contract; divine theory; natural theory, and the conquest theory.

The social contract is perhaps the most dramatic of such theories. The contractarians, Thomas Hobbes, John Locke and Jean J. Rousseau contend that man in his natural state is not a social being. Human existence prior to social organization was a state of constant warfare and fear of violent death, to adopt the Hobbesian version. As a result, life was "solitary, nasty, brutish, and short." Man therefore entered into a "contract" with his fellow beings to create a "Leviathan," the state, that would protect them all. Though historicity is not implied in it, the social contract theory certainly makes the origin of the state plausible.

The natural origin theory contends that social organizations radiate outwards from the nuclear family in concentric circles based on human needs; the state is the outermost circle.

The state assumes a variety of forms. Among these are theocracies, democracies, monarchies, republics, oligarchies, dictatorships, and even "cleptocracies" - the most recent coinage in the lexicon.

Like the concept state, the concept nation also has two meanings: a group of people with common characteristics and no common independent government/state or government/state of their own, and; such a people with a common independent government/state or an independent government/state of their own.

The concept nation-state highlights the idea of the state, the most powerful social organizational tool invented by human beings, as an instrument/mechanism for the advancement of the interests of a people and not of individuals. It is the culminating of a protracted tortuous process beginning with the rejection of the French King's dictum: "I am the state and the state is me."

### **3. Constituting and Structuring Government**

Part Two of this paper discusses the following issues which distinguish political systems: fusion of powers versus separation of powers; unicameral versus bicameral legislatures; checks and balances; unitary versus federal systems; head of state versus head of government; parliamentary supremacy versus judicial review, and; limitation on state powers.

Fusion versus separation of powers are ideal types/models with no exact fit; empirical referents in time or space; only approximations exist. The models are distinguished on the basis of personnel,

functions and institutional arrangement. In fusion of powers, functions are shared among three branches of government - the executive, legislative and judiciary; the memberships in these branches overlap. In separation of powers memberships in the three branches are mutually exclusive and the functions are theoretically distinct.

The best approximations of the two models are the United Kingdom and the United States respectively. In the former the Chief executive and the cabinet must, by law, be members of the legislature. The law lords in the House of Lords constitute the highest court of appeals. By contrast in the United States, the Chief executive and the Cabinet must, by law, not be members of the legislature; the chief executive is elected by the national constituency. Both have their strengths and weakness. Perhaps the worst scenario in separation of powers is the possibility of government impasse arising from different parties controlling the executive and legislative branches.

In unitary political systems power is concentrated in the national government. The national government creates administrative units and delegates powers to them; the number, boundaries and extent of the powers of these units can be modified or abolished at the whim of the national government. In federal systems powers are shared between the national and sub-national authorities in such a way that each has primary or exclusive responsibility in particular public policy areas. The autonomy or virtual independence of each level in such areas is entrenched. The boundaries of the constituent units also cannot be altered without their consent.

Bicameral legislatures are typically, but not exclusively, a feature of federal systems while unicameral ones are more common in unitary systems. In federal systems the upper house of the legislature typically serves the purpose of equalizing the

otherwise diverse sub-national units in terms of population, size and economic resources. Equalization is attained through equal representation.

Parliamentary supremacy and judicial review are modes of legislation. In the former, legislative authority is vested in the legislature/parliament exclusively. For a variety of reasons, the legislative may, however, delegate such powers while retaining control and monitoring capability. In judicial review, a body of experts, usually judges, are empowered to review legislation passed by the legislative and to strike them down as null and void if found to be in violation of the constitution of the country. Neither one of these is inherently superior to the other; each has its own strengths and weaknesses. An immediate strength of parliamentary supremacy is that it conforms to the democratic tenet of legislation by the elected representatives of the people. An immediate strength of the judicial review model is that it can be used to cater for the interests of particular disadvantaged groups who may not be able to elect enough representatives at their own.

Separating the head of state from the head of government is akin to triumviracy. Where separation exists the former is expected to be apolitical, above the factional fray. The latter is immersed in politics and runs the day to day activities of government, but is responsible to the former. Unless carefully designed such separation may lead to mutual dismissal from office such as that of President Kasavubu and Prime Minister Patrice Lumumba in the former Congo Leopoldville.

Limitation on government powers is justified on the grounds of various theories based on ideas of individual rights, the general will, and democratic ideals. The presumption as it were, is that an unfettered Leviathan may run amok to the detriment of the individuals who created it. Such ideas

can be traced at least to the social contractarians but especially to the liberal democratic theorists, or utilitarian, Jeremy Bentham and John Stuart Mills. These people argue that government finds justification for its continued existence only in serving the interest of the governed - the people.

A variety of techniques, devices, principles and features of political systems are used to effect limitations on government power. These include: impeachment, veto, veto override, legislative committee oversight, ultra vires, elections, limitation on terms, recall, federalism, separation of powers, judicial review, democratization and the nurturing or inculcation of an allegiant participant political culture that helps to develop individual efficacy in the citizenry. Finally, the emerging two-pronged and seemingly paradoxical trend of globalization and villagization may prove to be a portent instrument of limitation on government powers especially in the developing countries.

Theorizing on government and governance is a cumulative task. The theory of government for Kenya must necessarily be eclectic to benefit from the extant models and experiences of other countries in time and space. The fluidity of our setting as a new nation offers a special challenge for our nation-building efforts. In the final analysis the theory must be unique and tailored to suit the particular context of our nation. Such a theory must reflect the following: our past – pre-colonial, colonial and post colonial; the rich diversity of our society; the values we cherish, and the aspirations that though elusive and not immediately attainable, will serve as beacons as we strive for higher heights in our nation building efforts. The governmental and political institutions and process we devise and forge must seek to limit the effects of centrifugal forces and to maximize those of the

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centripetal forces. They must remain flexible to meet future challenges for ourselves and

our

future

generations.

## **CONSTITUTION MAKING: A NORMATIVE OR SOCIOLOGICAL APPROACH**

**Prof. Henry Mwanzi.**

### **1. Introduction**

This Commission, assisted by Kenyans in general, and informed Kenyans in particular is engaged in a search for national identity – a shared value system that forms a defining characteristics of what we call Kenya, and who we know as a Kenyan.

Cicero once said, “there is nothing in which human excellence can more nearly approximate the divine than in the foundation of new states or in the preservations of states already founded”.

Thus for me, the commission has a divine duty if you agree with Cicero. And in our case, not so much to found, because it is already founded, but to reinvent our Kenyan nation. Certainly to help preserve it. Whether or not the foundation of states is a divine task, their preservation and maintenance have been, throughout history, the principal concern of those who lead them.

I believe that is the reason why this commission was appointed. There were signs that our nation was in danger of disintegration. The need for preservation is acute in those states that are characterized by sharp cleavages based on ethnic, racial, economic and other factors that divide the population.

So, the first task of a constitutional review process is to ensure that what comes out ensures social stability as a means of preserving the state. Social progress nourishes nationalism, until nationalism

appears a an indispensable condition for social progress- the two constitute national identity, and reinforce each other. The means to achieve this integration is what is the problem in many contemporary systems of government. Integration in the western world pre-supposes the existence of a strong unified elite which has the ability to mobilize economic, social, political and military sanctions and which has the freedom and the willingness to apply these sections to the rest of society to ensure submission to it's will.

Systems of government in developing countries lack this type of unified elite. They also, as a consequence, lack the means to enforce their will. This is so because developing countries lack a dominant culture. What they have are several or many cultures which have co-existed throughout the ages and which compete with each other, for recognition. It is this competition among cultures that breeds ethnicity and ethnic rivalry. It may be a worthwhile idea, since we are engaged in a comprehensive review, for the commission to identify from our historical experience, a dominant culture or a set of values that may form the basis for social integration. South Africa attempted to deal with this problem by declaring virtually all South African languages, national languages and by having this embedded in their constitution.

### **2. Constitution-making**

Constitution making has two elements : it is normative as well as structural.

The normative element has to do with the value system that should be attached to and

be contained in the constitution. It constitutes the sociological element of the constitution. It gives it life. The structural element deals with politics and is concerned with power arrangements and with distribution of offices. However, the values, symbols which affirm a national political community and which sustain legitimate public authority need to be established for a constitution to have a base and meaning so that it can endure. I believe this is what was meant when it was stated that this process should be people driven, that is it should start from the bottom rather than from up. The commission will need to establish what that bottom is.

In what are called third world countries, constitutional arrangement has tended to concentrate on the structural context. The normative element has received little attention if it has not been ignored altogether. Structural arrangement as a means of integrating society politically requires a number of things.

- (a) It requires a formal arrangement of governmental structures.
- (b) It requires formal linkages among positions of public authority. These linkages involve a set or sets of reciprocal rights and obligations which are legally defined.
- (c) It requires existence of informal linkages between rulers and the ruled. This entails interpretations of rights and obligations, judgments and performances as well as channels of communication, among other things.
- (d) It requires formal and informal linkages among citizens. This requires means to organise society to pursue common goals with minimal conflicts.

Now, what has all this to do with contemporary systems of government? The vast majority of systems of government in

the world today seem to be inherently unstable. This instability seems to be due to defects that emanate from their constitution making process. If we are to construct a stable system of government, we need to be aware of these defects, and try to avoid them.

These defects stem from failure to give equal weight to normative and structural aspects of society, which in turn affects the process of constitution making.

There are various systems of government in the world today, which are well known. Among them are:

- (1) Unitary systems with centralized power.
- (2) Federal systems of government, or decentralized systems of government. Again there are various forms of this.
- (3) Dictatorial or autocratic systems of government. There is hardly any of this in the modern world today. For that reason, it does not require any consideration except safeguard against its occurrence.
- (4) The presidential systems of government. Again there are various forms of this.
- (5) Lastly there is parliamentary system of government with various forms.

The most common systems of a government are presidential, unitary, federal and parliamentary.

In a parliamentary system of government, the legislative majority is sovereign. By extension, the electorate which is represented by the legislature is sovereign. A committee of that legislative majority, which is called a cabinet heads the legislature and directs the executive. In a true parliamentary system power is clearly defined and fixed. Leadership is accountable

to the legislature and must maintain the confidence of the parliamentary majority that formed it.

To function properly a parliamentary system requires strong party discipline for decisions to be arrived at quickly. It is an efficient system of government. It is also effective. Great Britain is a model of this type of government. In this type of government there is unlimited expression and practice of democracy. The people are truly sovereign. The leadership enjoys unlimited tenure of office so long as it enjoys the confidence of the Electorate. That is the system Kenya inherited from Britain at the time of independence.

The Presidential system of government is exemplified by American governmental system. A British Prime Minister was so impressed by the American constitution that he described it as "the most wonderful work ever struck off at a given time by the brain and purpose of man". The durability of that document and the development that have taken place in that country since; testify to the wisdom and inspiration of its framers. These framers were afraid of two things. They were afraid of tyranny. They were also afraid of democracy. If tyranny has excesses, democracy too has its excesses. The framers of American institution sought to guard against both excesses. They insisted on strict separation of powers of the three branches of government namely the Legislature, the Executive and the Judiciary. Theirs was a partial success. The Executive appoints Supreme Court Judges, the Vice-President chairs sessions of the Senate. Nevertheless the Executive, on the whole is separate from Congress.

The President and members of his cabinet are not members of Congress. The election of the President is separate from that of members of Congress. In the American case the electorate is not allowed unlimited

expression and exercise of democracy, as is the case in parliamentary democracy. American electorate proposes a candidate for President. The electoral college elects the President.

The last presidential elections in America in 2000 is an illustration of this. The electorate nominated Al Gore for President, but the electoral college elected George Bush as President of the United States of America. A limit has also been placed on how many times the electorate can nominate the same candidate for president. It can only be done twice and no-more. And because the president is not a member of Congress and his election is separate from that of Congressmen, this limitation does not affect congressmen. If the President had been a member of Congress, limiting his tenure of office would have meant limiting that of Congressmen as well.

That is why it is not easy or prudent to limit the tenure of office of a leader in a parliamentary system, without at the same time limiting the number of times that same leader can be a member of the legislature.

The durability of American system is not only due to a well constructed structure, but also to a well entrenched social system, the shared value system that informs and sustains that structure. The normative element is as strong, if not stronger than the structural element. The framers of the American constitution were all white protestant Anglo-Saxon male. This protestant Anglo-Saxon culture which is transmitted through the English language is what makes the American system enduring. To be an American one is required to know and to speak the English language in order to be integrated into the American way of life. Protestant Anglo-Saxon culture is the dominant culture of the American system of Government.



Perhaps the best example of the importance of the normative element in constitution making is the British constitution. Soon after our independence, a presidential system was grafted onto a parliamentary one. The resulting mixture does not seem to have worked well. We took the structures of the two systems, but without the normative elements that sustain them.

The stability and durability of the British system of government is further testimony of how a shared value system can hold a nation or state together. This type of value system may be enhanced or diminished by the structure that is imposed on it. This is particularly so in a country like ours. We as a nation have experienced four systems of government. These are federal, unitary, parliamentary and presidential. We started with a federal structure of government. It was tried for about a year. Thereafter, it was abolished. The federal system of government in Kenya was not given a fair trial. This time round I would like to see it given a fair trial. A consensus seems to be emerging that indeed, this be the case. There seems to be some misunderstanding on the part of some people as to what federalism entails. Federalism is a political arrangement. It is a power arrangement. It involves devolution, or distribution of power to various centers in a country, and defines how those centers are related.

Federalism is not an economic arrangement. It is not about distribution of resources, even though it entails development of resources. Federalism thrives under any system of economic arrangement. Indeed, virtually all the countries that have a federal system of government have different economic systems. Some have capitalism, while others have socialism. Some have a mixture of both. While others, like Somalia, Uganda under General Amin, practice an economic system that is difficult to describe. There is no country in the world, and which practices

a federal system of government, where all regions are equally endowed with resources. Some states in U.S.A for example, are near deserts others are rich farm lands or industrial complexes. Federalism is not about citizenship either. All who reside in any region of a given state are citizens of that state. Federalism does not diminish enjoyment of the rights of citizens. On the contrary, it enhances enjoyment of those rights, by placing responsibility for affairs of citizens into their own hands.

We replaced the federal structure in Kenya with a unitary one. That is what we have today. There is no doubt that it has been successful in keeping the country together. However, it appears that it has not worked as well as it should have to a majority of Kenyan elites. Formation of a commission to review the constitution is in itself acknowledgement of that fact. If then it is accepted that the present constitution is defective, then we either correct the defect and the current constitution continues to be in place, or look for an alternative. There is a commonly held view that the original independence constitution has been amended beyond recognition. And that the original constitution was desirable and ideal for Kenya.

If this is the consensus, then the work of this commission will be easy. All you need to do in that case is simply remove that original document from the shelves and recommend it to parliament for adoption. But I doubt that it is that simple. The country has changed a great deal since independence.

We have new varying experiences that need to be taken into account. We have different sets of problems to deal with. The most pressing ones are ethnicity and power relationships. This commission will have to pay special attention to these two. The need to tackle ethnicity is a pressing one. It is the root cause of most conflicts throughout the

world .In the late 1970's and in 1980's a phenomenon developed in the world, which eventually led to the holding of a United Nations conference on indigenous people of the world. What had happened and continues to happen to-day is the universalization of ethnicity. This in practical terms has meant ethnization of politics as well as politicization of ethnicity. This has led to various demands by various groups or communities on the state. Where those demands have not been met adequately, conflict has been the result. Conflicts that occurred in Africa, Asia and Europe can be traced back to ethnicity.

The question that needs to be addressed is, when does a settler become indigenous? The answer to this may provide a solution to conflicts that are related to ethnicity and may help in the construction of an enduring constitutional order in Kenya and in many parts of the world. Professor Mandani asked this question in his indigenous lecturer, but did not provide an adequate answer. Conflicts in the Congo, Rwanda, Sierra Leone, Liberia, Indonesia, Yugoslavia, Kosovo, Macedonia, the Middle-East - name them, have an ethnic connection. In our own case, conflict in Likoni and in parts of Rift Valley, had an ethnic connection; them and us.

To find an answer to the problem of ethnicity we may need to revisit both our precolonial and colonial experiences. Pre-colonial communities had a way of absorbing settler into a dominant culture. Ceremonies were performed to absorb settlers into a clan, or into a value systems, in order to provide settlers with identity. That is why there are no pure ethnic communities. Some of these pre-colonial values may need to be revived and incorporated into the new constitutional order so as to give it a social, normative base. There ought to be something that one does to become a Kenyan, apart from simply

filling forms. We may require anyone who wishes to become a Kenyan to know and to be fluent in Kiswahili, for instance among other things. Clearly it is within the mandate of the commission to find a common value system that unites Kenyans and to incorporate that into our constitutional order.

Colonial experience instructs us differently. Colonial society was a racially divided society. There were two distinct societies in one. There was the settler community on one side. Africans, natives were on the other side. The natives were subjects and were divided into reserves and given customary identification. Settlers were citizens and enjoyed what are called civic rights. After independence, racial distinction was abolished, as was the distinction between subjects and citizens. Everyone became a citizen and was entitled to enjoyment of civic rights. But the indigenous populations still retained customary, or ethnic rights which were and still are territorially defined. These are group rights. What is wrong with the current constitution, in my opinion, is the fact that it concentrates on individual, civic rights and is weak on group, customary, ethnic rights. In other words it lacks a strong normative base. I hope the commission will come up with a balance between these two.

In conclusion, I see this constitutional reform in three phases. The first one is to sort out the politics of the country. This will require a power structure that will permit a healthy political game. This is the structural aspect of the constitution. The second thing is to identify a social order that will hold that structure to make it endure. This is the normative aspect of the constitution. The last thing is to set up rules and regulations that will help to enforce the social order identified and to regulate the political game that goes with it. These rules impose punishment on those who do not comply,

and also distribute rewards. This is the legal aspect of constitution making.

This exercise is an enormous task, but I believe the Commissioners will meet the challenge posed by it. At times you may

require divine intervention. Remember all the constitutional systems that have endured, have a strong value system as their base. The UK, U.S.A and India constitutions provide good examples.

## ORGANS OF GOVERNMENT - THE EXECUTIVE AND PUBLIC SERVICE NEEDS

**Saulo Wanambisi Busolo**

### 1. Introduction

The executive is one of the official policy-making agencies of modern governments established by a constitution. In a properly run community, the citizens establish a constitution that:

- (a) stipulates what the whole government may and may not do and what powers the government will have;
- (b) establishes certain government agencies as well as providing procedures for selecting their members; and
- (c) allocates certain powers to each agency.

Since the 17th and 18th centuries, a group of influential political theorists including John Locke, the Baron de Montesquieu, Jean Jacques Rousseau, Thomas Jefferson and the authors of *The Federalist*, developed a new conception of the governing process in which the legislatures legislate, the executives execute and the judges adjudicate.

These political theorists further argued that any concentration of powers in a single agency is tyrannical no matter whether that agency is an elected and responsible representative assembly of an irresponsible hereditary monarch. Only genuine separation of powers, it was felt, protects the liberties of people against the aggressions of government.

### 2. Separation of Powers

In Presidential democracies American style, the three types of powers are kept formally separate by two main devices:

- (a) the separation of personnel; and
- (b) checks and balances.

In contrast, parliamentary democracies, British style, operate on the principle of "the fusion of powers", i.e. the constitution stipulates that the executive, the cabinet, the ministry and the prime minister will hold office only as long as it "holds the confidence of a majority of the legislature".

Most contemporary political theorists regard the 18th Century Enlightenment Philosophers' classification of the powers of government as inadequate and misleading. Today legislative bodies often engage in executive activities i.e. investigation of wrongdoing in government; courts often make law as in their interpretations of constitutions and statutes while executives and administrative agencies often make and interpret laws in addition to enforcing them.

In the scheme of separation of powers, clarity over bureaucratic power is not clear either. This power is neither legislative nor judicial. Therefore, it must vest in the Executive. This brings to the fore the problem of conceiving the separation of powers as a doctrine of democratic responsibility and the same conceived as a doctrine of functional specialization. Under these circumstances the President as the most powerful politician in the land is a principal threat to the separation of powers when considered as a doctrine of functional specialization. Vested with "all executive

power" the President has broad discretion in managing bureaucracy in any way he likes. He can for instance call up a middle level bureaucrat but not a judge about a pending court case!

Similarly as Parliaments decline in power, legislative functions have been partly transferred to the executive branch, as seen by the importance of delegated powers which allow the public administration to set regulations. Laws promulgated as guidelines or decrees issued by the executive also point to this delegation of law making authority. Even Bills passed by Parliament are generally prepared and proposed by the government. In essence many tasks labeled legislative in character have become executive in locus.

Parliament not only has lost power as in the case of lawmaking but also in national budgeting. The main purpose of legislative bodies has traditionally been the adoption of the budget but they have gradually given up this prerogative. The job of preparing the budget falls on the Executive which in turn leans on bureaucrats. Members of Parliament do not have the right to propose amendments which would increase public expenditure or decrease revenues.

Even in economic planning, Parliament lacks necessary technical means for controlling national economic plan. The lateness of Parliamentary involvement in the decision making process demonstrates that the agencies which closely participate in drawing up the plan i.e. the Executive, have more influence than the body which must approve it. Likewise in the management of public and privatized industry managers are usually chosen from among the senior civil servants not politicians or business people. Briefly put, a double transfer of power has taken place; from Parliament to the Executive and from the Executive to the top civil service. Constitutionalists should

therefore extend their thinking to embrace the distinctive structural problems involved in controlling the bureaucracy as a fourth branch of government.

Indeed lately, it has been established that bureaucracy cannot work if bureaucratic decisions are up for sale to the highest bidder. But neither can elected politicians be trusted to get serious about corruption. As a result, there has arisen a need for a special article in modern constitutions to create a separate institution, the integrity branch, that would check and balance these corrosive tendencies. A failure to control corruption undermines the very legitimacy of democratic government.

The inclusion of women's voices in the politics of government has proved a more difficult challenge. Out of 191 countries worldwide, only nine currently have a woman elected head of state or government. In a male-centric world, the male standpoint on governance dominates our societies Kenya inclusive, in the form of the objective standards. Isn't there a need now more than ever to recognize officially the gender dimension in governance that may lead to the construction of a gender branch?

Equally important, transparency and accountability in elective and other governmental agencies require abilities to assess official conduct. The standard component in controlling the exercise of public power by officials on the other hand needs freedom of information laws. This means the media as another branch requiring power of autonomy.

Be that as it may, how do we map out what has been said so far from the point of view of our history and the structure of society? The root problem here really has to do with a model of governance structure informed by the industrial age. The current digital age

spawns transformations at all levels of governance as shown below-

	Industrial Age	Digital Age
Democracy	Representative	Participatory
Citizens	Passive consumers	Active partners
Politics	Broadcast, mass, class Polarized	One-to-one
States	National, Monocultural	Global, local, virtual, multicultural

The demise of representative democracy together with its traditional party system also signals a shift in the movement of constitutionalism associated with equality of independent, self-governing national states and the equality of individual citizens to politics of cultural recognition sensitive to the multiplicity of differences i.e. marginalized peoples such as the Ogiek, Women, linguistic and ethnic minorities, inter-cultural groups, suppressed nationals and supranational associations.

### 3. Formation Of The Executive

Citizens are usually presented with the opportunity to go to the polls at frequent or fixed intervals to elect at local, national and supranational levels a host of legislators, executive heads and in some cases, judges. In this case the electoral system performs two functions:-

- (a) Through election of Parliament it is expected to produce a government;
- (b) Through a purported democratic franchise and mode of election, it is expected to confer legitimacy upon the government to govern

Utilizing the Kenyan case of “first - past the – post” plurality method of election in single-member constituencies, it has been argued that it does not allow realization of the

principle of “one person, one vote, one value”.

Furthermore, given the difference in the spread of support between the parties, one party has got more votes than its opponent parties in some areas but has had fewer seats. Relatedly the plurality system of voting seems to work against third parties. Electoral results in Kenya thus tell a story of unequal representation especially of women, youth and regions.

In 1997 for instance a party that received 38.6% of the votes in the General Elections obtained 51.0% (107 seats) representation in Parliament. Under a proportional representation system with a threshold of 10,000 votes, that party could have won only 81 seats. The legitimacy of the Kenyan electoral system and that of the Executive it produces remains under question.

Besides the electoral system, Parliament in Kenya has been dubbed a place of no power. The executive still decides when to dissolve Parliament and call an election. The Executive also controls the registration of voters through the issuance of personal identity cards and passports - the only documents valid for voter registration. As has been stated, in proportion as the diversity of a system of election representatives is inadequate to represent the diversity of the people it governs, the more likely it is to be tyrannical.

### 4. Role of The Executive

The President as head of the Executive in Kenya could be considered as Chief of State, Chief Executive, Commander in Chief, Chief Legislature, Chief Diplomat, Party Leader, and Manager of Development. Fundamentally, the Executive plays two principal roles:

- (a) Chief of State i.e. the nations official ceremonial head and spokesman for its whole people.
- (b) Head of Government acting as a leader of those office holders who propose, direct and enforce the nation's public policies.

In parliamentary democracies each role is performed by a distinctly different official or group of officials. In presidential systems both functions are performed by the same officials.

## PARLIAMENT AS AN ORGAN OF GOVERNMENT

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**Vice Chairman Parliamentary Service Commission Parliament Buildings,  
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### **1 Introduction**

I must admit that I was a little bit excited to be with you here today to share with you some ideas I have about our Parliament and Government. As a politician for about three decades, it is even more exciting to address some of the most eminent lawyers in our country who, as Commissioners now, have an extremely important task to carry out on behalf of Kenyans. I wish you the best of luck in your assignment.

That said, let me tackle directly the topic you requested me to talk on.

### **2. The Origins Of Government**

I would like to begin by undertaking a very risky enterprise - defining the word Government. The word Government may mean different things to different people at different historical times.

But crudely, the Government is that organ of state whose duty it is to carry out the day-to-day administration of the state. The state is a geographical reality having definite boundaries recognized by all nations, Governments and states in the world.

What does the day- to-day administration of state involve? Keeping law and order to safeguard the security of individuals living in that state and their property. It has been said for the umpteenth time that this constitutes the primary duty of Government.

To keep law and order is not a simple thing. What many countries have ended up doing is to keep order without the law. Those perceived to be opponents of the state are ruthlessly punished, silenced or liquidated and the rationale is to serve as a deterrence for those others who might dare. In other words, the use of terror to silence critics of the Establishment might appear to be a very normal thing because the result is "order", "peace" and "stability"!!!

Unfortunately, this is how many states were created. Whoever was the ruler was to be absolute. Anybody questioning the power structure was to be destroyed. And in order to ensure this was done, monarchies were established so that the ruling elite could be from one group of people related by blood. They would get posted as governors and princes in charge of the various administrative units of the Kingdom or Empire. Laws were made by the King. He is again the person who enforced those laws. And anybody accused of breaking the law would be arrested and prosecuted with the King sitting in judgement. Talk of absolute power!

In other words, the Government personified by the monarch used to perform all the three separate functions which today are performed by three different organs of Government. In a Parliamentary system of Government, therefore, Parliament makes laws, the Executive enforces the laws and the Judiciary adjudicates on the conflicts that arise between the individuals that the Executive allege have transgressed the law.



In order for the accused to get a fair trial, the Judiciary must be independent and impartial when executing its mandate as provided under the Constitution.

The Parliamentary system, however, has not solved the perennial problem of the separate functions of the three organs of Government. How separate should they be? In the United Kingdom, for example, Parliament is defined as the House of Commons, the House of Lords and the Queen (the monarch). Yet, the highest court in the United Kingdom is Parliament by virtue of the Law Lords being Members of the House of Lords. The link between the Judiciary and the Legislature in the U.K. is therefore real and strong and you cannot speak, on a serious note, about the separation of powers between the Legislature and the Judiciary even if this link only exists at the highest level.

What about the Executive and the Legislature? The Queen of England appoints the Prime Minister from among the leaders whose Parliamentary party has the largest number of seats. Once appointed, the Prime Minister heads the Government. He appoints his Ministers, approved by the Queen, who sit in the front bench in the Legislature to dominate and control the legislative process. The link between the Legislature and the Executive is therefore not only strong and permanent but is a political reality that any elected Government in the Parliamentary system is always keen to enjoy.

This is the situation that obtains in Kenya. Our Parliament is defined in section 30 of the Constitution as comprising Members of the National Assembly and the President (who heads the Executive and appoints Judges of the High Court including the Chief Justice).

Why does the President form part of Parliament and that without him, actually, there is no Parliament? The answer is in

section 46(2) of the Constitution which gives him power to assent to Bills. Bills passed by the National Assembly cannot become law until and unless the President gives his assent. That is why we talk of an Act of Parliament, not an Act of the National Assembly. The Legislative function of elected Members of Parliament is incomplete without the President.

But alas! The Queen of England is not a Member of Parliament while the President of Kenya is. Indeed, the President of this country cannot assume office even if he won the majority vote but lost his constituency seat. Critics of our system have always charged that our President enjoys the privileges of the English Queen and the rights of the American President without any provisions in our Constitution explicitly instituted to check those privileges and rights. Parliament is merely meant to bring Government to account and not the President.

In the Commonwealth political parlance, the word Government refers to the so-called ruling party. The party in the House with majority seats forms the Government. Any other parties in the House are thus opposition parties whose main aim is to battle the ruling party in and out of the House so that come the next general elections, the government may be changed at the polls. Which should remind all of us that free and robust debates that take place in Parliament per se cannot be the only yardstick of democracy. Those who seek to obtain power must be protected by the law to propagate their ideas to the electorate through organized public rallies.

In our Parliamentary system of Government, therefore, the word Government can be very divisive. You either support or oppose, it is "us" against "them". Small wonder, the KANU/NDP proposed merger is raising several strong eyebrows, so to speak.

Just for the sake of comparative analysis, let us scan for a moment the Congressional/Presidential system in the U.S.A.

The political parlance in the U.S.A. does not attribute the same meaning, reaction and emotion to the word Government. While it is common and normal to speak about the Conservative Government under Margaret Thatcher or simply the Labour Government in the U.K., in the U.S. the standard appellation is, for example, the Kennedy Administration, the Nixon Administration, the Carter Administration or the Reagan Administration. The word Government is always inclusive because it is the American Government, not the Nixon or Democratic Government. What might change in the U.S. after a Presidential election is the administration of the Government.

But the meanings attached to any word depend on the cultural environment. In the House of Representatives and in the Senate the Party with majority seats is simply called the Majority Party and with minority seats the Minority Party. The Administration is formed by an elected President who is not a member of the Congress. He appoints Ministers to help him in executing his duties and these Ministers are not members of the Congress neither do they sit there.

The Founding Fathers of the United States contrived to perfect the separation of powers principle so that the President heads the executive Government, and the work of Congress is to legislate. Certain senior positions in the Government including Ministers can only be occupied by people nominated by the President but confirmed in their appointments by the Senate. The same thing is true of senior appointments in the Judiciary. Several times in American history, a President whose party is a minority both in the House of

Representatives and in the Senate has successfully ran the Government although not without some teething problems. The Congress of the United States is the purse holder. The powers that Finance Ministers have in Commonwealth countries is unknown in the U.S. The Congress makes its own budget for the Executive and negotiates with the Executive regarding their priority of expenditure. These negotiations are held with each head of a Department. The Minister for Finance is only in charge of helping in designing policies and priorities of an Administration in incurring expenditure.

### **3. The Origins Of Parliament**

The British Parliament has the most documented history dating back to almost a thousand years. It is hence regarded as the mother of Parliaments.

But the Parliament of England started from very humble beginnings. The King of England was in constant need of funds - those days called tributes -to finance his wars overseas. The Barons in England would therefore be summoned by the King to appeal to them to bring more money to pay the army. They would meet the King and agree how much tribute each one of them would bring to the crown.

That is how Parliament sourced its power to authorize taxation. And because these Barons would bring the money from their subjects, they were keen to see the results their tributes brought to the Kingdom. You can also see the origin of the authority of the Government to propose taxation. It is the organ with the mandate to do what it promised the voters and therefore should come to Parliament with concrete proposals how it proposes to raise the revenue to finance public expenditure.

As the King became more busy, he needed to have a trusted Minister who would look after the affairs of the Government so that when the Barons come, there would be a competent man to answer their questions. This was the emergence of the Crown's Minister variously called the Prime Minister, Chancellor or Chancellor of the Exchequer.

But there was another silent revolution taking place in England. Several rich people whose wealth was derived from overseas trade (including slavery) did not belong to the landed gentry and therefore could not be Members of Parliament. Since their wealth qualified them to rub shoulders with the Establishment, the House of Commons was created to take care of such people. The House of Commons became elective and assumed special powers on money bills and other bills having something to do with taxation.

From the beginning, therefore, Parliament in the U.K. was a special club where leaders would come and debate any issue concerning their society. It did not even have written rules of procedure, i.e.. Standing Orders, until about 140 years ago.

But the Industrial Revolution in Britain changed the informal club nature of debates in the House. The Government of the day had to pass urgent laws to govern new investment in public infrastructure (the canals and railway-lines), town planning and land use systems, etc. Control of the legislative timetable and calendar, therefore, came to be very important. Irish Members were also involved in ceaseless filibusters in the House and all this was meant to either delay or block legislation. But this topic is outside the scope of this paper.

#### **4. The Role Of Parliament**

As we observed from the beginning, there are three branches of Government, i.e., the

Executive, the Legislature and the Judiciary. Let us now turn to the role of Parliament as an organ of Government.

The Constitution of Kenya gives Parliament legislative power (section 30) which it exercises by Bills passed "by the National Assembly" (section 46(1). Section 47(1) of the Constitution gives Parliament power to alter the Constitution while section 59(3) gives it power to remove "the Government of Kenya" from office by passing a vote of no confidence in the Government.

These are enormous powers by any standards. Why did the Constitution give Parliament such powers?. My humble submission is that sections 31 and 32 of the Constitution should be read very carefully so that the legitimacy of Parliament and its supremacy in law making could be well understood.

Sections 31 and 32 of the Constitution deal with the election of Members of Parliament, the division of Kenya into Constituencies for the purpose of electing Members of Parliament and the qualifications a citizen must meet in order to be registered as a voter.

In modern political philosophy, Parliament is not sovereign. During the era of Enlightenment in Europe, monarchs saw themselves as Divine appointees and *ipso facto* were the sovereigns. Today, it is the people who are sovereign but Parliament is only supreme in so far as its law-making role is concerned. Parliament is therefore a creation of the people and its major role must be to guard and protect the sovereignty of the people who elected it.

The authority of Parliament is thus derived from the sovereignty of the people. Members of Parliament are those citizens who risked allowing their names to appear on a ballot paper. The voters from every

corner of the country turned out in large numbers to vote for a representative who would listen to their grievances against Government inaction and excesses, misuse of public resources, bureaucratic inertia, misadministration, etc, and speak out against these vices on their behalf. Let it be admitted even grudgingly, there is no group of Kenyans today who enjoy this kind of mandate from the citizens.

That is why the Constitution so jealously and vigorously protects the right of an elected Member to stand up in Parliament during debate and speak up his/her mind without fear of legal redress. The framers of our Constitution believed that a Member needed these rights, privileges and immunities so that he/she might go about his/her job of representing the public unimpeded. Laws that are made in this country must be brought to Parliament for a thorough and fearless debate because a people can become vulnerable and poverty-stricken due to the weak, defective or harmful laws that exist in their statutes. Parliament must remain firm in its role of probing Government activities so that those who occupy public offices are individuals who are finally accountable to the people on whose behalf they have been given those offices to hold.

What about if Parliament, instead of being the game warden to guard the game, turns to be the poacher, by being corrupt and passing laws that Members have been paid by an individual to pass?. This may look remote but democracy in every country has come a long way. How do we ensure that we do not elect miscreants to Parliament, individuals who behave like mercenaries?.

Elections must be held regularly, under transparent conditions in an even playing field. Civic education is still a major issue in the United States. It is encouraged by the Government. Our people must be taught the

role of an M.P. Elections must be free and fair so that by and large, their results represent the views of the general public. Elections should not be held just to endorse the Government in power.

Neither should they be regarded as a formality or ritual meant for the incumbent Government to be seen to be renewing its mandate. On the contrary, elections should be serious contests where ideas are let loose in the political market place and the victor is decided upon under transparent rules. In this country we do not have rules that control or prevent monopoly media ownership, use of money during elections to gain unfair advantage, etc. This situation must be corrected.

## 5. Conclusion

Democratization has become contagious all over the world. It has made people to be known as citizens with rights provided in the Constitution, not subservient subjects of a monarch, emperor or some silly dictator somewhere in a corner. Once people taste the fruits of democracy and freedom, their demands do not become less. Instead, democracy and freedom open more opportunities even for conflicts.

But the beauty of it all, a people who want to live in a democratic environment must be prepared to negotiate, debate and hold dialogue on all issues that concern their governance. People who hold the reins of power must do so by consent of the governed obtained in a fair and free elections.

This Commission is a very sincere attempt by the people of Kenya to start cultivating a culture for dialogue that will bring greater freedom and understanding among themselves. For a longtime, the Kenya Parliament, in the form of a few gallant Members, stood up to demand that serious

issues concerning governance of the country be addressed. On several occasions in the past, these gallant Members were silenced through detention without trial, etc. The Executive arm of the Government spread its tentacles like an octopus to every aspect of life in this country. The democratic space was seriously limited. Being a good Kenyan meant you were to be a conformist, see no evil, utter no criticism, etc, against the Government.

Finally, I want to salute Kenyans from various walks of life whose thirst for democracy and freedom, have made us see today when all of us are involved in playing a vital role in making the institutions of this country to work for the benefit of our people. The price of freedom is eternal vigilance.

This Commission must assist Kenyans to create institutions that will perpetually ensure that the dignity of our people cannot be negotiated with any Government in power. It is the duty of the Government to ensure that the people who elected it into office live decent and respectable lives.

In conclusion, Parliament can only be empowered to be a useful organ of Government if the people of Kenya are empowered to elect a Parliament which will take all the risks needed to stand up for the people's right to be free. This is because freedom is never free. It is when we fight for it that we shall know how precious it is so that we have to guard it all the time.

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## ORGANS OF GOVERNMENT

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### 1. Abstract:

In establishing the governance framework for a country, a Constitution creates the vital public organs. Traditionally, these organs are: the Executive, the Legislature and the Judiciary - the first to carry the functions of policy and administration; the second to lay down, change or repeal the law; and the last one to be the adjudicator, where disputes arise in the process of implementation of the law. In some countries there may be additional organs of government, depending on the existing needs and priorities.

Kenya today has only the three basic organs of government, and this sets her apart from many countries, including neighboring Tanzania and Uganda. In both these countries the Constitution provides for an Ombudsman institution, to protect the citizen in their attempts to access and to make use of administrative services. Disputes and complaints invariably arise in this sphere because, whereas administrative assistance and support to the ordinary citizen is ever so important, bureaucrats generally assume for themselves informal privileges and Immunities that render them abusive or inaccessible, and the ordinary citizen becomes the victim. Such matters are not justiciable in the courts of law, and hence the citizen needs a constitutional protector outside the three basic organs of government.

The Executive in Kenya was of a dual character under the Independence

Constitution - an aspect which favoured the functioning of checks-and-balances in government. However, the constitutional changes of the 1960s took away this element and left a linear-structured Executive whose accountability was only after five-year intervals, to the voters themselves.

This process of constitutional change took away the pluralistic Parliamentary base which had provided for a two-chamber parliament, as well as for decentralized Regional Assemblies. The single-handed Executive acquired yet more power over the National Assembly, a constitutional development which over the years, became the greatest challenge to constitutionalism, given in particular the advent of the single party system which lasted from 1969 to 1992.

It is precisely this constriction in the political and constitutional space that evoked the clamours for constitutional change of the early 1990s. While significant constitutional and operational changes have since taken place to allow more room for pluralistic political activity, constitutional change has been of a patchwork kind, and thus a vibrant framework of political activity has yet to be created. This is the primary task of the Constitution of Kenya Review Commission.

As the Commission focuses its attention on the creation of a vibrant context for constitutionalism, it will need to be guided by the quest for constitutionalism, the rule of law, and the creation of larger space for

lawful political activity. The Commission will need to consider among other things, the creation of one or more additional organs of government, and the Ombudsman institution is clearly a candidate in this regard.

The Commission will also need to consider the present interplays between the Executive and the Legislature, and to work towards a scenario in which genuine Parliamentary control of government can take place. In this regard, it will be necessary for the Commission to hear the voice of the people, on the question whether the single Parliamentary chamber is adequate or whether Kenya should return to bicameralism.

If the people continue to accept parliamentary government, then it will be important to address the party system, since traditionally the effectiveness of Parliament, as a constitutional organ is dependent on the free play of political parties. In that event, guarantees for the effectiveness of political parties and even coalitions of parties would become necessary.

As regards the Judiciary, the Commission should consult with the people on the desirability for a Supreme Court, to be the ultimate adjudicator in all-legal claims including the interpretation of the Constitution. The people should also give their opinion on the best ways of assuring competence and impartiality in the Judiciary. They should give an opinion on the role that Parliament can come to play in assuring the impartiality, dignity and integrity of the judges.

## 2. Introduction

A Constitution establishes the regulatory framework for political activity and the

governance process in a country. One of the things it does is to establish organs of government, define their functions and specify their powers for the discharge of these functions.

Experience from all over the world, and from time immemorial has taught that three particular organs of government are the most basic. These are: the Executive; the Legislature; and the Judiciary. These organs correspond to the vital and most basic governance functions, namely (and respectively),

- (i) the conduct of policy and administration;
- (ii) the making or repealing or amendment of the governing laws; and
- (iii) the adjudication of conflicts that arise while the laws of the land are being implemented through executive and administrative decision-making or action.

Although all Constitutions will provide for the three organs and their functions and powers, the Constitutions of different countries thereafter take different approaches, as some may go further and provide for additional governance -related organs. For example, the Ugandan Constitution provides for a further constitutional organ, known as the Inspector-General of Government, as does that of Tanzania , which provides for the Permanent Commission of Inquiry - both being nomenclature describing the Ombudsman institution.

The current Constitution limits itself to the three basic organs of government. In this paper we consider the broad outlines of these organs of government.

### 3. The Executive Organ

The Executive under the Kenya Constitution started off with a dual character, under the Independence Constitution in 1963. The day-to-day operation of government was conducted under the direction of a Prime Minister, who was the leader in Parliament of the political party with the largest number of seats in the House. The more occasional, symbolic and constitutional acts of government, such as formally naming the Prime Minister, proroguing or dissolving Parliament, were conducted by the Governor-General, representing the Queen of England, who operated in the capacity of Head of State.

The Executive organ was a diverse entity with a clear scope for checks-and-balances. This feature, however, was taken away with the inauguration of Republican status on December 12, 1964. The advent of the Presidency severed the political link between Kenya and Her Majesty the Queen's Government in the United Kingdom. Henceforth, the Executive of the Kenyan State consisted solely in the President, who was his own Prime Minister while in his other capacity, he was the Head of State and Commander-in-Chief of the Armed Forces. An unqualified monolithic structure was thus installed upon the constitutional system.

If this monolithicism was at first essentially instrumental, it was to be confirmed in place, firstly by the changed politics that brought the single party system, and then by a series of amendments that enhanced and consolidated the executive powers of the President and gave him the upper hand in his interplays with the Legislature. In the few years following the establishment of Republican status, all the main elements of diversity in the constitutional system, such

as the semi-federalist structure and the bicameral Parliamentary system, were removed and the outstanding and greatly empowered profile of the President, became the main landmark of the constitutional order.

Those who have paid keen attention to the more recent political changes in Kenya will readily recognize that, it is precisely the monolithicism of the immediate post-independence years that prompted the public to initiate clamours for change, leading to the re-introduction of the multi-party system and a re-dedication to the principle of pluralism.

Against this experience, it may now be regarded as a basically valid proposition that the people of Kenya are likely to support enlargement of the number of participating agencies in the stall of the Executive.

However, the present Constitution of Kenya retains the limited - scope Executive; and this will necessarily be a subject in respect of which the Constitution of Kenya Review Commission should receive the opinions of the members of the public.

Issues pertaining to the ideal characteristics of the Executive must also address its interplays with Parliament. The term Parliament means all the elected and nominated members of Parliament, taken together with the President as Head of State; for it is only this whole institutional chain that can make and complete the law-making process. But the person who is President, by virtue of being an ordinary Member of the National Assembly as well as the Head of Government, also belongs to the National Assembly *qua* member and *qua* Head of a government (in effect, a Prime Minister) who is accountable on the floor of the National Assembly. The effect is that Kenya



has a Presidency that is inseparably fused with the National Assembly. This is a classic example of the absence of separation of powers.

The Executive's intimate fusion with the National Assembly may be said to be normal in a parliamentary tradition of government. However, there is the significant difference that the President has, besides, been directly elected by the people, and often feels himself more accountable to the people (at election time, once in five years) more than to anyone else. This produces a duplicity in lines of responsibility, and considerably weakens the National Assembly's scope for exercising control over executive powers. It is desirable that this duplicity be removed, in a quest for governmental accountability, transparency and constitutionalism. The Commission needs to address this question and if need be, make appropriate consultations with the people.

#### 4. The Legislature

In the rapid constitutional amendment process of the 1960s, the preoccupation with the enhancement of the power of the Executive not only achieved that goal, but also entailed the reduction in the size and strength of the legislative body. Under the Independence Constitution there had existed a House of Representatives and a Senate, the latter forming part of the package of institutions attached to the semi-federal constitution. Now the Executive in the first place did not allow funds to be disbursed for the running of the semi-federal (Regional) agencies; and then the Executive secured the abolition of semi-federalism through a constitutional amendment. Soon thereafter the Senate was itself abolished, again through a constitutional amendment. No check-and-balance institution was left to

limit the free reign of the Executive, which became still more powerful, in particular, owing to the removal of 1969 of the political context of pluralism, by abolishing the Opposition Kenya People's Union. Kenya thereafter remained a one-party State (*de facto*, 1969-1982; *de jure*, 1982-1992). This condition greatly weakened the strength of the National Assembly which now, in the totality of its membership, had always to take the line of the single party, KANU and, therefore, had no capacity to assert any real control on the Executive.

As the strength, and check-and-balance capacity of the Kenyan parliament rests on the scope for the existence of differing opinions and the free play of voting alliances on the floor of the House, it follows that the National Assembly was no longer able to serve as an effective power-control institution.

The Commission should share thoughts with the people on the suitability of the parliamentary system for Kenya. If it is agreed that this constitutional system is an essential part of the country's constitutional heritage, or that it is intrinsically good for Kenya, then a further question to be asked is whether it is agreed that Kenya must remain committed to multi-partyism and to political pluralism. If the people consider that a strong parliamentary institution is desirable in Kenya's quest for constitutionalism and the rule of law, then there will be a duty to put in place a Constitution in the liberal tradition associated with the older members of the Commonwealth.

Such a Constitution would provide for the freedoms of assembly and association, for the recognition and acceptance of multi-partyism, for the full accountability of the Executive to Parliament, and for some of the usual conventions of the Parliamentary

system, such as the censure or no-confidence vote in Parliament leading to the fall of the government; the practice of ministerial responsibility; etc.

The Commission may indeed want to elicit the people's opinions on the best ways of strengthening Parliament, e.g. by abolishing the nomination of a section of the MPs; by enhancing the controls by Parliament in respect of matters such as public finance; etc.

## **5. The Judiciary**

The Kenyan Judiciary, in its essential character, has three tiers: the magistracy at the bottom level; the High Court in the middle; and the Court of Appeal at the top.

There has been some debate on the possibility of establishing a Supreme Court. The Commission could put this before the people for an opinion. If a Supreme Court were put in place, how would it relate to the Court of Appeal? What specific functions would be entrusted to the Supreme Court? What would be the size of this court? What would be its primary functions.

It would be necessary to resolve the question as to the role of the Supreme Court in constitutional interpretation. Today, it is the High Court that is regarded as the Constitutional Court. So, what is the position of the Court of Appeal in relation to constitutional matters? Ought the Supreme Court not to be the ultimate Constitutional Court?

The Commission may wish to take up with the people the question as to what should be the role of the Executive in the affairs of the other organs of government, in particular the Judiciary.

Is the current procedure of appointment of judges acceptable? What of the procedure for removing them? What role should the Executive play in the appointment or dismissal of judicial staff? What are the best ways of assuring the independence of the Judiciary? Should Parliament be given a place in the appointment process for judges? How should competence and impartiality be assessed in the Judiciary? In what ways can the Judicial process be made more accessible to the people? Ought there not to be a clear Constitutional recognition of legal aid, as an empowering scheme for allowing the people greater access to the Judicial process?

## **6. New Organs of Government**

Since the Commission has a mandate to seek greater constitutionalism in Kenya's governance system, it will need to submit to the people the question whether more organs of government should be established. In particular, the Commission should canvass the people's views on the institution of Ombudsman. This organ, by whatever name called, serves as the poor person's lawyer and protector, by ensuring this person does not suffer harm at the hands of administration officials. The Ombudsman ensures that mal-administration (incompetence, delay, corruption, rudeness, discourtesy, high-handedness, abusiveness) is kept to a minimum, and that the ordinary citizen who requires assistance from government, is accorded that assistance.

The Commission should also address issues relating to Alternative Dispute Resolution, as a further avenue for giving the people more access to the conflict resolution facility.

## DEVOLUTION OF POWER

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### 1. Introduction

#### 1.1 Background of Kenya

Kenya's history dates back to many centuries, from the late stone age, to the early migrations and settlements of various groups among them the Nilotes, the Bantus, the Arabs, the Portuguese, the early missionaries and so on. The Nilotes came from the north along the Nile and entered present day Kenya through Ethiopia and Lake Turkana about 1000 AD. The Bantus came to Kenya in two different directions; namely through Uganda and Central Tanzania in the 15th Century. The Cushites migrated from the Ethiopia highlands to Northern, Central and Eastern Kenya. By 10th Century they had reached the Indian Ocean Coast and lived around Mogadishu. By 19th Century they were firmly settled in Kenya.

In all these groups, clans, age-sets and age grades formed the basis of government. Government in most traditional Kenyan societies was by Councils of Elders. Some were ruled by chiefs, for example, the Luyia of Wanga had a ruler known as Nabongo and it was hereditary. The Luo had councils called Buch Piny. The Gusii had chiefs who were called Omogambi. The Maasai and Nandi greatly valued religious leaders for example Koitalel arap Samoei, the Orkoiyot of the Nandi who led the people in resistance to the British rule from 1896 to 1905 and ole Lenana among the Maasai. Most of the people in Kenya speak their own tribal languages and there are 42 of them in

Kenya. The current Constitution guarantees the freedom of worship and freedom of assembly. The top ten tribes in Kenya in percentage terms are:

<u>Group</u>	<u>%</u>
Kikuyu	20.78
Luhya	14.38
Luo	12.38
Kalenjin	11.46
Kamba	11.42
Kisii	6.15
Meru	5.07
Mijikenda	4.70
Maasai	1.76
Turkana	1.32

The mainstay of the economy is agriculture and contributes 1/3 of the GDP but employs about 70% of the workforce. Tourism is also a major foreign exchange earner and this is around the Coast and the National Parks and Reserves. The state of infrastructural development is poor. For example 8% of Kenyans have access to electricity compared to 60% in South Africa.

Rural life is difficult and mainly depends on subsistence farming and on incomes of urban dwellers who constitute 25% of the population. As such there is a very high dependency ratio. 47% of Kenya's GDP is concentrated in Nairobi making Kenya have the second worst income disparity in the world after Brazil. The structure of Kenya's economy on a population basis is thus:

6% - Formal

21% - Informal  
73% - Subsistence/Rural.

Kenya's GDP is \$280 per person per year compared to an average of \$460 for sub-Saharan and a world average of \$4,470. Kenya is the 17th Poorest Country in the world.

### *1.2 Meaning of Devolution of Power*

According to the Oxford dictionary, devolution is the delegation by central government to local or regional administration; a descent or passing on through a series of stages.

Therefore, it entails the transfer of political authority to make decisions in some sphere of public policy from the central government to local governments or similar units at the local level. Decentralization implies that the centre delegates certain tasks or duties to the outlying bits while the centre remains in overall control. The centre does the delegating, initiates and directs. Some literature on devolution of power have argued for reverse thrust organizations, where the initiative, the drive and the energy comes mostly from the local units and the centre takes a relatively low profile. Switzerland is a good example of this principle at work; a country both peaceful and prosperous.

It is easy, in logic, to think of the centre taking the long-term decisions and leaving the implementation to the parts. That logic, however, seeks of the old language of management of delegation of tasks and controls. The new concept of devolution of power requires the centre to act on behalf of the parts. In political terms, the centre becomes an assembly of chiefs acting in that place and time on behalf of the total country, then returning to their own units to do their own bit for the whole.

Running the centre is not therefore the job for a monarch, overarching authority or autocratic government. Isamu Yamashita of Mitsui Corporation in Japan said this about the role of the centre, "the best corporate structure today comprises a small strategic centre supported by many front-line outfits; we need to compete outside but collaborate within".

### *1.3 Subsidiarity and the Inverted Doughnut*

The philosophy of devolution is characterized by the word 'subsidiarity'. It was first enunciated by Pope Leo XIII but later recalled in a papal encyclical 'Quadragesimo Anno' in 1941 and it holds that it is an injustice, a grave evil and a disturbance of right order for a large and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies. To steal people's decisions is therefore wrong. To be effective, therefore, devolution requires a positive will to trust and enable a willingness to be trusted and enabled, a moral act-subsidiarity.

An alternative analogy is that of the inverted doughnut. To have a large doughnut the centre must be made smaller. Therefore the devolved units have a few core requirements spelled out and have a lot of discretion in activities of the unit they lead.

### *1.4 Devolution of Power and Democratisation of the State*

Democracy as espoused by Abraham Lincoln is the rule of the people, by the people and for the people. It therefore means that all who are affected by a decision should have the chance to participate in the making of that decision either directly or through chosen representatives and thus the will of the majority should prevail.

In countries where civil society is strong, well knit and inclusive, the system based on majoritarian democracy may not produce adverse results on an excessive scale. Even in political sphere, when the decisions are taken by the majority, the minority interests will be taken into account because of the strength of the civil society and the prevailing democratic culture. However, in a multi-ethnic, pluralist society like Kenya, with the state playing a dominant role, majoritarian democracy may not be democratic at all. As Arthur Lewis put it "translated from class to a plural society, this view of politics is not just irrelevant; it is totally immoral, inconsistent with the primary meaning of democracy and destructive of any prospect of building a nation in which different people might live together in harmony...In a plural society, the approach to politics as a zero-sum game is immoral and impracticable"

It is therefore necessary to create political institutions and to restructure government ensuring that those who are affected by a decision get a fair chance to participate in the decision making process. Experience in Asia, Africa, former USSR and Yugoslavia teaches us that the failure of democracy was as a result of politics of inclusion and exclusion along ethnic lines where the minority are excluded from the decision making process.

The right to vote is a basic tenet of democracy but as Prof. Lani Guiner of University of Pennsylvania Law School observes, "those who interpret the act narrowly theorise that if you can vote, you are enfranchised and you are therefore politically equal to every other voter. The problem is that no one votes purely for symbolic reasons ...Voting is also an instrumental activity, not just a symbolic one. People do not vote just to feel good about themselves, they vote in addition because they want to influence who gets

elected...Democracy means not only the ability to cast a ballot, but the ability to cast a ballot that leads to the election of a representative, and then the ability of that representative to have some fair chance of influencing legislative policy".

A very interesting emerging devolution of power is in Sri Lanka. The new constitution proposes to establish a decentralized state by creating a number of provincial governments. These provincial governments have exclusive power to make laws on 43 devolved subjects and execute them. This power is not granted to the provincial governments by the central government but will be derived from the constitution. The central government and the provincial government are coordinate and not subordinate to each other. The exclusion of Tamils from the law making process is partly overcome by the setting up of the provincial autonomous administration.

### *1.5 Positive Outcome of Devolution of Power.*

One key outcome of devolution of power is evolution of a community-owned government. The basic idea is to make the public responsible members of the community rather than big government lording over the same community. Citizens are people who understand their own problems in their own terms. People who are dependent upon and are controlled by big government wait for others to act on their behalf. The major contrasts between big government and community-based government are:

- Communities have commitment to their members than big governments.
- Communities understand their problem better than bureaucrats in government.
- Bureaucracies deliver services; communities solve problems.

- Bureaucracies offer service; communities offer care.
- Communities are more flexible and creative than large bureaucracies
- Communities enforce standards of behavior more effectively than bureaucracies.
- Communities focus on capacities, bureaucracies focus on deficiencies.
- Communities are cheaper to run than bureaucracies.

Devolution of power therefore is designed to create a political environment in which power to access political, economical and social resources is distributed between the central government and lower levels of government. State authority is spread among a wide array of actors, making politics less threatening and therefore encouraging joint problem solving. Devolution creates a fairer political ground, protects group and individual human rights, establishes checks and balances to central power, avoids winner-take-all political competition and prevents political violence among rival groups.

Devolution will help deter a state's internal use of coercive power against political opposition through formal recognition of the legitimacy of ethno-regional claims to power, which encourages moderate behavior, easing tensions and possible resort to violence and secessionist activities. By dispensing limited powers to lower levels of government, devolution schemes will reduce conflict by giving current and prospective leaders at lower levels greater power and incentives to cooperate.

## 2. Ethnicity And Conflict In Africa

The euphoric hopes that accompanied Africa's independence in the early 60's have, so far, proved to be largely a cruel mirage for many Africans, including a large

majority of Kenyans - 55% who now live below the poverty line of less than a dollar per day.

During the decade of the 1980's alone, it is estimated that conflict and violence claimed over 3 million lives in Africa. Since 1960, 19 full-fledged civil wars have been fought in Africa. At the beginning of 1990, Africans accounted for 43% of the global population of refugees, most of these fleeing from political violence.

The most popular and enduring perspective on the sources of conflicts in Africa is the contention that ethnicity per se constitutes the critical, if not the determinant, source of conflict on the continent. After independence, African leaders declared 'tribalism' as divisive and the primary source of conflicts and that the remedy was the monolithic political party. Authoritarianism, they claimed was a necessary mechanism to hold together a society which would otherwise fly apart and to promote conditions conducive for integration, political consolidation and development.

Ethnic heterogeneity does not on its own produce conflict, nor is socio-political pluralism absolutely incompatible with responsive governance and democratic practice. As Francis M. Deng, the UN Secretary General Representative for Internally Displaced Persons in 1992 deplored that; "Africa has cornered itself into rejecting ethnicity as an organizing concept in the process of nation-building: the challenge then is whether it is possible to reverse the mindset so that ethnic groups which are African realities, could be seen in reverse light as resources or building blocks that can provide a sound foundation for sustainable political and socio-economic development from within ".

Chief Emeka Anyaoku, the former Secretary General of the Commonwealth expressed the following sentiments:

"There was a time when some of us were idealistic enough to think it is possible to wish away essential differences between the component ethnic groups of our country and mould a truly united Nigeria out of it without taking account of its plurality. But experience in Nigeria and in many other countries shows that this is neither possible nor indeed desirable. It shows further that for national unity to become truly nurtured beyond the limits of rhetoric and realized in a way that generates genuine patriotism among the citizens, there has to be a minimum of openness and accountability in the governance system...It should also mean a democratic government that recognizes the importance of reaching out...for consensus among the significant component units of a pluralistic society"

Contrary to commonly held impressions, envy, resentment and fear of other ethnic groups is not inequitable distribution of national wealth and authoritative positions which precipitates internal conflicts; the issue at stake invariably devolves on the processes by which resources are allocated, and these processes relate to such needs as recognition, identity and participation. The process may be more important than the actual allocation; and the process is a political issue.

### *2.1 The Need for a New Management Paradigm for Africa and Kenya*

Whereas the individual is responsive to opportunities for improvement in lifestyle and malleable, there is no malleability in acceptance of denial of ontological needs such as security, recognition, participation, autonomy and dignity. Therefore, any political system that denies or suppresses these human needs must eventually generate

protest and conflict. The late Chief Obafemi Awolowo said this about Nigeria in 1947, "Nigeria is not a nation...It is a mere geographical expression.. .There are no 'Nigerians' in the same sense as there are 'Englishmen' or 'Welsh' or 'French'. The word 'Nigeria' is merely a distinctive appellation to distinguish those who live within Nigeria from those who do not". This can be said for many African countries including Kenya and therein lies the challenge of ethnicity.

Ethnic ties override loyalty to the state because while at the local level in most African states, there is still a deep sense of belonging to a community based on and nurtured by kinship, there is no parallel to such modes at the state level. A fine web of kinship in the traditional African society has not been usurped or even duplicated, within the balance of perceived legitimate authority, which it has failed to earn. Ethnic groups therefore find themselves trapped in an oppressive, predatory condition in a colonial inheritance of a polity they did not bargain for or underwrite.

The introduction of electoral processes leads to power defining phenomenon of ethnicity that further embitters the relations among various ethnic groups. The two social forces that operate at the core of politics in Africa are ethnic groups and political parties. In the absence of widely held and strongly felt ideologies, ethnicity provides the focus for "party" loyalty. The salience of ethnicity in competitive politics creates an ascriptive majority-minority problem where elections more or less become a census of the adult population.

Ethnic parties develop and contest extremely divisive elections, the ethnic group with the largest population takes power in the majoritarian electoral system; and a feeling of permanent exclusion is provided on the part of those who are locked out of office by accident of birth. The question therefore is

how do diverse peoples with distinct political cultures, and often with negative, bitter memories and images, live amicably in a polity of an alien political system? There is therefore the need for democratic elections to be sustainable and helpful in ethnically divided societies. Prudent and responsive electoral, administrative and/or territorial arrangements will have to be crafted to build the confidence of each group in the political system

## 2.2 *Devolution Of Power as a Strategic Response to Ethnic Conflicts*

The fundamental challenge Africa faces as it strives to eliminate destructive ethnic conflicts is to change the popular mindset, which view ethnicity as some pathological societal conditions with backward atavistic roots, to be cured with an enlightened dosage from the medicine cabinet of modernization. An understanding is needed of the fact that the conflicts resulting from ethnicity are primarily attributable to two factors; universal, basic human needs for group identity, security, recognition, participation and a sense of an empowering level of autonomy, and the absence of appropriate policies and institutions of political and economic systems that would enable the attainment of these needs.

The structural measures this paper proposes to deal with in these issues include:

- Decentralization and devolution of governmental authority and responsibilities
- Benign processes of integration, guided through conducive policies and facilitating conditions with less emphasis on coercion.
- Innovative electoral arrangements that avoid tyranny of the majority.

A healthy system of ethnic relations also needs a sound policy on public education

and culture. Many conflicts are sustained by stereotypes, myths or prejudices that have been fed into discourse at household, neighborhood or national levels. Some measure to deal with this issue may include:

- Establish special unity schools that admit pupils from a cross-section of ethnic groups e.g. current national schools.
- Develop national youth service programs that oblige participants to service in regions other than their own.
- Guarantee freedom of passage to travellers in unfamiliar territories.
- Share joking relations to tease or swear at each other in public - humour helps to tame differences and allows for some level of understanding between groups.

## 3. **Country Experiences On Devolution Of Power**

### 3.1 *Canada*

When Canada was founded in 1867, the framers of the country's first constitution believed that if the provinces were given exclusive jurisdiction over education and the French language was afforded special constitutional protections, no other steps were needed to safeguard Quebec's unique heritage. In 1960 Quebec began to question whether the traditional division of powers between the federal and provincial governments gave Quebec sufficient jurisdiction to carry out its mission. It concluded that it did not and began a quest for more power that virtually every Quebec government has since continued.

In the 1960's and the 1970's more and more English-speaking Canadians demanded a change in their relationship with their government. They began to push for a constitutionally entrenched charter of rights.



For Quebecers, the key question is not whether they have a constitutionally entrenched charter, but who will control the enforcement of charter rights. The hostility arose from the fact that the arbiter is the Supreme Court of Canada, which is appointed by the federal government and will always have a majority of English-speaking Canadians among its judges.

Quebecers view Canada as a nation of collectives defined primarily by language. The French collectivity lives primarily in one province - Quebec and the English collectivity controls nine provinces out of ten, and by nature of its majority status controls the federal government and all its institutions. This lead directly to the conclusion that Quebec needs special powers to defend itself and cannot be subject to the dictates of institutions representing the collective power of the English.

The English-speaking Canadians conceive of Canada as a nation of individual citizens who are equal before the law regardless of language their forebears spoke, and who live in a federation of provinces with equal constitutional status.

The competing views between Quebecers and the rest of Canada reflect the challenge to each other's sovereignty. The process of devolving power to the regions entails two independent yet related aspects. The first is a constitutionally guaranteed territorially defined unit and the second aspect defines the powers that we assigned to the unit. Conflicts can arise from questions relating to either of these aspects. Issues can arise where the existing powers assigned to the regions are found inadequate to yield preferred outcomes, at which point, the territorial unit is used as a lever, by threats of secession, to seek the desired advantages.

### 3.2 *United Kingdom*

Since 1998, the constitutional structure of the United Kingdom (UK) has undergone dramatic changes. Through the process of devolution, certain powers formally vested in the UK parliament have been transferred to new legislative bodies located in Scotland, Wales and Northern Ireland. Attempts to provide these regions with degrees of legislative autonomy have existed in various forms since the 19th Century, but the present Labour government has been the first government to succeed in providing all these regions with home rule.

One key lesson from this devolution is that the provisions for each region need not be identical. The Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998 have differing degrees of home-rule. Wales for example has no primary legislation authority granted. The Scottish Parliament is unicameral; to deal with delegated legislation comprised of the rules, regulations, orders and bylaws. The Scottish Executive is comprised of the First Minister, Ministers, the Lord Advocate and the Solicitor General. They can only make laws on matters that are within its devolved competence as defined by Section 54 of the Act.

The Government of Wales Act 1998 was the result of dissolution in the principality during the last administration of the Conservative Party. Following the 1997 election, the Labour Government released the White Paper, *A Voice for Wales: The Government's Proposals for a Welsh Assembly* in which it recommended that executive, not legislative powers be devolved to the principality. A referendum held on September 18th 1997 saw the Welsh vote in favour of this proposal by a slim margin of 50.3%. The assembly does not have primary law making authority and has executive powers in tourism, culture, ancient monuments, highways, health, education,

transportation, agriculture, environment, sports, water and Welsh language. Although this devolution was largely symbolic, for the first time in over 700 years the country of Wales has an elected body located within its borders capable of developing and implementing policies for the people of Wales. The assembly is comprised of 60 members led by the First Secretary and a Cabinet.

The process of devolution for Northern Ireland has been in a far more complex and fragile process than that experienced in Scotland and Wales. Northern Ireland had experienced home-rule between 1921 and 1972, when the British government declared an end to home rule and instituted direct rule from Westminster. The parliament was perceived as a body more representative of the Unionists' interests than the Catholics. In 1973 a second attempt at devolution was made with the creation of the first Northern Ireland Assembly but it lasted only five months as a result of increased sectarian violence. Negotiations have been going on regarding home rule and in 1998 there was a breakthrough with signing of the Belfast Agreement (Good Friday Agreement).

The Northern Ireland Act 1998 delineates between the following powers:

- Transferred - defines scope of assembly powers
- Entrenched - Human rights, EU matters and basic constitutional documents can be altered by the assembly
- Excepted - outside the legislative competence of the assembly
- Reserved matters - within the competence of the assembly but can only be legislated on with the consent of Secretary of State for Northern Ireland.

The Northern Ireland Assembly has since been suspended again this year following the resignation of David Trimble as First Minister over the failure of the IRA to surrender weapons as agreed.

The existence of these assemblies in UK, however, falls short of a federal system of government compared, say, to USA and Canada. Although England, Scotland and Wales see themselves as separate nations with their own flags, football teams, newspapers and electronic media, and their own distinct cultures; all three are united by a common language although there is a sizeable Welsh minority who speak Celtic language and a Scottish minority who speak Gaelic. Anyone who has crossed the England-Scotland border can be in no doubt they are in a separate country. The Scots have a distinct accent while the hauntingly beautiful landscape and granite architecture are quite distinct from England. The contrasts between England and Wales are less clear but a visitor quickly notices that it is poorer than England. Many Britons worry that the Scottish nationalists will use the Edinburgh parliament as a stepping stone to full independence, and the main contentious issue is over allocation of resources.

### 3.3 *Pakistan*

The institutional crisis in Pakistan has a lot of resemblance to the political situation in Kenya. The political system has deteriorated as a result of horse-trading and cronyism, the politics of postings and transfers in the bureaucracy, and corruption. Political leaders have run their parties as fiefdoms, shirking democratic process and basing loyalty on political favours and kickbacks rather than commitment to democratic laws and principles.

The administrative system is based on colonial ethos of control rather than service and has systematically been used as an

instrument of political victimization and vendetta. Peoples' rights have been sacrificed on the altar of political expediency and participation has been reduced to decreasing voter turn out, apathy, mistrust and disgust. Instead of urbanization of rural areas, Pakistan has had an opposite effect of ruralisation of urban areas.

The military government is now trying a new approach of District government which they believe utilizes a bottom-up methodology, is people-centered, responsibility based and customer service-oriented. The president's strategy includes:

- Devolution of power for genuine empowerment of citizens
- Decentralization of administrative authority
- Deconcentration of professional functions
- Diffusion of power for checks and balances to preclude autocracy
- Distribution of resources to the provincial and local level

Following this strategy, a fully fledged district government as the basic governance and development unit of the country, and Citizen Community Boards at the grassroots level are proposed, creating an enabling environment for massive peoples involvement in civic affairs through the close monitoring of services, rights and security.

The local level structures to support this strategy are:

- Union councils - representing small cities and towns on a 50-50 basis for male and female.
- Citizens Community Boards - these are monitoring committees for hospitals, schools, colleges, infrastructure etc.

- Village Councils - Union Council members of a particular village constitute this Committee and works closely with the Citizen Community Boards.

The Union Councilors have judicial functions to resolve local disputes speedily through alternative dispute resolution mechanisms.

The District government will be formed of the District Assembly, a directly elected Chief Mayor and Deputy Chief Mayor who will contest as joint candidates, a district administration and police. The Chief mayor heads the district administration. The District Assembly constitutes all chairmen of union councils, plus additional 20% female members and 5% peasants elected indirectly by Union Councillors of each Tehsil. The Deputy Chief Mayor is the Speaker of the district assembly. It will also ratify the appointment of district officers made by the chief mayor. Legislative functions are limited to creating new taxes, bylaws, rules and district budget.

The District Administration is headed by the chief mayor and coordinated by a District Coordinator Officer. A District Officer will head each department (13 of them). Each district is expected to adopt corporate governance principles and have an entrepreneurial approach. Tehsil Councils has two main functions; provision of municipal services under the control of the mayor and coordinating the monitoring of the District government functionaries at the Tehsil level.

The District Police maintains law and order and is a provincial subject but the chief mayor selects the District Police head from a panel. Investigation and prosecution is done by another arm of the police under the District Officer, Law. The target is to have 90% of court cases to be completed within

the District by enhancing the jurisdiction of the district judge, establishment of small causes courts at Tehsil level, introduction of family and women's courts, and withdrawal of judicial powers from administrative agencies. Public Safety and Justice Committees to undertake citizen monitoring of police and judicial activities.

It is important to note that India is also in the process of devolution of power to the Panchayats- Village Councils. Karnataka governor, Rama Devi said reconstruction of villages was important in the country as the 'heart and soul' of India lived in villages. She said democracy should start from village level and panchayats were the main units from where it should grow up to Parliament level.

### 3.4 *Finland*

Aland province of Finland enjoys a special arrangement with the rest of the country. Finland remained under Swedish rule for about 600 years, from the 13th to the 19th century, but instead of being a colony, was considered an equal partner with the other provinces of Sweden. During this period, Swedish had become the sole language of Finland and its political, social, legal and educational institutions developed along the Swedish patterns. In 1809, a defeated Sweden ceded Finland to Russia under whom Finland came to enjoy extensive autonomy. The result was the emergence of a national identity along with Finnish as a language. In 1863 both Finnish and Swedish were equal in status.

After Finland gained independence from Russia, the people who inhabited the islands of Aland, who were descendants of Swedish settlers wanted a union with Sweden. But in 1921 the League of Nations ruled that Finland would retain sovereignty over the province. The Alanders refused to accept the Autonomy Act but the ruling of the League

of Nations was so strong. The result was that Finland had to allow extensive powers of autonomy to the Alanders without allowing it to become an independent state in order to retain these islands within the sovereignty of Finland. In spite of these unique arrangements and by virtue of their history, a group of Alanders even today want to be completely free of Finnish rule.

Horowitz said this about this devolution "Proposals for devolution abound, but more often than not devolution agreements are difficult to reach and, once reached, soon abort. Most such agreements are concluded against a background of secessionist welfare or terrorist violence. Where central authority is secure, as in India, the appropriate decisions can be made and implemented by the centre. But, where the very question is how far the writ of the centre will run, devolution is a matter of bilateral agreement, and an enduring agreement is an elusive thing".

## 4. **Proposals For Devolution Of Power In Kenya**

It is of utmost importance to replace an outdated political system to suit the contemporary political and social constraints of a country. In the genuine attempt at nation building, at this juncture, all Kenyans have to shed communalism and to think as Kenyans. The rights and privileges of all communities of Kenya have to be safeguarded. As we review our constitution, devolution of power among the communities living in the country could be considered as enhancing our nationhood.

### 4.1 *At District Level*

- Have the District as basic governance unit
- Dissolution of the provincial administration institutions

- Restructuring of the current rural local authorities systems as follows:
- Establishment of sub-location/village councils headed by a Sheriff
- Establishment of Divisional Council along the lines of the current constituencies headed by Chief Councillor
- Establishment of the District Assembly head by Mayor
- The executive officer will be the District Officer appointed by the council reporting to the Mayor

#### 4.2 *Restructuring of the Current Urban Local Authorities*

##### *Capital City*

- Enact special legislation for the Capital City, Nairobi along the lines of London and Washington DC
- Establish a divisional council along the constituency boundaries as the basic operational unit
- Give recognition to residents' associations as the equivalent of village/sub-location council in the rural setup.

