2013

PROPOSED AMENDMENTS TO THE CONSTITUTION SINCE 2010 BY WILLIS EVANS OTIENO

1. Background

The people of Kenya in a referendum adopted a new constitution replacing the independence constitution. The journey to a new constitution was fraught with several challenges and contentions that at times threatened the adoption of the constitution. Issues that undermined the constitution making process were mainly those deemed contentious by opinion shapers and stakeholders in the review process. During the Constitution of Kenya Review Commission (popularly known as the Bomas Draft) the main contentious issues were on system of government, devolution and the land chapter provisions of the Constitution. Political contestation on the issues of concern led to a partial withdrawal by the executive and a section Parliament from the Bomas Conference at its final stages. The walk away group ended up developing what was referred to as the Kilifi Draft Constitution that was subjected to a referendum in 2005 and resoundly rejected.

The 2007 general elections were held against the backdrop of the failed Constitution making process of 2005. The poisoned environment of the 2005 referendum led to hotly contested general elections and a political crisis arising from the general elections. Part of the negotiated settlement to the political crisis was that the then constitution be reviewed to address the governance and legal challenges that contributed to the post election crisis. This was part of the agreed Agenda 4 items to address long term issues of governance in the country.

The review of the Constitution was undertaken under the general direction of the Committee of Experts who developed a draft harmonized constitution. This was further discussed and reviewed by the Parliamentary Select Committee on the Constitution which was meant to harmonize any contentious issues emerging in the constitution making process.

When the proposed Constitution was tabled before Parliament for deliberation, a total of over 120 proposed amendments were suggested by Members. None of the proposed amendments was adopted by the House.

Ever since the adoption of the constitution, there have been calls and suggestions for its amendment from sections of the Society. It is worthy of note that of all proposed amendments none has been formally discussed in the Parliament or presented to the people in a referendum.

2. Avenues for amending the Constitution

The Constitution in Chapter 16 sets out avenues through which it can be amended. These include;

2.1. Amendments that require a referendum

The constitution provides that there are certain provisions of it whose amendments require a referendum for such amendments to be effective[1]. This is borne of a realization that these provisions are so key to the general design and architecture of the Constitution that an amendment affect its overall design and architecture. Such amendments must involve the people in a referendum.

2.2. Amendment by Parliamentary Initiative

The Constitution gives Parliament the power to amend it through a laid down procedure[2]. The process requires the input and vote of both Houses of Parliament before it can be adopted. The proposed amendment must be supported by at least two

[1] Article 255

[2] Article 256

thirds of all the members of the respective House of Parliament[3]. Of interest to note is that an amendment Bill to the Constitution must be published for at least ninety (90) days after the first reading of the Bill.

2.3. Amendment by Popular Initiative

The Constitution further provide for its amendment through popular initiative supported by at least one million registered voters in the Country[4]. A popular initiative may be in the form of a general suggestion or a draft Bill. Promoters of a popular initiative must deliver the proposed Bill and supporting one million signatures to the Independent Electoral and Boundaries Commission which shall verify that those supporting the initiative are duly registered voters[5]. The draft Bill shall then be submitted to all the county assemblies for consideration. If it is supported by at least a majority of the county assemblies, the draft Bill will be tabled before Parliament[6]. Parliament will vote on the draft Bill and if it passes by at least a majority vote then it will be forwarded to the President for assent. It should however be noted that if the Bill relates to any of the matters referred to Article 255 (1), it shall be submitted to the people in a referendum.[7]

3. The journey to implementation; hurdles and proposed Amendments to the Constitution

As already demonstrated, the adoption of the Constitution was not unanimous. There were those who felt that certain of its provisions needed amendments. It was a popular

[3] Article 256 (1)(d)

[4] Article 257 (1)

[5] Article 257 (4)

[6] Article 257 (7)

[7] Article 257 (10)

refrain, that the proposed Constitution was 90 % good and only 10 % bad (there was never any scientific basis for this claim).

3.1. The Gender/ Elections Date Proposed Amendment

The first proposal to amend the Constitution was to address the gender question and determine the general elections date. The Constitution provides that the electoral system shall comply with the principle that not more than two thirds of members of elective public bodies shall be of the same gender[8]. It further require the State to take legislative and other measures to effect the principle that not more than two thirds of members of elective and public bodies shall be of the same gender[9].

