

The Peace Dialogue

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Article I

The Politics of Reviewing a “New” Constitution in Kenya

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Opposition Leaders arrive for the Saba Saba Rally (Photo: Courtesy of The Nation Media Group, Kenya Ltd)

Constitutionalism in Kenya is laden with tensions and reversals with ethnic polarization and elite fragmentation as its denominators. Upon the post-election violence of 2007-8 that almost lurched the country into civil war,¹ the need for constitutional reforms became imminent since

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the violence was partly blamed on weak state institutions that needed strengthening or overhaul. The process was to be expedited and in two years' time Kenya promulgated a new Constitution on 27 August, 2010 amidst thunderous jubilation. Nearly five years down the line, the players appear the same but the playground is perhaps different with emergence of the debate on the need to amend the Constitution which many regard as new. The dual factor of elite fragmentation and ethnic polarization has come to haunt Kenya once again during the debate on constitutional amendment just as it was the case during the debate on constitution-making.

Amendment of the Constitution is a possibility in law. However as Ringera argues "the Constitution of Kenya, does, "*ex abundanti cautela* (out of an excessive caution) expressly recognize the sovereignty of the people and their constituent power."² Article 1 (1) of the Constitution states that, "all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution." The exercise of such power may be direct or indirect according to Article 1 (2).

A referendum is a direct exercise of the sovereign power of the people. Being a part of constituent power, the power to amend the Constitution after it has been adopted or enacted by the people is also an original power exercisable only by the people directly or by a specially elected and mandated constituent assembly.³ The frequency with which the people can will to exercise their sovereign power directly is not expressly determined by law, however, the

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¹Kegoro, G. (2013, October, 20). By conduct, we have repudiated the constitution. *The Sunday Nation*. Nairobi: Nation Media Group Limited

²Ringera, J. (2008). The landmark case of Njoya & 6 Others v. Attorney General & 3 Others. *Kenya Law Review* 2, 680

³Nwabueze, B. O. (1993). *Ideas and facts in constitution making*. Ibadan: Spectrum Books Limited, p. 7

Constitution as a declaration by the people on the manner in which they wish to be governed needs to give an element of stability to the nation.”⁴

Kenya’s Constitution was enacted in 2010 and it remains one of the most progressive constitutions in Africa today. It is perplexing how the constitutional dialogue in Kenya has swiftly shifted from that of implementation to the one on amendment on its fifth anniversary. Indeed there is in place a Constitutional Implementation Commission (CIC) with a five year mandate to oversight and advice on the implementation of the Constitution. The CIC may seek an extension upon the lapse of five years but most importantly, it is expected to give a comprehensive report on the progress and status of constitutional implementation in Kenya at the end of its tenure. Naturally it would have been expected, and reasonably so, that the CIC report would form the basis upon which the next direction on constitutionalism in Kenya anchors. Nevertheless, the dialogue on constitutional amendments has already been initiated, effectively overtaking the awaited CIC report, as such justifying this essay’s submission on the ongoing debate.

During a political rally dubbed *Saba Saba* (Swahili for Seven Seven, meaning the 7th of July) the Coalition for Democracy and Reforms (CORD) revealed a thirteen point agenda of what they termed major grievances suffered by Kenyans alongside their demands. This followed an earlier call by the political opposition to have a national dialogue with government, a demand that the Jubilee administration refused to honor accusing the opposition of issuing ultimatums and indicating that government was ready to dialogue but not with any ultimatum. Refusal of government to heed the opposition’s call for national dialogue led to the announcement by CORD on its intention to rally the populace to support the constitutional amendment as a remedy to what in their view, are issues of grave concern to Kenyans. On the 13th of August, 2014 CORD launched *Okoa Kenya* whose agenda is, *inter alia*, to spearhead the agenda of the

⁴Maina, J. N. (2014). A critique on the debate for a constitutional amendment in Kenya Available online at: <http://www.ssrn.com/abstract=2516713>

opposition and a section of civil society to amend the Constitution of Kenya through a popular initiative under Article 257.

As envisioned in the Constitution, a referendum is undeniably a fundamental right of the people in the exercise of their constituent power. Ascribed in Article 1 of the Constitution is the sovereignty of the people and Article 38 (3) (b) provides for every citizen, the political right to exercise this power by voting in an election or a referendum. In the event that there is a referendum, Part V of the Election Act pronounces the procedure for conducting a referendum in Kenya. However, the element of constitutional stability has been taken into consideration by setting a very high threshold for constitutional amendment.

