

REFERENDUM ESSAY NO. 2 - THE STRENGTHS OF THE PROPOSED NEW CONSTITUTION - WHY THE PROPOSED NEW CONSTITUTION IS BETTER THAN THE CURRENT CONSTITUTION

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1. During referendum, the choice of Kenyans will be between the proposed Constitution and the current Constitution. Section 28(2) of the Review Act provides that "*the question upon which the people shall vote in the referendum shall be whether they are for or against the ratification of the proposed new Constitution*". It is through the majority vote, if one is obtained, that the proposed new Constitution will be established by Kenyans. Article VII of the USA Constitution of 1787 described the constitutive fact of ratification as follows,

The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

The elected representatives of the people ratified the Constitution for them. It is the vote which will establish the proposed new Constitution or demand the retention of the current Constitution. That is how important each vote is. The referendum reminds Kenyans what did not happen when the current Constitution was negotiated at the 1960, 1962 and 1963 Lancaster House Constitutional Conferences. They were not asked to approve or reject it. Subsequently, when those who drafted it decided to alter it fundamentally, they did not consult or obtain their approval.

2. Through their votes, Kenyans will decide the Constitution under which they will live thereafter. If they ratify the proposed new Constitution, the consequences of this will be as indicated in the Sixth Schedule. They are as follows -

- (a) the Executive as it is today, made up of the President, the vice-President and Cabinet Ministers will continue until elections are held under the new Constitution in 2007; (see section 6);
- (b) the current Parliament will continue for the remaining part of its five-year term which is established by section 59 of the Constitution; (see section 3 of the Schedule);
- (c) all holders of constitutional officer such as judges, shall continue to hold offices as if they had been appointed under the proposed new Constitution; (see section 7);
- (d) holders of public offices shall continue to hold them as far as so doing is consistent with the Constitution; (see section 7);
- (e) the President and other persons will be required to take and subscribe the appropriate oath or affirmation of office shall do so;
- (f) constitutional commissions will be established within 90 days; (see section 14);
- (g) a commission on the implementation of the Constitution will be appointed;

- (h) within six months, Parliament will pass legislation to empower the Commission on Human Rights and Administrative Justice which will inquire into past human rights abuses;
- (i) judges of the supreme court shall be appointed within 90 days of the establishment of the appointment of the members of the Judicial Service Commission;
- (j) all the rights and obligations of the government shall continue;
- (k) all the laws in force shall remain in force;
- (l) Provincial Administration will be dissolved within six months of legislation to facilitate the new two-tier system of government;
- (m) section 287 of the proposed new Constitution provides that where Parliament is required to pass facilitative legislation, it will do so as stipulated; for instance, section 116(2) provides that about 5% of members of Parliament shall be persons with disabilities and it will be ensured that no gender has more than two-thirds of the members of Parliament; section 116(4) provides that legislation will be enacted to give effect to this Act.

The transitional arrangements, therefore, show that many provisions in the proposed new Constitution will come into operation after the referendum while others will come into operation after legislation is passed. Yet others will come in 2007 when the elections will be held under the proposed new Constitution. Whenever a new constitution comes into existence, transitional arrangements are made to provide for both change and continuity. Similar arrangements were made by the Kenya Order in Council (1963) which is contained in Legal Notice No. 145 of 1963 which was subsequently replaced by Legal Notice No. 718 of 1963. For instance, section 4(1) of the former provided as follows,

Subject to the provisions of this section, the existing laws, notwithstanding the revocation of the existing orders, have effect as from the appointed day as if they had been made in pursuance of this order.

3. To arrive at the correct decision on the "yes or "no" vote, one must ask five questions and get correct answers. The questions are -

- (a) What is the purpose or philosophy of the proposed new Constitution?
- (b) How is that philosophy given effect by the various chapters and provisions of the proposed new Constitution?
- (c) How would a better constitution than the proposed Constitution look?
- (d) What is the method to be used to get the better Constitution than the proposed new Constitution, and how long will it take to do so?
- (e) As of today, which is better to live under - the proposed Constitution or the current Constitution?