Based on previous electoral experiences of women candidates and women representation in elective public bodies which had been dismal, the women caucus feared that the gender principles of the Constitution would not be respected in the 2013 general elections. They agitated for an amendment to the Constitution to provide mechanisms for realization of women representation in a manner that respect the gender principle in the Constitution. It was as a result of the women clamour that the first proposal to amend the Constitution was made. The proposal sought to amend Articles 97 and 98 of the Constitution by introducing a new provision to read;

"The number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly/Senate is of the same gender"

Consequential amendments were proposed to Article 90 of the Constitution to realign it with the proposed amendments.

[8] Article 81 (b)

[9] Article 27 (8)

Opinion was divided on how to treat the 47 women county representative seats in the proposed amendment. One group argued for the removal of the seats while another argued for their retention.

Suffice to say the women caucus succeeded in creating sufficient interest in the amendment to an extent the main political players at the time voiced their support to the proposal.[10]

Riding on the back of the gender issues was the proposed amendment to the election date. The Constitution provides that elections shall be held in the second Tuesday of August of every fifth year[11]. The transitional provisions had provided for the then Parliament to serve for its unexpired term[12]. This term was to end on the 14th January 2013. It was impossible to hold elections in August of 2012 in light of the transitional provisions. The then Justice Minister, Hon. Mutula with the support of the cabinet suggested an amendment to the Article 101 of the Constitution to provide for elections to be held on the third Monday of December of every fifth year.

Consequential amendments were proposed to Articles 136, 177 and 180 to realign them with the now proposed elections date.

The Bill was published on the 21st September 2011 but was never formally debated by the National Assembly. Intervening circumstances succeeded in undermining its formal deliberations. These came in the form of two court decisions on the matter. The Court of Appeal in a majority decision in the Case of Center for Rights and Awareness & Others vs. Attorney General & Others[13], held that the IEBC could hold elections within

[10] http://allafrica.com/view/group/main/main/id/00019417.html

[11] Article 101

[12] Section 10 of the Sixth Schedule to the Constitution

[13] Civil Appeal No. 74 of 2012

60 days from the date of dissolution of Parliament and that such an act would be legal for the first elections after promulgation of the Constitution.

The Supreme Court in a majority decision to an advisory opinion sought by the Attorney General on the applicability of the two thirds gender principle held that the realization of the Articles 27 (8) and 81 (b) requirements on two thirds representation was progressive[14]. In their assessment, the Court held that the realization should be achieved by the year 2015. It is worth to note that the court failed to prescribe the consequences of failure to achieve the requirement by the year 2015. Further it did not set out the formula of achieving it by that year.

The effect of the above court decisions was to steal the thunder from the then raging debate on amending the Constitution. Public discussions and debate on the matter dissipated with the court decisions. The amendments were hence lost.

3.2. Proposal to reduce the number of Members of Parliament

In May, Hon. Agostinho Neto proposed an amendment of Articles 82(b) 88(k) 89(1), 97(c), 98(b), 98(c), 98(d) and 101. The amendments were aimed at reducing the number of MPs, reviewing constituency boundaries in terms of population distribution and creating a legal system to help attain the gender principle. He proposed to remove the provision for nominated MPs and to have parliamentary and presidential elections held on different days.[15]

A similar proposal has been made by the Deputy Minority Leader Hon. Jakoyo Midiwo to reduce the number of MPs to curb the spiraling wage bill that is detrimental to the country's development agenda[16].

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[14] Advisory Opinion Application 2 of 2012

[15] http://www.nation.co.ke/news/politics/-/1064/1853244/-/jx3yl8/-/index.html

[16] http://www.nation.co.ke/news/politics/MPs-to-push-for-leaner-House/-/1064/2073712/-/b6txbyz/-/index.html

He proposed a reduction of the number of constituencies to at least 150 before the 2013 elections in order to avoid a high wage bill, further sating that Kenya does not need 416 legislators (47 senators, 16 nominated women, 2 youth, 2 persons with disabilities, 290 elected and 12 nominated Members of Parliament, and 47 women representatives) which is a large number for Kenya considering its small population[17].