Article 255 of the Constitution of Kenya outlines the parameters for the approval of constitutional amendments by a referendum which can be either by Parliament or by popular initiative. While this essay will not dwell on why the opposition settled on the latter, it appears that lack of the numbers in Parliament could be the main reason for their evasion of the former. A recent failure by the political opposition to prevent their counterparts in the ruling coalition from passing the Security Laws Amendments Act whose several clauses the court has since ruled as unconstitutional is a case in point.⁵ While the opposition has blamed its frustration on what they term the 'tyranny of numbers' by the ruling coalition in Parliament, the question on the genuineness of the call for amendment of the Constitution by popular initiative is as valid since they did not even attempt the parliamentary way. In a democracy, it is expected that if the issues the opposition outlines are indeed of grave concern to citizens, then members of Parliament from either side of the floor should be able to come into consensus as representatives of the people.

Coming to the requirements for a referendum, Article 255 (1) of the Constitution has identified ten fundamental aspects that may require a referendum. These include: the Constitution's

⁵Mugambi, L (15 January, 2015). Kenyans and the Constitution under attack. Available online at: <http://www.constitutionnet.org/news/kenyans-and-constitution-under-attack>

supremacy, the territorial integrity of Kenya, the people's sovereignty, values and principles of governance outlined in Article 10 (2) (a) to (d), the Bill of rights, the term of office of the President, the independence of the Judiciary and the commissions and independent offices to which chapter 15 applies, the functions of Parliament, the objects, principles and structure of devolved Government and the provisions of chapter 15.

The matter(s) of amendments should be couched in a Bill (Article 256), but where it is by popular initiative, it may be a suggestion/question or a Bill in light of Articles 257 (2) and 257 (3). In both scenarios, and particularly in respect to the former, it is required that the proposals for amendment are clearly presented to the electorate. The securing of signatures must not be disjointed with the deliberative process to ensure the understanding of the matters for constitutional amendment, and the proposals laid. The Bill should then in line with Article 257 (4) be presented to the Independent Electoral and Boundaries Commission (IEBC) accompanied with, at least, one million valid signatures of registered voters as provided in Article 257 (1).

The opposition is therefore constitutionally bound to follow this procedure. However, various pronouncements by CORD leaders have indicated that the opposition already gathered the requisite signatures even before launching the Bill, hence fundamentally questioning the procedure. The process of securing the signatures should follow the presentation of the proposed Bill for constitutional amendments to the people first, so that the signatures are supportive of the proposals contained in the Bill. On the contrary, after the launch of *Okoa Kenya* in August 2014, the opposition commenced the collection of signatures. It is not immediately clear whether and how CORD presented the Bill to the electorate for the signatures before the Bill's launch which was only unveiled on 23 of April, 2015.⁶

⁶Okoa Kenya Bill launched amid calls for better security, reforms (Thursday, April 23, 2015), available online at: <http://www.nation.co.ke/news/politics/Cord-launches-Okoa-Kenya-drive/-/1064/2694564/-/10b2sf2/-/index.html>

Citing the case of Njoya,⁷ one constitutional expert during Kenya's constitution-making process argued that "the generation of views by the citizens is not a constitution-making act but an expression of their opinion. The process of constitution-making entails the collation of such views, their processing into constitutional proposals, the debate of a document which bears the form and name of a Constitution."⁸ The converse of this, which appears to be the case in Kenya, portends certain dangers since the outcome is likely to be representative of political power or voter prejudice that ultimately lowers the threshold upon which constitutions are made and/or amended.⁹

Many Kenyans, as well as, government agree that there are various issues of concern including the ones that the opposition is raising but it appears that the subject of contention centers on process and procedure as opposed to the issues. For instance, one of the thirteen point agenda of the *Okoa Kenya* initiative is revenue allocation to the county governments. This has been a matter of disputation that has also been addressed by the Supreme Court of Kenya prompting an Advisory Opinion issued on the case of the Senate on Division of Revenue Bill, 2013.¹⁰ It is curious that in this case filed by the Senate, members from either side of the floor were in agreement. It is not surprising then that the Supreme Court's Advisory envisions dialogue through institutions established by the Constitution on the matter of revenue allocation to counties. In the most recent standoff between the Senate and the National Assembly over allocation of funds to counties, the call for dialogue dominated the public opinion. The people of Kenya appear to be inclined towards seeing leaders work on consensus as opposed to competition. While CORD vaguely called for national dialogue, which the President accepted but without ultimatum, the opposition's swift vacation from the call for dialogue to that of the referendum leaves room for speckled conjecture.

⁷Ringera, J. (2008). The landmark case of Njoya & 6 Others v. Attorney General & 3 Others.

⁸Nwabueze, B. O. (1993). Ideas and facts in constitution making. Ibadan: Spectrum Books Limited, p. 8

⁹Abrams, P. (n.d). The majority will: A case study of misinformation, manipulation, and the Oregon Initiative Process, Vol. 87 Oregon Law Review, 1025

¹⁰Advisory Opinion Ref. No. 2 of 2013.

