BUILDING BRIDGES: AN ANALYSIS OF THE PROPOSED CONSTITUTIONAL REFORMS.

BY: MUCHAI LUMATETE;
MARGARET KAHIGA; and
EVANS KAZUNGU
OF LUMATETE MUCHAI & COMPANY ADVOCATES

INTRODUCTION

The highly politicized Report of the Steering Committee launched on the 26th October, 2020, promises a bag of mixed future fortunes. The report, borne out of the March 2018 Handshake between His Excellency President Uhuru Kenyatta and the Right Honorable Raila Odinga, contains a raft of proposals that will, in an unprecedented way, substantially alter the 2010 Constitution consequently creating a constitutional dispensation that conversely mirrors the Lancaster Constitution. The raft of proposals will substantially modify fifty-eight (58) Articles with far-reaching constitutional reforms, are contained in an annexed draft Bill to amend the Constitution of Kenya, 2010, which primarily focuses on promoting a cohesive society and to further the ideals of a united, prosperous and just nation.

This paper will endeavor to render a fair opinion on the raft of proposals.

The discussion and critique of the proposals will be directed towards understanding the path the constitutional reform journey set in motion and the legal ramifications likely to be felt.

Briefly, the proposed amendments notes to address issues arising from divisive elections arising from electoral processes; county revenue allocation and structure of devolution; equitable resource allocation and equitable distribution opportunities; streamlining the roles and functions of the two houses of parliament; implementation of economic and social rights under Article 43 of the Constitution; culturing a responsible citizen; inclusivity and gender parity in governance and ensuring accountability for public resources and the fight against rampant corruption.

This analysis will endeavor to examine pertinent provisions that will substantially shape the emerging dispensation.

CITIZEN AND THE REPUBLIC

In an attempt to address the already deteriorating regional relations, the draft Bill proposes to amend Chapter Two of the Constitution by inserting a new Article 10A (Regional integration and Cohesion). The clause recognizes that regional integration

and cohesion as integral tenets towards achieving national economic goals. The provision imposes a positive duty on the State to take policy and legislative measures for the attainment of the proposal.

Regional integration is instrumental in overcoming divisions that impede the flow of goods, services, capital, people and idea. The provision is alive to the fact that lack of regional cohesion and integration constrains economic growth, especially in developing countries. Further, the Bill introduces Article 11A, on Economy and shared prosperity, in to the Constitution, hinged on the introduction of a new economic model based on value creation. It is hoped that the new model will provide equitable opportunities for all, promote industrialization and support small and micro-enterprises.

The mission of the East African Community is to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments. In 2015 Kenya launched a **Draft Regional Policy for Kenya**, briefly, the draft policy sets out the key priority intervention areas, namely: "*advancing Kenya's national interests through innovative commercial diplomacy; pursuing a coherent regional integration policy framework and coordinated approach to regional and international engagements; pursuing convergence of national and regional macroeconomic policy framework; developing policy intervention programmes to ensure maximum utilization of opportunities presented by regional integration; consolidating the regional market and promoting integration into the global economy; improving quality of human capital and creating opportunities for employment, poverty reduction and wealth creation; and providing adequate resources for regional integration."*

Regional Integration is indeed key in unlocking our economic potential however, diverse opinions and hunger games have derailed the Journey towards achieving this goal. The attempt to slip in an amendment into the constitution does not at all reflect the political intention. Policy should as matter of logic precede legislation. In our opinion, the proposal is inconsequential as it lacks the political goodwill. If the recent developments in the region are anything to go by, then an amendment to our Innocent Constitution will not solve the Regional Disintegration.

REPRESENTATION OF THE PEOPLE

In matters political representation, disputes arising from political party nominations which are currently being entertained by the Independent Electoral and Boundaries Commission ("IEBC") and the Political Parties Disputes tribunal ("PPDT"), the confusion ensuing from the concurrent jurisdiction vested on these two bodies will be a thing of the past, thanks to numerous Court decisions and the new proposal to strip the IEBC of its jurisdiction. The

IEBC's jurisdiction is provided for under Article 88 (4) (e) of the Constitution; Section 4(1) of the Independent Electoral & Boundaries Commission Act; and Section 74 of the Elections Act.