4. THE PURPOSE OR PHILOSOPHY OF THE PROPOSED NEW CONSTITUTION

The objects of the Constitution are to be gathered from the entire document itself, but are concentrated in

the Preamble and Chapters 1 to 6 of the proposed new Constitution. These are -

(a) to democratize Kenya by distributing state power amongst many organs so that dictatorship or authoritarianism does not emerge again; the 1963 Constitution established a constitutional democracy but amendments made to it between 1964 and 1988 turned the country into a dictatorship; four of the five organs are mentioned expressly in Article 1(3) whilst the fifth one, the people, is mentioned in many other provisions; those which are described by that section are -

(i) Parliament and district assemblies

(ii) Executive

(iii) Judiciary

(iv) Constitutional Commissions

(b) to facilitate the self-determination of Kenyans through practice of democracy; (see Article 1(2));

(c) to promote the values of human dignity and equality; (see Chapter which contains the Bill of Rights; also see Chapter 3 - National Values, Principles and Goals);

(d) to honour all those Kenyans who have struggled so that Kenyans may live in freedom and justice; (see the Preamble and Chapter 3);

(e) to establish institutions which will facilitate fast and equitable development of the country; and

(f) to consolidate the democratic gains which have been made since the struggle for the re-democratization of the country started in 1990.

Through the proposed new Constitution, the nation is re-inventing or seeking to renew itself. A nation with a new character and institutions is being ushered in to replace the unhappy nation and inadequate institutions. One can say that if the proposed new Constitution is adopted, we shall call the new nation the "second Republic". This is made clear by chapter 2 which gives the features of the new Republic. Section 4(2) provides that the Republic is founded on the principles of good governance through multi-party democracy, participatory governance, transparency and accountability, separation and devolution of powers, respect for human rights, and fundamental freedoms and the rule of law. No similar provisions are to be found in the current Constitution.

Although not mentioned in that section, people are an important constitutional organ and they operate through such institutions as the referendum which ratifies all amendments seeking an alteration of the basic features of the proposed new Constitution, the Bill of Rights, the periodic elections of members of Parliament who approve of the holders of constitutional offices nominated by the President, and the independent presidential, parliamentary and district assembly candidates; (see sections 281-283; chapter 6), sections 106 and 144(10) & (11), and chapter 14). Inter alia, the preamble states,

We the people of Kenya, enact and give this Constitution to ourselves and to our generations.

HOW IS THAT PHILOSOPHY GIVEN EFFECT BY THE VARIOUS CHAPTERS AND PROVISIONS OF THE PROPOSED NEW CONSTITUTION?

This entails an examination of the entire proposed Constitution. It will be done through different essays on the referendum which will follow the second essay.

HOW WOULD A BETTER CONSTITUTION THAN THE PROPOSED CONSTITUTION LOOK?

This question has three dimensions, namely, personal, philosophical and historical.

It is personal in that every voter has to ask himself/herself whether a better constitution than the proposed new Constitution would have been obtained. The answer must be in the affirmative because of the ideal of perfection. In a world where men and women are perfect, certainly a better constitution would have been made. It could also be argued that if Kenyans were better organised than they are, a better constitution could have been made. It could also be argued that if we had a better process of making the constitution than the one which produced this one, a better Constitution might have been made. Since empiricism shows that the process of review became increasingly democratic between 1997 when the first version of the Review Act was made and 2005 when the referendum is to be held, it is reasonable to believe that if more time is taken on the review process, a better constitution may emerge. Since, however, the campaign for re-democratization of the country gained momentum in 1990, how many more years are Kenyans prepared to wait for a better Constitution? Is the better or perfect Constitution being made for this generation and or generations to come?

The future generations will have their right to review any constitution made by the previous generations. There is a rational case for the voter having a constitution which improves his/her condition and the proposed Constitution meets this need as will be shown shortly. The case for a "yes" vote at the referendum is unanswerable.