Through the popular initiative, citizens can completely bypass the Legislature and, by a simple majority vote, enshrine policy preferences into the state's fundamental charter.¹¹ This is the course sought by the opposition through *Okoa Kenya*. However, as argued here-before misinformation and failure to adhere to the correct procedure can leave voters confused about the consequences of their vote, posing the risk of a 'bad law', a situation that ultimately could lead to abuse of constitutionalism in the country.

Amendment of the Constitution through popular initiative is a matter that needs political abstemiousness. It is important therefore, that the genuineness of the *Okoa Kenya* be put into scrutiny since truly it remains a matter of national strategic interest that must not be reduced into narrow political ends. Furthermore, it is time Kenyans worthily queried on whether at its 5th anniversary, the dialogue on the Constitution should center on its implementation or amendment. This scrutiny would ensure that the correct procedures are adhered to and that the initiative is not reduced into sheer political interests of Kenya's elites, thereby guarding the ideals of constitutionalism in Kenya.

Since the launch of *Okoa Kenya* Bill on 23 April, 2015, CORD has carried out few and low gear rallies to drum up support for the Bill. Prof. Kisingani in one of his TV debates argued that, it appears that CORD wishes to drag this debate right to the door stop of the next general elections. It will be unfortunate if this weighty matter of Constitutional amendment is to be made an election issue. It is not lost in mind how the International Criminal Court (ICC) question was made an election issue in Kenya's 2013 general elections effectively and unfortunately so, turning a national election into a referendum against The Hague based court.¹² Kenya should not allow another scenario whereby an election is tied to yet another issue that diverts the

¹¹Miller, K. P. (2001). Constraining populism: The real challenge of initiative reform. Vol. 41, No. 4, Santa Clara Law Review, 1046

¹²Africa Centre for Open Governance (2015). Africog seeks non-compliance ruling against Kenya at ICC. Available online at: <http://mobile.nation.co.ke/news/Africog-Kenya-International-Criminal-Court/-/1950946/2718922/?format/xhtml1/item/1/-/2at1sp/-/index.html>.

electorate from focusing on the quality of the leaders to that of an extra-election matter. The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a mirror reflecting the national soul, the identification of ideals and aspirations of a nation, the articulation of values bonding its people and disciplining its government. This is the nobility of the Constitution that the people of Kenya ought to keep in mind amidst the political competition championed by Kenya's elite.

Article II

BOKO HARAM AND THE CHALLENGE OF NATION BUILDING

By Rev. Fr. Dr. James Ngahy, M. Afr

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The recent Presidential and National Assembly elections (March 28, 2015) as well as those of Gubernatorial and House of Assembly elections (April 11, 2015) in Nigeria, have proved that the citizens have achieved or reached democratic maturity amidst the Boko Haram palaver and the challenge of the nation building. There is great hope and expectation that what has been retarding and making the country stagnant, or even going backwards due to insecurity in the name of religion will find a permanent solution with the leadership, the newly elected government. This week President Muhammadu Buhari fired all his military service chiefs for failing to curb insecurity in the country.

Religion in its complexity remains to be a living and effective instrument, sharper than a two-edged sword in both fuelling and healing conflicts! It penetrates in all aspects of life dealing with particularities attached to the perceptions of peace and meaning of life in relation to the transcendent being, beyond the material world. In other words, religion is a convergence of the transcendental and historical dimensions, searching for the positive meaning of life.

Boko Haram members who claim to be Muslims (a sect of Islam) or act in the name of Islam in Nigeria, since their outset in 2009 have been a challenge not only to the nation building but also to the religion itself. They have been portraying religion – Islam – from its very negative side, hence, retarding progress and development of the country especially in the areas of the country where they operate. Peace in those States – Borno, Bauchi, Plateau, Kano and Kaduna – have become an expensive value, a mere dream.

Terminologically, Boko Haram are two different nouns which merely describe rather than define a system of beliefs. In fact, they have no theological meaning as such. *Boko* simply means *book* which for them stands for *western education*; while *haram* means *impermissible*. The full Arabic expression would be *ilimin boko*¹³ which literarily means *book education*. Boko Haram members advocate for *Ilimin Islamiyya* that is *Islamic education* based on the Quran. It is for this reason that Boko Haram members have been attacking education institutions to the extent of abducting the over 270 secondary school girls from Chibok over one year ago (April 2014). Their frequent attacks in education institutions do not only retard the education standard in the North and North-east of the country but also paralyse the education system as a whole. People now fear or rather they are scared to go to schools, colleges or offices which deal with education.