While the PPDT is established under Section 39 of the Political Parties Act, its jurisdiction is set out under Section 40 of the Act.

It is noteworthy, the jurisdictional issue has arisen in several cases before both the High Court and the Court of Appeal. The Appellate court in allowing the appeal in part in **Fredrick Odhiambo Oyugi v Orange Democratic Movement & 2 others [2017] eKLR** cited with approval there holding in **Eric Kyalo Mutua vs. Wiper Democratic Movement and another Civil Appeal No. 173 of 2017**, where the court noted that there was "*an urgent need for law reform with a view to providing a clear and orderly framework for resolution of disputes arising from or relating to nominations so as to avoid a conflict or clash of jurisdictions between the IEBC under Article 88(4)(e) of the Constitution and that of the PPDT under Section 40 of the Political Parties Act*" so as "*to avoid parallel streams of adjudication of disputes arising from nominations that might lead to confusion and conflicting approaches and decisions, and for good order*,"[1]

On the premises, the proposed amendment to the Article 88 of the Constitution is positively welcomed. However, the same selective obedience of Court Opinions should reflect even when the Opinions are averse to the Political interests.

With our tongue-in-cheek as we reconsider forgetting and assuming Chief Justice David Maraga's advisory to the president to shut down parliament, the steering committee seems to give in albeit on paper, to the demands of the principles of gender and equality by proposing to amend Article 90 and 91 on party seats allocation in parliament to give effect to Article 81 on equality and the two thirds

[1] [2017] eKLR

gender rule. Notably, Parliament has failed to enact the gender rule that seeks to have more women in Parliament for the last 10 years. In our opinion, we are yet to settle the debate between, 'shall' and 'will', that notwithstanding, gender parity and equality must be reflected right from the grassroot public service. Affirmative action must as a matter of urgency, be incorporated in the gender parity checks within the Public and Private sectors.

THE LEGISLATURE AND THE EXECUTIVE

After what seemed like a no-opposition government tenure, the report proposes to institutionalize the era of the seat of the Leader of the Official Opposition. The proposal seeks to expand the Membership of Parliament to include the Leader of the Official Opposition as a member of the National Assembly. Article 107A is inserted provides that the Leader of the Official Opposition shall be the runners up in the final results and whose Political party has at least 25 percent of all the members in the Assembly.

The Leader of the Official Opposition's main role is to question the Government of the day and hold them accountable to the public. Their proactivity also helps to fix the mistakes of the Ruling Party. The Leader of the Official Opposition is equally responsible in upholding the best interests of the people. They have to ensure that the Government does not take any steps, which might have negative effects on the people.

From a legal perspective, a vibrant and democratic legislature can only be realized where the opposition is empowered to duly keep the sitting government in check. Our rich political history, right from the clamor for multiparty democracy under section 2A of the previous Constitution, informs us that being in the opposition in Kenya is a tall order. One writer describes the movement;

> ***"The agitation for multiparty democracy in the late 1980s and early 1990s was a great accomplishment by political parties in this country. The vision and momentum were initially motivated by national interests rather than sectarian, ethnic or other interests. In this respect, opposition parties remained united for the purpose of entrenching the country's***

democratization process in the constitution, following the repeal of Section 2 A of the constitution."[2]

Contrasting the situation described above with the current and emerging ethnic aligned political parties, it is doubtful, that a vibrant opposition will be borne out of this proposed amendment.

The Executive too is getting revamped, an amended Article 97 of the Constitution will see us return the era of Cabinet ministers getting picked from Parliament, while the Attorney General will soon undertake the functions of a Cabinet Minister, with a permanent seat in Cabinet. This is because, the nature of the office of the AG is neither of a purely executive nor a purely judicial nature, but rather a quasi-judicial or *sui generis.* That notwithstanding, jurisdiction all over the world have adopted similar models of inclusion. The Attorney General's Office has always been part of the executive, the proposal to confer a status of a cabinet minister is not any different from what we have already had, save for the fact that the AG will perform the functions of a cabinet minister. However, the sanctity of the Office of the Attorney General must be realized, respected and upheld.