3.3. Proposed Amendment on cluster of State Officers (Amendment to Article 260 of the Constitution)

Some members of the National Assembly have sought to amend Article 260 of the Constitution by removing MPs, Members of County assemblies, judges and magistrates[18] from the list of state officers. This move is motivated by the desire to remove Members of Parliament from the clutches of the Salaries and Remuneration Commission and to remove them from the application of Chapter six on leadership and integrity. The move was prompted by the attempt by the Salaries and Remuneration Commission to reduce financial emoluments of Members of Parliament. The Members supporting the initiative felt that by removing themselves from the list of State Officers, the SRC would not have jurisdiction over them. This would allow Parliament to determine its own salaries and emoluments.

3.4. Proposed amendment to increase county revenue

[17] http://www.nation.co.ke/news/politics/Midiwo-wants-constituencies-reduced-to-150/-/1064/1508626/-/gfoaqfz/-/index.html

[18] http://m.standardmedia.co.ke/story.php?articleID=2000089653&story_title=Bill-to-remove-MPs-from-State-officers-list-ready

The council of Governors proposed an amendment to Article 203(2) of the Constitution[19] to raise the minimum amount of revenue allocated to counties from 15% to 40%[20]. This raise, they said, would enable them to effectively deliver services to the electorate, and to fund 70% of the devolved functions[21], stating that the current amount was not enough to deliver services to the electorate. The governors also demand control over all devolved funds to women and youth to enhance job creation and development[22]

Those opposed[23] to this move point out that the minimum of 15% does not preclude higher allocations[24]. Article 202 (2) of The Constitution states that County governments may be given additional allocations from the government's share of the revenue either conditionally or unconditionally. Further, Article 203 provides guidelines for the sharing of revenue, including the need to ensure that county governments are able to perform the functions given to them, fiscal capacity and the other needs of the county, economic disparities within counties and the need to amend them. Proposals to increase funds to the counties should be based on a logical timeframe and should be after county governments demonstrate the capacity to absorb and utilize the funds.

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[19] Article 203(2) for every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than 15% of all revenue allocated by the national government

[20] http://www.nation.co.ke/News/politics/Governors-plot-to-amend-law-on-county-cash-/-/1064/1893852/-/v5uiomz/-/index.html

[21] http://www.standardmedia.co.ke/?articleID=2000088782&story_title=governors-in-plans-to-alter-law

[22] http://www.apsea.or.ke/reforms/index.php/component/content/article/29-constitutional-review/374-governors-push-for-constitution-referendum

[23] http://hardtalkkenya.wordpress.com/2013/09/21/the-push-for-constitutional-amendments-by-governor-of-bomet-county-isaac-rutto-is-most-absurd-and-too-simplistic-he-advocates-amendments-that-would-increase-revenue-allocation-for-counties-from-15/

[24] http://www.standardmedia.co.ke/m/story.php?articleID=2000090053&story_title=Why%20I%20oppose%20hasty%20plans%20to%20amend%20the%20Constitution

3.5. Proposed amendment to strengthen the Senate

Senators proposed an amendment of Chapter 8 and 12 of the Constitution that defines their roles as senators especially in relation to their ability to make law concerning revenue allocation county governments.[25]

Further, Senators and Governors want Bills that touch on counties not to be handled by the National Assembly. They have sought an amendment of Article 110 which provides for Bills concerning county Governments and Article 111(2) which provides that the National Assembly may amend or veto a special Bill that has been passed by the Senate only by a resolution supported by at least two thirds of the members of the Assembly.

They have also sought to amend Article 112(1)(a) which provides that if a Bill passed by one House concerning counties is rejected by the second House, it shall be referred to a mediation committee.

These proposals were made as a result of the president's failure to take into account Senators' input into the Division of Revenue Bill 2013[26].