##### *Current Municipalities, Town and Urban Councils*

- Multi-constituency municipalities to have divisional council along the current constituency boundaries as the basic operational unit.
- Single constituency municipalities to serve as basic operational unit.
- The administrative head of the unit be a Mayor.
- The executive/coordination function will be done by the District Officer appointed by the Divisional Council and reporting to the Mayor.
- That at least 30% of the seats in all councils be reserved for women

- That all councils have both executive and legislative powers.
- Districts courts to emphasize ADR systems
- The Provincial Senate and National Government shall respect the quasi-autonomy of the councils
- National Government law takes precedence over all council law
- The tenure of office be 4 years for all elected officials

#### 4.3 *At the Provincial Level*

- Dissolution of the Provincial Administration
- Establishment of the Provincial Senate
- Headed by the Governor directly elected by the people
- The executive officer will be the provincial officer appointed by the Provincial Senate reporting to the Governor.
- At least 30% of the seats be reserved for women
- Election of the assembly be by direct suffrage based on the current constituencies
- Each constituency elects 2 Senators
- At least a third of the Senators be eligible for re-election every 2 years
- The tenure of office be 6 years for all elected senators for a maximum of 2 terms
- The Provincial Senate shall have executive and legislative powers
- Each province shall have a High Court
- Culture and Police will be a provincial issue
- The Provincial Senate shall designate their official languages. In order to preserve harmony between linguistic communities, they shall respect the traditional territorial distribution of languages and take into account the indigenous linguistic minorities

- Education at primary and secondary will be a provincial matter
- The regulation of the relationship between the church and state is a provincial matter
- Assistance to the needy persons will be a provincial issue
- Running of District and Provincial Hospitals is a provincial matter
- Establish the Provincial Public Service Commission
- Deal with land matters
- Establish the office of a Provincial Attorney General
- Establish the office of Provincial Ombudsman/Inspector General

#### 4.4 At the National Level

##### *Judiciary*

- Establishment of a Supreme Court to deal with constitutional matters, communal autonomy, international contracts, inter-provincial contracts, and disputes between the National Government and the provinces
- Establishment of a Court of Appeal
- There will be a Judicial Service Commission

##### *Parliament*

- The National Parliament is the highest authority of the country
- 30% of the seats in parliament shall be reserved for women
- There shall only be one chamber, the House of Representatives
- They shall be elected by the people along the lines of the current systems in proportion to the population and geographical spread.
- The meetings of the chamber shall be public
- Every representative be elected for four years for a maximum of three consecutive terms
- There will be a Parliamentary Service Commission

- Election of Speaker by at least 50% of the MPs

##### *Executive*

- President
  - Head of state
  - Commander-in-chief of the armed forces
  - Opens and dissolves parliament
  - Symbol of country sovereignty
  - Shall not be a nominee of any political party
  - Sign all bills passed by parliament by the people
  - Share defined executive powers with the Prime Minister
  - Elected for a six-year term renewable once directly by the people
  - Deputized by one Vice President, elected as running mate
- Prime Minister
  - Head of Government
  - Head of political party with majority seats or coalition of parties
  - Cabinet will be from among the members of parliament
  - Parliament shall set the limits for the cabinet size
  - Responsible for coordination of national government operations
  - Chairman of the Governors' Conference which shall be held at least twice in a year
  - Brief the President once a week on the operations of the government
  - Leader of government business in parliament
  - Assisted by a maximum of 3 deputies
  - Share some executive power with the President under defined terms
- Attorney General
  - Minister for Justice
  - Director of Public Prosecutions
- National Service Commission
  - Responsible for the appointments of all National Civil Servants

- Auditor General
  - Merge the two current units into one Inspector General/Ombudsman
  - Deal with public complaints

## THE ELECTORAL PROCESS IN KENYA

**S. M. Kivuitu**

**Chairman, Electoral Commission of Kenya**

### **L. Legal Sources of the Electoral Process**

1. The Constitution of Kenya
2. The National Assembly and Presidential Elections Act (Cap.7)
3. The Local Government Act (Cap. 265)
4. The Presidential and Parliamentary Elections Regulations
5. The Local Government Elections Rules
6. The Election Offences Act (Cap. 66)
7. The Kenya Broadcasting Act (Cap. 221)

### **2. The Electoral Commission Of Kenya**

The Electoral Commission is a creature of the Constitution, which also sets out its powers and responsibilities. It has been in existence since the first independence Constitution in 1963 (see section 38 (4) of the Independence Constitution). However, most people in Kenya did not know of its existence or its powers and obligations until in 1991 when the late Justice Mr. Chesoni and his team of Commissioners were appointed to prepare the country for the 1992 general elections.

#### *2.1 Composition*

The ECK is composed of 21 Commissioners (Members) and a Chairman. That is how section 41 of the Constitution puts it. And that is the maximum number. These include ten (10) Commissioners that were nominated by some of the opposition political parties represented in parliament in 1997. However, the Constitution is silent

about these supposedly opposition Commissioners.

The President appoints the Chairman and the members of the Electoral Commission of Kenya (ECK) (section 41).

Sitting MPs, public service office-holders and members of the Armed Forces are disqualified from such appointments. The Chairman and the Vice Chairman must be persons who qualify to be appointed as Judges of the High Court or Court of Appeal. It means these two must at least be advocates of the High Court of Kenya. Other than that, there are no constitutional or statutory qualifications that a person must have before being appointed. But once a person is appointed there is a Code of Conduct which determines what he or she cannot do or must do.

Upon appointment each member takes an oath of office. By doing so he/she commits himself/herself to discharge his/her responsibilities impartially as between contending political parties or political viewpoints or rival political candidates. This accords well with the provisions of the Code of Conduct for the Commissioners and staff of the ECK. The Code demands that the Commissioners and the staff must maintain neutrality in the political affairs and activities in connection with elections. A Commissioner who transgresses that prohibition thereby commits a misconduct warranting removal from his/her office.

The ECK as constituted since October 1997 has worked very well. The authorities that nominated them brought together mature



people who have served the public in the past in one way or another. Generally they are fairly educated. But most of all they have very high sense of responsibility and their integrity cannot be faulted. The result of this has been that this group has worked harmoniously.

## 2.2 *Security Of Tenure*

The Chairman and the members are appointed for 5 years (renewable). They enjoy the same protection against removal as Judges of the High Court i.e. that any of them can only be removed from office after a special tribunal determines that way after due inquiry. The President appoints the tribunal but its members must possess certain sound qualifications.

During a member's tenure his or her salary or other terms of service cannot be varied to member's disadvantage. Their salaries and allowances are paid from the Consolidated Fund. The salaries are determined by Parliament along with that of the other Constitutional offices like Judges, Public Service Commission and Controller and Auditor General. However, the allowances are determined by the President for all these offices.

Finally, the ECK is protected by the Constitution from interference by any person or authority in connection with its performance of its work. These constitutional provisions are intended to promote and safeguard the independence of the ECK from harassment, intimidation, blackmail, pressure and the like from all likely sources.

## 2.3 *Comments*

Some of the areas that may attract the attention of any reformer are the following:-

- composition of the Commission
- mode of appointment of the Commissioners
- the size of the Commission in membership terms
- the duration of the tenure of office
- basic qualifications for members

An elections commission, as an election management body, must be competent, efficient and impartial in the execution of its electoral functions. Impartiality is at most times a matter of perception. And perception in politics is endemic. It is for those reasons that it is essential for any reviewer of a country's constitution to look hard at these issues. Different countries have addressed these matters in different ways. That however should not mean that what is good elsewhere is also good for Kenya in the way.

## 2.4 *Finances*

The finances for the ECK's operations other than the salaries and allowances payable to the Commissioners are voted for by Parliament as part of the Government's Annual Budget. That means, for instance, that funds for registration of voters and for holding of elections for each year have to be passed by Parliament. Consequently, if no funds are so approved or the approved sums are less than is required for the elections the ECK will have no funds to perform that essential function. Elections can become necessary at any time. There can indeed be more by-elections than was originally planned and thus budgeted for. Consequently, it is essential that funds for elections should be available always. Furthermore, that dependency can be used to compromise the independence of the ECK. In most countries election management bodies take money directly from the Consolidated Fund or some suitable constitutional arrangement is in place. It is time Kenya rectified this weakness.

## 2.5 Administration Staff

By virtue of powers derived through the Constitution the ECK employs its own staff. It has a Secretariat, which is still too small but it works. This consists of an Administrative Secretary and a Deputy and heads of departments namely Finance, Supplies, Public Relations, Computer and Cartography. The Deputy Administrative Secretary is responsible, among other duties, for election matters. Other than his personal secretary he has only one other officer to assist him. During general elections, however, ECK can employ temporary staff to assist him. The ECK finds that more preferable than having a director of elections or a chief election officer.

The ECK employs election officials it calls District Election Coordinators (DECs), each of whom is in the district, in charge of such functions as the ECK may specify. Basically, the DECs provide support services to the returning officers (ROs) during elections. They are also Registration Officers and in that capacity they oversee the revision of voters' registers in their respective districts. Each DEC has three (3) junior officers to assist him/her in the performance of his/her duties. This is also a small group but it works.

## 2.6 Powers And Obligations

These are set out in section 42 and 42 A of the Constitution of Kenya. They are -

- (a) to carry out delimitation of parliamentary constituencies by determining their numbers, their boundaries and their names;
- (b) to carry out reviews of these numbers, names and boundaries of parliamentary constituencies after every 8 to 10 years after the last same exercise and

- (c) to carry out some review of the parliamentary constituencies after every official population census and in case of changes in administrative boundaries.
- (d) to conduct presidential, parliamentary and local government elections;
- (e) to register voters and revise the voters' registers;
- (f) to promote voter education;
- (g) to promote free and fair elections; and
- (h) to carry out such other functions as may be prescribed by parliament.

## 3. Delimitation Of Parliamentary Constituencies And Periodic Reviews

Section 42 of the Constitution lays out the principles that ECK follows in its discharge of this responsibility. The most important is that "all constituencies shall contain as nearly equal number of inhabitants as appears to the Commission to be reasonably practicable". It is important to note that the Constitution refers to "*inhabitants*" and not "*registered voters*". It also confers on the ECK a very broad discretion whose parameter is that it must be "reasonable" to the ECK. In Kenya many "registered voters" of a parliamentary constituency, for example, in Mombasa may be inhabitants of Lamu or Kitui or Taita/Taveta districts. Consequently, any honest student of the distribution of parliamentary constituencies in Kenya will look at the population as opposed to the number of registered voters in a constituency. In fact, in the same section of the Constitution the ECK is enjoined to take the latest population census as giving the correct number of inhabitants.

The Constitution then provides that the ECK can *depart* from this principle of equality of population between parliamentary

constituencies "to the extent that it considers expedient" in order to take account of -

- (a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely -populated rural areas;
- (b) population trends;
- (c) the means of communication;
- (d) geographical features;
- (e) community of interest, and
- (f) the boundaries of existing administrative areas.

An additional discretion is granted on the ECK - i.e. to deviate from the principle of equality "to the extent that it considers expedient" and, as regards density of population alone, "the need to ensure adequate representation of urban and sparsely -populated rural areas".

Clearly the discretion placed on the ECK is very wide -indeed it may not be easy to define it in precise terms. The exercise of discretion is always a common area of disagreement. The way one person exercises a discretion bestowed on him might differ from the way another person would have exercised that discretion. So long as the decision was not influenced by caprice or malice or self-interest it would be dishonest to say one of the two decisions is definitely wrong.

In 1996 the ECK reviewed the parliamentary constituencies by a constitutional amendment. Parliament had set a maximum of 210 constituencies. At that time there were 188 constituencies. Thus 12 new constituencies were to be created. The last population census had been held in 1989.

There is no set procedure on how to go about reviewing boundaries and names of constituencies. The ECK however called for suggestions from the public and truly it received many memorandums with bright

ideas. It also held consultative meetings with the people in every district and received their views. After considering all the proposals and opinions in combination with its independent research on relevant matters and on taking into account the principles of equality of the population amongst constituencies and upon exercise of its discretion in the lines provided by the Constitution, the ECK reviewed the constituencies in the manner and extent that is now Legal Notice N0.298 of 1996.

During its tour of the districts to consult people controversies abounded at all the places. Even after the ECK took its decision controversies still persist.

The first parliamentary constituencies of independent Kenya came on the recommendations of the Kenya Constituencies Delimitation Commission in January 1963 headed by S. Foster-Sutton. As a result Kenya was divided into 117 constituencies. Did the distribution favour any particular region or province? The next reorganization of constituencies came about at the liquidation of the Majimbo Constitution in 1966 when 41 new constituencies were created for the senators to pave the way for the Senate's liquidation. Parliament actually directed how the constituencies were to be distributed. Was any particular region or province favoured in the process? Another review was carried out in 1986. Did this favour any region or province? Then in 1996 what would the ECK do constitutionally that it did not do? The point being made is that it is essential to study the whole history of constituency making in Kenya in order to make meaningful suggestions.

The provisions of section 42 of the Constitution on constituency making are not very much different from those found in many other countries. However, in most countries the Constitution provides some

guidelines as to how far the responsible authority can depart from the principle of equality of population. That may warrant serious consideration by any reformers of the Kenyan constitution.

#### **4. Elections**

Kenya practises “first-past-the post” system of elections. In an election the winning candidate is the person who scores most votes. That result has no bearing to the margin of the win or the total votes cast in the election. The victory could be by one or two votes.

Each voter is entitled to one vote in every election, that is, for example, in a presidential election, a voter will cast only one vote.

The ballot paper contains the names of the candidates, the party symbol of each candidate's political party and a space in which the voter marks his/her vote. Thus a valid used ballot paper will bear only one voter's mark.

Kenya is divided into 210 parliamentary constituencies. In a parliamentary election each constituency elects one person to represent it in parliament. The successful candidate is called a Member of Parliament for that constituency.

For Presidential election Kenya is treated as one constituency.

Local government in Kenya consists of four types of local authorities, namely, county councils, municipal councils, town councils and one city council called Nairobi. Each local authority has a section of elected councillors. They represent electoral areas also known as civic wards. One or more councillors can be elected to represent one electoral area. The ECK determines the number, names and boundaries of these

electoral areas. It also determines how many persons will be elected for each electoral area. Currently no electoral area has more than one councillor.

Each candidate in all the elections must belong to a political party. The political party must sponsor the candidate. Independent candidates are not allowed.

Each political party must have its party symbol, which must be approved by ECK, so that voters can identify the political party of their preferred candidate by his/her party symbol where the voter is illiterate. That is why the ballot papers must bear the party symbols.

There are members of parliament and councilors who are not elected. Political parties that are represented in parliament and local authorities, as the case may be, nominate them. A political party is entitled to nominate a ratio that is proportionate to the number of its elected members of parliament or elected councilors.

In the nomination of members of parliament or councilors the constitution and the statutes require that political parties should observe gender equality. They never do. The ECK is legally mandated to ensure the political parties observe this requirement. The ECK never does so. And this is the only provision in the Constitution and the statute law that explicitly demands equal treatment between the sexes.

#### *4.1 Comments*

The electoral system used in Kenya is common in many of the Commonwealth countries. There is the other alternative electoral system known as Proportional Representation (PR) which is practised in many countries some of them members of the Commonwealth e.g. New Zealand and

South Africa. And there are countries that have a mix of both systems.

The goal of all PR systems is to deliberately translate a political party's share of the vote nation-wide into a corresponding proportion of parliamentary seats. Thus a political party would be awarded a proportion of the parliamentary seats that equal the share of the votes cast in its favour nationally. The system is lauded for providing fair representation. Representation in Kenya is one of the most contentious issues. Consequently, a system that is seen to improve representation would be attractive. However, it is a system that requires certain circumstances to obtain e.g. the existence of organized political parties. It will be necessary to address that first. The system is reputed to resolve ethnic rivalries. It will be welcome to Kenya if it can do that.

Last year the ECK in conjunction with the Friedrich Ebert Stiftung held a workshop where all the political parties and major groups within the civil society were represented to discuss exclusively the ideal electoral system for Kenya and other African countries. South Africa, Namibia, Ghana, Tanzania and Uganda attended and were represented by senior election managers, University dons and representatives of the civil society. At the end of the workshop the participants recommended that African countries should implement a mixture of Plurality-Majority system (to which FPTP belongs) with one or two of the PR-variants. List PR from PR stock was favoured. There are plans to hold a follow-up workshop for the East African Community countries in the next few months on the same subject matter. It is hoped this time the workshop will come up with recommendations that will identify ways by which that ideal electoral system can be explained to the inhabitants of these countries for them to understand what is at stake in order to enable them to make an

informed and deliberate choice between the alternative electoral systems. The ECK will, at the same time, learn more about these systems. At the moment it cannot claim to be well-informed about them.

There are advantages and disadvantages in all these systems. It is very attractive for a democracy enthusiast to urge for the immediate adoption of PR system or a mixture of systems in Kenya during these days of constitutional and legal reforms. It should however be borne in mind that

- Kenyans have a system they are used to (since 1963);
- Kenyans are entitled to know and understand well what each system involves;
- Kenyans are entitled to choose the system they wish to adopt;
- any new system that does not have the full support of Kenyans will be undesirable. By Kenyans we not mean the elite. We are talking of the ordinary voters.

My personal view, as S. M. Kivuitu, is that this aspect of reform should be carried out without haste. In New Zealand it took many years of consultations with the people before adoption. In Britain a parliamentary commission recommended some changes that would amount to a mixture of electoral systems. That is some few years back and yet that country has not rushed to adopt those, indeed, very mild changes. Maybe I am unduly cautious. Or maybe I am absolutely wrong.

#### 4.2 *Holding And Conduct Of Elections*

In respect of the three elections a candidate must be a Kenya citizen and registered as a voter. In presidential and parliamentary elections the candidate must also be registered in a parliamentary constituency. And for local government election the

candidate must be so registered in an electoral area within the locality that the candidate intends to seek election.

A presidential candidate must be 35 years of age and above. A parliamentary candidate must be 21 years old or older. A civic candidate must have attained 18 years of age or above.

#### 4.3 *Presidential Election*

Section 9 of the Constitution of Kenya provides as follows: -

- "9 (1) The President shall hold office for a term of five years beginning from the date on which he is sworn in as President.
- (2) No person shall be elected to hold office as President for more than two terms.
- (3) The President shall, unless his office becomes vacant by reason of his death or his resignation or ceasing to hold office by virtue of section 10 or section 12, continue in office until the person elected as President at a subsequent presidential election assumes office.
- (4) The holding of the office of the President shall be incompatible with the holding of any office in any professional or labour organization and with any professional activity or any other public employment."

The last presidential election was held on 29 December 1997. The President was sworn on 31 December 1997.

Presidential election is held whenever the President's office falls vacant. It falls vacant if the sitting President: -

- (a) dies or
- (b) resigns or

- (c) is removed by nullification by Court of his/her election in an election petition or
- (d) is removed by Court after due inquiry on grounds of incapacity to carry out the presidential duties or
- (e) becomes disqualified to be a member of parliament under the law that governs the requisite qualifications;
- (f) parliament is dissolved or
- (g) the President's term of office expires

Except in the case where the issue comes up as a result of a motion of no confidence in Parliament only the President is empowered by the Constitution to dissolve Parliament at any time before its life legally expires. The ECK's role is to publish an appropriate notice of the holding of the election in the Kenya Gazette. When the election is to be held in general elections then the period of the taking out of the notice must agree with the timetable for the general elections. In any other case the notice must be taken out as soon as possible after the occurrence of the vacancy in the Presidency. The by-election however, in these other cases, must be held within 90 days of the occurrence of the vacancy.

In the notice, the ECK will state the dates for the nomination of the candidates and the election date.

The Presidential candidate must be nominated by a political party. His nomination must have a proposer and a seconder (both of whom must be national officials of the candidate's political party. He must also be supported by at least one thousand (1000) subscribers. The proposer, seconder and supporting subscribers must be registered as voters in some parliamentary constituency.

To win the presidential election a candidate must lead in votes and in addition receive twenty five percent of the valid votes cast in

at least five (5) provinces of the 8 provinces that make up Kenya. However, if no candidate succeeds as stated then there follows a run-off between the two rival candidates who scored highest votes. Even this time the candidate who scores more votes than the other, scores at least 25% of the votes in five provinces of Kenya's 8 provinces is declared the new President.

A presidential candidate must also be a parliamentary candidate for a parliamentary constituency. He or she must win the parliamentary election as well in order to claim victory in the presidential election.

#### 4.4 *Parliamentary Election*

Parliamentary election is held if parliament is dissolved or a member of parliament dies or resigns or Court nullifies his or her election as a result of an election petition or the Speaker of the National Assembly declares his seat vacant or becomes disqualified by law to remain such a member. The parliamentary term of a member of parliament is five years after the date of the first parliamentary sitting following general elections. In any other case the term is limited to the remaining part of the life of that parliament. All this is subject to earlier dissolution of parliament.

Parliament would stand dissolved after five years from the day it first sat following a general election. The President can dissolve parliament at any time before that day. The present parliament first sat in January 1998. It will therefore cease to exist on that day in Jan 2003. In view of the fact that the President's term will automatically terminate on or about 31st December 2002 the life of the present parliament may be unable to exceed that day.

The law lays out the timetable within which the election must be held. Where parliament is dissolved general election is held. The

Speaker of the National Assembly must issue writs within fourteen days after dissolution of Parliament to the Returning Officer (RO) for each constituency to hold election to fill the vacancy in that constituency. The Speaker must transmit the writs to the ECK, which in turn, must deliver the writs to the Returning Officers within ten days. The ECK must then, within the same ten days, publish notices of the general election stating the days when the nomination of the candidates will be carried out and the day when the election will be held. The nomination days allocated must allow the political parties a minimum period of twenty-one days, to conduct the nomination of their candidates.

A minimum period of fourteen days from the last nomination day must be allowed before the Election Day. This timetable applies to by-elections (i.e. election other than general election) except that the law allows for a longer period between the occurrence of the vacancy and the issuance of the writ by the Speaker.

A parliamentary election candidate must prove that he/she is sufficiently proficient in both the English and Swahili languages to the extent that he or she will be able to take part in parliamentary debates. The proof required is provided under the National Assembly and Presidential Elections Act (Cap. 7). If the candidate does not hold the educational certificates or has not attained the status set out in the Act then he or she must take a test on the language he or she is not proficient. The test is held under the aegis of the ECK.

During the nomination of candidates a parliamentary candidate must be supported by a proposer and a seconder and between seven (7) and eighteen supporters all of whom must subscribe on his nomination paper. They must be members of the candidate's political party and be registered

voters in the constituency the candidate seeks to be elected.

#### 4.5 *Local Government Election*

The Local Government Act (Cap 265) provides that whenever parliament is dissolved the councils will automatically be dissolved and general election would ensue. The general election for the local authorities is by law held together with the parliamentary election in such general elections.

Vacancies within local authorities occur where, among other things, a councillor dies or resigns or is disqualified for contravening specific provisions of the Local Government Act or when his/her election is nullified by a Court of law on application to Court after the holding of the election or for defection from the political party which sponsored him/her at election to another political party. Except for the time allowed for communication to the ECK about the existence of a vacancy in a local authority the rest of the timetable is the same as for parliamentary election.

#### 4.6 *Election Officials*

Whenever an election is to be held the ECK appoints certain election officials. It appoints Returning Officers (ROs) and through those it appoints presiding officers, polling clerks and counting clerks. Election officials must be non-partisan concerning the election they are conducting. Those whose duties will involve entry into a polling station must take the oath of secrecy to the effect that they will safeguard the secrecy of the electors' vote.

The functions of each category of these election officials is clearly set out in the Presidential and Parliamentary Elections Regulations and the Local Government

Elections Rules. A Returning Officer (RO) would be in-charge of the electoral process for the parliamentary constituency whereas the presiding officer (PO) would be in-charge of the electoral process within the polling station.

The ECK designates polling stations. These are the places or premises where the voters would go to vote. Their names, locations and identification numbers must be published sufficiently for the benefit of the voters. They must be sited and distributed so as to secure convenient and maximum use by the voters. Each constituency would have several polling stations the actual number being dependent on the number of the registered voters and the size of the parliamentary constituency.

Only registered voters can vote. They vote at the polling station. The serial number of their voters' cards would guide them as to the correct polling station to go to. Once a person presents himself/herself before the presiding officer or a polling clerk the officer checks if the voter is registered as a voter and if he or she is really the right person named in the voter's card. To establish the latter the voter must also produce his/her National Identity Card or his/her Kenyan passport. Then after a few other formalities the voter is issued with a ballot paper whereupon he/she proceeds to mark his/her ballot paper. He or she enters a secret compartment alone for the purpose. He or she then folds the ballot paper in a way that ensures no one can see how he or she marked the ballot paper. He or she then deposits the now folded ballot paper in a ballot box provided by ECK for that election and which is kept within the sight of the presiding officer and all other occupants of the room.

Where a voter is illiterate or physically incapacitated to the extent that he or she requires assistance to vote, and the voter



requests the presiding officer to so assist, the presiding officer is allowed to render that assistance. He or she, however, must invite a polling agent for each candidate to come along and witness the voting. He/she must mark the vote according to the wishes of the voter.

At every polling station, a candidate is allowed to have polling agents. The number that a candidate will have is determined by the presiding officer having regard to for example, the size of the room and the number of candidates. These are supposed to safeguard the candidate's interest. However, on most occasions they do not seem to know their responsibilities well enough for the job.

ECK has black opaque ballot boxes. The British freely donated the original supply. The ECK only adds a few more such boxes every time the need arises.

Only a limited category of people are allowed to enter into a polling station besides the voter, the candidate, the candidates' agents, election officials and police officers on duty. These include the press and election observers.

ECK accredits election observers. Before that is done they must convince the ECK that they are neutral with regard to the results of the election. The accreditation confers on them the right to make observation and make notes of their observation. They are not allowed to interfere or question the electoral process or the election officials' decisions, while the election is in progress. Thus, they are not monitors. Kenya does not recognize monitors.

There are some very competent Kenyan (i.e. domestic) election observers. But there are equally plenty of ignorant ones especially during general elections.

The ECK uses the police force to keep order at polling stations, to escort ballot boxes and ballot papers and to maintain law and order at the counting halls where votes are counted. ECK pays such police officers some honoraria.

#### 4.7 *Counting Of Votes.*

After the close of the poll all ballot papers used and unused and all election materials used for the polling e.g. voters' registers, are put in the ballot boxes. The presiding officers seal the ballot boxes. They allow the candidates' agents to do the same if they have their own seals. The ECK does provide candidates with seals in case they want to seal the ballot boxes and they have no seals of their own.

The ballot boxes, so sealed, from all polling stations in a parliamentary constituency, are transported to one place. Counting is carried out at that place. Usually it is a hall. Its location and identity would have been published long in advance of the counting.

The Returning Officer carries out counting. Candidates are allowed to be present or to be represented by counting agents who must have been appointed in writing and notified to the returning officer in advance. The Returning Officers count ballot papers polling station by polling station. When he or she establishes the total, he or she announces the results of the election.

The ROs then convey the results to the HQs of the ECK as prescribed. But before they do so, in practice, each RO telephones the ECK and dictates the results. After receiving these results in the prescribed manner, ECK releases the results to the public except in the case of the presidential election.

In this latter case the ECK tallies the results brought by each RO and from those forms it

declares who the winner is and the scores of all the candidates.

#### 4.8 *Adjudication Of Election Disputes*

There is no constitutional or statutory provision for the adjudication of disputes that may occur during party nominations, nominations of candidates by Returning Officers or election campaign period. The High Court, however, has held that such disputes can only be resolved in election petitions.

##### *Presidential and Parliamentary elections*

The Attorney General or any person who was entitled to vote in an election may lodge election petition in relation to that election. Returning Officer is not thus authorized to file such election petitions. The election petition must be drawn as provided by the Constitution, the National Assembly and Presidential Election's Act (Cap.7) and the National Assembly Elections (Election Petition) Rules. The petitioner must deposit Shs.250,000= with the Court at the time (or very soon after) he presents the election petition which is some kind of security for costs of the litigation. The petition must be lodged and served within 28 days after the date of the publication of the results in the Kenya Gazette. The Courts have held that service of the election petition must be personal.

The election petition challenges -

- (a) the validity of the nomination of a President,
- (b) the validity of the election of the President or a Member of Parliament.

Whether or not a parliamentary seat has become vacant can be a matter for petition for the High Court to determine.

A bench of three Judges of the High Court called the election Court hears the election petitions. Several such election courts are usually established. An election court can only -

- (a) nullify the nomination of a Presidential candidate, or nullify the election of a President or a Member of Parliament or
- (b) dismiss the petition. It cannot declare any other candidate as the winner.

There is no appeal to the Court of Appeal on the determination of the question of the validity of the nomination and/or election.

##### *Civic Election*

A person who is qualified to be elected or to vote and a returning officer can challenge the validity of the election of a councillor. This is done by way of an application. The application must be lodged in a Magistrate's Court that is for the area or of the local authority nearest to that area within fifteen days of the publication of the election results.

The Magistrate is empowered to declare the election invalid and to go further and declare a particular candidate as a winner.

#### 4.9 *Election Offences, Electoral Conduct*

The Election Offences Act (Cap 66) is entitled as an "Act of Parliament to prevent election offences and corrupt and illegal practices at elections" and it just does that. Its scope is wide enough to protect elections from acts and omissions that would compromise fairness in an election, freedom and secrecy of the voter and of the vote. The problem therefore is not the law but its enforcement. The police's attitude seems to be that since such offences arise from a political activity they are politics which the police should not be involved. That is not to

say that the Kenya police necessarily act fairly during elections.

Indeed, on the contrary, in 1997 a new section had to be added to the Police Act enjoining the police to act fairly and impartially in election matters. The only plausible explanation for this reluctance seems to be fear of losing their jobs. That is an area that must be seriously addressed if the police is expected to act as it should under the law. Secondly, no prosecution can be commenced without the Attorney General's sanction.

It is not clear why that is necessary now even if it was thought necessary at the time the Act was passed in 1958. It seems Kenya simply lifted the British statute on these matters and transplanted in our country. There was no Electoral Commission of Kenya (ECK) then, just like in Britain there has never been one. It provides a round-about way of dealing with a real issue that does not seem necessary. Bank robbers do not get such dignified honour though their crime seems to be more serious than an election offence or illegal or corrupt practice going by the penalties attached to each.

Kenya has statutory Electoral Code of Conduct. It is Fourth Schedule to the National Assembly and Presidential Elections Act. Its paragraph 3 reads as follows "The object of this Code is to promote conditions conducive to the conduct of free and fair elections and climate of tolerance, in which political activity may take place without fear of coercion, intimidation or reprisals". No political party or candidate is allowed to take part in an election unless and until the political party and the candidate subscribe to the Code. Such subscription binds the political party and its supporters and the candidate and his/her campaigners to comply with the standards set out by the

Code which are well summarized in paragraph 3 referred to above.

Political parties and candidates have so far treated the Code casually. They all treat it as if it is for ECK. They do not seem to realize that it is some sort of covenant among themselves for the good of the country. The ECK does not find it easy to enforce the Code without the cooperation of the political parties who prefer to politick over its infringement. Furthermore ECK does not have the human and financial resources to act on its own on these matters without the parties' and candidates' cooperation. ECK will still continue to press these groups to respect the Code.

It used to be routine to see public officers campaigning for votes for the election of a candidate. On many occasions they would even use their official vehicles to do that. This is no longer the case. Such conduct was outlawed in 1997 by an amendment of the National Assembly and Presidential Elections Act. The law enjoins these officers to keep off politics at such times. Generally the law is being observed.

#### *4.10 Political Parties*

Only political parties that are registered are allowed by law to participate in elections. A Government department carries out registration. Except for a few references to political parties in the Constitution and the National Assembly and Presidential Elections Act, political parties are treated by the law, like it treats social clubs, football clubs, funeral associations, religious and revival societies etc. They are registered under the same Act of Parliament. From its provisions it is clear that the Act was never intended to deal with political parties.

This situation requires attention. There should be a legal regime that will lead to proper organization of political parties.

Indeed it is not possible to see how the political parties as currently constituted and operated can account for public funds which may be given to them in order to improve their performance and potency.

All the same when elections are imminent, whether general elections or by-elections, or whenever the ECK is about to embark on an exercise that will affect elections, the ECK holds consultative meetings with the registered political parties and discusses with their representatives the whole matter. These consultations have proved to be beneficial to the political parties and ECK. The parties' contributions on such occasions are remarkable. The ECK is very grateful to all the political parties for this cooperation.

## **5.0 Registration of Voters**

Section 32 of the Constitution of Kenya provides that the person who may be allowed to vote in a parliamentary election must be registered as a voter in the parliamentary constituency. No person can be elected as a President or Member of Parliament or a councillor unless he/she is registered as a voter. That makes the registration as a voter extremely crucial.

Voters are registered under the National Assembly and Presidential Elections Act and the Local Government Act. To register, the applicant must produce before the voters' registration officer a National Identity Card (ID) or a Kenyan passport. The ECK has no power or authority to issue or demand the issuance of any of these two vital documents. Government departments under different legal regimes issue them.

The law empowers the ECK to carry out registration of voters in a single stretch from time to time. As the law is currently worded it cannot possibly entertain continuous registration of voters. In compliance with the current law the ECK carried out

registration of voters exercise in 1997, in preparation for the general elections that year. It was computerized for the first time. Thereafter it became unnecessary to carry out registration of voters afresh as was the practice in the past. The ECK decided to be revising the registers, still in one stretch as opposed to a continuous activity. The ECK did so in 2000 and 2001. It is going to do the same early next year (2002). This time the ECK will have a representation in each village and residential estate. The ECK's intention is to get onto the register as many unregistered but qualified persons as possible. Currently there are 9,402,680 registered voters in Kenya.

There are many people in Kenya who swear that they are Kenyans but who have no ID cards or have difficulties in obtaining these ID cards. The effect is that they therefore cannot be registered as voters and thus they cannot vote. The Principal Registrar of Persons whose office is responsible has promised ECK that his office is doing its best to address these matters and hasten the issuance of these cards to those who have applied for them. ECK would like to see the Principal Registrar of Persons succeed. Qualified Kenyans have a right to be issued with ID cards whenever they apply for them.

At the same time it should be recognized that not all Kenyans who hold ID cards wish to be registered as voters. To register as a voter or to vote is not compulsory in Kenya.

Finally, many Kenyans have failed to collect their ID cards from the Department's offices. In some cases the reasons for this failure is understandable like where the applicant has to spend money to travel for the purpose and has no such money. Once again, the Principal Registrar of Persons has agreed to deal with the problem by arranging for the ID cards to be taken to the applicants.

## **6.0 Promotion of Voter Education**

The ECK recognizes the importance of this responsibility. It however does know that it is not possible for the Government to provide sufficient funds for the purpose. As a consequent, the ECK sought the participation of those who seem to support the promotion of democracy. There were many who showed interest. They however advised that they would only come in if Government showed commitment to the voter education by providing some token sum for the purpose. The Government accepted the challenge and has annually given some financial provision for voter education. None of these friends showed interest after that.

In 1999 UNDP came up with a voter education programme for 9 districts in the promotion of good governance for the purpose of reduction of poverty. The ECK joined with UNDP and Institute for Education in Democracy (IED) in the implementation of the programme. In the process, all the DEC's were trained on how to design voter education programmes and the methods for its promotion. With no funds however, that knowledge is of no avail.

This UNDP/ECK/IED voter education programme has produced a voter education manual and community voter education promoters in these lucky districts. The ECK has noted that in the districts where this programme is in progress there is heightened awareness about the electoral process. It is unfortunate that the programme is restricted to these selected districts.

In the promotion of voter education ECK has found that it is important to involve the provincial administration and the political

leaders of all political parties. That is not to say you seek the permission of the Government officers or the politicians. No. What the ECK did was to approach them to attend and take part like any other trainees and make their contribution. As a result the ECK has been able to get the cooperation and participation of those who most likely would have been its opponents.

The ECK is now working out on a limited programme for the promotion of voter education in the other districts. Its extent and success will depend on the available funds.

## **7.0 Other Functions as May be Presumed by Parliament**

Parliament, in 1997, empowered the ECK to be drawing electoral areas (i.e. civic wards) just as it does parliamentary constituencies. The ECK has, between April and August 2001, carried a major review of the current electoral areas and it is going to announce new electoral areas presently.

In order to come to its decision it first carried out a research on the past creation of electoral areas in Kenya, held consultations with Kenyans in all the districts, and considered memorandums it received from Kenyans on the matter. It found that given their freedom, Kenyans know a great deal and have admirable ideas. In fact what the ECK proposes to do came from the mouths of ordinary Kenyans. The ECK's experience is that ordinary Kenyans should always be given an opportunity to say their bit and they should be seriously listened to. This works best when the subject matter for this consultation is explained to them in simple but clear terms so that they realize what is in issue.

## ELECTORAL SYSTEMS

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### 1. Introduction

This paper discusses the various electoral systems currently in use in different parts of the world. This is done against the backdrop of the ongoing constitutional reforms in Kenya aimed at improving governance in the country. It is hoped that the issues raised in the paper will contribute to the design of an appropriate electoral system for Kenya. In this regard the paper suggests the major factors that ought to be taken into account in designing an electoral system.

The paper begins with a conceptualization of an electoral system. This is followed by a discussion of different categories and types of electoral systems currently in use in different parts of the world. An attempt is then made to demonstrate the importance of an electoral system and why it is necessary to spell out a country's electoral system in the constitution. The subsequent section of the paper discusses Kenya's experience with the current electoral system. The next and final section of the paper suggests what Kenya should do to improve her electoral system as a way of improving democratic governance in the country. It provides a number of possible electoral systems that Kenya may wish to consider

The paper presents a number of arguments about electoral systems.

- First we argue that an electoral system is so central to governance that it must be spelt out in the constitution.

- Secondly we argue that each country must design an electoral system that best serves the country's national democratic aspirations and that such a system must take into account the peculiarities of the country including an identification of the core interests that compete for representation in the legislature. Achieving this objective may entail combining different elements of different electoral systems.

- We finally argue that changing the electoral system in Kenya may require making changes to other aspects of our governance system. The country must therefore be prepared to make radical changes in the governance system and not regard the current system including the electoral system as sacrosanct.

### 2. The Concept Of Electoral Systems

It is appropriate to begin this discussion by providing a definition of an electoral system. In ordinary discourse, the term electoral system is used to refer to the entire framework that govern elections in a country including the electoral laws, procedures used in managing elections and the actual casting of a vote among others. This conception of an electoral system is however, not quite correct, even though the electoral laws, rules and procedures that go into elections have an important bearing on the successful operation of an electoral system.

The above considerations actually describe and define an electoral process and is best

handled under the management of elections. A more correct way to define an electoral system is to conceptualize it as the set of rules which govern the process by which citizens, in their capacity as voters, express their opinion about candidates and political parties and by which the votes they cast are translated into seats. An electoral system thus refers to the method used to determine how votes cast at an election, will be translated into seats won by parties and/or candidates.

Electoral systems thus constitute basic lines of mediation that any electoral law establishes between votes and representation. It must therefore be distinguished from a country's electoral processes which deals with how the electoral system is to be managed. The electoral process is thus a management and administrative matter.

The elements that make up the contents of an electoral system are:

- the constituency, considered to be the geographic unit of conversion of the votes into seats
- the electoral formula, or mathematical conversion procedure of votes into seats
- whether or not an electoral barrier will be set i.e., a minimum percentage of votes so that the candidates will be able to participate in the seat count.
- The form of expression of the vote. This refers to the capacity of the voter and correspondingly of the political groups that organize candidates to determine which persons in particular will hold office being disputed.

It may also be appropriate at this point to observe that there are several categories and types of electoral systems. While some may

be described as pure types others are hybrid systems in the sense that they are a combination of different electoral systems put together to maximize the advantages of the different types while minimizing the disadvantages of some. There is in fact no limit to the types of electoral systems that can be designed.

It needs to be noted that a country can use different electoral systems to elect leaders to the different houses of parliament. If for example a country has two houses of parliament it can use one electoral system to elect members to the lower house and another electoral system to elect members to the upper house.

Alternatively a country can use one electoral system to elect a section of its parliament and another system to elect another section of the same parliament. Another alternative is to use one system to elect members of parliament and a different electoral system for local government elections.

It all depends on what the country wishes to achieve with its electoral system. These issues will become clearer when we discuss the specific electoral systems and where and how they are applied.

### **3. Factors to Consider in Designing an Electoral System**

An ideal electoral system should ensure or promote the representation of all major interests in a political system. An electoral system must, in other words, be as inclusive as possible by making it possible for as many divergent interests as possible to be represented. Identifying these interests then becomes central. This is to ensure that no one interest group dominates the rest as this would be undemocratic. It would also be unrepresentative.

In liberal democratic systems of government, political parties provide the channels by which different interests are organized and compete for representation in a country's legislative body. The interests may take a religious character, and thus leading to the formation of religious parties. It is also possible to have parties that champion the interests of workers and thus leading to the formation of labour parties such as the British Labour party. In situations where parties provide the channels for interest aggregation an ideal electoral system should facilitate the representation of as many political parties as possible.

Electoral systems that encourage inclusiveness by making it possible for even smaller parties to get represented will encourage the formation of many different kinds of political parties.

From the above observations, it is clear that an electoral system can determine what kind of political parties are formed. In Kenya for example, under the current electoral system newer and smaller parties are discouraged because the system does not provide them with a lot of chances of surviving as viable political parties that can challenge the older and bigger ones.

The Double Ballot system used in France on the other hand encourages the formation of smaller parties, which then go on to form alliances with other parties that have similar ideological orientation. The formation of alliances occurs especially during the second ballot. The point about this system is that it encourages as many interests as possible to be represented in parliament. Details of the system are discussed in a different section of this paper. An ideal electoral system should, therefore, make it possible for as many political parties as possible to have a chance of being represented in parliament if the system is to contribute to democratic governance. This is why it is necessary to

carefully deliberate on the design of an electoral system. It is only in this way that the system can take into account the peculiarities of the country for which it is designed. The peculiarities to be considered include the country's political history, the social forces at play such as ethnic composition, religious diversity, level of political and or civic awareness, literacy levels, religious composition and level of economic development among other factors.

In practice of course it is not possible to have all interests represented in the legislature. There are, however, some interests whose exclusion from the legislature may have disastrous consequences for democratic governance and for the stability of the country. Such interests must therefore be included. In saying this one is not in any way suggesting that other interests must be ignored. We are simply saying that ways be found for accommodating as many and varied interests as possible but that those interests considered critical for political stability must not be excluded. The challenge then is to identify an electoral system that has the capacity to be as inclusive as possible. This underscores the fact that electoral systems that work in one country need not work in another country.

The challenge for countries in which political parties are either weak or underdeveloped is to find the best way in which different interests can be organized for purposes of representation in parliament. Once this is done, then an electoral system has to be designed that can facilitate the representation of as many of these interests as possible. This is the challenge for countries like Kenya.

An electoral system must also be well understood by the voters if it is to facilitate effective and meaningful participation by the electorate in the electoral process. Some electoral systems are quite complicated



while others are simple to understand. Complicated electoral systems may disfranchise many potential voters. The problem may be addressed to some extent by civic education. I say to some extent because some systems are so complicated that even civic education may not demystify the system. Germany's two votes for each voter, the details of which we discuss later, is an example of a very complicated electoral system. The point is however that it is desirable that voters should understand the electoral system that they are required to use in electing their representatives. Details of the various electoral systems including the major variants of each system are discussed in the section that follows.

The other consideration that must go into a choice of an electoral system is the cost of running the system. This is important because some electoral systems are more expensive than others. The cost of using a particular system may be out of reach of a particular country. Considerations of cost must not be ignored as doing so could plunge the electoral process into chaos. This is not to suggest that cost must dictate all other considerations. The point is that some means of balancing cost with other considerations must be found. This is the other challenge that those designing an electoral system must grapple with.

Finally it is important to remember that no electoral system is perfect in the sense that it will satisfy the interests and aspirations of all groups in a country. It is also true that whereas one electoral system may be suitable for one country or groups of countries it may not necessarily be suitable for another country. This is why it is necessary to take into account the peculiarities of a country before designing an electoral system for it. These must include the political history of the country, the nature of its population in terms of literacy rates, ethnic composition cultural

and religious diversity, and the nature of other social forces that require representation among other factors. An electoral system must certainly not be imposed on a country from another country simply because it worked in that particular country. While this may appear to be a straight-forward matter, it is not always so in practice. This is because there are many instances in which electoral systems have simply been imposed on countries.

#### **4. Types of Electoral Systems**

Having discussed some of the conceptual issues relating to electoral systems it is now opportune to identify the major political systems that are commonly used in different parts of the world. Currently there are three broad categories of electoral systems in use the world over. These are: Majoritarian /Plurality systems, Proportional Representation systems, and Semi-Proportional Representation systems.

##### *4.1 Majoritarian / Plurality Electoral Systems*

The majoritarian / plurality electoral systems are those in which the candidate who obtains the highest number of votes cast in an election compared to his competitor (s) wins the seat and thus becomes the representative of the constituency. The winner requires to obtain the most votes and not necessarily an absolute majority. It is also known as the single member district system. This is because the system almost always uses single member district or constituency. The majoritarian system is also known as "First-Past the- Post" or "winner- take- all" system precisely because only one candidate can be declared a winner.

The system has many variants depending on the formula used to determine the winner. When the system is used in multi member

constituency it becomes Block Vote. Other variants of the majoritarian system try to ensure that the winner obtains an absolute majority. These include the Alternate System and the Two Round System. In an attempt to ensure that the winner gets over 50 percent of the votes these variants of the majoritarian system conducts second rounds of voting.

This system has in many cases produced rather absurd results especially in constituencies where more than one candidate or party contests an election. It tends to produce a winner with a minority of the votes cast. The question that these kinds or outcomes raises is whether the winner really represents the seat since he or she is elected by a minority.

#### 4.2 *Proportional Representation Electoral Systems*

The other major category of electoral system is the Proportional Representation. The Proportional Representation system is an electoral system in which parliamentary seats are allocated proportionately to the votes cast for each party that wins seats in the constituency,

The basic principle underpinning all Proportional Representation electoral system is that a party should receive parliamentary seats in proportion to its share of the total vote. Thus if a party wins 10 percent of the votes cast in an election to a parliament of 100 seats, the party will be awarded 10 seats. If another party wins 1 percent of the votes, the party will be awarded one seat only. Usually the system works in places where the country is divided into one nationwide electoral unit.

The PR system is premised on the idea that an election should result in, or produce a parliament that mirrors, as far as possible, the significant sets of opinions and interests

in the country. The PR should consequently reduce the disparity in representation of various groups and interests in society.

There are several variants of Proportional Representation electoral system some of which are very complicated. The most commonly used is Party List Proportional Representation. In this system, voters vote for a party rather than a candidate and the parties receive parliamentary seats in proportion to their overall share of the national vote.

According to this system, each party wishing to participate in elections draws up its list of candidates up to the number of seats to be filled. The names on the list are arranged in order of preference. This means that if the party wins only five seats, the first five party candidates in the list become the party representatives in parliament. The party machinery draws up the list from among its members. Each party must therefore design a criterion for choosing candidates and the order in which they will appear in the party list. The emphasis in this system is on political parties. In most countries using this system, the voters have no say identifying the party candidates to be submitted nor the order in which the candidates appear in the party list. This is done exclusively by the relevant party organ.

In an attempt to enable voters control the electorate the Swiss have effected two modification in their Party list PR system. First is that unlike the Netherlands which has one electoral district, the Swiss have created 26 electoral districts. The electoral districts correspond to the 26 Swiss Cantons. The seats are then distributed to the cantons in proportion to their respective population sizes. The largest Canton gets more seats. The second modification is that the voters and not the party rank the candidates that will have been submitted by the parties. The

system also allows voters to modify the names so long as they do not exceed the number of seats to be filled. This is done to give the voters some measure of control over the candidates. The determination of results is based on the votes each party receives. The candidates are given seats in order of the ranking.

#### 4.3 *Semi Proportional Representation Electoral System*

The third major category of electoral system is the Semi Proportional Representation. This is an electoral system that combines some elements of the Majoritarian system with those of the proportional representation system. The idea is to maximize on the advantages of each system while reducing the pitfalls of each. The specific methods in which the elements of each system are combined will vary from country to country thereby giving rise to different types of semi proportional representation systems.

The most common ones are the Single Non-Transferable Vote, The Double Ballot System, the Mixed Member Proportional Representation also known as the Parallel system.

*The Double Ballot* system as used in France requires a candidate to obtain an absolute majority i.e. 50 % plus for one to be elected on the first ballot in a district. In addition, the candidate's share of the vote has to constitute no less than one fourth of the registered voters. The first ballot lists candidates from several parties. As a result of this, very few candidates obtain the required number and percentage of votes to win the first round of balloting. This makes the second ballot necessary. During the second ballot a plurality of the votes is sufficient to win. The original list of candidates is used in the second ballot but those who received less than a certain percentage in the first ballot are eliminated.

The competition in this system is between parties. The system tends to encourage coalition or party alliances especially in the second ballot. Usually the weaker parties would give up and support the stronger party if the two parties are ideologically not very different. The system involves a lot of political calculations and therefore requires parties to be very skillful in calculating a winning formula by working together with likeminded parties.

*Two Votes For Each Voter.* Each voter has two votes in his or her ballot (used in Germany and Norway). It is also known as the parallel system. In this system one half of the lower house members are elected by the winner-take-all system while the other half by proportional representation. In this way it is hoped that the shortcoming of the majoritarian system would be taken care of.

The experience has been that the bigger parties do very well in the first ballot. Sometimes they win all the seats. The second ballot which is party list proportional however gives the smaller parties a chance to win many seats.

The voter is free to split his or her vote by voting for different parties and candidates in the two rounds. Each voter votes two times on the same day. The number of seats a party gets is determined in the second ballot.

It is also important to note the complexity of the system. As one scholar put it, surveys have repeatedly shown that at the height of any given campaign, less than half the voters know the precise meaning of the two ballots... shortly after the election, even this percentage drops to roughly one-fifth of the voting population.

## 5. **The Importance of an Electoral System**

The significance of electoral systems can be conceptualized from different perspectives.

- First is that they are very important political tools that are used to determine an electoral outcome
- It can determine who or which party comes to power and with that the policies to be pursued.
- It can have an impact on many other aspect of a county's political life.
- It can also be used by different political actors to undermine each other or to promote particular interests.

In other words an electoral outcome is to a large extent a function of the electoral system being used. The choice of an electoral system is therefore important precisely because of the importance of elections to which the electoral system gives rise.

## **6. The Electoral System and the Constitution**

Having established the importance of elections and the electoral systems it may be necessary at this point to establish the link between electoral systems and the constitution.

The position taken in this paper is that the constitution should spell out the electoral system to be used in the country. This arises from the fact that as the basis of a country's laws, and a critical instrument, the constitution should have a provision to guide the management of all major instruments of governance of which, as already noted, the electoral system is one.

Elections are core to liberal democracy and can either promote or derail democracy depending on the electoral system chosen. It is therefore imperative to carefully deliberate on and design an electoral system

that will serve the nations democratic aspirations best.

Electoral systems must not be taken for granted or as a given. Spelling out the electoral system in the constitution should facilitate stability in the electoral process and related practices. It would ensure that MPs or the powers that be do not change the electoral system at will especially if the changes are designed primarily to serve their own individual or partisan interests at the expense of national interests.

One way to make it hard for politicians and interested groups to change the system at will is to incorporate it in the constitution. Once this is incorporated into the constitution the details such as the dates for presidential, parliamentary and local government elections can, be spelt out in relevant Acts of parliament. It will ensure predictability of the electoral process. This is also important for stability. Needless to say that predictability and stability are important governance requirements as it helps reduce or eliminate arbitrariness. This is especially important for countries struggling to establish and institutionalize democratic governance.

## **7. Kenya's Electoral Experience**

At independence in 1963 Kenya adopted the Majoritarian electoral system, according to which the candidate with the majority of votes wins the seat. This applies to presidential, parliamentary and Local Government elections. These elections take place on the same day, time and place.

Kenya operates a single member constituency. The legislation that provides the legal framework for the conduct of these elections are to be found in the Constitution

of Kenya, the National and Presidential Elections Act (Chapter 7), the Election Offences Act (Chapter 66), and the Local Government Act (Chapter 265) of the laws of Kenya.

The question that begs an answer at this point is why did Kenya adopt a Majoritarian electoral system? Secondly, how has the system served the country?

The answer to the first question is that Kenya inherited its electoral system from Britain reflecting the fact that electoral systems can sometimes reflect the special political circumstances that attend to their grafting. The adoption of the British electoral system by Kenya also goes to show that very little, if any, thought was put into the issue of electoral system. Perhaps this was due to the rush with which preparations for independence was carried out. It may also have been due to the strong faith that Kenyans had and continue to have in British systems.

The fact that the system has been retained may be due to the fact that the system serves the interests of some powerful people who are in a position to resist changes in the electoral system and rules

Has the system served Kenya well?

A number of concerns about Kenyan elections have been expressed especially since the introduction of multi-party politics in the early 1990s. The concerns relate to both the electoral system as defined in this paper as well as to other features of the electoral process.

We shall confine ourselves as much as possible to the concerns regarding the electoral system, touching on other aspects only to the extent that they are closely affected by, or they affect issues of electoral system.

The feeling among many critics of Kenya's majoritarian electoral system is that it encourages the winner take all practice especially in the formation of government. Related to this is the fact that it disadvantages the smaller and newer parties that may represent interests not represented by the bigger parties. It is thus a system that does not encourage inclusiveness. Instead it encourages ethnic polarization

It is the failure to mirror society by facilitating the representation of as many interests as possible that makes the system unpopular. It tends to encourage party warfare. The system also encourages warfare between candidates as each tries to do all within his or her power including the use of illegal means to defeat the opponent.

This hostility is likely to be far less if the system was such that each candidate has an opportunity to take only a share of the vote and a chance to be elected. This would be the case for example if we had multimember constituencies. Many more interests in each constituency would also get a chance to be represented under such a system.

Kenya's electoral system has also been criticized on the grounds that it does not facilitate fair representation. This has more to do with the fact that currently there is no provision in the relevant electoral legislation for ensuring that constituencies have more or less equal number of voters. The result has been that some constituencies are much more populated than others. This leads to imbalance in representation.

The imbalance is particularly glaring between constituencies in the Northern part of the country and those in the rest of the country. It is, however, also to be found in between constituencies in the same province. This problem is obviously an issue to do with the management of elections

which includes demarcation of electoral boundaries. We mention it here because it has implications for representation which as we said at the beginning of this paper, is also a concern of an electoral system.

It is instructive to note that this is a problem that the British, from whom we borrowed our electoral system, have solved by clearly spelling out the minimum and maximum number of voters that an MP can represent. This has resulted in more or less equal ratio between MP and voters in every constituency. Kenya may wish to do the same.

One other feature of Kenya's electoral system that has raised concern is that it tends to give less weight to the smaller parties than would be the case under a proportional representation system. This point is well illustrated by the 1997 election results. Using a proportional representation system, the distribution of parliamentary strength for each of the parties would have been very different.

## **8. The Way Forward**

In concluding this discussion I wish to suggest ways by which Kenya could deal with its electoral system as part of attempts to improve representation in this country.

The starting point is for the country to agree that the electoral system should be spelt out in the constitution. This is for reasons already discussed in the paper

Secondly, in determining constituency boundaries there is need to place more emphasis on numbers than on geographical area as is currently the case. This would mean that the minimum and maximum number of people an MP is required to represent be set. This is to ensure equitable representation. This is important because the democratic principle of each vote having

same weight would require that each MP represents the same number of people. It would also address the current concerns about imbalance in representation.

Constituencies for groups such as Universities, women, the business community, and the labour movement should also be considered. Currently it would appear that the system is designed to facilitate the representation of ethnic groups only. While this may have been appropriate during the immediate post independence years, it is no longer desirable. The country has become more differentiated than during the 1960s and this needs to be reflected in our electoral system.

There may be need to consider the possibility of using elements of the current electoral system alongside those of proportional representation. The German system of two votes for each voter may be a candidate for consideration.

Kenya may also wish to consider introducing two houses of parliament and stagger the election to the two houses in such a way that one house is always in session. This would ensure that there is no time when parliament is in session. We should avoid a situation where one organ of government is not in session as is the case now when parliament is dissolved

Another electoral issue worth considering is the question of why Kenya has all its national elections on the same day. This is significant precisely because combining the parliamentary, presidential and local government elections on the same day may drag local government politics into national politics and thus mar the autonomy between these two levels of government. In this regard, it may be noted that Uganda and Nigeria have found it necessary to separate local government elections from

parliamentary elections. Uganda in fact conducts the three elections separately.

## ETHICS AND IDEOLOGY IN A CONSTITUTION

**Prof. Vincent G. Simiyu**

### A. IDEOLOGY

#### 1. A Definition and the Concept:

Ethics studies human actions in terms of right or wrong. In that respect ethics studies the morality of human action undertaken at individual level or collective level. Social groups and individuals do, therefore, provide the subject matter of ethics. This is why ethics is also called moral philosophy.

Etymologically, the word ethics is derived from the Greek work “ethos”, which actually meant custom or habitual mode of conduct.

The concept of ethics is a concept of judgment between right and wrong, between an action that is judged to be morally wrong or right. Ethics is, therefore, an area of production of knowledge that applies to the daily lives of individuals and societies as they grapple with the choice between right and wrong.

#### 2. Choice of Voluntary Action:

Ethics deals with deliberate or voluntary actions. Voluntary actions are infinite in number because they relate to the infinite activities of individuals and/or societies, social groups or sections of societies. These actions can be work, play, conduct, behaviour, practical moves, practical activities - the spectrum is infinite. Involuntary actions are usually limited in spectrum and they do happen in spite of the human will whether individually or collectively. They are actions over which humanity has no control. Examples of such actions include, but not exhaustively, breathing, digestion, natural sleep, natural

phenomena beyond the human control like accidents, earthquakes. Some actions may border on both voluntary and involuntary actions. Natural sleep is involuntary. However, a police officer on duty is supposed to be awake inspite of the natural urge to fall asleep. If he/she lets him/herself slip into sleep that could be judged as an unethical act.

A young person may have a dilemma of an ethical choice to make. He/she may decide to opt for paid work because he/she thinks that the parents and/or relatives have made enough sacrifice for his/her education. It's time for him/her, morally to pay back by working and giving some money to the family. He/she may also think that he/she has the final responsibility of his/her future life. He/she wants to live a comfortable way of life in future and the key to that is higher education. The choice is his - the ultimate morality of his/her choice lies with him/herself only.

One therefore chooses to do such and such action. If the person chooses to do the right things and adheres to them and, beyond the individual a society or a section thereof chooses to do the right things, then ethics is the science of right living.

Societies or social groups set in place systems of morality which they expect their members to adhere to. These are ethical systems. Ethical systems are as old as human societies and are as many as the societies are. And no ethical system can naturally evolve in two different societies. However, since ethics deals with human actions there are universal principles and



precepts that apply to all human societies, albeit with local variants.

It must also be noted that in history more powerful societies or even individuals have imposed either through peaceful influence or more often through military and economical conquest and domination their own ethical systems onto other societies. We shall come back to this. But for now let us by way example, examine ethical systems *per se*.

They are systems of moral principles which are set in place and against which individuals and/or social groups' actions are judged in respect of the morality of those actions. In "Things Fall Apart" by Chinua Achebe, the main character is Okwonkwo. Okwonkwo made a choice quite early in life that he was not going to be like his father. The father was reputed in the community as a lazy person who planted his yams on exhausted fields which other men had abandoned. He did not go for the virgin lands that required the hard labour of cleaning the big trees and thick bushes, not to mention breaking the land.

His yam yields were always poor, in a society which cherished and judged men according to the yam harvests. Young man and later adult Okwonkwo always went for virgin lands and long before he married his first wife, he had several yam granaries in his possession. He later became polygamous and rich by the social standards of his community.

His father died and the spirit joined the world of the "Living Dead". His father's spirit was, as usual, thirsting for the sacrificed blood of an animal; goat, cow, whatever.

Through the medium of dreams of elders the spirit of Okwonkwo's father requested his son to make the sacrifice. Okwonkwo was

furious and his answer to the elders was curt.

"Go and ask my father, when you were alive, did you leave any goat, cow, chicken, anything, that you now want slaughtered?"

Two things emerge from this imagery. First Okwonkwo's society had developed an ethical system that required hard work from men. A man worth his salt must be a hard working one who planted yam on good, virgin and fertile land that gives good yields. This also means that a good society must develop a work ethic where one earns something through hard work. A society where people acquire wealth without working for it is a wrong society, is a society where ethically wrong actions are tolerated or even encouraged. A former governor of the Central Bank of Kenya once said "Kenya is a country where millionaires have not worked for their millions".

As Kenyans make their Constitution they need to consider inserting in it some provision about work ethics. The other derivation from the Okwonkwo case is that ethical principles in an ethical system are binding even to the dead. The dead should not make unethical - read morally, unacceptable demands.

This second derivation or interpretation may not be feasible in a Constitution, but reveals the vital importance of ethics in a society and therefore in a Constitution in one-way or another.

### 3. Public Morality:

An ethical system also determines the way people, especially adults and leaders behave in public. These are rules or principles of public morality. The concept of public morality is hinged on a higher philosophical concept of highest and common good. The Aristolian principle of a society and its members pursuing common good and happiness is a deep philosophy. Disaggregated to a lower level it is actualized into people adopting a public mode of conduct that promotes the common good. Defacing a public monument like the "Uhuru Pillar" with posters, writings etc. may or may not be covered by a specific law. An individual citizen will refrain from such act not because of the fear of punishment but for a higher moral motive: "the respect for things public" (*res publica*).

If a leader does some act that is deemed unethical by the public, the leader should by the standards of public decency, public comity, public morality, resign from office. The leader does not have to await public outcry, demonstrations, even violent manifestations before stepping down. Being charged in a court of law for an alleged crime is enough ground for stepping aside, political expedience notwithstanding.

In Africa and in Kenya today, lack of an ethical public code of conduct has ruined society. Leaders and individuals are left to their discretion to the detriment of public morality.

Public morality has a lot of ramifications. The above statement has to do with the individual value of self-judgment, self-criticism. To what extent has/have the individual(s) been imparted with the cultural value of assuming the ultimate responsibility of their actions? To what extent has society imparted on its individuals the value of truth? Whether this truth is at the individual level and especially at the public level?

When the executive scuttles the truth to which the public is entitled, what message is it sending to the public in terms of public morality? When the executive from the top to the lowest creates a culture of lies, what is happening to a perceived code of public conduct? Isn't it high time for a code of conduct were incorporated into the constitution for the common good? Isn't it high time that the erosion of public confidence in the leadership of the country, not only the executive and the political leadership but also for all, were halted?

In a society that recognizes cultural cum ethnic plurality, a related issue emerges. That is the question of ethnic line-ups in public office appointments.

In Uganda, the President forced his brother to resign from public office when it became evident that the latter was involved in high office corruption and scandal. In Zimbabwe, Bishop Banana, a Vice President, was forced out of office on the account of homosexual immorality.

Until President J. F. Kennedy appointed his own brother Robert Kennedy as Attorney General the ethical issue of nepotism had not arisen. The American constitution was amended - the Kennedy Amendment to prohibit any US President from appointing his/her relatives to public office.

Is it ethical in Kenya to have ethnic line-ups in public office appointments whereby a Minister, Assistant Minister, Permanent Secretary, Deputy PS, etc all come from one ethnic group, especially the group in political power?

How is a code of conduct for public office especially, but also for the general public, to be incorporated into the Constitution? We shall come back to this in the internal conclusion of this section.

#### 4. Ethics and Law

We shall be short on this aspect because the Commission has a whole pride of men and women of law to handle this aspect more competently than I can even dream. I will limit myself to one small angle: the Justice of Laws. It is not simply the incompatibility of the laws and the supreme law (the Constitution) that I would like to raise. It is the very justice of the Law including the Constitution. A historical precedent existed in NAZI Germany. Adolph Hitler and his 3rd Reich leaders never did anything illegal. Hitler always made sure that whatever action he contemplated was duly preceded with a law in the Bundestag. But was justice enshrined in those laws? NIET. They were inhuman and therefore, unjust laws.

Property laws, especially land laws in this country are unjust laws. The laws governing the ten mile coastal strip, the laws governing community or is it communal, sacred places (the Kaya, Chingoba, Nchuri Ncheke lands) have not been harmonized with the 1894 India Land acquisition Act and the 1897 Legislation as applied to Kenya.

A British precedent on this is an eye opener. At the peace of Westphalia, 1648, ending the religious cum political 30 years' War it was stipulated in one of the articles that any property lost by any of the religious factions - Catholics and Protestants, was deemed to have been lost forever. Thus Catholics lost property, churches, cathedrals and land in England, Denmark, Sweden, while Protestants lost in France, Spain and Portugal.

However, for the case of England, two hundred years later, 1848, a long process of legal restitution of property to the rightful descendants of the original owners of

property started and might have been completed early 20th Century.

Isn't it ethical that a similar process be bravely undertaken in Kenya and the start would be to have the principle inserted in the Constitution? In short, there is need to decide on Kenyans basic ethical principles underlying not only the Constitution but also other Laws. We cannot meaningfully reform the laws unless we agree on the basic ethical principles and philosophies against the background of which to reform those laws.

#### 5. Ethics and Religion

Ethics and religion are very close because humanity is very religious. Indeed one of the differentiation factors between anthropoids and humanoids is the human belief in the world hereafter. Religions, whether formalized and codified or otherwise, have used their ideologies to impose their ethical systems and principles first on their members and second on the others who are brought into the movance of that religion. The positive aspect of this interaction between ethics and religion has been a peaceful infiltration into societies, social groups or even countries.

The negative aspect has been that religion is extremely intolerant of other ethical systems, codes of conduct and systems of belief. Islam for example is not simply a religion, but a way of life, a whole system of how a Muslim person must live in daily life. Christianity too, especially Catholic, has some rules of conduct with regard to prayers and so on. The intolerance has led to some of the most violent wars in history up to the present (The September 2001 plane crashings into the W.T.C. and the Pentagon in the U.S.A.) From the very ancient times of Hinduism, Buddhism, Macedonian or Alexandrian ethical systems, Roman system, Judaism, Christian, Islamic, medieval crusades, laws of religious reformation in

16th Century Europe, modern wars in the middle East, all have exhibited such religious intolerance and violence that have shaken the very ethical roots of humanity and the value for human life.

Non-religious ethical systems like atheism, communism, scientific socialism, anarchism have also erred by the other extreme. Establishing national ethical standards means carrying out a balancing act of averages between those extremes. It means give and take for all in the society. Various ethnic groups will have to give up some of their ethical values and adopt positive ones from other ethnic groups.

## **6. Professional Ethics;**

Here again we shall be brief because all major professions have established their own ethics of professional conduct: doctors, engineers, architects, lawyers, pharmacists and others.

On this score we shall mention in passing where the Western civilization has robbed Africa of its professional credit in professional ethics. In human medicine we are told that the Greek Hippocrates (420 B.C.) was the "father of medicine". The truth of the matter is that Hippocrates had access to the library of Imhotep at Alexandria. Imhotep, a personal physician of Pharaoh Djozer of the 3rd Dynasty (2700 B.C.) was the first to postulate the natural causes of diseases, wrote manuals for training doctors on how to diagnose diseases, examine the patients and decide on the treatment. The oath of the profession of medicine attributed to Hippocrates was actually plagiarized by him from the works of Imhotep, who was also an engineer and architect. Imhotep's oath read "I will adopt the regimen which is my best judgement beneficial to my patients, and not for their injury or for any wrongful purpose and I will not give poison to anyone, though be asked

..... nor will I procure abortion". These are exactly the words put in the mouth of Hippocrates.

The point here is that even in professional ethics the Western civilization has engaged in unethical activities of plagiarism to say the least. For the purpose of the Constitution, there can only be general framework stipulations.

To conclude this section we propose that basic Kenyan ethical principles be incorporated into the Constitution. They can be formulated as a national Code of Conduct or as Ethics and Public Morality, OR in any other formulation.

They may be stated in the preamble or in special section in the body of the Constitution or both.

From the practical point of view the Commission may need to consider this matter at length with further inputs before embarking on the collection of views from the public. Ultimately, it is the responsibility of Kenyans themselves with the help/guide of the Commission and its Civic Education programme to provide the fundamental ethical principles and code of public conduct.

## **B. IDEOLOGY**

### **7. Definition**

Ideology can be defined as a set of beliefs, principles, social laws that a political movement or group articulates to convince other people so as to achieve its goals. Those goals are usually political for the achievement of political power. Ideology is, therefore, usually political.

However, ideology can also be cultural and especially religious. In history, there have been many examples of politico-religious

ideologies. The ancient Egyptian belief of God was a good example of a political religious ideology. Indian spirituality as a basis of civilization and political power is a good example of political religious ideology. The Christian belief in the creation of the universe and everything in it is a cultural ideology. However, when St. Augustine argues in the "City of God" that the Roman civilization had to fall because it was Pagan and the everlasting City of God where rulers would show their legitimacy from the ordainment of the Christian/Pope he was propagating political religious ideology.

The Romans also believed in their gods that intervened in political life of the state. When a general won a major battle and was returning he had to stay outside the walls of the city of Rome until the Senate passed a special law allowing him to move through Rome with his troops bearing arms. As for himself, he was on a white horse naked because he was now a god. The medieval and European absolutist powers resting on divine ordinance through pontifical or other claimed divine enthronement were all political religious ideologies. The Islamic belief that it is only Allah who gives the Khalifa the legitimacy to rule is a political religious. Historically, Islam and other similar religions have established theocracies which is a combination or to use Montesquieu's characterization a confusion of the state and spiritual authorities.

The above succeeded, especially in the ancient, medieval and early modern Europe where rulers wielded both spiritual as well as temporal (things of this world) power. One can say that virtually all-African political systems before colonialism were based on and articulated around politico-religious ideologies. The Alafin of Oyo, the Asantehene of Asante, the Mwami of the Rwanda- Burudi to name but only those, wielded both religious and political power. The Mwami of the Banyarawanda was

untouchable by ordinary human beings because he was a god. In 1959 he used that spiritual endowment to crush the first coup attempt against his regime.

The non-centralized African polities also rested on the same combination of spiritual and temporal ideologies to remain in power. The Nchuri Ncheke, the Wazee wa Kaya, Baswaala Kamuse use spiritual ideology to impose their political authority on their respective societies.

## **8. Non-Religious Political Ideologies**

While the above has been generally true, there have been other ideologies in the history of humanity which have been non-religious, even violently anti-religious. The first set of these and about which we shall not say much is anarchism, an ideology that denies the need for an established order of things in society. Its proponents argue that everything should be left to the natural flow of things in society. They reached their climax in the last half of the 19th century, especially the last two decades. The ideology has waned since.

Another non religious political ideology is materialism that goes back to the ancient Greek Philosopher Hieroclitus of the 3rd century B.C. The ideology was taken up much later by Karl Marx and his friend Friedrich Engels of Germany from the second half of the nineteenth century. Others in that school of thought were Vladimir Ulianov Ilich (Lenin) the first President of the Socialist Soviet Union 1917-1924, Mao Zedong, and many others in the 20th Century. They believe in the materialist and scientific origin of the universe. And so they deny the God as the Creator of the world and call that ideology idealism. They believe in dialectical materialism which is a system of understanding nature through contradictions. That the law of nature is through perpetual contradictions and

resolution of those contradictions. The system is like this: thesis-anti-thesis, synthesis. The synthesis is as different from the thesis as from the anti-thesis. A seedling cannot emerge from the seed unless the seed is destroyed, a chick cannot emerge from the egg unless the egg is destroyed. And the chick is equally different from the cock as from the hen. It is a system of perpetual change.

In human society, they believe in historical materialism as the philosophy of history. Human society has developed on the basis of the class struggle. In the latest stage it has been the struggle between the class of capitalists who own the means of production and Proletariat who own only the labour which is exploited. This is capitalism. The overthrow of capitalism ushers in a scientific socialist stage where the workers are on top to suppress the capitalists (bourgeoisie). Capitalists used the state to suppress workers. Workers too having taken over the state use it to suppress the bourgeoisie. When that is accomplished the society is at a communist and final stage of the class struggle and the state dies by itself. Under Communism each individual gives to the society the best of his/her ability and gets back the maximum of his/her needs.

Needless to say that up to the fall of the iron curtain i.e. the Soviet system in 1989 no society in the world had reached that stage in spite of the claims, counter claims, accusations and counter accusations, especially during the Cold War.

Some African countries tried to experiment with this brand of socialism without much success. Nationalism is yet another non-religious political ideology. However, there have been and are still very many shades of nationalism. Islamic nationalism is religious, based on the ultimate precepts of Islam; national socialism of Adolph Hitler of Germany of 1919-1945 was the other extreme, a violent racist, irreligious

nationalism of the extreme right. Fascism of Italy of 1919-1943, was yet another of the kind.

Between these two extremes there are the mainstay nationalisms as political ideologies for the acquisition and recognition of a nation, territory, and in the 19th century Europe, a sovereign and democratic government. Examples are many. The Greek and Belgian were at independence, German and Italian unifications are a few cases.

Third world countries like India, Indonesia, Syria and African countries waged nationalist struggles to gain independence from the colonialists. They used the nationalist ideologies modeled on the Western European ideologies. Some African leaders like Julius Nyerere and Leopold Sedar Senghor of Senegal tried an amalgam between Utopian socialism and African social beliefs and principles of hospitality, generosity, and political consensus based on mutual tolerance, and consensus. They called their ideology African Socialism.

It soon became clear that African Socialism had two branches too. One was actually a disguised form of capitalism and another a disguised eastern European type of socialism albeit with some strong African nationalist dose.

On the whole, African Socialism ended up being a shallow variant of capitalism.

## **9. Capitalism**

This is an ideology that has evolved in Western Europe since the end of the European medieval period (15th Century) and beginning of the modern period (16th Century).

Its basic tenet is economic free enterprise, individual pursuit of profit and accumulation of wealth and re-investment of part of that

profit for more profit. It is the underlying ideology of the current Western and its off-short civilization of North America, Australia and their former colonies. Japan is part of that ideology. And since the collapse of the Soviet Union in 1989, it's generally the overall world ideology. Third World countries are simply following suit at different stages if not directions. In political content, capitalism embraces the ideology of liberalism.

## 10. Liberalism

Liberalism is a political ideology that developed first in the England of early nineteenth century and then spread to the rest of Europe, except Russia and Eastern European Countries. It has survived to the modern times as the underlying ideology of capitalism.

Its proponents believe in maximum individual freedoms and rights. The current Kenya Constitution is a typical example of a liberal political document that governs the management of public affairs. Liberalism like capitalism emphasizes maximum freedom for the individual not only in political and social matters but also in economic and cultural matters. There should be less and less government in individual people's private, lives, economies and cultural lives. The Government is supposed to provide the enabling environment by promulgating a liberal Constitution with checks and balances, liberal laws, guaranteeing basic human and civil rights but leave the rest to the citizens; individual and social enterprises, initiatives and creativity.

The State should only ensure internal law and order and security against external aggression. The Kenya Constitution being a liberal one, the Commission can only make it more liberal but with more social internal checks and balances of power.

## 11. Racism

This is an ideology that is quite ancient. It believes in the supremacy of one race above another or others. In the ancient world and later times, Jews were seen as people who did not want to mix with other races.

The climax of racist ideology was in the nineteenth century Europe when some European scholars falsely argued that survival of the fittest law also applies to the human societies, apart from the plant and animal worlds. They falsely argued that all human achievements have been by an indo-European race called Aryans, a mixture of central eastern Europeans and Northern Asians.

Hitler's NAZI system was the worst example of racist ideology when it tried to wipe out Jews from the European map, especially in lands conquered and occupied by Germany. But Russians had also carried out anti-Jewish pogroms.

It must be pointed out that since the revolt of Blacks in Baghdad in the 9th Century AD and the brutal crash of all Blacks in the Abbassid Europe, black people have for now more than one thousand years suffered racist violence in both the Muslim and Euro-Christian civilizations. The two civilizations have used the ideology of racism to enslave and practice slave trade against African peoples inspite of the fact that both religions of Islam and Christianity do not officially sanction slavery and slave trade.

We need to mention two more ideologies for the purpose of the constitutional review. Republicanism and Secularism.

## 12. Republicanism

This is an ideology that spells out the nature of political regime. It wants the Constitution to spell out clearly that a country is a

republic and not a monarchy. A monarchy is a regime where there is a King or Queen like Great Britain, Swaziland, Sweden and so on. Article 1 of the current Constitution of Kenya declares that, but an amplification of that could enshrine the ideology of republicanism either in the preamble or a full section comprising several articles declaring republicanism as one of the basic ideologies underlying Kenya's political regime. The republic should also embody its unity and indivisibility as yet another sub-ideology.