The philosophical question is whether it is possible for a nation to have a Constitution whose content is acceptable to everybody or to about 70%-99% of the people. The differences of perceptions and needs make the attainment of such a high consensus impossible. In the democratic world, all constitutions are compromised documents. The kind of dissatisfaction which some Kenyans have with the proposed new Constitution is of the kind which Dr. Benjamin Franklin discussed amongst the delegates who, in 1787, drafted the US Constitution soon after they finished the task. The expressions of dissatisfaction with the proposed new Constitution today remind one of the arrogant attitudes of some delegates to the USA Constitutional Convention of 1787 which Dr. Benjamin Franklin condemned as he appealed for tolerance on September 17, 1787. At 82, he was the oldest delegate and too weak to read his own speech, which was read for him by one, Wilson. He said,

I confess that there are several parts of this Constitution which I do not at present approve, but I am not sure I shall never approve them. For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions, even on important subjects, which I once thought right, but found to be otherwise. It is therefore that, the older I grow the more apt I am to doubt my own judgement, and to pay more respect to the judgement of others. Most men indeed as well as most sects in religion, think themselves in possession of all truth and wherever others differ from them, it is so far error. Steele, in a dedication, tells the Pope that the only difference between our churches in the opinions of the certainty of their doctrines is, "the Church of Rome is infallible, and the Church of England is never in the wrong." But though many private persons think almost as highly of their own

infallibility as that of their sect, few express it so naturally as a certain French lady who, in a dispute with her sister said, "I don't know how it happens sister, but I meet with nobody but myself, that is always in the right ..."

[See Dr. Benjamin Franklin's contribution on Monday, September 17, 1787, in James Madison, Journal of the Constitutional Convention, pgs. 741 and 742].

The historical dimension of the proposed new constitution has four components.

The first component is the commencement of nationhood in 1963 with a democratic constitution which was, over time, so greatly amended that dictatorship emerged. The question which the individual will ask is whether if the proposed new Constitution is adopted, it will prevent a return of dictatorship. The answer is in the affirmative. It will not.

It was between 1964 and 1988 that many unnecessary constitutional amendments which turned the country into a dictatorship were passed. One which was passed in 1968 prevented the institution of independent presidential parliamentary and local government candidates at elections. The proposed new Constitution has restored these at presidential, parliamentary and district assemblies elections; (see sections 106 and 148(1)). Another one passed in 1982 turned the country into a one-party dictatorship. Yet others passed in 1986 and 1988, respectively, abolished the offices of independent attorney-general, auditor & controller-general, and member of the public service commission. That one of 1988 also abolished the independence of judges. These amendments which abolished checks and balances and democracy were passed by members of Parliament ostensibly for the benefit of the people who were to live under a dictatorship!

The second component is the suffering of the individual and economic decline which followed the onset of dictatorship.

The third component is the struggle for the restoration of democracy and a constitution to anchor it. This has taken place since 1990. That year witnessed the July 7, 1990 uprising at Nairobi and other towns. Between May and August 1997, other uprisings accompanying the clamour for the comprehensive review of the Constitution took place.

The fourth component is the controversy which has surrounded both the process of constitutional review and the content of the new Constitution since 1994 when the Law Society of Kenya, the International Commission of Jurists, and the Kenya Human Rights Commission published the model constitution which convinced Kenyans that a new constitution can be made.

The question which arises in the circumstances is - If we have not got the kind of constitution we would like, how much more time, energy and money are we prepared to invest in the better Constitution?

WHAT IS THE METHOD TO BE USED TO GET A BETTER CONSTITUTION THAN THE PROPOSED NEW CONSTITUTION AND HOW LONG WILL IT TAKE TO DO SO?

One remembers the 1990, 1991 and 1997 mass-actions in support of re-democratization of the country and the clamour for a comprehensive review of the Constitution took place. In all of them, these were accompanied by loss of lives, much human suffering and loss of property. The question is - Is there an adequate price for the ideal constitution, if it is attainable?

AS OF TODAY, WHICH IS BETTER TO LIVE UNDER - THE PROPOSED CONSTITUTION OR THE CURRENT CONSTITUTION?

As the following analysis shows, the proposed new Constitution is certainly a much better document than the existing constitution. Consequently, the "yes" vote campaign has better arguments than the "no" vote campaign which is a campaign for the status quo. A few illustrations will suffice.

