

TAKING A FRESH LOOK: 36 REASONS WHY KENYANS WANTED THE CONSTITUTION TO BE OVERHAULED AND A NEW ONE MADE THROUGH A PEOPLE DRIVEN PROCESS¹.

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- i. Parliament's power to amend the constitution had been abused for many years and this has thrown the nation into untold suffering. Kenyans wanted to exercise their sovereignty either directly or through elected representatives in a parliament which had both the national assembly and the senate. Kenyans had a problem with the concepts of the supremacy of parliament instead of the supremacy of the constitution and, with the doctrine of the sovereignty of the state instead of the sovereignty of the people. These two concepts were important for us to locate where power inheres, who donates power and to make it clear that the state and its institutions are a creature that is not an end but a means to an end- which is to create an environment where the human being (citizen) shall enjoy his/ her rights as an individual, as a community, group and as the collective of the people of Kenya. The rights and freedoms of each single human being and in their collective is the basis and justification for establishing the state. Kenyans finally won this fundamental intellectual battle and therefore secured the right and solemn political act of constitution making to themselves even though the political class has always usurped this duty and primordial political power. It is on this basis that NCEC went to court in 2004 to secure the right to a referendum on the constitution to ensure that in future Parliament did not arrogate itself the power of making or fundamentally altering the structure of governance the people of Kenya chose.

¹ Original synthesis based on the reports of several civil society organizations including 4Cs, NCEC, KHRC, CLARION, Youth Agenda and the Ecumenical Justice and Peace Commission (EJPC) by Cyprian Nyamwamu, Ndung'u Wainaina, Kepta Ombati, and Mugure Gituto on behalf of NCEC (2005)

- ii. The President had unfettered powers to appoint ministers and assistant ministers, nominate MPs, military bosses, appoint judges, the AG, ambassadors, Permanent secretaries, Parastatals chiefs, Provincial commissioners and District commissioners of his choice without parliamentary vetting or approval. In most cases, sycophants and individuals who needed to be in jail were allowed to run ministries and important constitutional and public offices.
- iii. The one party dictatorship which was *de facto* since 1966 but became *de jure* in June 1982 revolted all patriotic Kenyans. This is how the 1982 coup became inevitable. The Mlolongo tragedy of 1988 within KANU as the only political vehicle to participate in politics and governance made it urgent that Kenya be established as a multi-party democracy. But then again the repeal of section 2A without making a democratic constitution with checks and balances, separation of powers and devolution was not going to do it. So Kenyans demanded for a Multi-party democratic state as a basis of building a democratic, just, cohesive and inclusive state. Moi said that Multi-partyism would bring about chaos and indeed because he controlled all instruments of the state, he presided over ethnic clashes. Not a single DC- because DCs chaired the district security committees- was ever arrested for failing to secure Kenyans. The Akiwumi report is replete with stories of how the state was used to hurt the nation, kill Kenyans and destroy our economy so that Moi and KANU could remain omnipresent and all powerful to a fault.
- iv. The military and the police force (instead of service) were not regulated through the constitution and therefore was largely an instrument of the president lacking in civilian/constitutional oversight. This is how many assassinations, ethnic clashes, detentions without trial, the Wagalla Massacre and other gory occurrences of state terrorism were sustained.
- v. A minority president who could be elected with as little as 27% would form government without the requirement to form a coalition government. This electoral system and constitutional standard based on

the First-Past-the-Post system ensured that Kenya was always ruled by a constitutional dictator who used the electoral system to rig the elections in favour of his party and use the courts to ensure that petitions never saw the light of the day. Kibaki's petition against Moi's rigging in 1997 never got concluded until now.

- vi. Corruption and misuse of office had become rampant because there were no checks and balances in place. The Golden berg, Anglo-leasing, land grabbing, asset stripping of Parastatals and all the documented theft (in the Auditor and Controller General reports) all happened because of the impunity with which the neo-patrimonial state was and is founded on. The patron-client system run by kitchen cabinets punished those who were critical of the ruling party and rewarded sycophants. Impunity had taken root to the core. This was so especially because ministers were members of parliament and members of the cabinet hence holding the executive accountable was always a mere intention.
- vii. Detention without trial, Torture and state terrorism continued unabated as it has now been documented in the Nyayo torture chambers case, Kamiti, Naivasha, Shimo La Tewa, Manyani, Wagalla Massacre and other infamous cases of state terrorism against its own citizens. This is because the Presidency can not be held to account for the security of Kenyans. Kenyans were brought to courts at 7pm in the evening to be tried after been starved for as many as 21 days where they used to eat their own faeces and drink the urine to stay alive.
- viii. Kenya's Bill of rights was made with the interests of the colonialists at heart. The bill of rights is so weak and totally unjusticiable because the rights and freedoms there in are subject to state security, public health, public morality and public order considerations. Kenyans wanted an expanded and justiciable Bill of rights which included socio-economic, cultural, and special categories and group rights.