#### **14. Secularism**

This is an ideology that believes in the separation of the State and the Church. We saw that there has been a lot of mixture between politics and religion. Formal religions like Christianity and Islam have managed in the past and for Islam upto today to have an iron stranglehold on the political affairs of the State.

Liberal movements struggled to achieve the separation of the State and the Church. In the Western Christian world and in the former socialist countries this was achieved and enshrined in the Constitutions of the countries. But not in all. Where a religion is declared an official state religion that political regime is a theocracy and not a secular republic. Even a republic can be a theocracy like virtually all Muslim states of

today, Libya and Iran to mention only those two. Sudan has imposed Sheria on the whole country including the Christian South and that is why there is the long protracted civil war.

The current Constitution of Kenya is silent on this issue. Secularism (or simply separation of the State and the Church) should be spelt out clearly as one of the underlying ideologies. Religion then becomes an individual affair guaranteed by the right to freedom of worship. There should be no mix of State functions and religious functions.

#### **C. CONCLUSION**

Ethics and ideology are, therefore, very important aspects of a society and should be reflected in the Constitution. The Constitution, being the supreme law of the land, and ethics, ideology together with culture being the very fabrics of the society, should, very well and clearly be articulated in the Constitution.

We propose that these three issues be featured in the preamble and also in a special section devoted to culture, ethics and ideology. There should be a National Code of Conduct. It is up to the Commission to reflect over this matter and consider it.



# THE ROLE OF CULTURE, ETHICS AND IDEOLOGY IN A CONSTITUTION

**Dr. Naomi Kipuri**

## 1. Introduction

Culture may be defined as ‘the integrated pattern of human knowledge, belief, and behaviours... language, ideas, beliefs, customs, taboos, codes, institutions, tools, techniques, works of art, rituals, ceremonies and other related components...’ (Encyclopedia Britannica, 1989). In anthropological terms, culture encompasses a broad range of material objects, behaviour patterns and thoughts.

Culture includes designs or models for behaviour – norms for what is considered proper, or moral, or even sane.

These are modes for acting that are learnt than biological in origin, and that are shared to at least some extent by other members of the society. Culture is a body of knowledge, a tool by which we adapt to the physical environment. It is a set of rules by which we relate to each other; it is a storehouse of knowledge, beliefs and formulae through which we try to understand the universe and man’s place in it. Culture is pre-eminently a means of communicating with others, a tautology. It is culture that stabilizes the social environment and makes it possible for man to associate with his fellow human beings. Culture minimizes uncertainty in human interaction by setting the rules of how one should behave in a given situation. In this sense, it is a ‘set of expectations’. Culture not only tells us how we should act, but it also tells us what we can expect of the other person. Culture is a weave that keeps society together.

## 2. Culture and Nationality Unity

Kenya has inherited diverse cultures, comprising agriculturalists, pastoralists and hunter-gatherers, all speaking a multiplicity of languages – Nilotic, Bantu, Cushitic, etc. yet the constitution does not properly reflect this diversity.

Many newly emerging nations have tended to emphasize the importance of national unity at the expense of cultural diversity. It is as if acknowledging diversity would automatically bring down the pluralistic cultural component making up the nation states. Ethnicity, it is said tends to disturb peaceful co-existence. But now the legitimacy of the national structure is being questioned because of its failure to acknowledge the countries’ pluralistic cultural components.

The question remains: Does recognition and acceptance of plurality in culture inherently tear countries apart? History has not proven this to be right. On the contrary, suppression of differences is what appears to threaten national cohesion. Even single ethnic nations are not spared the threat of disintegration deriving from some form of domination or another.

In Kenya, the semblance of cohesion exists in spite of, rather than because of the unitary nature of the constitution. But the cohesion is delicate, all the time being threatened by ethnic conflict. Ours is a history of cultural suppression. While culture is a way of life, we have banned people from dressing in their cultural dress, for instance in Parliament where the Speaker allows Parliamentarians in only if they are

‘properly’ dressed in suits. Not even Kaunda suits are acceptable. Many people are turned away from public places in urban centers because of being in cultural attires. Judges in Kenya still have to wear wigs as is in Britain when making judgements. This is after almost 40 years after colonialism.

Culture, cultural institutions such a moranism (among the Maasai) have been banned during the colonial period and after. It only survives because it takes place every ten years and authorities tend to forget about it. The Naabo Institution of the Rendille, Councils of Elders, Councils of Women and other social institutions that are useful for governance are either unknown or ridiculed. Consensus decision-making is common in most of Africa and is what we are using to write a new constitution. Why can’t we acknowledge it as a useful cultural institution?

In the economic sphere, agriculturalism is dominant in Kenya. We allocate money for agricultural research e.g. to develop the double cobber maize, while we do not even have a single industry to process meat in order to support the livestock sector. Hunger-gatherers are even worse off. With so much cultural intolerance, it is no wonder we experienced ethnic conflicts.

For new nations, culture can draw on many roots – as many as our cultures. This is the only way for all communities to feel a part of the artificial boundaries within which they have found themselves. The question of self-determination is at the apex of respecting social, cultural and political rights of citizens. These rights are guaranteed by international instruments of which Kenya is a signatory.

The UN Declaration of Human Rights has established that safeguarding and protecting one’s own culture, and having access to and

participating in cultural activities, are all human rights.

### **3. Reflection of Culture in the Present Constitution**

Section 115 of the Kenya constitution vests all Trust Land in the County Councils within whose area of jurisdiction it is situated. The County Council is to hold such land for the benefit of the persons ordinarily resident on that land. The County Council is required to give effect to such rights, interests or other benefits in respect of the land under where a given Customary Law is applicable, being vested in a given community, group, family or individual.

This reference to customary law is presumed to be a reference to law whose source and foundation is in the culture of a particular people resident in a given area of Trust land. The rights, interests or other benefits in relation to the particular Trust Land must be those derived from the culture of a particular community resident in an area of trust land. Such right must be the basis upon which that land is to be owned or utilized and managed by the deemed owner.

There is a rider to this provision in that no right, interest or other benefit under such customary law shall have effect for the purposes of the constitution so far as it is ‘repugnant’ to any written law. One such written law, which comes to mind, is that which requires registration of those rights and interests to land. That becomes the only applicable law after such registration of those rights and interests. That exclusion introduces a new situation of land ownership, rights, etc. and completely obliterates the land ownership scenario provided under the framework of customary law in relation to land ownership.

Culture appears to have been given a passing chance in the manner in which customary law rights are to be ascertained as a requirement of section 116 of the constitution to bring the Trust under section 115 to an end. Pursuant to section 116, the Land Adjudication Act was put in place as a prelude to the codification of the ownership of Trust Land. This adjudication and registration, which followed, brought all the respective cultural laws of Kenyan people in relation to their land to an abrupt end.

The Lancaster House conference that produced the present unitary form of governance, pretends that unity can only be realized within a unified culture. The result has been a systematic denial of diversity and an inherent intolerance of divergence of views – political, socio-economic and cultural. The future constitution should not make the same mistake. It should not only mention all the ethnic groups within borders as owners of the constitution, it should go further by stating what guarantees and rights have been provided and how. The right to culture should be seen as a fundamental right. And rather than pretend we are united, it would be more appropriate to maintain ethnic balance in the allocation of employment and other opportunities.

This should not continue to be because culture is a human rights issue and international instruments are there to ensure observance. The UN and UNESCO declared 1988-97 a ‘culture decade’ and stated four (4) principal aims :

1. To acknowledge a cultural dimension in development;
2. To affirm and enrich cultural identities;
3. To broaden participation in cultural life;
4. To promote international cultural cooperation.

International donor agencies began including culture in their development work in the late 1980s and early 1990s. In 1995, the World Commission for Culture presented its report *Our Culture Diversity*. In 1998, the UNESCO conference “The Power of Culture” was held in Stockholm, and this was followed by another one in Florence on “Culture Counts” in 1999. The President of the World Bank (James Wolfensohn) has persistently led efforts to include culture in the Bank’s work. In his words,

‘...we are at a crossroads in our understanding of development and how to go about it. We are realizing that building development solutions on local forms of social interchange, values, traditions and knowledge solutions on local forms of social interchange, values, traditions and knowledge reinforces the social fabric. We are starting to understand that development effectiveness depends, in part, on ‘solutions’ that resonate with a community’s sense of who it is... we hope that through collaboration, emerging development practice will conserve and amplify the values, expression and heritage that give people’s lives meaning and human dignity’. (*Culture and Sustainable Development – a Framework for Action* – World Bank, 1999).

Culture helps us transgress limits; to challenge ourselves; and to discover talents we were aware of – talents that are valuable in every kind of situation in life. Without imagination and creativity, we are prisoners of the structure of others. A rich and pluralistic culture is a cornerstone of thriving democracy. Every society is enriched by, and dependent on creative forces for survival and development.

With a poor concept of our own identity, we have little capacity to relate to others. To see the others, we must know and see ourselves. This has implications for conflict resolution and respect for human rights, as well as solutions to problems of everyday life. Self esteem, identity and dignity are important cornerstones for a culture of tolerance and understanding. 'Social peace requires that differences between culture be regarded not as something alien and unacceptable or hateful but as other ways of living'. (Perez de Cuellar *Our Creative Diversity*, 1995).

Awareness of our origins and experiences and beliefs that have molded us is more important than ever. Understanding one's past and present context is a crucial precondition for choosing what to take with us into the future, what we leave behind, and the point at which we seek to build something new and merge with other cultural expressions. To grasp other's pride in their history and culture we must know and be proud of our own. Every community nourishes the cultural manifestations of its own identity.

Yet in Kenya, we are unsure of whether or not to respect and uphold our cultures. We are at the lowest ebb in our ethics and our ideological position seems to be always shifting. It would be a relief if the new constitution could clarify our position in

relation to the fundamental question of culture.

The African Charter for Human & People's Rights has 6 articles dealing with peoples' rights.

Article 19 guarantees equality of all people and prohibits the domination of a people by another. Article 20 guarantees the right of all peoples to self-determination. Article 21 guarantees all peoples the right to freely dispose of their wealth and natural resources in their exclusive interest. Under Article 21, a people dispossessed of their wealth and natural resources shall be entitled to lawful recovery and compensation. Article 22 guarantees the right to development. Article 23 guarantees the right to national and international peace and security and Article 24 guarantees the right to a satisfactory environment.

#### **4. Proposals**

1. Admission of cultural diversity and formulation of ways of articulating it in the public sphere.
2. Implementation of cultural programmes to reduce sensitive ethnic feelings.
3. Implementation of decentralized autonomous governance structures to support cultural diversity.

## CIVIL SOCIETY AS CONSTITUTIONAL ORGANS

Oduor Ong'wen

### 1. Conceptual Problematiques

Mention the word "civil society" and what comes to the mind of many is a nongovernmental organization (NGO). Too often, NGOs have been seen as - and have sometimes claimed to be - synonymous with civil society. It is therefore important to interrogate the concept of civil society if for nothing else other than situating their role in the constitutional dispensation. Dominant analyses of the concept of civil society are reflective of the paradigmatic muddle of the globalised world order. Nonetheless, two major streams are vaguely discernible: the one that de-emphasizes class in favor of the concept of citizenship and the other that argues that civil society is not homogenous and thus reflects the class tensions that are the stuff that all political, economic and political contests are made of. The latter simply affirms Karl Marx's assertion that all struggles that have hitherto existed are class struggles<sup>1</sup>.

Ideological position notwithstanding, some common understanding of "civil society" as a concept could be identified, needless to say at the risk of oversimplifying this complex phenomenon. Below are some of the common characteristics of the civil society formations:

- They constitute the non-profit organized formations between the family and the state.

- They are a product of historical development of the state a product of sociopolitical contests around the state.
- They are not apolitical. They have strong political views and positions.
- They are far from being homogenous but reflective of class, gender, cultural and other social differentiation within the society.
- Some sectors of the civil society like NGOs, religious organizations, trade unions etc. are globalised while others like welfare associations, neighbourhood associations and pressure groups with limited political or social agenda are national or sub-national.
- While there has been a misleading tendency to dichotomise the state and civil society, their mutual relationship is marked by conflict and confrontation, cooperation and dialogue, co-option, engagement, and go-stop-go alliances.
- They eschew violence in all its forms<sup>2</sup>

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<sup>1</sup> In his book, *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya*, 1992-1997 published by MWENGO and SARAT, Willy Mutunga gives this subject quite an elaborate treatment.

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<sup>2</sup> This has been contested as some argue that the civil society has a right to use any means necessary, including the force of arms in order to help create or

**Socio-Economic Context For Civil Society Development**

The history and political economy that structures the reality of civil society in Africa and elsewhere in the developing world differs fundamentally from that of Africa. To understand the full implications of that difference, it is useful to classify the

major differences identified by Southern scholars and activists in the course of their work (see summary in Table 1 below). This observation does not, however, ignore the reality of replication of Northern civil society culture and forms of organizations in some organizations of the civil society the South.

**Table 1: The Socio-economic context of Civil Society Development.**

Northern	Southern
Imperial history	Colonial history
Strong civil society	Weak civil society
Multi-party tradition	Single-party history
Strong tradition of organised labour	Weak tradition of organised labour
Strong social welfare entitlement	Weak social welfare entitlement
Environment for conspicuous consumption/leisure	Environment as a basic need
Controlling the limits of nature	Limiting the control of nature
Capital insurance against risks	Wider or extended family to minimise risk
Voluntarism	Patronage
Increasing capital savings	Increasing revenue expenditure
Funds internally generated and/or managed	Funds externally negotiated
Management culture	Autocratic culture
Institutionally set priorities	Personally set priorities
Line management	Group negotiations
Technology as part of production process	Technology as an imported product
Involved in defining national agenda	Responds to internationally set agenda

**3. Civil Society as the Germ for Social Movement**

The fact that people themselves need the space and environment to develop and create their own organizations and movements by which they can express their needs and wants as well as negotiate with the state, cannot be gainsaid. Without this

counterweight, there is no way the change agents within a society can be able to make adjustments necessary to the generation of a demand-led social or political transformation. Africa - not least Kenya - has experience of grassroots mobilization, which played a decisive role in the struggles for independence. The newly independent regimes were so aware of this role and its power that they deliberately set out to suppress or co-opt it, with a great deal of success. Today, as more and more people get disillusioned with the performance of the post-independence leadership, conditions are changing; the leadership is willingly or

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expand the political space. This is self-contradicting as the term "civil society" implied that segment of society committed to employing civil means to create self-limiting power, as opposed to armed struggle.

unwillingly opening up the space for social organization, and the people are promptly occupying that space. This needs to be encouraged and supported.

The task of grassroots organizations is to build up the capacity of the people themselves to become decisive actors in determining their own multiplicity of agenda. They are the key to people-centered social and political development and, therefore, to a demand-driven socio-political re-engineering. The ultimate goal is to generate a level of organization that is capable of ensuring that both national governments and the international community serve as instruments of the people, and are accountable to them. Since these conditions are currently absent in our societies, the attempt to create them comes into direct conflict with the status quo.

Grassroots organizations or social movements do not arise spontaneously,

however. A key role is always played by change agents, often "outsiders" who have volunteered to come and work with the communities, generally for political or religious reasons. Often, they are members of the community who have returned after having been exposed to outside world, possibly through access to secondary or tertiary education, perhaps through participation in trade unions or political parties. What is always found is a person whose exposure to the outside has provided her or him with a vision and a drive, which allow that person to be seen by the community as a valid inter-locutor with the outside world - including government, other CSOs and service agencies. Table 2 below identifies elements that distinguish grassroots organizations from service organizations. They are not necessarily mutually exclusive. In fact both types are necessary and complementary elements to socio-political development.

**Table 2: Comparative characteristics (a typology) of Social Movements and Service NGOs**

<i>Social Movements or Grassroots Organisations</i>	<i>Service Organisations</i>
Community-based formations	Professional organizations
Process-focused	Product-focused
Building blocks of civil society	Operational structures of civil society
Local culture	International culture
Mainly lack any form of training	Highly trained
Poor, marginalized	Middle class
Representative	Non-representative
Interest-focused	Issue-focused
Social-base policy	Boards of directors
Responsive to society	Responsive to funding source
Key actors are activists	Key personnel are professionals
Devolved decision-making	Centralized decision-making
Ideological in practice	Ideological in theory
Single constituencies	Multiple constituencies
Legitimacy based on successful struggle	Legitimacy based on negotiating a product with a funder and generating a result

Given the foregoing typology, it is evident that organizations of the civil society operate in permanent internal conflict with regard to balancing community focus with professionalism. As Table 3 below shows, there is always either a bias towards the

community or towards the donor. The ideal situation, seldom reached, is to be the intermediary, the negotiator. Given the complexity of needs, roles, and specific political demands, there is no single model of civil society operation

**Table 3: Criteria for Typology of CSOs**

<i>Oriented to serving community</i>	<i>Oriented to serving donor/contractor</i>
Process-focused Integrated development Social reproduction Tension with donors over priorities Inner commitment to social mission  Long-term vision Class-focused Target group participates in policy making Work with CBOs and communities directly Recognise inherent nature of contradictions with target groups People-driven, emphasis on commitment and service Focus on institution building for others Wary of government and bilateral funding Seeking partnership with donors  Emphasise the role of field workers and community mobilisers Rewards linked to responsiveness to community initiatives Downward and upward accountability	Output-focused Single-sector development Project delivery/implementation Donor-driven priorities Mission changes according to donor preferences Short-term focus on project cycle Issue-focused Policy made by directors and managers Work for the poor Fail to recognise problems in their nature and work Emphasis on compatibility with government or private sector Focus on institution building for self Positively disposed towards government and bilaterals Seeking money from donors Emphasise role of secretariat staff Rewards linked to meeting project targets  Upward-only accountability

**4. Citizens As Custodians Of Governance**

More than 45 years ago, T.H. Marshall dwelled on the distinction between political, civil and economic aspects of citizenship. He averred that the civil component of citizenship comprises the rights necessary for individual freedom, which in turn consist of liberty of persons, freedom of speech, thought and faith, the right to own property

and to conclude contracts<sup>3</sup>. To these can be added the right to justice. The political component of citizenship is considered to be the right to participate in the exercise of political choices and power as a member of the body invested with political authority or an elector of members of such a body. Finally, Marshall's definition of citizenship includes the right to a modicum of economic welfare and security and the right to share fully in the social heritage and live the life

<sup>3</sup> CRIC, 1996, "A Choice for Self-Governance", Discussion Paper, Nairobi



of a civilized person according to the standards prevailing in the given society. However, the realm of citizenship is not limited to rights only, but also imposes responsibilities and obligations. While the state is often more than willing to remind citizens of their responsibilities and obligations, the rights and freedom are, in most cases, extracted from it only after a long struggle.

Self-organization of citizens reflects the need for diverse forms of associational life that are broad-based and indigenous to their respective societies. It ought to be borne in mind that this associational life cannot be fully realized without formal organization based on shared values and a sense of mission. The growth of social movements or civil society is thus a consequence of associational life motivated by the need to enforce the rights and freedoms while negotiating responsibilities and obligations in return. In modern societies, these negotiations and struggles are conducted within constitutional frameworks. A constitution is, thus, seen as a covenant that binds the citizenry on the one hand to be loyal to the polity, discharge its obligations and responsibilities as well as periodically gives legitimacy to the state. The state, on its part, is required by the constitution to not only guarantee the rights and freedoms of the citizen - from the right to life and security to all freedoms. It is also under obligation to prevent one citizen or groups of citizens from adversely interfering with the rights of other citizens. More importantly, the constitution provides the framework for the resolution of tensions and conflicts arising out of the inability of either party to discharge their part of the covenant. As states have grown into complex and intimidating entities, they have not only become difficult for the majority of the citizens to understand, but also alienated from them. It is therefore, through their social organizations that they can hope to

engage the state. Constitutions can only provide a legal and political framework for good governance. They, however, cannot guarantee good governance. Neither do political regimes confer or guarantee good governance, their having been popularly elected notwithstanding. Only citizens in the realm of associational life within civil society can, through a protracted struggle and continuous bargain, guarantee the establishment of structures and institutions of good governance and ensure that such institutions remain pillars of good governance.

The state gives scant recognition to the citizen as an individual. So it is through associational life or social movement that the citizen gets that recognition. This flies in the face of the arguments of Hobbes and Locke that social organization was a social contract between individuals who possessed certain natural rights with the state being overseer and arbiter of the contract. The inference here is, therefore, that citizenship and state are in constant conflict and at the same time mutually supportive engagement. The civil society becomes the vehicle for the citizens to articulate their "perfect rights with defective duties."<sup>4</sup> They also help citizens not only understand but more importantly, fulfill their obligations. They therefore occupy a vital link between the state and the individual citizen. A fundamental constitutional function.

## 5. Civil Society and Self-Governance

Self-governance, as an alternative to state governance, is at the center of paradigm shift that has recently preoccupied political discourse. Under the new paradigm, policy formulation, policy enactment and policy

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<sup>4</sup> Fukuyama, F., 1992, *The End of History and the Last Man*, New York: Penguin Books

implementation are no longer seen as the preserve of the state but a corporate project where the state is just one of the actors. Self-governance allows active participation of various sectors of the society in choosing development strategies and determining political direction. It, therefore, implies multi-faceted process of decentralization of development responsibilities from the central government as follows:

- Dispersion to local communities of responsibility to choose development projects and to provide social services.
- Enlargement of resources allotted to communities.
- Constriction of the role and power of public officials to those tasks necessary to manage and carry out their official
- Protection of and provision of policy and legal frameworks for voluntary groups organized for social, communal, occupational, religious, professional, labour etc. to optimize their operations.

Self-governance under a strong civil society is central to sustainable development. Evidence from empirical research has demonstrated that self-governance is a better means to successful social development especially because social capital or civic engagement is capable of diminishing poverty, improving health and education, inhibiting crime, boosting economic productivity, fostering better national governance and leading to enhanced social and human development<sup>5</sup>. In order to achieve this self-governance, civil society

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<sup>5</sup> Cornell S., and J.P. Kalt (eds), *What Can Tribes Do?* Los Angeles, Regents of the University of California

must first mobilize and sustain support for formal and informal institutions that bolster the culturally supported standards of right and wrong, proper and improper, normal and abnormal. As the constitution addresses fundamental issues of development, the role of civil society in spearheading self-governance becomes difficult to overlook.

## 6. Civil Society And Civic Education

One incontestable fact is that education is not only a right but also central to enjoying other rights and freedoms enshrined in the Constitution and other instruments. Indeed it is a duty to self to ensure that one is educated and the state is equally under obligation to provide adequate facilities and resources to ensure universal formal and informal education. Two dangers of uneducated citizenry stick out. One, the less one is educated the more vulnerable one is to manipulation. Two, an uneducated citizenry's skills are underdeveloped, thereby making the citizenry less competitive<sup>6</sup>. Given their proximity to the citizenry, it is natural that civil society formations are leading actors in citizens' education, particularly civic education. There is no doubt that trade unions are the best placed agents for worker education. Equally one cannot fault the role of women groups in raising awareness of women and girls concerning women's rights.

A good constitution, needless to state, must not only guarantee the right of civic education but also spell out measures of protecting providers of such education.

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<sup>6</sup> Kibwana K., O. Ong'wen and M. Oloo, 1996, "Towards a National Civic Education Movement" in Kibwana K. (ed.) *Learning Together to Build One Nation: A Practical Guide on How to Do Civic Education*, Claripress, Nairobi.



## CIVIL SOCIETY AS CONSTITUTIONAL ORGANS

**Abdulahman M. Wandati**

### 1. Introduction

The debate on how the World should be administered and driven is rife around us. What seems to have been settled, as least for now, is that Global Societies in their local climes be split into three contending territories. Over the past two decades, efforts have been expended with much gusto to propagate a Three-Sector Model World Order with distinct turf marked out for occupation by the State, the Market and the Civil Society.

In Kenya, the purposes of these divisions and their reach within the populations and resultant impact on the population's present and future has been chronicled more as a result of the experiences suffered in silence or in mild protest than by the postulations of the learned not so few, who have ventured to explain away and to their own satisfaction, this concept of Secular Trinity. The very definition and demarcation of these three distinct territories – each with its own retinue of offshoots – remains hazy.

### 2. Working Definitions

The State, though severely gelded, puts up a brave face – not in improving its record of service delivery and governance, but in terrify, if possible a population that is increasingly learning to spit into its face. In many ways, the state performs the ceremonial role that is so in line with the flag – independence that characterizes the post-colonial State everywhere in Africa. Even this ceremonial role is couched in mythical renditions of nationalism and patriotism as even more and more secrets are hidden away from the public in

deference to its time – honored title is *Siri Kali*.

The Market, a social mongrel sired through the cross-breeding of international capital and local labour and a sprinkling of local capital forever promoting itself, not as the alternative but the very *sine qua non* of social growth and stability. It continues to lash out at the moral values that hold the society together by promoting profit-oriented values that put a price on everything including the call of nature! The desperate manner in which this sector protects its interests befits a *Mbwa Kali* – the warning with which they keep out intruders.

The Civil Society – that territory without physical boundaries with, in a manner of speaking, the sky as the limit, - remains barren except for surrogate offsprings weaned on the callousness of both the state and the Market. This sector, associated with *Jua Kali* has readily stretched its arms out and received to its bosom for comfort, all those bruised from contacts, associations or relationships with the State and Market and which had been severed. In its humanitarian role, the Civil Society has ministered to all regardless of the Sector they were associated with in the past.

### 3. The Three Sector Model in Societal Interaction

Civil Society has engaged itself in an ambivalent relationship with both the State and the Market – sometimes pitching for one against the other and often seducing both to its (Civil Society's) way of doing things. As the State – even a leaner one- has consolidated itself and the market continues

to skim even more from the Society, plowing back almost nil, it has taken Civil Society only but a few years to convince many Kenyans that, handled differently, and with a particular kind of Structures and operation of Systems, social relations among Kenyans could improve bringing with it better dividends than the New World order in its current configuration can even deliver.

Civil Society has, in its consolidative years allowed some personalities, institutions, and structures (occasionally) known for years to be in the consort of the state to deliver broadsides against the state from its bosom. The State has wasted little time in branding the Civil Society “opposition lackeys” incapable of any action untainted by partisanship. That some Civil Society Organizations are directed by Civil Society operatives with a known affinity for opposition rhetoric and quarters has not helped thaw these seeming frosty relations.

The Civil Society’s publicly declared Agenda for a people-friendly New World Order has sought a moratorium on the *political dole* that has characterized what has been dubbed the Patron-Client form of loyalty peddling that many in our country could independently write volumes on. Civil Society has insisted that whether it be the State or the Civil Society, loyalty must be won by free exchange of truthful information, persuasion and rational choice made from conviction. It has condemned loyalty extracted by coercion or by the cheque-book. It has insisted on a new way – a people-driven way. A way sensitive to the inadequacies because of which *Wanjiku’s* Story may remain untold. Civil Society has the moral responsibility to empower *Wanjiku* to tell her story.

The Civil Society has acted in this regard in its assigned role of custodian and monitor of public space. The question being posed is:

wither from commeth the legitimacy of the Civil Society in this new appropriation?

Civil Society has been credited with the majority of the major positive shifts in public and social relations and involvements in the past few decades. From the earliest organized African resistance to Colonial rule and oppression to the current “State of the Art” NGOs with the capacity to picket against the World Trade Organization policies during the Organization’s Meeting in Seattle in the United States of America, and congregate in a global NGO Coalition that set the Agenda for the recently concluded United Nations Conference on Racism in Durban South Africa, Civil Society has faced both State and Market, and short of getting the ‘pig in the pork’ has scored some major successes against both.

What may have, perhaps slowed down the establishment of a Civil Society hegemony has been its diversity, lack of unifying definition and its not-for-profit nature that compels it to peg its survival on the possibilities and probability of funding from donors who themselves may have an Agenda the promotion of which, the Civil Society may be enlisted – even to the detriment of the values that alone define Civil Society in Kenya.

Today, a Funeral Committee, a Peaceful Demonstration and indeed a public processing as are the raucous mob in a political rally, have been included in the definition of Civic Society. The question persists: if the Civil Society, Whence commeth their authority from?

It is pointed out in response that the authority wielded by Civil Society, first and foremost commeth from their being Citizens of Kenya, their rights having been identified and protected by the Constitution of the Republic of Kenya solemnizes this their authority. Section 70 of the Constitution

alludes to this as Section 80(1) guarantees freedom of association, assembly and belonging to Associations. It may still be inquired – perhaps even with bewilderment: how does Civil Society become a Constitutional Organ?

#### **4. The Constitutional Reform Process and Civil Society**

The Constitution of Kenya declares Kenya to be a Republic with the sovereignty vesting in its People and exercised through the three Arms of Government in the behalf of the people, which people in their diverse forms of organizations that which are neither Statal nor ‘for profit’ constitute Civil Society and in that case a Constitutional Organ.

The Constitution of Kenya Review Act recognizes Civil Society as an Organ of Review – albeit- in a circumscribed form. It states that the objects and purpose of constitutional review include:

“Guaranteeing peace, national unity and integrity of the Republic of Kenya inOrder to safeguard the well-being of the People of Kenya.”

The Act also established a number of Organs within the review process that are primarily Civil Society – based. These include the Constituency Constitutional Forum, the National Constitutional Conference, and even the Constitution of Kenya Review Commision itself.

It names in its Third Schedule, Non-Governmental Organizations. I dare add, that Political Parties as popular institutions too conform to the definition of Civil Society and fall within the Constitutional Organs named in the Act.

The Constitution Review Process will focus on rights, and not just the rights of the

individuals, but those of groups especially. These groups are in their diverse forms, sectors and interests. When any numbers of individuals congregate for the purpose of advancing or protecting their interests, they conform to the standards of Civil Society.

The right of Citizens to petition their governors for a better a order is inviolable and held to be a constitutional means of requiring remedy. When Citizens come together to perform this task, they perform the function of Civil Society.

If Citizens organize outside of State apparatus for the purposes of sharing information, they exhibit a characteristic of Civil Society and they must be recognized as such.

#### **5. The Place of Civil Society in the Post – Review Constitution**

Civil Society has emerged recently as the only sphere in which public discourse and programme have been legitimized. This is a grave responsibility that recognizes Civil Society as a repository of public normativeness; but Civil Society must also encourage creativity and recognize new ways. For instance, being unanimous on the course Social relations will take in guture in the Secular Trinity of State, Market and Civil Society or whether another model will take its place. What Social Model that emerges from the post – Development State must radiate the ethos of the new Society to emerge from the new Constitution.

With the immense knowledge – base developed in the Civil Society over the years on the issues of authority and morality, the level to which Civil Society is involved in the whole process of Constitutional Reform will determine whether or not the reviewed Constitution will usher in a dispensation that will overcome the tensions experienced in Fiji soon after the review of its Constitution.

As Parliament reels from the specter of possible irrelevance to the way of life of the People, and still musing over the significance of its roles of representation and oversight it is supposed to play and the capacity to play that role effectively; and the media pander absolutely to the market – acting for profit, Civil Society has ventured into the realm of law-making. They are poised to actively be in this realm as they wean society in the transition from ‘Development’ to ‘Rights’.

## 6. Conclusion

The Constitution of Kenya Review Commission is itself a Civil Society Organ socialized into the Constitution Review and formalized by dint of law. Yet, its calls for independence bespeak of attempts by some quarters to patronize it as had been done to the Trade Union Movements, the Academia, the *Maendeleo ya Wanawake* and a number of other Civil Society Organizations. The Commission must continue to resist the persuasion – by patronage practice currently in vogue. It must uphold and rectitude of action and resist with consistency all the pressures directed towards it with the purpose of capturing it.

The State and the Civil Society have tended to recently square it off within

the ambit of the review process. The state – such of it as is still viable – gelded by the market has been wont to bark at the Civil Society, if for no other value, to restrict the space Civil Society can legitimately occupy. Yet, even in this times of heightened mistrust between the state and Civil Society, the Constitution of Kenya Review Commission remains the gallant billboard on which is displayed the success of the latest enterprise of both Civil Society and the State compromise.

Many other initiatives such as the Social Dimensions of Development (SDD), the Anti-poverty Trust, the Poverty Reduction Strategy Paper, have demonstrated an ability for the State and Civil Society to dialogue in mutual support of the review process and may entrench the culture of dialogue and mutual support.

There may not be a consensus on the definition of NGOs, but as the role of Parliamentarians as people’s representatives, that of the Market as the engine of growth remains ever so doubtful, the Civil Society as the custodian of hope and the only alternative that delivers persuasively, may already have been endorsed.

## MANAGEMENT OF PUBLIC FINANCES

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### 1. Introduction

In Kenya's economy today, total taxation is 24% of GDP and is considered on the high side by world standards. The Government is the biggest employer either directly or indirectly through parastatals. The Government borrows heavily from the domestic market, taking an average sh.8 billion per week. A very large proportion of our taxes go to support Government's recurrent budget - mainly salaries and debt repayments.

Beyond the budgetary function, public policy influences the course of economic activity through monetary, regulatory and other devices. Public enterprises play an important role, though most of them are poorly managed and have become avenues for corruption. The modern capitalist economy is thus a thoroughly mixed system in which public and private sector forces interact in an integral fashion.

### 2. The Need for A Public Sector

In a supposedly private enterprise economy, questions are asked why a substantial part of the economy is subject to some form of government direction rather than left to the "invisible hand" of market forces. The prevalence of government may reflect the presence of political and social ideologies which depart from the premise of consumer choice and decentralized decision making. Public policy is needed to guide, correct and supplement the economy in certain respects. The following are some of the reasons for

need for governments to intervene in economies:

- The claim that the market mechanism leads to efficient resource use is based on the condition of competitive factor and product markets. Thus there must not be any obstacles to free entry and consumers and producers must have full market knowledge. Government regulation or other measures may be needed to secure these conditions
- They may also be needed where competition is inefficient due to decreasing cost
- The contractual arrangements and exchanges needed for market operation cannot exist without the protection and enforcement of a governmentally provided legal structure
- The production or consumption characteristics of certain goods are such that they cannot be provided for through the market. Problems of 'externalities' arise which lead to market failure and required correction by the public sector, either by way of budgetary provisions, subsidy or tax penalty.
- Social values may require adjustments in the distribution of income and wealth which results from the market system and from the transmission of property rights through inheritance
- The market system does not necessarily bring high employment,



price level stability and the socially desired rate of economic growth. Public policy is needed to secure these objectives.

- Public and private points of view on the rate of discount used in the valuation of future consumption may differ

Although particular tax or expenditure measures affect the economy in many ways and may be designed to serve a variety of purposes, several distinct policy objectives include:

- The provision of social goods or the process by which total resource use is divided between private and social goods and by which the mix of social goods is chosen. This provision may be termed the allocation function of budget policy. Regulatory policies are considered part of *the allocation function*.
- Adjustment of the distribution of income and wealth to ensure conformance with what society considers a 'fair' or 'just' state of distribution. This is thus the *distribution function* of government.
- The use of budget policy as a means of maintaining high employment, reasonable degree of price level stability and an appropriate rate of economic growth, with allowances for effects on trade and on the balance of payments. This is the *stabilisation function*.

While these policy objectives differ, any one tax or expenditure measure is likely to affect more than one objective. The problem is how to design budget policy so that the pursuit of one goal does not void that of another.

### 3. Government Policy Instruments to Manage the Economy

#### 3.1 *The Allocation Function*

The market mechanism is well suited for the provision of private goods. The assumption is that consumption of goods and services is based on exclusion unless you pay and is rivalrous. The government must step in where the market cannot deal with a particular situation.

The political process must enter the picture as a substitute for the market mechanism. Voting by ballot must be resorted to in place of voting by dollar bids. Since voters know that they will be subject to the voting decision, they will find it in their interest to vote such that the outcome will fall closer to their own preferences. Decision making by voting becomes a substitute for preference revelation through the market, and the collection of cost shares thus decided upon must be implemented via the tax system. If we say that social goods are provided publicly, it means that they are financed through the budget and made available free of charge. How they are produced does matter. When looking at the public sector in the national accounts, the cost of such provision is through salaries of public employees, and purchases from private firms. Public production of private goods should be severely limited.

#### 3.2 *The Distribution Function*

This is the major point of controversy in any budgetary debate as it plays a key role in determining tax and transfer policies. In the absence of policy instruments, the distribution of income and wealth depends on the distribution of factor endowments e.g. personal earnings abilities and the ownership of accumulated and inherited wealth. Distributional attention appears to be shifting from the traditional concern with

relative income positions, with the overall state of equality, and with excessive income at the top scale to adequacy of income at the lower end. Thus the current discussion emphasize on prevention of poverty, setting what is considered a tolerable cut-off line or floor at the lower end rather than putting a ceiling at the top, as was once a major concern.

Among various fiscal devices, redistribution is implemented most directly by:

- A tax-transfer scheme, combining progressive taxation of high income with a subsidy to low income households
- Progressive taxes used to finance public services which particularly benefits low income households
- A combination of taxes on goods purchased largely by high income consumers with subsidies to other goods which are used chiefly by low income consumers

### 3.3 *The Stabilisation Function*

This does not come automatically but requires policy guidance. Without it, the economy tends to be subject to substantial fluctuations and with growing international interdependence, forces of instability may be transmitted from one country to another, which further complicates the problem.

The overall level of employment and prices in the economy depends upon the level of aggregate demand, relative to potential or capacity output valued at prevailing prices. The level of demand is a function of the spending decisions of millions of consumers. These decisions in turn depend on upon many factors, such as past and present income, wealth position, credit availability and expectations. In any one period, the level of expenditures may be insufficient to secure full employment of

labour and other resources. Expansionary measures to raise aggregate demand are then needed. Expenditures, also, may exceed the available output under conditions of high employment and thus may cause inflation. In such situations, restrictive measures are needed to reduce demand.

Policy measures available to deal with these problems involve both monetary and fiscal measures.

- Monetary instruments - if left to its own devices, the banking system will not generate precisely that money supply which is compatible with economic stability but will accentuate prevailing tendencies to fluctuation. The money supply must be controlled by the central banking system and be adjusted to the needs of the economy in terms of both short-term stability and long-range growth.
  - Monetary policy - cash ratio, treasury bills, discount rates, interest rates, exchange rates etc - is thus an indispensable component of stabilization policy. Expanding money supply will tend to increase liquidity, reduce interest rates, and thereby increase the level of demand, with monetary restriction working on the opposite direction.
  - Fiscal Instruments - raising public expenditures will be expansionary as demand is increased, initially in the public sector and transmitted to the private market. Tax reduction, similarly, may be expansionary as taxpayers are left with a higher level of income and may be expected to spend more. Expansionary effects of deficit finance, if matched by a tight monetary policy will call for an increase in the rate of interest.
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### 3.4 *Fiscal Institutions*

Whereas a unitary government need not have its taxing and spending powers specified in the Constitution, a federation by necessity must have them so specified. Fiscal arrangements of taxing and spending powers are all at the very core of the contract between the constituent governments which combine to form the federation. Even though the Central Government necessarily must have fiscal powers, the composing units retain a sovereign right to conduct fiscal transactions of their own.

## 4. **The USA Experience on Public Finance**

### 4.1 *Constitutional Provisions*

The fiscal powers of the Federal Government were laid down in a series of specific constitutional provisions which came to be further defined by judicial interpretations given to certain other provisions not exclusively aimed at fiscal matters. The major provisions are:

- Taxing powers and expenditure functions - the general enabling statute for federal taxing powers is contained in Article 1 Section 8 of the Constitution which provides that the "Congress shall have power to levy and collect taxes, duties, customs and excise, to pay the debts and provide for the common defense and general welfare of the United States".
- Uniformity Rule - also covered in Article 1, Section 8, states that all taxes shall be uniform throughout the U.S. This means that there is equal treatment of tax payers in equal

position independent of their place of residence.

- Apportionment Rule - this is covered under the 16th Amendment which states 'Congress shall have power to levy and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to census or enumeration. This cleared the way for uniform and nationwide income tax.
- Export taxes - Article 1, Section 9 of the Constitution also prohibits the levying of export taxes. It is interesting to note in connection with the potential use of tax policy to affect the balance of payments that there is no corresponding prohibition of export subsidies. Whereas the Federal Government had to be granted basic taxing powers by the constitution, the states did not need this provision. Taxing powers of the states is vested in their sovereign rights as constituent members of the federation and retained by them under the residual power doctrine. The constitution however, imposes certain restrictions on the taxing power of the states, partly through specific provisions and partly again through judicial application of other clauses of the constitution to tax matters. The following four limitations are important:
  - In Article 1, Section 10 of the Constitution, the states are prohibited specifically from imposing taxes not only on exports but on imports as well. This was to place the regulation of foreign commerce exclusively under the authority of the federal government.

- The immunity doctrine forbids federal taxation of state and local instrumentalities and also applies in reverse. States may not tax the instrumentalities of the federal government. Salaries paid by the federal government are subject to state income tax though.
- The 14th Amendment holds that a state must not deny to any person within its jurisdiction the equal protection of the laws. This clause has been interpreted as a prohibition against arbitrary classification and sets some limits on the extent to which states may discriminate among various categories of taxpayers.
- The 14th Amendment has also been interpreted as granting the taxpayer the right of appeal against arbitrary acts of state or local tax administration, similar to its application at the federal level.

#### ***4.2 Right to Education and School Finance***

The bulk of the funds for public elementary and secondary education come from the local property tax. Since the property tax base varies among school districts, children in low base districts may be disadvantaged. The California Supreme Court in *Serrano v. Priest* held that the right to an education in public schools is a fundamental interest which cannot be conditioned on wealth.

#### ***4.3 Budgetary Process***

The central instrument of expenditure policy is the budget. The four steps involved in the budget cycle are:

- Formulation of the President's budget by the executive branch
- Appraisal of the President's budget by Congress and budget legislation
- Execution of this legislation by the executive branch
- Auditing by the General Accounting Office - the independent audit office reporting directly to congress

### **5. Proposals Regarding Public Taxation and Expenditure**

#### ***5.1 Sharing of Revenue***

- National Taxes
  - Income tax, VAT, customs and excise, court fees and levies
- Provincial Taxes
  - Rates on property, land taxes
  - Special consumption taxes
- District/Municipal Taxes
  - Cess, tolls, fees, licenses
  - Special consumption taxes
- Creation in the constitution a Monetary and Fiscal Commission to oversee the Central Bank and Ministry of Finance policies

#### ***5.2 Education***

- Provincial and District government matter
- National government grants to subsidize education
- Commitment to universal primary education up to Standard 8
- Establishment of national secondary schools funded by the national government
- Universities will be national matter
- Commitment to affirmative action
- Research to be funded by the National Government
- All schools and colleges to be run by Community Management Boards

### 5.3 *Health*

- Provincial matter for District and Provincial hospitals
- Referral hospitals to be run by the national government
- directly to Congress.
- Disease control a national government matter
- Commitment to universal basic health care

### 5.4 *Labour*

- Constitution to protect the interest of minorities, children and disabled
- Constitution to clearly delineate employee/employer relationship
- Provinces to establish appropriate labour contracts e.g. working hours
- Prohibition of double taxation

### 5.5 *Infrastructure*

- Aviation, railways, postal, telecommunications, highways, radio, television to fall under the control of the national government
- Water and energy to be shared between the national, provincial and local governments

### 5.6 *Science and Technology*

- National government to protect intellectual property rights
  - Research to be a national issue in collaboration with university research institutes and international institutions.
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# ENVIRONMENTAL RIGHTS AND DUTIES IN THE CONTEXT OF MANAGEMENT OF NATIONAL RESOURCES

**Prof. C.O. Okidi**

## **I. Introduction**

This presentation is designed to provide issues and suggestion on constitutional entrenchment of environmental rights and duties in the context of management of national natural resources. It will provide brief working definitions of environment and its management terms, such as conservation, preservation, and sustainability. Secondly, the presentation will outline the basic conceptual tools essential for rational management of natural resources. Thirdly, and for completeness, we shall provide the fundamental character of constitutions and thus, suggest the reason why it is a proper place for the basic legal requirement on environment in Kenya.

Lest someone gets worried that Kenya is alone in seeking to entrench environmental rights and duties in its Constitution the presentation will list out the countries which have already done so. African countries under this category are highlighted.

The fifth section is bold enough to propose possible provisions in order to focus discussions on environmental rights and duties for Kenya. The final part of the paper will open up the discussion by suggesting provisions for the management of natural resources in order to promote sustainable development.

## **2. What Is Environment?**

All natural resources and the total context within which they exist and interact as well as the totality of infrastructure constructed to

support human socio-economic activities constitute environment. In other words, single natural resources sectors are simply components of the environment. In pristine settings, the components of the environment interacted while maintaining a balance. However, the impact of technology, human consumption with the increasing population have led to pressure which require management interventions.

Conservation is a management term which means to utilize renewable resources sustainably and to avoid waste of non-renewable resources. Preservation, on the other hand requires that a given resource be left alone. The ultimate objective is to ensure that the components of the environment are utilized to meet the needs of today without jeopardizing the interest of future generations.

These definitions mean that environment also embodies the life support system. Danger to environment implies danger to life on earth.

## **3. Conceptual Tools For Management**

The following are the generally accepted conceptual tools or basic principles which guide environmental management:

- 1. Sustainability:** The guiding principle implied is the protection of the threshold of sustainability or that point beyond which utilization of assault on natural resources should

not exceed. Whatever may be done in the environment or with its natural resources, should ensure sustainability and respect inter-generational equity.

2. *Precautionary Measures:* These are procedures which ensure that precaution or prudence is exercised to ensure that the threshold of sustainability is protected. They include EIA, Environmental Risk Assessment, Monitoring, environmental audit and observance of the precautionary principle which requires the intended action should be withheld where there is possible danger even if scientific knowledge is inconclusive.
3. *Integration of Environmental Consideration into Development Planning:*  
This principle requires that the experts who manage national development should take environmental considerations into account so that the threshold of sustainability is protected.
4. *Promotion of Public Participation:*  
This principle requires that all stakeholders in a project that involves environment should be involved directly. Their involvement may be at least through administrative mechanisms such as EIA or through provision for locus standi. Public participation requires free access to information and access to justice.
5. *Provision of Legal and Institutional Mechanisms:* This principle requires that there must be law in place setting out the expectations as well as the institutional mechanisms to ensure redress,

#### 4. Why Should Environment Be In A Constitution?

A constitution is the highest legal order in any country or society. "Every law or administrative regulations is null and void to the extent that it conflicts with the provisions of the national constitution. Environment, as pointed out above, has to do with life support system. A danger to environment is potentially a danger to health or life itself. Its protection requires the stability of a constitution which can only be changed, if at all, by a special and substantial majority of the national legislature. Entrenchment of environmental rights and duties is therefore ranked among the highest provisions. We therefore submit with the Philippine Supreme Court decision in the celebrated *Oposa v. Factoran* [GR No 101083, 224 SCRA 793 (1993) at 14-15] that:

" Such a right belong to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation ... aptly stressed by the petitioners ,... the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental character, it is because of the well founded fear of its framers that unless the rights to a balanced and healthful ecology and health are mandated as state policies by the Constitution itself thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be far when all else would be lost not only

for the present generation, but also for those to come - generations which stand to inherit nothing but perched earth incapable of sustaining life".

Within a constitution, environmental provisions may be in form of declaration of public policy or as fundamental rights. While the former provisions normally defer to the legislature to prescribe precise and enforceable rule; the fundamental rights expressly provide actionable obligations. Oftentimes constitutional provisions have a combination of both. Some of the constitutional provisions are concise and brief as one finds in Malawi or Austria, others are rather expensive as will be found in Brazil.

### 5. Many Precedents For Kenya

Our research has found that there are at least 55 countries globally, with constitutional provisions on environment and may be summarized as follows:

1. North America: Canada and Mexico have such provisions. Although the United States has no such provisions in the federal constitution, eight of its constituent states have environmental provisions.
2. Latin America: Costa Rica, Panama, Peru, Chile, Guyana, Honduras, El Salvador, Ecuador, Haiti, Nicaragua and Brazil.
3. Europe: Switzerland, Austria, Germany (Federal Republic), Hungary, Poland, Czechoslovakia, Malta, Albania, Bulgaria, Yugoslavia, Belgium, Greece, Spain, Portugal, Sweden and Russia .
4. Asia and Pacific: Indonesia, Taiwan, Japan, India, Myanmar/Burma, Papua New Guinea, Sri Lanka, Philippines, United Arab Emirates,

Thailand, Yemen, Tran, Vanuatu, Vietnam, China, South Korea.

5. Africa: Equatorial Guinea, Ethiopia, Burkina Faso, Malawi, Ghana, Lesotho, South Africa and Uganda. It will be recalled that research done in mid 1980's found that there were only two countries, Equatorial Guinea and Ethiopia that had environmental provisions in their constitutions. It seems then that the other six were during the last one decade.

### 6. Consideration For Kenya

We believe that Kenya is the latest African country to enact a framework environmental law. The statute is quite rich in terms of public participation and sustainable development. But this discussion has been clear on the reason why statute-based protection of the environment is inadequate. And like Uganda, and the other seven African countries, Kenya can now join the countries with environmental provisions in the constitution. The current constitution-making process offers such an opportunity.

Discussions can go to great length as to which of the formulations presented to the Commission approximates the ideal one for Kenya. Consider the following:

#### *Republic of South Africa*

Environmental Provision:

- "24. Everyone has the right -
- (a) to an environment that is not harmful to their health or well-being; and
  - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
    - (i) prevent pollution and ecological degradation
    - (ii) promote conservation; and
    - (iii) secure ecologically sustainable development and use of natural



resources while promoting justifiable economic and social development".

*Republic of Uganda*

"XXVII, The Environment (P. 9)

- (i) The State shall promote sustainable development and public awareness of the need to, manage land, air, water resources in a balanced and sustainable manner for the present and future generations.
- (ii) The utilization of the natural resources of Uganda shall be managed, in such a way as to meet the development and environmental needs of present and future generations of Ugandans; and in particular, the State shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from pollution or other causes.
- (iii) The State shall promote and implement energy policies that will ensure that people's basic needs and those of environmental preservation are met.
- (iv) The State, including local governments, shall-
  - (a) create and develop parks, reserves and recreation areas and ensure the conservation of natural resources;
  - (b) promote the rational use of natural resources so as to safeguard and protect the biodiversity of Uganda"

"39. Every Ugandan has a right to a clean and healthy environment". (P.32)

"245. Parliament shall, by law, provide for measures intended - (P.150).

- (a) to protect and preserve the environment from abuse, pollution and degradation;

(b) to manage the environment for sustainable development; and

(c) to promote environmental awareness",

*Republic of Malawi*

Environment Provision

"13. The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals –

(a) The Environment

To manage the environment responsibly in order to-

- (i) prevent the degradation of the environment;
- (ii) provide a healthy living and working environment for the people of Malawi;
- (iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and
- (iv) conserve and enhance the biological diversity of Malawi".

*Republic of Kenya*

"The Parliament shall, by appropriate legislative enactment, promote the protection and rational management of the environment and natural resources of Kenya, as part of national heritage, for the benefit of the present and future generations.

Every Kenyan has a right to a healthy environment and a right to defend it through administrative and judicial mechanisms.

Every person resident in Kenya has a duty to promote the health of the environment and sustainability of natural resources".

Which way would you like to go? We can look at other examples.

The foregoing provisions deal with environmental rights and duties. However they do not go to the core of management of natural resources and the environment. They fall short of the questions of how management of such resources can be shaped to ensure conservation and management. That is a broad question but I would like to contribute to the broader debate by proposing adoption of a provision similar to the one from Article 268 of the 1992 Constitution of Ghana which says:

"268. (J) Any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person including the Government of Ghana, to any other person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to ratification by Parliament.

(2) Parliament may, by resolution supported by the votes of not less than two-thirds of all the members of Parliament, exempt from the provisions of clause (1) of this article any particular class of transactions, contract or undertakings."

The discretion remains for Parliament to decide on factors to be taken into account before ratification. We propose that Parliament be urged to consider the following to be submitted with the proposed development as applicable:

1. Environmental management plan
2. Environmental restoration plan
3. Industrial development plan - How will the enterprise, contribute to

industrial development. No raw materials should be exported without value-added. How else will Kenya industrialize ?.

4. Resettlement plan
5. Fund management plan - How will the proceeds be managed?
6. Socio-economic development plan. - How will the enterprise contribute?

## 7. Land As A Natural Resource

This is a question being handled by a Commission of Enquiry to ascertain questions of tenure and land use. Both issues require the thorough review which is under way. One point which we wish to flag to this Commission at this stage is that all land considered government land or trust land at present should be vested in the people of Kenya with the government as a trustee. Any change in that status should be subject to parliamentary ratification, taking into account the six points above.

## 8. Conclusion

This abstract is designed to lead to more detailed discussions.

## CONSTITUTIONAL ISSUES RELATING TO NATURAL RESOURCES

**Dr. Albert Mumma**

### 1. Right to environment

The right to environment and to natural resources is not expressly provided for in the Constitution. This needs to be spelt out.

Such a provision would also define the environment and should include within the definition the physical environment but extend to the social, economic, and cultural environment. It would spell out the obligation of the government as being the promotion of sustainable development, referring to the development of natural resources in such a manner as to enhance the right to environment; broadly defined.

### 2. Ownership of Natural Resources

Presently, ownership of natural resources, including land, is vested in the State. The nature and scope of the State's ownership of natural resources has not been spelt out. Consequently, the State has at times acted as if its ownership of natural resources is similar in extent and scope to private ownership, allowing the State to use and abuse the resources, and dispose of them at will. It is proposed that the Constitution should specify that the State owns natural resources as trustee for and on behalf of the public.

### 3. Jurisdiction

The present Constitution does not make express provision for jurisdiction over the environment and natural resources. Jurisdiction over the environment is considered an issue of shared local and national competence. This should be

reflected in the Kenyan Constitution. In that eventuality, it would be necessary to ascertain what issues go to national competence and what issues go to local competence. This is the case whether the Constitution provides for a unitary or a federal system.

### 4. Rights of Local Communities

The current Constitution and laws vest ownership of natural resources (water, forests, minerals etc) in the national State. This follows the model of natural resources protection which relies on the creation of protected areas, separating local communities from protected natural resources.

It is proposed that the relationship of local communities to local natural resources be reassessed and the rights of local communities over natural resources and their management be spelt out in the Constitution.

### 5. *Locus Standi*

*Locus Standi* is now provided for in the Environment Management and Coordination Act 1999. Its exact scope there is rather ambiguous.

It is proposed that the Constitution provide unambiguously for *locus standi* for members of the public without having to demonstrate a personal interest with respect to the environment and natural resources. This is particularly important as the conservation of

natural resources is a cross-cutting issue needing to be dealt with in a diverse range of statutes.

## **6. Access to Information**

Kenya currently operates under laws which provide for state secrecy with regard to information in the hands of public authorities. This hinders efforts at

enforcement and environmental conservation.

It is proposed that the Constitution provide for access to information, including information on environment and natural resources, which is in the hands of public authorities, subject only to the imperatives of state security and commercial confidentiality. This is another cross-cutting issue best dealt with in the constitution.

## CONSTITUTIONALISATION OF FOREIGN POLICY AND DIPLOMATIC RELATIONS

**Hon. Dr. Bonaya Adhi Godana, EGH, MP**

### 1. Introduction

It gives me great pleasure to address the Constitution of Kenya Review Commission on the subject of "Constitutionalisation of Foreign Policy and Diplomacy".

I take it that the Commission wants to hear views on the desirability or otherwise of the constitution regulating the conduct of foreign affairs and diplomacy and if it is so desirable, the extent of such regulation. Before putting forward arguments for or against such constitutional regulation of the conduct of foreign affairs, it is pertinent to make a re-statement of the current constitutional position in Kenya on this important subject.

The foreign policy of a state is the combination of principles and norms, which guide or determine relations between that state and other states or bodies in the international system. The path each state decides to follow in world affairs depends on its capabilities, actual or potential, and its assessment of the external environment.

In our constitutional context the conduct of foreign affairs is the prerogative of the chief executive, i.e. the President of the Republic. The independent Government of Kenya inherited all the prerogative powers that the Queen could exercise in relation to Kenya in 1964, *via* S.16 of the Constitution of Kenya Amendment Act, No.28, of that year. To date, foreign affairs are conducted under prerogative powers. Indeed, it is also right to say that the power to conduct foreign affairs is part of the executive powers that are

expressly vested in the President by section 23 of our Constitution.

On both premises the Government is free to negotiate treaty and other relations with foreign nations, subject only to the rule of incorporation into domestic law, where such incorporation is necessary. Save in such cases of incorporation into domestic law, there are wide and important areas in foreign affairs where the Government is free of legal, as opposed to political controls. These include the declaration of war, the dispatch of armed forces, the annexation of territory, the conclusion of treaties, the accrediting and reception of diplomats and the recognition of new states and revolutionary governments. All such acts sometimes called "acts of state" fall within the scope of the prerogative to conduct foreign affairs and are assertions of state sovereignty in international relations.

To recapitulate then, foreign policy is the prerogative of the Chief Executive, His Excellency the President. He is the chief initiator, articulator, and director of our foreign policy at any forum or platform of his choice. The Minister for Foreign Affairs, like any other Minister of State, may defend and articulate such a policy and represent the President at various fora where foreign policy issues are discussed and debated and a stand taken on issues, but the ultimate prerogative and privilege of initiating, directing and shaping foreign policy remains with His Excellency the President. Nor is this unique to Kenya. It is true of all countries in the world today, for whether the office is that of Foreign Secretary, Foreign Minister, External Affairs Minister or Secretary of State, the Minister

for Foreign Affairs everywhere is a Minister of State under the Chief Executive.

## 2. Constitutionalization of Foreign Policy and Diplomacy

The method or style of formulating and articulating foreign policy may vary from country to country. In one case there may be a highly institutionalized and somewhat predictable system, while in another the system may be highly personalized and less predictable.

On the whole, however, the Chief Executive of the State everywhere guides foreign policy. The issue of the constitutionalisation of foreign policy and diplomacy, which I have interpreted to mean the need for or otherwise for express constitutional regulation of the field leads to the following questions-

- What should be the role of the Executive over the conduct of foreign affairs? For example, should the executive have an exclusive authority over the conduct of foreign affairs or should it have some limited role? If so what should be the extent of such limitation?
- What role should Parliament, however conceived, have in the formulation of foreign policy? Should for instance major decisions such as the declaration of war or conclusion of peace, the conclusion of treaties and appointment of Ambassadors be subjected to Parliamentary ratification, vetting or some form of censor, as the case may be?
- What role should the citizen be assigned to influence the conduct of foreign affairs?

The answers to these questions will hinge on the assessment of the competence of each of

these institutions in the matter of foreign affairs, the Executive, Parliament and the Citizen.

In a nutshell the contest is between greater democratization of foreign policy on the one hand, which would mean a constitutional role for the citizen and his representative in Parliament to participate in the formulation of foreign policy and diplomacy, and an exclusive or near exclusive assignment of responsibility for the conduct of foreign affairs and diplomacy to the Executive organ of the State, on the other hand. The issue is whether the country adopts one or other of these options or a sort of a hybrid. What is needed is a constitutional structure where competence, confidence and power are properly assigned in the constitution to facilitate effective foreign policy.

I want to state at the outset my bias for the position which some of you will no doubt call conservative in favour of the primacy, if not monopoly, of the Executive over the conduct of Foreign Affairs and Diplomacy. In this, I find solace *inter-alia* in the fact that the early principal theoretical writers on government such as Blackstone, Locke and Montesquieu are on record for unanimously contending that power to conduct Foreign Affairs must always rest with the Executive.

In our own modern times it is interesting to note that even in such renowned constitutional democracies such as the United States of America where Congress has been given an express role in the Constitution to influence foreign policy, the courts have liberally invoked the doctrine of "political questions" which lie largely outside judicial competence or authority, in order to avoid deciding on matters relating to the conduct of foreign relations. Thus, for instance, in 1829, in the case of *Foster-v-Neilson* the Supreme court refused to rule on the location of the boundary between Spain

and the U.S. in 1804 because in its own words this was more "political than a legal question" and one on which the country must accept the decision of "political departments".

### **3. The Role of the Citizen in the Conduct of Foreign Affairs**

Constitution making is after all about better democratic governance. Ideally in a democracy citizens must decide on the ends of public policy and the means of those ends. A country is democratic or non-democratic to the extent that the citizen can or cannot influence the conduct of his or her country's public affairs. In the realm of foreign policy as one part of public policy the question arises as to whether the citizen is competent enough to decide on issues of foreign affairs and diplomacy, so as to be given a clear role to that effect. The simple answer is no. The average citizen is least competent in this field as there are many difficulties that confront him or her in making rational decisions. I would like to outline here some of the major barriers to citizen competence in foreign affairs.

A central problem of democracy in a complex modern society turns upon the question as to how and indeed whether the citizen can bring to bear on broad questions of public policy sufficient rationality to achieve his basic purposes. By rationality here, we mean the capacity to choose the best means available, i.e. the best of the alternatives available, for achieving desired targeted ends. Ordinarily most of us tend to act rationally when we have to make choices about things within our own experience, than when we are concerned with things remote from us. Foreign affairs is definitely one field of public policy in which the problem of rational decision making by the citizen is great. This is because foreign policy questions involve matters that are not of immediate or direct interest to many of

us. The more remote the issue is from my experience the less rational I am likely to be in making a decision.

Not only are foreign policy decisions remote from most of us; they are also often extraordinarily complex even to the expert. A matter which is complex to the expert must be overwhelmingly so to the non-expert.

The individual citizen's claim to a direct constitutional role in foreign policy making also comes up against impediments inherent in the political machinery for registering choices. By its very nature politics does not favour the citizen with clearly formulated alternatives from which he can make a rational choice. For instance, the absence of coherent parties, the lack of decisive influence by the party leadership over party voting in parliament, the perennial and sometimes deliberate ambiguity of the party platform and its general inadequacy are hallmarks of many a multiparty political scene. All these serve to confuse the citizen and inhibit him from making an effective choice.

Let me rest there the case against a pronounced constitutional role for the citizen in the conduct of foreign affairs.

### **4. The Role of Parliament in Conduct of Foreign Affairs**

I want now to turn more specifically to the case against parliamentary competence in this field. We said that an action is rational if it is designed to achieve the preference of those in whose interest the action is taken. Foreign policy decisions are taken or at least ought to be taken for the benefit of the country in its entirety, and not of one segment. The enhancement of the national interest must always be at the fore of decision making.

Greater parliamentary role in the conduct of foreign affairs can only mean or lead to greater inquiry, discussion and debate by parliament in the formulation of policy. Yet such inquiry, discussion and debate would mean ventilation in public and augur badly for the effective pursuit of foreign policy in the national interest.

Firstly, such public ventilation on issues may militate against attaining agreement on objectives. Publicity given to the process of negotiation can hinder rational and responsible decision making. The glare of public debate promotes policies of extreme intransigence as every concession is likely to be seen as weakness in the mirror of public opinion. A leadership which might otherwise tactfully concede a bargaining point and then give way to achieve its real aims, may not do so for fear of losing face at home.

As both sides suffer the same fate international negotiations will be stalled! Secondly, international political strategy may sometimes depend on secrecy and surprise for success. It can sometimes be disastrous to draw up plans of action and then broadcast them through public or Parliamentary debate.

Further, because international events move with speed, there is a premium on the ability to decide and to act quickly. Not infrequently, the state may have only one chance to decide - i.e. may not have a second chance if the first decision is wrong. The process of inquiry, discussion, and debate in Parliament is inherently ill-adapted to speed.

Similarly, unity of decision is a positive asset in international negotiation. But an essential quality of the legislative function of inquiry, discussion and debate, is the exposure of differences, i.e. of "disunity" or "disagreement". Such public display of

disunity, is a serious limitation on effective foreign policy. The portrayal of unity in the country on foreign policy is the guarantee for full mobilization of the nation behind the policy concerned and perseverance and tenacity in the pursuit of that chosen policy. These in turn lead to fuller and persistent exploitation of a country's power potential. Conversely, a display of disunity behind a foreign policy option results in conflict and compromise, and therefore, a less than full exploitation of the country's power potential.

Moreover, the training, education, and personality of the Members of Parliament are not particularly conducive to the managerial, executive kind of outlook which is suitable for effective foreign policy. It is usually unlikely that organizational problems will preoccupy the attention and interest of the Member of Parliament. The politician has been said to be less interested in creating order, rules, organizational "efficiency," and more interested in manipulating order, rules and organization to suit his purposes.

Even if the average Parliamentarian were to be well versed in foreign policy issues, Parliament faces severe constraints of time to effectively influence foreign policy. The Members of Parliament tend to devote their daily activities to the needs and complaints of his constituents. The M.P. is above all else an ambassador from his constituents; they see him as their liaison man for every problem that might conceivably be solved in the capital. He dare not take time from this function to attend to his more national duties, because it is his service to constituents and not his stand for the national interest that will get him the votes. As government becomes more complex, citizens' demands on the M.P, multiply, and time becomes increasingly in short supply.

If parliamentarians are to effectively discharge responsibility in foreign affairs



they will have to overcome this problem of time constraint.

Additionally, given the opportunity to have a constitutional role over foreign policy, M.Ps are bound to become preoccupied with attempts to control details as a method of controlling policy. This will be a most undesirable development. Were the method of parliamentary control of foreign policy to be by Parliamentary legislation it would mean a rigid foreign policy which will be as undesirable as it is impractical.

### **5. The Role of the Executive in the Conduct of Foreign Affairs**

Having considered both the citizen and the MP and marshalled arguments against their leading roles in the conduct of foreign affairs, that leaves us to examine the position of the Executive. As I said at the beginning the general trend the world over is to give primacy, if not monopoly, to the executive in the conduct of foreign affairs.

The field of foreign affairs is one characterized by rapid shifts and increasingly crisis politics. The fact that international politics is increasingly characterized by acceleration of events makes speed and flexibility of decision making critically important. Speed and flexibility necessary for creating and implementing foreign policy, demands the executive be conferred with near exclusive responsibility in foreign affairs as the only guarantee for competent policies. The argument is succinctly captured in the words of an American Supreme court judge-

"It is quite apparent that if, in the maintenance of our international relations, embarrassment... is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through

negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries.... He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials".

Effective foreign policy responses to international events often required accurate prediction of the behaviour of other actor and future happenings, a function the experts serving the executive, and not the citizen or politicians, are best suited for.

Additionally as between the competence of the Citizen, of Parliament and of the Executive, responsibility and nation-wide consensus is more likely to be achieved through the executive. The executive alone is best placed to secure a national mandate for its foreign policy. This is because the executive founded on an electoral mandate is the organ which can claim to be responsible to a national-wide electorate, which is capable of basing policy upon the widest possible agreement or consensus in the nation, and above all, which has at its disposal the organization and information necessary for rational action amidst the tremendous complexities of international politics.

It is my humble view that discretion over foreign policy by political leadership-often very great discretion is essential for survival in modern international politics.

Foreign policy is too complicated an affair to be conducted by plebiscite of public opinion. The basic question is not whether political leadership is to exercise discretion in foreign affairs, but how. In other words

the challenge is to design a constitution which makes it reasonably probable that in exercising its discretion the political leadership will maximize so far as is possible the values of responsibility, rationality, and agreement.

I suspect that some of you are burning with rage that I have surrendered everything to the executive in the pursuit of strong government. I am fully conscious that my argument above is an unhappy one for a democratic society, because it has favoured the executive with what some might characterize as "dangerously unlimited power" to commit the country without the people's consent.

But then I am also conscious of the fact that we live in an era of international politics least suited to the democratic method at all levels and all stages. If you cannot achieve the Utopia in which competence, responsibility and agreement (unity) can all be maximized at the same time, then you will have to sacrifice one to achieve another, - in this case sacrifice the democratic value of public/parliamentary control of policy.

## **6. Conclusion**

Having said that, I want to concede even this late that complete unfettered executive discretion in the discharge of foreign affairs is not tenable. Firstly, to argue as I have argued is not to deny completely a role for Parliament in influencing foreign policy. As it is even today under our current constitution, Parliament can exercise some influence through its powers of investigation

and appropriation. The parliamentary power of appropriation gives the legislature influence over every executive policy that requires funding.

Beyond such existing inherent checks, the Commission could consider some express roles for Parliament to influence "but not to control" the conduct of foreign affairs and diplomacy by the Executive.

For instance, it could consider and provide: that the declaration of war and the conclusion of peace be made subject to some sort of ratification or approval by Parliament within reasonable time; that the appointment of ambassadors be subject to parliamentary scrutiny but not ratification, (which would mean the Executive need not be bound to withdraw the appointment or proposal where Parliament expresses strong reservation or criticism)-and it could require that all foreign treaties be notified to Parliament, i.e. in addition to those which have to be enacted into domestic law.

In conclusion, I wish, to submit that the Commission should design a constitutional dispensation in this regard that ensures a strong executive, which for the duration of its mandate is not unduly fettered by irresponsible controls and checks; an executive that is strong enough to implement confidently the program on which it was elected and the foreign policy it deems fit in the best national interest. Citizens can always have the ultimate check on irresponsible and unpopular foreign affairs at election time.

## DOMESTICATION OF INTERNATIONAL OBLIGATIONS (AN ABSTRACT)

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### (A. Foundation for Law and Policy for Contemporary Problems)

#### 1. Introduction

This topic calls for a discussion on the question of how, in applicable cases. States achieve the incorporation into their domestic laws (domestication) of multilateral or bilateral treaties (international obligations) of which they are parties, so that the rights and duties contained in such treaties may become applicable and enforceable *domestically* in the States concerned.

By focusing on the question of domestic application of treaties, the framers of the topic have rightly put aside the issue of application of treaties to States *internationally*, since that issue has been well settled by the 1969 Vienna Convention on the Law of Treaties. That Convention, let us observe briefly, *inter alia*, established the means by which a State may express its consent to be bound by a treaty, which thereby becomes applicable to it at the international plane, by: "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

Thus, limiting itself to the choices of means by which a State may accept international obligations arising from treaties, the Convention does not address the question of how States may then bring about the implementation *domestically* of the treaties, which they have made applicable to them *internationally*. The Convention rightly

leaves this question to be settled by each State, in accordance with its legal system. Thus, "domestication" of treaties is a matter of national law and is not governed by international law.

Two major approaches, and some variations of them, may be identified with respect to the question of the status of treaties in domestic legal systems. Some States follow the dualist approach to this question, while others follow the monist approach, to which more must be said.

#### 2. The Dualist Approach

Under the dualist approach, treaties are part of a separate legal system from that of the domestic law: They do not form part of domestic law directly. Thus, under this approach, a treaty to which a State has expressed its consent to be bound does not become automatically applicable within that State until an appropriate national legislation has been enacted to give the treaty the force of law domestically. This is the so-called "act of transformation", which has several ways for bringing about. One of them is the direct incorporation of the treaty rules through a drafting technique which gives the force of law to specified provisions of the treaty or indeed the whole treaty, usually scheduled to the transforming act itself. This is the approach which was inherited by Kenya and other commonwealth countries from the British practice, as the prime example.

Where the treaty-making power (negotiation and ratification) of the State is vested in a governmental body other than the legislature and there are no constitutional or specific legislature provisions for "democratic participation" in that process, such as parliamentary approval of treaties, the subsequent act of transformation plays an added role. The upshot is that, under the dualist approach, a State can indeed express its consent to be bound by a treaty first (ratification) without involving the legislature, thus making the treaty applicable to it internationally, then subsequently involve the legislature when transforming the treaty to make it enforceable domestically.

Thus, Kenya may for example, begin discharging its obligations at the international plane (reporting requirements) under the Convention on the Rights of the Child (CRC) or under the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) both of which it has ratified, but cannot at the same time, give effect to the rights based on these Conventions domestically because it has not yet "domesticated" them! This does not seem to be a desirable result.

### **3. The Monist Approach**

Under the monist approach, traditionally a legal system of a State is considered to include treaties to which that State has given its consent to be bound. Thus, certain treaties may become directly applicable in that State domestically (self executing) and do not rely on subsequent national legislation to give them the force of law once they have been ratified by the State. "Where a treaty is thus considered to be "directly applicable", under this approach, it means that the domestic courts as well as other governmental bodies would look to the treaty language itself as a source of law."

There are, however, variations to this monist approach. There are what I may call the "extreme monist" States whose constitutions expressly provide that certain treaties are directly applicable in the State and that in such cases the treaties in question are deemed superior to all laws, including constitutional norms! Then there are the "moderate monists" whose constitutions provide for direct application of certain treaties, which may only have a higher status than later legislation but not superior to the constitution. Finally, there are the "ambivalent monists", whose practice classifies certain treaties to be self-executing and therefore directly applicable. The courts of one of the prime example of this monist group have however ruled that "directly applicable treaty" has the same status as federal laws and statutes, and that the latest in time prevails. The result is that, later statutes in that jurisdiction would prevail over "a directly applicable treaty", and this has caused problems for the State in question.

It may be observed that, under the monist approach, the treaty-making process always involves a "democratic participation", such as parliamentary approval of treaties before the State may express its consent to be bound. Thus, a treaty would become directly applicable both at the international plane and at the domestic level, on the critical date of its entry into force for that State, following its ratification, acceptance, approval or accession by the States, in accordance with the relevant final clause of the treaty in question.

Let us also note that, in the earlier cited example of classification of treaties into self-executing and non self-executing has tended to generate domestic power struggle as to which treaties would be classified as directly applicable (self-executing) and which are not. The latter would require both the approval of the legislature and the

subsequent act of transformation, thus resulting into a cumbersome double parliamentary action in the treaty-making process. Such a process which involves a double parliamentary action does not seem desirable.

#### **4. Conclusion**

Each of the these two approaches to treaty implementation has advantages and disadvantages which need to be carefully weighed in making the choice, as a matter of domestic law, as to which approach may best serve our people through an appropriate constitutional provision. We need to take into account the rich experience from the

application of these two approaches, some of which are our own, and to state constitutionally our attitude towards the relationship between the treaty law and domestic law in our system, and the role of the legislature in the treaty-making process.

May we, in that connection, ponder the possibility of devising constitutional provisions intended to generate an "act of transformation" procedure, which would be both an expression of a parliamentary approval of a treaty and of its incorporation into domestic law, consequently permitting the State to express its consent to be bound by the treaty in question by the appropriate means.

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## BASIC RIGHTS THE CONSTITUTIONALISATION OF BASIC RIGHTS

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### I. Introduction

Why constitutionalize basic rights?

The assumption behind such a move is that the constitution is the supreme law of the land and therefore any law or conduct inconsistent with it is void. Constitutionalization of basic rights is therefore an attempt to entrench such rights in not only the highest law in the country for justiciable purposes, but also to flag the primary purpose for the existence of the state namely; the promotion and protection of human dignity, equality for all, and human rights.

However, for the above to hold water, the constitution itself "must be entrenched" (supreme) before it can purport to protect those rights; institutions, and offices entrenched in it.

A constitution is not a plastacine toy that should be moulded at every hurdle the state encounters, at every bend of our national development. Such a law would be neither supreme nor worth the name. If anything, it is a source of instability by virtue of its unpredictability.

### 2. General Principles and Structure of A Modern Bill Of Rights

A Bill of Rights should be founded on certain values, which include: human dignity, equality, and human rights. For such rights to be meaningful, it is essential that they be crafted within the right environmental infrastructure such as

constitutional supremacy, democracy, and rule of law.

A Bill of Rights, should, at least in theory, group basic rights into two categories: civil and political, and economic, social and cultural rights.

