

THE STATE OF OUR CONSTITUTION

The Importance of the Constitution

Constitutions are deliberately made hard to change. They reflect, or should reflect, a solemn commitment on the part of the whole nation to a framework for governance, including, in modern constitutions, a commitment to the protection of the rights of everyone—even against the wishes of the majority. Our constitution is not easy to change. Though Parliament can make some changes, these must be with the approval of two-thirds of all the members of both houses, and this vote must take place twice in each house. And, once a proposal is introduced to change the Constitution, Parliament is supposed to proceed no further for three months. In that time they are supposed to publicise the proposal and facilitate public discussion. Changes that go to the root of the constitution and its principles must be approved, in addition, by a referendum. This is without considering the popular initiative approach, which Okoa Kenya embarked on but was unable to complete.

There is talk in the air of amendment to the Constitution. Though in the media there are occasional references to some need to amend it, usually without any specific suggestions as to what is wrong, the main focus at present is on questions that arise from electoral politics. The question is essentially what do we do to avoid a situation in which there is such lack of faith in the electoral process that some sections of the community feel, and it is assumed will always feel, that they will never be able to get into power. Additionally, there is no commitment to the idea of being an effective opposition. The only objective of the political activity is to get into office, and, for most of those who achieve this, to steal what they can while they are there.

One consequence of this scenario is that Kenya constantly occupies itself with fights about elections. No sooner is one over than the jockeying for the next begins because the only purpose of politics is to get into power, not offer or carry out social and economic policies.

Constitutional Innovations

The way that the political class seems to be approaching the dilemmas of the realities is to think in terms of expanding the scope of the executive (those in power) at the national level so that more people have their turn to eat.

For some, this approach is taking the form of demanding a shift from a presidential system to a parliamentary system. It is true that there has been a degree of support for a parliamentary system, beginning with the Constitution of Kenyan Review Commission, through the Bomas and Committee of Experts draft constitutions. But the Parliamentary Select Committee moved the entire system towards a US-style executive presidential system, in a great rush, without understanding the full nature of the system or the implications of it. And some features of the Constitution designed for a parliamentary system with a largely ceremonial president

were left intact although they no longer made the same sense once we had a presidential system. The main critique of a presidential system has been the focus it places on a single dominant figure—the pinnacle of ambition for every politician. The hope was, during the constitutional process, that a parliamentary system, with a prime minister—and a president who would be a genuine symbol of the nation and a force for unity— would be less divisive.

Civil society has been watching the development of this discussion (debate does not seem to be the appropriate word) with considerable concern. Our constitution is seen by the of Kenya people as their constitution. They have a commitment to it even when they do not entirely understand it (which is true of a majority including of politicians). What seems to be in danger of happening is a takeover bid by politicians. The discussion seems to be driven by a concern to ensure shares of the national “cake” not for the people but for the political class. There is a risk that changes will be made without careful enough consideration. It took ten years of official activity to get our constitution; revising it would not need to take so long, but it is not a process that can be rushed, and done without the full participation of the people. Nor must constitutional amendment be done for the benefit of politicians to the exclusion of the people.

The People to Rescue

We the People is mindful of what happened to the 1963 Constitution. It had its faults (every constitution does) but it was never allowed to operate fully because the government of the day did not wish it to do so. All too soon that government emasculated the constitution: removing the checks and balances of the parliamentary system but not replacing them with others, and doing away with the devolution system of the time, and the Senate that was designed to protect it.

It is unwise to pretend that what one does not wish to happen will not—or is not—happening. We propose to set up a working group within the We the People Movement to examine the main issues that are raised, from the perspective of the best interests of the people of Kenya. This will include a though examination of the idea of a parliamentary system (including the many variants of such a system that are possible, with many implications for political stability and effective governance).

We invite the collaboration of all those who have the best interests of the people of Kenya at heart.

We remain convinced, however, that the admittedly considerable problems that face Kenyan democracy are not the “fault” of the Constitution. It is a delusion to think that we will fix things with some tweaks or even major changes to the constitution.

We also consider that there are certain aspects of the Constitution that must be absolutely sacrosanct: these include the Bill of Rights, the values of the Constitution and the strength and independence of our judiciary.