5. THE STRENGTHS OF THE PROPOSED NEW CONSTITUTION AS COMPARED WITH THE CURRENT CONSTITUTION

(a) First, unlike the current Constitution which does not do so, the proposed new Constitution gives effect to the principle of the supremacy of the people over their elected leaders; this translates into the supremacy of the Constitution as opposed to the supremacy of Parliament, which has wrecked havoc after 1964; the proposed new Constitution is based on the idea of a higher law than the one which peoples' representatives, the members of Parliament, can or should make. It is because the Constitution is the higher law than the Acts of Parliament that citizens participate in making through organs such as the referendum, constituency forum, and review commissions; it is based on the view that, at best, peoples' representatives are agents who can only exercise delegated authority delegated to them by the principals, the people; (see Article 1 which declares that "all authority belongs to the people" no identical provision exists in the current constitution; in the past, people's representatives ie. MPs acted as though they were the people themselves and changed the Constitution as they considered fit to change; that is how one-party dictatorship emerged - through some of the amendments to the 1963 Constitution referred to above; the proposed new Constitution has taken that power from both the President and the Parliament, and returned it to the very people who had delegated it to them; it has done so in three ways, namely -

(i) all major amendments to the Constitution will be passed by Parliament and be ratified by the people through a referendum if the new Constitution is ratified (see sections 281 to 283 of the proposed new Constitution); under the existing Constitution, Parliament passed whatever amendment it chose, including making Kenya a one-party state, abolishing the independence of judges, auditor & controller-general, civil service and attorney-general;

(ii) under the proposed Constitution, the President will merely nominate such holders of constitutional offices as judges, commissioner of police and attorney-general whilst Parliament will either approve or reject the nominees; (see section 144(10) of the proposed Constitution); this idea is repeated in many provisions of the proposed new Constitution; the people will thus share with the President and Parliament the power to appoint their rulers;

(iii) through their parliamentary representatives, the people will have the power to remove from office a president who violates the Constitution; (see section 155).

(b) Secondly, if ratified, the proposed new Constitution will increase or add on to the existing checks and balances to power; it is adding checks which do not exist in the current Constitution; we shall have vertical and horizontal divisions of state power; we only had the horizontal division; the vertical division is that of distribution of state power between the national

government and district governments; (see Chapter 14 on Devolution of power); previously, we have had a government that set out to do everything ostensibly for all but in essence for a few, as our history tells us; in the horizontal division to the traditional three organs, namely, the Executive, Judicial and Legislature, there is added one other organ, namely, commissions (see section 1(3) of the proposed Constitution; in addition to the following commissions established by the current Constitution i.e, Public Service Commission, Judicial Service Commission, Parliamentary Service Commission, there are added the following commissions: Salaries and Remuneration Commission (section 252), Police Service Commission (see section 266 of the proposed Constitution), Gender Commissions (see section 76), Commission on Human Rights and Administrative Justice (see section 77), Teachers Service Commission (see section 250), National Land Commission (see section 85), National Environment Commission (see section 92); these commissions are doing many functions which were being done in an incoherent manner by either the President and or other arms of the government; this division will lead to democratic governance;

(c) Thirdly, unlike the current Constitution, the proposed Constitution requires that -

- (i) the President shares his power to appoint holders of constitutional offices with the Parliament which has to ratify the appointments; (see section 144(11);
- (ii) Parliament does have power of removing before the five-year term ends a president who violates the Constitution (see section 155);
- (iii) the power of the President under section 59 of the current Constitution to dissolve Parliament at any time, within the five-year period be terminated; the President under the proposed new Constitution shall have no such power; section 139 of the proposed new Constitution provides that "*the life of the Parliament is five years from the date of its first sitting after an election.*"
- (iv) the Judicial Service Commission do recommend to the President the persons to be nominated by him for appointment as judges (see section 197);
- (v) public land be administered by a National Land Commission so that it is not grabbed the way it was under the previous governments; today, the Government Lands Act gives the President power to alienate government land; (see section the Government Lands Act, Cap. 280 of the Laws of Kenya);
- (vi) the President's power under the current Constitution to declare a state of emergency or war be curtailed; the President can, today, declare a state of emergency in the country the way the colonial governor did on October 20, 1952; under the proposed new Constitution, the President can declare a war only with approval of the Cabinet (see section 144(3); under section 85 of the current Constitution, the President alone can declare a state of emergency; under section 17 of the current Constitution, the role of the Cabinet is merely advisory;
- (vii) the power of the President alone to make treaties be curtailed; under the current Constitution, the President has power to conclude treaties alone; under the proposed new Constitution, he can only do so by signing or concluding treaties with the

approval of Parliament (see section 144(3));

the claims that the awesome powers vested in the President have been retained or been increased are false.