### 3. Human Rights

Human Rights are generally grouped into: Civil and Political and Economic Social and Cultural rights. Of the two categories, civil and political rights seems to have not only occupied an inordinately larger claim than probably deserved (sections 70-86 of the current Constitution) but evokes considerable emotions *vis-à-vis* the other category of rights. What cannot be overemphasized is that human rights are interdependent and indivisible. No human right or group of such rights can claim priority over the rest, except the right to life, around which all other rights revolve.

#### (a) *Civil and Political Rights*

These are stipulated in sections 70 through 86 of the current constitution; and include the right to: life; security of the person; privacy; participation in the choice of our governors; citizenship; equal treatment (equality) before the law; right to private property etc. Also within the civil and political rights fall such fundamental freedoms as: freedom of religion; conscience, expression; assembly, association; and freedom of movement. The list is fairly lengthy.

All the foregoing rights are justiceable, even though their actual enjoyment by the citizenry is quite a different matter due to a variety of reasons.

**(b) *Economic, Social and Cultural Rights***

This category of rights is not in the current constitution of Kenya and is by and large, unjusticeable. The source of this group of rights are: International Treaties, and Conventions and other international instruments to which a state is a party. The rights under this category may, for want of a better term, be described as rights that deal with basic needs. They include the right to: food; health care; water; social security; housing; education; employment; right to information; right to healthy environment; language and culture. The collectivity of all the foregoing rights constitutes the recently found right to development.

As compared to civil and political rights, it is difficult to rationalize inclusion of some rights in the constitution, while leaving out those without which the first category is practically hollow. A hungry person is unlikely to be concerned about freedom of association or assembly.

**(c) *Misconceptions about Economic, Social and Cultural Rights***

A number of arguments have been advanced as to why economic, social and cultural rights have not been constitutionalized or are not justiciable. The arguments run like: "no state can afford to actualize such rights because of the economic implications thereof". Proponents of the economic, social and, cultural rights have even been branded "communists", or "pseudo socialists". Such accusations are based on misconceptions and, or, deliberate distortions by those who ought to know better.

A demand for an economic, social or cultural right is not a demand for state handouts. To the contrary, such a demand is for the state and the government of the day, to put in place social and policy arrangements that facilitate access to such right. An examination of any of such rights, within the Kenyan context illustrates the point. Consider, for instance, the right to housing, education and employment.

It is worth noting that economic, social and cultural rights are not rights that can be "imposed" or demanded of any state, overnight. They are progressive rights, and given the proper wording and will, they are actualizable and an essential component of a Bill of Rights of the future.

**4. Promoting a Rights Culture**

Human Rights - Basic Rights - is not a subject to be raised only when there is a crisis - genocide; ethnic clashes or a constitutional review process. It should be a continuous, life-time process.

In the process of executing one of the terms of reference of the SCHR (K), "to educate Kenyans on Human Rights issues" - the Committee opted for an inclusion of a human rights topic in our educational curricular - primary to university levels. That is the only way the Committee sees sustained success in human rights awareness, respect and observance of the same, in the long term.

(The preparation of the curriculum in consultation with other stakeholders, is in its final stages).

**5. The State of Rights In Kenya**

As alluded to elsewhere, the existence of human rights - civil/political or economic/ social and cultural is one thing. Their

accessibility and enjoyment by the potential beneficiaries is a totally different matter. For instance, in the human rights sphere, Kenya is party to some seventeen conventions. These include, to mention but a few: 1948 Genocide Convention; 1952 Convention on the Political Rights of Women; 1954 Convention on the Status of Stateless Persons; the Convention Abolishing Slavery (1956); Convention on the Elimination of Racial Discrimination (1965); Covenants on Economic, Social and Cultural Rights; Covenant on Civil and Political Rights; Convention on the Elimination of all Forms of discrimination Against Women (1979); Convention Against Torture (1984); 1989 Convention on the Rights of the Child; The African Charter on Human and People's Rights (1992) and the African Charter on the Rights and Welfare of the Child.

Despite ratification of the foregoing instruments by Kenya, the provisions therein are of no consequence to individual Kenyans. This is on account of lack of domestication. The problem is not confined to human rights instruments. It is found across the entire spectrum of the international conventions to which Kenya is a party.

The root cause of the problem is the loud silence in our Constitution on such an important matter. The dualist approach to the intergration of treaty obligations into domestic law which Kenya practices is conducive to unmanageable backlogs in the enactment of enabling legislations.

There is urgency in a constitutional solution on the matter, for the enjoyment of the human rights provisions contained in the countless human rights conventions to which Kenya is a party. The monist (self-executing) approach may go a long way in

hastening the process if enshrined in our proposed new constitution.

## **6. Conclusions and Recommendations**

Reviewing or rewriting a constitution is not an opportunity many countries go through or experience in their nationhood. Kenya, and this review Commission, must neither misuse nor trivialize such a rare opportunity. This Commission has the heavy burden of guiding the country in determining the system we need for an effective practical constitutional democracy that values human dignity, rule of law and the full enjoyment of our human rights. A constitution that will achieve the foregoing vision must itself be entrenched - zealously protected by us all, before it can protect us all. To that end, the following recommendations are made:

- (a) The new constitution should have an all-inclusive Bill of Rights which provides for both civil and political as well as for Economic, Social and Cultural Rights.
- (b) The Constitution of Kenya should not be changed or amended except through an effective process of referendum.
- (c) The proposed Kenya National Commission on Human Rights should be made a constitutional body, with, among other functions:
  - The promotion and protection of human rights, and
  - The monitoring of the observance of human rights within the country.

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## **BASIC NEEDS AND BASIC RIGHTS**



## A RIGHTS BASED APPROACH TO POVERTY REDUCTION

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### 1. Introduction

This paper bears evocative title of Basic Needs and Basic Rights, but apart from the emotive sound, the theme that forms the body of this presentation would have been attenuated in places. To further qualify this presentation I have added a sub title "A Rights based approach to poverty reduction". An even more appropriate title could have been "Basic Needs are Basic Rights".

The late Sir James Fawcett, a former member of European Commission of Rights preferred to call human rights "common rights" because what we are talking about is fundamental. Indeed, the underlining issue for the promotion and advocacy of basic needs as basic rights is the widespread poverty that now afflicts our society, which in essence can undermine the basis for the existence of the State. Communities and individuals have one simple agenda when they enter into social contract where by they agree to be subjected to the rule of an authority called Government. The agenda is that they hope that by coming together into such an arrangement whereby they agree to be ruled by an authority, their socio-economic well-being shall be of paramount importance. This gives rise to certain presumptions of rights accruing to the persons who agree and submit themselves to this authority hereby called the State.

These rights often referred to as the "Third Generation Rights" are by their nature very fundamental to an extent that the other more conventional rights cannot be achieved if the

so called Third generation Rights are not guaranteed.

The Kenya Government is a signatory to the Declaration of the World Summit for Social Development held in Copenhagen, Denmark whose goals focused on commitments to poverty eradication, universal primary education, health for all and social integration of the disadvantaged. More recently the government launched the National Poverty Eradication Plan (NPEP) 1999-2015 which seeks to provide an enabling national policy framework for addressing poverty.

The Plan has 3 major components notably a Charter for Social Integration (CSI) that sets out rights and responsibilities of citizens and communities and envisages major improvements in the supply and accessibility to basic services, commitments to improved access to essential services by low income households lacking basic health, education and safe drinking water and a strategy for broad based economic growth.

Lately again, the government has released another policy paper known as the Poverty Reduction Strategy Paper (PRSP) for the period 2000-2003. We find ourselves surrounded with a lot of policy papers which has left us confused and wondering what is the direction to take in the battle against poverty.

This paper does not claim to pinpoint all the basic socio-economic rights, which have direct link to poverty nor solutions thereto,

but offers a heightened awareness and understanding around the various issues and the laws concerned and hope to lead to intense discussion on how to tackle poverty by guaranteeing certain rights. The paper offers an in-depth look into the range we should go when examining the issue of Rights. It highlights a position where by the fundamental needs are not at the mercy of changing governmental policies and programs but become the peoples' entitlements and shifts the burden of proving the necessity of limiting the enjoyment of a right to anyone or authority seeking its limitation.

## **2. Correlation between Poverty and Human Rights**

Poverty is a result of several factors both nationally and internationally. I will focus on the national aspect of the causes of poverty. At the national level, causes of poverty are mainly seen as a result of poor governance or the denial of the basic rights. People become poor when their capability to provide for themselves and influence others is eroded. Increasing the capability of the poor to analyze situations, make decisions and self-organization for empowerment is the key to poverty eradication. The sense, among the poor, of hopelessness and lack of control or influence over processes and relationships that affect their well being highly facilitates their continued impoverishment and incapacitation.

People who are incapacitated to the extent that they are unable to participate in household and public governance, fulfill their basic needs, access productive resources and public services are described as poor and vulnerable. The opportunities brought by economic liberalization and the widening of democratic space are significant and provide Kenyans with a window of opportunity to improve the lives of all and in particular those living in poverty.

The basic rights approach considers poverty as the denial and violation of the fundamental human rights in the context of the inability of the State to provide the basic needs. This makes poverty an integral part of the governance equation. Development should and must be centered on human beings and the central goals of development must include the eradication of poverty, the fulfillment of the basic needs of all people and the protection of all human rights. That being the case, in fulfilling its mandate the State must be at the pivotal point as the custodian of duty to guarantee facilities necessary for the enjoyment of Basic Rights.

## **3. The Constitution**

The battle against poverty starts with an enabling Constitution for poverty reduction. The mandate of the proposed Constitution Review Commission is sufficiently broad to receive representations on almost any issue that is related to the Constitution including poverty.

Chapter V of the present Constitution deals with the fundamental rights of the citizens. The Chapter only recognizes civil and political rights - the right to life; personal liberty; protection from slavery and forced labour; protection from torture, and inhuman and degrading treatment; the rights to private property; protection from arbitrary search or entry; the right to due process, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement and protection from discrimination.

It is evident that the present Constitution is glaringly deficient of economic, social and cultural rights. For example rights to basic education, food, health, shelter, water and information among others are not guaranteed despite that these are basic human needs without which the civil and political rights can not be achieved.

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Expanding the Bill of Rights to encompass these fundamental needs as rights will be the first step in mainstreaming poverty reduction as a core function of the State. The Constitutional review process has given this nation an opportunity to domesticate into our supreme legislation key international commitments Kenya has made.

Neither the Constitution nor any other laws secure economic and social rights - e.g. the right to education, the right to work, the right to food, the right to shelter, the right to water and the right to health - but legislation often regulates the environment in which such rights, once secured by individuals, are to be enjoyed. Thus for example, while the right to work is not secured, the Employment Act (Cap 296) and the Regulation of Wages and Conditions of Employment Act (Cap 229) regulates terms and conditions of employment. Though the right to access clean water is not secured, the Water Act (Cap 372) regulates the use of that resource. The Education Act (Cap 211) governs establishment and management of the school institutions even though the right to education is not protected therein or in the constitution.

Is it that the drafters of our constitution did not appreciate that the right to work, food, shelter and other socio-economic rights are indeed human rights? It is not a privilege to know how to read and write. It is a need without which your very existence in the present world is threatened. It is not a privilege to have food; it is a basic need. It is not a privilege to have shelter or to be healthy; it is a basic need. These basic needs therefore automatically translates into Basic Rights.

### **3.1 *Education as a Basic Right***

It is more than 40 years since the Universal Declaration of Human Rights, asserted "everyone (girl and boy; woman and man;

poor and rich) has a right to education". Grim statistics of access to education enrolment rate, completion rate, gender and regional disparities are still magnificent at all levels of education despite the substantial expansion of learning institutions since independence.

The answer to this question has, first in various government commitments to recognizing education as a basic need and a basic right and second, how such commitment is translated into country - specific development policies and actual intervention/activities put in place.

The World Declaration on Education for All and other relevant conventions ratified by Kenya committed government to urgently pursue sustainable policies and frameworks for providing basic education for all by the year 2000. It is generally considered that the first 10-12 years of schooling to be basic education without which an individual might be confined to perpetual poverty. If that is the case then the denial of education of the first 10-12 years of schooling to an individual is a serious Human Rights violation. Those years of schooling should be made free and compulsory. The cost sharing policy should be excluded for the period of acquiring basic education to enable the children who are in this instance the violated, acquire the basic education.

Since the Education Act (Revised 1980) meant to guide the development and operation of education in the country is silent on education as a basic right, primary schooling is not compulsory in Kenya. Consequently, parents can deny their children education without inviting any penalty and still argue that they cannot afford it. The Children and Young Persons Act cap. 141 which is designed to safe guard the welfare of the child has not been effectively enforced resulting into our children pouring into alleyways as street

kids and thereafter as street families. Obviously, education is the first way of empowering an individual to be self-sustaining. If this basic equipment is not even guaranteed, then the government will always be offering half measures to the provision of education.

### **3.2 *Food as a Basic Right***

Available data shows that food security situation has deteriorated since the 1980s and the country has relied on commercial imports and food aid to fill the gap between food production and consumption. Food security refers to the actual access to an adequate and balanced diet, including safe drinking water, by all people at all times.

Kenya is signatory to covenants that bind her to guarantee food security to the citizens. Article 25(1) of the Universal Declaration of Human Rights bestows the right to food to everyone, the convention on the Rights of the Child commits the state to provide adequate nutritious food and clean drinking water. None of these covenants have been translated into national law as required. The constitution of Kenya is once more silent on the critical issue of food, as a basic right yet we all know it is a basic need. The right to life is, however, addressed in sections 70 and 71 of the constitution.

The silence on the food question renders the government legally unaccountable for its failure to ensure food security in the country. Statutes that give ownership of land to persons and which have a bearing on food security in the country are the Government Land Act (Cap 280), the Registered Land Act (Cap 300), the Trust Land Act (Cap 302) and the Wildlife (Conservation and Management) Act (Cap 376). These statutes if appropriately amended and even consolidated can influence national food security.

The need to overcome food insecurity has been recognized and articulated in the major policy papers and the various National Development Plans. It has therefore rightly been observed that the statements made have been enough, conferences held have been great, and the covenants signed are instrumental. It is now time to move from observance to enforcement by including food as one of the basic rights in the Constitution and thereafter amend the related subordinate statutes to be in line with that guarantee. There is no need to belabor this point because we all know that if you don't have food to eat you will die thereby defeating all the intent and purposes of the Civil and Political Rights.

### **3.3 *Health as Basic Right***

While it is important to recognize the great strides made in improvement in health standards of the citizens, Kenya still has a long way to go in tackling maternal mortality rate, infant mortality rate and HIV/AIDS and safe motherhood initiatives.

Health issues in Kenya are governed by four main legislation; the Constitution, Medical Practitioners and Dentist Act (Cap 253), Nurses Act (Cap 257), and Pharmacy and Poisons Act (Cap 244). As I have pointed out, the Constitution does not make provisions that facilitate the enjoyment of social, economic and cultural rights consequently, health is not listed as a right within the Bill of Rights.

Other laws governing health do not endorse adequate health as a right but merely regulate the environment and institutional and individual conduct within which the right to health is enjoyed. The law, despite the increasing recognition by the government, does not regulate the activities of traditional medicine practitioners. There

is a need for their greater integration into the health care system.

The rapidly collapsing physical, economic and social services have a negative impact on the health of the people and on the capacity of the health care system to respond to their increased needs. This situation renders the achievement of basic health needs difficult to meet and hence basic rights (human rights) will be prone to violation.

### **3.4 Shelter as a Basic Right**

It is without doubt that shelter has been recognized universally as a basic need, playing the role of protecting human beings against the elements.

Shelter development in Kenya receives a very small proportion of the national budgetary allocation. While shelter is easily acknowledged as a basic need, it does not enjoy practical acceptance as a basic right. This is despite the international community having long recognized the right to adequate housing and incorporated in various international instruments.

Kenya is signatory to nearly all international covenants touching on the subject of shelter, but housing as a right is not provided for in the country's legal framework.

The Universal Declaration of Human Rights declares shelter as "inalienable and inviolable rights" of all members of the human family. But perhaps the most authoritative international covenant with regards to the right to housing is the covenant on Economic, Social and Cultural Rights, which has been ratified by Kenya.

In order to address the shelter crisis facing Kenya, there is need to thoroughly scrutinize the legislative and policy environment, which are bottlenecks to shelter

development. The Housing Act (Cap 117) is so narrow in that it deals with only one agency i.e. the National Housing Corporation and does not address other important players and variables in the development of shelter.

Land is a crucial factor in the development of shelter. At present, Kenya has nearly 100 inconsistent Acts of Parliament governing land which has been a major hindrance to the development of shelter.

The Sectional Properties Acts has been lying on the shelves instead of being put to use. This Act was designed to enable low-income people to be "partial owner" of buildings by owning only units in a building and not the whole building.

### **3.5 Water as a Basic Right**

We have been told that life started in water. Water is the most important precondition for sustaining life, protecting the environment, improving health and alleviating poverty. It is important, therefore, that strategies adopted for the development and management of water resources is critically analyzed to ensure equity in the distribution of and access to the resource by different social economic classes in society. The first step is to guarantee Water as a basic right.

Our Constitution is again found wanting as it is silent on the individual right to water. Although there are a number of laws which touch on different aspects of activities in the water and sanitation sector, the major ones are the Water Act (Cap 332) and Local Government Act (Cap 265).

The existing legislation should be revisited as the government adopts a new role as a facilitator, rather than provider of services in the sector. The government would now be responsible for such tasks as drawing up the national plans for the sector, drafting and

enacting legislation to ensure the smooth running of the sector and protecting the interest of the user. The existing Water Act does not apply to non-gazetted water undertakers, and therefore, the undertaker would be unable to provide water until the Minister responsible has appointed them and gazetted their appointments. Provisions on control of pollution need revision as the provisions in the Water Act which attempt to link the institutional regime within the Water Act with that under the Public Health Act are not clear cut.

With the acknowledgement of water as a basic right, policy makers will then be obliged to establish adequate water points nearer to the population.

### **3.6 Information as a Basic Right**

Information held by the State is a public resource. Access to such information is critical in assisting individuals and private bodies in their planning processes. More importantly, however, access to public information empowers citizens to hold the government accountable and improve levels of participation in public affairs by citizens. In our Constitution and our laws that touch on this crucial sector, (Books and Newspapers Act (Cap. I11)) provisions should be made to provide for measures to ensure full enjoyment of the right to access information unless such access would compromise security or privacy.

### **3.7 Right to Fair Labour Practices**

The right to fair labour practices should encompass the workers' right to form and join a trade union of choice, to participate in the activities and programmes of trade unions and to strike as regulated by the law. Equally, the employers are entitled to form and join an employers' organization and participate in their activities and programmes.

### **3.8 Environment**

This is a key aspect to the health of an individual. Healthy minds breed a healthy nation. Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected for the benefit of present and future generations through conservation measures, prevention of pollution and ecological degradation

### **3.9 Security**

Maintenance of security should not be a mere State function. Security for both the person and property is fundamental to enable any person to go about and undertake their daily socio-economic and political activities. Indeed, communities organize themselves into States believing and trusting that their personal and property shall be secured.

## **4. Inalienability of Rights**

It should be noted that rights of the individual are inherent and not granted by the State. There is normally a misconception portraying rights as something to be begged from the State. We are born with our rights.

## **5. Responsibilities of the Citizens to Achieve the Basic Rights**

Rights and responsibilities go hand in hand. The achievement of socio-economic rights demands for an equally responsible and enlightened citizenry.

## **6. Enforcement of Rights**

However, it is important that the rights granted are capable of being enforced. Citizens should have the right to approach a competent court, alleging that a right has been infringed or threatened, and the court

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may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- a) Anyone acting in their own interest
- b) Anyone acting on behalf of another person who cannot act in their own name
- c) Anyone acting as a member of, or in the interest of, a group or class of persons;
- d) Anyone acting in the public interest; and
- e) An association acting in the interest of its members.

## 7. Conclusion

In conclusion, I wish to state that the Constitution is not self-empowering. Basic needs and rights are two sides of the same coin. Without the guarantee of basic needs, basic rights will never be fulfilled. But, it should be admitted that mere provision of these needs as rights within the new Constitutional dispensation will not ensure their enjoyment, if there is no effective and accountable governance structures - an independent and pro-people judiciary, professional and committed civil service,

enlightened police force, independent electoral structures and the overall culture of constitutionalism imbibed in the society.

The empowerment of the poor to benefit from rights enshrined in the Constitution is the only lasting way to eradicate poverty. In the fight against poverty, what is needed is the mobilization of all national forces - government, political parties, the private sector, trade unions, policy institutes, and non-governmental organizations- around common social development objectives. In reviewing our laws that target poverty, provisions that ensure the participation of these sectors in the task should be provided. Empowering people to define their own priorities, articulate their needs and enter into coalitions around commonly defined goals will greatly contribute to closing the power-gap, which keeps them poor and isolated.

The basic rights approach illuminates the probability of a new method that confronts poverty directly and puts the concerns of people living with poverty and marginalisation at the forefront of the national agenda. It is here that the core challenge of constitutional reform lies.

## INCORPORATING WOMEN'S RIGHTS INTO THE NEW CONSTITUTION

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### 1. Introduction:

A new constitution has been awaited by Kenyans for more than a decade now. The constitutional review process represents hope through which rights of women will be mainstreamed. It is also a process through which the jurisprudence of international human rights conventions should be incorporated into the Kenyan constitution.

### 2. Why Women's Human Rights?

The UDHR provides for protection of human rights of all people in relation to such matters as security of the person, slavery, torture, protection of the law, freedom of movement and speech, religion and assembly. It stipulates that these human rights apply to all equally " without distinction of any kind such as race, colour, sex, language....or other status."

However, tradition, prejudice, social, economic and political interests have combined to exclude women from prevailing definitions of "general" human rights and to relegate women to secondary and/ or "special interest" status within human rights considerations.

### 3. Why Constitutionalise Women's Rights?

The UDHR does not require any rights to be constitutionalized. However, putting provision in the constitution gives them the status of supreme law which largely

immunises them from ordinary political process.

It is important that the idea of rights, and the principal rights, have constitutional supremacy, and women's rights will not in fact, be respected and ensured, unless they are rendered effectively supreme under the law.

### 4. Why Is The Current Constitution Deficient.

#### *4.1 Citizenship*

Sections 90 and 91 discriminate against women in not giving them a right to bequeath citizenship to their foreign husbands or children born out of those unions. Sections 90 and 91 generate the continuation of sexist immigration policies. Registration for national identity card also requires the existence of a father or the physical presence of a husband.

#### *4.2 Equality*

Despite the 1997 amendment to include sex as basis of discrimination, the existence of Section 82 (4) (b) and (c) reserve the right to discriminate especially in the area of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; and for the application in the case of members of a particular race or tribe with respect to any other matter.



Although statutory laws are supposed to be superior to customary law and that any law that contradicts the Constitution of Kenya is null and void to the extent of the contradiction, there have been instances where customary law has overridden the written law. A 1987 case known as *Virginia Edith Wambui Otieno - v- Joash Ochieng, Ougo and Omolo Siranga* is illustrative of this point. It was a burial dispute in which the Court of Appeal decided that a widow does not have rights over the body of her husband because under customary law, the wishes of the widow and children are irrelevant.

#### **4.3 Language (Male Centered)**

The language of the constitution is not gender neutral. The constitution uses "man" to represent both genders.

#### **4.4 Other Areas of Concern to Women.**

The Constitution is supposed to set up a framework within which laws can be made. Its provisions should provide a framework for legislation to protect all citizens from discrimination. I provide some examples to illustrate:

##### *Property Laws*

Under the Constitution of Kenya, women can acquire, own and dispose of property. However, many customary laws prevent women from inheriting land. Land being the most accepted form of security to acquire credit, this then means that Kenyan women's access to credit is highly restricted.

Although Kenya ratified the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in 1984, it reserved, and still reserves, Article 13 of (CEDAW) which requires state parties to protect women's rights to economic participation.

Kenya does not have local legislation on marital property. To date, the country relies on the English Married Women Property Act of 1882. However, the country now has well settled case law.

##### *Succession and Inheritance.*

The law does not distinguish between male and female heirs or married or unmarried heirs. However, culturally, women did not inherit from their fathers and more so married women. Where the husband dies, his brother and parents in many cases disinherit the widow.

The law of succession in Kenya is complex. It allows a woman to claim as a wife of the deceased even though the deceased has a subsisting monogamous union with another woman.

##### *Marriage Laws*

There are several forms of marriage in Kenya.

Statutory marriages are recognized under the Marriage Act, the African Christian Marriage and Divorce Act, Hindus And Islamic systems. At the same time, the law recognizes customary marriages. Considering that there are more than 42 different ethnic communities in Kenya, these types of marriages have put women at great disadvantage.

Recently, Kenyan courts started recognizing the so called "come we stay" marriages where two people live as man and wife without undergoing any type of marriage ceremony. Despite the recognition of those marriages there is no legislation and the resultant confusion is inevitable.

##### *Child Support and Maintenance.*

The responsibility to maintain children is limited to 18 years of age.

The law can therefore not compel a father to continue paying maintenance for a child older than 16 years. In most cases women are left with the burden of educating their children through to university where the average completion age in Kenya is 23 years.

Children born out of wedlock in Kenya cannot legally access maintenance from their fathers.

### *Violence Against Women*

Violence against women is a pervasive problem. Hardly a week passes without the media reporting the serious injury and the occasional death of a woman in the hands, predominantly, of people known to the.

A 1999-2000 study of women attending antenatal clinics by FIDA Kenya showed that 48.7% of them had experienced domestic violence at one point in their lives. Some 23% of the 1067 women who participated in the study reported that they had experienced domestic violence in the one year preceding the study.

Despite all these there is no law on domestic violence and the bill has been pending before parliament since last year.

### *Sexual Violence*

Kenyan law provides a maximum life sentence for rape but does not provide a minimum sentence. This is problematic because it leaves too much leeway for judicial officers - some of whom have been known to sentence rapists to non-custodial sentences.

The maximum sentence for defilement is only 14 years. Yet defilement, defined as the rape of a girl aged below 14 years is an

extremely serious crime. In this age of HIV/AIDS, defilement is in many cases equivalent to attempted murder.

## **5. Recommendations**

1. The Constitution should provide that international human rights and conventions be automatically incorporated into domestic laws upon ratification by the state.
2. The new Constitution should provide for automatic admission into Kenyan laws of international human rights instruments which Kenya has ratified.
3. The current discrimination in the citizenship rules should be removed and discrimination on the basis of sex in politics or laws specifically outlawed.
4. The right to obtain a national identity card should not be premised on the existence of a father or the physical presence of the husband.
5. Citizens should be allowed to continue being Kenyan citizens while also being citizens of another country.
6. Gender inequality should be outlawed. This must begin by outlawing Section 82(4) and forfeiture of annual leave in cases of maternity leave.
7. The Constitution should have a provision requiring the state to take Affirmative Action to help historically disadvantaged groups overcome discrimination.
8. Social and economic rights (right to education, employment, shelter,

equal pay for equal work) should be constitutionalised.

9. The Constitution should protect people with HIV/AIDS from discrimination, including discrimination in the workplace.
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# ENGENDERING GOVERNANCE THROUGH THE CONSTITUTIONAL REVIEW PROCESS

**Prof. Maria Nzomo**

## 1. Introduction

In this paper, I proceed from the premise that democratic governance is a desirable form of conducting and regulating public affairs in Kenya and which we should endeavor to achieve. I am further arguing that democratic governance can only be achieved when all citizens are effective participants in it, in a context where an enabling environment exists for citizens to exercise their rights, obligations and advance their interests.

I define governance as the exercise of political, economic and administrative authority to manage a nation's affairs. It is the complex mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests, exercise their rights and obligations and mediate their differences. Governance encompasses every institutions and organization in the society, from the family to the state and embraces all methods - good and bad - that societies use to distribute power and manage public resources and problems. Good governance is therefore a subset of governance, wherein public resources and problems are managed effectively, efficiently and in response to critical needs of society. Effective democratic forms of governance rely on public participation, accountability and transparency

My main argument then is that for "good" and /or democratic governance to be attained, gender equity in both public and private spheres, must be reflected in the

existing national policies, programmes and legal frameworks, buttressed by a philosophical and ideological national ethos that supports and promotes gender equity. Attainment of gender equity also assumes leveling the governance playing field by empowering women to attain the same level of capacity as men, to be able to exercise choices and access opportunities to participate, or endorse decisions that affect their lives. I therefore argue that in Kenya today women are neither adequately empowered nor are they participating effectively in the governance structures and processes which, at any event, remain undemocratic. However, at this time when Kenyans are determined and have set in motion the process of democratizing governance through the constitutional review process, women are presented with a significant window of opportunity not only to engender the constitutional review process but also to ensure that the resulting constitution is gender sensitive and promotes democratic development.

In the rest of the paper, I briefly examine and analyze the history of women's participation in governance and identify the constraints they have faced, before suggesting some of the constitutional changes and strategies that could be considered in order to engender the new constitution and promote democratic governance in Kenya.

## 2. Women Participation in Governance in Kenya:

To-date, women have primarily participated in "mailing governors" (through their reproductive activities, participating in liberation struggles, voting in political elections etc.) but stop short of becoming political governors themselves. When they do participate in governance, their role is often peripheral, as majority of voters in the national elections, routinely voting in male legislators who do not advance their gender concerns. It is significant in this regard that whereas women participated actively in the struggle for political liberation from colonial rule, they have been conspicuously marginal or absent in the emerging governance structures and practices following independence. Indeed, women were hardly represented at the crucial Lancaster Constitutional negotiations talks that laid the framework on how the post-independence Kenya would be governed. The token woman - Priscilla Abwao- who accompanied the male leaders to Lancaster, was an afterthought and could hardly be expected to effectively represent women's gender concerns at that historical moment. Similarly, whereas women are rhetorically praised as "the backbone of the economy" they are conspicuously absent at strategic decision making tables where national economic policies are charted and allocation of budgets made. The result is that women literally end up as "the backbone of the economy", carrying the heavy burden of poverty, resulting from inappropriate economic and social policies designed primarily by male policy makers.

I have documented elsewhere the marginality of women's participation in politics and public decision making in Kenya, and proposed the key causal factors of this state of affairs as being a combination of patriarchal social-cultural values and practices and a flawed and undemocratic legal and policy framework. I have noted that progress in the area of political

participation for women remains slow, despite the fact that women have the right to vote on paper, to be eligible for elections, appointment to the public office, and to exercise public functions. In most cases, women participate only marginally at the highest levels of decision making so that the higher one goes in either party or state hierarchy, the fewer women there are, and when women are found in policy making and administrative positions, they typically hold "soft" positions.

The paucity of women in strategic decision-making has not been because of their lack of vision or political apathy., though women leaders immediately after independence demonstrated a measure of political naivety by underrating the patriarchal nature of power and leadership. As Asiyo has noted:

"In 1964, Kenyan women leaders saw visions of where Kenya and her people would be the first decade of self-rule. The establishment of a just Government in which both women and men would participate equally in decision making, as they did during the struggle for self-determination. There was also the hope that at the end of the same period, poverty, disease and lack of education would have been reduced drastically and a better life realized and guaranteed. We were sure to be in Parliament and the Cabinet in greater numbers. Some of us put it at 50-50 in those days because our country needed both men and women to make decisions, design policies and pass legislation that would shape the future destiny of the young nation. We knew then, as we still know now, that politics is about numbers. And since women had 51 percent of the total population, we strategized and were satisfied that this was a formidable force that nobody could ignore. As is usual with women, we trusted and waited for the men to hand over those positions to us. So many years into our independence, we

discuss issues about which the pioneering daughters of Kenya had clear visions but which none of them has seen come true.”

Women have made some progress especially since 1992, in regard to the question of gender equity and justice. Certainly there is a higher level of awareness of gender issues than was the case some ten years ago. Certainly there are more gender sensitive women and men than there were back then. It could even be argued that women's presence in the decision-making in certain sectors and bodies has significantly improved. But I would hasten to add that such achievements have been but a drop in the ocean compared with the enormous efforts made by women as individuals and in groups during this last decade to empower themselves and to sensitize both women and men of the merits of gender equity.

### 3. Status of Women's Rights in the Kenyan Constitution

The question may be asked; why focus on women's constitutional rights and not men's rights? The simple answer is that whereas the current constitution contains major flaws and shortcomings of a gender neutral nature, its language content not only tends to privilege men, but some of the legal provisions have the effect of discriminating against women.

Kenya has ratified several international human rights instruments that affect women's human rights, namely the *International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, to which Kenya acceded to on 9th March, 1984, the *Declaration on the Elimination of Violence Against Women of 1993 (DEVAW)* and the *Beijing Declaration and Platform for Action of 1995*. Except for the latter, these

conventions have not been incorporated into Kenya's municipal law. Very little has been done to ensure that Kenya's domestic law conforms with international standards in respect of women's human rights.

The basic tenets of the constitutional reform debate are that the original Constitution was drafted outside of Kenya by a minority of Kenyans and that the people of Kenya were not *en masse* involved in the writing of the Constitution. Secondly, during the last 38 years many undemocratic amendments have been made to the independence constitution without consulting the citizens. Women particularly feel they have been short changed and gender discrimination in law has continued to persist and hence, their rights as women, which are human rights, have been denied.

It is important to note however that the struggles of Kenyan women to empower themselves especially in the last decade have yielded some positive legal reform results, including the amendment of section 82 (3) of the constitution to explicitly outlaw discrimination on the basis of sex. The inclusion of the term 'sex' in this section means that women can now push and have public policies and laws repeated purely on ground of sexism. Gender sensitive women and men can now successfully challenge the unconstitutionality of sexist policies/laws that are inconsistent with section 82 (3). However, many gender discriminatory laws remain in the current constitution that need to be reviewed, repealed and/or amended as necessary. It is however important to note that, section 82 is limited in that it does not apply to laws relating to adoption, marriage, divorce, burial, devolution of property on death or matters of personal law, as section 82 (4) still protects the use of customary laws in Kenya, particularly in relation to family and property matters. Second, the jurisdiction which empowers section 70 to enforce fundamental rights and freedoms,

also states that the courts are to be guided by the norms of African customary law so far as this is not 'inconsistent with any written law. As African customary law generally places women in a less favorable position compared to men, it would appear to conflict with the written law of the constitution. It seems therefore, that we need a constitutional standard; a single legal framework, to avoid a conflict in the rules of law, particularly with regard to customary laws which infringe on women's rights.

Another positive development has been the acceptance by most policy-makers of the principle of Affirmative Action as one of the strategies for attaining gender equity in governance, as exemplified by the passing by Parliament of the Bills on the Beijing Platform of Action and political Affirmative Action respectively. However, there is now an opportunity to enact a more comprehensive affirmative action law that not only addresses the question of gender equity and justice but also provides for all disadvantaged social categories in our society, including the disabled. I also propose for inclusion in the new constitution a Gender Commission to act as a mechanism for monitoring the progress in the implementation of gender specific laws.

#### 4. Gender Commission

In societies where convention is deeply rooted, and various practices, beliefs and circumstances are not in favour of women, it is not enough to have laws that seek to upgrade the status of women. There is often need for a national machinery to oversee the transition from gender inequality to gender equality and to ensure that the trend is not reversed. This machinery will support women's causes and monitor implementation of policies and recommendations.

In South Africa, Parliament passed a legislation to create a National Commission on Gender Equality, which commenced its work in 1997. The task of the Commission is to promote gender equality in society and to ensure that Government and other non-statutory bodies implement their commitment to gender equality. The Commission, consisting of both men and women chosen by Parliament and approved by the President, engages civil society and Government structures in gender issues, monitors the situation and advocates gender equality in a variety of ways.

In Kenya, it is important that this kind of Commission be established. We are at a level in our society's development when patriarchal attitudes and stereotypes are deeply entrenched in our social cultural traditions and practices. This raises a genuine fear that any equality measures instituted under a new constitution would find some frustration in implementation. There is, therefore, a need for the watchdog role that a gender equality Commission could offer. The Commission will also involve civil society and other actors in formulating a comprehensive national policy on gender issues so that it can buttress the constitutional guarantees and ensure a society where men and women have as equal representation as is possible in all public spheres.

#### 5. Affirmative Action: Experiences From Other Countries

Opinions vary on the fairness and effects of quotas and the consequences of using them to increase women's representation. Although quotas represent a shift from the classic liberal notion of equality, they are a result of a realistic evaluation of the

prevailing conditions. They have come about because of the realization that it is not enough to remove the formal barriers by, for example, giving women the right to vote and contests elections. This is because direct discrimination and a complex pattern of hidden barriers have prevented women from being fairly represented in policy-making bodies

Examples of countries with quotas such as South Africa, Namibia, Uganda, Argentina, Bangladesh, Eritrea and Tanzania show that if implemented successfully, a quota system will lead to the recruitment of a critical mass women into public decision-making bodies who will be able to influence political norms and culture and effectively influence decision-making as individuals with specific women's or feminist points of view.

In South Africa, prior to the historic election in April 1994, very few Members of Parliament were women; now South Africa is among the leading ten countries in terms of sizeable representation of women in Parliament bodies. Women negotiators and advisors organized themselves into a women's caucus to address gender specific issues which would otherwise not have been addressed. In addition to negotiating the constitutionalization of women's rights, women successfully lobbied for the establishment of a Sub-Council on the status of women within the framework of the Transitional Executive Council (TEC) to ensure the creation of a climate conducive to women's claims for civil and political rights. It also laid the foundation for the active participation of women in the Government of National Unity.

Within the ANC, the Women's League spearheaded a demand for a quota of women on all party lists. After considerable debate and resistance, a 30% quota was accepted for Provincial and National electoral lists. The result was the election of a relatively

high number of women in both the first and second democratic elections in 1994 and 1999 respectively. The Municipal Structures Act of 1998 also reformed the Local Government electoral framework and called for political parties to ensure that 50% of the candidates on their lists are women and that women are evenly distributed on the lists. Today, 29.6% of South Africa's MPs are women and the country now ranks in the top ten in the world for women in Parliament. In the Parliament of the Government of National Unity women make up 15 percent of Senate Members and 24 percent of National Assembly Members

In Uganda, a parliamentary seat from each of the 39 districts is reserved for a woman, resulting in an increase in women's political representation. There are also other women elected to parliament on the non-gender specific seats. In Argentina, electoral law establishes a compulsory 30 percent quota for women candidates. This has increased women's representation in Argentinean chamber of Deputies considerably.

In the case of Namibia, affirmative action was not adopted in order to improve women's electoral chances but rather, it was adopted to dislocate entrenched racial and social divisions. During the 1992 elections, only one measure was aimed specifically at improving women's candidacy. This was an affirmative action provision embodied in the Local Authorities Act No. 23 of 1992. However, to enforce the affirmative action provision, local party lists with 12 members, were required to field at least three women candidates. In those Municipalities with only seven seats, each party had to field at least two women candidates. However, the provision did not stipulate the position women should have on the list, and parties were not required to allocate seats in order of appearance on the list. The Local Authorities Act also provided for parties to be broadly defined, allowing women's



organizations that do not exclude male membership to field candidates. Any organized group therefore with support of a minimum of 250 members registered to vote, could field candidates. This broad definition of parties which is the only provision affecting women favorably, was to apply in future local elections.

## 6. Affirmative Action in Kenya

Legally, Kenya has an electoral system based on universal suffrage: whereby, both men and women have the legal capacity to vote so long as they fulfill the minimum requirement as to age and citizenship. This can be interpreted to mean that they have an equal chance of attaining political office or determining who gets elected to political office. In practice, this is not the case. Studies conducted on factors impinging on women's participation in elective politics show that there are other underlying factors that can make the success of women in politics an uphill battle. If equality of result is to be achieved in elective politics, we cannot afford to rely on the basic legal guarantees of that equality. Other mechanisms must, therefore, be injected into our laws to level the playing ground or to directly increase the proportion of women in decision making.

Kenya's experience with affirmative action demonstrates that the existence of a quota system in itself is not enough. The rule establishing the quota must be clear and devoid of ambiguity. Indeed, the more vague the rule, the higher the risk that it will not be properly implemented. An example is section 33 of the constitution of Kenya, inserted *vide* the Constitution of Kenya (Amendment) Act No. 9 of 1997 - as part of what has been loosely referred to as IPPG Reform Package. This section provided that there shall be 12 nominated members of Parliament appointed by the President to represent special interests. Subsection (3)

stated: "The persons to be appointed shall be nominated by parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality". However, at the end of the nominations, less than six women were nominated! Where a party had only one chance, it nominated a man except in the belated case of SAFINA. Out of the six opportunities, KANU only nominated two women. Eventually therefore, the final tally of the nominated women MPs did not meet the anticipated gender equity criteria precisely because the affirmative measure was targeted at the wrong level - the pre-selection level.

## 7. Proposed Legal Reforms

Legal obstacles to women's advancement are closely intertwined with the political, economic and social status of women. Indeed, gender discrimination laws that give legitimacy to the existing economic, political and social practices that often discriminate against women, militate against their effective participation in governance.

Legal strategies for empowering women must, then, address issues that cut across all aspects of women's lives. While recognizing that changing the laws may not necessarily affect the status of women immediately, legal reforms are needed as a first step to enhancing the progress and development of women in Kenya and in assisting women to contribute legitimately to the economy and gain equal access to social services and control over resources. In this connection, there are a number of laws that need to be scrutinized, revised or added with a view to instituting reform, repeal or amendment to the Kenyan Constitution as follows:-

- Preamble- The new Kenyan constitution must have a preamble that expresses the basic national values, philosophy and the vision to

which Kenyan people collectively aspire. The preamble should capture the spirit of the entire constitutional framework stating and affirming the basic principles and commitments expounded in the rest of the constitution, including commitment to gender equality, democratic development and pursuit of social justice. A preamble would therefore, fix the parameters of the meaning of Kenya nationhood and the true meaning of Kenyan citizenship. Good examples in this regard are South African and Ghanaian Constitutions, among others.

- A comprehensive affirmative action law should be put in place requiring the establishment of a gender sensitive quota system in all public and private institutions and companies. Affirmative action should be applied in appointment, recruitment, promotion, retention, deployment, training and staff development, in recognition that women are starting from a point of great disadvantage *vis-a-vis* men, as they struggle to take their rightful place in public life. Political quota system is already working well in such African countries as Tanzania, Algeria and Uganda. If the principle of quota system is adopted in this country, the female percentage should be at least 35% of the total in key decision-making organs of political bodies, bureaucracies and private institutions.
- The new constitution should provide for an independent Gender Commission to monitor and review progress in the implementation of gender equity law and policies, and peruse existing national development policies, and programs and

recommend amendments to make them consistent with a gender sensitive democratic agenda.

- The constitution should provide for full citizenship rights for women- In this connection, any woman who has reached maturity age (18 years) should not be required to obtain permission from her father or spouse in order , for example, to obtain travel documents or to travel abroad with her children. Furthermore, Kenyan women married to foreigners should be granted the right to pass on their citizenship to their spouses in the same way as Kenyan men pass on their citizenship to their foreign spouses. In other words, the Kenya constitution should once and for all, remove the gender double standard that reduces women to second class citizens and privileges Kenyan men's citizen rights over those of Kenyan women.
  - Family law needs thorough review and reform as appropriate, especially to harmonize the co-existing and often contradictory Customary, Christian, Hindu and Islamic Laws. Women have often been victims of manipulation of such laws, especially on matters of marriage, divorce, inheritance, as well as ownership of marital property. In regard to marriage law, there is need for its unification and harmonization to ensure that the same rights and duties exist for all individuals in the country, and does not contain provisions that discriminate against some women. Maintenance Law should also be reviewed to provide for stiffer penalties for those who default in their maintenance responsibility.
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- The Law of Succession Act of 1981:- while in general this law makes provision for both men and women to inherit family property, this law does not protect pastoral women who are still governed by the Land Groups Representatives Act, whereby women cannot inherit family land. The law should be amended to provide that all family land, even when registered in the name of a husband, should be deemed registered in the name of both spouses.
  - The Employment Act:- This Act is outdated and needs thorough reform. As it stands at present, this Act clearly discriminates against women on matters of terms and conditions of employment in the public sector. In this connection, women's employment rights and privileges should not in any way be pegged against their spouses. Women should not be penalized during maternity leave. They should be accorded adequate maternity leave with full employment benefits. Furthermore, the law should provide that, as part of "affirmative action" women employed in the civil service should be given special consideration in the current retrenchment process, taking into account the central role women play in the economy and the fact that the number of women in public employment is very small as it is.
  - Given the enormous amounts of work women do that is not recognized as work, a legal provision should be introduced in the Kenyan Constitution to legitimize and give recognition to household work and agricultural work undertaken by women on behalf of their families and society. Such work should constitute equal contribution to family income, as formal employment, so that in the event of divorce, property acquired during marriage would be divided equally between the spouses.
  - Amendment may be necessary to re-introduce the Independent Candidates Act repealed in 1969, to allow candidates to contest political office without being required to be nominated by a political party. The restoration of this Act would create more space for political participation in future Civic and Parliamentary elections. For example, this could assist women who would otherwise wish to vie for political office, but cannot find a suitable political party and may not want to set up a new party.
  - There should be a thorough review of all laws relating to all forms of violence against women and girls. Minimum sentence for rape should be set at life sentence with hard labour. All rapists should be medically examined and if found to be AIDs carriers, be charged with murder of their victim(s). The law should also provide for the possibility of rape within marriage.
  - The new constitution should completely separate and differentiate gender rights from those of youth and children, so as to accord full recognition and attention to the needs of each social category.
  - Section 84 of the Constitution needs to be reviewed so that clear, precise methods are spelt out for cases of contravention of any of the fundamental rights and freedoms. It
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is worth noting that the process of enforcing certain provisions in Chapter V has been a long and arduous process in Kenyan legal history, with heavy political undertones.

- Kenya should incorporate all the key international instruments concerning women's rights into our Municipal law, including CEDAW, DEVAW and the Beijing Declaration and Platform for Action of 1995 and the 1985 Forward Looking Strategies.
- The language of the new Constitution should be simplified with a view to demystifying the law and making it more citizen friendly.

## 8. Conclusion

The formal constitutional guarantees of women's rights is just the first step towards the attainment of gender equity. It must be followed by a deep transformation in social values and practices. It is for this reason that the civic education programme that is planned during the constitutional review process should be continued even after the completion of the new Constitution, until such a time that the retrogressive socio-cultural attitudes and values that obstruct the attainment of gender equity and social justice are gradually eroded and eventually eradicated.

## INTERNATIONAL CONVENTIONS OF THE RIGHTS OF CHILDREN

**Lee G. Muthoga,**

**Advocate of The High Court Of Kenya and Chairman, ANPCCAN (Kenya)**

### 1. Introduction

During the decade 1979 - 1989 the International Community was engaged in a process of negotiating for the creation of an International Treaty that would consolidate the various International instruments that made provisions for one or other aspect of child rights and particularly the Geneva Declaration of the Rights of the Child of 1924, the Declaration of the Rights of the Child adopted by the United Nations on 20th November, 1959, and in the provisions of the International Covenant on Civil and Political Rights (particularly articles 23 & 24) and also in the International Covenant on Economic, Social and Cultural Rights (particularly article 10 thereof) and also in various statutes and relevant instruments of specialized agencies and International Organizations concerned with the welfare of children.

That process culminated in the adoption by the General Assembly of the United Nations on 20th November, 1989 of the Convention on the Rights of the Child (the CRC). That Convention became the first instrument declaratory of the universally accepted standards of treatment for all children by the government, parents and others who are involved in the upbringing and development of the child. It put together in one instrument the principles and purposes declared in the various of these documents. It became what one might call the source book of our commitment to our children.

In its preamble, the CRC recalls the basic principles of the United Nations and specific provisions of a number of human rights treaties and proclamations and affirms the

fact that children, because of their vulnerability, need special care and protection and places special emphasis on the primary caring and protective responsibility of the family. It also reaffirms the need for legal and other protection of the child before and after birth, the importance of respect for the cultural values of the child's community, and the vital role of international co-operation in securing children rights.

This Convention (General Assembly Resolution 44/25) to which 191 states have, by ratification, become parties is the principal binding treaty that sets out all the rights to which Governments have agreed that children are entitled. Other subject specific sets of rules and guidelines have since been adopted by the global community to provide greater details on the various aspects of child welfare. Similarly, the world community has, at regional level, adopted regional specific instruments to provide for such aspects of children welfare that different regions of the world feel were not fully or adequately provided for in the CRC and where it is felt that the provisions in the CRC need further strengthening. This process saw the adoption of the European Convention on the Legal Status of Children Born out of Wedlock and The OAU Charter on the Rights and Welfare of The Child (the charter) as well as United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the Riyadh Guidelines.

It is not possible in a presentation of this size to examine in detail each and every of

these instruments. I shall confine my presentation to a capitulation of the salient features of the Convention and the Charter.

It is important to observe that the African Group that drafted the Charter, which group I was privileged to chair, was concerned that Africa had been under-represented in the process of negotiating the input into the CRC. They were desirous of creating an instrument that would reflect more specifically Africa's concerns and values - an Instrument that they could truly regard as their own.

It is understandable therefore that the principal distinction between the two instruments is that the CRC provides for rights only while the Charter provides for both rights and responsibilities. The children enjoy certain rights but carry certain responsibilities as well. The Charter also prescribes duties not only for state parties but also for parents, guardians and other groups and parties having the responsibility to care for children. Let us now undertake a quick review on these two main instruments.

## **2. Convention on the Rights of the Child**

### ***2.1 The Main Four Principles of the Convention***

The Convention on the Rights of the Child entered into force on 2 September 1990. Its provisions bind one hundred and ninety-one States, which means that States parties are committed to adopting all necessary measures to ensure that children enjoy all the rights set forth in the Convention. States are required to harmonize their national laws, procedures and policies with the provisions of the Convention.

The Convention protects the civil, political, economic, social and cultural rights of the child in peace and armed conflict. Although

the Convention is lengthy, the rights enshrined in it may, for convenience, be divided into four principle approaches (also referred to as the "four Ps") as follows:

- (1) the participation of children in decisions affecting their own destiny;
- (2) the protection of children against discrimination and all forms of neglect and exploitation;
- (3) the prevention of harm to children;
- (4) the provision of assistance for their basic needs.

The breakdown of the Convention in this way is useful, since, in addition to making the treaty easy to explain and digest for both children and adult, a duty expressly placed upon Governments by the Convention, the four specified areas involve the four principal complementary approaches to children's rights, namely; participation, protection, prevention and provision. Those four approaches apply equally to juvenile justice. It is not a question of prevention or protection or participation or provision: all are equally necessary when applied appropriately.

### ***2.2. A Holistic Approach***

The Convention on the Rights of the Child enshrines the full range of civil, political, economic, social and cultural rights. It stresses a holistic approach to children's rights. All rights are indivisible and related, and this has important implications for juvenile justice, as it implies that all rights must be considered for children in the criminal justice system, from their right to freedom of expression to their right to the highest attainable standard of health.

### ***2.3. Five Major Goals of the Convention***

An analysis of the Convention reveals that it achieves five goals;

- (a) It creates new rights for children under international law where no such rights existed, including the right of the child to preserve his or her identity and the right of indigenous children to practice their own culture (Articles 28 and 30).
- (b) Secondly, the Convention enshrines in a global treaty rights that, until the adoption of the Convention, had only been acknowledged or refined in case law under regional human rights treaties - for example, the right of a child to be heard either directly or indirectly in any judicial or administrative proceedings affecting that child, and to have those views taken into account (Article 12).
- (c) Thirdly, the Convention creates in areas of concern binding standards that, until the entry into force of the Convention, were only non-binding recommendations. They include safeguards in adoption procedures and recognition of the rights of mentally and physically disabled children (Articles 21 and 23).
- (d) Fourthly, the Convention enshrines umbrella principles that apply to all children in relation to the exercise of all their rights. Areas covered by the principles include the best interests of the child, the evolving capacities of the child, the right of children to participate in decisions and non-discrimination.
- (e) Fifthly, the Convention also contains specific articles on juvenile justice, including Articles 37, 39 and 40.

#### **2.4. *Rights against Inhuman or Degrading Treatment and Punishment***

Article 37 of the Convention specifies that children are not to be subjected to torture or other cruel, inhuman or degrading treatment and punishment. The death penalty and life imprisonment for children without the possibility of release is prohibited.

Children should not be unlawfully or arbitrarily deprived of their liberty. If in custody, children are to be separated from adults, unless it is considered in the child's best interest not to do so. All children deprived of their liberty are to be treated with humanity and respect and in a manner that takes into account their needs. Such humanity includes the right to prompt legal and other assistance, such as medical and psychological services.

Article 37 also provides that deprivation of liberty for children can only be used as a measure of last resort and for the shortest appropriate time.

#### **2.5. *Rights of the Child as a Victim***

Article 39 focuses the attention of States on children as victims of crime, an aspect of criminal justice that is often overlooked. Article 39 requires all State parties to take appropriate measures to promote physical and psychological recovery and social reintegration for child victims of abuse, neglect, torture or any other form of cruel, inhuman or degrading treatment or punishment. Such recovery and reintegration ought to occur in an environment which fosters the health, self-respect and dignity of the child.

#### **2.6. *Rights of Children in Conflict with the Law***

Article 40 provides that children in conflict with the law should be treated in a manner which promotes the child's sense of dignity and worth, takes age into account, and aims at the child's assuming a constructive role in

society. The article also enshrines the minimum guarantees of due process of law including the presumption of innocence, provision of clear and prompt information about the nature of the charges, availability of legal or other assistance, proceedings conducted without delay, the right to silence, the right to cross-examine witnesses, equality for the witnesses of the defense, the right of appeal and the right of the child to have his or her privacy respected at all stages of the proceedings.

Articles 40 also promotes the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of or recognized as having infringed the penal law. States are also to establish a minimum age below which children should not be presumed criminally responsible. Article 40 further highlights the desirability of diverting children away from formal justice procedures and from institutionalization.

### **3. The African Charter on the Rights and Welfare of the Child**

#### **3.1. *Standards for the Treatment of the African Child.***

The African Charter on the Rights and Welfare of the Child is not a lesser document than the Convention on the Rights of the Child. It is a regional instrument that was drafted in Africa for the African Child, in a manner that was as explicit and as simple as possible. Kenya ratified the African Charter on the Rights and Welfare of the Child in the:

#### **3.2. *History of the African Charter on the Rights and Welfare of the Child.***

The idea to develop an African Charter on the rights of the child emanated from a Conference on Children in situations of Armed Conflict in Africa in 1987. The

participants at the Conference had learnt of the Convention on the Rights of the Child which was being drafted in Geneva. Considering that only a few African Countries had been involved in the process, they recommended that a regional meeting be held to examine the draft convention from an African perspective.

A meeting was thus held in May 1998 at the UNEP headquarters in Gigiri in Kenya and consequently, it was observed that certain areas needed to be considered with children in Africa in mind. They included among others;-

- children living under apartheid then, in South-Africa
- poor and unsanitary living conditions that threaten survival of children in Africa
- children of imprisoned mothers
- role of relatives in adoption and fostering, and in general, care and protection of children.

The meeting in conclusion recommended among other things that a Working Group comprising of African experts from different professions be formed to prepare a draft Charter on the Rights and Welfare of Children to be considered by African Governments. The proposed objectives of the Charter were as follows:-

- To pay attention to special issues prevailing in Africa
- To complement the UN Convention on the Rights of the Child being drafted at that time
- To facilitate the ratification and implementation of the UN Convention once adopted

In July 1990, the OAU Secretary - General presented the draft charter to the Council of



Ministers and Heads of State and Government Summit during the twenty-sixth Ordinary Session of the Assembly of Heads of States and Governments of the OAU in Addis Ababa, Ethiopia, where it was adopted.

### **3.3. *Content of the African Charter on the Rights and Welfare of the Child***

The Charter which borrows heavily from the Convention on the Rights of the Child is divided into two parts made up of four chapters.

- Part one is made up of only one chapter. It deals with 'Rights and Duties' and has 31 Articles.
- Part two deals with application of the Charter and has three chapters.

### **4. *The Distinction between the African Charter on The Rights and Welfare of The Child and the United Nations Convention on the Rights of the Child***

Whereas the United Nations Convention on The Rights of the Child and the African Charter on the Rights and Welfare of the Child are similar in many respects, they have a few differences. The African Charter attempts to "Africanize" the United Nations Convention which most African countries felt was a 'Western Concept'. This makes both of them key instruments in setting standards for the treatment of children world wide, and in Africa in particular.

- (i) The Convention is open for signature to all states world wide , while the African Charter is only open for signature to the member states of the Organisation of African Unity.
- (ii) The Convention puts a lot of demands on the parents and state with regard to their responsibilities to ensure that

children are availed their rights, whereas the African Charter on the other hand gives a corresponding responsibility to a child for the rights that they are entitled to at Article twenty one which provides that:

Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

- a) to work for the cohesion of the family, to respect his parents, superiors, and elders at all times and to assist them in case of need;
- b) to serve his national community by placing his physical and intellectual abilities at its service;
- c) to preserve and strengthen social and national solidarity;
- d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance , dialogue, and consultation and to contribute to the moral well being of society;
- e) to preserve and strengthen the independence and the integrity of his country;
- f) to contribute to the best of his abilities , at all times and at all levels, to the promotion and achievement of African Unity.

- (iii)The United Nations Convention provides for protection of children's social and cultural rights in a broad and general manner, whereas the African Charter

while appreciating positive aspects of African culture, provides for the protection of a child against harmful social and cultural practices in particular those prejudicial to the health and life of the child, those discriminatory to the child on the grounds of sex or other status, child marriages and the betrothal of girls and boys.

## 5. Other International Instruments

There are a number of other international instruments relating to the Rights of Children. It is not the scope of this presentation to examine them in detail. These go some way in complimenting or strengthening the implementation of the principal covenant, the CRC. Amongst these are:-

1. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty.
2. The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).
3. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

These conventions and other instruments together constitute today's international law on the rights of the child. They do not form part of the law of Kenya. But, Kenya, like many other African countries, has ratified these conventions, largely as a response to donor pressure.

## 6. Conclusion

In most countries of the world and especially in Africa, children under the age of 18 constitute more than half the population. In Kenya, for example, 53.3% of the population comprises children. If human rights have to do with democracy, which is the prevalence of the interest of the majority over the minority, then any attempt to address the issue of human rights has to address the issue of children's rights because they are the majority. Human rights are universal and are acquired at birth and therefore not imported. Whether as parents, guardians or caregivers, we need to respect the rights of children even as we go exercising our rights. Children's rights, after all are human rights.

It is essential that countries become alive to the need to strengthen democracy by ensuring children Rights in their constitutions as they have done with Human Rights.

## APPENDIX

### AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

(As Circulated By African Network For The Prevention And Protection Against Child Abuse And Neglect (ANPPCAN) Nairobi, Kenya)

#### BACKGROUND

The idea to develop an African Charter on the rights of the child emanated from a conference organized by ANPPCAN and Supported by UNICEF on Children in situations of Armed conflict in Africa in 1987. The participants at the conference learnt of ; the Convention on the Rights of the Child which was being drafted in Geneva. Considering that few African countries had been involved in the process the conflict conference recommended that a regional meeting be held, to examine the Draft Convention from the African perspective. Accordingly, ANPPCAN was asked to convene a meeting with the support of UNICEF.

In May 1988, the meeting took off with the following objectives:

- Deliberate upon and take clear position on the United Nations Draft Convention on the rights of the child regarding its :- general application to all children globally and its specific application to children in Africa, given unique factors of their socio-economic, cultural and developmental circumstances.
- Consider the degree of comprehensiveness of the instrument and whether it was necessary to supplement it with an African Charter,

The meeting, which had a wide representation from Africa, took place at UN headquarters in Gigiri in Kenya where the draft, convention was extensively discussed. The conclusion was that the draft convention was comprehensive and needed to be treated in general terms to give global acceptability. Hence could not be too particularistic to fit regional needs. As such the meeting supported the international efforts, but observed certain areas that needed to be considered with children in Africa in mind. These included among others:

- Children living under apartheid which was the case at that time.
  - Poor and unsanitary living conditions which threaten survival of children in Africa
  - Unequal treatment of female children and female genital mutilation, a phenomenon which was a reality in Africa
  - The lack of meaningful participation of local communities in planning and managing basic programmes for children
  - Obligation of State Parties towards displacement and refugee children responsibilities of children to their parents, communities and the state which is enshrined in African culture.
  - Children of imprisoned mothers
  - The role of relatives in adoption and fostering and in general care and protection of children
-

- All forms of discrimination e.g. religion, ethnicity, race, gender
- Uncertainty on definition of a child especially referring to Article 38 of the draft Convention

In view of the above, the meeting recommended, among other things that a working group composed of African specialists in different disciplines be constituted jointly by the OAU in collaboration with ANPPCAN with the support of UNICEF and other interested organizations to prepare a draft Charter on the rights and welfare of children to be considered by African Governments.

The envisaged objectives of the Charter were to:

- pay attention to special issues prevailing in Africa
- Complement the UN Convention being drafted at the time
- Facilitate the ratification and implementation of the UN Convention once adopted.

With the support of the Ford Foundation and UNICEF, the OAU and ANPPCAN constituted a Continental Committee of experts. This committee identified experts from the legal profession, medicine and social sciences who were then assigned to write papers on different areas needed to be covered after extensive consultation. Eventually, one comprehensive paper was developed and circulated to various known persons on the continent for comments. Finally, a document was constructed and a meeting of Committee of experts was convened in Nairobi, May 1989 to discuss the document. The committee took 4 days deliberating on the document and did not only come up with a draft of the African

Charter, but also developed strategies of implementing the Convention and the Charter.

The committee of experts and the OAU representatives agreed that the African Charter was not going to be a lesser document to the Convention. As such, it had to be seen to be reinforcing the Convention. Thus, the current Charter borrows a lot from the Convention. The drafting team made efforts to make it as explicit and as simple as possible.

The task of final drafting of the Charter was delegated to a legal team with ample experience in drafting. The team eventually produced the final draft that was sent to Secretary General of the OAU. The Secretary General distributed the draft Charter to all countries in African for comments using country Foreign Offices.

In April, 1990, OAU in collaboration with ANPPCAN, with the support of the Ford Foundation and UNICEF convened a meeting of Government Experts to discuss the Charter. African Governments were well represented at the meeting. The draft Charter was extensively discussed and amendments made. The OAU Secretary-General presented the draft Charter to the Council of Ministers and Heads of State and Government Summit in Addis Ababa in July 1990 where it was adopted.

## **HOW DOES THE CHARTER DIFFER WITH THE UN CONVENTION**

The Charter raises standards in many significant areas. For example a child is anyone under the age of 18. It reaffirms the unique and privileged position children occupy in African society, but also recognizes with concern the current problems facing the children in Africa.

The Charter in Article 4, Clause 1, asserts as a matter of fact, that the best interest of the child shall constitute the primary consideration in all actions undertaken by any persons or authority.

The above pre-empts any pretext by any person or authority to abuse the rights of the child. Thus, the child's welfare is considered first.

The Charter makes the right to education simpler to the reader by first spelling out what education should aim to accomplish before making it compulsory.

Participation rights are not only restricted to children, but to parents, relatives, communities and NGOs in ensuring these rights.

Article 15 dealing with child labour, recognizes the work children do in the informal sector which is the area where most children work on the continent. It also provides for promotion to disseminate information on the hazardous nature of child labour to all sectors of the community. Begging is seen as economic exploitation where children need protection.

The Charter recognizes the importance of the institution of the family and provides for its protection in Article 18.

Article 22 in the Charter, under Armed conflicts, prohibits the participation of children under 18 years in armed conflict and hostilities.

The Charter took cognizance of discriminatory practices of all forms and Article 26 commits state parties to the Charter to accord priority to the special needs of children living under such practices and urges state parties to double efforts to eliminate them.

The Charter does not ignore the role women play in upbringing of children and Articles 30 of the Charter provides for children of imprisoned mothers. The Charter is explicit that children do not only have rights, but they also have duties and obligations to their families, communities, and the state, (Article 31, Responsibilities of the Child; Clauses A-F)

The Children are specifically urged to respect their parents and to assist them in case of need, thus, conforming to some of the African practices of taking care of and supporting one another.

## **WHO OWNS IT**

The African Charter is now the property of the OAU as it was adopted by the twenty-sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU in July 1990, in Addis Ababa, Ethiopia.

## **THE CHARTER**

The Charter is divided into two parts consisting of 4 Chapters. Part 1 deals

with the Rights and Duties and has 31 Articles. Part II of the Charter deals with its application and has 3 chapters.

The Charter is open to signature and ratification by all member states of the OAU.

The Charter played a major role in introducing the Convention to the continent. Its implementation will ensure protection of children in the continent in a broader sense.

#### PREAMBLE

The African Member States of the Organization of African Unity, Parties to the present Charter entitled "African Charter on the Rights and Welfare of the Child"

Considering that the Charter of the Organization of African Unity recognizes the paramountcy of Human Rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, Political or any other opinion, national and social origin, fortune, birth or other status,

Recalling the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.1) adopted "by the Assembly of Heads of State and Governments of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July, 1979 recognized the need to take all appropriate measures to promote and protect the rights and welfare of the African Child,

Noting with concern that the situation of most African children, remain critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care,

Recognizing that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of its personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding,

Recognizing that the child, due to the needs of its physical and mental development requires particular care with regard to health, physical, mental moral and social development, and requires legal protection in conditions of freedom, dignity and security,

Taking into consideration the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child,

Considering that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone,

Reaffirming adherence to the principles of the rights and welfare of the child contained in the declaration, conventions and other Instruments of the Organization of African Unity and the United Nations and in particular the

United Nations Convention on the Rights of the Child; and the OAU Head of State and Government's Declaration on the Rights and Welfare of the African Child,

HAVE AGREED AS FOLLOWS:

PART I: RIGHTS AND DUTIES

CHAPTER ONE  
RIGHTS AND WELFARE OF THE CHILD

ARTICLE I: OBLIGATION OF STATE PARTIES

1. The Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrines in this Charter and shall undertake to take the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

2. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international convention or agreement in force in that State.

3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

ARTICLE II: DEFINITION OF A CHILD

For the purposes of this Charter, a child means every human being below the age of 18 years.

ARTICLE III: NON-DISCRIMINATION

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or status -

ARTICLE IV: BEST INTERESTS OF THE CHILD

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

ARTICLE V: SURVIVAL AND DEVELOPMENT

1. Every child has an inherent right to life. This right shall be protected by law.

2. State Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.

3. Death sentence shall not be pronounced for crimes committed by children.

#### ARTICLE VI: NAME AND NATIONALITY

1. Every child shall have the right from his birth to a name.

2. Every child shall be registered immediately after birth.

3. Every child has the right to acquire a nationality.

4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

#### ARTICLE VII: FREEDOM OF EXPRESSION

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

#### ARTICLE VIII: FREEDOM OF ASSOCIATION

Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.

#### ARTICLE IX: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

1. Every child shall have the right to freedom of thought, conscience and religion.

2. Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.

3. States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

#### ARTICLE X: PROTECTION OF PRIVACY

No child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

#### ARTICLE XI: EDUCATION

1. Every child shall have the right to education.



2. The education of the child shall be directed to:

- (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and convention;
- (c) the preservation and strengthening of positive African morals, traditional values and cultures;
- (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups;
- (e) the preservation of national independence and territorial integrity;
- (f) the promotion and achievements of African Unity and Solidarity;
- (g) the development of respect for the environment and natural resources;
- (h) the promotion of the child's understanding of primary health care.

3. State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

- (a) provide free and compulsory basic education;
- (b) encourage the development of secondary education in its different

forms and to progressively make it free and accessible to all;

- (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
- (d) take measures to encourage regular attendance at schools and the reduction of drop-out rate;
- (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

4. State Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children schools, other than those established by public authorities, which conform to such minimum standard may be approved by the state, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.

5. States Party to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

6. State Parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.

7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish

and direct educational institutions subject to the observance of the principles set out in Paragraph 1 of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the states.

#### ARTICLE XII: LEISURE, RECREATION AND CULTURAL ACTIVITIES

1. State Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. State Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

#### ARTICLE XIII: HANDICAPPED CHILDREN

1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.

2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for

employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.

3. The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.

#### ARTICLE XIV: HEALTH AND HEALTH SERVICES

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:

- (a) to reduce infant and child mortality rate;
- (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- (c) to ensure the provision of adequate nutrition and safe drinking water;
- (d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;
- (e) to ensure appropriate health care for expectant and nursing mothers;
- (f) to develop preventive health care and family life education and provision of service;

- (g) to integrate basic health service programmes in national development plans;
- (h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;
- (i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of basic service programme for children;
- (j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

#### ARTICLE XV: CHILD LABOUR

1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.

2. States Parties to the present Charter shall take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization's instruments relating to children. States Parties shall in particular:

- (a) provide through legislation, minimum ages for admission to every employment;
- (b) provide for appropriate regulation of hours and conditions of employment;
- (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;
- (d) promote the dissemination of information on the hazardous of child labour to all sectors of the community.

#### ARTICLE XVI: PROTECTION AGAINST CHILD ABUSE AND TORTURE

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child abuse and neglect.

#### ARTICLE XVII: ADMINISTRATION OF JUVENILE JUSTICE

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner

consistent with the child's sense of dignity and worth and which reinforces the child respect for human rights and fundamental freedoms of others.

2. States Parties to the present Charter shall in particular:

- (a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;
- (b) ensure that children are separated from adults in their place of detention or imprisonment;
- (c) ensure that every child accused of infringing the penal law:
  - (i) shall be presumed innocent until duly recognized guilty;
  - (ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;
  - (iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;
  - (iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, "be entitled to an appeal by a higher tribunal;
  - (v) shall not be compelled to give testimony or confess guilt.
- (d) prohibit the press and the public from trial.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-

integration into his or her family and social rehabilitation.

4. There shall be a minimum age below - which children shall be presumed not to have the capacity to infringe the penal law.

#### ARTICLE XVIII; PROTECTION OF THE FAMILY

1. The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for it's establishment and development.

2. States Parties to the present Charter shall take appropriate step to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of it dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.

3. No child shall be deprived of maintenance 'by reference to parents' marital status.

#### ARTICLE XVIII: PARENTAL CARE AND PROTECTION

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial author determines in accordance' with the appropriate law, that separation is in the best interest of the child.

2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct

contact in both parents on a regular basis.

3. Where separation results from the action of a State Party, State Party shall provide the child, or if appropriate, another member of the family with essential information concerning whereabouts of the absent member or members of the family. State Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.

4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of apprehension by that State Party.

#### ARTICLE XX: PARENTAL RESPONSIBILITIES

1. Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty:

- (a) to ensure that the best interests of the child are their basic concern at all times;
- (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development and
- (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

2. States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures;

- (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;
- (b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and
- (c) to ensure that the children of working parents are provided with care services and facilities.

#### ARTICLE XXI: PROTECTION AGAINST HARMFUL SOCIAL AND CULTURAL PRACTICES

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

- (a) those customs and practices prejudicial to the health or life of the child; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.

#### ARTICLE XXII: ARMED CONFLICTS

1. States Parties to this Charter shall undertake to respect and ensure respect

for rules of international humanitarian law applicable in armed conflicts which affect the child.

2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child

3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

#### ARTICLE XXIII: REFUGEE CHILDREN

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are parties.

2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an

unaccompanied refugee child in order to obtain information necessary for reunification with the family.

3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.

4. The provisions of this Article apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

#### ARTICLE XXIV: ADOPTION

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

- (a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counseling;
- (b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of child's care, if

- the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
  - (d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;
  - (e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs.
  - (f) establish a machinery to monitor the well-being of the adopted child.

#### ARTICLE XXV: SEPARATION FROM PARENTS

1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;
2. States Parties to the present Charter:
  - (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in the environment shall be provided with

- alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;
- (b) shall take all necessary measures to trace and re-unit children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.

3. When considering alternative family care of the child and best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

#### ARTICLE XXVI: PROTECTION AGAINST APARTHEID AND DISCRIMINATION

1. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under Apartheid and in States subject to military destabilization by the Apartheid regime.
2. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under regimes practicing racial, ethnic, religious or other forms of discrimination as well as in States subject to military destabilization.
3. States Parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards the elimination of all forms of discrimination and Apartheid on the African Continent.

ARTICLE XXVII: SEXUAL EXPLOITATION

1. States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent;

- (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
- (b) the use of children in prostitution or other sexual practices;
- (c) the use of children in pornographic activities, performances and materials.

ARTICLE XXVIII: DRUG ABUSE

States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.

ARTICLE XXIX: SALE, TRAFFICKING AND ABDUCTION

States Parties to the present Charter shall take appropriate measures to prevent:

- (a) the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child;
- (b) the use of children in all forms of begging.

ARTICLE XXX: CHILDREN OF IMPRISONED MOTHERS

States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) establish special alternative institutions for holding such mothers;
- (d) ensure that a mother shall not be imprisoned with her child;
- (e) ensure that a death sentence shall not be imposed on such mother;
- (f) the essential aim of the penitentiary system will be reformation, the integration of the mother to the family social rehabilitation.

ARTICLE XXXI: RESPONSIBILITIES OF THE CHILD

Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitation as may be contained in the present Charter, shall have the duty:

- (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;



- (b) to serve his national community by placing his physical and intellectual abilities at its service;
- (c) to preserve and strengthen social and national solidarity;
- (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) to preserve and strengthen the independence and the integrity of his country;

## PART II

### CHAPTER TWO ESTABLISHMENT AND ORGANIZATION OF THE COMMITTEE ON THE RIGHTS AND WELFARE OF THE CHILD

#### ARTICLE XXXII: THE COMMITTEE

An African Committee of Experts on the Rights and Welfare of the Child hereinafter called "the Committee" shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child.

#### ARTICLE XXXIII: COMPOSITION

1. The Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child.
2. The members of the Committee shall serve in their personal capacity.

3. The Committee shall not include more than one national of the same State.

#### ARTICLE XXXIV: ELECTION

As soon as this Charter shall enter into force the members of the Committee shall be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the present Charter.

#### ARTICLE XXXV: CANDIDATES

Each State Party to the present Charter may nominate not more than two candidates. The candidates must have one of the nationalities of States Parties to the present Charter. When two candidates are nominated by a State, one of them shall not be a national of that State.

#### ARTICLE XXXVI:

The members of the Committee shall be elected for a term of five years and may not be re-elected, however, the term of four of the members elected at the first election shall expire after two years and the term of six others, after four years. Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to determine the names of those members referred to in subparagraph I of this Article. The Secretary-General of the Organization of African Unity shall convene the first meeting of the Committee at the Headquarters of the Organization within six months of the election of the members of the Committee, and thereafter the Committee shall be convened by its

Chairman whenever necessary, at least once a year.

#### ARTICLE XXXVII: TERMS OF OFFICE

1. The members of the committee shall be elected for a term of five years and may not be re-elected. However, the term of four of the members elected at the first election shall expire after two years and the term of six others, after four years.

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to determine the names of those members referred to in subparagraph I of this Article. The Secretary-General of the Organization of African Unity shall convene the first meeting of the Committee at the Headquarters of the Organization within six months of the election of the members of the Committee, and thereafter the Committee shall be convened by its Chairman whenever necessary, at least once a year.

#### ARTICLE XXXVIII: BUREAU

1. The Committee shall establish its own Rules of Procedure.
2. The Committee shall elect its officers for a period of two years.
3. Seven Committee members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.

5. The working languages of the Committee shall be the official languages of the OAU.

#### ARTICLE XXXIX: VACANCY

If a member of the Committee vacates his office for any reason other than the normal expiration of a term, the State which nominated that member shall appoint another member from among its nationals to serve for the remainder of the term - subject to the approval of the Assembly.

#### ARTICLE XL: SECRETARIAT

Secretary-General of the Organization of African Unity shall appoint a Secretary for the Committee.