- a. Capital punishment remains a major concern for Kenyans as it remains in the statute books and the constitution did not make it illegal. Sadly the proposed constitution does not outlaw capital punishment but empowers parliament to repeal the penal code to repeal it.. see (Article 26(3)).
- b. extra-judicial killings and incarceration in police cells for more than 24 hours, arbitrary arrests and harassment of Kenyans especially the youth by the police, and incarceration in remand prisons is a serious violation of rights
- c. The violation of the people's right to privacy is a major concern
- d. Denial of basic rights to poor people in slums and far flung areas like in Pokot, Turkana, Mandera, Marsabit etc because basic rights such as education, health care,
- e. The fact that Kenyans can not assemble freely, process, demonstrate and petition their government without being harassed and taken through malicious prosecution is a major concern. There are Kenyans like Kalembe Ndile who before his election in 2002 to Parliament had 9 cases going on in court.

These violations make Kenyans wonder whether they belong to the government. Are Kenyans the property of their government? Hon. Michuki's March 2006 confession that the government is like a serpent that if rattled shall strike adds to the need for the overhaul of the constitution so that when a minister orders the police to invade private property and to destroy property, such a minister can then be arrested, tried in a court of law and jailed for life.

- ix. Ethnic clashes, assassinations, tribalism and threats to national security had become the way of life the president and security organs could not be held to account for the security of the nation.
- x. Dual citizenship was never provided and Kenya was missing out in a big way both politically and economically.

- xi. Academic freedom continue to be violated since the freedoms of citizens to disseminate academic ideas remains fettered under the current constitution and violation of rights is rarely punished since the Acts establishing universities are themselves draconian.
- xii. Citizenship remained a major problem. Kenyan women could not and still do not confer citizenship to their children if the husbands are not Kenyan. This is constitutional discrimination.
- xiii. Kenyans were very concerned and lamented about the tyranny of the provincial administration and the chiefs Act. This governance system remained and remains oppressive because of the decentralization system of governance instead of the system of devolution which empowers the citizens to established democratic governments that are accountable to them. Kenyans wanted a devolved system of government where they controlled both political power to make decision and elect government at a sub national level as well as control economic power and resources that could be applied to transforming the lives of Kenyans with the aim of securing the basic rights, opportunity and security of every single Kenyan.
- xiv. The AG's arbitrary powers of *nolle prosequi* that has been abused so many time remains a concern to Kenyans since this is used to let the rich criminals off the hook while grandmothers who steal a chicken to feed orphans are sentenced to eight years in prison (an example in 2006 in Nyeri).
- xv. Land grabbing and dispossession because land would be illegally given out to the friends of the president including the Mau forest and other gazzeted lands public lands has continued to be a major concern for Kenyans. In fact it has been a source of land based conflict.
- xvi. Historical injustice going back to the colonization of Kenya remains unaddressed. Courts could not be accessed by communities or human rights groups in the name of *locus standi* and because once a title had been issued to an entity it could not be challenged.

- xvii. The issue of 999 years (ten centuries of lease!) leases to land allocated under the leasehold (even to foreigners) continues to truly irk Kenyans.
- xviii. Poverty, hunger and marginalization due to the skewed way of budgeting and allocation of resources have made Kenyans live lives of abject poverty and marginalization. Kenyans wanted the budgeting process to be open, participatory, fair and equitable.
- xix. The Police which kills with impunity and which can not be held to account even in cases of extra-judicial killings remain a major concern for Kenya. If the colonial state killed Kenyans with impunity, how can Kenyans, even suspected criminals be killed without due process being followed?
- xx. Parliament, which was a mere extension of the executive remains too weak and totally without teeth to hold the executive accountable to the people of Kenya. The main problem remains the fact parliament can not pass of a vote of no confidence in the president/ government because that will cause MPs to lose their jobs immediately and face an election.
- xxi. The president can dissolve parliament, prorogue it and open the sessions of parliament at his pleasure since parliament can not even set out its own calendar.
- xxii. The Kenyan Judiciary has become a system of subversion to justice. The judiciary lacks independence because the judges are appointed through a system that the President controls. Due to this the judiciary is largely captured by the executive and therefore judgments sometimes are given under duress or after judges have been bribed to deliver these judgments in favor of cronies of the Presidents etc.
- xxiii. A corrupt judiciary that also lacks financial independence has denied Kenyans justice. According to the economic survey (2009), there are about 840,000 cases pending in the judiciary with others running back as far as 1983! Kenyans demanded a judiciary that is open, transparent, independent and progressive to secure the rights of Kenyans and check the executive and the legislature.