(d) Fourthly, the single-chamber Parliament has been strengthened in a number of respects and, where necessary, power has been taken away from it; today, as will be under the proposed new Constitution, the Parliament will have one chamber; this is what is being sought to be done by the proposed new Constitution -

(i) its pretended (from 1964) unlimited power to alter the Constitution has been drastically reduced; it can only make minor amendments alone and major amendments with the approval of the people taking the form of a referendum; (see sections 281-283);

(ii) it has been given power to try and if it finds him guilty, remove a President from office; (see section 155) under section 59 of the current Constitution, it can only remove him from office through a vote of no confidence" in the government after which the Parliament itself either commits political suicide through dissolution or gives him power to dissolve it;

(iii) as seen above, it shares with the President the power to appoint holders of constitutional offices; it must approve all appointments of holders of constitutional offices (see section 144(11));

(iv) it has been given power to approve declarations of a state of emergency and war (see section 115(2)(j));

(v) the principles of its composition which are set out in chapter 10 on - Representation of the People - will make it more accountable than the current Constitution in that multi-partyism is recognized as a feature of the government; measures are to be put in place to make it representative;

the claims that the Parliament has been weakened is also false.

(e) Fifthly, the Judiciary has been strengthened in the following ways;

(i) a stronger judicial service commission which has two representatives from the Law Society; (see section 196);

(ii) judicial service commission recommends to the President the persons to be appointed judges; (see section 197);

(iii) addition of a new appellate court, the supreme court; (see section 183); this will have exclusive original jurisdiction in respect of presidential election petitions and in disputes arising from the process of the impeachment of the President and appellate jurisdiction to hear appeals from the Court of Appeal or from any other courts; this restores the kind of structure Kenya had until 1964, which obtains in virtually all democracies;

- (iv) establishment of religious courts, Christian, Kadhi's and Hindu courts to hear disputes arising from religious laws relating to personal status, marriages, divorce and matters consequential to divorce, inheritance and succession; section 12 of the proposed new Constitution provides that *state and religion shall be separate, there shall be no state, religion and the state shall treat all religions equally*.

6. THE CASE FOR THE "NO" VOTE AT THE COMMENCEMENT OF THE REFERENDUM CAMPAIGNS IS AS FOLLOWS

On August 26, 2005 members of Parliament who included five Cabinet Ministers, namely -

- (a) Hon. Raila Odinga;
- (b) Hon. Anyang Nyong'o;
- (c) Hon. Kalonzo Musyoka;
- (d) Hon. Najib Balala;
- (e) Hon. Achilo Ayako;

launched a "no" vote campaign and gave the reasons below, for their stand.

First, they claimed that the proposed new Constitution does not reflect the wishes of Kenyans. The following are the answers to this claim:-

- (a) each of them will have only one vote on the day of the referendum; they will be entitled to vote "no"; however, their judgements are as good as those of other Kenyans - whether or not it reflects the wishes of Kenyans - is the issue to be resolved through the referendum; they have prejudged the matter before the voting day; they appear not to have taken account of the factor of compromise in constitution-making; and
- (b) the statement did not contain an analysis of the proposed new Constitution; an analysis shows the very opposite of this;

Secondly, the MPs' claim that the voters were promised that the imperial presidency would be terminated and this has not been done. In the country's constitutional review debate, the expression "imperial presidency" has not been used now. What has been used is the "concentration of too much power in the presidency".

This contention is ahistorical. The project of re-writing the Constitution goes back to more than two decades but picked up a new movement in 1990 when the street campaign for the restoration or democracy started.