The Senate was however not so lucky, there is a Proposal to Amend Article 98 of the Constitution on Membership of the Senate, undoubtedly suspicious, the justification provided by the Committee that the same is to ensure compliance with equality and gender rules under Article 27 and 81 respectively does not hold water. If at all there was need to amend provisions relating to the Senate, the role and status of the Senate would have been best defined clearly in this report. Moving on, every county will have to elect male and female senator. In our view, the gender parity and equality question are debatable when it comes to elective posts. Imposing a mandatory post of a female senator, not only does it bloat the membership of the senate, but also is unnecessary. Creation of political posts to fix constitutional questions is akin to painting wall to cover a fault line.

Our founding parliament had a prime minister, so will the next one if a proposal to introduce an executive prime minister sails through. The order of precedence in the National Assembly restructured with the proposed repeal of Article 108 and replacing it with a new provision placing the Prime minister and the Leader of the Opposition second and third respectively after the Speaker of the Assembly in a new

[2] Friedrich Ebert Stiftung "Institutionalizing Political Parties In Kenya', 2010.

order of precedence. The thin line between the Legislature and the executive must never be forgotten, the doctrine of separation of power is a principle of law that maintains that the three arms of government remain separate. The rationale of the separation of powers is often elided with the rationale of checks and balances. The advent of the 2010 Constitution brought with it clearer definitions of the separate roles of the three arms of Government. The point is, slowly by slowly, the Executive is encroaching on the two other arms of the government. Placement of presidential appointees in independent arms of government is not only courting anarchy but also shredding the constitutionalist spirit embedded within the other arms of government, which will definitely return us to the dark days of fear and subjugation.

Parliament will also be granted more time to refine and restructure a Bill passed in either houses before being referred to the president for assent. Currently, Article 113 on Mediation Committee provides for seven days only, under the new proposal, parliament will have up-to fourteen days to refine a bill before it is referred to the President for assent.

A Prime Minister and two deputy prime ministers, a whole new part is inserted immediately after Article 151 of the Constitution. The new Part 2A provides for the appointment, functions and cessation of office of the Office of the Prime Minister and the Deputy Prime Ministers

The proposed Article 151A, 151B, 151C and 151D of the Constitution provides for the appointment, functions and vacancy in the office of the Prime minister and the two deputy prime ministers. The proposed prime minister shall have sweeping powers in the National Assembly. He will be the leader of government business and oversee the legislative process on behalf of the government. By dint of this proposed Article 151A, the post of a Leader of Majority in Parliament is abolished. The president shall nominate the prime minister from the National Assembly within seven days of being sworn in or in the event of vacancy in the office of the prime minister.

Mixed reactions have been rife on the subject of inclusion of a Prime minister. Noteworthy is the fact that the president has the residual power to hire and fire the prime minister, if not, then a simple majority vote of no confidence by the parliamentarian will effectively send him home, if he survives that, then he could also be frustrated to resignation. The deputy prime ministers will be Cabinet

ministers, picked from the lot picked from amongst the parliamentarians, while Principle secretaries will be appointed from amongst persons recommended by the Public Service Commission, this removes the need for vetting of nominees by Parliament. We are not convinced by the justification provided in support of the broadening of the Executive. To achieve inclusivity, cohesiveness, and unity for the benefit of the people of Kenya, it remains unanswered what informed the committee's decision to include a Prime minister's post. The same is not justifiable and not supported by any validation exercise input.

Besides strengthening the Office of the DPP by proposing to confer upon it the status of an Independent Office under Article 248 (3) of the Constitution, the report also proposes to raise the qualification requirements to equal those of a Judge of the Court of Appeal. In our honest opinion, it doesn't really matter who heads the ODPP or what kind of qualifications he holds, what really matters is, cultivating a culture of respect for independent offices and the rule of law. To realize cogent achievements in the prosecution of criminal cases, a seamless interdependent relationship must be established between the Judiciary and the ODPP.

THE JUDICIARY

The report proposes to establish the independent Office of the Judiciary Ombudsman who shall sit at the Judicial Service Commission. The basis for this proposal is that the accountability of the Judiciary to the people of Kenya will be enhanced.