However, we realise that the leaders of Boko Haram such as Mallam Mohammed Yusuf and his deputy leader, Alhaji Mamman Foi were educated; hence, quite articulate and organised in their dealings and leadership.

The sophisticated weapons¹⁴, transportation and communication system which they use contradict their claim that western education in the name of modernisation is *haram* (impermissible).

¹³ *Ilimin boko* in Swahili would be literarily translated as *elimu kitabu!*

¹⁴ The general impression is that the group is heavily sponsored from outside the country and enjoys the sympathy and sponsorship even among people in government and security agencies. This much has unfortunately been admitted by government officials in Nigeria. (cf. Bishop Emmanuel Badejo, *Ailment of a Giant*, Vatican Radio, June, 2014).

Looking at the Nigerian contemporary reality, the general frustration of citizens due to the evil effects of corruption, exploitation, marginalisation, laxity and collapse of public morality, lawlessness, criminality, lack of proper health care and social system, insecurity, political 'god-fatherism' and injustices are pervasive. Anyone who stands up against the state whether by way of sermon, an editorial opinion or street protest (like those who have been demonstrating against the government's silence on the abducted girls of Chibok) will not be doing anything new or considered subversive. The Boko Haram members, in their reasoning, attribute all this to those who govern the country because of their western education which has corrupted and polluted them. They are also against some of their Islamic leaders, Christians and government institutions (such as police and the army) whom they think that they are advocating or defending western education; hence, going to the extend burning of some Mosques, Churches, police stations and army barracks as a revenge or resolution to their claim.

In the recent time, Boko Haram members have gone wickedly far to the extend of wiping off some of the villages in the North-eastern part of the country. Movements of people in those areas are very limited if not paralysed because of insecurity. Fear and hopelessness among the people continue to diminish or retard the economic progress of the area. Moreover, the spread of violence in the country and outside the country by Boko Haram has led to a serious suspicion among different communities and among Nigerians as a whole. It is difficult to know who is who and stands for what. Why so? It is simply because the Boko Haram members are like 'ghosts', invisible; they do not identify themselves in public. In fact, in most cases they are only identified when they strike especially through suicide bombings. It is for this reason that security is now being tightened in Mosques, Churches, education institutions, public car parks and in other public places.

It is obvious that no society develops or grows strongly in a situation of violence, extreme radicalism and fundamentalism. The development and spatiality of any society depends largely on the ability of its citizens to live together in harmony and peace regardless of their religious or tribal background. Thus, Nigerian newly elected government has a serious homework to do before Boko

Haram dismantles the unity of the country at the detriment of its citizens and their development. Good enough, President Muhammadu Buhari has stated clearly "... his resolve to rescue the 276 Chibok school girls kidnapped by Haram, the Islamist group. In a statement to mark one year of the Chibok girls' kidnap, Buhari also insisted that he would ensure that the Islamists are defeated."¹⁵

It is important to note that inter-religious dialogue in a pluralistic society like Nigeria is an imperative aspect for progress, unity and nation's building. This will help to reduce not only religious conflict but it will also enhance peaceful co-existence of religion and the society. Indeed, inter-religious dialogue will clarify the ambiguity that has shrouded the correct understanding of the true meaning of secular state in the Nigerian context since Boko Haram members are pushing that Nigeria should become an Islamic State under Sharia Law. From a pragmatic point of view, the Nigeria Interreligious Council and the Christian Association of Nigeria should be encouraged to come together more often and explore positive and lasting solution to the problem at hand.

Boko Haram takes advantage of the North and North-eastern parts of the country because the region remains unable and unwilling to rescue its children from darkness posed by illiteracy and ignorance. As a long-term project, the government has to holistically invest more in the area of education in order to empower people and the region as a whole. *Ilimin Islamiyya* alone will simply generate ignorance which can easily be manipulated into more Boko Haramism. This shows that the very aspect that they go against – western education, is the very solution to their claim.

Moreover, Buhari's government has also a duty of exploring and finding out the best solution of unemployment of the many young people who may easily be manipulated or attracted to joining Boko Haram as an alternative solution to their problem. The new government should also find ways and means of economic development of the North and North-eastern parts of the country where Boko Haram members are terrorising innocent citizens.

¹⁵ Madu Onuorah, "Buhari Pledges to Rescue Chibok Girls" in *The Guardian: Conscience: Nurtured by Truth* (Tuesday, April 14, 2015) 1.

All in all, the Boko Haram palaver remains a serious challenge to the nation building. The President's decision to streamline security by appointing new security chiefs gives a glimpse of hope, but the final success lies in the collaborative regional efforts to combat radicalization and terrorism that is gradually destabilizing countries in West Africa.

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