#### ARTICLE XLI: PRIVILEGES AND IMMUNITIES

In discharging their duties, members of the Committee shall enjoy the privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

#### CHAPTER THREE MANDATE AND PROCEDURE OF THE COMMITTEE

#### ARTICLE XLII: MANDATE

The functions of the Committee shall be:

- a) To promote and protect the rights enshrined in this Charter and in particular to:
  - i) collect and document information, commission interdisciplinary assessment of

- situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give views and make recommendations to the Government
- (ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of the children in Africa;
  - (iii) cooperate with other African, International and Regional Institutions and Organizations concerned with the promotion and protection of the rights and welfare of the child
- b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.
  - c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.
  - d) Perform such other tasks as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU, or the United Nations

#### ARTICLE XLIII: REPORTING PROCEDURE

1 Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which give effect to the

provisions of this Charter and on the progress made in the enjoyment of these rights.

- a) within two years of the entry into force of the Charter for the State Party concerned; and
- b) thereafter, every three years.

2. Every report made under this Article shall:

- a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and
- b) shall indicate factors and difficulties, if any, affecting the fulfillment of the obligations contained in the Charter.

3. A State Party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (a) of this Article, repeat the basic information previously provided.

#### ARTICLE XLIV : COMMUNICATIONS

1. The community may receive communication, from any person, group or non-governmental organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.

2. Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

#### ARTICLE XLV: INVESTIGATIONS BY THE COMMITTEES

1. The Committee may resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures a State Party has adopted to implement the Charter.
2. The Committee shall submit to each Ordinary Session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made under Article 46 of this Charter
3. The Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government.
4. States Parties shall make the Committee's reports widely available to the public in their own countries.

#### CHAPTER FOUR MISCELLANEOUS PROVISIONS

#### ARTICLE XLVI: SOURCES OF INSPIRATION

The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples rights, the Charter of the Organization of African Unity, the universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United

Nations and by African countries in the field of human rights, and from African values and traditions.

#### ARTICLE XLVII: SIGNATURE RATIFICATION OR ADHERENCE

1. The present Charter shall be open to signature by all the Member States of the Organization of African Unity.
2. The present Charter shall be subject to ratification or adherence by Member States of the Organization of African Unity. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity
3. The present Charter shall come into force 30 days after the reception by the Secretary -General of the Organization of African Unity of the instruments of ratification or adherence of 15 Member States of the Organization of African Unity.

#### ARTICLE XLVIII: AMENDMENT AND REVISION OF THE CHARTER

1. The present Charter may be amended or revised if any State Party makes a written request to that effect to the Secretary General of the Organization of African Unity, provided that the proposed amendment is not submitted to the Assembly of Heads of State and Government for consideration until all the States parties have been dully notified of it and the Committee has given its opinion on the amendment.
2. An amendment shall be approved by a simple majority of the States Parties.

Adopted by the Twenty-sixth Ordinary  
Session of the Assembly of Heads of

State and Government of the OAU,  
Addis Ababa, Ethiopia - July:1990

## CONSTITUTIONALIZATION OF THE RIGHTS OF MINORITIES & MARGINALIZED

**Hon. Farah Maalim**

### 1. Introduction

Who are the minorities in Kenya and who are the majority? The multiplicity of identities in Kenya makes it almost impossible to categorically identify a given group as a majority or a minority. The majority is generally identified as the big tribes and the minority as the smaller tribes. To address the majority-minority issue one ends up with rapidly changing scenarios as you tackle ethnicity, race, religion, region, class, gender, age, rural/urban-agrarian/pastoralist /fishermen, education etc. You are forced to contend with the fact that every group is a majority at times and a minority at other times.

Muslims are a minority as opposed to all the other denominations but if compared to Catholics, Anglicans, Methodists, Presbyterians, Traditonlists, etc. then, Muslims are second to only Catholics in Kenya. The Agikuyu the largest tribe in Kenya are only 21% followed by the Luhya who are about 12% of the national population. They are clearly both minorities by all standards. Whereas the pastoralists occupy about 70% of the landmass of Kenya they constitute only about 14% of the national population. Under the existing electoral system, their small numbers notwithstanding, pastoralists hold a powerful sway in three provinces and constitute a significant minority in a fourth.

I am suspicious of the liberal classification and definition of minorities. The practice in the west, clearly borne out of the old racist and puritanical inclination of American whites, should have no place in our country.

Lumping together blacks, lesbians, gays and gypsies as minorities was designed to make a permanent under class out of the African Americans. Being a gay is a behavior and not a race, what then is the logic of lumping them with African-Americans? The Mormons who are clearly a fraction of African American are not classified as minorities in the states. American Jews are less than half of African Americans but literally control the American economy and not classed as minorities. The term minority in the western world has clearly been coined to describe what they considered as lesser humans.

What the marginalized communities in Kenya need is equity, equitable distribution of the national resources, equal opportunities in schools and institutions of higher education and equal application of the rule of law for all Kenyans but not sympathies. As long as the opportunities are equal, then equal merits should apply. But if the opportunities are not equal because of the Government's lopsided management of resources, then equal merit cannot apply in our national institution of learning and capacity building in the public sector. Affirmative action through quotas is imperative in today's Kenya until equal and uniform opportunities are created for all Kenyans.

### 2. Constitutionalisation of the Rights of Marginal Groups

Constitutionalisation of the rights of marginal groups is much easier to delineate. The marginalized groups are Muslims,

Women, Pastoralists, Lake Turkana fishermen, the Coastal people etc.

The experience of our short independent history is that the Government has maintained a consistent victimization of all the communities at one time or another. Victimization is always confined to a powerless easily identifiable minority. The majority in all cases is not alarmed though inclined to tow the line out of fear. Victimization takes many forms such as freezing development to a given area, retiring senior officers of the targeted community from the civil service and parastatals, sabotaging and destroying economic activities of the community through unnecessary government regulations and interference, using the provincial administration to harass the community and so on.

Strictly speaking all Kenyans can qualify as a minorities at one time or the other. Yet the fears of the majority are so big and passionately held that it is unrealistic to say it is misplaced and does not exist. These fears were borne out of the political dynamics of our country during the run-up to and immediately after our independence in the early 60's. The syndrome with all its abuses was sustained by subsequent governments.

The majority in our context is increasingly proven as the government. The minorities are all or any group that can be targeted by the center for abuse/victimization. Whereas it is widely internalized that we have a semblance of democracy and freedom in our environment, the reality is the reverse. When our national security intelligence service is engaged in a 24-hour complete surveillance (bugging, taping, tailing etc) of opposition politicians, when the provincial administration and police are consistently denying opposition forces the freedom of expression, association and movements,

when the President openly intimidates and scolds citizens for hosting opposition politicians, when ruling party officials and goons declare sections of the country as no-go zones for opposition politicians, then how can we boast that there is a democracy in Kenya?

Without political independence there is neither sovereignty nor real freedom and certainly, not equality. We have only changed one colonial master for another. The provision of the constitution should protect Kenyans (minority). The majority (Government) will be protected by the political power it wields. Our protection against despots, bigots, demagogues, fanatics, extremists and all centrists who could access unlimited power in a democracy should lie not in their forbearance but in the limitations of our constitution. The constitution should be a bastion for the meek, weak, poor and powerless. The powerful protect themselves through controlling the instruments of power.

The Constitution should preserve and protect practical and substantive rights. It should consist of general provisions and be considerably flexible, because it has to be a permanent document that cannot calculate for possible change of things in the future. The test of courage in a society comes in its consistence in fighting for constitutional rights and the tolerance of the powerful.

The constitution will hopefully be a hybrid value document that has integrated the best of all our diverse sub nations. The conclusion of such a noble but arduous task will culminate in our first republican deal. We can thereafter call ourselves Kenyans legitimately. Our current identity and republicanism is by imposition and default. Fundamental rights in our constitution should include freedom of speech, expression, freedom of movement,

association, freedom from fear, freedom from hunger, destitution and deprivation and freedom of religion as opposed to freedom of worship, which is limited. Freedom of religion should allow Muslims to determine their family law up to their final appellate. Currently the Kadhi's court does not have appellate structure. It is deemed as a magistrate court. Islam is a distinct identity, which is a complete way of life that clearly overrides ethnic considerations in matters of constitutional negotiations. Fair distribution of national resources for regional development and capacity building in the public sector should also be a fundamental right.

The right of Kenyans to be governed in a defined constitutional format with swift redress should be an entrenched fundamental right. Devolution of genuine powers to the local authorities should be provided as a constitutional provision without necessarily ushering in a concept of federalism, which entails the creation, and promotion of ethnic enclaves. The widely held federalist concept in Kenya will transform our proud and healthy nation into a cancerous prejudice, pitting tribes, religions, denominations and ethnic groups against one another. Our vibrant, hardworking and hopeful people will in no time be addicted to the political painkillers of violence and demagoguery. A society that has traditionally believed in the pursuit of happiness through hard work will be reduced to empty sub-national prides and idle widespread politicking. I will be quick to point out that although the experience of our peoples for the last century was tough and costly. We are now more than ever close to a profound integration and common nationhood. The mainstream Kenyan society is not segregated. We are evolving a splendid unity within a rich diversity.

Federalism with regional legislatures will encourage ethnic based anarchies. Regional

legislatures can easily end up with consociational arrangement that can agitate for self-determination up to and including succession. The majority populations of Kenya's frontier regions have their kith and kin in the bordering countries and can easily precipitate a process that can lead to irredentism. We should be cautious lest we set our nation on the path of an irreversible decline followed by dissolution. Strengthening the existing local authorities and reforming the local government act will enable people to determine their priorities at the local level. A controlled and gradual devolution of power to the people is clearly preferred to a swift volte-face. Homogeneity doesn't invariably translate into stability and development. Somalia, Rwanda and Burundi have shattered the hitherto widely believed synergy of homogeneity, stability and development. The reverse is currently holding irrefutable credence. Let's be candid advocates of federalism in Kenya are driven by the fear of Kikuyus period. We cannot chart the future course of our nation out of fear. We can best face the future with courage coupled with a vision and a desire to actualize a noble dream for posterity. After all Kikuyus are less than a quarter (¼) of Kenya's population.

The current electoral system called the first past post system is fairly easy to administer and comparatively less costly, but in a multiparty democracy, quite often the winning candidate has the support of a minority of his/her voters. The candidate who has a simple majority vote over each of the other candidates is the winner. We are likely to witness as many as thirty candidates in one constituency in Kenya in the next election. We have 43 registered political parties in the country as of today, who all have the right to field candidates in all the elective seats in the country. One advantage of the first-past-post system is that the elected representative devotes more



time with his direct voters in the constituency to initiate development and listen to their problems. Minorities have problems getting elected to represent constituencies because of ethnic sentiments and other parochialisms.

I suggest that we embrace a mixed proportional representation system. The system will leave our constituencies as they are, but add the parliamentary seats by a determined number. I suggest we increase our parliamentary seats by 106. The additional seats will be won by the contesting parties on a proportional quota. Every voter in addition to voting for a candidate of his/her choice, will cast a vote for the party of preference. Political parties will be required to present their lists for the national seats to the electoral commission in the order of priority before the election. If a given party wins 50% of the proportional national votes cast, the first 53 persons in the list will have been elected into the parliament. The M.Ps elected on the proportional representation have the entire country as their constituency and the ideals of their parties for their propagation.

The system will go along way in integrating the country, and political parties can tap the talents of Kenyan minorities and party members from parts of the country where the party has little following. The system will enable parties to sell themselves in all the corners of the country and facilitate the involvement of minorities in the legislative body.

The criteria used originally to determine constituencies has drawn a lot of criticisms from many quarters. The proportional seats will, hopefully, address other imbalances too and go along way in unifying the country. The existing constitutional provision setting a minimum of 25% of the voters in at least five provinces for the winning Presidential candidate had clearly enfranchised most of

the marginal communities e.g. the pastoralists, coastal people etc. and created a sense of collective ownership of the country.

An improved version of this rule depending on the kind of governmental model we embrace (executive/parliamentary) should be entrenched in the new constitutional order.

### 3. Conclusion

The preamble to the American constitution starts as follows:

“We the people of the United States of America in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution of the United States of America”.

The American declaration of independence, authored by the third president of the united states of America Thomas Jefferson has the following sentence:

“We hold these truths to be self-evident that all men are created equal and that they are endowed by their creator with certain inalienable rights that among these are life, liberty and the pursuit of happiness”.

Though Jefferson was one of the framers of the American constitution and the author of the American Declaration of Independence with the above eloquent and impassioned assertion, he was himself a slave owner. In all his public life he was never on record as having condemned the despicable inhumanity of enslaving a fellow human.

African Americans and Native Americans endured the worst forms of segregation,

slavery, genocide, pestilence and oppression for the better part of two (2) centuries after the declaration of independence and the establishment of the American constitution which guaranteed equal rights for all Americans and humanity. We can have a good and balanced constitution but without spirit and determination to uphold the documents as a sacred valuable piece on the

part of Kenyans, it cannot be effective to the letter and can easily be mutilated, abused and consigned to the dustbin of history. For the Constitution to command the appropriate respect and ownership, Kenyans should be educated on its fundamental provisions/rights at all levels of the society. We should be able to recite it like the National Anthem.

## RIGHTS OF PERSONS WITH DISABILITIES

**Dr. Michael M. Ndurumo, HSC**

### 1. Introduction

The appointment of the Constitution of Kenya Review Commission to review the Constitution of Kenya is most timely because Kenya is at crossroads. The information that the Commission will receive from a cross section of people will enable it to come up with a constitution that is responsive to the dynamic needs and aspirations of Kenyans. This will in turn usher in new concepts, trends, contours, and texture to the political life of Kenya. I am happy that the Commission has taken into cognizance the needs, rights and privileges of persons with disabilities.

#### *1.1. Population of Persons with Disabilities in Kenya*

To give an exact number of persons with disabilities in Kenya is not possible. However, the United Nations estimates that 10% of the population of a given country is persons with disabilities. In a developing country, especially one whose citizens are faced with poverty, inaccessible education, and inaccessible health services, the prevalence could be as high as 25%. Kenya is no exception since half of its population lives below poverty line. Furthermore, there is high drop out rate of children from school. The transition rate from one educational level to another is high. The scourge of HIV/AIDS is devastatingly rearing its diabolical face in the country. Therefore, a prevalence of 20% would not be too conservative to accommodate. This means that according to the 1999 census, Kenya, with a population of nearly 28,000,000 people, has 5,000,000 persons with disabilities. This is quite a large number of people and talking in terms of ethnicity,

persons with disabilities constitute a large community.

It therefore behooves us to consider the place of this significant population in the revised constitution of Kenya. To leave out this population is to plant a time bomb that will have great impact in the future development of Kenya. For instance, countries with old democracies such as the United States realized too late - in the 1970s - that they had not taken into consideration the welfare of persons with disabilities in their constitution. Thus in the 1970s, an upsurge of lawsuits against school boards, employers, institutions of higher education, and the like were the order of day. This made the United States government to become more sensitive to the needs of persons with disabilities and enacted Section 504 of the Vocational Rehabilitation Act in 1973; Education for All Handicapped Children's Act in 1975 (now renamed Individuals with Disabilities Act of 1986); The Civil Rights of Institutionalized Persons Act in 1980; the Telecommunications for the Disabled Act in 1982; the Voting Accessibility for the Elderly and Handicapped Act in 1984; and Americans with Disabilities Act in 1990.

#### *1.2. Definition of Persons with Disabilities*

Persons with disabilities are defined as those who have sensory, physical, intellectual, or communication impairments of one kind or another, which severely impairs their performance academically, socially, economically, and so on. They include the visually impaired, the hearing impaired, the physically and health impaired, the emotionally and behaviorally impaired, the

mentally retarded, the communication impaired, the deaf, blind, the multiply handicapped, and those with specific learning disabilities. We shall below define each category of persons with handicaps.

(a) *Emotionally and Behaviorally disturbed.*

These are persons with psychosocial problems. Sometimes they are referred to as psychosocially different because their emotional condition is medically and/or psychologically determined to the extent that they cannot be adequately educated in a regular class without provision of specialized services. When these persons are of school age, they cannot be adequately served in regular schools or classes without provision of specialized services. They tend to be placed in juvenile and remand homes, including approved schools.

(b) *The Hearing Impaired.*

These are individuals whose hearing is impaired to the extent that they cannot successfully process linguistic information with or without a hearing aid. Their hearing loss ranges from mild to profound. They include the deaf and the hard of hearing. They have problems in understanding normal conversations and this results in a delay in language and/or speech development, academic achievement, and other educational and social handicaps (Koech Report, 1999).

(c) *The Visually Impaired.*

Persons with visual impairments are those who have limitations imposed by visual loss or reduction on person's ability to interact with his/her environment, which includes physical, social, economic, political, aesthetic, and psychological environment within which a person with a visual impairment lives. The visual impairment ranges from mild to profound and includes those with low vision or partially seeing and

those who are called blind who depend on touch reading such as Braille.

(d) *The Mentally Handicapped.*

Persons with mental retardation are those with significantly subaverage general intellectual functioning that exists concurrently with deficits in adaptive behaviour (American Association on Mental Deficiency, 1973). These persons may have mild intellectual retardation, some moderate, and others severe to profound. Therefore, they have problems in learning and caring for themselves unless adequate measures are taken into consideration.

(e) *The Physically and Neurologically Impaired.*

Persons with physical impairments include those with amputations, deformity in muscular development, those with neurological impairments such as the cerebral palsied, and those with health impairments. These impairments interfere with normal functioning to the extent that they require technical equipment, specialized services and programme to effectively cope with the required academic, social and emotional standards of the school and community (Koech Report, 1999).

(f) *Persons with Specific Learning Disabilities.*

Persons with specific learning disabilities are of normal or above normal intelligence but have specific learning difficulties involving the ability to process information related to understanding or using spoken or written language. Such learning difficulties are manifested in the tasks of listening, thinking, speaking, reading, writing, spelling, or doing mathematical calculations (Koech Report, 1999). These persons, while in school, have problem following lectures, some write backwards, and so on. In adulthood, they may manifest problems in signing their names, documents, or reading. Some of them though have been in school,

still cannot write or comprehend written or spoken language.

(g) *The Severely and Multiply Handicapped.*

These are persons whose disability is so severe that they require specialized care. Some have a combination of disabilities such as the deaf, blindness, mental handicap and visual impairment, and so on.

(h) *Persons with Communication Disorders.*

Persons with communication disorders have abnormality of speech which adversely calls attention to itself, impairing communication, or causing maladjustment arising out of problems associated with articulation, rhythm, voice, and/or oral language (Koech Report, 1999)

Therefore we note that the population of persons with disabilities is heterogeneous with diverse needs and aspirations.

## 2. Areas where Disabled Persons Require Rights

First and foremost, it is important to note that persons with disabilities are an integral part of the society who yearn for equality of opportunities. A dynamic society takes into cognizance the needs of its minority groups in the context of laws. As explained earlier, developed countries realized too late that they had omitted significant members of their country in the constitution after a century in existence. Kenya therefore will be on the right track if it includes the rights of persons with disabilities in its constitution or in separate laws.

Below are some areas that I believe this Commission would do well to bear in mind as it reviews the Constitution of Kenya.

### 2.1. *Right to Education.*

Right to education is one of the most fundamental needs of a person. This was exemplified in the US Supreme Court's ruling in the *Brown vs. Board of Education of the District of Columbia* in 1954. The litigants were black people who were challenging segregated education with its archaic belief in "separate but equal education". The court ruled that-

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in the awakening the child to cultural values, in preparing him to adjust normally to his environment.

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

In the special education arena, courts showed remarkable expressions of disgust at the excuses given by boards of education. For instance, in *Mills vs. Board of Education of the District of Columbia* in the United States, the court ruled-

"If sufficient funds are not available to finance all the services and programmes that are needed and are desirable in the system, the available funds must be expanded equitably in such a manner

that no child is entirely excluded from a publicly supported education”

The court further ruled-

"The inadequacies, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child"

Another court ruled in *In Re K-*

It would be a denial of the right of equal protection and morally inequitable not to reimburse the parents of a handicapped child for monies they have advanced in order that their child attend a private school for the handicapped when no public facilities were available, while other children who are more fortunate can attend public schools without paying tuition and without regard to the assets and income of their parents."

Another court threatened to sell the land on which a school stood in order to use the money to pay for the education of the children with handicaps. All this shows that the courts are less sympathetic to the institutions that deprive handicapped persons of their rights, especially the right to education.

Thus, we see the importance of the right to education as expressed in the court rulings. These court rulings bespoke of the need to enact laws to safeguard rights of persons with disabilities in education. This resulted in the enactment of the American Public Law 94-142 of 1975 entitled Education for All Handicapped Children's Act (now Individual with Disabilities Act of 1986), which states that a handicapped child has a right to a free, appropriate, public education in the least restrictive environment. The education provided, according to these laws,

is not only to be free, but also qualitatively and quantitatively appropriate and financed by public funds. In addition, the child has the right to be educated in the least restrictive environment - in regular schools with provision of support personnel such as interpreters, readers for the blind, mobility specialists for the physically handicapped, speech therapists, among others.

I propose that in Kenya the right to education for persons with disabilities be incorporated in our constitution. The constitution should stipulate that persons with disabilities should not be denied admission to a programme or educational facility that receives government funds.

## **2.2. Right to Employment**

Employment is an insignia of independence, a fulfillment of one's worth, a means of contributing to the development of self and others. Employment is therefore of paramount importance in all persons in order for them to lead independent living. Lack of employment leads to dependency and a lowered self-esteem. An unemployed person becomes a burden to the society and the country as a whole.

Persons with handicaps have been discriminated against in employment. Furthermore, they are not accorded the same terms, conditions, benefits, privileges, compensation, and fringe benefits like their non-handicapped counterparts. Because of this realization, section 504 of the American Rehabilitation Act of 1973 was enacted which opened a floodgate of opportunities for persons with disabilities in the United States. The section states that:

"No otherwise qualified handicapped person in the United States shall, solely by reason of his handicap, be excluded from participation in, be denied the benefit of, or be subjected to

discrimination under any program or activity receiving federal financial assistance."

I propose that the revised Constitution of Kenya incorporate right of persons with disabilities to employment, and that they should be given the same benefits, privileges, conditions, and compensations accorded non-handicapped persons. I further propose that the concept of reasonable accommodation be made for persons with disabilities in employment and that institutions that receive government assistance such as board of schools, hospitals, parastatals, government agencies, local and municipal councils, be compelled to employ persons with disabilities and that private organizations and entities be given an incentive in order for them to employ persons with disabilities.

### **2.3. *Right to Access Health Services and Public Amenities***

Persons with disabilities, due to the nature of their handicap, have need of health services and assistive aids and devices. Some of them have health-associated disabilities such as need for treatment of *Otitis media*, physiotherapy, speech therapy, use of hearing aids, optic devices, among others. They also need to use public amenities. Access to public health and recreational facilities are made inaccessible due to lack of personnel to assist persons with disabilities. Some public amenities such as theatres, game parks, and other social amenities are inaccessible to persons with disabilities.

I propose that the revised constitution take into account that persons with disabilities be allowed to use public amenities. I also propose that access to health services be a right to persons with disabilities so that their handicap may be alleviated one way or another. Health services should also mean

provision of assistive devices such as crutches, optic devices, hearing aids, ostomy bags, and specialized services such as physiotherapy, occupational therapy, speech therapy, orientation and mobility, among other services.

### **2.4 *Right to Legal Representation***

Persons with disabilities are unable to seek redress or challenge discriminatory laws and practices. Even when they are underpaid, overworked, harassed at places of work, denied opportunity to education, thrown out from public institutions, denied the right to do national examinations lest their marks lower the national standing of a district, they are not able to seek redress due to lack of money. They are not able to even request for auxiliary services of interpreters, readers, and so on lest they be refused employment, education, and the like. Thus, most simply take on what is available as they are told that they are just being given a favour.

It is doubtful that even if the revised constitution enshrines their rights they will enjoy those rights unless modalities of enforcement of the rights and clauses are put in place for them to have legal representation they will enjoy those rights. Therefore, I propose that the revised constitution incorporate that disabled persons have the right to free legal representation and that the offices of the Attorney General, the Chief Justice, or the Ministry responsible put in mechanisms for the provision of legal services to persons with disabilities.

### **2.5 *Right to Barrier-free Environment***

Right to barrier-free environment means that buildings, pavements, roads, and social amenities be accessible to persons with mobility problems such as the physically handicapped, the visually impaired, and the elderly. This means that public buildings

must have ramps leading to the buildings. Furthermore, parking spaces for disabled drivers are essential and need to be provided. Laws should be put in place to penalize any person who blocks accessibility for persons with disabilities.

Furthermore, lifts need to be fitted with proper identification devices such as sound or signals or raised dots for the benefit of persons with visual impairments. This would assist persons with visual impairments to know which floor they are on. In addition, toilets in public buildings need to be designed in a way that persons with physical problems are able to use them. Buildings also need to have handrail support system.

## **2.6 *Right to Use Public Transportation***

Mobility is a major problem for persons with physical and visual impairments, including the elderly and the aged. This is due to the fact that persons with physical impairments have to use wheel chairs and crutches. Also public buses do not have level lifts where they could be lowered to enable persons on wheelchairs and the elderly to use them. Also public vehicles including taxis and matatus do not have space saved for a person to keep the wheel chair. At times, a wheelchair is viewed as a luggage and the person is asked to pay for its passage.

I propose that public service vehicles and railways have adaptations for persons with mobility problems and that mechanisms be put in place to assist persons with disabilities to embark or disembark from public service vehicles, railways and airplanes. I also recommend that public transport and private vehicles have versatile handrail support system.

## **2.7 *Right to Vote***

Voting is a form of exercising one's rights, especially the right to vote who should represent the voter. However, the voting system in Kenya and other countries has not been friendly. For instance, we tend not to take into consideration whether or not the voting halls and booths are accessible to persons in wheelchairs, whether persons can read or write their names. We also tend not to take into consideration whether the visually impaired and the elderly persons are able to cast their votes.

I propose that the voting boxes, booths and halls are accessible to persons with mobility problems and the elderly. I also propose that a person of their choice to assist them in writing or casting the vote may accompany disabled persons.

## **2.8 *Right to Representation***

Disability is a development issue. This means that until disabled persons are involved in national development, their needs and aspirations will continue to be neglected. More often than not, the disabled are not involved in policy making, in the deliberations of the national development plan, and many other issues. Thus, policy makers rarely consider their welfare. This explains why they become more dependent than independent, which makes them to be viewed as a burden to the society.

It is therefore important that persons with disabilities are represented at the national level where laws are made. Some countries with recent constitutions such as Uganda and South Africa have incorporated representation of persons with disabilities in their constitutions. I propose that Kenya follow the same suit, but with an increased number of seats. For instance, if Kenya adopts a federal constitution, I propose that at regional assemblies, disabled persons have nine seats, three for persons with hearing impairments, three for persons with



visual impairments, three for persons with physical impairments. At the national level, if we are going to have two houses of representatives, I propose that persons with disabilities have six seats —two for the hearing impaired, two for the visually impaired, and two for the physically impaired. At the senate, I propose that a similar number be maintained, unlike Uganda and South Africa where the physically handicapped have one seat, the hearing impaired one seat, and the visually impaired one seat.

The concept of having two or three seats for each category of persons with disabilities is to ensure that the disabled are able to consult with each other adequately and present a strong case. However, if Kenya is to have a unitary system of government I propose that six seats be reserved for persons with disabilities— two for the hearing impaired; two for the visually impaired; and two for the physically impaired. This is a modest request and the number of seats does not even constitute 10%.

I further propose that auxiliary personnel such as interpreters, readers for the visually impaired, and mobility assistants, be provided by the legislatures. Qualifications for aspiring candidates should be a university degree. For the auxiliary personnel, a diploma or degree should be a preference. Furthermore, there should be no restrictions based on handicap such as ability to read, speak, or similar words as found in the current constitution.

Apart from representation in the legislatures, I also propose that persons with disabilities be represented in the Electoral Commission of Kenya and the Law Reform Commission.

## **2.9. *Right to Access to Media***

The visually impaired and the hearing impaired are particularly disadvantaged

when it comes to media. For persons with visual impairments, you find that there is scant or no materials written in Braille for them. Furthermore, you find that the materials are in the normal letter prints. For persons with hearing impairments, you find that they cannot use telephones, listen to radio, or benefit from television programmes.

I propose that right to accessible media for persons with disabilities be enshrined in the revised constitution. This means that brailled materials, large prints, TDDs, relayed services, and telephones be manufactured in a way that they are accessible and usable to persons with disabilities. Furthermore, sign language interpreting insets need to be included in news, in educational programmes, and in programmes of national importance. Also, telephone companies need to lower their charges for persons with hearing impairments who use teletypewriters, relay message, AIM, etc., since these take longer unlike speech oriented telephone calls.

## **2.10. *Right to Auxiliary Services***

In order for persons with disabilities to thoroughly benefit from the privileges and achieve equal opportunities, they need auxiliary services. These services include services of interpreters, notetakers in educational settings, readers for the visually impaired, mobility aides for the visually impaired, the physically impaired, the deaf, blind, the mentally handicapped, among others. They also require assistive devices such as braille, brailler, braille papers, hearing aids, optic devices, mobility aids, among other devices.

I propose that the revised constitution take into cognizance the importance of auxiliary personnel and devices to persons with disabilities. I further propose that auxiliary devices be exempted from value added tax

and import duty in order to make them accessible to persons with disabilities.

### **3. Parameters to Consider in the Formulation of Rights of Persons with Disabilities**

#### **3.1. Right to Education**

Right of persons with disabilities to education will not be adequately safeguarded without establishing mechanisms for its implementation, including establishment of a Special Education Tribunal, the Special Education Trust Fund, and by ensuring that teachers and the allied personnel working with persons with disabilities possess competency skills such as sign language, braille, and so on. These are covered in the Special Education Bill found in the Koech Commission Report 1999.

#### **3.2. Right to Welfare Related Services and Opportunities**

Right to access and quality of delivery of services will not be provided without clauses on provision of related services in special schools and inclusive settings whether educational, employment, health, or otherwise. The services include interpreter services, note-takers, readers for the visually impaired, provision of Braille and large print material, psychologists who understand persons with handicaps, including their ability to communicate in sign language. Furthermore, the establishment of National Council for Persons with Disabilities to implement and ensure the enforcement or implementation of the rights of persons with disabilities will go a long way. These elements are covered in a draft bill entitled "Persons with Disabilities Bill 2000", which should be tabled in the Parliament.

I recommend therefore that the this Constitutional Review Commission

highlight the need for the Parliament to enact the Special Education Bill 1999 and the Persons with Disabilities Bill 2000 in order for the rights of persons with disabilities to be met. I further recommend that the Commission also include elements of the rights of the disabled in the revised Constitution of Kenya.

#### **3.3. Recourse to Redress**

As stated earlier, it may be one thing to enact laws to safeguard rights of persons with disabilities. However, if mechanisms for enforcement are not put in place, it would be difficult for persons with disabilities to benefit from the rights. I recommend that mechanisms be put in place where disabled persons would have procedural and substantive due process and that a disability tribunal is put in place where disabled persons would seek redress

#### **3.4. The Concept of Reasonable Accommodation**

The concept of reasonable accommodation need to be put in place when it comes to determining whether a person with disability is being accommodated in education, employment or other situations. The concept can also be applied to institutions and programmes to determine whether they have made reasonable accommodation for the benefit of the person with disability in their programmes and/or institutions. In both instances, the purpose is to ensure that the person with disabilities is accommodated to the programme. For instance, it is not ever going to be possible to remove a disability. Thus the concept of reasonableness needs to be applied to accommodate a person by either lowering the entry requirements or adapting, say examination papers or interview. It also includes the use of interpreters and readers for the visually impaired to achieve reasonable accommodation. The concept also implies

that buildings are to be accessible to persons in wheelchairs; the lowering of desks to the level of a person in wheelchairs; the provision of devices to enhance performance of tasks by persons with hearing impairments and those with musculoskeletal disorders (Mazrui, 1997).

### **3.5. *The Concept of Undue Hardship***

We need to be mindful of the fact that reasonable accommodation may lead to some hardships on the part of the accommodating programme or institution. It is therefore essential that the government one way or another compensate an accommodating institution or programme. This could be in form of incentives such as providing an increased grant to an institution that has employed qualified and otherwise qualified persons with disabilities. A private entity or organization that employs disabled persons could be given an incentive by lowering the income tax it should pay to the exchequer.

### **3.6. *Women with Disabilities***

Kenya is becoming more gender sensitive with the proposed family court, etc. Women with disabilities are in triple jeopardy. In the majority of Kenyan families, a son without disability is given priority to education, followed by daughter without disability, then son with disability, and finally by daughter with disability. Therefore they are ranked fourth in importance to the families. They also have to cope with their disability as women in the larger society. In matters of marriage and inheritance, they come almost nowhere to being considered. It is therefore important that as Kenya becomes more gender sensitive, women with disabilities be given more focus.

### **3.7. *An Abiding General Clause***

Section 504 of the United States Vocational Rehabilitation Act of 1973 is considered the most inclusive statement on the education, employment, and provision of auxiliary or related services to persons with disabilities. The section reads,

"No otherwise qualified handicapped person in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The inclusiveness of this clause has made it possible for persons with disabilities, whatever their age, to demand their right to education, social welfare, employment, health, related services, and so on from a programme, institution, or activity that receives government financial assistance. The section has been used in different ways and courts have been giving deference to it. It is therefore essential that the Constitution of Kenya Review Commission finds ways to make a comprehensive and all-inclusive statement to safeguard participation of persons with disabilities in programmes and institutions that receive government assistance.

## **4. Conclusion**

This paper presented areas that disabled persons believe they have rights. These include right to education, employment, public transportation, auxiliary services, representation, use of media, health and social amenities, and others. The paper also tackled some parameters that should be put in place to ensure that the rights are enshrined in our revised constitution and also in our statute books and laws. The paper appeals to this Commission to ensure that the proposals in this paper are adopted

and that mechanisms are put in place to ensure they are enforced.

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# CONSTITUTIONALIZATION OF THE RIGHTS OF PEOPLE WITH DISABILITIES IN KENYA:

**Hon. Josephine Sinyo, Mp.**

## 1. Introduction

We are all here because we do not want to be patronized but rather, shape our own destiny both locally and at the international level. I like one of the old Jews sayings about Angels;

"the strength of Angels is that they cannot deteriorate and, the weakness of Angels is that they cannot improve. Conversely, the weakness of men is that they can deteriorate, but the strength of man is that he can improve".

Certainly, we are here because of our strength to deliberate the improvement of our status.

My salient point today here is that this topic has been identified because as it were we are yearning to be responsible for our own lives and I want to emphasize as strongly as I can that, nobody shall waylay us in this process. For that matter, I have a sense of personal fulfillment that I am the one to take you through this topic, which is truly very close to my heart. We are here to broaden horizons on our issues so as not always to feel like grasshoppers (small and inferior) but rather, mount up high and fly like eagles. As such, I reckon that though ordinarily we bury the dead, one more thing needs to be buried - the stigma towards the people with disabilities in society.

May I pose a question at this juncture; are we ready to bring changes and make tough decisions affecting our lives? Clearly, we should have a substantive agenda for change and an enabling environment if we were to succeed.

I construe the subject matter of my paper to mean that, we want a more action oriented approach (practice and application), rather than the prevailing rhetoric and theoretical approach of emphasis on principals and legislations. Yet, apparently, very serious discrepancies exists between the two approaches; i.e., definitely, the constitutionalization of the rights of people with disabilities is important and must be a reality soonest possible.

In my paper I will discuss generally the human rights and human development principles; then the history of the international human rights of the people with disabilities; and finally the process and challenges facing the people with disabilities warranting the constitutionalization of their rights.

## 2. Human Rights

Human rights are the rights possessed by all persons, by virtue of their common humanity, to live a life of freedom and dignity. They give all people moral claims on the behaviour of individuals and on the design of social arrangements - and are universal, inalienable and indivisible. Human rights express our deepest commitments to ensuring that all persons are secure in their enjoyment of the goods and freedoms that are necessary for dignified living.

### 2.1 *Universality of Human Rights*

Human rights belong to all people, and all people have equal status with respect to these rights. Failure to respect an individual's human right has the same weight as failure to respect the right of any other - it is not better or worse depending on the person's gender, race, ethnicity, nationality, disability or any other distinction.

## **2.2. *Inalienability of Human Rights***

Human rights are inalienable: they cannot be taken away by others, nor can one give them up voluntarily.

## **2.3. *Indivisibility of Human Rights***

Human rights are indivisible in two senses. First, there is no hierarchy among different kinds of rights. Civil, political, economic, social and cultural rights are all equally necessary for a life of dignity. Second, some rights cannot be suppressed in order to promote others. Civil and political rights may not be violated to promote economic, social and cultural rights. Nor can economic, social and cultural rights be suppressed to promote civil and political rights. All the human rights are of equal status.

## **2.4. *Realisation of Human Rights***

A human right is realized when individuals enjoy the freedoms covered by that right and their enjoyment of the right is secure. A person's human rights are realized if and only if social arrangements are in place sufficient to protect her against standard threats to her enjoyment of the freedoms covered by those rights.

Human rights and human development share a common vision and a common purpose - to secure the freedom, well-being and dignity of all people everywhere. To secure:

- Freedom from discrimination - by gender, race, ethnicity disability national origin or religion.
- Freedom from want - to enjoy a decent standard of living.
- Freedom from fear - of threats to personal security, from torture, arbitrary arrest and other violent acts.
- Freedom from injustice and violations of the rule of law.
- Freedom of thought and speech and to participate in decision-making and form associations.
- Freedom for decent work-without exploitation.

Human freedom is the common purpose and common motivation of human rights and human development. The movements for human rights and for human development have had distinct traditions and strategies. United in a broader alliance, each can bring new energy and strength to the other.

Human rights and human development are both about securing basic freedoms. Human rights express the bold idea that all people have claims to social arrangements that protect them from the worst abuses and deprivations - and that secure the freedom for a life of dignity.

Human development, in turn, is process of enhancing human capabilities - to expand choices and opportunities so that each person can lead a life of respect and value. When human development and human rights advance together, they reinforce one another - expanding people's capabilities and protecting their rights and fundamental freedoms.

Until the last decade, human development and human rights followed parallel paths in both concept and action; the one largely dominated by economists, social scientists and policy-makers, the other by political activists, lawyers and philosophers. They

promoted divergent strategies of analysis and action economic and social progress on the one hand, political pressure, legal reform and ethical questioning on the other. But today, as the two converge in both concept and action, the divide between the human development agenda and the human rights agenda is narrowing. There is growing political support for each of them - and there are new opportunities for partnerships and alliances.

Human rights can add value to the agenda of development. They draw attention to the accountability to respect, protect and fulfill the human rights of all people. The tradition of human rights brings legal tools and institutions - laws, the judiciary and the process of litigation - as means to secure freedoms and human development.

Rights also lend moral legitimacy and the principle of social justice to the objectives of human development. The rights perspectives helps shift the priority to the most deprived and excluded, especially to deprivations because of discrimination. It also directs attention to the need for information and political voice for all people as a development issue - and to civil and political rights as integral parts of the development process.

Human development, in turn, brings a dynamic long-term perspective to the fulfillment of rights. It directs attention to the socio-economic context in which rights can be realized - or threatened. The concepts and tools of human development provide a systematic assessment of economic and institutional constraints to the realization of rights - as well as of the resources and policies available to overcome them. Human development thus contributes to building a long run strategy for the realization of rights.

In short, human development is essential for realizing human rights, and human rights are essential for full human development.

The 20<sup>th</sup> century's advances in human rights and human development were unprecedented - but there is a long unfinished agenda. The major advances in human rights and human development came after the horrors of the Second World War. The 1945 Charter of the United Nations, followed by the Universal Declaration of Human Rights in 1948, ushered in a new era of international commitment to human freedoms-

- Emphasizing the universality of rights, centred on the equality of all people.
- Recognizing the realization of human rights as a collective goal of humanity.
- Identifying a comprehensive range of all rights - civil, political, economic, social and cultural -for all people.
- Creating an international system for promoting the realization of human rights with institutions to set standards, establish international laws and monitor performance (but without powers of enforcement).
- Establishing the state's accountability for its human rights obligations and commitments under international law.

### **3. International Background of the Human Rights of the People With Disabilities**

There has been an increasing international recognition that disability is a human rights issue. There is also recognition that disability and disability-related exclusion and marginalization is a concern for the UN human rights bodies.

The World Programme of Action concerning Persons with Disabilities, adopted by the UN in 1982, recognized the responsibility within the UN system of

addressing the human rights of persons with disabilities, in the following (and other) recommendation:

“Organizations and bodies involved in the United Nations system responsible for the preparation and administration of international agreements, covenants and other instruments that might have a direct or indirect impact on persons with disabilities should ensure that such instruments fully take into account the situation of persons who are disabled” (Para. 164).

In August 1984, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur, Mr. Leandro Despouy, to conduct a comprehensive study on the relationship between human rights and disability. In his report (1993), Mr. Despouy made it clear that disability is a human rights concern, in which the UN monitoring bodies should be involved. Included among his recommendations was the following:

“After the Decade has ended, the question of human rights and disability should be kept on the agendas of the General Assembly, the Economic and Social Council, the Commission of Human Rights and the Sub-Commission as an item of constant concern and on-going attention”.

The Committee on Economic, Social and Cultural Rights in 1994 assumed the responsibility for disability rights by issuing a General Comment No. 5, in which the Committee makes an analysis of disability as a human rights issue. The General Comment states:

“The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all

human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, in so far as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2 of the Covenant that the rights 'enunciated, will be exercised without discrimination of any kind' based on certain specified grounds or other status' clearly applies to discrimination on the grounds of disability”.

At the 54th session of the UN Commission on Human Rights in March/April 1998, the Commission adopted resolution 1998/31, in which the Commission made a series of statements and recommendations for future development in this area. Resolution 1998/31 was a principal breakthrough and a general recognition of the UN responsibility for human rights and persons with disabilities. Therefore, expectations were high that finally things would start to develop. However, in the two years following the adoption of the Commission resolution, there was little follow-up. This was a major concern when the Commission on Human Rights again discussed human rights and disability at its 56th session in April 2000. As a result of the discussion the Commission adopted another resolution (2000/51), which incorporated and expanded the recommendations of Resolution 1998/31.

In the first operative paragraph, the Commission recognizes the UN Standard



Rules as an evaluative instrument to be used to assess the degree of compliance with human rights standards concerning persons with disabilities.

“[The Commission] recognizes that any violation of the fundamental principle of equality or any discrimination or other negative differential treatment of persons with disabilities inconsistent with the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities is an infringement of the human rights of persons with disabilities”. (Para. 1, Resolution 2000/51)

Further, the Commission encourages all the treaty bodies to monitor the compliance of States with their commitments in order to ensure full enjoyment of rights by persons with disabilities. Governments are urged to cover fully the question of human rights of persons with disabilities, when reporting under the relevant United Nations human rights instruments.

“[The Commission] invites all the human rights treaty monitoring bodies to respond positively to its invitation to monitor the compliance of States with their commitments under the relevant human rights instruments in order to ensure full enjoyment of those rights by persons with disabilities, and urges Governments to cover fully the question of the human rights of persons with disabilities in complying with reporting obligations under the relevant United Nations human rights.” (Para. 11, Resolution 2000/51).

In addition, the following operative new paragraph was added which reflects the recognition of the urgent need for action.

[The Commission] invites the High Commissioner for human rights, in

cooperation with the Special Rapporteur on Disability, to examine measures to strengthen the protection and monitoring of the human rights of persons with disabilities and solicit input and protection proposals from interested parties, including particularly the panel of experts. (Para.30 Resolution 2000/51).

It is this framework that provides the impetus for me to write this paper "Constitutionalization of the Rights of People with Disabilities in Kenya" .

It is an opportune time to develop the capacity and competence of all parties concerned to ensure that the occurring violations of the human rights of persons with disabilities start to reach the appropriate entities within the UN system and governments, political parties around the world and Kenya in particular. Disability leaders recognize the need to find an effective mechanism to communicate their experiences to the human rights monitoring bodies.

Human rights experts recognize their need to learn more about how various obstacles prevent persons with disabilities from exercising their rights and freedoms and make it difficult for them to participate fully in the activities of their societies. (Standard Rules, Para 15)

I submit that the constitutional review Commission recognizes that persons with disabilities have human rights and are subjects of law. Therefore, persons with disabilities enjoy all the rights set forth in international human rights instruments, as well as some specific rights. These rights must be respected. The international and national communities, Kenya included have the obligations to do what is necessary to enable persons with disabilities to effectively enjoy all their human rights on

an equal footing with persons without disabilities.

### **3.2. *Legal Recognition and Enforcement.***

Recognition under the law lends legal weight to the moral imperative of human rights - and mobilizes the legal system for enforcement. Unless the people with disabilities claim to equal treatment is legally recognized, they cannot demand a remedy against discrimination. States have the first obligation to participate in the international rights regime and to establish national legal frameworks. But human rights activists and movements can also press for legal reforms to give people access to legal processes, with institutional barriers removed. However in the Kenyan scenario, the constitutional review process takes on board both the State and the human rights activists.

### **4. *The Process and Challenges In Constitutionalization of the Rights of the People with Disabilities***

I wish to categorically state here that, Kenyans must recognize that disability is a social development and human rights issue that deserves to be high on their agenda of priorities i.e. even in the Bill of Rights chapter of our Constitution, the concerns of the people with disabilities must be expressed explicitly in order to correct the imbalances, injustice, inequalities and the discrimination that the people with disabilities succumb to daily. Certainly the yardstick for measuring the inclusion of people with disabilities fully in the society is the state of their human development thus human development is the process of enlarging people's choices, by expanding human functioning and capabilities. Human development thus also reflects outcomes in these functioning and capabilities. It represents a process as well as an end.

Albert Einstein, in 1945 when the World was waking up from the nightmare of the World War II said:

"Not until the creation and maintenance of decent conditions of life for all men has been recognized and accepted as a common obligation of all men and all countries, not until then shall we, with a certain degree of justification, be able to speak about mankind as civilized".

Today, almost 50 years later, all persons who happen to live with a disability, we are far from enjoying decent conditions of life.

For me to contribute constructively on this topic I wish to submit that, there is no better way forward in fulfilling our dream of a society for all when our governments do not seriously consider putting in place disability indicators as tools of analysis for development agenda. The state of being disabled should not mean that efforts to actualize oneself comes to a halt. For, one of the American Presidents, Thomas Jefferson, put it quite precisely when he said: "There is nothing more unequal than the equal treatment of unequal".

Globally, any sampling of programs or projects are designed to suit the able bodied and this is a violation of human rights of people with disabilities as it is a direct discrimination. The State must develop a comprehensive Constitution and enforceable legislations to protect and implement the rights of disabled persons.

The government must ensure that discrimination on the basis of disability is prohibited by the constitution and laws and that every disabled man, woman and child enjoys other inherent rights to life, liberty and equality in every aspect of daily life.

Legal aid and services should also be provided for the disabled. Equalization of opportunities and human rights of disabled

persons should be enabled in the areas of education, training, employment, accessibility to social, cultural and political opportunities, rehabilitation services, auxiliary personnel and aides, counseling services, health services and communication and other aspects incidental to the enjoyment of those rights. The present constitution does not adequately protect the people with disabilities. They are often denied opportunities for self-advancement and to participate in public affairs. Consequently, now that I have an enormous opportunity to contribute to the constitution, I will simply give my personal suggestion as to what the Commission should do in the advancement of the Right of the people with disabilities in the constitution.

My interpretation of this topic is this, what is there to be done to make the people with disabilities visible and heard in the process of constitutional review? The answer is simple, the people with disabilities have to be mobilized, stimulated and assembled either provincially or according to districts to air their views to the Commission. This means that, we have to prioritize disability as an agenda and target this group separately from the mass. I suggest that you give a time frame of about two months in which you will specifically interview the people with disabilities. You must ensure that in each stipulated fora there is a person to document the process. Actually, this is a replicate of what was done by the government during the Poverty Reduction Strategy Paper campaign.

#### **4. Conclusion**

Definitely, both human and financial resources to accomplish this mammoth task is needed. At this juncture I wish to share the Ugandan experience, which is considered successful. First, disability was identified as a constituency of its own and funded by the government. Secondly, the only representative of the people with disabilities in the constituent assembly was a very committed man and dynamic in lobbying for disability issues and concerns to be reflected in the constitution. I pose this as a challenge to our Kenyan Commissioners with disabilities.

The salient point here is that, I appeal to you to facilitate the mobilization of the disabled people for this course with the finances allocated to the Commission for the civic education. Once the Commission give us this recognition, I am sure that there are many other players who would willingly top up the finances for the civil education for the people with disabilities. On the other hand, United Disabled Persons of Kenya (the umbrella organization of the people with disabilities) would be supportive in human resources. Thus, aware that the people with disabilities do not have political muscle, the fate of constitutionalizing our rights hangs in the balance. The Commission's economic goodwill and its political goodwill, will determine the incorporation of the rights of the people with disabilities in the Constitution.

## BUILDING ON THE LANCASTER HOUSE EXPERIENCE

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### 1. Introduction

It is certainly a pleasure and privilege to be of some assistance in this very, very vital and noble venture to write a new Constitution. We now have the experience on the working of the Lancaster House Constitution over the past 38 years.

I certainly take my share of responsibility (and hope some credit) for the results of the Lancaster House Conference. I was given the honour by President Kenyatta (then Hon. Jomo Kenyatta, President of KANU) to be KANU's principal legal adviser with a seat next to him. But I requested that that honour should be given to Hon. Jaramogi Oginga Odinga (then Vice President of KANU). While I sat next to Hon Odinga, he kindly removed his chair far back - so in effect I was still seated next to Mr. Kenyatta.

Chief Justice B. Malik from India, who, at the request of Jomo Kenyatta, was sent by Jawaharlal Nehru to advise and assist us, modestly insisted on taking a back seat with other civil servants and advisers. However, he was of incalculable assistance when we met each night to discuss the results of the days meeting and to formulate plans for the next day, and generally in the legal drafting of the Constitution.

The most important outcome of the Conference was that after almost three months of non-stop discussions we came away with a new Constitution that was unanimously accepted by all parties and with each party proclaiming that they were victorious and that all their requirements had been met. As you are aware, all sixty members of the Kenya National Assembly took part in the Conference. They

comprised four racial and religious groups (including Arabs) with a history of great animosity and sometimes open hostility to each other. They also comprised of different parties and groups with several serious clashes of personalities and rivalry within each party and each tribal group. The credit for the outstanding success at the Conference was the result of the statesmanship and political wisdom of the leaders of all parties who realised that if we failed to achieve an agreed independence constitution, there would be increased frustration and bitterness which could lead to a total breakdown in law and order and even fratricidal strife when the British left Kenya. The experience of the Congo was very fresh in all our minds.

A great deal of credit also goes to the Colonial Secretary, Reginald Maulding, who allowed and indeed encouraged different parties and leaders and their legal advisers to speak as long as they wished often repeating their position several times without interruption from the chair. They were exhausted after almost three months of talking. The Colonial Secretary did not personally intervene or comment, but his staff secretly lobbied with each group to bring them closer together. Eventually all parties began asking, almost begging, the Colonial Secretary to state his views being aware that the breakdown of the Conference was imminent and would not help any party or group. Wisely, the Colonial Secretary then dictated the terms of his draft constitution (ostensibly without notes), which was a compromise draft on a take it as a whole or leave it basis. It included some of the basic demands of each party and excluded others. It pleased no party but also did not totally displease any of them. After

intense lobbying, each party decided to stress the points acceptable to them and accepted the Colonial Secretary's draft constitution and proclaimed victory and vindication of its original stance, and agreed to join in an interim coalition government with British participation until general elections on an adult franchise in the following year.

## **2. Salient Features of the Lancaster House Constitution**

I personally think that the Lancaster House Constitution was as near perfect as could be obtained under the circumstances. I will briefly examine a few salient features:

### **2.1. *Majimbo or Unitary Government.***

There was a clear compromise. We rejected a Swiss type federal government but accepted a federal constitution but with a strong central government with residuary powers. There were seven regional assemblies, regional civil services, and some regional police. The Central Government assisted by a National Parliament consisted of two Chambers (like the U.S.) one on the basis of population, and the other on the basis of districts. We did consider, within the party, the possibility of a British type Constitution with a titular head of state with a Prime Minister responsible to a Parliament of 2 Chambers.

I personally strongly supported the Westminster type of Government but with the Congo experience fresh in our minds, where the President and Prime Minister had dismissed each other, I found that both Kenyatta and Ronald Ngala personally favoured the American system. Kenyatta told me that in Africa only one Paramount Chief was accepted in any area and two would invariably invite conflict. I think he was probably right. A Presidential system was therefore agreed upon.

### **2.2 *Two Chamber Legislature***

KANU (especially Tom Mboya) strongly favoured a single chamber, to avoid delaying tactics in reforms envisaged by KANU particularly regarding land and private enterprise (subsequently referred to as "African Socialism", Africanisation) etc. Originally I supported a single Chamber Parliament. I vividly recall a brief chat over a drink alone with Maulding when he said:

"You know Fitz, a Second Chamber is required not only as a break to inexperienced exuberance but also to kick upstairs a veteran politician whose contribution had now diminished with age or drink, but whom the community wished to honour and provide status (with housing, car allowances etc) and whose experience and wisdom would be a much needed guide and some sort of break to aggressive "reformists" or revolutionaries."

He felt that the Upper Chamber should consist primarily of nominated members with only limited powers of delay in legislation. We ultimately accepted a Second Chamber but on the basis of an elected Senate, which really served neither purpose. I now feel that a House of Chiefs or Senior Wazees with primarily Nominated Membership will provide continuity, and with the benefit of their wide experience, will be good for the country. These elders may not wish to or cannot go through the rough, strenuous and costly election process. I certainly believe this deserves serious consideration. I personally know of a number of wise Politicians who would contribute to the nation in this way e.g. my friends, Jeremiah Nyagah, Achieng Oneko and perhaps even Ngei and Kaggia.

### **2.3 *The Judiciary***

The intention was a judiciary comprised of independent impartial senior and competent lawyers of considerable experience and recognised integrity; to avoid the temptation of corruption. I will revert to this aspect later.

#### **2.4. *The Safeguards***

The safeguards in the Constitution including the Judiciary, Controller and Auditor-General, the Judicial Service Commission, the Civil Service Commission, Land Control Boards, Bill for Human Rights etc., were entrenched in the Constitution. This would avoid the Executive from attempting to trample on the fundamental human rights of the citizens and/or of its minorities and also to stifle any attempt at corruption or the abuse of power.

### **3. The History after Independence**

Kenyatta believed that his main objective after attainment of Independence was to solve the landless problems and this had to be principally in the Rift Valley. His closest advisors believed the main obstacles were his lack of support from the peoples of the Rift Valley, the safeguards enshrined in the constitution and the composition in his cabinet. He therefore decided to change his second main power base. His Vice-President was humiliated into resignation. His main rival, then Secretary General of the party was given this job and did it so well perhaps in anticipation of being offered the job himself. The Left Group was split and broken with the appointment of Joseph Murumbi, a Maasai as Vice President. Murumbi along with the Odinga, Anyieni, Oduya, Ngei, Wariithi and Pinto etc had been its principal pillars. The Leaders of the Right Group at the time were Mboya, Gichuru, Koinange and McKenzie. Kenyatta also shifted his support from the Left Group to the Right Group at this point of time. Murumbi soon realised that he too was

being humiliated into resignation. In utter disgust he did resign soon after but was asked to remain for a few months until arrangements for a new successor were made. The new successor, arap Moi, was the leader of the Rift Valley who was third in line in the hierarchy of the Opposition Party. This disappointed the two leaders above him, Ronald Ngala and Masinde Muliro and soon led to the disintegration of the opposition party. The land resettlement programme went into full swing with the full support of the new hierarchy.

### **4. Changes to the Constitution**

The first to go were the Regional Assemblies. This was effected by the simple means of inordinate delay in forwarding salaries and emoluments to the majimbo assemblies and their officials. Their Chief Officers reverted to their former names and uniforms and even the feeble majimbo system was abolished in all but name. (In fact this had been envisaged by Kenyatta in meeting with his closest advisors at Lancaster House). Thereafter, meetings were held creating euphoria when members of Parliament felt they were fighting some imaginary conspiracy and went into the lobbies voting for amendments which very few of them understood, even if they had bothered to read them. The new set of advisors who pushed through their amendments were well aware that they were abolishing the constitutional safeguards so carefully enshrined in the Constitution to safeguard the fundamental rights of Kenyans and against possible abuse of the President's powers: these officers often used these powers in the name of the President.

One of the first of these Bills declared vacant the parliamentary seat of any MP who joined another party. It was so skilfully steered through Parliament by Tom Mboya that many MPs voted for the Bill, which would lead to their own political demise, in

the belief that there was a secret verbal assurance outside Parliament that the provisions of the Bill would not be retrospective. They only became aware that the Bill's provisions would indeed be retrospective after the Bill was signed and they were debarred from Parliament.

The Bill that shocked me most was the reintroduction of the executive's right to arrest and detention without trial. I personally called on former very close friends to discuss the fact that we had argued and fought against detention so strongly and emotionally both before and after Lancaster House, only to be told that we were only against detention previously because it was being done by Whites but it was alright if it was done by Africans. Those who persisted in opposing this abandonment, *de jure* and/or *de facto*, of human rights and safeguards were given lucrative jobs or promises of jobs within the government or parastatals or threatened or bullied into submission, failed to secure nominations or left politics altogether.

The leaders or civil servants who introduced an all powerful executive culminated in making Kenya into a *de facto*, and subsequently a *de jure*, one party state, with an all powerful police, special branch, wire tapping, censorship of letters, engaging thousands of spies and intelligence officers, that made Kenya very little different in practice from a dictatorship. There were no legal barriers to Government abuses. All opposition was stifled - with allegations of under-ground movements like Mwakenya, Fera etc. The Judiciary was totally impotent or conniving. The mere possession of a list of alternative individual names and Ministries was conclusive proof of treason punishable by death etc.

Mr. Chairman, when making my introduction speech at the first day's sitting at Lancaster House, I ventured the

observation that writing of a constitution for a Democratic State was not difficult. What is more important was genuine willingness, indeed desire, to live and work in a Democratic Country and to make the constitution work in a free and fair manner. The same is as true today as it was then.

Democracy in the modern world - and we all want to be part of the modern world - means giving the opposition an equal hand to organise themselves freely and fairly to win the next election with a guarantee, by action rather than words, to the opposition that the present incumbents will be entitled to the same rights after the next general election as the present opposition enjoys should they lose election. Fundamental human rights are sacrosanct, they are not a privilege but a basic human right, which no human being can or should be denied.

However comprehensive a Constitution we draw up, we will not be able to cater or provide for every possible eventuality. Indeed, any attempt to do so would keep us in a straight-jacket and in the long run counter-productive. Societies and countries evolve, ideas about what is acceptable and what is not acceptable change e.g. marriage and divorce, homosexuality, violence, wife beating, rights of women and children, preservation of the environment etc.

Free Kenya started in 1963 as the land of hope and promise for the future. We had free and fair elections supervised by the colonial power prior to the hand over of power. Kenyatta and KANU won and due to his statesmanship, he was very soon almost venerated by all races, religions and tribes. Relations with opposition leaders were cordial. Many foreign settlers in Kenya who were calling Kenyatta a murderer, a leader unto darkness and death and who vehemently opposed his release, were now praying for his long life and happiness. He

was now the embodiment of life and justice in Kenya for all its population.

I personally felt that at last humanity had established a new nation of different races, religions and cultures who were proud of each other, where every man or woman could contribute his or her best for the good of the nation and where merit and ability would be the sole test to any position in jobs, business or development rather than tribe, religion, race or sex etc.

But sadly after nearly 40 years, we are in an even greater mess than before independence. Unemployment has reached phenomenal proportions and millions wander in the streets of towns and villages with thousands of street children looking for jobs and scavenging for food. There is a total collapse of industry. Coffee and tea production is declining, and the factories are in danger of civil strife and some have actually been destroyed by the people who own them. Foreign firms have closed down because of lack of financial and personal security and gone away. Foreign aid has ceased to come and Kenya has been branded as a corrupt country. Violence and crime and robbery on the streets and even in the sanctity of ones homes are the order of the day. No one is safe. No business is safe. Ethnic clashes allegedly inspired could be a rehearsal of more violence to come. Could Kenya ever be another Rwanda or Congo or Sudan or Somalia? I sincerely hope not. This Commission has been entrusted with the job, which ensures that we avoid that situation and present the country with a Constitution which will protect its citizens and develop Kenya for years to come.

Mr. Chairman, I think we are all agreed that we started Independence with generally a good constitution. It was deliberately tampered with until we became virtually a one party dictatorship, even with *mlolongo* style of voting and were on the verge of

disaster. We have moved a little back from that position by reinstating multi-party system and agreed to re-examine and produce a new constitution. But the appalling consequences of removing safeguards in respect of human rights, the electoral system, the judiciary, the police, the administrative system, the legal system, etc. which has created our economic collapse and breakdown of law and order must never be allowed to reoccur. We have seen, as we are afraid of, that by administrative action e.g. refusing registration of a political party or breaking up of political meetings, one can sabotage democracy and the rule of law.

## 5. The Remedies

What then are the necessary remedies? I believe that we could go back to the Lancaster House Constitution before amendments. But in the light of our experience, since 1963 our citizens and Parliament should be more involved in the running of the country. They are the final judges of Government's performance. There is no overnight cure or magic word, co-operation and a will to succeed is absolutely necessary. But we can put sufficient safeguards in place to make it more difficult for any one to flout the Constitution and the laws of the country.

### 5.1. The Constitution

I believe that the Lancaster House Constitution, before amendments, is a good start or a very similar constitution. I have nothing against a Parliamentary System with a titular President except what President Kenyatta remarked at Lancaster House (see above). In the light of experience and our knowledge of human behaviour, I would now prefer an Executive President, who would not preside at Cabinet Meetings. The President should appoint a Vice President who would chair Cabinet Meetings and be



the President's representative at most functions etc.

## 5.2 *Human Rights*

This is pretty comprehensive today, but I would like the freedom of information and preservation of the environment including forests etc in the Bill of Rights. It should be made extremely difficult to tamper with.

## 5.3 *Amendments of the Constitution*

We should make it extremely difficult to amend the Constitution - I believe a 75% of MPs eligible to vote is required to amend the Constitution, with 90% to amend the Bill of Rights. We should make sure that the Constitution cannot be made impotent by administrative actions, and the Courts would be obliged to act if the basic tenets of the Constitution are infringed.

## 5.4 *The Majimbo System*

If there are seven *Majimbo* there will be seven separate parliaments, seven taxation systems and officers, seven police forces, seven sets of District Officers, seven *majimbo* representatives in Nairobi with offices, secretaries etc. The country can ill afford such expenditure. The resources could be better utilized in economic development and creating employment. Without economic development revenue will not be adequate.

The separate *Majimbo* will have separate police forces, and as gangsters today are armed with even AK47 rifles and sub-machine guns, the police will be armed. When tribal clashes occur - and they cannot be permanently avoided, the police, now armed, will support their own *jimbo*, which will be basically their own tribal unit. This could easily become a warlord society as in present day Somalia.

I would not recommend *Majimbo* today. Perhaps more devolution of power to District Administrators and Councils with the assistance and guidance and support, but with minimum interference, from the Executive.

Further, all the district and urban councils in each of the seven provinces should have restored to them all the powers taken away from the elected representatives by the Government and given to the Ministry of Local Government. I would also encourage them to arrange quarterly or even monthly meetings of all Mayors and Chairmen of Councils and Chairmen of Committees at their Provincial Headquarters so that they can liaise and discuss problems that are common to them.

## 5.5 *The Judiciary*

Public perception of the Judiciary is at present at a low ebb. I am advised that one reason for the sharp rise in the incidence of lynching is that the public believe that merely catching thieves or other criminals and handing them over to the police is a waste of time. It is said that within no time the thief or criminal is back at his game after a few notes being exchanged with the police or even the magistrate. Even judges are no longer respected for their integrity and this perception is supported by the judges themselves. Only a few weeks ago, a very senior judge of the highest court in the realm, called the press and television to announce what was clearly understood to be an allegation of corruption against his two equally senior judges in the highest court of Kenya.

As the written Constitution cannot forecast and cater for all contingencies, a lot will depend on the ability, integrity and impartiality of the judiciary. In addition to the interpretation of the Constitution or any ambiguities in the law, in deciding the

validity or otherwise of all elections from that of the President to the most junior elected members of any council, or the validity or otherwise of the actions of the police or the attorney general or the government etc., or the validity or otherwise, of any Act of Parliament, the Judiciary is the country's final arbiter.

This Judiciary is the king pin of society. It is in the last resort the protector of our citizens. It functions along with the Executive and Legislature to run the country. It is also the arm of society most open to corruption or influence. If judges are corrupt our basis of an honest, efficient and fair society collapses. We must examine and cater for their appointments, promotion, salary, suspension or dismissal etc. Some suggestions in this regard are:

- (a) I believe that all Judges must declare all their assets - personal assets as well as that of their wife or wives and children, on appointment and after every year. After all they have to declare their assets and sources of income to the Income Tax Department if so requested. There was, until recently, a senior judge who lost gambling at a Casino in one night what was more than his month's official salary!
- (b) Judges must not take part in business of any sort. If they have a share in business these should be declared and placed in Blind Trusts as in America. I personally know of one Chief Justice who would adjourn in the middle of a hearing in Court when he heard that one of his several buses had a problem. He also had a map in his office with pins that pin-pointed where each of his buses were at that particular time. I know of another judge who would invite an advocate during the hearing of a

case, give him some coffee and tea and ask him why the advocate's company or client did not buy paints manufactured by the Judge's company. It was an opportunity too good for the Judge to overlook and very embarrassing for the Advocate and/or his client.

- (c) Judges should be paid very well - so that there is no temptation to take bribes to meet family expenses etc. Their emoluments to be fixed by a non-political Standing Committee, which reviews them yearly.
- (d) Appointment of Judges, in my opinion should be made as follows:
  - (i) Names of prospective Judges should first be vetted by a Judicial Service Commission (JSC) comprising seven members i.e. The Chief Justice, one senior judge appointed in rotation. Chairman of the Law Society, and one Senior Member of the Law Society appointed in rotation, a Member of Parliamentary Judicial Commission and two Professors of Law one from Nairobi University and from another University. The JSC must first see that the proposed nominee is an experienced lawyer with at least 12 years in practice or on the Bench as a Magistrate; that he or she is a senior and successful practitioner, has an unblemished reputation and has never been engaged in any fraudulent or undesirable activities.
  - (ii) His name along with others considered suitable should then be submitted to a Parliamentary Judicial Commission (PJC) who will note the recommendations and then interview him or her. The PJC should comprise at least 15 members of

whom eight would be from parties in the opposition in proportion to their numbers in the House. The PJC would particularly wish to check whether his judgements showed bias towards any tribe or religious group etc. It will also inquire about his past political activities and of his connections with any member of the Government or of any Member of Parliament or any businessman in the country to ensure that he cannot be influenced. There must be at least 60% support for the applicant.

(iii) The Judge must then be approved by Parliament. If so required by more than 10 MPs, there would be a debate open to the Press.

(iv) Judges would retire at the age of 58 and there would be no extension of his term except with the approval of 80% of the Members of Parliament.

### **5.6. *The Electoral Commission***

Their qualifications should be the same as those for Judges. The Judicial Service Commission and the Parliamentary Judicial Commission would also vet the Electoral Commissioners. After all, we want the people who run the electoral system to be like the Judges we need and desire to have. They must also be outstanding in their profession, (but they do not need to be lawyers) honest and without reproach, incorruptible, who cannot be influenced or bribed and who will be our guardians of democracy and of the peoples' rights. The Electoral Commissioners must also declare their assets on appointment and yearly thereafter.

### **5.7 *The Police (which will include the C.I.D., Intelligence Services. GSU. etc.)***

The Police are appointed and paid by the country to be the main protectors of the rights of all our citizens. They must be impartial and fair in the exercise in their duty to ensure that all citizens can exercise the rights guaranteed to them in the Constitution and the law of our democratic society, including freedom of expression and of assembly. In particular, they should protect with all their power the right of citizens including politicians and Members of Parliament to meet the people, to ascertain their needs and their grievances, to explain to them their policies and their proposals to solve the people's problems. The last thing they should possibly do is to use violence against their fellow citizens and endeavour to suppress their fundamental rights. The public were shocked when they saw, the other day, the very police, appointed to protect them, savaging one of their Members of Parliament - a defenceless lady at that - who was trying to exercise her fundamental right of freedom of expression and freedom of association. The person or persons in Government who control and are responsible for the police actions are also elected, but not one of them condemned the action. In democratic countries such actions would be condemned even by the Government, an investigation ordered and the guilty ones suspended and/or charged.

It is obvious that we have not got the right police force and the present method of recruiting them; especially their senior officers has failed. I believe that the strict and overt procedure for appointment of Judges should also be applicable to the police, so that they are more competent, honourable, fair and just and accountable to the public and parliament for their actions. We should appoint a Police Service Commission consisting of seven members: two from the Police, two from the Parliamentary Police Commission, one Judge, one from the Human Rights Society

in Kenya, and one Professor or senior lecturer in Social Science at the University of Nairobi selected by the Parliamentary Police Commission.

The Police must also declare their assets and sources of income on appointment and yearly thereafter.

### **5.8. *The Civil Service***

The Civil Service is the backbone of the Government whose officers are entrusted by the citizens to carry out the policies approved by the electorate after electing Parliament and appointing the executive. From the highest Permanent Secretary to the District Officer, and headman to the humble office messenger, their performance affects the country and its economic development. We must ensure that they are most competent, honest, impartial and non-partisan and diligent and hard working in carrying out their duties. In the colonial period, the Colonial Civil Service and the Colonial Legal Services, which began with District Officers, had to be post-graduates from Oxford or Cambridge Universities and after selection were given a year's course in familiarisation of their duties in the new appointment. I believe that, like the Judiciary, we should choose the best the country can give us, pay them well and demand the best from them especially regarding honesty and in impartiality.

I believe, that like the Judiciary, all Civil Servants from District Officer upwards should first be recommended by the Civil Service Commission with representatives from the Civil Service, Parliament, the Judiciary, Universities and one from the Civil Service Association (which should definitely be now allowed to function). Like the Judicial Service, the recommendation should then be submitted to the Parliamentary Civil Service Commission for confirmation. Parliament could over-rule

any proposed appointment. There should be full disclosure of their assets and income and they should now not be permitted to engage in business. The argument that if Civil Servants, MPs and Ministers were not allowed to take part in business there would be no competent Africans left to take part in business etc., no longer stands. The danger is that the Civil Servants besides spending too much of their time on private business activities, would compete unfairly against local business and also more available for contacts etc., facilitating corruption.

I shall also state here that some of their more archaic and dictatorial powers inherited from the colonial rulers should be immediately abolished e.g. the Registrar of Societies' power to refuse to register societies including political parties and to cancel registration at will; the reason sometimes given that they are a danger to security is also a legacy of the colonial past. Another power retained from the worst era of the past, at the beginning of the Emergency i.e. the power of the Registrar to ban newspapers or require a very heavy cash security deposit, or to savage and dismantle any printing press to stop it publishing "subversive" publications should also be removed. Where danger to security is claimed as an excuse, a Court Order from a High Court Judge should first be obtained. In any event, appeals must always lie to the Court of Appeal and/or the Parliamentary Civil Service Commission.

### **5.9. *Parastatals***

Parastatals have often been used as a dumping ground for failed politicians of their party or friends to keep them as supporters and perhaps to use them again at the next general elections. These directors are usually totally inexperienced in the business they have been given. Neither their expertise nor their integrity has been fully apparent. What is known is their former

allegiances and the obvious sense of gratitude for being given plum jobs at difficult times in their lives. Whereas some have been successful in their new jobs there are many who have run the parastatals so badly that fortunes have been lost. In Banks, for example, they have given large loans which are termed "non performing" i.e. that they hardly ever repaid the loans or interest and perhaps never intended to do so. This could be with the knowledge and connivance of the Bank's management and the bank hardly ever filed a suit or took any serious steps to recover the loan usually to very important persons, but instead tried to take steps to write off the entire loan. When the Bank's net worth then fell, the Bank hoped and expected that the Government would eventually give a grant or soft loan to make up the loss. It therefore drives us to the conclusion that these loans were meant to influence the recipients concerned.

As parastatals are partly owned by Government and may cause loss to the country's exchequer, we should set up the same standards for their senior staff's appointment etc. as we do for the Civil Servants, Police and the Judiciary.

### **5.10. Parliament**

Parliament is elected by, and directly represents, the peoples of the country, should itself set an example of incorruptibility, moral rectitude and fairness. The power of Parliament to set its own wages etc. is an anachronism. There is a clear conflict of interest in this decision. It has been effectively abolished even in the U.K. A special committee to advise on salaries, allowances and other emoluments, comprising of members of both parties as well as accountants from at least three internationally accepted firms of accountants and at least two members from the University representing tax payers or civil society would recommend the correct

payment to Members. In other countries e.g. U.K. such committees decide even the salaries of the Queen or Heads of State or Government which are liable to tax.

#### *(a) The Parliamentary Standards Committee*

The Parliamentary Standards Committee should be appointed with a former High Court Judge as Director, to investigate and report on the extra-curricular activities of Parliamentarians especially on their private incomes etc. Members will also submit to this Committee a list of their assets and sources of income at their election and yearly thereafter. Members of Parliament and the Public will be entitled to report any Member or any conduct by any Member, which in his or her opinion will lower the image of Parliament and/or bring it into disrepute. The Committee would investigate and report to Parliament if any Member has breached the acceptable standards and Parliament will then take suitable action against the errant Member.

#### *(b) Nominated Members*

The concept of Nominated Members, which was originally asked for to represent minorities and/or special interests, who would be independent and non-partisan in politics has outlived its usefulness and is also an anachronism. Special Interests and Minority Interests could be sufficiently represented in the House of *Wazees* in Parliament.

In order to function properly each Parliamentary Commission should have separate and adequate offices and accommodation and staff. In particular they should have competent research officers preferably from universities and at least graduates in law and/or economics and politics or journalism. These research officers should be committed persons who

wish to see that proper democracy, justice and fairness are introduced into the country and they should be adequately remunerated with allowances etc. for transport, telephones, housing etc. As in Europe and the U.S., these research officers (or research assistants as they are called in the U.K. or aides as they are called in the U.S.A.) will often be important leaders for the future of the country.

### **5.11. *The Attorney General***

The Attorney General has two distinct and often conflicting functions. He is appointed by the President (who is himself fundamentally a politician and head of a political party), he is a Government Minister and he sits in Parliament in the front Government Bench and therefore feels he has to support Government policy, even if he cannot be sacked. In practice he can be harassed and made to resign if the Government so wishes. He also advises Government on the law, draft legislation for Government, which may possibly be very contentious and strongly opposed by the opposition. He is also in charge of the Registrar General's Office which includes the Registrars of various departments. His appointment is also closely connected with the Judiciary and he has tremendous *de facto* power as regards to their appointments, transfers, housing, leave etc. He is also a Civil Servant in charge of prosecution - with the very important task of deciding whether or not to prosecute any person for an offence, or to give him a warning, or to decide there is not sufficient evidence to prosecute him. This is a very subjective decision and his status in Government could affect his decision, and to decide the degree of gravity which he should be charged with.