- (i) the phrase "imperial presidency" has been used in American constitutional law discourse to describe the great powers which the American Presidents wield under the Constitution; there is no campaign there to eliminate or reduce the powers of the "imperial" presidency; one does not understand the relevance of the expression to the Kenyan situation;
- (ii) the truth is that what Kenyans have wanted all the time has been to re-distribute state power amongst different organs from which it is concentrated; these organs include the presidency and the legislature;

- (iii) it is worthy of note that all parliamentary parties agreed on the structure of the presidency in the proposed constitution at the Naivasha Retreat of November 4-7, 2004; they agreed on a non-Executive Prime Minister partly because they judged that Kenyans prefer a presidential system of government to a parliamentary system, and partly because they realized as crafted in the Bomas document, the respective powers allocated to the President and Prime Minister created a system of government which could not work;
- (c) the five ministers claim that in supporting the "no" vote campaign, they are acting constitutionally because in their judgement, the constitution allows them to do so whilst remaining in the Cabinet and cite British example of 1975; they are wrong because -
- (i) the law governing collective responsibility of Ministers in Kenya is to be found in section 17 of the Constitution and practice as gathered from the Kaggia and Muliro cases of 1964 and 1975, respectively; in 1964, the late Hon. Kaggia was dismissed from office of Assistant Minister because of criticizing, in writing and publicly, the government's land policy; in 1975, the late Hon. Masinde Muliro was dismissed from the Cabinet for failing to support the government policy on how to handle the late JM issue in the National Assembly; section 17(2) provides that "the Cabinet shall be collectively responsible for all things done by or under the authority of the President or the vice-President or any other minister in their execution of his office"; unlike Britain, Kenya has a written Constitution which shows how the government is run; the British examples can only be used when interpreting the Kenya Constitution;
- (ii) the five members of Parliament have got entirely wrong both the British doctrine of Cabinet collective responsibility and its application in 1932 and 1975, respectively; the doctrine requires the Cabinet to first decide whether or not there will be an "open question" - whether or not dissent will be allowed either in the House of Commons alone, or both in the House of Commons and outside; if the decision is that there is no "open question", then every minister must toe the line; he must adhere to what the Cabinet has decided or resign; if there is an open question, permission may be given to vote against only outside the House or both inside and outside the House; in the Cabinet, freedom is allowed; the Cabinet has not recognized an open question on the issue; the five ministers have violated the Constitution; they must now campaign for the "yes" vote to resign;
- (iii) some of the five Ministers and Uhuru Kenyatta, Leader of the Official Opposition, claim to have a right to seek support for the "no" vote from foreign powers; since authority of the democratic government is based on the consent of the governed, there cannot be justification for any member of Parliament soliciting political support from foreign governments; there is a gross misunderstanding of the tenets of democracy; in a democracy, Kenyans removed KANU from power on December 27, 2002 because it was committed to undemocratic governance;
- (d) in the statement, the authors claim that the proposed Constitution gives the President greater powers than in the current Constitution; this is not a correct reading of the proposed new Constitution;

(vi)the authors also claim that the proposed new Constitution is undemocratic "in that it gives a president power to appoint up to 20% of Cabinet Ministers from outside Parliament; it is claimed that this provision is inherently dictatorial; there is no merit in this claim; under the USA Constitution which is a democratic constitution, the President appoints the entire Cabinet from outside Parliament which is known as the Congress; that constitution does not establish a dictatorship; it is difficult to see how the application of the principle of the American Constitution turns Kenya into a dictatorship; the only thing that can be said about the statement is that the authors disapprove of the preference of the presidential system of government over the parliamentary system with which the office of prime minister goes; in the history of the making of the new Constitution, the process has been used to improve on political fortunes of parties and individuals; the campaign for the "no" vote appears to be a power game and not a part of the making of a democratic constitution since the majority of Kenyans believe that the current Constitution is undemocratic;

(vii)the authors do not also approve of the two-tier system of government - a national government and district governments; the principle of the two-tier system of government is that of devolution; as to whether one adopts what is called federalism or devolution, is a question of what is good for a particular country; the same MPs, it is to be recalled that (i) at Naivasha, agreed on a two-tier system of government, and (ii) some of them were members of the PSC which recommended the two-tier system; in other words, they were members of the committee which compiled the PSC Report which was tabled in Parliament on June 29, 2005 and adopted, and subsequently modified at Kilifi and tabled again on July 19, 2005; the PSC members included;

- (i)Hon. Raila Odinga;
- (ii)Hon. Uhuru Kenyatta
- (iii)Hon. William Ruto
- (iv)Hon. Otieno Kajwang
- (v)Hon. Dr. Bonaya Godana
- (vi)Hon. Mutula Kilonzo
- (vii)Hon. Henry Kosgey

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