

REFERENDUM ESSAYS No.3  
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**THE NATURE OF THE REFERENDUM IN CONSTITUTION  
MAKING AND THE MERITS IN THE ARGUMENTS ADVANCED  
BY TOSE CAMPAIGNING FOR THE NO VOTE**

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In this essay, I discuss the historical origins of the referendum in constitution making in the democratic world and address some of the issue which have arisen this week.

This week, the electoral commission (ECK) announced that the referendum will be held on Nov, 21. It is important to understand what a referendum is, its purpose and how it has been used in history. AS it was observed in Essay No.2, on November 21<sup>st</sup> the question which the people will vote on shall be whether they are for or against the ratification of the proposed new constitution. Put differently, the question would be whether they want to live under the proposed new constitution after the referendum or under the current constitution under which lives were made miserable by the KANU administration. A No vote will be a certain way of enabling Kenya to bring back oppression under a different leadership. A Yes vote will prevent a return to dictatorship.

It is worthy of note:

- a) The referendum in a democratic society is a device of direct democracy in that it is an exception to representative democracy where elected representative like those in parliament take decision for the other peoples. It is the best type of democracy because every voter take s an important decision in this case the referendum will enable the individual to decide whether to live under the existing constitution meant for one-party dictatorship or the proposed new constitution meant for a democracy. This direct democracy used to be practiced in Greek cities in old Greece.
- b) In world's constitutional history the referendum was first used by Switzerland in the 16<sup>th</sup> Century whereby it was considered important to consult citizens on many issues

- c) The referendum is used to get citizens either to pronounce on important public measures put to them under the govt or in cases of the exercise of constituent power for instance in the ratification of proposed new constitutions whether for a state as is happening in Kenya or where states that want to form a union e.g. the EU. It has also been used a lot recently in the USA State of California.
- d) It was first used to ratify a constitution in 1778 by the state of Massachusetts in the USA where the people were required to ratify the constitution of that state. In that year, the electors found the draft constitution unsuitable and demanded that it be revised and in 1780 referendum was used to ratify the present day constitution of the constitution of Massachusetts.
- e) The present constitutions of Australia, Denmark ,Ireland Spain and Switzerland and all the states if the USA apart from Delaware require that every amendment under the constitution be ratified under a referendum. The reasoning is that people must have control over their lives by ensuring that no fundamental changes in the life of the society take place without their consent.
- f) Referendum was used in 1802 in France to appoint Napoleon the leader of France for life and in 1804 to make him the emperor of France. It was also used by Hitler in the 30s to legitimize dictatorship.
- g) Between 1970s and the 1990s it was used by mainly by European countries s to decide whether or not they should become members of the EEC. All the members decided so by referendum mainly. It is likely that a referendum will be used by East Africans to adopt a constitution to establish an East African Federal State which is the political goal of the ongoing integration.

**B. THE QUESTIONS RAISED BY THE “NO” CAMPAIGNERS AS REVEALED BY THE REPORT OF THE MACHAKOS MEETING WHICH WAS PUBLISHED BY THE STANDARD ON 8<sup>TH</sup> SEPT AT PG 1& 2.**

In arriving at a decision to vote No or Yes on November 21<sup>st</sup> the citizen will need to monitor the arguments advanced at the Yes and No campaigns in rallies, the print and the electronic media or elsewhere. This week, the no vote campaigners held meetings at Machakos, Kajiado and Mombasa. In this essay, the arguments advanced for the No vote are examined.

The No campaigners have held three meetings this week at Machakos, Kajiado and Mombasa where the following claims were made;

- a) The first claim is that the No vote is required because not much change in the way the country is governed has been realized. This is a direct attack on the government and has absolutely nothing to do with the referendum in Nov, 21 since the question is whether one is for or against the proposed constitution.  
Moreover, the No vote is a vote for the current constitution which was used by some of these ministers when in KANU to oppress Kenyans. It is therefore a vote for the extension of the one-party dictatorial constitution. The campaign for the No vote is a campaign for power before the 2007 as required by the Constitution. Consequently, it is a premature judgement because under section 9 and 59 of the current constitution, the president and parliament have 5 yrs to perform before judgement on their conduct is passed.
- b) The second claim associated with the honourable Kalonzo Musyoka is that the No vote is grounded on the fact that the other cabinet ministers have refused to dialogue with them on matters he did not specify. Again this has nothing to do with the referendum but power politics. Moreover, the government was in 2002 elected to serve for five years and if anybody is dissatisfied he can either resign from the cabinet and parliament or base his 2007 campaign on this claim.
- c) The third claim is that the government is led by old men and for that reason citizens should vote No. This translates in to an argument that Kenyans should vote no since their president and the vice president who are senior citizens or elders support the Yes campaign. This is a strange

argument because over time everyone must become old and with age comes wisdom. The test ought not to be whether the argument for or against the ratification comes from an old person or a young person but rather whether the argument is sound or not. Which should weigh in the mind of the voter is the merit of the argument advanced. This argument like the other two are irrelevant and only serve to demonstrate that the campaigners for the no vote are engaged in a competition for power this year instead of 2007 when the constitution requires the competition to take place.