In my opinion, the office of the Attorney-General should be split into two. There should be a Minister for Law or Legal Affairs or Minister for Legal &

Constitutional Affairs if there is a problem of status. He would be appointed in the usual manner from his party and would presumably be a lawyer, (but Tom Mboya who occupied that position performed exceptionally well even though he was not a lawyer - but then he was an exceptional man). He would be the legal adviser of Government, he would supervise drafting of new legislation and amending old legislation, he would liaise with the Judiciary and the Attorney-General, but both the latter would be completely independent of the Government and be non-partisan, and be clearly seen to be non-partisan in their functions.

The Attorney-General would, I repeat, be a non-partisan Civil Servant and the Director of Public Prosecution. He would not be a Member of Parliament or a Minister. As not being connected with the Government he would take his decisions independently, and the fact that he is not responsible to the President for his appointment, could make it more easy for him to take his decisions without being influenced by any political colleagues. He would be in charge of the Official Receivers Dept, the Trustee Dept, the Bankruptcy Dept, the Registrar of Births & Deaths, of Marriages and most important the Registrar of Companies, of the Press and Newspapers, of Societies etc. (Please note that in this and other matters I am not referring to or discussing the present incumbent or his predecessors, but only making suggestions for inclusion in the new Constitution for the future).

### **5.12. *Corruption***

I believe the most difficult task of your Commission is to recommend measures to wipe out corruption in this country. If corruption is not seriously tackled, this country will continue to slide downwards to levels I don't wish to contemplate. In any case, if corruption continues on its present

scale all the laws and constitutions you draft will remain bits of printed paper - it will be the size of the *CHAI* or *TKK* that will be effective in making decisions.

The problem about corruption today is that it is almost universal and has seeped into the body politic and into our psyche. Even the smallest messenger or guard in a Government office demands *chai* or donations (for which receipts books for collection for the benefit of relatives are readily available) before he shows you the lift or the door of the official you have come to meet.

The saddest part is that it seems to be accepted by the public at large. Everybody and everything has a price, and they are willing to pay the price if they can afford it. Ironically, the complaint is openly made, that the particular minister or civil servant did not give more jobs to people from his home area, or that he did not make more money to help his home area and his tribe or clan.

By corruption, I am not referring merely to the traffic policeman who stops you on the road and asks you to stop on the side of the road to find some excuse to take you to the traffic police headquarters etc., and demand his *TKK* when he is seated in your car, but to the scams appearing almost daily in the papers where hundreds of millions of shillings of public funds or of large companies are embezzled every day. In one case, it is alleged that hundreds of millions of shillings (and foreign currency) were taken in suit cases from certain offices of a Government Department I cannot name. A Senior Resident Magistrate complained at one time that it had taken several years for the competent authority to decide if a prosecution should be instituted against an individual banker and his accomplices. The matter has still not been concluded and we

do not know how many of his accomplices if any, were not charged.

But even educated friends have told me that it is all right because he has now changed to the right religion or that he has now organised a charity for street children. In yet another case of a Banker who has absconded from the country after allegations of massive fraud being levied against him, I was told again by advocates and accountants who should know better, that he is a good man because he has contributed to his particular religious house and goes there every day to pray. When leaders talk against corruption they usually talk about corruption by others who have the power or opportunity to do so. Their main objection is that they have not also been given an opportunity "to eat".

I believe that the massive looting of public funds, euphemistically usually called corruption, is one of the main causes for the massive increase in crime. Not only does this looting result in less money available to the Treasury which in turn causes tens of thousands of civil servants losing their jobs and with their friends almost homeless and displaced. It also brings down the economy and causes a depression with further loss of jobs etc. More important my friend and colleague, Mr. James Nyamweya used to say many years ago,

"those who can play the system do so and become rich and have a lavish life style. Those who are not in the system or are not well placed or intelligent to play it find they are left behind the "successful" members of their family or villagers or clan." Their wives point to these "successful" people and ask why their husbands cannot also afford the same standard of living - and so those who have less brains are driven to use their brawn and resort to violent crime etc."

I am now convinced that this is one of the forces behind the crime wave, which is pushing the country further down and driving away tourists and foreign exchange, which again deepens the depression that we are facing. The moral principle of uprightness, honesty and incorruptibility has eroded by society and are never caught and charged or even asked to return their ill-gotten gains. Before we blame the World Bank we should clean our own house. We are a rich country and if we did not have massive corruption we would not need hand-outs from foreign donors even to survive.

## **6. Conclusion**

I know the Chairman and Members of the Commission have a very difficult job to do, some would say, it is almost an impossible job. The Commission will be under pressure from all sides. Perhaps you will merely try

to find a compromise solution that will please most of the parties. Permit me to state that your job is to find a lasting solution for our problems today that will put us back on the rails, with corruption almost wiped out (I concede that it can never be totally wiped out), with confidence restored for renewed investment in our country, for law and order to be restored and crime reduced to acceptable levels, so that our citizens can work in peace and harmony, with no fear for the lives for their families or their jobs. With security and contentment they will proceed to develop our country and our national wealth, by increasing production in industry, agriculture, tourism etc. so that future generation can look back and say that this Commission and all its members did the country proud so that we are once again a country of happy people "respected and loved by all.

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## BUILDING ON THE LANCASTER HOUSE EXPERIENCE

**Hon. G. G. W. Nthenge**

**Former M. L. C. Machakos, and Former MP. Iveti South and Kamukunji Constituencies**

### 1. The 1962 Lancaster House Conference:

The above Conference was held because Kenyans, Africans in particular, for over 50 years were objecting to being a British Colony. Finally the British government decided to invite to Britain all members of the Kenya Legislative Council (M.L.C.S) to discuss fully the matter.

Kenya's Legislative Council then had members who belonged to various groups whose political beliefs were very different. These were:-

- (1) Colonial civil servants - Europeans
- (2) Elected members by:-
  - (a) Africans ( anti-colonialists)
  - (b) Asians (50-50)
  - (c) Europeans (British - for colonialism)

The African elected M.L.C.S were from KANU and KADU whose political beliefs were very similar. Their differences were on methods of approach and individual behaviour.

Before we Africans went to London for the Conference, KADU and KANU were called by Mr. Kenyatta and agreed in principle that their aim was the same. Later Kenyatta joined KANU. All the parties including Asians and Europeans met separately to discuss Kenya's future.

The KANU Secretary had made many press statements saying that KANU wanted a unitary government. KADU had made statements that it wanted a Federal

government. Many closed door meetings were held by each party. Finally they invited constitutional lawyers for advice. We in KANU had agreed on what we wanted in principle, which was we wanted power to be shared by many. KADU as well had arrived at the same ideas but we did not compare notes till we met at Lancaster House in London.

KANU's proposal was that some power be given to districts. KADU's proposal was some power should be given to provinces. After a discussion we all accepted to give power to provinces in the name of regions.

The conference had many advising lawyers from all groups. In the conference finally all agreed to give power to:-

- (1) Senate comprising of one elected person in each district
- (2) National Assembly with more elected members in consideration of both population and area.
- (3) Regional Assemblies with elected members from the region.
- (4) Local Councils without much power but deriving their powers from Regional Assemblies.

The first African government was formed on return by both KANU and KADU. That government prepared for the 1963 elections. On return, Members appointed by both parties became Ministers and Assistant Ministers.

Dr. T. Towett and I with other MLCS formed a KANU/KADU opposition to make

the KADU/KANU government work. Dr. T. Towett became the Secretary and I became the Chairman and leader of the opposition.

## 2. Changes to The 1962 Lancaster Hose Constitution.

The 1963 election used the 1962 Lancaster House Constitution. The Constitution was practiced for about 3-4 years. Due to selfishness of a few leaders and pride, the Constitution was changed reducing power from many to a few if not one person. It happened that then I was a member of the Electoral Commission, from Eastern Province. We in the Commission were instructed to create an extra constituency in each district to accommodate the senators who were each representing a district. The regional governments and the Senate were then done away with. The life of National Assembly was added one more year.

Why was the 1962 Lancaster House Constitution good ?

1. It gave power to many for power is tempting and it corrupts
2. Many persons were employed
3. There was fair regional competition that would have developed Kenya
4. It would have made the Nation grow gently and tribes finally would have developed friendship and great understanding
5. The potentiality of (various) all areas would have been exploited in each region.

I was a great supporter of 1962 Lancaster House Constitution. I am still a great supporter of it with minor amendments, and without changing the basic principle of power to be shared by many. KANU and KADU in this respect differed in terminology and in individual pride and selfishness.

## 3. Proposed Amendments

The amendments I would like to see in the 1962 Lancaster House Constitution among others are:-

### 3.1. Government Structure

- (a) status of parliamentary candidates to be raised greatly
- (b) no member of Parliament to serve beyond four terms
- (c) no President to serve beyond two terms
- (d) a Senator should be over 50 years with good leadership record and should serve for no more than three five-year terms
- (e) Members of Regional assemblies should be over 35 years with two other positive qualifications and serve for not more than four terms.

The positive qualifications to be considered among others are:-

- (i). Education
- (ii). Leadership
- (iii) Honest wealth
- (iv) Experience
- (v) Wisdom
- (vi) Acceptability

### 3.2. Land

Reduce the number of individual large farms. Reduce individual small farms uneconomically used. Join them into large cooperative farming managed by highly qualified persons for proper scientific farming. Non-Kenyans to lease land for not more than 40 years.

### 3.3. General

- No *harambees* except to government by way of taxation and proceeds be for all in the nation.

- Leadership should be by those who declare wealth obtained fairly.
  - Extra rich persons without proper accounting to pay that extra to the government.
  - Those who have worked in government in any capacity and enriched themselves to return the wealth to government.
  - Ministers be appointed from all areas of the country.
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## BUILDING ON THE LANCASTER HOUSE EXPERIENCE

**Hon. Joseph Martin Shikuku, EBS**

### 1. Short History of the Kenya Constitution:

Before independence, Kenya was a colony of Britain and it was governed and received its orders from Whitehall in Westminster Abbey. Such orders from her Majesty's Government were sent to the Governor of Kenya, who in turn passed it to the Provincial Commissioners, District Commissioners, District Officers and colonial African Chiefs. The Kenyan people were never consulted nor their approval sought.

As a result of the above, the armed struggle for independence ensued, and on 20<sup>th</sup> October, 1952 Sir Evelyn Baring declared a state of emergency. The said emergency ended in 1950. In 1962, the then governor with all the elected and specially elected members of the Legislative Council left for London to attend the Lancaster House constitutional talks and for the first time, agreed on a Framework Constitution.

#### 1.1. Points of Agreement Between KANU and KADU:

- a) Both parties were sick and tired of being governed by colonial government which was 4000 miles from Kenya namely, White Hall.
- b) Kenya should be independent.
- c) Kenya would become a member of the Commonwealth.
- d) After serious negotiations it was agreed that we have a Majimbo Constitution (federal government).
- e) That power from the center to be transferred to the regions with all possible speed, the departments and services which were still remaining

in the center to be handed over in accordance with requirements of the Framework Constitution agreed by both parties in 1962.

- f) The greater part of this transfer would be effected on December 1963 and the remainder was to be completed by 1st January, 1964.
- g) The report of the Conference together with the Secretary of State's statement, the text of Mr. Kenyatta's letters and full particulars of the constitutional changes were published as a White Paper (Cmd 2156 HMSO 1S6d) on 21st October, 1963.
- h) The above can be found in Kenya Independence Conference 1963.
- i) The date of independence to be 12th December, 1963

#### 1.2. Why Majimbo Constitution?

In 1963, a regional, then known as *Majimbo* type of Constitution was agreed upon by both parties. This is because both parties namely, KANU and KADU were opposed to being ruled or governed from Whitehall where all the power was centred, and opted to govern themselves through a system that de-centralized the power from the center to the regional assemblies and to ensure equitable distribution of the country's resources.

#### 1.3. Why was Majimbo Constitution Scrapped?

The argument at that time was that if the *Majimbo* Constitution was implemented, it will bring disunity and tribalism. This was not only untrue but deceitful. Today there is not a single informed man or woman unless

he is a liar, hypocrite and a fool who can deny that there is no tribalism and disunity, yet the *Majimbo* Constitution for all this years was not in operation. To elaborate, one only needs to look at the independence Cabinet, appointment of Permanent Secretaries and other strategic arms of government, to realize that such appointments were based on tribalism.

Of course the present government is following the "Nyayos" of the previous government.

#### ***1.4. Why has Unity and Abolition of Tribalism not been Achieved?***

It is because the leaders preached against tribalism when they actually practiced it. The leaders advocated for unity yet after 38 years of independence, we have not achieved it. There can only be one reason; namely, they preached drinking of water while they themselves drank wine, for actions speak louder than words.

#### ***1.5. The Review of the Present Constitution***

All agree that the present Constitution requires review because all powers are centralized and we all complain that there is too much power in one man's hands. I must however, point out that the said Constitution is not the one we came with from the Lancaster House because when Kenya became a republic on 12th December 1964, the Lancaster House Constitution was so much amended between 1965 and 1967. All the powers that had been decentralized were again centralized hence the present problem.

## **2. What do We do to Change the Situation?**

### ***2.1. Truth***

Time has come when the leaders of this country stopped being liars and hypocrites and embraced the truth for the truth is God and God is the truth. For it is written "seek ye the Truth and the truth shall set you free". For without truth there will be no justice, there will be no love and above all, unity.

The future Constitution should be based on the 1963 independence Constitution because the said Constitution had checks and balances and all we need is to review that Constitution, amend parts that are no longer necessary and add parts that we feel will make it more workable. For instance, we cannot overlook the fact that Kenya is made up of 42 tribes and this must be included in the Constitution as a fact and must be accepted because it is the truth. The 42 tribes should be looked upon as equals, be they big or small and the bigger ones should not attempt to swallow the small ones by grabbing their land or properties. And whoever thinks that he can fool the *Wananchi* of Kenya, will find out that he will be fooling himself.

Yes, there is the talk about the new generation. Is it not true that even at our higher learning institutions, groups of tribal affiliations like the Kikuyu Student Associations, Luhya, Luo Kamba etc are formed. We must accept this ethnicity and look at India, where they have more tribes and borrow a leaf from them on how they manage their tribes and cultures - yet India is the greatest democracy in the world. Let us look at Britain where the Scottish, English, Irish and the Welsh etc co-exist. Let us stop being hypocrites.

The Constitution of Kenya must include the following - truth should be our guiding light, and also to include the important saying 'In God we Trust'.

### ***2.2. Participation of Mwananchi in the Review of the Constitution***

For *Mwananchi* to fully participate in the review of the Constitution, he/she needs to be educated on the contents of 1963 Lancaster House Constitution and the present Constitution, so that he should be in the position to review the said Constitution. The question is "how do you review what you do not know ?

The only alternative would be the lawyers and other learned professors to review it which will render it not a people driven constitution, but that of the academics because they were not elected by the people.

In the Lancaster House Constitution discussion, we had political leaders who designed a suitable Constitution based on the gathered views from *Wananchi*, and the lawyers then put these views in legal language. There were only three lawyers, one for KANU and one for KADU then one from the colonial office. If one looks at the USA Constitution which has withstood the test of force, was made by the simple folks most of whom were farmers.

### **2.3. *Appointment of the Cabinet and Public Officers***

To curb the present tribalism in appointment, all appointment must be approved by the Senate.

### **2.4. *System of Governance***

So far we have opted to adopt the Westminster type of parliamentary system where people elect one amongst them to represent them in Parliament. Henceforth the member of Parliament becomes the spokesman of the people for a term of five years. But today, it appears having elected a member of Parliament, there appears to be other leaders being equated to elected representatives in the name of spiritual

leaders, wome rights champions, youth leaders, lawyers, disabled representatives, NGOs etc.

It is my considered opinion that all these categories other than the elected representatives have a right to have their views taken into account. The spiritual leaders for example, have a right to air their views but such views can be channeled through their elected representatives for they also vote. The same applies to other categories named above. But it is upto the people to decide on who should represent them. However when one meets the required qualifications, one should be legible to stand for election and the people should be the deciding factor. Privileges should not be extended to anyone.

### **2.5. *Dissolution of Parliament***

A clause must be included in the Kenya Constitution to amend that section that gives the power to the president to dissolve parliament even before the end of five year term. We should adopt the United States system whereby the Constitution shall provide a term of five years and parliament on the fifth year, in a certain month of that fifth year, elections be held.

### **2.6. *Discrimination***

No one should be discriminated against because of one's sex, colour, size, religion, education, or age.

### **2.7. *Corruption***

No country in the world can prosper with corruption and being a serious subject, we must find a place for it in the Constitution whereby this serious disease can be taken care of. And all leaders from the councillor to the President must declare their wealth and also explain how they acquired such

wealth before being elected to take up a public office.

### **2.8. *Election Expenditure***

This should be restricted by the Constitution as to how much one should spend on an election so as to give a chance to those with less finances to be elected and hold public office. Failure to do this, Kenyans will be governed by the rich whose wealth was looted from public office. After one's term, declaration of wealth should be again be made when seeking re-election.

### **2.9. *Expectation for Leaders***

- a) One must be morally upright.
  - b) One must not have engaged in corruption, bribery or money laundering.
  - c) Someone capable of managing ones financial matters e.g. should not be fail to pay or meet financial commitments.
  - d) One who has not looted the wealth of the nation .
  - e) One who was involved in murder .
  - f) A leader who is not a liar and hypocrite.
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## BUILDING ON THE LANCASTER HOUSE EXPERIENCE

**Hon. J. J. M. Nyagah**

### 1. Introduction

You unlike us are not in London (Lancaster House) but in Nairobi the capital of Kenya Republic – our beloved motherland. You may want to know: why did we have to go all the way to London; what compelled us to hold such conferences; and what were the consequences of the outcome of those two major conferences? You may want to know from whom and on whose mandate did we go to those conferences; who chose the participants for the conferences; etc.?

### 2. The Mandate of the Lancaster House Conference

First let me begin with the mandate aspect of it and who chose the delegates. The compelling mandate stems way back way back to the time of the British colonization of Kenya.

Then the seemingly selfish and arrogant way, the colonizers did allocate nearly all the administrative powers of the Government to themselves; and also the way they discriminated any of the native's (African) contribution as to how Kenya should be ruled/administered in all human aspects of life e.g. In agricultural lands and produce; in provision of education, health, commerce facilities in enjoying human social amenities (in hotels, traveling facilities, housing localities, etc).

Why did we go all the way to London? It is because any attempt to hold such remedial discussions in Kenya or in any of the neighbouring countries (e.g. Uganda or Tanganyika) were sabotaged by the colonial office delegates by their listening too much to the views of the white European settlers – in their powerfully controlled so called

“white highlands” (for European farming only), towns (e.g. Nairobi, Mombasa, Nakuru, Eldoret etc) all favouring foreigners – Europeans and Asians and in some cases Arabs.

Who delegated to us the powers to be the people's liberating agencies – both locally and abroad – and also how did we know what were the peoples desires in the country's (then) present and future legal and administrative governance?.

The African were particularly enlightened by the following experiences:

- (a) The selfishness of the Kenya colonizers (rulers and their protected white farmers/settlers and businessmen of foreign origin) and this compared to other neighbouring African so called colonies, or protectorate or even mandated.
- (b) The Kenyans conscripted to fight in the world wars for their ruling British masters in: e.g. -
  - The world war I (1914 – 1918) in Tanganyika, and
  - The world war II (1939 – 1945) in Africa, Europe and Asia

They thus came into contact with other educated parts of the world. This helped the Kenyans to be enlightened as to what and how their political demands should be expedited.

- (c) The British Colonial Government under the biased influence of their fellow countrymen (who were in minority population – wise: but most powerful in



dictating what the Government of this country should be like) would not listen or harken to the genuine demands of the African natives of this land. Instead the colonial government structured the following order of human merit:

- 1<sup>st</sup> Order: European ;
- 2<sup>nd</sup> Order: Asians;
- 3<sup>rd</sup> Order: Arabs (and a few Somalis), and
- 4<sup>th</sup> Order: Africans (the natives of Kenya).

The African political protest or otherwise against all this was not heeded to by the colonial government.

It was not until the end of the 2<sup>nd</sup> world war that more Africans became enlightened politically and educationally. They came out of the warfronts with practical ideas of what it means to be one's country's master in the government. Their education, observation and experience abroad made the Africans to demand their right even more vigorously. That way then, the need to struggle more physically for *Uhuru* came into prominence, rising to *Mau Mau-ism* of the early 1950s which led the colonial government to declare a state of emergency in Kenya – starting in October, 1952. This confrontational activity took about 10 years. Many Kenyans were then put into prisons and detention camps, and those out were subjected to obhorable village life which was strictly supervised, unwarranted restrictions e.g. curfews, killings etc. Those whom the government thought that they were their loyals, were also not amused by that kind of government of the people. They eventually also joined in the struggle for *Uhuru*. Kenya as a whole was to be liberated wholesale from the *Mkoloni* – not on the tribal considerations, but as one nation.

It was as a result the African determined struggle for freedom – and incidentally the

African cause was supported by some others not necessarily Kenyan natives, but also by those others from Africa, Asia, Europe and America – that the British harkened to the African demand for a change of their system of administration.

First, they allowed Africans to be somewhat directly elect into the Legislative Council in addition to the few nominated/selected Africans by the British Colonial government. The first batch was elected in 1957 under a kind of weighted – franchise. This then saw the first 8 African Members of the Legislative Council (MLCs) (who included the current President Daniel Arap Moi) elected. Then about a year later (in 1958) an extra batch of 6 was allowed to be elected – thus bringing the number to 14 (fourteen). Today we have only 3 of this 2<sup>nd</sup> batch living.

The African population, which was in majority, was represented by fewer MLCs than the total number of others – Europeans (13), Asians (5) and Arabs (2). These MLCs elected group of non-Africans had in addition to their number quite a number of racially government nominated MLCs. They were therefore in the majority.

In view of this the 14 African MLCs decided to unitedly strengthen consolidatedly our demanding power for our right to have Africans increased and to be in majority, and through our organization, which we called AEMO (African Elected Members Organization). We did it this way until the sight of our political determination was within view, for we knew that an effective fighter of those enemies must be an *educated* and *healthy* person in order to conquer *poverty* effectively.

### 3. The Results of the Lancaster House Conference

What then did we come out of the Lancaster House Conference with? First, with a constitutional content that guaranteed fair play to all – not discriminative to any *mwananchi*; one that guaranteed every *mwananchi* his/her human rights regardless of age, gender, social status, tribe, race etc.

The government was to be national and non-discriminative. We endeavoured to do so at first but later we started amending it – sometimes not well, or for good reasons.

We started with two chambers of Parliament viz; a Senate (a check point in a Senate of 41 members) and a Legislative Chamber of National Assembly. After a time when we realized that we were all heading towards our national avowed goals of governing ourselves better than the *Mkoloni*, we did away with the upper chamber (the Senate) and we named the legislative lower house a Parliament. We went on reasonably well to develop a Kenya of our desired socio-economic goals– so much so that we had the great honour in celebrating the 10 great years in 1973 when we had more or less fulfilled the majority of our self-governing objectives.

I am sorry to say that now when we look back on our almost 40 years of *Uhuru* we notice that it was during our first 10-15 years that we fell victims of several constitutional amendments which in some cases tended to land us to where we regretfully are today - not quite happy with the situations in the country.

#### 4. Conclusion

The current constitutional review exercise entrusted into your hands, therefore must truly and effectively reflect the practice of democracy - “the rule of the people, by the people and for the people” It must also reflect the parliamentary slogan on the top of the entrance doorframe of the main

Chamber, which reminds our MPs their duty to the country: of their endeavour to do: “their duty to God and the country, and for the good of the people; and the just government of men”.

This will not only affect MPs’ duties but all those entrusted with the running of the affairs of this country – from the lowest rank (all of the civil service officer) to the top (the Presidency) and also a free and just legal wing. This review should reflect the wishes of the Kenyans without prejudice. This civil service and others must not take any changes that might be proposed and/or recommended to be a slight on their past/present as a condemnation or lack of appreciation on their part as partners in the service of our nation. Your result should come out with the proposals to help Kenya revive positively their original legacy of “*Uhuru na Kazi*”, and a Kenya of Peace, of Liberty, United, Free and Prosperous.

Transparency, hard work and honesty should be the goal of every Kenyan nationalist.

## SUCCESSION AND TRANSFER OF POWER

**Hon. George M. Anyona, MP – Kitutu Masaba (KSC)**

### 1. Political Succession and Democracy:

#### 1.1. Meaning of Succession

- (a) Transfer of the instruments of Government by the incumbent and outgoing President, Prime Minister or both, as the case may be, where there is change of incumbency after elections.
- (b) Transfer of the instruments of Government to the incoming President, Prime Minister or both, as the case may be, where there is change of incumbency after elections.
- (c) Retention of the instruments of Government where there is no change of incumbency after Elections.

#### 1.2. Scenarios of Succession

- (a) Transfer of the instruments of Government between incumbent or outgoing President, Prime Minister or both, as the case may be, where there is change of incumbency after elections-
- (b) Transfer of the instruments of Government between two political parties where there is a change of incumbency after elections.
- (c) Transfer of the instruments of Government between President, Prime Minister or both, and between a coalition of political parties, as the case may be, where there is change of incumbency after elections.
- (d) Retention of the instruments of Governments by President, Prime

Minister or both, and between two political parties or a coalition of political parties, as the case may be, where there is no change of incumbency after elections.

- (e) Transfer or retention of the instruments of Government after a judicial process where there is electoral dispute or stalemate after election and petition.

#### 1.3. Meaning of Democracy

- (a) System of Government by all the people of a country as in the ancient Greek City States of Athens and Sparta.
- (b) System of Government by a Council of Elders or Guardians based on Consensus as in some Traditional African Societies.
- (c) System of Government by all the people of a country through elected representatives as in modern Nation States.
- (d) System of Government by all the people of a country with the active involvement and participation of the citizenry in the process of governance.
- (e) System of Government that allows and guarantees the exercise and enjoyment of freedom of assembly, association, speech, religion, political opinion, rule of law and respect for majority rule and minority rights as basic principles of Democracy.
- (f) System of Government, in an egalitarian society, where all citizens are equal without negative social

divisions based on ethnicity, nepotism, sectarianism or tribalism.

- (g). System of Government where the allocation, deployment, exploitation and enjoyment of national resources and public services is equitable and in the interest of social justice.

#### 1.4. Forms of Democracy

- (a) Direct Democracy as in the Greek City States.
- (b) Democracy by Consensus as in Traditional African Societies.
- (c) Parliamentary or Representative Democracy as in modern Nation States.
- (d) Participatory or Popular Democracy where the citizens take active participation in the process of governance.
- (f) Social Democracy as in Welfare Societies.

#### 2. Mechanics of Orderly Succession and Transfer of Power

- (a) Election Date(s) be entrenched in the Constitution-
- (b) Tenure of office of President or Prime Minister and Parliament be entrenched in the Constitution.
- (c) Elections be conducted in a fair, free and orderly manner.
- (d) Election results be declared and published in an open and transparent manner.

#### 3. Transition Arrangements in the Succession and Transfer of Power

- (a) Caretaker administration of the outgoing Government within sixty days.
- (b) Formation of incoming Government within thirty days after the elections

- (c) Commencement of a session of Parliament within fifteen days after elections.
- (d) Vetting proceedings of the incoming Cabinet and senior Government officials (public service, judicial service, foreign service and military service) by Parliament as soon as nominations are made.
- (e) Installation of the incoming Government (swearing in of President, Prime Minister, Cabinet Permanent Secretaries, Ambassadors and Military Chiefs).
- (f) Administration of Oath of Allegiance by the Speaker(s) of the National Assembly, the Chief Justice, the Judges of High Court, Court of Appeal or Supreme Court (as the case may be).

#### 4. Post - Incumbency

- (a) Guarantee and protection of the retirement benefits and rights of retired President, Prime Minister, or Ministers (allowances, pensions, residence, security, traveling, etc.) as the case maybe.
- (b) Guarantee and protection of retired President, Prime Minister and Ministers against political embarrassment, harassment and persecution by the incoming Government.
- (c) Guarantee and protection of retired President, Prime Minister, Ministers in the enjoyment of citizen rights, including civil liberties and human rights.
- (d) Observance of all citizen obligations by retired President, Prime Minister, Ministers, including the due process and the rule of law.

## **SECTION TWO**

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### **SEMINAR ON THE INDEPENDENCE CONSTITUTION HELD AT THE AFC TRAINING CENTRE IN LANG'ATA, NAIROBI, FROM THE 27<sup>TH</sup> – 28<sup>TH</sup> SEPTEMBER 2001**

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#### **List of Presentations and Presenters**

1. “The Structure and Values of the Independence Constitution” by Mr. Githu Muigai;
  2. “The Politics of Constitutional Change in Kenya since Independence, 1963 – 69” by Prof. H.W.O. Okoth-Ogendo;
  3. “The Strengthening of the Unitary State” by Mr. Mutakha Kangu;
  4. “Amending the Constitution: Lessons from History” by Mr. Githu Muigai;
  5. “The Manipulation of the Constitution of Kenya, 1963-1996 : a Reflective Essay” by Prof. Macharia Munene;
  6. “Constitutional Development in Kenya: a Historical Perspective” by Prof.. Macharia Munene;
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## **THE STRUCTURE AND VALUES OF THE INDEPENDENCE CONSTITUTION**

**Githu Muigai**

**Commissioner, Constitution of Kenya Review Commission**

### **1. Introduction**

The Independence Constitution was a long, detailed, and highly complex document. It reflected the diverse positions taken by the parties who negotiated it. It was a less than perfect document. It sought to capture the fragile compromise that the parties had thrashed out at the Lancaster House conferences. It was also unfortunately, a document that the protagonists did not have much faith in, because of its failure to provide for their version of good government. In this sense it was inherently unstable.

In a very real sense however, it institutionalised, entrenched and legitimised the colonial political and legal legacy. More significantly, it provided the parameters for all latter discourse on the political future of the country - it had both political and legal significance.

First, it was a symbol of the fact of independence and the creation of a new state. Secondly, it provided a measure of legitimacy for the new rulers who had been associated with its creation and who had assumed office under it. Thirdly, It was an indication of national unity because it was contemporaneous with the formation of the new state and had been endorsed in principle by most of the political leaders at the pre-independence constitutional conferences.

The Constitution was essentially designed as a vehicle for introducing new values. The most important of these were the notion of constitutionalism, concerning the limitations of the powers of government and the assurance of the rights of the citizenry, and liberal democracy concerning the right of the majority to rule on the basis of free and universal suffrage. These value creating role of the Constitution was particularly important given the history of the colonial constitutional order

### **2. The Basic Principles**

The Constitution was based on two overriding principles,:

- (a) Parliamentary government and
- (b) The protection of minorities.

The scheme for the protection of minorities had a long history. At the Lancaster House conferences it had elicited the greatest controversy. Its inclusion fundamentally affected the structure of the Constitution. In a sense, it also introduced a serious contradiction because a parliamentary system by definition, is unitary and centralised while a federal system is fragmented.

The parliamentary system in Kenya therefore, started life in a severely modified form and the government envisaged by the Constitution was a weak one.

### 3. Basic Structure

At least in theory, Britain was bequeathing to Kenya the Westminster model constitution. In reality there were several major differences between the Westminster export model constitution, and the home model .

- First, the Independence Constitution was a written constitution invested with special legal sanctity. It was the fundamental or basic law, and any legislation or other administrative act inconsistent with it was deemed null and void and could be so declared by the High Court.
- Secondly, the legislature had a very central and critical role in the total political process. Special majorities were required to alter the Constitution or to introduce states of emergencies. Parliament could pass a vote of no confidence in the government.
- Thirdly, the judiciary which was to be manned by judges who enjoyed security of tenure, was to be the final arbiter in the interpretation of the Constitution .
- Fourthly, a bill of rights modeled on the European convention on human rights, against which all legislative and administrative action would be measured, was inserted in the Constitution.
- Fifthly, the civil service and the police were insulated from

political pressures. They were controlled by the Public Service Commission and were not required to take any advice in the discharge of their duties .

- Sixth, the Constitution assumed that there would always be an opposition party in the legislature which was to be consulted whenever changes to the Constitution were proposed.
- Finally, the amendment process was rigid and inflexible .

### 4. The Institutions of the Constitution

#### 4.1. *The Executive*

Kenya started its independence as a dominion. Executive power lay with the Queen who was the head of state .It was in practice delegated to the Governor-General who was resident in the country. The Governor had very extensive powers relating to defense, external affairs and internal security and could even veto legislation. Whereas he was expected to act on the advice of a cabinet, he was in fact answerable to the Colonial Office .

The Prime Minister was head of government. He was appointed by the Governor-General from amongst the members of the House of Representatives with the largest majoritarian backing. He therefore had to be a member of parliament.

#### 4.2. *Legislative Power*

The National Assembly was bi-cameral (had two chambers) with the House of

Representatives as the lower house and the Senate as the upper house. The senate was intended as a political safeguard for *Majimbo* (regionalism), since it had a very crucial role in the procedure for constitutional amendment and the declaration of a state of emergency. In every other respect the Senate was subordinate to the House of Representatives and was similar to the House of Lords in the United Kingdom. There were direct elections into the senate from forty districts including Nairobi. The districts were as much as possible tribally homogeneous in order to ensure the representation of tribes in the upper chamber. The Senate was a continuous body as - one third of its members resigned every two years .The longest term that a Senator could serve, was six years

#### **4.3. *Federalism-Regionalism***

The Constitution provided for regionalism or what KADU had called *Majimboism* which was a very loose form of federalism. The country was divided into seven regions each having its own legislative and executive powers. In each region, there were elected and specially elected members. In order to vote in the region one had to show a genuine connection with the region , for example its being his birth place . The boundaries of the regions could not be changed by the Central Government nor could the Central Government change the boundary of a region without its consent .

The government of the region was complex. The president of the region was elected to the office by the elected members either from among themselves or from those qualified to be elected as

such. In order to be elected, a candidate needed two thirds majority of the electoral college .Once elected he could only be removed by a vote of three quarters of all members .The executive functions of the region were in the hands of the finance and establishment committee of the Assembly . The chief executive officer of the region was the civil secretary who was appointed by the Public Service Commission after consultation with the regional president. The Public Service Commission also made appointments to the civil service of each region. Each region had a police contingent under a Regional Commissioner, which however, was under the overall control of the Inspector General of police .

A very complex relationship between the Central Government and the Regional Government was created. The allocation of power between the two was more detailed than that provided in any other commonwealth constitution. In practice it was intricate elaborate and confusing. Furthermore, the legislative and executive powers of the regions were subject to the right of intervention by the Central Government. This inevitably created conflict. If there was one issue in the Constitution that was very difficult to operationalise, it was this issue of Regionalism.

#### **4.4. *Minority Rights***

Commentators have argued that the constitutional history of Kenya has been primarily a history of the settlement of the claims of the various tribes and races to political power This is largely true. During the colonial times, various political methods were employed by the government to safeguard the interests of



the various groups. It was only towards independence in the late fifties that efforts were made to integrate safeguards in the Constitutional structure. Once the 1960 constitutional conference, when, the Colonial Secretary made it clear that Kenya was to develop as an African country, much heat was taken out of racial politics. The Asians and Europeans now concentrated on protecting their specific interests as opposed to fighting for a share in political power.

The Europeans had been very concerned about securing their property and land rights, and in particular compensation to white farmers in the event that their land was compulsorily seized. European civil-servants were concerned about obtaining their retirement benefits and compensation in case of premature retirement. The Asians had similarly been concerned about the security of their investments in the country and the right to continue working and residing in Kenya.

A number of indigenous smaller communities had also been concerned about domination by larger, better educated and politically more active communities. They wanted greater control of their own regional areas, and less dependency on the Central Government. The Arabs and the Somalis for their part wanted to secede . The Constitution dealt with these concerns by providing an elaborate scheme for the protection of minority rights secured by a bill of rights, and enforceable by the judiciary .

#### **4.5. *The Judiciary***

The Constitution provided for an independent and impartial judiciary to regulate the exercise of public power and to prevent abuse and corruption. The appointment of judges was insulated from politics by vesting on an independent judicial service commission, and by according judges security of tenure. Thus, they could only be removed from office after very exhaustive investigations by an independent tribunal made up of senior judges from the commonwealth .

Security of tenure was also extend to the Attorney-General who as the principal legal adviser to the government was to be completely independent in the execution of his duties

#### **4.6. *The Civil Service***

The Constitution provided for an independent and apolitical civil service. An independent Public Service Commission, whose members were appointed by the Judicial Service Commission was set up. Recruitment and promotion within the civil service was to be done by the public service commission, which also had powers of dismissal over public servants. The Commission also had jurisdiction over all public servants employed in the regions .

In the appointment of very senior civil servants the commission had to consult the prime minister or the regional president as the case warranted. Some civil servants like the Attorney General and the Auditor and Controller General enjoyed security of tenure, and could not be removed by the Commission. A

separate appointments commission was set up for the police force, which consisted of the chairman of the Public Service Commission, a judge appointed by the Chief Justice and three other members appointed by the first two after consultation with the Inspector General. The Police Service Commission had the same powers over the police force, as the Public Service Commission had over the public service including the power to appoint the Inspector General.

#### **4.7. Elections**

The Constitution protected the conduct of elections by ensuring impartiality and honesty in elections, by setting up an independent Electoral Commission, which was to be responsible for drawing up constituency boundaries and the actual conduct of elections. The Electoral Commission comprised of the speakers of the two national houses, a nominee each of the Prime Minister and the regional presidents. The commission was responsible for the drawing of constituency boundaries to obviate the dangers of gerrymandering, and for the actual conduct of elections.

#### **4.8. The Bill of Rights**

The Constitution contained a fairly extensive bill of rights that was to be supreme over ordinary laws. The bill of rights was modeled on the European convention on human rights and fundamental freedoms which was signed in 1950 and came into force in 1953. It was adopted from the Nigerian and Ugandan adaptations. The Bill secured for every person in Kenya whatever his race, tribe, place of origin or residence, political opinion, colour, creed or sex subject to respect for the rights and

freedoms of others and for the public interest, the following; life, liberty, security of the person and the protection of the law, the freedom of conscience, of expression, of assembly and association, and the protection of the privacy of his home and other property from deprivation without compensation.

#### **4.9. Citizenship**

The Constitution also dealt with the very complex issue of citizenship. Until independence, there was no Kenya citizenship and therefore neither political nor other rights were conditional on it.

There were two problems to be resolved by the provisions on citizenship. First, was the status of people immigrants resident in Kenya at independence. Secondly, was the position of those born after independence. In a fairly elaborate criteria, the Constitution provided that some persons would become citizens automatically by operation of law while others would be registered as such if they so desired. All the indigenous communities automatically became citizens of Kenya, as did a section of the migrant communities. The great majority of the residents of Kenya, provide they were British subjects, could qualify to become citizens of Kenya.

A curious provision gave non-citizens who were ordinarily and lawfully resident in Kenya on the date of independence, a constitutional right to reside in the country and protection from deportation. This provision was inserted to protect those immigrants who wanted to live in Kenya, yet did not want to take out its citizenship.

#### 4.10. Land

Historically land in Kenya fell into three categories. The land alienated to Europeans in the white highlands which was known as *the scheduled land*. The land set aside for the Africans on a tribal basis which was known as the *native reserves* or trust land and crown land which consisted of forests and other unalienated land.

The Constitution confirmed the existing titles and interests in land and where land was subject to an unadjudicated claim under the Land Titles Ordinance, subject to such adjudication. Most of what used to be *crown land* was vested in the regions. The Central Government, however, got public and *trust land* in the Nairobi area. The trust land was vested in the county councils within whose area of jurisdiction it was located, which held the land in trust for the resident there.

#### 4.11. The Amendment of the Constitution

The Constitutional amendment process was part of the larger constitutional settlement. It is significant that the language used to describe the process was that of alteration and not amendment. This signifies the suspicion with which the drafters approached the whole question of constitutional change.

Since the Constitutional compromise captured in the independence constitution was very fragile, serious efforts had gone into ensuring that the amendment process was greatly insulated from unilateral and partisan action. Initially, it was proposed that changes would require a majority of

75% of each house except in amendments seeking to alter the entrenched rights of individuals, the regions, tribal authorities or districts, in which case the required majority in the Senate would be 90%.

There were two categories of amendments, ordinary amendments and amendments to specially entrenched provisions. The specially entrenched provisions could not be altered except by a bill secured by 75% of the votes of all the members on the second and third reading in the house of representatives and nine-tenths of the members in the Senate on similar readings. The entrenched provisions related *inter-alia* to fundamental rights, citizenship, elections, the senate, structure of regions, the judiciary, and the amendment process itself. The non-entrenched provisions of the Constitution could be altered much more easily. All that was required was 75% of all members in both houses on the 2nd and 3rd readings. Significantly, if a decisive vote was not obtained the bill could be presented to the electorate in a referendum, and if supported by 2/3 of the votes it would be reintroduced into the house and passed by a simple majority just like ordinary legislation.

Significantly, while the whole edifice of regionalism was specially entrenched, schedule one which dealt with exclusive authority of the regions, executive and legislative was not entrenched. It was thus possible to remove all the powers of the regions and leave them as empty shells. This did happen with time. This omission to safeguard the powers of the regions, which were a dominant structure of the Constitution created the first impetus to amend it.

## THE POLITICS OF CONSTITUTIONAL CHANGE IN KENYA SINCE INDEPENDENCE, 1963-69

**Prof. H. W. O. Okoth-Ogendo,  
Commissioner, Constitution of Kenya Review Commission**

[This is a revised version of a paper presented in January 1971 at St. Antony's College, Oxford,  
United Kingdom and first published in *African Affairs* pp9-34]

### 1. Introduction

Constitutional systems in Anglophone Africa have not had a happy history, especially during the last decade. Almost without exception, the independence documents have either ended up in military dustbins or have undergone profound and rapid change as to alter their value content and significance beyond recognition. Scholars trained in the Westminster tradition, which tends to view constitutions simply as a body of rules, which define and limit governmental power and regulate major political activity in the state, have explained this phenomenon primarily in terms of the inherent inability of Africans to run constitutional systems<sup>1</sup>. There is a strong temptation to give generalized explanations for the widespread breakdown of constitutions in Africa; explanations, which tend to leave unexplored, certain basic factors in the operation of constitutional systems in the new nations<sup>2</sup>.

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<sup>1</sup> See for instance Friedrich, in *Patterns of African Development*, edited by Spiro (New York, 1967), as interpreted and criticized by Professor Y.P Ghai in his inaugural lecture 'Constitutions and the Political Order in East Africa' Series No. 18 UCD.

<sup>2</sup> Drastic amendments as a method of constitutional change are predominantly an East and Central African phenomenon. The major factors contributing to constitutional breakdowns (leaving aside eccentric colonial systems such as South Africa) have been military coups which have ravaged at least 28 African countries, civil wars (Chad and Sudan) and

Out of these, we may single out three relevant points. The first being that all "Westminster constitutions" imported into Africa were almost exclusively concerned with state institutions, power distribution and limitation and none of them contained normative definitions prescribing the purposes of government. Bills of Rights were written into constitutions not as minimum prescriptions of justice and good government, but as limitations on governmental power, this notwithstanding the fact that if they survive alteration they might eventually come to perform normative functions, particularly as legitimating factors.

The second is the very "home-grown" nature of customs and conventions of government and their operation, both as definitions of purpose and limitations of excesses. African governments, which have attempted to administer Westminster principles have shown profound confusion as to what these are, and as to their efficacy. The third factor relates to the logic of constitutional transplantation and the nature of the individual constitutions, which were transplanted. Although these showed little interest in normative processes, they nevertheless showed remarkable sensitivity

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outmoded forms of monarchical rule (Ethiopia and Morocco)

to the compromise nature of African political activity before independence. With minimum and necessary adaptation, the colonial powers imposed upon the new African regimes constitutions which were inherently fragile and which depended, for their stability, largely upon the maintenance of good public relations in politics the one thing which most ruling elite were not prepared to guarantee. Apart from these factors, any account, which purports to give an explanation of constitutional change in African countries must also examine the pressures operating upon the new power elite, the direction in which they were manipulating constitutions, and the motives underlying the manipulations.

In Kenya there has not been a major breakdown of public order, nor any discontinuity in constitutional government. But there have been such drastic changes in the 1963 constitutional document that a proper explanation may well provide a clue to the general problem of legitimizing constitutional systems in Africa. The period considered here has seen ten constitutional amendments, which divide roughly into two phases: the first from 1963-65 and the second from 1966-69. Closely linked with these are certain aspects of the law of public order whose operation is complementary to the major constitutional amendments, and which will also be considered here<sup>3</sup>.

In this article the argument is that both the constitution and the process of amendment were used almost exclusively to solve political problems, some of which were of a public and defensible nature; others private and indefensible. The major themes to be discussed will be centralization, stability and legitimation, on the one hand; and political

survival, public participation and succession, on the other. In tracing these themes, the pattern, as far as possible, will be first to set out the political circumstances within which any particular amendment took place, then followed by the amendment itself. And in discussing the constitutional debate, an attempt will be made to separate public rhetoric from private motivation.

## 2. Colonial Foundations of the 1963 Constitutional Document

In order to give proper foundation to the argument, two colonial legacies must be briefly examined — the first of a political nature, and the second, administrative<sup>4</sup>. In political organization and expression, Kenya has been remarkably lacking in innovation and has remained loyal to the patterns of organizational behaviour and the political values of the later part of the colonial period. The pattern of political organization may be traced back to the administration's creation of Local Native Councils in the 1920s and 1930s. In Kenya these Councils were never intended to function as political forums in any independent sense; being controlled and manipulated, as they were, by the colonial administrative officers, especially the District Commissioners who were their ex-officio chairmen. But they did have a nucleus effect in concentrating African political awareness. They were the first attempt at 'representational' administration in African areas, and consequently were closely associated with the emergence of local leadership.

With the formation of Kenya African Union (KAU) in 1944, the Local Native Councils

<sup>3</sup> These include the operation of s. 52 of Penal Code (prohibited publications); Public Order Act (Cap 56); Preservation of Public Security Act (Cap 57); Chiefs Authority Act (Cap 128 – formerly Native Authority Act)

<sup>4</sup> For the best treatment of these legacies, see generally the following:- C. Rosberg and J. Nottingham, *The Myth of Mau Mau* (New York, 1966); C.J. Gertzel, *The Politics of Independent Kenya* (Nairobi, 1970), and J.J. Okumu, 'Charisma and Politics in Kenya' in *E.Af. Journal* (February, 1968)

in many areas ceased to represent African political expression, although its hierarchy contained some 'LNC-trained' men whose grass-roots support was basically district-oriented<sup>5</sup>. KAU and African political activity generally were banned in 1953 following the declaration of the Emergency in October of the previous year. The ban created a vacuum in African political life and once again LNCs assumed constitutional significance; being used as late as 1954 in the Lyttleton Constitution to advise the governor on African representation in the Legislative Council. The mainstream of African political expression, however, continued outside their operations; being either underground, or largely subsumed in the activities of the African trade unions in the Nairobi area.

In 1955, the colonial government began to encourage simple and orderly development of African political life, which was - except in Central province - to be organized district wise. By 1957, when the administration was ready for the first African election, at least seven major "district" parties were in existence, each of which was tribal and led by a tribal personality<sup>6</sup>. This was the framework for the 1957 and 1958 elections; the Lennox-Boyd Constitution of 1958 and the period leading to the Lancaster House Conference in 1960. Against this background, what the formation of the Kenya African National Union (KANU) in 1960 signified was not the emergence of a

new political culture or ideology, but simply - as stated in the party's inaugural manifesto - 'to bring unity of purpose and action, so necessary in the national structure of any country for freedom and independence.'<sup>7</sup> Leaders of 30 political organizations attended KANU's inaugural meeting which was held in Kiambu.

During the whole of this period there was a complete absence of the expression of any fresh values, distinct from those which were part of the logic of colonialism. Once settlerdom had been accepted as a fact, the original message by Harry Thuku's East African Association based on a rejection of the fundamental premises of white rule, and on the restoration of alienated lands, was converted into a general demand for equal distribution of settler rights and privileges or its corollary, the removal of disabilities imposed upon the Africans, especially in land distribution and agriculture.<sup>8</sup> There is nothing new in this pattern, which is a common phenomenon in nearly all systems based on racialism as a philosophy of government in which much of the political activity becomes centred on the demand for equal opportunities, and this is nearly always defined as giving the oppressed what the oppressor already enjoys.

The upsurge in political activity after 1955 saw an interesting shift. The politics of the African elected members was now organized around the transfer of power; the new political idiom being *Uhuru Sasa*. Much activity accordingly went into organizational tactics, especially the creation of a united front; correspondingly value

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<sup>5</sup> See generally George Bennet, *Kenya: A Political History; The Colonial Period* (London, 1963) Prominent among these LNC trained men was Oginga Odinga.

<sup>6</sup> See the list given by J. J. Okumu in 'Charisma and Politics', *loc. Cit.* Okumu has excepted the Nairobi District African Congress from 'tribal' leadership but A. J. Hughes, in *East Africa* (harmondsworth, 1969) notes at p. 118 that 'the repatriation of Kikuyu, Embu, and Meru from Nairobi..... led to an influx of those from other tribes, in particular the Luo. And so it was that political leadership in Nairobi became a contest between two Luo'.

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<sup>7</sup> Declaration for proposed 'Uhuru Party of Kenya', March, 1960. Of the original 14 Africans elected in 1957-8 seven were members of the 1961 Cabinet, and were still looked upon as political chieftains in their home areas.

<sup>8</sup> See Rosberg and Nottingham, *Myth of Mau Mau*, pp.35ff., where this change could imply the pre-eminence of rural over urban politics.

thinking and political education were significantly de-emphasized. The late T. J. Mboya stated this explicitly when he asserted:

“For the effective struggle against colonialism...it has come to be accepted that you need a nationalist movement. I use these words advisedly, as opposed to a political party. A nationalist movement should mean the mobilization of all available groups of people in the country for a single struggle. Mobilization is planned on the assumption that for the time being, what is needed is to win independence and gain power to determine one’s own destiny”.<sup>9</sup>

This shift in priority also puts into proper perspective the early split in the ranks of the African elected members, especially the eventual formation of the Kenya African Democratic Union (KADU)<sup>10</sup> and the African People’s Party (APP) and the case they finally took up - that of minority safeguards in the event of power transfer. The split with KANU can be explained as a problem of organizational tactics, in which case KADU’s strange alliance with Euro-Asian communities becomes simply another facet of the pre-Independence power struggle. Or it can be explained in terms of an absence of strong common fundamental values; hence Ronald Ngala, the KADU leader, was able to elevate ethnic fears and animosities into a political principle, which was in fact given constitutional form. In either view, KANU, which remained the dominant stream of political expression, was

not only devoid of an ideology of values but partially failed in its attempt to create a ‘united’ front.

It is in agrarian land law that the administrative legacy is especially apparent<sup>11</sup>, but it is also to be discerned throughout the whole of the administrative machinery. The institutions inherited at Independence were heavily weighted towards the protection of settler interests, and, in the case of governmental institutions, they were particularly well adapted for the control of African political activity at the provincial level. Hence from the beginning, law was used as an instrument of class domination, particularly since the colour differentia was co-extensive with the economic stratification. The full implications of this point are fully appreciated when read together with the political legacy already mentioned. In the focusing of attention on ‘power transfer’ in the abstract, no attempt was made to examine the institutional basis of that power in the hands of the colonialists. Once that transfer was achieved not only the values but also the institutions of colonial rule were received. This led to a mere formal substitution of color groups, and hence of economic groups, leaving unaltered the class interests and the corresponding administrative powers which just sustain them.<sup>12</sup>

The problem, against which the analysis of the 1963 constitution and of the subsequent changes is based, may therefore be stated as

<sup>9</sup> T. Mboya, *Freedom and After* (London, 1963), p. 61. See also Odinga’s views in *Not Yet Uhuru* (London, 1966) and also J. J. Okumu Odinga and the Purpose of Independence’, *E. Af. Journal* (October 1967).

<sup>10</sup> KADU’s forerunner was probably the Kenya National Party formed in May 1959 with the objectives of regionalism and independence in 1968. Its leaders were Masinde Muliro (Chairman), E. V. Cooke (Vice-Chairman); Ronald Ngala (Secretary) and Arwind Jumida (Treasurer).

<sup>11</sup> See the present author’s outline views in ‘Law Reform and African Law in East Africa’, *E. Af. Journal* (December 1970).

<sup>12</sup> See Y. P. Ghai and Patrick McAuslan, *Public Law and Political Change in Kenya* (Nairobi, 1970), pp. 506ff. on the role of law in the colonial system, and A. Mohddin, ‘The Changing of the Guard’ (review of Professor Ghai’s book) *Mawazo* 20,2, 4 (December 1970). A similar argument is outlined in my paper to the University Students Association of East Africa in 1969, ‘The Role of Universities in the African Revolution’ in *Focus* (1969).

the persistence of institutions and values which were extremely ill-adapted to the new operative demands. The political parties reached Independence as mere federated ethnic loyalties grouped around individual personalities. Their immediate concern was, for KANU, the transfer of power and for KADU its limitation in the interests of ethnic minorities. The administration espoused no tradition of government by rules as a legitimate system; much less a constitution as a sacred and basic law laying down the major institutions of state and prescribing the norms by and within which they function.<sup>13</sup> The idea of a constitution was therefore largely alien to the history of government in Kenya and even more significantly, it was at variance with the authoritarian structure of the administrative set-up which was inherited from the colonial period and which was left virtually unshaken by the process of democratization that had been the political pre-occupation since 1954.<sup>14</sup>

The constitutional document that finally led Kenya to independence was published in March 1963. Y. P. Ghai and Patrick McAuslan have emphasized that it showed remarkable distrust of power, and like many of its Westminster predecessors, it showed extreme sensitivity to the compromise nature of African politics prior to independence.<sup>15</sup> It thus institutionalized and entrenched the colonial political legacy while at the same time imposing on the new central government severe limitations on its exercise of the powers inherited under the

administrative legacy. The basic framework offered by KADU was designed to accommodate two broad categories of people. There were the Euro-Asian communities whose interest in aligning themselves with KADU was to establish principles of compensation for settlers and civil servants who wanted to leave Kenya; and of property rights and protection against discrimination for those who wished to stay. And there were “the minority groups” amongst Kenya’s own peoples. In their case, the fear on which KADU’s propaganda was centred was the domination of KANU by the Kikuyu and the Luo, and their alleged intention to take over the lands of these ‘minority’ groups. Within this category there arose two secessionist movements — the Somali in the Northern Frontier District demanding complete secession and the Arabs in the coastal strip prepared to settle for autonomy. The Maasai moreover even requested the British government to stay in Maasailand after other parts of Kenya had become independent.<sup>16</sup>

In the event, the constitutional document contained two elaborate schemes of power limitation — the first provided through the regional system itself and the other by the provisions in the Bill of Rights. The basic characteristic of regionalism was its geographical distribution of power and the general benefit allocation following that pattern. The regions were, so far as possible, delineated in such a way as not to split up any ethnic group between different regions.<sup>17</sup> The constitution then proceeded to

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<sup>13</sup> The Lennox-Boyd Constitution of 1958, the only attempt to lay down extensive rules of government activity and political behaviour, was also the latest permanent and fundamental.

<sup>14</sup> For the structure and role of the provincial administration see C. J. Gertzel, ‘Provincial Administration in Kenya’, *F. Com. Pol. Studies*, 4, 3 (1968).

<sup>15</sup> Ghai and McAuslan, *Public Law*, p. 190. The fact that KADU was then leading a minority government did not in my view substantially affect its structure.

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<sup>16</sup> On minority fears see Y. G. Ghai, ‘Independence and Safeguards in Kenya’, *E. Af. Law Journal* 3 (1967), pp. 79ff.; *Report of the Northern Frontier District Commission*, Cmnd. 1900 (HMSO, 1962); *Report of the Commission on the Kenya Coastal Strip*, Cmnd. 1585 (HMSO, 1962).

<sup>17</sup> *Report of the Regional Boundaries Commission*, Cmnd. 1899 (HMSO, 1963), published during the first week of January, 1963. This did not prevent the sparking off of tribalism in Western Kenya by the readjustment of boundaries.



prescribe an extremely detailed power distribution between the centre and the regions. The former, retained important powers of intervention, for example, over grants and loans, the implementation of international agreements, and emergency situations.<sup>18</sup> There was also the omnibus clause:

'The executive Authority of a Region shall be so exercised as ... (a) not to impede or prejudice the exercise of the executive authority of the Government of Kenya, and ... (b) to ensure compliance with any provision made by or under an Act of Parliament applying to that Region ...'<sup>19</sup>

The general philosophy nevertheless was that the greater the detail, the tighter the control over the centre.<sup>20</sup>

The exercise of powers and functions was classified roughly in the following ways:<sup>21</sup>

- (i) as to those matters which were within the *exclusive*, legislative and executive competence of the regions. This included such matters as agriculture, primary, intermediate and secondary education (except certain 'national' institutions) housing, medical (except for certain hospitals) and local government.
- (ii) as to those matters which were within the *concurrent* legislative competence of parliament and regional assemblies which included power over various aspects of the list in (i) above, e.g. certain agricultural matters, public examinations at

primary and secondary level schools; and

- (iii) as to those matters which were within the legislative competence of parliament (including those areas to which sometimes the executive authority of the regions might extend). All residual powers were also left with the center.

As political supervisor over the regional institutions, an Upper House (or Senate) was provided for. In it were vested significant powers over governmental conduct including crucial delaying powers over legislation.<sup>22</sup> Senatorial representation was distributed over 40 districts, and the Nairobi area. Given the ethnic delineation of regional boundaries and due to the fact that each senatorial district consisted predominantly or wholly of a single group, the Senate became a very close approximation to a forum for tribal representation in Kenya's political and governmental system.<sup>23</sup>

As a scheme of power limitation *vis-à-vis* the centre, the regional system was therefore external and structural. The Bill of Rights, on the other hand, provided for limitations on governmental power, which were internal and normative.<sup>24</sup> Moreover, the general scheme of limitation, which makes clear a distinction between *proprietary* and *personal* guarantees, reflects interests which KADU and its allies sought to sanctify within the regional structure: interests

<sup>18</sup> Ref: ss.67-9 of 1963 Constitution.

<sup>19</sup> Ref. S.106 especially sub-section 2 thereof.

<sup>20</sup> Ghai and McAuslan, *Public Law*, p. 197. See pp. 197ff for a more detailed description of regionalism.

<sup>21</sup> Ref. Schedule I Parts I-III. Cf. Schedule II which covered similar ground but was couched in 'exclusive' terms. See also s.66 of 1963 Constitution.

<sup>22</sup> Generally s. 61.

<sup>23</sup> See J. H. Proctor, 'The Role of the Senate in the Kenya Political System', *Parliamentary Affairs*, 8, 4 (1965), pp. 309-415.

<sup>24</sup> To take this view is not to devalue the significance in general of Bills of Rights as fundamental principles and normative sources of basis donor of good government. The Kenya Bill of Rights probably has its origin (via Uganda and Nigeria) in the 1950 European Convention of Human Rights and Fundamental Freedoms, extended to Kenya by Cmd. 9045 of 1953 (and later suspended).

basically economic on the one hand, and related to political victimization of particular groupings on the other. The subsequent history of this part of the constitution is a strong argument for discrediting written guarantees against the exercise of state power.

The governments of new states need greater powers than those of old states in order to put their systems on the path of legitimacy and, therefore, severe limitations, even if framed in terms of bills of rights, are an invitation to unconstitutional action. A more fundamental objection is that to write guarantees into the constitution is to quantify and make finite the aggregate of individual rights and freedoms; hence derogation becomes mechanical and respectable if carried out by way of procedural — and therefore constitutional — propriety, unless they are put beyond the pale of legislative power. These internal limitations were attached to the exercise or possible exercise of power over a large number of things and situations. The first was property. Euro-Asian communities (the propertied class before 1963) were afraid that independence would be followed by widespread and arbitrary nationalization and Africanization of land ownership and business control. For these communities KADU's scheme appeared to provide a respectable umbrella within which they could argue safeguards for their interests.<sup>25</sup> The colonial power machinery was on their side and consequently proprietary safeguards became perhaps the most elaborate and stringently entrenched of the Bill of Rights provisions. Provision was made against all expropriation or compulsory acquisition of property save under the most rigorous conditions — including prompt and full payment of compensation. These guarantees were not

<sup>25</sup> It is to be noted however that, on land, European interests coincided not with KADU policy but with KANU's demand for central control.

subject to the derogation provisions contained in s.19 (now s.83) of the Constitution, and although this section now covers nearly all of the personal guarantees the property section remains intact.

The next clauses, which related to discrimination,<sup>26</sup> complemented the proprietary limitations in that they were a system of personal guarantees which were an important ancillary protection particularly against administrative action in such things as the granting or withdrawal of trade licenses. They were defined, however, sufficiently widely to cover ethnic fears institutionalized in the scheme of regionalism and thereby provided a system of non-proprietary personal (individual and group) guarantees. It is true that the constitution expressly sanctioned discrimination by *legislative* action in certain significant proprietary and personal circumstances both against citizens and non-citizens. Discrimination by *administrative* action was, however, outlawed in all its forms unless it was 'expressly or by necessary implication authorized ... by such provision of law as is previously mentioned'; no distinction being made between citizens and non-citizens.<sup>27</sup> Express personal guarantees were contained in a declaration of liberty and 'freedoms'; religious freedom, freedom of expression, of assembly and association, and of movement. It is suggested however that in view of the close correlation between political expression and ethnic loyalties on the one hand and the strong association of the entire framework with individual local leadership on the other, there was a strong possibility even in 1963

<sup>26</sup> See s. 26 (now s. 82) of the Constitution. The section also defines 'discrimination'.

<sup>27</sup> See s. 26(1) (4) (now s.82 (1) (4) to which the operative part of the section does not apply when exercised in areas of personal law specified in s.82 (4) (b-d). Legislative discrimination against non-citizens is absolutely without restriction and can extend to any matter whatsoever. See Ghai and McAuslan, *Public Law*, pp. 421ff.

that these freedoms would become the casualties of political conflict. In this respect it is interesting to note that whereas in 1963 none of the freedoms were subject to the derogation provisions as they then stood, with the extensive widening of the latter provisions, all except freedom of conscience are now subject to derogation. Similarly the guarantees attached to personal liberty were purely nominal since most of what relate to the meaningful exercise of personal liberty was in fact subject to derogation right from 1963.<sup>28</sup>

The supervisory power over these internal and normative limitations was vested in the High Court. Any person could apply to the court upon allegation that 'any of the provisions . . . have been, is being or is likely to be contravened.' Thus the High Court was made to perform *vis-à-vis* the center functions similar to those which the Senate performed with respect to the external and structural limitations.<sup>29</sup> In order to complete the system of limitations, parliament itself was 'limited' in a manner that corresponds to the schemes already described. An extremely rigid amendment procedure was established, particularly for 'entrenched clauses' — those dealing with citizenship, fundamental rights, senate provisions, regional structure, the judiciary, and land. To change these a 75 per cent vote in both second and third readings in the Lower House, and a 90 per cent vote in the Senate, were needed. Besides this, parliamentary control was tightened over security legislation and powers. Security powers could be exercised in special circumstances only, that is when Kenya was

at war or when a state of emergency existed, and very stringent conditions were prescribed for the declaration and continuance of a state of emergency. As Professor Ghai has pointed out, these parliamentary restrictions were meant to prevent the giving to the executive of certain powers - or alternatively as a safeguard against skillful manipulation of parliament which would have tended to undermine the regional and Bill of Rights limitations.<sup>30</sup>

But behind its apparently neat arrangement the constitutional document was defective in many respects. Its provisions were extremely complicated and, as it later turned out, made it a cumbersome system to understand and operate; in consequence it was never really implemented. Furthermore, the decentralization of power reflected in the external limitations was a potential drawback to central planning, financial co-ordination and the proper formulation of policies on such important issues as health, education and agriculture. In fact, it did not solve the one prominent problem it ought to have solved, the political debate that had been going on since 1954. The 1963 document, particularly the regional system, was therefore out of date even before it came into force. It was bound to be dismantled.

### 3. First Phase of Change, 1963-65: Centralization, Stability and Legitimation

It is with the dismantling of regionalism that the first phase of change - from 1963 to 1965 - is fundamentally concerned. As a starting

<sup>28</sup> The 'freedoms' are to be found in ss. 2025 (now ss. 78-81). Under the 1963 Constitution, 'liberty' and 'discrimination' provisions were subject to derogation in any case. The rest of the rights and freedoms sounded more like a denunciation of colonial forms of oppression than limitations of powers.

<sup>29</sup> See now s. 84, but the effectiveness of this supervision is doubtful.

<sup>30</sup> Y. P. Ghai, 'The Government and the Kenya Constitution' *E. Af. Journal* (December 1967). Note that while the 'structure of the regions was entrenched, by some fatal oversight to the system, their 'powers' were not! Under current provisions *no* declaration of emergency is necessary nor are there any fetters in the exercise of security powers. See. p. 27.

point, however, it is necessary to explain the politics of this period as three aspects of a projection of pre-independence issues into the public debate of post-colonial Kenya. The first aspect concerned the establishment of regionalism itself in the constitutional document of April 1963 - a victory won before independence by KADU, aided by Euro-Asian interests, by the colonial power machinery, and also by the fact that Kenyatta had been content to compromise for the sake of speedy power transfer. But KANU did not conceal its hostility towards the regional constitution. In Oginga Odinga's words, it was 'the latest product of the wicked design of imperialists and their stooges'. Kenyatta himself, as president of KANU, gave hints of the possibility of substantial changes in the regional structure; hints which were carried further by the late Tom Mboya and by Mwai Kibaki. The latter specified amendment procedure and fiscal provisions as first priority targets; adding that for KANU, the constitution which was published on 19 April, 1963, was meant to lead Kenya to self-government and not Independence. KANU, therefore, treated the May election of 1963 as a referendum on regionalism. In fact a lengthy and detailed statement of what amendments KANU would make on coming to power preceded the elections.

The second aspect concerned the intrinsic demerits of regionalism for Kenya, particularly the strong security implications of its ethnocentric character - especially in border flare-ups and general political irredenticism. It was during the first half of 1963 that the Luhya-Kalenjin clashes over the transfer of Kitale District to Rift Valley Region occurred; and serious border clashes flared up between the Luo and the Luhya over Maseno Division, resulting in deaths and extensive damage to property. This was also the period when the Kenya-Somali question ripened into an international problem. The seriousness of the situation

was reflected in Kenyatta's reply at the end of July to a parliamentary motion moved to debate a tough line speech he had just made in Kisumu: Said he:

"I spoke as I did last Sunday because some people are talking about shedding blood, making war, autonomy - it looked to me that while I was labouring hard to bring confidence in this country some people who call themselves nationalists were destroying that which I was trying to build."<sup>31</sup>

Thirdly, the charisma of Mzee Kenyatta was itself a major factor in giving KANU greater credit with the public than their regionalist opponents could have hoped for - a factor which even KADU leaders accepted without question. But what finally precipitated a crisis was KADU's refusal to co-operate with the government on emergency in the Northern Frontier District on 27 December 1963. In the first vote in the Senate the government only received 60.5 per cent affirmation instead of the 65 per cent required to approve the declaration; KADU's excuse being that they were not consulted. This particular stalemate - which was resolved only by inter-party negotiations - dramatically highlighted the dangers of regionalism as a system of power limitation and up-graded the merits of centralism. The government suddenly became attracted to the one-party system both as an answer to weaknesses of executive power, and as a way of eliminating trivialities in serious national issues.<sup>32</sup> When these issues were put to public debate KADU lost out. In any case KADU had been noticeably weakened by the dissolution of its partnership with the Africans People's Party (APP) led by Paul

<sup>31</sup> *E. Af. Standard*, 26 July 1963.

<sup>32</sup> See Kenyatta's lengthy statement on arrival from England, *E. Af. Standard*, 24 February 1964, and Mboya's speech in Australia, *E. Af. Standard*, 21 August 1964. Also *E. Af. Standard*, 15 and 18 August.

Ngei - ostensibly on the issue of regionalism. This was followed by what started as a trickle, then became a flood of cross over which made the institutional dissolution of KADU on 10 November 1964 a simple matter of course.

Throughout the first phase of change, regionalism continued to dominate public political debate, and whereas KADU for its part was fighting a rearguard battle, KANU sought public support for a centralized system of government even if to do so meant the introduction of a one-party state. The pre-requisite of this was the elimination of the regional structure and with it the “external” power proscriptions. The constitutional changes of this phase in effect amounted to creating the situation that KANU would have liked to see in 1963. With the dissolution of KADU, the ruling party had no trouble in achieving its purpose. By the first amendment,<sup>33</sup> Kenya was declared a republic with a presidential government devised in such a way as to embody the fact of national leadership as seen in the eyes of the people, the concept of collective ministerial responsibility and . . . supremacy of parliament.<sup>34</sup> This enactment, which marked the erasure of the last marks of political dependency, was further used to de-regionalize a large part of the system through the deletion, by carefully drafted clauses, of key provisions of the 1963 document. Nearly all the non-entrenched regional provisions, and in particular Schedule Two which dealt largely with areas of concurrent central and regional powers over some agricultural and veterinary matters, and aspects of educational

<sup>33</sup> Act No. 28 of 1964, see Schedule 1, which deleted Chs. VII and IX, Schedule 2, s. 121; and also made extensive amendments to Schedule I and Ch. XIII of the 1963 Constitution.

<sup>34</sup> These words were used by Kenyatta when introducing the amendment, *Kenya Debates*, Vol. II, Part II Col. 1208, 14 August 1964. For changes relating to the presidency, see the discussion on succession reform, pp. 29-32.

standards, were deleted. The entire financial arrangements between the regions and the centre, especially those concerning regional taxation powers, were revised. Provisions for the control and operation of the police force, and in particular those relating to the maintenance of regional contingency forces, were deleted, and finally the regional powers over the establishment and supervision of local authorities were transferred to parliament.

The second amendment<sup>35</sup> re-designated the regional 'Presidents' as simply 'Chairmen'. It also effected further changes; transferring to parliament powers to alter regional boundaries formerly vested in Regional Assemblies and exercisable by them in consultation with one another; permitting the delegation of executive authority of the regions — previously vested in their Finance and Establishments Committees — to persons other than those serving in the establishments of the regions; and repealing the remaining provisions for independent regional revenue, thus making the regions entirely dependent on grants from the centre.

If this amendment confirmed the contempt with which KANU treated regionalism, it also reflected Mboya's concept of what role the regions should play in their constitutional relationship with the centre. In a key speech to the Nyanza Regional Assembly in March 1964 he said:

“I see the position of regional assemblies as one which includes the translation of government policy and promotion of government programmes at the regional level, as well as giving of guidance and assistance to County Councils in their efforts to serve the day-to-day needs of

<sup>35</sup> Act No. 38 of 1964 which by Schedule 1 wholly deleted Parts 2 and 3 of Ch. VIII, enacted new provisions to Ch. XIV, and amended s.105 of the 1963 Constitution.

our people at home. The regional authorities are not governments in themselves.”<sup>36</sup>

The third amendment<sup>37</sup> was perhaps the most significant of the trio. Not only did it complete the process of de-regionalization and demotion, but it went to the extent of amending the procedure for constitutional amendment itself so as to lower the required majority, from 90 per cent in the Senate and 75 per cent in parliament, to 65 per cent in both Houses for all purposes. This was achieved with considerable subtlety. Amendment procedure itself was one of the specially entrenched clauses in the Constitution, by repealing in *toto* the schedule dealing with specially entrenched clauses, the majority required for all purposes became subject to the 75 per cent rule. This was then reduced to 65 per cent in a miscellaneous amendment. By this means the government avoided the more direct but politically troublesome route of having to bring a specific amendment affecting amendment procedure.<sup>38</sup>

By other provisions of the amendment the name 'Regions' was altered to the colonial term 'Provinces', and 'Regional Assemblies' became 'Provincial Councils'. The whole of the part dealing with exclusive legislative competence of the regions was deleted — concurrent competence being vested in parliament in all such areas; those provisions

relating to the exclusive executive authority of the regions were deleted outright. The general effect of these three amendments was to reduce the regional system, from early in 1965, to something purely nominal.<sup>39</sup> Essentially the politics of this period — as reflected in the first three amendments — were a continuation of the Independence struggle.<sup>40</sup> Only after the third amendment had been enacted can it be said that Kenya became politically independent in the manner that the former party's (and in a wider but looser context, the radical) elite wanted it to be. From December 1965, when 'power transfer' politics effectively ended, we can begin to examine critically the developmental aspects of post-colonial political thinking among Kenya politicians. This point also marks the end of a theme which, while it lasted, eclipsed other political issues, both national and personality-oriented. At the same time a power re-arrangement had taken place within the constitutional framework, in particular, the process of de-regionalization had re-invested much legislative power in parliament, so that it was clear that any subsequent power struggles would centre there. The removal of the serious administrative handicaps imposed by the Independence Constitution correspondingly strengthened the executive, particularly its provincial administrative wing. In many respects this was a reversion to the pre-1963 situation, based on a framework essentially

<sup>36</sup> *E. Af. Standard*, 20 March 1964, where the full text is published. The emphasis is mine.

<sup>37</sup> Act No. of 1965, which by Schedule 1 not only deletes in *toto* Schedule 4 of the Constitution but also amends s. 71 thereof by reducing the procedural requirements and also to reflect the first mentioned deletion. With the deletion of Schedule 1 of the Constitution legislative and executive competence now rested completely with the centre.

<sup>38</sup> It might be added in mitigation that the amendment was severely criticized by parliament; one of the objections being that it would give the government too much power — although initially the government got the requisite majority under the 1963 system.

<sup>39</sup> See Ghai and McAuslan, *Public Law*, p. 213. Generally certain aspects of the seventh amendment (discussed below), together with the ninth amendment, belong to the first phase. The former abolished the Senate; by the latter it was consequently possible to perform the last rites of the phase by legislating the regional system — senators and all — out of the Constitution.

<sup>40</sup> Indeed President Kenyatta's New Year's day speech in January 1966 was more in the tone of an 'independence' speech than an appraisal of past developments. *E. Af. Standard*, 1 January 1966. Cf. *E. Af. Standard*, 13 December 1963 and also Odinga's comment on the latter in *Not Yet Uhuru*, p. 253.

colonial and authoritarian. The second phase of change is inextricably linked to these bases.

#### 4. The Second Phase of Change, 1966-69: Political Survival, Public Participation and Succession to the Presidency

If during the first phase of change, from 1963 to 1965, an attempt was being made to stabilize the governmental system through the centralization of power and politics, it was a grave error, in Kenya's conditions, to assume that legitimate institutional dissolution of KADU did not signify the centralization of politics, but rather a shift in the field of operation of Kadu-ism. For another, regionalism was simply the problem singled out by the government and presented to the nation for debate and solution. The solution of this particular problem revealed KANU as a party without a coherent ethic to convey to the public. The debate about the meaning and practice of African Socialism which had been briefly popularized in 1963 continued to emphasize the ideological cleavages within the party and government hierarchy. When this debate had erupted in 1964 it was summed up, dismissed and passed over with the publication of Sessional Paper No. 10 — a document which was neither a political philosophy nor a plan but a simple answer to public clamour for an ideology of government.<sup>41</sup> Nor did the party command sufficient force to hold its framework

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<sup>41</sup> See initially Kenyatta's speech accompanying the KANU manifesto of 1963, *E. Af. Standard* 19 April 1963 (and note editorial on that occasion). Specific aspects of the African socialism debate in 1964 revolved around land, nationalization, foreign policy and education. In a foreword to Sessional Paper No. 10 President Kenyatta states: 'There has been much debate on the subject and the Government's aim is to show very clearly our policies and also explain our programme. *This should bring to an end all the conflicting theoretical and academic arguments that have been going on*' (emphasis mine)

together. In fact it was clear that for some time a rapid decline in the effectiveness of the central organs of the party had been taking place. To this the fluidity resulting from the merger with KADU contributed a further factor, as did the emerging presidential charisma — a phenomenon functionally external to the party and not dependent on it for inertia.