3.6. Proposed amendment to change the system of government advanced by the Cord Coalition and the March 4 Movement

The proposed amendment has been brought to the attention of Parliament by Hon. Jakoyo Midiwo. It seeks to amend the Constitution to embrace a parliamentary system of government stating that the current presidential system denies MPs an opportunity to question executive as done in Parliamentary systems.[27]

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[25] http://www.standardmedia.co.ke/m/story.php?articleID=2000090053&story_title=Why%20I%20oppose%20hasty%20plans%20to%20amend%20the%20Constitution

[26] http://www.businessdailyafrica.com/Senators--governors-plot-to-keep-MPs-off-county-affairs-/-/539546/1880892/-/9n2q15/-/index.html

[27] http://www.kenyan-post.com/2013/07/midiwo-wants-to-change-constitution-to.html

Earlier this year, CORD embarked on a campaign seeking 1 million signatures from Kenyans to change Article 138(4) of the Constitution which states that 'a candidate shall be elected as president if the candidate receives; a) more than half of all the votes cast in an election and b) at least twenty five percent of the votes cast in each of more than half of the counties.

This amendment seeks to ensure that the next president is elected by an Electoral College rather than popular vote[28]. In Electoral College, in order to be declared winner, one must receive at least more than half of the 431 college votes cast by MPS, senator's women representatives and governors elected in a general election. Under the parliamentary system therefore, votes cast at county level for governor, senator and Mp will decide the president's votes. In their opinion, this system will reduce tribalism, electoral fraud and end marginalization[29]

3.7. Proposed constitutional amendment on the Equalization fund

Proposed by Hon. Lati Lelelit, the Bill seeks to amend Article 204 which deals with the Equalization fund. It seeks to remove the use of or application of the Equalization fund for the intended services from the purview of the National Government by deleting Article 204(2) of the Constitution and to include a sub clause stating that the National government would remit the amounts Equalization fund appropriate under Article 204(3)(a) to the county governments for use for the purposes for which the appropriate was made, shifting the power to spend the funds from the National government to the counties[30]

[28] http://www.thepeople.co.ke/15518/uhuru-raila-lock-horns-over-referendum-calls-2/

[29] http://eaclj.org/constitution/20-constitution-feature-articles/148-kenya-s-first-possible-constitutional-amendment.html

[30] http://northkenya.com/2013/07/samburu-west-mp-seeks-constitutional-amendment-on-the-equalization-fund/#sthash.kO214JyA.dpbs

3.8. Proposed amendment to abolish the Senate

Hon. Jeremiah Kioni proposed to remove the senate stating that the senate is an unnecessary expense that will burden the tax payer who was already burdened with the National Assembly, considering that the Senate's role was a duplication of the roles to be played by either the National government or the county government [31] questions raised 'with a central government to oversee things, county governments to harness and manage local resources and a representative parliament in place, why do we need an appendage that is the senate'[32] A similar proposal has been pursued by the Hon. Irungu Khangata in the present Parliament[33].

4.0. Claw Back legislations by Parliament (Rear door amendments)

Realizing the difficulty and almost impracticalities of amending the Constitution through the legal process, Parliament has adopted a dangerous trend of enacting what may be termed claw back legislations that negate the spirit and principles of the Constitution. This has emerged as the single most threat to the implementation of the Constitution. The Constitution in the Fifth Schedule sets out a myriad of laws the legislature is to enact to give it full effect. However, in exercise of that power, the legislature has enacted laws which contravene the spirit and principles of the Constitution.

4.1. Provisions on recall of Members of Parliament

Amongst the laws passed that claw back on the principles of the Constitution include provisions on recall of Members of Parliament.

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[31] http://www.mzalendo.com/blog/2011/12/14/scrap-the-senate/

[32] http://www.standardmedia.co.ke/?articleID=2000048248&story_title=kioni-is-right-senate-is-superfluous&pageNo=2

[33] http://www.nation.co.ke/news/politics/Some-senators-to-blame-for-weakening-the-Upper-House-/-/1064/1884224/-/view/printVersion/-/15brcys/-/index.html

The constitution grants the electorate the right to recall non performing members of Parliament. [34] The introduction of this provision is informed by the realization that some members of parliament once elected fail to meet the aspirations of their constituents. The previous legal process of removing a sitting member of parliament was limited to a petition challenging the member's election to the Assembly.[35] In granting this right, the constitution left it to Parliament to enact legislation to provide the grounds on which a member may be recalled and the procedure to be followed.[36]

Parliament, in execution of that mandate enacted sections 45 to 48 of the Elections Act. The Act sets out the grounds upon which a Member of Parliament may be recalled by the electorate in a constituency (for an elected Member of the National Assembly) or the County (for an elected member of the Senate) to be where the member: is found, after due process of the law, to have violated the provisions of the Constitution relating to leadership and integrity; is found, after due process of the law, to have mismanaged public resources; is convicted of an offence under the Elections Act.