The proposed Judiciary Ombudsman shall be nominated by the President and vetted by the National Assembly. The mandate of ensuring accountability and discipline of officers of the Judiciary is vested on the Judicial Service Commission by virtue of Article 171 of the Constitution and the Judicial Service Act No. 1 of 2011. The proposal mirrors the Judicial Appointments and Conducts Officer of the United Kingdom. Similarly, the said JACO of the UK is mandated to;

"The Ombudsman provides an independent 'second tier' investigation function in the handling of complaints involving judicial discipline or conduct, or the judicial appointments process (the Judicial Conduct and Investigation Office, and the Judicial Appointments Commission respectively, handle the 'first tier'

investigations). The position is a statutory office established by the Constitutional Reform Act 2005."[3]

The only difference is that unlike the JACO, the proposed Ombudsman acts as a second tier Office to the equivalent of the Judicial Service Commission. In our opinion, the inclusion of a Presidential appointee into the JSC, is averse to the independence of the Judiciary, if at all the aim was to enact mechanisms on ensuring discipline and accountability of the Judiciary, the JSC is already empowered to and mandated so. It is a sinister move, with a questionable motive.

DEVOLVED GOVERNMENT

The Bill proposes a raft of minor amendments to Chapter 11, importantly, the report proposes to allow the electorate to recall a member of a County Assembly by inserting Article 177 (5) (a) to the Constitution. In line with insisting on gender parity, the Contestants to the position of a governor shall be required to nominate a person of the opposite gender as a deputy governor nominee. Article 203 (2) of the Constitution provides that the annual revenue allocation to the County shall not be less that fifteen percent of all revenue collected, it is proposed to increase the annual allocation to thirty-five per cent. In our opinion, Article 203 (2) does not restrict the government from allocating a higher per centum, the proposed amendment was not warranted as the same could have been done without resort to amending any of the concerned constitutional provisions.

OTHER NOTEWORTHY AMENDMENTS

The National Youth Commission.

The proposed Commission will have its membership of six persons appointed by the President with the approval of National Assembly, its core functions, to amongst other things, promote the implementation of the rights of the youth under Article 55 of the Constitution. Article 55 contemplates and obliges the State to take affirmative action towards the achievement of the provisions of the outlined provisions. In our conscious opinion, the proposal to establish a Youth Commission is not backed by cogent evidence of need.

Matters concerning National Security.

[3] Accessed on 11/4/2020 at 12.31 PM https://www.gov.uk/government/news/appointment-of-judicial-appointments-and-conduct-ombudsman

The Bill proposes to replace the National Police Service Commission with the Kenya Police Council which shall be responsible for overall policy coordination, control and supervision of the National Police service. The previous National Police Service Commission was vested with the mandate to amongst other, recruit and appoint persons to hold offices in the service. The residuary powers of the NPSC will most likely be vested with the Inspector General of Police.

The Statute based Independent Policing Oversight Authority (IPOA) will be succeeded by a proposed Constitutional Commission, the Independent Policing Oversight Commission. Further the proposed Independent Policing Oversight Commission (IPOC) will be established under a proposed Article 246A and Article 248 (1) (j). Unlike Statute based State Organs, Independent Constitutional Commissions enjoy unfettered independence and autonomy from the State, it is however, arguable whether indeed, Constitutional Commissions enjoy the perceived independence. Nevertheless, the proposed IPOC will hopefully reign in on the increased wave of extra-judicial killings by Police Officers. It will be up-to the new Commission to take the baton from IPOA.

CONCLUSION

A transformational constitutional reform journey ought to adhere to certain guiding principles, broadly, the concept of public participation; inclusiveness (including gender equity) and representation; transparency, and national ownership.

The BBI Steering committee might have succeeded at ensuring compliance with Participatory mechanisms, however, it has failed to show inclusivity of ideas. An inclusive process is not only measured by drawing representatives from all segments of the community but also must be able to accommodate the voices of such persons. When these guiding principles are adhered to, the public approval and ownership of the resulting document is usually very dominant.

It is a commendable attempt; however, we are not yet there. Personal interests cloud the spirit of the report, a national dialogue would be appreciated to address the concerns and voices of the minorities and the underrepresented majority. As it stands, we have a floating/hanging bridge, that needs to be anchored to the shores lest it is carried away by the waves.

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