It was not only the party, but the whole political discipline of the state, as embodied also in parliament and government, that suffered. Members of Parliament suddenly lost real interest in the Assembly except on occasions when their personal interests were affected. They were moreover often quite prepared to disobey the party whip, as was shown in the Pinto elections when independent candidates triumphed over party nominees.<sup>42</sup> The MPs (all of whom were now KANU) began to express discontent and disillusionment with the party and thereby reinforced the attitudes of the party branches which were already restless and demanding a reorganization. The public likewise showed their discontent, for instance, by electing independent candidates over party nominees in the Senate elections of 1965. The possible formation of opposition parties was freely discussed.<sup>43</sup>

These problems, unveiled by the ending of the politics of regionalism, were really — except possibly in their ideological dimension — political problems within

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<sup>42</sup> The assassination of Pinto in February 1965 had created two vacancies, one as specially Elected Member in the National Assembly, another as a member of the Central Legislative Assembly. In both cases KANU's candidate was defeated in spite of a three line whip. For another view of these elections see Odinga *Not Yet Uhuru*, p. 292. See also parliament's initial refusal to pass the Income Tax Bill in January 1966.

<sup>43</sup> For these debates see *E. Af. Standard*, 22 June, 8 July, 1965, and *Daily Nation* 4 January, 22, 25 February, 2 March, 1966.

KANU itself. The solution required, therefore, was a political rather than a constitutional one. But in fact the attempt was made to deal with them by constitutional mechanisms, and this may perhaps be regarded as the transitional point when the effort — albeit unsuccessful — to shape the Constitution towards stability and legitimacy gave place to a drive towards a regime based on survival and a corresponding concern with problems of succession to the presidency. The use of constitutional mechanisms also perhaps explains why no attempt was made to tackle directly the governmental implications of indiscipline. Parliamentary indiscipline was presented by the government as a constitutional issue: that the electorate must be protected from political careerists whose interest in parliament was simply the securing of allowances and other fringe benefits. Such was, ostensibly, the significance of the fourth amendment, passed in 1966.<sup>44</sup> In the event; the result of the amendment was something quite different.<sup>45</sup>

The amendment provided that a member who without having obtained the permission of the Speaker failed to attend eight consecutive sittings of a session of the National Assembly, or was sentenced to a period of imprisonment exceeding six months, would lose his seat in parliament. But its real intention appears to have been not so much to protect the electorate as to strengthen the personal control of the President over the system. Evading the first limb of the amendment, if one had to, was a matter of sheer arithmetic; as it was further provided that:

“the President may in any case, if he thinks fit, direct that a member shall not vacate his seat by reason of his failure to attend the Assembly as aforesaid.”

Certainly there is little evidence that MPs showed a greater readiness to attend parliament thereafter. Concurrently with efforts to remedy parliamentary indiscipline, attempts were being made to solve the wider problem of party indiscipline generally. In this connection the conference held at Limuru in March 1966 to discuss the re-organization of the party was a major milestone. To appreciate its significance, a brief mention is needed of Oginga Odinga and the “Communist witchcraft” which had been linked with his name ever since he entered politics in the early 1950s, and which turned out to be the successor to regionalism in public political rhetoric.<sup>46</sup>

As Minister for Home Affairs (to December 1965) Odinga had been repeatedly accused in the foreign press of trying to build up a communist force for the overthrow of the President. Although he became Vice-President in December 1964, his functions were steadily whittled away until, by February 1966, his office was in charge only of ‘affairs of the National Assembly, Africanization and training, and public holidays’. In public and in parliament there were allegations of communist plots and intended coups tacitly associated with Odinga.<sup>47</sup> It was against this background

<sup>44</sup> Instances of such clashes are reported in the *E. Af. Standard*, 11 and 16 February 1966 (over Rhodesia); 17 February 1966 (over ‘confidence motion’); and 31 May, 2 June 1965 (Odinga/Mobya polemics).

<sup>45</sup> Act No. 16 of 1966. Amending what is now s. 39 (1) (b-c). See also s.35 (1) (b).

<sup>46</sup> The description ‘communist witchcraft’ was in fact used by Mboya in a speech in Kisii, *E. Af. Standard*, 19 February 1966. For an interesting account of this as a colonial legacy see Gertzel, *Politics*, pp. 64ff. Much of the debate on communism was officially labeled as ‘rumour’ but there is no doubt that the politics of this period equated communism with subversion, hence the expulsion of Russians and Chinese and the banning of communist literature.

<sup>47</sup> See e.g. *E. Af. Standard*, 11 July, 28 August 1964 (Odinga press statements), 1 April 1965 (Uganda arms issue); 29 January, 2 and 13 February 1966



that Tom Mboya, as Secretary General of KANU, suddenly announced party reorganization plans to be ratified by a convention at Limuru. The announcement was preceded by an equally sudden motion of confidence in the government in parliament, moved by Mboya without the knowledge of Odinga who was then in charge of government business. During the debate, the two ministers clashed violently and the latter walked out of the Assembly.<sup>48</sup>

The debate, as Dr. Gertzel puts it,

“proved to be a dress rehearsal for a full-scale KANU conference at which the conservatives established their ascendancy in the party hierarchy as well.... In the process Kenyatta himself tacitly entered the arena on the side of the conservatives by his decision to hold the convention.”<sup>49</sup>

What could and should have been proper party reorganization became merely a way of getting rid of Odinga and his supporters. The main feature of the new party constitution was the abolition of the post of Vice-President (then held by Odinga) and the creation of seven provincial vice-presidencies. The most significant aspect of this change, however, was that it recognized the de facto regional nature of the party's internal structure and therefore *ex hypothesi* could not have solved it. At the same time by failing to accommodate Odinga and the radical wing of the party, the changes triggered off a situation which led to the first real test of constitutional durability in Kenya and to the emergence of political survival through the Constitution as a primary motivation.

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(Soviet and Chinese relations etc). Also June 1965 Budget debate.

<sup>48</sup> The ‘confidence’ debate is reported in *E. Af. Standard*, 17 February 1966. The government later denied that there was any such office as ‘Leader of Government Business’.

<sup>49</sup> See Gertzel, *Politics*, p. 71; also the second part of William Attwood, *The Reds and the Blacks* (New York, 1967).

On the day following the Limuru Conference, a group of KANU MPs met and announced that they would form a new party. A month later Odinga resigned, taking with him 28 MPs and a large section of the trade union movement. The rift merely made explicit a situation, which had existed in KANU since its inception; for the first time ideological differences were seeking expression in institutional terms. The resignations thus also represented a frontal challenge to, if not partial failure of, presidential charisma as a substitute ethic for party ideology. The executive itself was threatened with disintegration. It is illuminating that KANU's campaign theme during the ‘Little General Election’ which followed was that by his resignation Odinga had challenged the wisdom of Mzee Kenyatta. The idea of ‘survival’ as used here is therefore an analysis of how the executive as a ‘political institution’ survived in circumstances where the party and parliament were ill adapted to assist it.<sup>50</sup>

With the possibility of further defections from the party, the choice then was whether to strengthen the executive through the public by ordering new elections, or through parliament by strengthening the ‘parliamentary’ party. That the executive chose the latter course was a desperate attempt at survival and that the solution was found within a constitutional rather than a political framework was a remarkable tactic of crisis postponement. The formula used was the ‘turn-coat rule’, a device borrowed from the constitutional system of Malawi where it was first used in 1964 when the executive was faced with substantially the same situation as it now was in Kenya.<sup>51</sup> Its

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<sup>50</sup> It is true that subsequent decisions were made in the name of KANU but in fact as explained below, the personnel of the party executive coincided also absolutely with the ‘inner’ cabinet.

<sup>51</sup> Constitution of Malawi (Amendment) Act No. 11 of 1964, which was used to reprove certain former

substance, as contained in the fifth as read together with the eighth amendment<sup>52</sup> was that an MP who:

“having stood at his election. . . with the support of or as a supporter of a political party . . . either (i) resigns from that party at a time when that party is a *parliamentary party* or (ii) having after the dissolution of that party been a member of another *parliamentary party* resigns from that other party at a time when that other party is a *parliamentary party* shall vacate his seat at the expiration of the session then in being or if parliament is not in session at the expiration of the session next following . . . unless . . . that party of which he was last a member has ceased to exist as a *parliamentary party*.”

The immediate effect was instantaneous. Thirteen of the 29 MPs who had resigned rejoined KANU and were welcomed back by the President, although as it later turned out this did not save them from the operation of the rule! The official justification for this rule was to '... stop these political acrobats from fooling about with the public.' And yet in 1964 when KADU members had crossed over, Mboya congratulated them for their bravery and conviction and explained to the public that the MPs were representatives and not delegates. Even if the rule did protect the sovereignty of the electorate, it was difficult in those circumstances to determine who remained true to the original mandate and who betrayed it. Odinga's case was that it was the post-Limuru KANU leadership and not his followers who had broken that party's electoral pledges, and consequently it

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ministers of their seats when they resigned from Malawi Congress Party soon after independence. Dr. Banda subsequently made Malawi a one-party State.

<sup>52</sup> Acts No. 17 of 1966 and No. 4 of 1967 now contained in s. 40 of the Constitution. The fifth amendment was published, tabled, debated, passed through all its stages, and given presidential assent in less than 48 hours.

was they who were the real deviationists. And in fact the fundamental changes which took place between 1966 and 1969 and which resulted *inter alia* in the drastic concentration of security powers in the hands of the executive, the postponement of elections for two years, the assignment of constituencies to people who were never elected in those areas, were indeed a violation of electoral sovereignty in as much as they were never referred to the electorate. It is also significant that the amendment gave no indication as to what a 'parliamentary party' meant — this being left to the Speaker's discretion, which might itself be broadly directed by Standing Orders. In any case why should a violation of a pledge to the electorate cease to be such when the party ceases to be a parliamentary party or is dissolved during the same session?<sup>53</sup>

These are questions which the turn-coat rule, as enacted in Kenya, Malawi, Ghana and subsequently in Zambia,<sup>54</sup> has not adequately answered. In Kenya any doubt as to the 'survival' function of the rule was removed by the eighth amendment which declared that

“the references ... to a member who in certain circumstances resigns from a party at a time when that party is a parliamentary party include and have always included references to a member who before the commencement of [the

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<sup>53</sup> Some of these questions are raised by Ghai and McAuslan, *Public Law*, pp. 320ff. The art of limiting the Speaker's discretion by amending Standing Orders was in fact used to deprive the KPU of status as an official opposition party after the Speaker had recognized it as such.

<sup>54</sup> For Ghana, see National Assembly Act No. 300 of 1965 s. 2(2), the provisions of which were indeed much more extensive. Although at this time Ghana was a one party State, technically parliamentary representation was not dependent on party membership. For Zambia, see Constitution of Zambia (Amendment) (No.2) Ordinance No. 47/1966.

fifth amendment] resigned in those circumstances . . .”

Three days after the passing of the Fifth Amendment, the President prorogued parliament and the dissidents lost their seats. The ‘Little General Election’ showed just how effective strengthening the party in parliament rather than outside it was. KANU won more seats than KPU, although the latter polled more votes; an electoral minority had nevertheless produced a parliamentary majority.<sup>55</sup> The fifth and eighth amendments were thus designed, like the fourth, to strengthen the party — in this case, the party in parliament.

The timing, substance and operation of the sixth amendment<sup>56</sup> followed hard upon those of the fifth. This was significant. At the time the amendment was introduced, debated, and brought into operation, the dissidents were no longer in the Assembly, having lost their seats through the operation of the fifth amendment. Moreover it was deliberately subordinated, so far as the public was concerned, to the different and more sensational theme that the country was on the brink of subversion and Communist intrigue; in their various public statements the KANU parliamentarians explicitly indicated that the intention was to use the powers therein to control the current political situation. The amendment had the

effect of enormously enlarging the government's emergency powers. In the first place, it completely wiped out existing legislation relating to parliamentary control over emergency legislation and the law relating to public order. Existing constitutional provisions were repealed and replaced by one which gave the President a blank cheque 'at any time by order in the Kenya Gazette to bring into operation generally or in any part of Kenya, Part III of the Preservation of Public Security Act or any provisions of that part of that Act.' The possible duration of such emergency powers was extended from seven to 28 days (in some circumstances longer), and they could be approved by a simple majority; whereas to repeal them, unless by the personal decision of the President, a majority of all elected members of the Assembly was required. Similarly, detention orders made under those powers, which previously had to be renewed every eighth month, could now unless revoked by the President or Parliament remain in force indefinitely.<sup>57</sup>

At the same time the Preservation of Public Security Act (1960) was drastically amended to define the full scope and operation of the new constitutional powers. That Act now distinguished between public security measures and “special” public security measures; the former, available under Part II of the Act, could be brought into operation by a declaration of the President which did not require approval of the National Assembly; the latter, under Part III by an order under the new constitutional powers. But in fact in either case the President could invoke all or some of the powers provided for in the Act and for the

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<sup>55</sup> On the ‘Little General Election’ see Gertzel (with J. J. Okumu), *Politics*, pp. 73ff.; Bennett, ‘Kenya’s Little General Elections’, *World Today* (1966), p. 336. Broadly speaking, KPU polled 73,000 to KANU’s 36,000 votes in the Lower House, but won only 7 to KANU’s 12 seats, polled 79,000 to KANU’s 62 in the Upper House but won only 2 to KANU’s 8 seats.

<sup>56</sup> Act NO. 18 of 1966. The Bill passed through all its stages in the Senate in just under 4 hours. The preoccupation with political security can be amply illustrated from the daily press during 1966. See especially *E.Af. Standard*, 15-26 March; 17-23 April; 23 June; 4, 22, July; 5 August *Daily Nation*, 25, 26 May, 2 June.

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<sup>57</sup> What was the old s. 29 was wholly repealed (now s. 85). By the schedule to Act 45/1968 sub-sections 4 and 7 of the original s.29 as amended by the sixth amendment were deleted. By a miscellaneous clause in the tenth amendment detention orders now remained in force indefinitely. See Ghai and McAuslan, *Public Law*, pp. 430-56.

whole or part of the country. He could do this when, in his opinion, such powers were necessary for the preservation of public security — a term which could be very widely interpreted. They included power to make subsidiary legislation on the detention, compulsory movement or restriction of persons, the acquisition of property, and conscription for labour or into the armed forces.<sup>58</sup>

The rapidity with which the new powers were brought into operation and the political circumstances surrounding the first detentions hardly bear out the official explanations that public security was threatened. Just over a month after the presidential assent, s.85 of the Constitution was invoked; the regulations providing for detention and restriction being simultaneously promulgated. The next month, nearly all the trade union leaders who had joined the KPU — all of whom held prominent positions in that party — were detained.<sup>59</sup> By this method, and by other forms of political censorship, the KPU was virtually crippled in the attempt to reach the public. It was clear that, with the choice of parliament as the crucial 'survival area', the KPU was being stopped from its endeavour to survive at large.<sup>60</sup>

<sup>58</sup> See Cap. 57 (Laws of Kenya). It is a little misleading to describe this as an 'amendment' since the original provisions were entirely suspended. S.2 of Part I and s.4 of Part III respectively are the definitive and operative provisions.

<sup>59</sup> The first detentions, gazetted in LN. Nos. 2983-8, 3094-5 and 4101 of 1966, included 2 Administrative Secretaries, 3 Executives Members (including National Treasurer and Nairobi Branch Secretary), the Youth Wing Leader and Organizer of the KPU, and the Party President's private secretary and bodyguard.

<sup>60</sup> During the Little General Election there were only six KPU reported rallies in the three weeks campaign period to KANU's 22. For further control methods see Public Order (Amendment) Act No. 12/1968 which prohibits the use of flags or emblems signifying association with political parties or leaders; the notorious Local Government Elections of

The sixth amendment also marks the final stages of the dismantling of the lower limitations imposed by the 1963 Constitution.<sup>61</sup> In this case the internal normative limitations (except those relating to property and freedom of conscience) became subject to derogation in a manner that left individual liberty entirely dependent on the subjective assessment of the relevant minister. The function of the High Court — like that of the Senate — was reduced to merely that of ensuring compliance with procedural requirements of the Constitution. The process of reshaping the Constitution towards the political survival of the ruling party was completed by the seventh amendment,<sup>62</sup> which was passed ostensibly for the abolition of the Senate — an institution which had long ceased to fulfill useful constitutional functions. It is rather on the consequential provisions following the abolition that attention must be focused. These were far-reaching. Not only were all the former members of the Senate absorbed into an enlarged Assembly to represent constituencies to which they were constitutionally assigned, but the life of parliament (which was due to expire in June 1968), was extended for a further two years until June, 1970, 'unless sooner dissolved (by the President)'. At the same time 'specially elected' members became nominated members — the power to nominate being exercisable by the President, and the number fixed at 12 instead of one in every ten MPs as previously.

1968 when all 1,800 KPU candidates were disqualified — ostensibly for filling election forms wrongly but reputedly on orders from the President.

<sup>61</sup> As the court held in a case brought by one of the detainees, 'the truth of those grounds (i.e. alleging threat to security) and the question of necessity or otherwise of ..... continued detention are matters .... ultimately for the Minister rather than for this Court...' *P. P. Ooko v. Republic of Kenya*, Civil Case No. 1159/1965 (unreported).

<sup>62</sup> Act No. 40 of 1966. See E.Af. Standard, 25 May 1966

The reasons given for these provisions were unconvincing. Mboya argued that it would be unfair to those senators due to retire in 1969 if the life of the enlarged Assembly was not extended; that extension was necessary to coincide with the new revised (Development) Plan period (1966-70); and that elections were in any case tiresome and expensive. The *East African Standard* newspaper added the rider that:

“a general election would unleash a vociferous political campaign with consequent interruption of economic endeavour and all the disturbances caused by heated electioneering. After all that time and expense, the KANU government would be re-elected.”<sup>63</sup>

All these advanced reasons ignored the principle on which public justification of the fourth and fifth amendments rested; that the sovereignty and rights of the electorate must be safeguarded. It is interesting to note that a functional re-arrangement resulting in further accretion of power from parliament to the President had once again been achieved.<sup>64</sup> With the seventh and eighth amendments, a distinct era is completed, the full significance of which will now be reviewed.

It is clear that the process of political survival in Kenya did not take as extreme authoritarian forms as many African countries have witnessed. Indeed the executive was scrupulous in its conformity to technical legality throughout this period. But more significantly, the end of regionalism, and the political and constitutional changes subsequent to it, led to a situation where Kenyan politics were almost completely parliamentarized; a deliberate attempt had been made to centralize all the major activities of the state

in such a manner as to produce an abnormal concentration of political activity on the floor of parliament. All matters, from domestic party squabbles and personality friction to policy formulation and elections, became part and parcel of and were resolved as parliamentary business.<sup>65</sup> Correspondingly, since all public activities of the state were concentrated in parliament, there was reduced public participation in the processes of government through loss of interest in political activity and the absence of a strong and freely functioning opposition party, but what is even more important, the parliamentarization of politics led to increased executive control over parliament itself. “It is significant,” notes Professor Ghai, “that while legislative competence has increased, its control over the executive has decreased.”<sup>66</sup>

In Kenya, where the politics of charisma have been the dominant feature, parliamentarization in fact led to presidentialism. The power link in the equation: the leader = the party = the government, was the parliamentary party, over which President Kenyatta had strong personal influence. The net result was the negation of the concept of government by discussion. Moreover, it is strongly argued that when the succession to the presidency came up for debate in 1968, neither the public nor parliament as such were any longer capable of finding an acceptable successor to the then incumbent.

## 5. The Succession to the Presidency

Succession and leadership is perhaps the most critical political problem in independent Africa today, for bound up with it is the problem of the legitimation of socio-

<sup>63</sup> *E. Af. Standard*, 20 November 1966

<sup>64</sup> See Ghai and McAuslan's study of the Kenya executive, Public Law, Ch. VI pp. 220off

<sup>65</sup> Note especially debates on the Limuru Conference notably as reported in *E. Af. Standard*, 4-10 March 1966

<sup>66</sup> ‘The Government and the Kenya Constitution’, *loc. cit.*, p.12.

political systems as opposed merely to styles of individual governments.<sup>67</sup> This has been demonstrated again and again in military take-overs, which have not only deposed governments but also revealed the frailty of the base structure of political power in these areas. The lack of political recruitment through channels in which the public freely and effectively participate is the essential missing link. In Kenya the disappearance of this link was the logical byproduct of KANU's survival complex, especially after the KPU had, during the 'Little General Election', demonstrated that a large section of the public were disenchanted with the former party. More especially, parliamentarization of politics, resulting as it did in the direct convergence of political activity on the President, emasculated any form of political recruitment: hence by 1968 there was no obvious successor to President Kenyatta. The political reasoning behind treating the succession issue as a constitutional one was that to institutionalize the personality of the President was more desirable and feasible than to invert the political process in such a manner as to elevate KANU above him.

Two preliminary attempts to achieve this institutionalization foundered in the teeth of parliamentary opposition, when even Cabinet Ministers raised voices of protest. By the first attempt it was provided (as in the USA) that whenever the President vacates office or dies before the expiration of his term, the Vice-President would automatically succeed to full presidential powers for the remainder of the unexpired term. The second modified the first by providing for automatic succession to full presidential powers for a period of six

months only, after which presidential elections must take place. During such subsequent elections only persons above the age of 40 (instead of 35 as previously) were to be eligible. Objections in both cases ranged from the lack of reference to the public involved in elevating a person to the presidency even for six months, and fears that such a person might use security powers to perpetuate himself in office, to complaints that raising the age limit was a deliberate attempt to keep some potential candidate from the presidency.<sup>68</sup>

The third attempt, which became the tenth amendment,<sup>69</sup> in part simply repeated the main features of the old system introduced by the first amendment in 1964 (although not applied in the case of the first President); but it also made fundamental additions in other directions. The earlier system had provided for two methods of presidential election:

- (a) During a general election any citizen, being a registered voter, 35 years of age and a parliamentary candidate, could offer himself as a presidential candidate provided that his nomination was supported by at least 1,000 persons registered as voters in elections to the National Assembly. Every other parliamentary candidate was required— on pain of having his own nomination rendered void — to declare his preference for one of the presidential candidates. The candidate who received preferential declaration from a number of members elected to the Assembly (including himself) exceeding half of all the constituencies into which

<sup>67</sup> For discussions on the problem of succession see J. P. W. B. McAuslan: 'Succession and Elections in East Africa', *E. Af. Law Review* (1969) and R. B. Seidman, 'Constitutions in Independent Anglophonic Sub-Sahara Africa: form and legitimacy', *Wisconsin Law Review* (1969), p. 83.

<sup>68</sup> See *Assembly Debates* Vol. XV Cols. 90ff. on Constitution of Kenya (Amendment NO. 2) Bills published on 29 March and 10 May 1968.

<sup>69</sup> Act No. 45 of 1968 superseding Act No. 28/1964 (see above). For the ninth amendment, see note 39 above.

the country was divided, and who was himself an elected MP, was declared President;

- (b) At any other time, or if the first method did not yield any results, or if for any other reason the presidential office fell vacant before dissolution, then parliament itself became an electoral college. Any elected member could offer himself as a candidate provided his nomination was supported by at least 20 MPs. A person was declared President if he obtained an absolute majority of all members qualified to vote: in the event of failure two further ballots could be taken. Beyond that parliament stood dissolved and fresh elections would take place.

The major defect in both cases, from the point of view of those in power, was that the procedure did not guarantee loyalty to the President. This was the defect the new provisions of the tenth amendment sought to remedy. This specified that during general elections, nominations could only be made by political parties taking part in elections. Indeed it was imperative for a 'political party' taking part in any general elections to put forward a presidential candidate. During elections only one ballot paper was to be used and this must be so arranged as to pair the parliamentary candidate with his party's presidential candidate. The candidate who received the greatest number of direct electoral votes and was himself elected as a constituency member was to be declared President. At any other time during which the Vice-President led a caretaker government, elections must take place within 90 days of the vacancy occurring. A party might nominate a candidate from any of the elected members of parliament, provided that such nomination was not valid unless supported by at least 1,000 persons registered as voters in elections to the

National Assembly. The candidate who received a greater number of valid votes cast in the ensuing presidential election than any other candidate would be declared President. As in the old system, so with the new one, 'where only one candidate for the President is nominated (and that candidate is in or is elected to the Assembly) he shall be declared to be elected as President'. The effect of this was that there were no presidential elections in the 1969 elections. The tenth amendment introduced into the succession process a new dynamic factor — political parties

'duly registered under any law which requires parties to be registered, and which has complied with the requirements of any law as to the Constitution or rules of political parties nominating candidates for the National Assembly'.

These are not to be confused with the 'parliamentary party' introduced by the fifth amendment. Our interest here is with the legal and political aspects of this new factor within the succession process. By the National Assembly and Presidential Elections Act 1969, and the regulations made thereunder,<sup>70</sup> the presidential candidate must be proposed and seconded by a person who is both registered in some constituency as a voter in elections to the National Assembly and is a national official of the party. Although the parent statute provides for "preliminary elections' in respect of parliamentary candidates, none is required for presidential candidates, presumably because such a candidate will in any case have gone through the preliminaries in his attempt to capture a parliamentary seat or simply because of the inappropriateness of the system in election to the Presidency. In respect of parliamentary elections a supporting declaration of compliance with party rules is

<sup>70</sup> Act No. 13 of 1969 and LN 221/1969. The form of declaration is set out in Form 10 in the schedule to the Regulations.

necessary and this must be made “not earlier than one month before the nomination day”.

The effect of these provisions is *inter alia* to give constitutional effect to routine decisions of the party executive, not only in respect of the presidency but also of parliament. Similarly, party directives right down to the administrative and procedural requirements of the party secretary take constitutional effect as soon as they are made. Moreover, whereas the regulations merely require a supporting declaration from a party, in the 1969 elections KANU made its own rules after the banning of the KPU that it would give no such support unless the prospective candidate had been a member of the party during the six months preceding the elections for which the support is sought. In legal terms, the tenth amendment as read together with the 1969 Act and regulations give to political parties unlimited rule-making power and thereby the ability to determine who may or may not participate in the leadership of the country. The political aspects of this legal power cannot be under-estimated. It means in effect that the final decision as to who the President will be, particularly in cases where only one party qualifies to participate in elections, will be the party Executive Committee. The implications for parliamentary candidacy are even greater, since strong and effective direction will in the final analysis lie with the executive and consequently a parliamentary career under this system will depend on the maintenance of good relations with the party executive rather than with the party at large or with the public. In 1969 when the last of these measures was passed, of the nine Members of the National Executive Committee of KANU, seven were Cabinet Ministers and one was an Assistant Minister.<sup>71</sup> At the very least, the proposals

could be seen as an attempt to transfer the processes of political recruitment and the inevitable succession struggle from the public and parliament to the privacy of the Cabinet. If as we suggest, the Cabinet itself throughout this period used the Constitution predominantly as a survival tool, the tenth amendment and facultative legislation were merely the grand finale to the second phase.

## 6. Conclusion

This article has tried to investigate the extent to which political behaviour has dictated constitutional change in Kenya. The emphasis on politics rather than on the constitution stems from the belief that African countries are going through a transitional period during which the constitution must not be looked to as an impartial arbiter over the political activity of the state. Such a view is ruled out by the character and force of the colonial legacies; by the nature and content of the independence constitutions and their normative and institutional assumptions; by the behaviour of the political elite after independence and by the fluidity of variables operating upon them. Yet this merely states the dynamics of but not the answer to the problem which it poses: what governmental system or model would best achieve stability and legitimacy in these fragile constructs? To answer this question is beyond the scope of this article, nor do we think that a general model for Africa is possible. But it may at least be suggested that the Kenya experience brings out two general conclusions. The first of these is that the reception of the Westminster-type

<sup>71</sup> The members were (1) Sagini, Nyanza (Minister for Local Government), (2) Khasakhala, Western (Asst Minister, Education), (3) Khalif, North Eastern (the only non-cabinet member), (4), Moi, Rift (now

vice-president and Home Affairs), (5) Nyagah, Eastern (now Agriculture), (6) Ngala, Coast (now Power), Gicheru, Central (now Defence), (7) Kibaki, Nairobi (now Finance) and then there were the President and Mboya the Secretary-General. The Acting Secretary-General, R. Matano, is an Assistant Minister. In the 1969 elections Sagini and Khasakhala lost their parliamentary seats.



constitution in former colonial territories was a mistake, for on the one hand they represented institutions which had little “home-grown” character outside England, and on the other, they were inevitably used as frameworks for the limitation of power in an attempt to protect interests which were largely adverse to the new nations. Once the power to initiate change either within or outside the constitution had passed to these nations change was a mere question of time. When that change occurred — quite apart from the rise of militarism in many African states — an obsession with technical legality overtook the political process. Whereas many of the factors prompting change need not have been treated as constitutional problems, it may well be that by so treating them better public and perhaps international relations have been achieved than if extra-legal political ruthlessness had been preferred.

Secondly, the processes of change in whatever form have paradoxically committed these countries to the notion of constitutional government — particularly that of written constitutions. It is interesting that not only have constitutions re-appeared in some form or other after being swept away by military regimes, but countries like Upper Volta are now beginning to protect themselves from the phenomena of coups by bringing the military into partnership with civilian authorities within a constitutional framework.<sup>72</sup> At the same time, some of the constitutional doctrines evolved through this *ad hoc* system have, as in the case of Ghana,<sup>73</sup> outlived the political circumstances in which they originated, and they may well prove useful tools in the search for stable and acceptable principles. In Kenya, the first

hurdle in the process of legitimation would seem to be the colonial background which has not only had a continuous effect upon post-colonial development, but whose norms have also been re-injected into the new governmental system; both aspects being the result of the fact that there never was an alternative system or normative form in 1963.

The failure of KANU to fill this vacuum led, after regionalism, to a three-fold re-arrangement of power. Full legislative power was restored to parliament; full administrative authority was revived in the hands of the executive, while political power was re-directed from KANU to the President, bringing about a weakening of the party. Attempts to solve party indiscipline led only to the institutionalization of political differences which contributed directly to the emergence of a survival complex in politics. This complex found constitutional form, through the fourth, fifth and eighth amendments, in presidential control over MPs by possible exercise of the “equity” jurisdiction thereby given to him, and over parliament through personal influence over the parliamentary party, respectively. The sixth amendment led to aspects of political censorship by detention and restriction in non-emergency circumstances and under reduced parliamentary control, powers which were backed up by the entire machinery of the state including the Penal Code. The seventh amendment, while clearly indicating a reluctance to face elections, further deprived parliament of some of its powers by vesting them in the President. The final stages of this phase show an attempt not only to devise a constitutional form to solve the succession problem but also to do so in a manner depriving the public and parliament of effective choice. The tenth amendment is, on one interpretation, a genuine step towards solving the political ineptitude of parties in Kenya, in as much as it has brought them

<sup>72</sup> See Keesings Contemporary Archives, 1971. The new Upper Volta Constitution permits free elections but at least one-third of the members of the cabinet must come from the military.

<sup>73</sup> The 1969 Busia Constitution has retained the ‘turn-coat’ rule first used by Nkrumah.

into the constitutional process. But it assumes for its successful operation the presence of an organized and disciplined party and a tradition of government by

discussion at all levels of the political structure. Can such an assumption be made for KANU and Kenya in the 1970s ?

## THE STRENGTHENING OF THE UNITARY STATE

### Mutakha Kangu Commissioner, Constitution of Kenya Review Commission

#### 1. Introduction

The point of departure in this paper is the recognition of the fact that the project and process of dismantling the Independence Constitution, as is detailed by Professor H.W.O. Okoth-Ogendo, in his 1972 paper: "The Politics of Constitutional Change in Kenya since Independence 1963 - 69", had as one of its main purposes, to move away from the decentralized system of government to a centralized one. It was to dismantle the semi-federal regional system - which right from the beginning KANU found unacceptable -- and install a unitary state. This comes out clearly in Professor Okoth-Ogendo's paper when he writes that:

"The major themes to be discussed will be centralization, stability and legitimization on the one hand; and political survival, public participation and succession on the other."

On the other hand Professor J.B. Ojwang in his paper: "Constitutional Trends in Africa - The Kenya Case" emphasizes this project of creating a unitary state as having been KANU's main agenda right from the beginning in the following terms;

"The KANU Government led by Kenyatta, had been opposed to Semi - Federalism from the very beginning, and with the fractious Multi-party system gone, it now felt that it was in a position to gain the necessary Public and Parliamentary support for the creation of a Unitary Constitutional set-up, with but one Legislative Chamber. They succeeded and it took seven separate amendments, in a period of three years,

to establish a single-chamber National Assembly".

In this project and process of centralization, Unitarism was understood and intended to mean and assume, not only a horizontal but more importantly, a vertical connotation or dimension. There was going to be double or even triple centralization in Kenya. Centralization in Kenya was meant to operate at three different levels:-

1. There was going to be centralization affecting the two levels of government; the central level and the regional level. Power was meant to move from the regions back to the center. Consequently, all the provisions for regional Legislative, Executive and Financial powers were done away with.
2. There was going to be centralization in each of the organs of state and other institutions of governance. As a result, the dual arrangements at the Executive and Legislative levels were done away with. The Bicameral Legislative arrangements were removed and the hitherto two houses of Senate and House of Representatives collapsed into one House, the National Assembly. On the other hand, the dual executive comprising of the Governor-General, as Head of State and Prime Minister, as Head of Government were also ensconced into one Office of the President. At the political party level, there was also centralization by way of a move from the hitherto multi-

party system to a de facto one party system.

There was also going to be centralization at the level of the three organs of state and other institutions of governance. Power had to move from all the other organs of state to the executive. Where the executive could not take over the powers of the other organs, it had to ensure effective control of those organs. The consequence of this double or triple centralization in Kenya was that power was centralized not just in the executive, but in-fact a Unitary and individualized executive. This meant centralization of power into the hands of a single individual. Indeed one of the first amendments to the 1963 Constitution was meant to and did create a Unitary Executive. As earlier noted, it did away with the dual system of executive and ensconced both offices of Governor - General and Prime Minister into one Office of the President. Professor J.B. Ojwang in his paper "Constitutional Trends in Africa - The Kenya Case" emphasizes this perception of centralization in the following manner;

"An entirely new pattern of executive leadership emerged. A President who is both the Head of State and Head of Government, combining the formal role of the monarch or Governor General with that of the Executive Prime Minister. A President responsible mainly to the nebulous national electorate and, more indirectly, to a Parliament of which he is also a sitting member. A President who assumes office without the direct approval of either the electorate or the legislature. The new Presidency starts from a position of a special privilege and political authority. The Constitutional document itself designates a particular individual, and this is the holder of the totality of constitutional executive authority. This individual is strategically positioned inside the National Assembly

from which he may steer his business of government"

By the year 1969, therefore, the project and process of creating a unitary state had been finalized and all that remained was to strengthen this unitary state. This creation of the unitary state was concluded by the putting in place of a completely new constitutional document. This was done by the Constitution of Kenya (Amendment) Act No. 5 of 1969 which consolidated all the Constitution as at February 1969 into a revised Constitution for Kenya in one document that was declared to be the authentic version.

Having come this far, the subsequent amendments to the Constitution were meant to strengthen the unitary state already in place and shall therefore be discussed from this perspective. Given a chance, the unitary executive could easily have wanted to complete the project by abolishing all other institutions and putting all their powers in the hands of the unitary executive. However, because this could not be done, and because the conversion of all these other institutions into unitary status was not assuring enough, the unitary executive by subsequent amendments, sought to control these other institutions through all manner of ways. These included the legislature, the judiciary, political parties and the public service.

## **2. Control of the Legislature**

To strengthen the Unitary State (read the Unitary Executive) the Executive sought to place the Legislature under the control of the Executive. The first and most important mechanism of doing this was to ensure that the executive controlled the electoral process through which the Legislature is generated. In this connection, the 1969 amendment which consolidated the constitution into one document also put the Electoral Commission under the absolute

control of the President. This amendment changed the membership of the Electoral Commission by making all its members appointive by the President. Hitherto, the President did not have this kind of control of the commission since the speakers of both the Senate and the House of Representatives were automatic members. The purposes of controlling the electoral process was to ensure that the composition of the Legislature was of a people acceptable to the executive and those that could be manipulated.

In 1975, the Executive, by yet another amendment, went further to ensure that the Executive brought to Parliament whoever he wanted regardless of his moral or ethical standing. The Constitution of Kenya Amendment Act No. 1 of 1975, the so-called Ngei Amendment, extended the Presidential Prerogative of Mercy to include annulling of the report of an election court, following an election petition, where an election offence had been proved. This was a further interference with the electoral process aimed at bringing Mr. Paul Ngei to Parliament regardless of the finding by the Election Petition Court.

A tight control on who comes to Parliament was a very important tool of strengthening and maintaining the Unitary State. In this regard the political party became a handy instrument. In this regard, clauses in the party Constitution were used to ensure that there were no competitive elections for the office of the President. When President Kenyatta died in 1978, such clauses were employed to enable President Moi sail through without any opposition. Pursuant to a clause in the KANU Constitution providing for a single party President who would also be Head of State, candidates in the presidential election were constitutionally required to be nominated by a political party. This meant a KANU nomination since this was the country's only

party. A full cabinet meeting on September 1 adopted a resolution endorsing Vice-President Moi as President. For parliamentary elections it was also required that candidates must be members of KANU, and approved by KANU's National Governing Council. When this Council met to approve candidates, 23 of them including Oginga Odinga who had rejoined KANU had their applications rejected.

When threats of some of these rejected candidates pointed in the direction of a possibility of their forming another party, this avenue had to be solidly sealed once and for all. Hence the Constitution of Kenya (Amendment) Act (No. 7 of 1982) which introduced section 2A to the Constitution that made Kenya a *de-jure* one party state. Kenya would ensure complete control by the Unitary executive on who comes to Parliament.

Looking at the large number of Cabinet Ministers and other Members of Parliament who lost their seats during the 1983 snap elections, one realizes the strength and value that lies in the ability of the Unitary Executive to dissolve Parliament and call elections any time he deems fit.

Notwithstanding the 1982 *de jure* one-party state amendment, it was realized that there was a need for further controls within the party to avoid "unwanted elements" sneaking their way into the Legislature. Once again the party nomination procedures became the most handy tool to be used. These were changed to introduce the 1986 queue-voting nomination procedure that was used to lock out quite a number of unwanted people thereby ensure the Unitary Executive's control over the Legislature.

### **3. Control of the Judiciary**

To strengthen the Unitary Executive and ensure its survival, the Executive had to

control all the other institutions that it could not swallow through centralization. In the case of the Judiciary, the first attempt of controlling it was through The Constitution of Kenya (Amendment) Act No. 7 of 1984 which took away the right of appeal from anybody challenging the validity of the election of a Member of Parliament. The High Court in this regard was made the final Court as concerns determination of questions of membership of the National Assembly whether its decision was final or interlocutory. But perhaps the most far reaching, in this regard, was the Constitution of Kenya (Amendment) Act No. 4 of 1985, which removed the security of tenure of the Judges of the High Court and Court of Appeal.

#### **4. Controlling the Party System**

As already pointed out, the political party system was one that had to be controlled and used by the Executive to maintain his hold on the Unitary State. In the first instance, Unitarism had to be seen even at the party level. Consequently by 1969, there was already a de-facto one party state. By way of approval of candidates and nominations of the same as was seen in 1978 in the case of the Presidential and Parliamentary elections, and 1986-87 by way of the new queue-voting nomination procedure, and by way of the harsh disciplinary measures handed down by the party disciplinary committee in the mid 1980's, the party became a very important and effective tool for strengthening the Unitary State and maintaining the Unitary Executive in power. The use of the party was enhanced following the 1982 declaration of a de-jure one party state. This meant that a one-party system had become a matter of Law and that therefore, anybody attempting to form any other party would be committing an illegal act. Indeed this had the effect of criminalising such attempts.

An attempt to form a party could easily amount to treason. It is therefore no wonder that after this kind of criminalisation, security of tenure was taken away from the office of the Attorney General, Controller and Auditor General and the Public Service Commission. One may rightly argue that this was necessary so as to make it easy for the Executive to sue the Attorney General to bring charges against perceived enemies.

#### **5. Control of the Public Service**

The Public Service was also marshalled into this project of strengthening the Judiciary. It had to be brought under the Executive and controlled by him. This started with the 1982 Amendment which created the office of Chief Secretary who was going to be the Head of the Public Service and exercise supervision of the office of the president and general supervision and coordination of all departments of Government. The Chief Secretary was under the control of the office of the President and through him therefore the President was able to control the entire public service. It is interesting to note that when in 1986 this office was abolished all the powers under this office were transferred to the President who then had the power to appoint such number of Permanent Secretaries as he determined. This put the President in an even more powerful position vis-à-vis the Public Service. Then there was the concept of all public servants holding office at the pleasure of the President.

#### **6. Reversing the Trend**

By the early 1990's, it was becoming clear that the Unitary State and/ or the Executive were not going to maintain themselves unchallenged. Eventually, they gave in and the process of reversing the early trend of strengthening the Unitary State started. Indeed a number of amendments that were meant to strengthen the Unitary State have since been reversed. The Judges, the

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Attorney General and the Controller and Auditor General have been given back the security of tenure. Whether at the practical level this is real is not an issue here. But the most fundamental reversal was the repeal of Section 2A of the Constitution in 1991, re-introducing multi-partyism. Unfortunately, and because of the failure by those concerned to address the fundamental issues, this repeal has had the effect of re-introducing multi-partyism or power sharing in the Legislature while the executive remains Unitary as the winner can still take all. The current constitutional review, therefore, ought to focus on all of these fundamental issues.

In conclusion, it is important to observe that a very interesting tendency has been noted in the Kenyan constitutional development and governance tendencies and tactics. This is the tendency to chose which institution to use when need arises to serve a personal and individualized Executive. For instance, when in the 1960's Kenyatta found it difficult to control and rely on the party and the Legislature, he shifted power to the civil or public service, particularly the Provincial Administration to serve his own personal interests. As he relied on the public service he sought to control or even kill the party and the Legislature. This led to the detention of Martin Shikuku when he complained that someone wanted to kill Parliament the way he had killed the party. The deputy speaker of parliament Jean-Marie Seroney was detained together with Martin Shikuku for supporting this view. The two were arrested in the precincts of parliament in total disregard of their parliamentary immunity.

When President Moi took over in 1978 and found out that most of the members of the public service could not be loyal to him, he shifted power to the party which eventually became a very strong instrument of governance. It was so strong that the courts

in the mid-1980's could not have the courage of questioning what the party had decided. When multi-partyism was introduced, the Executive shifted from the party and went back to the public service for use. This may explain why the IPPG reforms notwithstanding, the provincial administration has continued to disrupt opposition and other meetings with impunity.

## **7. Conclusion.**

The story of Constitutional developments in Kenya has disclosed two phases. These are; a phase under which the focus was on the dismantling of the Independence Constitution to create a Unitary State and that which the focus was on the strengthening of the Unitary State. In both phases, Unitarism was taken as being the creation of an individual and Unitary Executive. This concentrated all power in the person of the President, which explains why the focus of most Kenyans today is on the office of the President which they complain has too much power. The questions that this commission must, therefore, deal with are numerous. Should the business of review be a reversal of this situation? Should it be a dismantling of the Unitary State? Should the review merely involve a reverting to the 1963 position or should it do more? If it should do more, what more should it do? Why was it easily possible to dismantle the Independence Constitution? How best can we guard against the risk of a similar dismantling of a new constitutional dispensation? It is interesting to note that when the struggle for change started in the early 1990s, it was on the platform of FORD, the Forum for the Restoration of Democracy. We need to find out, at what stage of our constitutional development did we have democracy, which we must restore.

## AMENDING THE CONSTITUTION : LESSONS FROM HISTORY

### Githu Muigai Commissioner, Constitution of Kenya Review Commission

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"Time has come when we must have a fresh look at the entire Constitution. Since the Constitution was drafted, there have been 30 amendments which have created anomalies in the document. We need to sit down and re-write it all over again; from A to Z"

*Hon Amos Wako - Attorney General At the LSK Cocktail to felicitate LSK Members elected /nominated to parliament.*

#### 1. Abstract

Speak of a dismantled Constitution and you will be speaking about the Kenya Constitution. Since 1963, the Kenya Constitution has been 'tampered' (read amended) with so much that it can no longer be classified as rigid.

Most of the amendments that this document has been subjected to have not been for the better. Indeed, most were intended to legitimise undemocratic and authoritarian administration.

Following the December 29th general elections, the Kenyan political scene has drastically changed. In Parliament for example, there is now a serious opposition. There is also a high number of 'learned friends' who will be taking part in parliamentary debates.

In a changed political scene like this, there is a need to have a legal set-up which is acceptable to all. Today, we can frankly submit that the legal provisions in existence suit the multi-party democracy we are practising.

Yet they must; from the Constitution to Subsidiary legislations. In order that the acceptable laws be put in place, there is a

need for the current parliament to address itself to the issue of law reform. And the starting point in this should be the Constitution.

The Seventh Parliament must aim at restoring fully the qualities which the Independent Constitution was endowed with. They must give it the qualifications relating to acceptability, legitimacy and respectability.

Thus, in this issue, we focus on the Constitution and what lessons we should have learnt from the previous Parliament's conduct. In so focusing, we are offering a silent prayer that the same does not happen again.

#### 2. Introduction

Since independence the Constitution of Kenya has been amended at the average rate of one amendment per year. This brief article is an attempt to analyse the nature of those amendments, the reasons behind the amendments and the lessons we can learn about the nature of the Constitutional process, which will be of use to our country in the years ahead, especially at a time when there is a lot of clamouring for Constitutional changes of one form or another.



Before we examine each individual amendment to the Constitution it is perhaps important for us to examine what the independence Constitution was like and the type of Government that it envisaged. So that we may appreciate how far we have come and how much further if at all we can go.

### 3. The Independence Constitution:

The Independence Constitution was a highly complex document that reflected the diverse positions taken by the parties that negotiated it. It was a less than perfect document that sought to reproduce the fragile compromise that the parties had thrashed out at the Lancaster house conference. It was also unfortunately a document that the protagonists did not have much faith in. What were the principal features of the Independence Constitution?<sup>1</sup>

- a) The Independence Constitution created a Westminster form of Government. The Prime Minister was appointed by the Governor from amongst the members of the house of representatives with the largest majority backing. Executive power lay with the Queen who delegated it to the Governor-General. The Governor had very extensive powers relating to defence, external affairs and internal security and could even veto legislation. Whereas he was expected to act on the advice of a cabinet he was in fact answerable to the colonial office, as Kenya remained a Dominion of the United Kingdom.

The National assembly was bicameral (had two chambers) with the house of representatives as the lower house and the senate as the upper house. The senate was intended as a political safeguard for Majimbo as it had a very crucial role in the procedure for Constitutional amendment.

In every other respect the senate was subordinate to the house of representatives and was similar to the house of Lords in the United Kingdom.

- b) The Constitution provided for regionalism or what KADU had called "Majimboism". The country was divided into seven regions each having its own legislative and executive powers with a very complex relationship between the central Government and the regional Government.
- c) The Constitution provided for a very elaborate scheme for the protection of minority rights secured by a bill of rights. Europeans had been very concerned about compensation to white farmers and white civil-servants obtaining their retirement benefits. The Asians had similarly been concerned about the security of their investments in the country and the right to continue working and residing Kenya. A number of indigenous smaller communities had also been concerned about domination by larger and politically more active communities.
- d) The Constitution provided for an independent and impartial judiciary to regulate the exercise of public power and to prevent abuse and corruption. The judges were insulated from politics by being accorded independence of tenure. That is, they could only be removed

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<sup>1</sup> The summary provided here is adopted for *Ghai, Yash and MacAuslan J.P.W.B. Public law and political change in Kenya*, (Oxford University press, 1970)

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from office after very exhaustive investigations by an independent tribunal made up of senior judges from the commonwealth. Security of tenure was also extended to the Attorney-General who was to be completely independent in the execution of his duties, as the principal legal adviser to the Government.

- e) The Constitution provided for an independent and a political civil-service. Recruitment and promotion within the civil service was to be done by an independent public service commission, which also had powers of dismissal over public servants.
- f) The Constitution protected the conduct of elections by ensuring impartiality and honesty in elections, by setting up an independent Electoral commission, which was to be responsible for drawing up constituency boundaries and the actual conduct of elections.
- g) The Constitution contained a fairly extensive bill of rights that was to be supreme over ordinary laws. The bill of rights was modeled on the European convention on human rights and fundamental freedoms which was signed in 1950 and came into force in 1953.

The bill secured for every person in Kenya whatever his race, tribe, place of origin or residence, political opinion, colour, creed or sex subject to respect for the rights and freedoms of others and of the public interest, the following:-

- a) Life, liberty, security of the person and the protection of the law.

- b) Freedom of conscience, of expression and of assembly and association.
- c) Protection of the privacy of his home and other property from deprivation without compensation.

- h) The Constitution also dealt with the very complex issue of citizenship. All the indigenous Communities automatically become citizens of Kenya, as did a section for the migrant communities.

#### **4. The Amendment Process**

Since the Constitutional compromise captured in the independence Constitution was very fragile the amendment process was greatly insulated from unilateral and partisan action. It was initially proposed that changes would require a majority of 75% of each house except in respect of amendments seeking to alter the entrenched rights of individuals, the regions, tribal authorities or districts in which case the required majority in the senate would be 90%.

As finally enacted there were two categories of amendments, ordinary amendments and amendments to specially entrenched provisions. The specially entrenched provisions could not be altered except by a bill secured by 3/4 of the votes of all the members on the second and third reading in the house of representatives and nine-tenths in the senate on similar readings. The entrenched provisions related inter-alia to fundamental rights, citizenships, elections, the senate, in similar readings, structure of regions the judiciary, and the amendment process itself.

The non-entrenched provisions of the Constitution could be altered much more easily, all that was required was a vote of 3/4 of all members in both houses on the

2nd and 3rd readings, if a decisive vote was not obtained the bill could be presented to the electorate in a referendum and if supported by 2/3 of the votes it would be reintroduced into the house and passed by a simple majority just like ordinary legislation.

The Constitution was in many ways unworkable. It was so complex and unrealistic that it was only a question of time before the process of dismantling it began. That has been going on for almost thirty years and unhappily most of the amendments have not been for better. It is to a review to these amendments that we now turn<sup>2</sup>.

#### **4.1. The Amendments -[1964 -1969]**

*The 1st Amendment*<sup>3</sup> - This Amendment established a republic with an executive President, who also became Head of State, Head of Government and Commander in Chief of the Armed Forces. The first president would be the man holding offices as Prime Minister immediately prior to the establishment of the Republic. A candidate for the presidency had to be a candidate for the House of Representatives, and his nomination had to be supported by 1000 registered voters. All candidates for the House of Representatives had to indicate their support for a presidential candidate. The presidential candidate who, having won his constituency seat also received a majority of votes of the number of members

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<sup>2</sup> The first ten amendments to the constitution are very well summarized by Dr. Cherry Gertzel in her book *The politics of independent Kenya* (E.A.P.H.) 1978) and the above summary is derived therefrom. For a good analyses of these amendments see Okoth-Ogendo "Constitutional change in Kenya since independence" 1970 *African Affairs*, 20

<sup>3</sup> Act number 28 of 1964 – Published on 24<sup>th</sup> November 1964

of parliament was declared elected. At times other than a general election (i.e. on the death or resignation of the president) the House of Representatives, acting as an electoral college, would elect a successor by a procedure laid down in the constitution. The amendment also removed all except specially entrenched powers from the Regional Assemblies by amending Schedule 1 of the Constitution. Other changes included the provisions of a Vice-president appointed by the President from among the elected members, to be 'principal assistant of the president in the discharge of his duties' but not automatically to succeed him.

*The 2nd Amendment*<sup>4</sup> - This amendment amended certain specially entrenched clauses concerning the Regions, e.g. on the financial relations between the Centre and the Regions, and the method of alteration of regional boundaries.

*The 3rd Amendment*<sup>5</sup> - This amendment altered the parliamentary majority required for approval of a declaration of a state of emergency from 65 per cent to a majority. It also provided that the period after which a parliamentary resolution must be sought should be extended from seven to twenty-one days. Significantly it decreased the parliamentary majority required for a constitutional amendment to 65 per cent in both Houses. Abolished the special entrenchment of certain sections of the Constitution concerning the executive powers of the Regional Assemblies, renamed those Assemblies Provincial Councils, and gave Parliament the power to confer functions upon them.

Abolished the right to appeal to the Privy Council. Altered the title of the Supreme

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<sup>4</sup> Act number 38 of 1964 – published on 17<sup>th</sup> December 1964

<sup>5</sup> Act number 14 of 1965 – Published on 8<sup>th</sup> June 1965.

Court to High Court. Removed the provisions concerning control of agricultural land transactions from the constitution. Declaration of emergency made valid for three months instead of two.

*The 4th Amendment*<sup>6</sup> - the Amendment made commonwealth citizens eligible for rather than entitled to citizenship. Brought the constitution into line with trade union law. Required that an M.P who was sentenced to a prison sentence of six months or over should vacate his seat. Required that an M.P who failed to attend eight consecutive parliamentary meetings without permission of the Speaker should lose his seat, although it allowed the president to waive the rule. Gave the speaker an original but not a casting vote. President given power to appoint and dismiss from civil service.

Public service tenure at pleasure of President. President's powers to rule by decree in North-Eastern Region extended to Marsabit, Isiolo, Tana River and Lamu districts.

*The 5th Amendment*<sup>7</sup> - This Amendment required an M.P. who resigned from the party that had supported him at the time of his election at a time when that party was a parliamentary party, to vacate his seat at the expiration of the session.

*The 6th Amendment*<sup>8</sup> - This Amendment must be read in conjunction with amendments made at the same time to the - Preservation of Public Security Act-, Cap 57

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<sup>6</sup> Act number 17 of 1966 – published on 12<sup>th</sup> April 1966

<sup>7</sup> Act number 17 of 1996 – Published on 7<sup>th</sup> June 1966

<sup>8</sup> Act number 18 of 1966 – Published on 4<sup>th</sup> January 1967.

Laws of Kenya. It provided that fundamental rights of, inter alia, movement, association, assembly and expression would not be contravened if, under the provisions of the Preservation of Public Security Act, the President exercised his special emergency powers including detention without trial.

*The 7th Amendment*<sup>9</sup> - This amendment provided for the merger of the Senate and House of Representatives to establish a unicameral legislature - The National Assembly. The life of parliament was extended by two years.

*The 8th Amendment*<sup>10</sup> - This Amendment removed doubts on the interpretation and effect of Section 42A of the Constitution concerning the resignation of members under the fifth amendment Act by making it retrospective in operation.

*The 9th Amendment*<sup>11</sup> - This Amendment abolished the Provincial Councils and deleted from the Constitution all references to the provincial and district boundaries and alteration thereof, thereby removing the last vestiges of regionalism.

*The 10th Amendment*<sup>12</sup> - This Amendment altered the method of presidential election. In future the president would be directly elected by the national electorate at the time of a general election. All candidates for a general election should be nominated by apolitical party. At the time of a general

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<sup>9</sup> Act number 40 of 1966 – Published on 31<sup>st</sup> March 1967

<sup>10</sup> Act number 4 of 1967 – Published on 31<sup>st</sup> March 1967

<sup>11</sup> Act number 16 of 1968 – Published 19<sup>th</sup> April 1968

<sup>12</sup> Act number 45 of 1968 – Published 12<sup>th</sup> July 1963

election every political party taking part in the election would be required to nominate a presidential candidate. At the poll the ballot paper would pair the presidential candidate and the parliamentary candidate belonging to the same party. Further it altered the provisions for succession. If the office of president became vacant other than at the time of dissolution of parliament an election for president should be held within ninety days. In the interim period the vice-president would exercise the functions of the office, but in certain matters including the preservation of public security and the appointment and dismissal of Ministers would act only in accordance with a resolution of the Cabinet.

It also removed the requirement that the National Assembly should every eight months reaffirm its support for an order bringing part III of the preservation of Public Security Act, (Which provides inter-alia for detention without trial) into force.

It finally, altered the composition of the National Assembly by substituting the twelve Specially elected members of the House of Representatives with twelve nominated members appointed by the President.

#### **4.2 Consolidation**

Act 5 of 1969, published on 18 April 1969, brought all these amendments together in a revised constitution. Certain additional amendments were also made, including the alteration of the membership of the Electoral Commission, all of whose members would now be appointed by the president, (Formerly the Speaker had been Chairman.)

The first ten amendments of the Constitution had a number of major consequences and the result of effectively rewriting the power map so dramatically as to have the effect of creating a new constitution:- Key among the major effects were:-

- a. The establishment of a republic and the dismantling of regionalism which Kanu had always been opposed to and which had been a major concession to KADU at independence. The Constitution now provided for a strong centralised authority.
- b. Reviewed the specially entrenched provisions of the Constitution and altered the requisite majority for Constitution amendments paving the way for more extensive constitutional changes;
- c. Power was centralised much more in the executive and particularly the presidency and parliament's authority diminished as more discretion was granted to the former. The senate was abolished as an independent chamber and the national assembly became a unicameral legislature, and in fact though not in law constituted Kenya a one party slate.

Why were these changes effected? Why was it considered necessary or desirable that the constitution should be amended in the manner already examined.

The amendments to the Constitution in these early years were occasioned partly by the desire to grapple effectively with the challenges of governance in an emergent nation and partly by the attempt by the political elite to shake-off opposition by strengthening themselves via the instrumentalities of the law. The second theme was however to achieve dominance in the years that lay ahead and was indeed to become almost exclusively the basis of all future constitutional changes.

The main key to an understanding of the political dynamics that occasioned Constitutional changes during this period

lies in an understanding of the nature of the colonial constitutional legacy. For in the colonial constitutional order can be traced the genesis of the post-independence constitutional paradox.

To begin with the concept of the constitution and of the constitutionalism were completely alien in Kenya. The colonial order had been one monolithic edifice of power that did not rely on any set of rules for legitimization. When the Independence constitution was put into place it was completely at variance with the authoritarian administrative structures that were still kept in place by the entire corpus of public law. Part of the initial amendments therefore involved an attempt - albeit misguided - to harmonise the operations of a democratic constitution with an undemocratic and authoritarian administrative structure. Unhappily instead of the latter being amended to fit the former, the former was altered to fit the latter. With the result that the constitution was effectively downgraded.

The second key to the understanding of the changes lies in appreciating the nature of the compromise that resulted in the independence constitution. KANU had always been opposed to "Majimboism" and on coming to power treated the "Majimbos" with such contempt that, it refused to implement key requirements of the constitution regarding regionalism so much so that Kadu threatened to file suit! It was just a question of time before the "Majimbos" were disbanded. When KADU voluntarily dissolved itself in 1964, that time had come.

Finally we can explain the changes during this period on the basis of the power politics of the day.

KANU came to power as abroad coalition of various forces most of which did not quite agree on the "correct" political path to take,

but were nonetheless united in the firm belief that independence and self-rule were of immediate concern. The ideological differences within KANU itself were subsumed in the demand for independence and self-rule, and did not show up until well after independence. As fate would have it the dissolution of KADU and the merger with KANU polarised the latter even further.

Two major groups emerged within KANU which for lack of better phrasing we shall refer to as the "right wing" and the "left wing". The right wing which had the sympathies of President Kenyatta had its positions best articulated by Tom Mboya while the left wing was led by Jaramogi Oginga Odinga.

The divisions within Kanu as a party partly explain why the problems posed by party indiscipline were dealt with as if they posed constitutional issues. The strengthening of the executive and through it the provincial administration was seen as a possible panacea for the instability of Government. Instead of a strong party government Kenyatta opted for a strong -almost draconian provincial administration. When the "left wing" of Kanu left to form K.P.U. the Government panicked and this was followed by drastic concentration of security powers in the hands of the executive, the postponement of elections for two years and the assignment of constituencies to persons not elected to them, all of which were affected by the changes discussed above.

#### **4.3 Part Two - [1974-1986]**

After the 1969 Amendments and the consolidation of all the constitutional amendments in a revised constitution no further amendments were made for a period of five years, which period it may be argued was a period of relative constitutional and political stability. It was also a period that

finally consolidated the imperial presidency and its attendant organs.

The next amendment (*the 12th amendment*): was effected in 1974. By the constitution amendment act no. 2 of 1974 parliament lowered the voting age from 21 to 18 years while simultaneously amending the age of majority act in the same terms.

It is important to note that this amendment was effected at a time when the country was preparing for a general election and was definitely intended to boost the pool of available voters.

*The 13th amendment* affected by the constitution of Kenya amendment act. No. 2 of 1974 made Kiswahili the official language of the national assembly. On the face of it the move to have parliament deliberate in English was none controversial. Indeed in the context of the cultural nationalism of the 1970's it was long overdue. What is significant however was the manner in which the amendment was first mooted and the manner in which it was effected both of which in a significant way began to redefine the sovereignty of parliament and the entire constitutional process in Kenya.

On 4th July 1974 at a KANU Governing Council Meeting President Jomo Kenyatta declared that henceforth the national and official language for all purposes including parliamentary proceedings would be Kiswahili. When parliament reconvened the next day it was not clear whether parliament should obey the letter of the constitution or the "*presidential directive*" (which in Kenya's constitutional jurisprudence has no legal validity unless provided for specifically by law.<sup>13</sup>) Ultimately a bill was

tabled before parliament to effect the changes, which bill dispensed with the 14 days publication period and waived the requirement that no more than one stage of the bill could be taken at the same sitting. It is ironical that debate was all these while being conducted in Kiswahili and ultimately the Attorney-General (unconstitutionally) had to amend the bill during deliberations to provide for its retroactive application. Both the speaker and the Attorney-General overruled Mr. Jean Marie Seroney who was opposed vehemently to the substance and procedure of the amendment. He was particularly disturbed by the emerging trend in which amendments were hurriedly made and hurriedly passed invariably without debate.

History vindicated the correctness of Jean Marie Seroney's position. In 1975 barely a year after the 13th amendment was enacted parliament repealed it *vide* the *14th amendment* which now provided that bills in parliament would be presented in English and debated either in English or in Kiswahili<sup>14</sup>. This was a more sensible compromise and it is hard to understand why it had not been proposed in the first place.

Quite clearly these changes regarding the use of language in the national assembly could have been effected by amending the standing orders. Indeed the new amendment was in conflict with section 34(c) of the constitution which set out the criteria for one to qualify as a member of the National Assembly which criteria included a command of English but not Swahili. Most amendments betrayed poor legal advice to the Government of the day or just sheer carelessness on the part of the Attorney-General.

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<sup>13</sup> Kenya law does not provide for executive orders as in the case in the United States. In practice however the so-called directives have created a

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situation whereby the president can literally rule by decree.

<sup>14</sup> Act number 1 of 1975.

It was however the 15th amendment that best illustrates the cavalier attitude assumed by the Government in respect of the constitutional amendment process and the institutionalization of parochial partisan and self-serving manipulation of the constitution.

*The 15th amendment*<sup>15</sup> extended the prerogative of mercy enjoyed by the president under section 27 of the constitution, to the removal of disqualification arising out of the report of an election court once an election offence has been proved against an election candidate. Both the substance and the procedure of this amendment put the bona fides of the Government in issue and greatly compromised the Governments alleged commitment to the rule of law.

Paul Joseph Ngei a friend of President Jomo Kenyatta and a co-accused at the Kapenguria trial and formerly a minister of Local Government had less than a month prior to the amendment, been found guilty of an election offence by an election court, and had been barred from contesting any elections for five years, as was then provided for in the relevant election law. President Kenyatta in his wisdom, or the lack of it decided to intervene to save Ngei from political oblivion. The result was this amendment to the constitution.

The Bill was published one day before it was debated 10th December 1975. The bill went through all the stages of parliament [1st, 2nd, 3rd reading] in one afternoon, received presidential assent on 11th December 1975 and was given retroactive effect to have come into force on 1st January 1975! Nowhere has such a lack of seriousness when dealing with the

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<sup>15</sup> Act number 14 of 1975

fundamental law of the country been recorded.

It is again not clear why the amendment, if at all necessary, could not have been effected through the National Assembly and Presidential Elections Act and saved the constitution an unnecessary and ill-advised amendment. Quite clearly the Government was not properly advised on the matter or if it was it chose to act in manner that undermined the integrity of the constitution, the Constitutional process and the rule of law.

*The 16th amendment*<sup>16</sup> of 1977 established a Kenya court of appeal after the East African court of appeal collapsed alongside the East African Community. The amendment also abolished the right to remit compensation after compulsory acquisition without complying with foreign-exchange regulations.

It is interesting to note that the first part of would be required to nominate a presidential candidate. At the poll the ballot paper would the amendment created a situation in which the Chief Justice is both a high court judge and a judge of the court of appeal with the resultant inconvenience that it has caused in practice.

*The 17th amendment*<sup>17</sup> of 1979 sought to undo the damage of the 1974 "Kiswahili amendment". It provided that English as an alternative to Kiswahili in the National Assembly and further that in future proficiency in both English and Kiswahili would be a prerequisite for election to parliament, thereby dealing with the anomaly previously created by section 34 (c) of the constitution.

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<sup>16</sup> Act number 13 of 1977

<sup>17</sup> Act number 1 of 1979



The first, second and third readings of the bill were passed in one sitting. The speaker gave very little time for debate and overruled those who sought to trace the history of the amendment and in particular those who sought to blame the Attorney-General for lack of foresight!

*The 18th amendment*<sup>18</sup> that came in 1979 specified the period within which certain public officers had to resign in order to qualify to contest parliamentary elections. Such period was specified as six months. This amendment was the first amendment to the constitution under President Moi., It was made amidst attacks and counter attacks between leaders in the run off to the 1979 elections.

Again this amendment had its genesis in one of the "directives". The government had issued a notice that all civil servants wishing to contest elections had to resign by 15th May 1979. Ostensibly the amendment was meant to eliminate the abuse of office by persons in public offices who intended to go into politics. In reality as was noted by the press reports at the time, the changes were intended as "a way of scaring would be opponents of sitting M.P.'s".

As had now become the procedure, the bills publication period was reduced from 14 to 8 days. The Bill was subsequently read for the 1st and 2nd time on the first day!

It is interesting to note that after the amendment had been effected the attorney-General promised to issue a statement clarifying which public servants were affected by the amendment although the amendment did not vest any discretion in the Attorney-General! Obviously it is important to recall that the then Attorney General

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<sup>18</sup> Act number 5 of 1979

himself resigned as a public servant in 1980 and became the member of parliament for Kikuyu.

*The 19th amendment*<sup>19</sup> was to go down into our history as the most far-reaching and controversial amendment to our constitution. This is the amendment that introduced the infamous section 2A into our constitution and converted Kenya into a de-jure one party state. The amendment outlawed all opposition whatsoever and gave the then ruling party KANU the monopoly of political power in the country. None could hold elected political office from the president downwards unless one was a member and nominee of KANU. In fact, one ceased to hold elected political office when one ceased to be a member of KANU. KANU was henceforth to enjoy a monopoly of political power in the country.

The background against which this amendment was made is very interesting. Oginga Odinga, George Anyona and others had allegedly formed the intention to form a new political party - The Kenya Socialist Party to challenge KANU. Subsequently Oginga Odinga was expelled from KANU and George Anyona was detained.

A Kanu Governing council Meeting ordered the Attorney-General immediately thereafter to prepare legislation immediately making Kenya a one party slate. This was in itself an interference with the sovereignty of parliament and the independence and integrity of the office of the Attorney-General<sup>20</sup>. More significant was the fact that in strict constitutional theory the amendment was outside the scope of the amending power granted to parliament by article 47 of

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<sup>19</sup> Act number 7 of 1982

<sup>20</sup> Section 30 of the Constitution vests the legislative power of the Republic in Parliament i.e. the president and the National Assembly.

the constitution. Indeed it has been argued that section 2A was unconstitutional *ab initio*.<sup>21</sup> It was intended as a Constitutional *coup detat*. A legal way of the ruling party legislating itself in power in perpetuity. The effect was to rewrite the constitution and especially the bill of rights ,in a fundamental and unconstitutional way<sup>22</sup>.

The disregard for procedure and other "legalities" which had now been established over the years was similarly present in the amending process. Before the amendment was debated the then Vice-president moved a procedural motion seeking to reduce the publication period of the bill from important matters like supplementary estimates!

Debate was kept to a minimum and consisted on the whole of a chorus of approval save for two M.P's only who voted against the amendment<sup>23</sup>.

While the bill was going through parliament a massive crackdown on university lectures believed to be unsympathetic to the Government commenced. Soon thereafter was the aborted coup attempt, which was followed by a state of great political tension in the country.

It is important to point out that other than converting Kenya to a de-jure one party state the 19th amendment formalized the position of the chief secretary. The chief secretary was to be head -of the public

<sup>21</sup> Muigai, Githu – “Constitutional Government and Human Rights in Kenya” (1990) *Lesotho Law Journal* pp. 107 – 135.

<sup>22</sup> In *Gitobu Imanyara V Attorney – General* Miscellaneous Civil application no. 7 of 1991. The High court (Digdale J) dismissed this argument. Quite clearly the jurisprudential issues was completely lost on the court.

<sup>23</sup> These were Charles Rubia and the late Jonathan Njenga

service and was to exercise supervision over the office of the president and general supervision and coordination of all other departments of Government. This post was to be abolished at a later stage revealing further what. little thought went into formulating amendments.

*The 20th amendment*<sup>24</sup> of the constitution of 1985 made the high court the final court of appeal as concerns the determination of questions as to the membership of the National Assembly under section 44 of the constitution.

It was also provided that a high court judge who had been appointed to the court of appeal could be allowed to continue and complete cases he was hearing while sitting at the high court. The amendment also increased the membership of the public service commission, to fifteen members - excluding the chairman and vice-chairman.

Against this it would appear that simple administrative restructuring which could have easily been affected by amendments of the relevant statutes were improperly treated as issues of constitutional significance.

*The 21st amendment*<sup>25</sup> of the constitution in the same year repealed section 89 of the constitution which provided acquisition of citizenship of a Kenyan born in Kenya after 11th December 1963, henceforth only those who had 'a mother or a father of Kenyan citizenship by virtue of being born in Kenya irrespective of their parentage.

*The 22nd amendment*<sup>26</sup> of 1986 was as far reaching in it's implications as the 1982 amendment and may very well have been a watershed amendment in terms of the

<sup>24</sup> Act number 6 of 1985

<sup>25</sup> Act number 15 of 1986

<sup>26</sup> Act number 14 of 1986

very severe criticism both local and international that it attracted. In many ways it was the genesis of extensive ill-advice amendments that followed thereafter culminating in the 25th amendment which is discussed below.

The amendment was a clear case of a situation where Government was no longer receiving legal advice and that Attorney-General was bending over backwards to accommodate every political whim!

The amendment removed the security of tenure of the offices of the Attorney-General and the controller and Auditor general. Two very key offices which in the original constitution had been insulated from the vulgarity of political life, being watch dogs of the public good. Why their independence was deemed a threat or what mischief was being redressed never became clear.

The Bill caused an outcry from the public inter-alia - The Law Society of Kenya (LSK), the National Christian Council of Churches (NCCCK) and the catholic Bishops. This very unpopular bill with the public, was nonetheless passed in record time and only got opposition from two M.P.'s. The debates in parliament justified the amendments as necessary in order to centralize power in the president and avoid the growth of alternative centre of power as occurred during Mr. Charles Njonjo's tenure as Attorney-General! significantly the then Attorney-General instead of protesting the erosion of his authority was sycophantically eloquent of the need to undermine his office!

The amendment also abolished the office of the chief secretary, which had been created by the controversial 1982 amendment. The argument again was that this office had been set up at the behest of Mr. Njonjo and it was no longer relevant and should be abolished. History now records that that the office far

from dying has grown from strength to strength under a new name.

Finally the amendment altered a number of constituencies by providing for a maximum of 188 and a minimum of 168. In respect of this particular aspect it is not clear why the number of constituencies would not be determined by parliament periodically on the advice of the electoral commission without the need for constitutional amendments every so often.

#### 4.3 *Part Three - [1987 -1992]*

*The 23rd amendment* of the Constitution was one of those rare but significant instances where the legislature overrules the judiciary. In the case of *Margaret Magiri Ngui V Republic*<sup>27</sup> - the high court sitting as a constitutional court had held that an ordinary statute like the criminal procedure Act, could not breach the fundamental rights guaranteed by the constitution -in this case the right to bail.

*The 23rd amendment*<sup>28</sup> made all offences which are punishable by death i.e. treason, murder robbery with violence and attempted robbery with violence non-bailable. In a significant way this was an interference with the discretion of the judiciary to award or refuse to award bail depending on the circumstances of each case. Bail is a fundamental human right because our criminal jurisprudence presumes all accused persons innocent until proved guilty after due process of law.

Indeed historically the courts had always declined to release persons charged with capital offences on bail due to the possibility that they would abscond and fail to show up

<sup>27</sup> Criminal application number 4 of 1985 (unreported)

<sup>28</sup> Act number 20 of 1987

for their trials. The interference with judicial discretion and jurisdiction which was reflected in other amendments to statute law was unnecessary and gave the impression that the independence and impartiality of the judiciary was being compromised.

*The 24th amendment*<sup>29</sup> of 1988 in part carried on the process commenced by the 23rd amendment but on the other hand made more radical and substantial changes to the constitution.

The amendment further eroded the rights of suspects and accused persons by empowering the police to hold suspects in capital offences for more than 14 days. The maximum period previously provided for by law was 24 hours! It is interesting to note that in the initial bill the Attorney-General sought to empower the police to hold suspects in respect of all offences for up to 14 days before taking them to court. The resulting public outcry caused a last minor amendment which did nothing to clarify the full import of the amendment.

It would appear that all the police had to do in order to justify holding suspect for more than 14 days without charge is to allege that they were holding the suspect in connection with investigations into a capital offence!

This amendment was made at a time when Kenya was facing various allegations of human rights abuses and especially of torture of suspects while in police custody. It was as ill-timed as it was unnecessary and irrelevant. As a matter of practice courts had always permitted the police to hold suspects after bringing them to court, in order to finalise investigations where this was deemed necessary. This again was further manifestation of the incompetent legal advice that Government was receiving and

of its own cavalier attitude and insensitivity to public issues.

If the first part of the amendment was ill-advised the second part was completely outrageous. The second part removed the security of tenure of the offices of the members of the public service commission and judges of the high court and the court of appeal, without providing any sensible jurisdiction whatsoever<sup>30</sup>.

In any country that purports to be democratic a number of values are fundamental. Key among these are the separation of powers - which entails in part the independence and impartiality of the judiciary and the political neutrality and impartiality of the civil service. This amendment went against the entire philosophical and jurisprudential basis of the constitution.