- xxiv. The civil service works at the pleasure of the president and hence largely serves the interests of the president and his friends not the people of Kenya.
- xxv. The electoral commission that would be composed of the ruling party stalwarts to help the incumbent to rig the election was reformed under the IPPG reforms of 1997 but only as a gentleman's agreement. Kibaki defied that gentleman's agreement and constituted a commission which comprised of nearly 95% his friends or loyalists. This became a major source of national chaos in the 2007 presidential elections dispute.
- xxvi. Lack of Directive principles of state policy: this led to institutionalized Marginalization through discriminatory policies such the Sessional paper No. 10 of 1965 on African Socialism and its application to Planning in Kenya
- xxvii. Skewed budgeting in favour of the President's region which leads to tensions and suspicion hence making elections a life or death affair
- xxviii. The idea of the winner-takes-it-all electoral system where a mere 33% of mandate translates to 100% of power has created the "it is our time to eat" political psyche that is responsible for the cut throat competition in politics. This political system has undermined the unity of the nation and national cohesion has been vandalized extensively.
- xxix. Nepotism and tribalism in the civil service has become a feature due of the winner-takes-it-all political system, the fact that ministers operate with impunity and due to the fact that parliament does not vet the appointees to state offices.
- xxx. Women were marginalized and excluded due to the lack of an affirmative action policy in the constitution which could lift the status of women so that they could meaningfully participating in decision making organs of the state.
- xxxi. The youth are totally ignored and marginalized in politics, economics, social and cultural sectors as well as legally and structurally. Although constituting 56% of the population, the youth between the age of 18-35

years have no say whatsoever in politics and governance hence they lack avenues of influencing state policy.

- xxxii. Persons with disability, minorities and pastoralists needed affirmative action and special policies since they remain marginalized. There has been a call for an equalization fund and other constitutional mechanism to ensure that Persons with Disabilities (PWDs) and minority communities also have a place in the representative organs of the state.
- xxxiii. Workers rights continued and continue to be violated because of the weaknesses of the industrial court whose decisions are not final but can be overturned by the high court. A minister can declare a workers right to a strike illegal even when workers bodies have exhausted the channels of industrial negotiations.
- xxxiv. Borrowing without parliamentary approval has led to Kenyans borrowing up to about Kshs. 2 trillion and paying back up to Kshs. 4 trillion to date where most of this debts are dubious and have gone to line the pockets of the rich, mighty and the powerful in the state since independence. For example Kenyan has borrowed up to Kshs. 11 billion to extend the railway line but not a single meter of the railway line has been built since independence. A fertilizer factory allegedly in built in Changamwe in the 1970s has cost Kenya billions to date and continues to be paid for up to date but no such factory exists in Kenya!
- xxxv. Gerrymandering of constituencies and arbitrary creation of districts without regard to the rule of law leading to skewed representation and political tyranny. This has led to serious ethnic tensions in Kenya. in 1998, KANU won about 36% of the nation vote but had 51% of parliament while the rest of the opposition won about 64% of the vote but controlled only 49% of the parliament (see below)

Party	% of vote won	% of Parliamentary strength
KANU	36%	51%
The Combined Opposition	64%	49%

This minority rule has invited serious questions about the electoral system in Kenya and the power to create boundaries and constituencies by bodies controlled by the presidency in Kenya. This phenomenon is now called gerrymandering.

xxxvi. National days that could be created under presidential decree, the power to direct that the national currency, stadiums, schools, public roads and streets, award of national honors and recognitions and all those acts that continued to entrench monopolization, personalization, manipulation and instrumentalization of power by the president made Kenyans to demand a constitutional and popular participation of Kenyans in naming things and deciding how to award honor and recognition as a national resource.

Commentary:

These 36 points formed the basis of the national mobilization and demand for constitutional reforms in Kenya. The Proposed constitution has extensively responded to each and every one of these concerns. Lately the clergy have minted new matters arising from the national consensus on reforms namely the question of the Kadhi’s courts and the issue of how abortion should be declared illegal in clearer and most unequivocal language in the constitution. While it is the right of all Kenyans to raise new issues as the process goes on, it is the responsibility of the vanguard of the reform movement to remind Kenyans that these issues were and are not at the core of the clamor for constitutional reform. Indeed, the Proposed Constitution now provides for the right to life of an unborn baby unlike under the current law where unborn fetuses do not have a right to life. Similarly the whole call for separation of state and religion is dangerous

because this premised on the quest for a secular state in Kenya. Such a secular state will totally devastate the arguments of Christians and our nation's heritage of harmonious, symbiotic and indeed complementary state-church/religious relationships.

ⁱ Cyprian Nyamwamu, The Chief Executive Officer of NCEC is a Governance Expert. The National Convention Executive Council (NCEC) has since 1997 acted as Kenya's vanguard advocacy and policy dialogue resource. It is a movement for constitutional reform and good governance in Kenya which focuses on reforms, reconstruction and reconciliation as key strategic objective of democratic consolidation in Kenya. NCEC holds the position that without justice there can not be peace. Conflict is a result of unjust economic, political, economic, gender and environmental relationships and constitutional reform is the most comprehensive way to bring about reforms, reconstruction and reconciliation to Kenya which has suffered nearly fifty years of misrule.