- d) The fourth claim was that the proposed new constitution has increased the powers of the president. It is further claimed that it would turn the current president into a life president and also that it might give him more than two terms of five years each to serve as such. The current constitution limits to ten years the period during which a person may serve as a president. No reference was made to the alleged provisions of the proposed constitution which support this claim. The claim is manifestly untrue as it is demonstrated below.
- i) Amongst others, section 144 of the proposed new constitution has taken from the president the power to appoint holders of constitutional office like judges and vested it in both the parliament and the president. This is a clear reduction of the powers enjoyed by the president under the current constitution under which the president every holder of a constitutional office.
  - ii) Section 139 of the proposed new constitution has taken away the president's power under Sec 59. of the current constitution to dissolve parliament. Now, parliament will run for five years without interruption.
  - iii) Sec. 85 of the Proposed constitution vests the power to manage land in the national land commission and is removing it from the president who manages it under the current constitution by the virtue of Govt. Land Act(GLA Cap 280)
  - iv) Section 144 of the proposed constitution takes away from the president in the current constitution the power to declare a state of emergency. Section 85 of the current constitution gives him

power to declare a state of emergency over Kenya the way governor Baring did on 20<sup>th</sup> October, 1952 when the late Mzee Jomo Kenyatta and the other Kapenguria Six were arrested and subsequently tried and convicted of managing the Mau Mau affairs. Under Section 144 of the proposed constitution, the president is required to get the approval of the cabinet and later that of the parliament before he can do so.

- v) The proposed new constitution takes away from the president power to conclude treaties with foreign powers unilaterally and requires him to get the approval of parliament before he signs any treaty.

The No campaign is based on imagination of its supporters and lies. Citizens should demand that arguments be based on the text of the proposed new constitution and further that opinions be separated from facts.

- d) The fifth claim is that the proposed new constitution is bad because it make it very difficult for parliament to amend the constitution to amend or alter it as it so desires. This is a direct attack on sections 281 and 283 of the Proposed Constitution which restore to ordinary people their control over their lives through requiring that all amendments to alter the constitution fundamentally be referred to a referendum so that the country is not turned into a one party dictatorship by parliament the way it was done in 1982 and also to prevent the parliament from taking away the independence of judges as they did in 1988 of the independence of presidential, parliamentary and local govt candidates as it happened with a constitutional amendment in 1968. The no vote therefore is a vote for returning the country to dictatorship, and not advancing the cause of democracy.
- e) The sixth claim is that the proposal will legalize abortion. Section 35 of the proposed new constitution states the very opposite of that. It states that abortion is not permitted except as [provided for by an Act of Parliament. Today Section 159 of the Penal Code allows abortion only where the life of the mother is in danger. As of today therefore, as will be the case after the referendum, there is no legalization of abortion except where the life of the mother is threatened.

- f) The 7th claim is that the proposed constitution requires a dialogue. This begs the question, since Kenyans have had dialogue since 1990, how will it be determined that an adequate dialogue has taken place and therefore the country requires a referendum. Kenyans have not been offered an idea of the ideal constitution or the time and money which will be required to realize it.
- g) The 8<sup>th</sup> claim is that the majority of Kenyans prefer the parliamentary system to a presidential system which is proposed by the new constitution. It is also linked to another version of it namely that the proposed new constitution does not reflect the wishes of the people as expressed to the review commission between 2001 and 2002 when the review commissioners visited every part of the country to receive the views as to the content of the proposed constitution.

Since the referendum has not taken place. By what device can one tell that Kenyans don't want a presidential system? The claim is based on intellectual arrogance. For a discussion of the historical and the philosophical basis of the referendum in democratic practice see *Vernon Bogdanor, 'The Blackwell Encyclopedia of Political Science' at page 524-525*

- h) The 9<sup>th</sup> claim is that the proposed constitution allows the president to rule for life. This is untrue for two reasons:
  - a. Sec. 152 of the proposed constitution provides that a president shall serve for a max of two terms of five yrs each and the commencement date is the date of assumption of office.
  - b. Sch. 6 Sec.6 and 8 which deal with transition provide that the president, the parliament and the cabinet shall serve the remaining part of the 5 year term and further that if the constitution is adopted they will take oath of office to be bound by it. It follows from this that president Kibaki's period of serving as president for 2 terms if elected in 2007 begins on 30<sup>th</sup> Dec, 2002 when he first assumed office. That term will expire on 30<sup>th</sup> Dec, 2007 and if re-elected will swerve only one more term. The claim therefore that the president will serve for life is based partly on misunderstanding of the provisions of the proposed constitution and also the existing constitution which confers on the president the right to serve as such for two terms.

- i) The 10<sup>th</sup> claim is that the Yes campaign has been tribalized. There is no merit on in this claim in that both the ‘Yes’ and the “no” campaigns have supporters from segments of all the communities. This claim was made at Machakos by Hon. Uhuru at a platform he shared with other communities.

It is clear that the no vote campaign is a premature power contest which is based on lies and not the text of the proposed new constitution.

### **C. SUPREMACY OF THE PEOPLE.**

The no vote campaigners appear to be very much afraid of the people who will benefit from the adoption of the proposed new constitution. It is also based on underrating the intelligence of every Kenyan who has innate intelligence to tell what is good or bad as affirmed by article 1 of the Universal Declaration of Human Rights (1948). This reads as follows:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Democracy is founded on the view that the people are the foundation of all power. This view is stated in Article 21(3) of Universal Declaration of Human Rights which reads as follows

The will of the people shall be the basis of authority of Government.

The proposed new constitution gives full recognition to the in four vital respects namely:

- a) It takes away from the parliament the power to amend constitution and restore dictatorship as they did on 1982. All major amendments will have to be ratified by the people through a referendum.
- b) The people will approve of all persons nominated by the president to hold constitutional offices through the requirement that parliament approves them.
- c) Through the power to impeach the president or remove him from office as given by sec. 155 the Kenyan people through their MPS

have the power to impeach a president who violates the Constitution.

- d) Through a better formulated Bill of Rights than the one which is formulated in the current Cap. V of the current Constitution the people have tied the hands of the govt. the new Bill of Rights is in Cap 6 and runs from Sec. 29 to Sec 77. The current Bill of Rights runs from Section 70 to Sec. 84.

Those in the No Campaign are enemies of Democracy and Kenyan People.

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