In effect the amendment gave to the executive powers to interfere with the judiciary, and civil service with impunity. Whereas this amendment was a logical extension of the process of concentrating immense powers in the executive and reducing its accountability to any other organ except itself, it was blatantly unconstitutional. There can be no interpretation of the constitution that can read into the amending power, a power to render one fundamental arm of Government into a subservient puppet of the other. If there be such an interpretation it is against constitutional theory, judicial precedent and the reality of a Democratic system of Government<sup>31</sup>

<sup>30</sup> It was claimed at the time that one British judge had disobeyed the orders of the chief justice to go on transfer and therefore showed his security of tenure could be abused.

<sup>31</sup> See 1 *Liyange V Queen* [1967] A.C. 259  
2 *Hinds V Queen* [1967] 2 all E.R.  
3 *Golak Nath V Punjab* [1967] A.I.R. (S.C.) 1643.

<sup>29</sup> Act number 4 of 1988

This amendment coming also at the that the Kenya Government was bet accused of autocracy and undemocratic practices was ill-advised and unnecessary. In many ways this amendment reveal Government that was either not receiving or not listening to sound legal, constitutional and political advice.

In it's third part the amendment recognized the creation of the office of the chief magistrate and the principal magistrate within the judiciary.

*The 25th amendment*<sup>32</sup> of 1990 started the long and laborious process of undoing the great harm done by hasty, ill-advised and downright unconstitutional amendments that had occurred since 1982. It represents to some extent the stemming of the tide.

The 25th amendment restored the security of tenure of judges of the high court and the court of appeal, the Attorney-General, the controller and Auditor general and members of the public service commission.

The background to the amendments gives an interesting insight into the workings of the constitutional process in Kenya and in particular the disharmony between formal constitutional provisions and constitutional practice.

Whereas the constitution provides that the Attorney-General is to act completely independently in the exercise of the functions of his office and that parliament is the supreme law making body in the land, the Attorney-General nonetheless did receive "a directive" in November of 1990 to draft a bill effecting the changes!

The bill brought out the very unprincipled and reckless way in which previous amendments were made. The same parliament that had waxed eloquence on the insignificance of judicial tenure and the need of a strong presidency, now fell over itself exacting the independence of the judiciary. It was George Orwells "1984" at large!

It is significant to point out also that this amendment represents the first piece of credible evidence that the Kenya Government was beginning to listen to international criticism and in particular was beginning to respond to the views of the donor community, as this coincided with the era in which the latter made demands of transparency and accountability on the former.

*The 26th amendment*<sup>33</sup> following closely on the 25th in 1991 sought to provide a new maximum (210) and a new minimum (188) number of parliamentary constituencies. This amendment was in many ways ill-advised to begin with. The function of specifying the number of parliamentary constituencies is in law reserved for the Electoral Commission which is an independent constitutional body, which is not subject to the direction of any person or authority.

The last review of electoral boundaries had been undertaken in 1986 and another was not due until 1994! By amending the constitution parliament was interfering with the work of the electoral commission, in a manner not anticipated by the constitution. This amendment by failing to meet a condition precedent may very well be unconstitutional.

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<sup>32</sup> Act number 2 of 1990

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<sup>33</sup> Act number 10 of 1991

*The 27th amendment*<sup>34</sup> was a major watershed in the country's swing back to the dictates of constitutionalism and the rule of law. The 27th amendment undid the damage done by the 19th amendment- The amendment repealed section 2A of the constitution and opened the way to pluralist politics and put an end to Kenya's de-jure one party status.

The repeal of section 2A was the culmination of efforts of various groups within and outside the country that had directed intense criticism against the Government of Kenya for failure to countenance any form of political opposition. Ultimately however it was an amendment that responded more to global political and economic pressures than to local self-evaluation.

*The proposed 28th amendment*<sup>35</sup>

On 3rd March 1992 the Government published a bill that would have affected the 28th amendment. If enacted the bill could very well have been largest single re-organisation of the constitution since independence and consequently would have had very far reaching consequences. In the nature of things the bill was shelved. It may or may not be enacted in the future. It is however useful to examine its provisions because of the light it sheds on the constitutional process in Kenya.

In broad outline its major provisions were as follows: -

a. Abolished the office of the Vice-President

- b. Vested in the speaker of the National Assembly the powers of the president whenever that office is vacant.
- c. Limited the tenure of the president to two five year terms.
- d. Defined specifically (for the first time) the functions, powers and duties of the president.
- e. Provided for a referendum to give public opinion on fundamental issues (including the removal of the president.)
- f. Provided for impeachment of the president for unconstitutional conduct - by a referendum vote.
- g. Created the dichotomy between the head of state and the head of Government with the president as the former and the prime minister as the latter.
- h. Repealed presidential powers to rule North Eastern province by decree.
- i. Clarified the role of the electoral commission in the conduct and management of elections.
- j. Provided for parliamentary supremacy over presidential veto of legislation.
- k. Provided for legal aid to victims of human rights violations.

The amendment proposed by the 28th amendment in a way address the lacuna that had existed in the Independence Constitution and to that extent were very progressive! For example the independence constitution had not explicitly stated what the president's actual powers were to be nor provided for a way out of a stalemate between the president and parliament in the event of a veto of legislation by the former.

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<sup>34</sup> Act number 12 of 1991

<sup>35</sup> Act number 15 of 1992

To the extent however that the amendment proposed a power sharing scheme between the president and a prime minister it was conceptually misconceived. In the final analysis it failed to clarify who of the two held *executive* powers.

The amendment having been proposed immediately after the re-introduction of multi-party politics as widely viewed as a rear guard action by the KANU Government to tamper with the political apparatus to their advantage. The truth may very well be however that the amendments were the brain child of a reformist Attorney General who saw the moment as right to make long overdue clarification. To the extent however that he sought to placate the political establishment he created a situation in which the baby was thrown out with the bath water!

Most of the amendments were crucial and progressive and in our view ought to be reintroduced. Those relating to power sharing need to be rethought and redrafted.

## 5. The Lessons From Our History

27<sup>th</sup> constitutional amendments later and on the brink of the 28th amendment. What lessons have we learnt that may guide us into the future?

A number of issues emerge:-

1. Whereas the constitution declares itself the fundamental law of the land and politicians give lip-service to this principle, the amendments to the constitution show that the constitution has never been perceived as such. At best the constitution has been perceived as a weapon in power politics to be manipulated to subdue or eliminate opposition.

2. The process of constitutional amendment has been hurried with very little or no debate and definitely with very little thought going into the implications of amendments so much so that some amendments have to be amended to return to the old position soon thereafter!
3. The *substance* of most amendments have gone to create an edifice of almost unaccountable power in the executive, and to undermine the other arms of Government viz the judiciary and the national assembly.
4. The sanctity and integrity of the constitution and the constitutional process has seriously been compromised by too many amendments, most of which have been ill-advised and unnecessary.

## 6. The Future

What must be done in respect of future constitutional amendments?

1. The constitution must be respected as the fundamental law of the land and frivolous or partisan amendments meant to achieve short term gains for sections of the political elite must be avoided.
  2. The process of amendment must be made more difficult in order to discourage frivolous amendments. Preferably all substantive amendments ought to be referred back to the people by way for referendum.
  3. The *substance* of future amendments , must relate to the process not of enlarging the state over civil society but of creating greater democratic avenues of public participation, greater respect for human right and greater control public power.
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4. The public's confidence in the constitutional process and the rule of law must be restored to enable the community to input meaning in all future amendments of our constitution.

If the above are observed, the constitution will be restored to its pride of place as the symbol of our collective part to peacefully live together in freedom and unity and to create an even greater country.



# THE MANIPULATION OF THE CONSTITUTION OF KENYA, 1963-1996: A REFLECTIVE ESSAY

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## 1. The Concept of Constitutionalism

A constitution by its very nature is an agreement on how people in a given place would like to live together, promote and advance their interests, and protect those interests from all types of threats. That agreement is often based on a realisation that people of diverse characteristics and temperaments that are often volatile and result in violence have no choice but to live together in a particular territory. In an effort to create harmony and, at least, minimize violent confrontations, common sense forces them to reach an agreement on how they will occupy the same space without killing each other. They are forced to make a constitution or enter into a formal social contact.

Over time, two conceptions of constitution have emerged. The one that has tended to dominate is the one that favours rulers whether they are kings, presidents, or party leaders. This would be a leader-driven constitution and is meant to legitimise whoever happens to be in control of a given territory. He then claims that an arrangement empowering him to rule other people is good for the general public. This conception of a constitution, however, has been in constant struggle with the desire of people in a particular area to determine their own destiny. In Kenya, this kind of constitutional thinking has come to be labelled *Wanjiku* -

driven or people driven. *Wanjiku* is the name of a woman who presumably is a representative of ordinary people rather than of the political class or the national elite. The name *Wanjiku*, acquired its constitutional connotation after Kenya's President Daniel Toroitich arap Moi used it to disparage the competence of rural women to understand constitutional complexities. In this sense, a constitution is an agreement by all the *Wanjikus* in a place on how they want to live, safeguard, and advance their interests without losing their natural rights to an individual or a clique of individuals occupying positions of authority. Both views have had strong advocates to justify them.

There are a number of explanations for the constitutional conception that justifies a situation in which the weaker side is forced to agree to an arrangement that favours the strong in terms of interests and values. Among these is the method described by Ibn Khaldun in his *Muqadimah: An Introduction to History*, in which people become so comfortable and lazy that they stop caring about their own protection. As a result, they become susceptible to manipulation by a power hungry maniac who promises to provide protection on condition that everyone else pays allegiance and tribute to him. This way the idea that a particular family, calling itself royal, has inherent right to rule other humans is implanted and with time becomes accepted as part of tradition to

which people are forced to agree. This tradition, incorporated into the value system of a people, subsequently becomes a kind of constitution.

Excessive indulgence in luxury that reduce communal consciousness that leads to a lack of vigilance on the protection of rights and thereby invite a manipulator to cajole his way into royalty is one way in which kings were created but there were others. There are those who, irrespective of the social setting, decide to impose themselves as kings or rulers and reshape the society to fit their liking. Some come up, as explained by Thomas Paine in his influential *Common Sense*, as the most cruel of brutes who succeed in beating up other brutes and then declare themselves kings. To legitimize their imposition, such royal brutes then go to the extent of claiming that their rule has divine blessings or is divinely constituted as a way of silencing those with questioning minds. Portrayed as being divinely inspired, therefore, the constitution becomes a basis for absolutist rule. This way of claiming legitimacy fits neatly into Niccolo Machiavelli's prescriptions in *The Prince* on how to grab and stay in power irrespective of what the wishes of the ruled are. How one becomes king, or retains his rule, is immaterial as long as he remains king. Such a ruler fluctuates between appearing like a concerned father figure protecting the interests of his subjects and a man who would not be trifled with by anyone or any regulation. In the process, his tools of trade become lies, cheating, and the brutalisation of his subjects. He behaves like both a lion and a fox, his problem being to know when to be brutal and when to cajole. If he succeeds, he ends up creating an impression that his rule is constitutional.

In this sense, therefore, the constitution is an instrument of justifying rule by one man and his close associates who claim to be advancing public good. It is a constitutional

notion that is guided by Plato's elitism that emphasizes a fatherly philosopher-king as being best in a territory. It is a view that most appeals to dictators and supporters of one party states in which the party leader or president is expected to be the only one who knows what is best for the state. In the process, what people want becomes irrelevant in the effort to justify the rulers and their cronies. As a consequence, such a constitution equates the interests of rulers or a ruling clique with the interests of the state. Subsequently, rulers, whose only pre-occupation is their determination to control everyone and everything in a given territory or state, are made to be synonymous with the state.

The second type of constitutional conception, is the one reached after negotiations on values and interests and does not seemingly favour one side to the detriment of the other; all are equal in that arrangement. In this instance, the base of the constitution, and the emphasis, is on what particular people consider to be a sense of justice or fair play in promoting, advancing, and protecting their interests and which must be applicable to all members of that community. In turn interests and the sense of justice help to define values that tend to be cumulative and end up taking into account traditions, modes of behaviour, and belief systems.

With this group, therefore, the constitution is an instrument that defines the parameters within which everyone in the society operates. Those parameters are meant to enable all the people in the given community to enjoy, protect, and advance their freedoms and natural rights. The constitution outlines how the holding of office will be shared and rotated as a way of ensuring public security against the machinations of potential tyrants. Implied in it is a deep distrust of any concentration of power in government as being potentially

dangerous to the interests of the people. In this, the constitution is a rejection of monarchies and rule by a special clique and a seeming reaffirmation of Aristotle's claim, in his *Politics and Constitution of Athens*, that monarchical and patriarchal governments are "primitive" by their very nature and tend to turn citizens into slaves while the rulers turn themselves into masters.

It is a point that Marcus Tullius Cicero emphasised, in his *De Republica* and *De Regibus*, by noting that "man was born for justice and that justice was established not by the judgement of men but by Nature." That being the case, he argued, it was "absurd to call just every article in the decrees and laws of nations." He then asked, "What if those laws are enacted by tyrants?" It was his belief that "the interests of the people could not be very effectively promoted when all things depended on the beck and nod of one individual." He observed that revolutions are natural when rulers, irrespective of official statutes and justifications, trample on the natural rights of the citizen. He did not believe in democracy because he had no wish to see "the ideas and desires of foolish men ... [subverting] Nature by a single vote." His solution was to have a republic as "the best possible state" that would have a "mixed and moderate government." A republican kind of constitution, therefore, was an anti-dote to all forms of tyranny. Societies that subscribe to the notion of the sanctity of natural rights for all citizens, sharing and rotating public office, and having mixed governments to avoid concentration of power in one area, tend to have constitutions that call for either a democracy or a republic.

The two notions of the constitution have been at play with each other for a long time and their effects have been felt in Africa. The idea that a constitution is an instrument for rulers to justify or legitimise their

hoarding of power in a given state was the sort of thing that appealed to various African chiefs and kings in different parts of the continent. They would argue that the tyranny they inflicted on their hapless subjects was constitutional because it was traditional or that God had meant it to be that way. This kind of thought made it easy for Europeans to colonise those parts of Africa by manipulating chiefs and kings, in what was called indirect rule, to do the bidding of colonial rulers. The king or chief who failed to impose colonial dictates on his people as if they were his, was quickly reminded that he was not in charge by being deposed. "No matter what the official claims about the traditional nature of Native Authority were," commented Mahmood Mamdani in his *Citizen and Subject*, "its officials were considered the lowest rung of the colonial administration ladder." The Kabaka of Buganda is a good example of this kind of African ruler. Imposing British rule was made to appear constitutional because it was made through the Kabaka.

There were those parts of Africa, however, where chiefs and kings were relics of the past and that rejected concentrated powers. In them, the people had reached agreements on principles of justice and fair play, the rules to apply to everyone without exception, how disputes were to be settled in just ways, and how everyone fitted in the bigger picture. Politically, they had evolved power-sharing mechanisms with checks and balances that were unique to each of the community concerned. In such societies, it was impossible for Europeans to claim that the imposition of colonialism was constitutional given that there were no kings to pretend that the foreign orders they gave were actually theirs. Since there were no traditional avenues of imposing foreign rule and still call it constitutional, the imposition of colonialism on such societies was direct and brutal. It necessitated creation of new institutions, such as provincial

administrations and offices of chiefs in order to force acceptance of the European order. It is this order that Jomo Kenyatta, in his *Facing Mount Kenya*, brilliantly attacked as not being constitutional in the eyes of the Africans. He portrayed a Kikuyu society that believed in a constitutional order that applied to everyone, one that did not give power to an individual or a special clique, and one that was accountable to the society.

To the Europeans, however, their rule in Africa was constitutional in the sense that they had reached agreements on how to grab African territories without killing each other and how to run those territories as colonies for the benefit of European powers. In many instances, European governments authorised their chartered companies to treat the territories and people in them as private property. They had then proceeded to issue decrees and orders-in-council which defined the parameters of governance in the colonies but always subject to control from London, Paris, Brussels, Lisbon, or Berlin. These decrees and orders-in-council were then projected to be the constitutions applying to various colonies for the purposes of advancing and protecting the interests of the colonisers. "No inhabitant of the country," former Speaker of Kenya's National Assembly Humphrey Slade, explained, in his *The Parliament of Kenya*, "had any constitutional right whatsoever to share in the making of laws, the choice of the government or advice or criticism of the government." Thus the colonised were not participants in those constitutions since they were treated as property - and property is rarely consulted on how it would be disposed.

The relationship between the colonial authorities and the Africans subsequently became one of struggle either for colonialists to place the Africans at the bottom or for Africans to throw off colonial rule which they considered to be

unconstitutional. While colonial authorities, like the British, wanted all Africans to accept British authority as being constitutional and unite in promoting British interests, Africans considered that authority to be simply foreign oppression. When Kwame Nkrumah, on being appointed leader of the Government Business in 1951, termed the Gold Coast constitution "bogus and fraudulent," he represented the general African view on colonial constitutions. In the case of Kenya, the two views of what a constitution was collided in the Mau Mau war whose essence rejected the idea that foreign rule, or any rule not based on the agreement of the people in that community, can be constitutional. The war convinced the British, and colonialists elsewhere in Africa, that it was impossible to convince Africans that foreign rule was constitutional, and so they started packing.

Before leaving, however, the British organised to have the African elite who were to replace them adopt the British conception of what a constitution was. In this view, a constitution was not an agreement in which the citizens reached, it was something imposed from above on a take-it-or-leave-it basis. A few selected Africans, together with settler representatives, were called to London in what was termed Lancaster House Conferences and received British dictation as to what kind of constitution they needed. It was a document, handed to Jomo Kenyatta in the form of a British Order-in-Council, that bordered on turning Kenya into some kind of monarchy with a lot of power concentrated in the hands of the president. Thus Kenyatta, a man whom the British had jailed because of Mau Mau activities, inherited British dictatorial institutions and structures such as the provincial administration. He liked them so much that he used them to minimise potential challenges to his rule.

Before acquiring power, Kenyatta had given the impression that Kenyans would hold a convention but since he was not a democrat, he started a process of manipulating the constitution that Moi would intensify so much that it boomeranged and led to the current constitutional debate. Instead, as expected after independence, of calling for a people-driven constitution, Kenyatta organised for manipulation of the defective constitutional document to be amended for reasons that were politically motivated and narrow in scope and set the example that Moi followed after 1978. It is possible, therefore, to examine Kenya's executive manipulation of the constitutional document in terms of political intrigues that gave reason to the amendments, first under Kenyatta and then under Moi. Executive manipulation, however, backfired after the 1988 election as people demanded that constitutional changes be in the interests of the country instead of the executive. Since then, the constitutional debate in Kenya has hinged on whether the final agreement on how Kenyans should live, run their own affairs, and protect their rights, should be determined by the ruling elite within the political class or whether it should be *Wanjiku*-driven.

## 2. The Kenyatta Period, 1963-1978

The Uhuru (Independence) constitution was one, which could not last because those who swore to uphold it had no faith in it. In May 1963, before KANU won the 1963 election, Jomo Kenyatta made it clear that he considered the Majimbo (federalist) constitution worked out at Lancaster House an imposition that Kenyans would have to reject. "Rather than submit to indefinite delays to our independence", Kenyatta had argued in a letter to the editor of the anti-KANU *Sunday Post*, "KANU agreed to a modified form of regionalism to serve for the period of internal self-government". Sure

of electoral victory that would put KANU in government, Kenyatta wrote: "Armed with a popular mandate, the Government will go to London shortly after the elections to tell the British government what sort of constitutions Kenya wants for independence. That will be no time for imposition. It is we who shall have to live in Kenya, not they".

He proposed that constitutional amendments be by simple majorities in Parliament and in a subsequent referendum. He concluded; "A vote of the Kenya Parliament, not of the British House of Commons, is the act upon which the legality of the Kenya constitution will rest at the achievement of independence".

Kenyatta's KANU won the May 1963 election and he was sworn in as Prime Minister on June 1, 1963. In his first Madaraka Day speech, he outlined his government's future policy. He made it clear that his government would not be fettered by unnecessary constitutional restrictions, that the constitution would be changed and that the new government would not tolerate dissension and political agitation. He essentially repeated his campaign pledge to disregard the Majimbo constitution and to deal harshly with those who tried to obstruct his desire to build "a democratic African Socialist Kenya". He said that the "Marxist theory of class warfare" was irrelevant to Kenya and added: "attitudes which were appropriate when we were fighting for independence have to be revised". He concluded, "Independent Kenya will adopt a republican constitution because we believe this is a form of government appropriate to our conditions and meaningful to our people".

In his actions and statements, Kenyatta showed himself to be one of those intellectuals like Nkrumah, Tom Mboya, and Kamuzu Banda who, according to Ali A. Mazrui's *Political Values and the*

*Educated Class in Africa*, were radical when struggling for power and the reverse after attaining power.

True to his pre-election pledge and Madaraka Day inaugural speech, Kenyatta sought a final constitutional conference, which the British granted in September 1963. The Europeans and their KADU creation continued to insist on safeguarding "the interests of minorities". The Europeans, as Wilfred B. Havelock remarked in a July 1994 letter to the editor of *The Nation* newspapers, had transformed themselves into a small tribe to gang up with other small tribes against "domination and exploitation by larger, more powerful groups". Kenyatta and KANU, in contrast, insisted on increasing the power of the central authority. The result of the final conference was to provide for a modified Majimbo constitution. Powers that had previously been lodged with regional governments, such as the police and public service, became a preserve of the central government. Amendments to the constitution were to be effected by 75% vote in both chambers of parliament with the exceptions of "entrenched rights of individuals, Regions, Tribal Authorities or districts" where 75% vote in the House of Representatives and 90% vote in the Senate would still be required.

Kenyatta got a modified constitution but not everything he wanted. This was because Havelock and KADU ensured that the constitution would go "a long way towards achieving our and other small tribes' objectives". He concluded that "in some areas decentralisation worked very well for the short time it was allowed to do so".

Kenyatta, ever the practical politician, accepted what he was allowed but he had no intention of accepting the constitutional constraints. Kenyatta was fortunate that Paul Ngei's African People's Party (APP)

dissolved itself and joined KANU. Ngei's defection to KANU before independence was followed by that of KADU members after December 1963. KADU officials were warned by constitutional Affairs Minister Tom Mboya that KANU would not tolerate regional governments and that the opposition would face "the full rigour of the law" since it served "no useful purpose and is a luxury we are not going to tolerate". They, therefore, decided to join KANU and by November 1964 before Kenya assumed full republican status, KADU had disappeared as a political party. Regionalism had become "dead wood", as Mboya put it, and thus no funds were provided for regional assemblies.

Kenya became a Republic with a constitution in which the powers of the governor-general and those of the prime minister were rolled into one in the presidency. Kenyatta became the first president to enjoy those powers unfettered by the British government, an opposition party or constitutional provisions that he did not like. In 1965, one of his first acts as president was to seek an amendment that would lower the majority needed to amend the constitution from 75% in the House of Representatives and 90% in the Senate to 65% in both Houses. In effect this amendment removed the "entrenched rights". It also eliminated regional presidents and the name "president" was preserved for head of state who was also head of government. Regional presidents were reduced to the status of non-executive chairmen.

In the title "president", therefore, was the symbolism of power which could not be shared at regional or any other level. The governor-general and the prime minister became, in 1965, the absolute president. Thus the amendments that came into force in 1964 and 1965 created a Republic and an executive president with extraordinary

powers. The fettering "entrenched rights" were removed with the support of those who had fought to entrench them. The title "president" acquired special constitutional privilege as it was reserved for one man. Given Kenyatta's pre-independence personal authority on people, the privilege exalted him more than he had been before.

### 5. The Amendments during Kenyatta's Era

Kenya became a single party state in November 1964 but KANU's gain from KADU defectors was also the root of its internal friction. Other than helping to dismantle KADU, KANU prima donnas spent a lot of time undermining each other. These prima donnas included Oginga Odinga, Tom Mboya, Mbiyu Koinange, James Gichuru, Joseph Murumbi, and Njoroge Mungai. The intrigue and chicanery that these people engaged in to undermine each other was in the hope of winning Kenyatta's favour or capturing the presidency should Kenyatta die. Kenyatta had been expected to die in prison or soon after independence but he disappointed a lot of these prima donnas by not dying when he was expected to.

The expectation of Kenyatta's death partly explains the political and constitutional intrigues that were dominant between 1966 and 1969. The ideological rivalry between Mboya and Odinga began in 1957 when both men were elected to the colonial Legislative Council and the media presented Mboya as the leader of African politicians and a potential prime minister in the mould of Kwame Nkrumah of Ghana. Odinga, in June 1958, undermined Mboya's leadership claims by insisting that the real leaders of the Africans were in jail; the most important of them being Kenyatta. It had then become prudent for politicians to pay homage to Kenyatta's name. Odinga, then considered a radical, a troublemaker, and communistic,

developed friendship with communistic countries. Contrasted to Mboya's western links, an ideological twist was added to personal rivalries and ambitions. When Kenyatta was released in 1961, the two ideologues tried to woo him to their respective positions.

Sentimentally, Kenyatta was attached to his political protégé, Odinga, but ideologically he was attracted to Mboya. Kenyatta had tasted communism first-hand in the 1930s as a student in Russia and had liked none of it. Along with other Pan-Africanists, he had been disillusioned by the failure of the Soviet Union to act decisively against Benito Mussolini's invasion of Ethiopia in the 1930s. At that time, the Soviet Union was eager to make peace with the West at the expense of the colonised people. To Kenyatta, communist Russia was just another white man's country that had little to offer Africans. Despite attempts to link him with communism because of the Mau Mau war, Kenyatta was temperamentally and socially a western type anti-Communist liberal. Mboya was essentially a younger version of Kenyatta with a little more polish and acceptability in the West.

In independent Kenya, therefore, Mboya had an ideological advantage over Odinga. Kenyatta's 1963 Madaraka Day Speech was a pointer that he had no sympathy with those who imbibed "Marxist theory on class warfare" and that tactics used to fight colonialism were not acceptable. Kenyatta's Vice-President, Oginga Odinga had problems accepting the President's way of thought. In 1965, therefore, Kenyatta tried to silence Odinga and other socialistic critics of his policies with the *Sessional No. 10 on African Socialism and its Application to Kenya*. Mboya enjoyed ramming it through Parliament as he taunted Odinga and his supporters. The fact that socialistic critics of the Sessional Paper did not keep quiet laid the base for the showdown of 1966 between

Mboya and Odinga. Subsequently, a number of amendments were passed to deal with political dissidents and further to reduce remnants of Majimboism.

First was an amendment to discipline MPs who had a habit of showing disdain by missing sittings. An amendment was imposed to deny those MPs their seats if they missed eight sittings. Those MPs who were sent to jail for six months, whether the reason was criminal or political, were also to lose their seats. In addition, since a number of public servants empathised with Odinga, it was made clear that they served at the pleasure of the President and should therefore toe the official line.

As Vice-President, Odinga stood the chance of succeeding Kenyatta to the Presidency and so Mboya devised a mechanism for removing him and this led to a short lived reintroduction of multi-partyism. This was to make the KANU vice-presidency a Majimbo affair and reduce Odinga's influence in the only existing political party. Given that the election of a President was to be done by the House of Representatives acting as an Electoral College should Kenyatta die in office, the message to Odinga was clear. He had no chance of becoming President as long as he was in KANU. Odinga resigned from the vice-presidency and from KANU and formed his own socialistic Kenya People's Union (KPU). The fact that a number of MPs including cabinet ministers resigned from KANU to join Odinga's KPU worried the government so much that it cooked up a defector's amendment. Those MPs who defected from the party that sponsored them were forced to return to the voters to seek a new mandate under a different political label.

That move had an immediate effect in that KANU MPs stopped defecting to KPU and others went to the extent of redefecting to

KANU. Those who stuck with KPU then faced the "Little General Election" of 1966 which saw Kenyatta actively campaign against his two jail mates; Bildad Kaggia in Kandara and Achieng Oneko in Nakuru. "Hata ile imenuka", Kenyatta told Nakuru voters, "msimpe! "(Don't give him votes even the ones that stink). Oneko and Kaggia lost but KPU did very well in Nyanza which returned Odinga to Parliament as leader of the opposition. Multi-party politics had returned to Kenya but it was to be less vibrant than it had been on the eve of independence.

With Odinga sidelined, the government then pushed through two other amendments. One increased presidential emergency powers and whittled down the Bill of Rights. The second abolished the Senate and thus created a unicameral legislature. The 41 Senators representing 41 districts that were actually tribal protective mechanisms were rewarded with seats in the New National Assembly. With the Senate eliminated the last vestige of Majimboism was thus removed with the connivance of the Majimboists in KANU. A more important political development, however, was a new split in the circle of power wielders. While Odinga was not a serious presidential hopeful despite his having a political party that was increasingly tribal, Mboya, was another matter. He had, in the 1964 amendment making Kenya a Republic, entrenched his presidential ambitions by requiring that the President be elected by the House of Representatives, acting as an electoral college, where his influence was second only to that of Kenyatta. In that formula, the vice-president was not the automatic successor of the dead president. He had gone on to ensure that Odinga did not stand a chance by creating Majimbo KANU vice-presidencies which led Odinga to quit. The path appeared set for a Mboya succession, the only problem being the intrigues of other ambitious men who



then considered Mboya as a threat to their political ambitions.

Fear of Mboya's ability to manipulate the Electoral College led to a draconian anti-Mboya Presidential Election Amendment of 1968 when it appeared as if Kenyatta was about to die. It removed the power to elect President from the National Assembly and made the Vice-President acting President for a period of three months. Its sponsors even tried to raise the minimum age for a potential President from 35 to 40 years, which would have automatically barred Mboya. That provision was rejected but it became clear that Mboya's chances of becoming President were eroded. That anti-Mboya amendment also required that candidates for any political office be sponsored by a political party and thus took away the rights of voters to choose a popular private candidate. It went on to empower the President to nominate twelve extra-Parliamentarians of his choice and removed that power from Parliament. It also eliminated the need for Parliament to approve a state of emergency. This was the amendment that would have a far reaching effect on Kenya.

Intrigues within KANU led to the disastrous events of 1969 when Mboya was assassinated in Nairobi and the emergence of KANU as Kenya's only political party. Though eliminated as a potential president through his ability to manipulate the Parliament, Mboya had a populist streak and international contacts that worried political conspirators. It was in that context that the oathings of 1969 associated with Gikuyu, Embu, and Meru peoples began. This was largely a meaningless exercise that was intended to bind Mount Kenya people into holding on to presidential power. The public first heard of it as a rumour that one could buy land in Gatundu for only ten Kenya shillings. Then came Mboya's assassination in July 1969 under suspicious

political circumstances. Mboya, the master of political intrigues and manipulation, was apparently manipulated out of this world. Without Mboya, politics in post-colonial Kenya could not be the same. The year came to an end with the Kisumu riots and the banning of the KPU as a political party. Should Kenyatta die in office, therefore, KANU barons would decide who should be the president without worrying about other political parties or populist individuals.

The rest of the Kenyatta's presidency, 1970-1978, witnessed other amendments as well as political manoeuvres aimed at undermining certain individual politicians. In 1974, an amendment to the constitution lowered the voting age from 21 to 18 but it was done in such a way as to deny many 18 year-olds the vote, since there was no time to register them. Many young people were not able to register and participate although some power brokers were able to arrange for the youth who were likely to vote for them to have special registration. That 1974 election, in addition, witnessed a lot of malpractice which in turn led to another amendment. Paul Ngei, Kenyatta's prison mate and cabinet minister, was convicted of violating election rules and was thereby disqualified to be in parliament or to be a candidate in a by-election. What followed was a Ngei amendment, in 1975, when parliament amended the constitution to allow the president to pardon election offenders. Ngei was immediately pardoned and thus continued to be a cabinet minister and a member of parliament. The Ngei amendment was proof that the constitution was there to be manipulated by power brokers rather than to act as a national guiding document.

There were other amendments which made parliament to appear silly. In 1974, Kenyatta had decreed that members of parliament use Kiswahili as the official language of parliamentary deliberations. The parliament

then went ahead and amended the constitution to satisfy Kenyatta's wishes in one day although several members were not fluent in Kiswahili. There then followed spectacles of confused members of parliament trying to debate in a language in which they had problems understanding. The inability to function in Kiswahili led to a compromise amendment in 1975 in which written law and financial matters would be debated in English but everything else was to continue being discussed in Kiswahili.

More serious than the silly Kiswahili amendments was the political chicanery outside the parliament. In 1968 the constitution had been amended to stop Mboya from ascending to the presidency by mesmerising members of parliament but that success had created a new danger; the automatic succession to the presidency by a sitting vice-president. To eliminate that danger, a conspiracy was hatched up in 1976 to amend the constitution to stop Vice-President Moi from automatically becoming acting president upon Kenyatta's death. Essentially, the move was to return to the 1964 presidential election requirements by repealing the 1968 amendment. In that thinking, the vice-president would not automatically assume the presidency in any capacity. Those with ability to manipulate parliament would then get a chance to become president. The effort was so crude that it was shot down with a simple statement from Charles Njonjo, the attorney general, to the effect that it was treasonous to imagine the death of the president. Though not the first time that politicians had engaged in such intrigues, the 1976 change constitution attempt led to very bitter feelings and made Moi appear like a helpless victim of the palace conspirators. He survived the conspiracy though and using the anti-Mboya amendment became president in 1978 when Kenyatta died.

## 5. The Moi Period, 1978-1996

In the Moi presidency a major transformation in terms of public constitutional awareness took place. In turn, a shift occurred with regard to initiatives for constitutional changes. During the Kenyatta presidency and the first ten years of Moi's rule, it was the executive that tended to impose constitutional changes, which the public resented or accepted grudgingly. After 1988, the executive was simply reacting to pressures for constitutional reforms and grudgingly made concessions. Moi, the former KADU chairman and majimboist, had greatly benefited from his ability to gauge the prevailing political wind. An astute politician who knew how to play up to the powers of the day, Moi had attracted the attention of the colonial state, which appointed him to the Legislative Council in 1955.

In 1960 he had joined Havelock's "small tribes" movement in KADU only to abandon it when the KADU cause was lost. He had defected to KANU in 1964 and was rewarded with cabinet appointments, the most important being the vice-presidency in 1967 following Joseph Murumbi's resignation. As he put it, he then sang to Kenyatta's tune so well that he ended up taking Kenyatta's job in 1978. The KADU majimboist had outmanoeuvred KANU prima donnas into the presidency of Kenya on a KANU ticket.

Moi started his presidency with a lot of public good will for his rule only to have that goodwill dissipate due to increased repression which lasted from 1982 to 1988. Once he was secure in office, signs of things to come that would develop into the *fimbo* ideology in which the constitution would be manipulated to make Moi's rule absolute began to manifest themselves. Up to that time civil servants were required to stay out of politics but since Moi's confidante, who

also happened to be the attorney-general, Charles Njonjo, wanted to be an elected member of parliament, the constitution had to be changed. The May 1979 Amendment required that civil servants resign their offices six months before the nomination date. Subsequently Njonjo resigned as attorney general and then contested the by-election for the Kikuyu Constituency which was conveniently made vacant by the resignation of the then MP, Amos Ng'ang'a. Njonjo was elected member of parliament in 1980 and was thereafter appointed minister for constitutional affairs.

The strong arm tactics used to get Njonjo elected to parliament was an indication of a growing confidence in the Moi presidency but it was also a pointer to political problems that would lead to the purging of Njonjo himself and the entrenchment of the *fimbo* ideology as symbolised by the well polished *rungu* (-stick) that Moi constantly wields in his hand. But as the economy began to take a nose-dive, grumbling emerged that questioned KANU's political monopoly. Oginga Odinga and George Anyona teamed up to create a socialist party in Kenya. As a result an angry Moi who had earlier tried to rehabilitate Odinga into national mainstream politics by re-admitting him into KANU, expelled him from the party and legally impose a one-party system, claiming it was what Kenyans wanted. Wrote Moi in his *Kenya African Nationalism: Nyayo Philosophy and Principles*: "I found it necessary to give expression to the people's will and wishes for a one-party system ... By an Act of Parliament, Kenya became, a *de jure*, one-party state. "

The process of fulfilling Moi's version of what people wanted was led by Njonjo who proposed a constitutional amendment to make it impossible for another political party to operate in Kenya. The Vice-President Mwai Kibaki seconded Njonjo's

proposal and members of parliament simply rubber stamped it. Section 2A passed in 1982 stating that there shall be only one political party in Kenya, namely KANU, became part of the constitution without much of a debate. Subsequently only candidates approved by KANU barons were eligible for elected office. Within a year, in 1983, KANU barons were at each other's throats as Njonjo, the legal technician responsible for Section 2A, was accused of harbouring treasonous thoughts. The country was then treated to a ritual of enquiry to determine whether or not Njonjo was a traitor only to have Moi pardon his former minister. Essentially, the Njonjo enquiry was a political purge to free Moi from any appearance that he was dependent on Njonjo. The purge was also popular politically given that Njonjo did not have a national or even a tribal following.

The successful purge of the Njonjo clique encouraged government hunting of supposed dissidents who were variously referred to as *Mwakenya* as a way of ensuring that Moi enjoyed his rule unrestrained from any quarters, whether political or judicial. In the process, legal and constitutional niceties were ignored when dealing with those suspected to be political dissidents. The magistrates and judges went along in the harassment of those who were considered political heretics, especially those at the universities whom the president believed were "intellectual terrorists", as he called on universities to produce intellectual "homeguards". Courts became willing tools of political repression in an effort, as Justice Sachdeva made clear, to avoid operating in a political "vacuum" and being "oblivious of the fact that subversive elements have unfortunately crept into the university and the state cannot simply ignore them". Sachdeva was representative of a prevalent trend but, fortunately, not every court officer subscribed to Sachdeva's political "vacuum" theory and that did not go down well with

the president who was then preparing to celebrate ten years in office.

As Moi prepared to celebrate his ten years in the presidency, every effort was made to apply the *finbo* ideology on those judicial officers and politicians who operated in the supposed political vacuum but the effort backfired. To deal with independent minded judges, a constitutional amendment in 1988 removed the security of tenure for judges. Attorney-general Matthew Guy Muli, a former High Court judge, had the dubious distinction of having removed his own security of tenure in 1986, and of openly rendering the Kenya Bill of Rights meaningless. Given that the Bill of Rights or fundamental rights are, as Kivutha Kibwana noted in his *Fundamental Rights and Freedoms in Kenya*, "political because they limit what the government can do to its citizens," rendering them meaningless made the president absolutist.

The judges, like other holders of public office, were henceforth to serve at the political pleasure of the president. The removal of security of tenure for judges in 1988 was part of the move to ensure that the president was unfettered as he celebrated the "Ten Great Years of the Nyayo Era". It was partly for the same reason that the *mlolongo* (queue voting) elections had been introduced in order to weed out those who were politically out of favour. The exercise was a public travesty as short lines were declared to be the longest. In the process, 1988 became the year of political and constitutional disaster for Moi rather than one of celebration. At least the public was not in the mood to endorse and celebrate Moi's absolutism.

Moi's political supremacy was eroded by the *mlolongo* election, as the public became defiant. The initiative for constitutional changes shifted from the presidency, and the attorney general's chambers, to what was

increasingly referred to as civil society. This was an assortment of individuals, pressure groups and organisations that took an interest in the erosion of confidence in the political system and the constitutional structure. They included the Law Society of Kenya, journalists, churches, and politicians who were rigged out in the *mlolongo* fiasco. These groups would eventually be responsible for constitutional changes and the raising of public awareness on their constitutional rights as from 1989 to 1996. The work of the pressure groups was assisted by government mismanagement of the economy, which in turn attracted the concern of foreign investors and financial donors. These linked economic failure to political misrule and demanded political and economic reforms. There was thus domestic and external pressure on Moi's regime that produced constitutional amendments. The first amendment initiated by the pressure groups returned security of tenure to judges, the attorney general, and the auditor-general in 1990. It was a political blow to the KANU government whose rejection by the public had been revealed in the Saitoti commission. It showed that Moi's government was vulnerable and could respond to concerted pressure. The judges, though still not operating in a political vacuum, could at least theoretically pass judgement in political cases without fear of intimidation.

The second public initiated amendment was the 1991 repeal of Section 2A that had given KANU political monopoly in Kenya. The repeal had been preceded by public uprisings best symbolised by the 1990 Saba Saba defiance and the flashing of the two-finger salute. "Mbili mbili kama kawaida" (two-two as usual) became a political slogan rather than a beer commercial for the Tusker Export brand. The free press led by the *Nairobi Law Monthly*, *Society*, and *Finance* magazines, attracted the wrath of the government by publishing views critical

to the government and for highlighting the political and economic misdeeds by those in power which the mainstream press avoided through self-censorship. There was, in addition, a combination of circumstances that forced the repeal of Section 2A. An umbrella pressure group had been created in the name of the Forum for Restoration of Democracy, FORD, bringing together people of diverse political outlook. They had in common a demand for the restoration of a multi-party political system. When the donors added their voice to calls for political change by cutting off aid to Moi's government, the president responded by calling a KANU delegates meeting and prevailed upon them to repeal Section 2A, ending the KANU monopoly to political power. Thus belonging to a party other than KANU became legal.

Once multi-party politics was allowed, the opposition unity that had existed before December 1991 dissipated as each political heavy jostled to replace Moi at State House. Although there were calls for a convention to draft a new and fair constitution before the election, the political leaders were not interested in the process. Their concern was to get to State House and then use the same powers enjoyed by Moi presumably to do good. One of them, Mwai Kibaki, implied in the presidential debate at Ufungamano House, that the opposition would only consider constitutional reforms after winning elections. At that time, Kibaki was convinced that elected members of parliament would then take appropriate measures to reform the constitution. This did not happen because Moi defeated the divided opposition parties.

After the 1992 election, constitutional reforms became attractive to the losing politicians. They joined the churches, the Law Society of Kenya, and numerous Non-Governmental Organisations in proposing model constitutions. The KANU Government was equally adamant in

rejecting calls for a fair constitution. In fact, some of the models proposed were perceived to be discriminatory to some people in government. The 1995 model constitution, for example, disqualified people without high school education from becoming President. It also contained an element of age discrimination by declaring those over 70 to be ineligible. No wonder many people in government wanted nothing to do with the proposed model constitution. The model constitution itself, however, was not the issue. What was important, by 1996, was the willingness of different groups of Kenyans to call for constitutional debate in a consistent manner without fear of intimidation. There was also a change in the way Kenyans looked at the constitution and those in power. The belief that the existing constitution was good dissipated and there gradually developed a view that the constitution was fundamentally defective and therefore it needed an overhaul rather than mere amendments. By way of a people-driven conception of a constitution, parliament would, at best, be regarded as not the key player but a contributor to a constitutional convention. Those opposed to this view insisted that parliament, which consists of leaders both elected and nominated, should continue to play a central role in constitutional reforms even if it had been found wanting in the past.

## 6. Conclusion:

A deep reflection on constitutional development in Kenya reveals a continuing struggle between two conceptions of what a constitution ought to be—leader driven or *Wanjiku*-driven. In colonial days, the British and their settler surrogates insisted their imposition was constitutional and proper although Africans had no input in those constitutions. In the process they aroused the wrath of the colonised Africans who considered British rule to be unnatural,

unconstitutional, and not based on reasons that Africans could accept.

To Africans, such constitutions, in Nkrumah's language, were bogus and fraudulent. The two constitutional views, one British and representing the interests of the rulers, and the other African and representing the interests of the colonised, led to the Mau Mau war in Kenya that forced the British to concede defeat by granting independence to a well chosen African elite.

Post-colonial Kenya started with a constitutional contradiction. This was in the form of a British dicta on the elite to accept a flawed and non-representative document and the expectations that Kenyans would get a chance to sit in a constitutional convention and agree on how to live together and run their affairs. Instead, the new African political class reneged on the expectation and embraced the notion of a constitution being an instrument for justifying their rule. The key man was Kenyatta who was very much like Cicero the Roman who lived two thousand years before him. Both were brilliant orators and talked of republics and both had little regard for the "ideas and desires of foolish men." Cicero, according to Saint Augustine of Hippo, was "a skillful manipulator of the republic," and the same could be said of Kenyatta. As president, Kenyatta started the process of manipulating the constitutional document to advance the interests of the executive at the expense of the citizenry, a process that Moi refined so much that it produced national confrontations between the two conceptions of what a constitution ought to be.

The view that the executive or rulers should turn the constitution into an instrument of their control was initially dominant as it

justified political expediency in eliminating potential political rivals and in entrenching the presidency. It can be seen in the internal party chicanery started even before Kenya attained the status of a Republic with Mboya, as the minister for Justice and Constitutional Affairs, ensuring that the prospective vice-president, who happened to be his ideological rival, Odinga, would not become president if Kenyatta died. The November 1964 amendment, therefore, called for the House of Representatives to elect a president. His other political rivals in 1968 who amended the constitution to make the vice-president an acting president emulated Mboya's success. This eliminated the possibility of Mboya mesmerising members of parliament into making him president. In 1976, those who did not like Moi tried to restore the pre-1968 formula for electing president but failed.

Apart from internal political elimination through constitutional amendments, there was presidential repression and erosion of the Bill of Rights. Presidential emergency powers were increased and a belief in presidential infallibility crept in. Only a president, therefore, could decide who was wise enough to serve in parliament as a nominated member. Judges were expected to operate under presidential influence and so their security of tenure was removed in 1988, the year of the *mlolongo* and the Ten Great Years of *Nyayo*.

The year of celebration and *mlolongo* was also the year presidential political power cracked and precipitated constitutional crisis. The public began to lose fear of government and demanded constitutional changes. The *Saba Saba* defiance and the Saitoti Review Committee convinced the KANU government that it had to pay

attention to what the people wanted. The result was the 1990 restoration of security of tenure for judges, the attorney general, and the auditor general. Additional public agitation led to the repeal of Section 2A on KANU political monopoly. It was another public victory over the government.

Following the 1992 multi-party elections, the now better informed public tended to lose faith in the political parties and leadership. That public therefore became vocal in calling for constitutional reforms, advocating civic education, and proposing model constitutions. In the process, the Kenyan citizens became more aware of their rights and demanded they be respected. Before 1988, the presidency or people in government initiated constitutional changes. But since then the public has in various forms resisted the government and taken the initiative to demand for constitutional reforms. Since the political class is unwilling to give up control, the debate over Kenya's future has hinged on whether the constitution should be ruler-inspired or *Wanjiku*-driven.

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## CONSTITUTIONAL DEVELOPMENT IN KENYA; A HISTORICAL PERSPECTIVE

**G. Macharia Munene**

[Text From Law And Development In The Third World]

### 1. Introduction

Kenya has gone through a turbulent period in the last 30 years. It moved from being a British colony to an independent African republic. As a republic, its political leaders changed the original constitutional document to fit their particular interests all in the name of the state. Starting as a multi-party state in 1963, the republic drifted into a single party system in practice and constitutionally. But single party rule created problems with its over concentration of power in the hands of the executive. This over-concentration, critics argued, was detrimental not only to the political well being of the republic but also to its economic survival. Eventually, such problems coupled with public pressure and outcry led to the reintroduction of multi-party politics in 1991. The country has, therefore, gone through a cycle from multi-party to single party and back to multi-party politics.

During this cycle, the constitution was amended, on the average, once a year. There are two possible reasons as to why there were so many amendments. First, the people who were trusted with the implementation of the *Uhuru* constitution did not believe in it. They treated it as an expedient path to the goal of being granted independence but not as a document they could live with. They had no faith in it and could not be expected to implement either its spirit or its letter. Second, once these leaders attained power, they did not want to call a national convention to deliberate on the exact type of

constitution suitable to Kenya. Since the *Uhuru* constitution had been one of expediency, leaders could argue that it was inappropriate and yet they showed no sign of trying to create an appropriate one. Instead there developed a pattern of constitutional distortions aimed at promoting particular interests and perpetuating the ruling party in power. It was the challenge to this trend that led to the changes of December 1991. These changes, however, are meaningless unless basic defects in the original constitution are rectified during a constitutional convention.

History is developmental despite the atrocities committed to it by the ideology of developmentalism in the 1970s. The ideology of developmentalism assumed that humanities and liberal arts as disciplines were not developmental. This was because advocates of developmentalism conceived it in terms of planting seeds, repairing a faulty engine, distributing medicine, or maybe tabulating figures on commodity use and supply. Disciplines that tended to go beyond mechanistic exercises and challenge the intellect with regard to the activities of a particular society were relegated to irrelevancy. The damage to the national psyche was immense.

What history does is to link the present to the past and to discern a pattern that would explain how things came to be. What went wrong would be clear and knowledge of history could therefore act as a corrective. Knowledge of what was done right should reinforce a correct and developmental path

for society. In this sense, history cannot be a medium of entertainment to make those in power, or a section of the community, feel good. Such an undertaking would be deceptive, counter-productive and essentially an agent of underdevelopment. Development is human progress materially and, more importantly, mentally and intellectually. African states made mistakes in the 1970s by overemphasizing materialism at the expense of intellectual growth. But what became clear was that the clique that promoted the ideology of developmentalism was mostly corrupt, unconcerned with the national well-being, and largely interested in perpetuating itself in power. Subsequently, that clique came to regard people involved in intellectual pursuits as trouble makers because they questioned certain activities that were presented as developmental.

## 2. Constitutionalism

Constitutional history, dealing with the evolution of fundamental laws in a society, is a subject that has occupied the minds of thinkers for many centuries. The Greeks differed on the virtues of autocracy, as presented by Plato's advocacy of philosopher-kings, and of democracy, or polity, as championed by Aristotle. Polybius, the historian, praised the Roman Republic's constitution for having checks and balances. And Cicero, the Roman statesman, emphasized the primacy of natural law or reason over all man-made laws.

More relevant to Africa than the classical experience were the American Revolution and Constitution. Essentially the Revolution rejected the concept of the divine rights of kings and the idea that a man could be above the law. It was also a rejection of Plato's philosophical autocracy.

The rejection of divine royalty and autocracy is evident in the drafting of the

American Constitution in 1787 and the subsequent attachment of the Bill of Rights to the Constitution in 1791. The running theme in the American Constitution, particularly the Bill of Rights, is one of fear of what a government can do to an individual. Fear of what anyone holding power could do, led constitutional framers to impose restrictions on the newly created institution of the Presidency.

As the executive arm of the government, the presidency was to share power with the legislature and the judiciary as equals in what is seen as an arrangement with 'checks and balances' and 'separation of powers'. The framers envisioned the possibility of a corrupt and tyrannical person assuming the office of president and they thus provided for an impeachment clause. In principle, therefore, the constitution rejected the idea of omniscience, omnipotence, and infallibility in the presidency.

The success in the application of the U.S. Constitution for the last two centuries has largely been due to the faith that American citizens and leaders have had in its sanctity. While the constitution embodies elements of suspicion and fear of those in power, the United States was fortunate in the choice of its early leaders. The basic honesty of George Washington, John Adams, and Thomas Jefferson was important in instilling faith in the constitution. Washington was popular and he voluntarily relinquished power after serving two terms in office. John Adams was unpopular, lost the election to his political rival and had the decency to vacate the office without a fuss. Within 12 years of the constitution being implemented, power was transferred peacefully from one political faction to another without a hitch. And it was to Jefferson's credit that the two term presidency established by Washington became entrenched as a tradition.

With a constitution in which they had faith, Americans expanded territorially and economically to become a major imperial power in the name of liberty. The ideology of liberty made the United States a reference point to those aspiring to freedom in the colonies and even in the post-colonial period. Intellectuals in Africa, and Kenya in particular, continue to cite and refer to American thinkers such as James Madison, Alexander Hamilton and Thomas Jefferson.<sup>1</sup> The current thrust for democracy in Africa, apart from the moral encouragement it receives from American officials, is essentially a throwback to the basics of the American ideals.

Yet, while imbibing the ideology of liberty, the anti-colonialists and advocates of democracy did not, and do not seem to be afraid of government. African activists appear overconfident that they can create a good government as long as they can field good men. For instance, the Forum for the Restoration of Democracy in Kenya (FORD) has a manifesto that merely aims at repealing "unjust and oppressive laws" and replacing bad people with good ones. It does not offer means of controlling government.<sup>2</sup> And if the reported threat by FORD's interim Secretary General, Martin Shikuku, to deport and incarcerate journalists was correctly reported,<sup>3</sup> then FORD is behaving in exactly the same way that the Kenya African National Union (KANU) did in 1963 when KANU Secretary General Tom Mboya made similar threats<sup>4</sup>. For inherent in Shikuku's threat, and that of Mboya almost 30 years before, is the expansion of

governmental powers rather than the limiting of them.

Since FORD has a high chance of forming the next government and thus imposing its programme on the country, the flaws of this opposition party need to be pointed out. In that connection, Kivutha Kibwana did a good job of pointing out the short-comings of the FORD constitution<sup>5</sup>. His analysis, however, was heavy on the mechanical errors rather than on the philosophical flaws. As he pointed out, Kibwana wanted FORD to tighten up its document.

Unfortunately, Kibwana was not in a position to comment on the KANU, KADU, and the national Independence constitutions. That none of these documents was subjected to close scrutiny is regrettable. The result has been a constant need to amend the constitution to fit into a particular political whim. From 1964, therefore, the Kenyan constitution has gone through a series of amendments, all rammed through compliant parliaments that made little effort to question those amendments. J.B. Ojwang in *Constitutional Development in Kenya: Institutional Adaptation and Social Change* listed 24 amendments between 1964 and 1988, which averages to one amendment per year.<sup>6</sup>

Ojwang's book came close to an analysis of constitutionalism in Kenya but its publication timing, 1990, was completely out of tune with the reality in Kenya. He struggled to justify mono-partism at the very time that Kenyans were demanding pluralism. Seemingly operating from the premise that Africans are peculiarly immune to universal rights which he claims are Western, he stated that "untranslatable

<sup>1</sup> See different articles, by among others Gibson Kamau Kuria, in different issues of the *Nairobi Law Monthly* since September, 1987.

<sup>2</sup> "The FORD Constitution," in *Daily Nation*, December 24, 1991, pp. 14-15.

<sup>3</sup> "Shikuku Criticised Over Press Threat," *Daily Nation*, December 18, 1991, p. 28.

<sup>4</sup> David Goldsworthy, *Tom Mboya: The Man Kenya Wanted to Forget* (Nairobi: Heinemann, 1982), p. 221.

<sup>5</sup> *Daily Nation*, December 30, 1991, pp. 11, 21-22 and December 31, 1991, pp. 17-20.

<sup>6</sup> J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi: ACTS PRESS, 1990), pp. 243-235.

Western trappings of the popular notion of constitutionalism cannot possibly be in complete harmony with African conditions."<sup>7</sup> He went on to assert:

“There is hardly any similar basis of durable multi-party formation in Africa. The obvious basis of party solidarity in Africa today is ethnic group, but the divisive and even atavistic tendencies likely to mark the political goals of ethnic groups would be distinctly inimical to a state management in accordance with constitutionalism! It is clear, then, that the prescription of multi-partyism as a factor in constitutionalism is misconceived—certainly in the case of Africa”.<sup>8</sup>

Ojwang misread his times and the history of post-colonial Africa, particularly Kenya. As his list of amendments shows, the trend was to whittle down individual liberties that supposedly were enshrined in the original constitution. This was done by increasing executive powers at the expense of individual rights, the powers of the legislature and those of the judiciary.<sup>9</sup> The over-concentration of power in the hands of the executive has not meant general economic improvement; the reverse may be true.

Apart from misreading history, Ojwang failed to take into account the commitment, to the constitution, of the people running the country. Had he done that, he would have found that they had no faith in the document they swore to uphold and that they considered its restrictions on the exercise of power to be an unnecessary hindrance to their ambitions. Indeed, they behaved as if the constitution was a tool of manipulation to advance political and ideological positions rather than being a body of

fundamental laws that governed them and protected individual liberties.

The Independence Constitution of 1963 was essentially authoritarian in the sense that it guaranteed, and in the same breath negated, individual rights; it is interesting that none of the numerous amendments sought to remedy it. Chapter II of that constitution enumerated the rights to life, liberty, and property as well as freedoms of speech, conscience, and assembly; post-colonial constitutions have reproduced this chapter as Chapter V. Yet every assertion of that right was negated by qualifying subsections that essentially made a mockery of the purported right or freedom. The right to life, for instance, was negated by the power of those in authority while arresting a suspect: "... a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force ... in order to effect a lawful arrest or to prevent the escape of a person lawfully detained ... (or) in order to prevent the commission by that person of a criminal offence." Other rights and freedoms are negated in the same way with the operating expression being: "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision..."<sup>10</sup>

### 3. Re-visiting Kenya's Constitutional History, 1961-1963

To understand these anomalies, it would be necessary to revisit the period 1961-1963. It was a period of tension with many African politicians jostling for position of leadership.

<sup>10</sup> "The Kenya Independence Order in Council 1963," *Kenya Gazette Supplement* No. 105, December 10, 1963, Notice No. 718, Statutory Instruments 1963, 1968, pp. 32-49; see also Laws of Kenya, *The Constitution of Kenya*, 1969 edition, Chapter V, pp. 33-49; and the 1987 Revised Edition of *The Constitution of Kenya*, Chapter V, pp. 40-60.

<sup>7</sup> *Ibid.*, p. 217.

<sup>8</sup> *Ibid.*, p. 218.

<sup>9</sup> *Ibid.*, pp. 229-231.

Jomo Kenyatta's role, whether in prison or out, was a point of disagreement within the African leadership as represented by the views of Oginga Odinga and Julius Gikonyo Kiano. When Odinga asserted that Kenyatta was the leader of the Africans, Kiano retorted that the only legitimate African leaders were "those of us whom you elected and the chiefs."<sup>11</sup> Kiano could not conceive of people other than those approved by the colonial government as leaders. It was mostly these approved leaders who were involved in drafting the Independence Constitution.

The Constitutional Conference of February-May 1962 in London created the framework for the Independence Constitution that turned out to be unsatisfactory. Only members of the Legislative Council (LegCo) were allowed to participate and because of this restriction a number of potential contributors were left out, among them being Paul Ngei who later formed the African People's Party (APP). Kenyatta squeaked through because a member of the LegCo, Kariuki Njiiiri, stepped down for him. Other potential participants were not that fortunate.<sup>12</sup>

The main political protagonists were the Kenya African National Union (KANU) led by Jomo Kenyatta and the Kenya African Democratic Union (KADU) led by Ronald G. Ngala. Most of the Europeans and Asians supported KADU. The two argued over the merits and demerits of Majimboism (regionalism), and of centralism. KADU held the initiative, and advocating a programme that was based on fear of majority rule, demanded regional autonomy within a federated state. It called for six regions each with power over the armed forces and finance. It wanted a two chamber

legislature in which the Upper House would represent the interests of regions and would have equal power to that of the Lower House.<sup>13</sup>

The Asian dislike for KANU and preference for Majimboism were articulated by the *Sunday Post* and especially by columnist Narain Singh. On January 7, 1962, for instance, he claimed that KANU had made "the emancipatory air of Kenya so foul" and that Jomo Kenyatta was incapable of cleaning up the mess should KANU assume power. He praised "the diminutive yet dynamic Mr. Musa Amalemba" whom he said had courage and initiative which apparently Kenyatta lacked. He went on to insist that KADU must be treated as an equal to KANU and added: "The fears displayed by tribal minorities must not be regarded as artificial, serving the purpose of emotional exploitation by unscrupulous politicians. They must be accepted as real and honest, and demanding forceful constitutional provision."<sup>14</sup>

At Lancaster House in 1962, KANU was a minority group combating a coalition of KADU, Asian interests, European interests, and the preferences of the British government. Despite the fact that KANU had majority support in Kenya, the end result was that its delegates accepted a British constitutional formula that was basically "KADU-ish". That formula, which the *Economist* of London termed "excellent", called for a Majimbo constitution. The Colonial Office proposals, asserted the *Economist*;

“... offer Mr. Kenyatta's party the strong central government it demands, while granting the asked for regions to Mr.

<sup>11</sup> Bildad Kaggia, *Roots of Freedom, 1921-1963: The Autobiography of Bildad Kaggia* (Nairobi: East African Publishing House, 1975), p. 183.

<sup>12</sup> *Ibid.*, pp. 182-193.

<sup>13</sup> The *Economist*, March 17, 1962, p. 988; Goldsworthy, *Mboya*, p. 192.

<sup>14</sup> Narain Singh, "The Tribes Could Be Pillars of Kenya Democracy," *The Sunday Post*, January 7, 1962. p. 8.

Ngala's party. The regions and local authorities would have a real say in matters affecting land, education, and housing — and the powers of the region would spring from the constitution, not the central legislature. An upper house representing the local authorities would be able to veto changes in the constitution”<sup>15</sup>

KANU, with little chance of its constitutional desires prevailing at Lancaster House, and confident of its electoral popularity in Kenya, did the politically expedient thing and accepted the Majimbo constitution. The acceptance was meant to enable KANU leaders to assume power as soon as possible without believing in the document they had accepted. According to Odinga, Kenyatta told KANU delegates "to reach a settlement" if they did not want to have government "snatched from our hands... We might be forced to accept a constitution we did not want, but once we had the government we could change the constitution."<sup>16</sup>

It is thus clear that on the way to independence, the people in the potential government did not believe in the constitution under which they were expected to work. Once in power, they had no intention of honouring the constitution and they made this clear during the May 1963 elections that led to internal self government. When in April 1963 Ngala suggested that Ngei become the Governor-General as provided for by the Constitution, Mboya angrily dismissed the idea. "Mr. Ngala must understand that Kenya does not require a Governor-General," Mboya stated, "but a President of the Republic of Kenya who KANU has already said will be Jomo

Kenyatta."<sup>17</sup> This prospective president was equally adamant that the Majimbo constitution would not last beyond a short period of the internal government.

In an unusual letter to the editor of the anti-KANU *Sunday Post*, Kenyatta made his thoughts on the Majimbo constitution and the politics of 1963 clear. The majority of Kenyans, he wrote, believed "in the dynamic of national unity" and were opposed by "a minority which wishes to retreat into tribal chauvinism". Tribal chauvinism "has been a sickly growth, existing only through the constant nurturing it received from the colonial administration". He insisted that a "schismatic attitude was formulated into the policy of regionalism by a number of the extremist Europeans who led KADU". KADU officials, Kenyatta claimed, "croak so often about democracy" and yet they adopted Majimboism "without reference to the electorate".<sup>18</sup> To Kenyatta, KADU was simply undemocratic and yet it had managed to impose itself on the country through the 1962 Majimbo Constitution.

KANU, Kenyatta stated, wanted independence quickly and for that reason it had accepted a defective constitution which it planned to change as soon as it achieved power. "Rather than submit to indefinite delays to our independence," he wrote, "KANU agreed to a modified form of regionalism to serve for the period of internal self-government." Claiming that KANU was not dogmatic and that it would retain the Bill of Rights, he asserted: ". . . to go into independence with an unpopular constitution of the complexity of that about to be introduced is asking for trouble. It is ridiculous to expect such a novelty of a document to be a workable blueprint, virtually incapable of being amended."

<sup>15</sup> The *Economist*, March 24, 1962, pp. 1096-1097.

<sup>16</sup> Oginga Odinga, *Not Yet Uhuru: An Autobiography* (Nairobi: Heinemann, 1967), p. 229; Goldsworthy, *Tom Mboya: The Man Kenya Wanted to Forget*, p. 192.

<sup>17</sup> Quote in *Daily Nation*, May 1, 1963, p. 16.

<sup>18</sup> Jomo Kenyatta's Letter to the Editor, "Kanu President on Fundamental Issues," *The Sunday Post*, May 19, 1963, p. 8.

Confident of winning the election, Kenyatta discussed his post election plans. He stated: "Armed with a popular mandate, the Government will go to London shortly after the elections to tell the British government what sort of Constitution Kenya wants for independence. That will be no time for imposition. It is we who shall have to live in Kenya, not they." Among the issues to be sorted out was what he termed "a constitutional strait-jacket, where 75% and 90% majorities are laid down" for amendments. He preferred, in constitutional amendments, simple majorities in Parliament and in a subsequent referendum. He closed the letter with telling remarks: "A vote of the Kenya Parliament, not of the British House of Commons, is the act upon which the legality of the Kenya Constitution will rest at the achievement of independence."<sup>19</sup>

KADU, in turn, accused KANU of bad faith and of making wild and utopian promises. Bernard Mate, a KADU official in Meru, pointed out that KANU's "promises of seven years' free education and free medical services" would lead to heavy taxation. "If parents do not pay fees directly to a school, obviously they must be heavily taxed to pay for it indirectly."<sup>20</sup> KADU Chairman, Daniel arap Moi, hoped that his party would win because the voters would see that KANU promises were impractical.<sup>21</sup> A KADU document published in the *Sunday Post* of May 5, 1963, claimed that KANU's promises of free primary education meant violating the "new constitution" which placed primary and secondary education under regional authorities. KANU, stated the document, was "noisy" in a lot of its promises but it was silent on "how" those promises were to be fulfilled without violating the constitution: "They are noisy about changing the Constitution, but are

silent, as signatories to it, about how this is to be done; they do not claim to be able to command a 75% majority of the Lower House, yet they are well aware that under the constitutional arrangements this minimum percentage will be necessary to initiate constitutional change." KANU, continued the document, wasted "nearly a year arguing about a constitution which they now appear to repudiate."<sup>22</sup> For KADU, therefore, the important thing was to stick to the Majimbo constitution even after the election.

KANU won the election easily which enabled Jomo Kenyatta to become Prime Minister on June 1, 1963 with a cabinet of 13 ministers. His speech outlined his hopes, as he said: "Independence will give us the opportunity to work unfettered for the creation of a democratic African Socialist Kenya." He said that the "Marxist theory, of class warfare" had no relevance to Kenya's situation and warned that "attitudes which were appropriate when we were fighting for independence have to be revised. An all out war by the trade unions now could only be waged against their own government and fellow citizens." Looking into the future Kenyatta asserted that "Independent Kenya will adopt a republican constitution because we believe this is a form of government appropriate to our conditions and meaningful to our people".<sup>23</sup>

In that speech are to be found germs of future behaviour. First, the government would not be fettered with unnecessary restrictions. Second, the constitution would be changed, and third, the new African government would not tolerate dissension and political agitation. The African government, therefore, would not be constrained in action, would not tolerate

<sup>19</sup> *Ibid.*

<sup>20</sup> Quote in *Daily Nation*, May 2, 1963, p. 5.

<sup>21</sup> *Ibid.*, p. 2.

<sup>22</sup> "KADU Condemn Vapourings", *Sunday Post*, May 5, 1963, p. 5.

<sup>23</sup> "African Government in Kenya", *Africa Report*, Vol. I, No. 6, June 1963, pp. 16-17.



criticism, and would change the constitution as it deemed fit.

Kenyatta's aim of negating the Majimbo constitution was resisted by KADU. David Lemomo, a KADU official and reportedly the Secretary General of the Maasai United Front, wrote to Duncan Sandys, Secretary of State for the Commonwealth and Colonies, on August 31, 1963, accusing KANU of having "failed to implement the Regional Constitution as clearly stipulated by the tripartite agreement reached at Lancaster House between the British Government, KANU and KADU". He called for the postponement of the date of independence, which had been fixed for December 12, 1963, in order to give KANU time to implement the constitution. Since KANU had not implemented the regional constitution, Lemomo argued, it had "forfeited all legal pretensions to the right of ruling the people of Kenya. What was supposed to be a nationalist government has in fact been turned into a constitutional monster—a tribal mouse brandishing imperialistic claws at the peace loving non-KANU African tribes of Kenya."<sup>24</sup>

Lemomo and other KADU officials had reason to be apprehensive. KANU Secretary General Tom Mboya made it clear that he had no time for majimboists or any other critics of KANU. He ordered newspapers banned because they did not give Kenyatta prominence and he threatened to curb freedoms of speech and press after December 12, 1963. He warned the opposition that it would face "the full rigour of the law" if, as he said, it served "no useful purpose and is a luxury we are not going to tolerate. We cannot afford it." Mboya was not going to tolerate those in opposition making "fiery" speeches or "trying to set up

a regional authority as a government".<sup>25</sup> As Lemomo had charged, KANU was not ready to honour the Majimbo Constitution.

Kenyatta had sought a final constitutional conference and this was granted in September 1963. At that conference, KANU insisted on increasing the power of the central authority while KADU and its European allies wanted to safeguard "the interests of minorities". Under the guidance of Duncan Sandys, the central government was given power to control the police at all levels so as to avoid the possibility of any region having excessive force. The Public Service Commission was consolidated into one, instead of having several independent bodies, with powers to post people anywhere in the country. And to provide "some element of flexibility", the percentage requirements in constitutional amendments were lowered to 75% vote in both houses of Parliament. This flexibility, however, did not affect the category of "entrenched rights of individuals, Regions, Tribal Authorities or districts" whose amendments continued to require 75% of the vote in the House of Representatives and 90% in the Senate.<sup>26</sup> The concessions given to the government increased KANU's power as Kenya prepared for independence with a modified Majimbo constitution.

The constitution under which Kenya became independent had problems that lingered into the future. First, as Paul Ngei's APP had pointed out in the election campaign of 1963, the constitution did not represent all Kenyans<sup>27</sup> since only those in the LegCo were invited by the British. No election was

<sup>24</sup> David Lemomo, "Maasai Challenge Britain," *Sunday Post*, September 1, 1963, p. 1.

<sup>25</sup> Goldsworthy, *Tom Mboya: The Man Kenya Wanted to Forget*, pp. 221, 225.

<sup>26</sup> British Information Service, *Kenya Independence Conference* (London: Central Information Office, October 1963), 4 pages; Odinga, *Not Yet Uhuru*, pp. 238-240.

<sup>27</sup> "A. P. P. States Its Case", *The Sunday Post*, April 21, 1963, p. 5.

held to choose delegates to the constitutional conference at Lancaster House. And at the end of it, no referendum was held to determine whether Kenyans accepted or rejected it. It was therefore an imposed constitution on Kenyans.

Second, there are defects that KANU, once in power, ignored because they favoured the government of the day. The exceptions to fundamental rights and freedoms, for instance, virtually give any government a free hand to violate those rights and freedoms as long as it can claim some sort of public interest or the enforcement of some law. There is also the problem of constitutional silence over what is to be done if the Governor-General or the president fails to give assent to a bill or constitutional amendment. There is no time limit as to when he has to make a decision and there is no provision for taking appropriate action in case he fails to perform his duty. The failure to have a time limit for assent became glaring in the 1991 repeal of Section 2A of the Constitution of Kenya when it appeared that the president was slow in giving his assent. Supposing the president had simply kept silent for months about the repeal, what would have happened then? The constitutional silence in this case gives the president veto power not only on ordinary laws but also on constitutional amendments without providing a mechanism for overriding the veto, if need be.

In addition to the implied veto, the Governor-General, and the President, had power that essentially made the legislature a subordinate institution. Although the constitution provides for a term of five years, this term is not certain since the president could prorogue or dissolve Parliament at his pleasure. The fact that any person holding the office of president can at any time terminate the life of the Parliament, for whatever reason, virtually makes Parliament to serve his will. There should be

certainty in the life of Parliament which would not be interfered with by presidential whims.

Related to the executive power to prorogue and dissolve Parliament was the constitutional silence on whether the Governor-General, and later the President, could be removed from office in case of gross misconduct. The constitution provided for a vote of no confidence on the government and the prime minister after which the Governor-General had the choice of whether to dissolve Parliament or not; the Governor-General would not be affected by the vote of no confidence.

The idea of the vote of no confidence was retained in the Republican Constitution in which the office of Prime Minister and Governor-General were consolidated into the Presidency. A vote of no confidence in the government would require the president to dissolve parliament in three days, failing which parliament would automatically be dissolved on the fourth day. A vote of no confidence, however, can be due to policy differences and having policy differences cannot be considered an abuse of office. There is, therefore, no mechanism for removing a president who abuses office or is involved in gross misconduct.

The most serious problem relating to the independence Constitution was that those who were entrusted with its implementation had no faith in it. They were itching to get political power. They were not concerned with the rules that restricted their exercise of power. In fact, they were determined to change those rules after December 12, 1963.

The new African government sought to entrench itself in power by eliminating constitutional constraints. Since the APP Members of Parliament had already joined KANU before Independence day and since a number of KADU members were gradually

defecting to KANU, KANU encouraged this weakening of the opposition which, by November 1964, had ceased to exist. In 1964, a Republican Constitution was introduced, and funding for regionalism cut since it was what Mboya described as "dead wood".<sup>28</sup> This was followed in 1965 with the reduction of the percentage required for constitutional amendments to 65% vote in both houses. In 1966, the Senate was eliminated as a house of parliament, members of parliament were required to vacate their seats if they quit the political party in which they were elected, and the first general elections in post-colonial Kenya were postponed from 1968 to 1970. In 1968, Majimboism in the constitution was eliminated and independent parliamentary candidates were banned.<sup>29</sup>

Throughout these series of amendments, the pattern was one of imposing executive desires on the constitution. These were not necessarily acceptable to the citizens, who were increasingly fearful of government, since no referendum was ever held. An opinion poll conducted in 1968 regarding proposed amendments showed that people were unhappy with the constitutional changes taking place. It showed that people wanted multi-partyism, that they wanted independent candidates to stand for elections, and that they wanted a popular election of the president and of the vice-president. They did not want a vice-president to be appointed or the president to nominate special MPs. They wanted Parliament to nominate special members. Most disturbing, 70% of the respondents complained that "fear of informers and secret police has become serious in Kenya".<sup>30</sup>

<sup>28</sup> Goldsworthy, *Tom Mboya: The Man Kenya Wanted to Forget*, pp. 225-226; Ojwang, *Constitutional Development*, p. 229.

<sup>29</sup> Ojwang, *Constitutional Development*, pp. 229-230.

<sup>30</sup> Gordon M. Wilson, Consultant, *Kenya Constitutional Changes-Succession to President*

The pattern set in the first five years of independence was copied with high frequency in the next two decades. Power was concentrated in the hands of the executive which could hardly be questioned. Although Parliament has authority to pass a vote of no confidence on the government after giving a notice of seven days, this implied control on the president is a useless and ineffective tool since the president can prorogue or dissolve parliament should such a threat arise. What is lacking in the present constitution is an impeachment mechanism through which a president cannot wriggle his way out by using other provisions in the constitution.

In April 1963, Ngei's APP had raised pertinent questions regarding the constitution. It pointed out that it was not a signatory to, and therefore it was not bound by, what it termed "the new half-majimbo, half-centralized Constitution in Kenya". It wanted a unitary constitution because a "federated constitution is a clear manifestation of divided loyalty, divided efforts and divided purpose". APP then called for a new constitution in which all parties would be involved in the making. This essentially was a call for a constitutional convention, the result of which would be acceptable to all as being of their own making and inevitable".<sup>31</sup>

If there were to be such a convention, delegates would of necessity go back to the Independence and Republican constitutions and overhaul them. The defects already pointed out should be remedied. These include putting a time limit for presidential assent and a specification of what would happen should the time expire. The sitting of Parliament should be definite rather than depend on the whims of a president. There

(Nairobi: Kenya Research Services, June, 1968), p. 11.

<sup>31</sup> "A.P.P. States Its Case".

should be an impeachment mechanism for presidents who abuse office. The exceptions to the fundamental rights and freedoms should be eliminated so as to reduce the excessive powers of the executive to interfere with individual liberties. As Justice G.B. Madan pointed out in 1985, "People will lose faith in the Constitution if it fails to give effective protection to their fundamental rights."<sup>32</sup> Post-colonial Kenya's experience is one in which leaders did not believe in the constitution and so they made it their tool. In the process, the fundamentality of the constitution has become questionable. A constitutional convention is likely to restore faith in the constitution and to make potential leaders believe in it

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<sup>32</sup> Quote in *Nairobi Law Monthly*, September, 1987, p. 3.