Procedurally, and in terms of timing, a recall of an elected Member of Parliament can only be initiated following a judgment or finding of the High Court confirming the grounds specified above[37]. Such recall can only be initiated after the lapse of at least twenty four months following the election of the Member of Parliament and at least twelve months before the next general election[38]. Whereas the logical underpinnings of these timelines are understandable, it creates an impression that Members of the

[34] Article 104 (1)

[35] This point was reinforced by the Court of Appeal ruling in the case of Kipkalya Kones vs. Republic & Another ex parte Kimani Wanyoike and 4 others, Civil Appeal No. 94 of 2005, where the court held that the only legal way through which a seat of a Member of Parliament could be challenged and declared vacant was through an election petition.

[36] Article 104 (2)

[37] Section 45(3) Elections Act

[38] Section 45 (4)

National Assembly and Senate who are aware of the unlikelihood of their election at the subsequent election can engage in the wrongs that form the subject of recall without the fear of such eventuality during the last twelve months to the next election.

In terms of frequency, a petition for recall can only be filed against a Member of Parliament once during the term of that Member of Parliament.

A rather disenfranchising provision is that a contestant who was unsuccessful in any election under the Elections Act is not eligible directly or indirectly to initiate a Petition under this Act[39].

A recall election is determinable by a simple majority of the voters voting in the recall election. If the recall election results in the removal of a member of parliament, the Commission must conduct a by-election in the affected constituency. A recalled member is at liberty to run in the by-election.

In enacting these provisions, the legislature made the realization of this right of electors legally impossible to achieve.

4.1. Affront to the Freedoms of Association and Information

The Constitution grants the freedoms of association and information as part of the comprehensive Bill of Rights. The Executive has made proposals to restrict the enjoyment of these freedoms by media players and nongovernmental organizations. The Attorney General published the Statute Law Miscellaneous Amendment Bill 2013

[39] It is hard to conceptualize how the law will catch up with election losers who initiate recall petitions through proxy since the proxy may not disclose that he is doing so on behalf of another person. It is also difficult to rationalize the prohibition against election losers initiating recall petitions since the merits or otherwise of the basis of the recall petition is a matter for determination by a court of competent jurisdiction with sufficient judicial checks which far outweighs the risk of losers lodging such proceedings out of vengeance or ill will. Once a court of competent jurisdiction has determined the basis for a recall by its order, it does not appear rational to prohibit a parliamentary loser from giving effect to that order through the exercise of the power of recall.

which seeks to restrict foreign funding of nongovernmental organizations to not more than 15% of their total revenue unless the Cabinet Secretary approves. This provision offends the freedom of association as spelt out in the Constitution.

The Kenya Information and Communications (Amendment) Bill[40] passed by Parliament introduced punitive restrictions to media players in the country. The Bill seeks to give the Executive regulatory powers over the media profession and it imposes what may be termed as punitive penalties for any party who contravene the Act. Media players have argued that the Act if implemented in its present form will adversely affect media practice in the country[41]. It infringes on the media rights and the right to information as enshrined in the Constitution.

4. Are these proposed amendments in order?

Civil society organizations and constitutional experts are voicing concern over this move[42], stating that it is too early to be making changes to the Constitution and urged both Mps and Governors not to forget the governance problems that led Kenyans to vote for change, and that instead they should seek an advisory opinion on the interpretation of the Law from the Supreme Court. As can be seen by the tenure of the proposed amendments, some of the proposals have been suggested in pursuit of political interests and as a result of contestation between the National Assembly and the Senate. Others have been sought to protect selfish interest of Members of Parliament like the one that has sought to remove MPs from the list of State Officers.

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[40] Published on the 22nd July 2013 by the Government Printer, Kenya

[41] http://kurunziafrika.wordpress.com/2013/11/10/kenya-uproar-as-a-handful-of-mps-pass-draconian-media-law/ on 28th November 2013

[42] http://www.standardmedia.co.ke/m/?articleID=2000089511&story_title=Experts-warn-against-amending-Constitution