



Who Will Speak for Us Now? Why Amendments to the University Act Are Undemocratic

By Wandia Njoya



In the last several months, students in Kenyan universities have been involved in translating the [amendments of the University Act](#) into their student body constitutions. The amended Act requires student councils to be voted in not by all the students, but by electoral college representatives elected by the students.

The amendments to the University Act, and their protection by the High Court following the [legal appeal](#) by some student leaders, are a serious blow to constitutionality in Kenya. The need for university students to entrench these undemocratic requirements into their constitutions is the opposite of the path that led to the 2010 constitution. Unlike the constitution that was the fruit of struggles for freedom, the Kenyan university students are being forced by law to deny themselves their own constitutional rights.

The anti-democratic roots of electoral colleges

The amendments to the Universities Act in 2016 were made by then Education Cabinet Secretary, Fred Matiang'I, as a way to rein in the multiple and chaotic terms of office in the Students

Organisation of Nairobi University (Sonu) held by Fred Ogili, commonly known Babu Owino. But rather than simply limit the terms of office of student officials, Matiang'i made one draconian addition. He drafted a law that required university student councils to be chosen by electoral colleges, rather than by direct popular vote.

There are at least two disturbing implications of the amended Universities Act. First, the Kenya Parliament passed a law not on principle, but to prevent a single man from running for office. Laws are supposed to be written for the public good, not to target a single individual. This is a bad precedent, with snowballing effects already simmering with the recent proposal to amend the country's constitution based on the failed presidential ambitions of a single candidate.

Rather than deal with the political, managerial and root causes of the crisis in university student politics, the country's legislators chose to pass a law that, as the African proverb says, burns down a whole house to catch a single rat. It is because of the abuse of the students by Babu Owino and other university student leaders that legislators have now written a law that denies students a say in how they are governed.

The second, and more disturbing aspect, of the amendments was the recourse to [electoral colleges](#) - a system that is rooted in racist slavery in the United States, and which has led to the absurdity of American presidents who do not win the popular vote. The [most recent](#) case is that of the current president Donald Trump who won the presidency but received 3 million votes less than Hillary Clinton.

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Rooted in slavery

Electoral colleges were [created](#) by the founding fathers of the United States as a bargain between the northern, more populated states, and the southern slave-holding states. During the constitutional conventions in 1787, the delegates realised that if the president was to be elected by popular vote, meaning including votes from slaves, it would present a political problem for whites, because the slaves would choose their own candidate, which the white men in power could not allow.

In response, then, the suggestion was that voting should be limited to "free people", meaning that only whites would vote. However, the southern states opposed that suggestion because in many of the states, slaves were a huge size of the population, sometimes even more than the whites. That meant that the northern states, which had a larger white population, would always dictate who would win the presidency. So southern states wanted to exploit the numbers of black people for electoral mileage, but without giving them an equal political voice.

In order to resolve the stalemate, the states reached what is known as the "[three-fifths compromise](#)". The compromise would decide representation by counting the slave population as three-fifths of its actual size.

Electoral colleges are, therefore, by design, intended to limit the voice of actual people. Electoral colleges exploit the numbers of people without allowing the same people to have an equal say in how they are governed, which continues in the United States to this day. Indeed, American legal historian

Paul Finkelman was right to say that the electoral college is “the last legacy of slavery in the US constitution that is still affecting our political lives”.

It is clear then that the intention of the Kenya government in requiring electoral colleges was to limit the voices of the students while giving students the illusion of having a say in how universities are governed. This conclusion raises two questions. Should student elections matter anyway? And, why did the High Court decline the appeal by students against the amended law?

Why do student elections matter?

One uncomfortable truth for university administrations, not just national governments, is that students do have an impact on how a country is governed. Many of the anti-colonial freedom fighters, like Frantz Fanon and South Africa’s Steve Biko, fought against racist oppression as university students. In the United States, it was black university students’ struggles that were a major pillar of the civil rights and black power movements, and that led to the introduction of African and African American studies in US universities.

Because university students have such an important national voice, how they conduct their affairs has implications for the nation’s future. In [her article](#) on the Universities Act, Nerima Wako-Ojiwa, one of Kenya’s important youth voices, reminded us that “for whatever happens in our universities, it is only a matter of time before it comes into national politics”. Therefore, if we want democracy and good governance in Kenya, universities must be places where students model what they envision for the rest of society.

Wako-Ojiwa is justified in seeing the curtailing of democracy in student elections as a preparation of the youth for the proposed amendment to Kenya’s constitution to have a parliamentary system, where the head of government is chosen not by the people, but by their representatives. Both the parliamentary system and the electoral colleges allow politicians to negotiate and play around with numbers while not consulting the people, and at the same time give the people the illusion that their opinion matters.

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In other words, the amendments to the University Act are designed to not only disenfranchise students, but also to prepare the youth for the same disenfranchisement in their larger public life. It is, therefore, very sad that the first attempt of this generation at constitution-making is an exercise in putting shackles on themselves. This process is not only anti-constitutional; it is at its very essence anti-human.

But the second disenfranchising element of the electoral colleges is that they make manipulation of student elections even easier, rather than more difficult. Once the electoral college representatives are chosen, the representatives can sell their vote to the highest bidder running for office, or the candidate’s godparent. It will also mean that unscrupulous deals and negotiating will become more rampant as students seeking office or administrations seeking to manipulate the vote have fewer students to appeal to.

The legal challenge

That said, university students did [challenge](#) the anti-constitutional amendments in court. On January 24, 2017, a number of students, led by Were Samuel, argued before the High Court that the amendments were made without adequate public participation, and that the amendments violated the students' right to vote, as enshrined in Article 38.

The government responded with a dubious argument that the amendments were made necessary by the violence and manipulation of student elections by politicians. However, as I've already noted, electoral colleges make the problem worse, because with electoral college representatives, there are fewer students to bribe more or manipulate in choosing the student council. But the bigger problem is the principle of the government's argument, which is that it is necessary to curb electoral malpractice by limiting students' rights even further.

Perhaps the joke of the government's response was in what constituted public participation. A mistake which the government made, and which it repeatedly makes, is to equate public participation with consulting stakeholders. Public participation should be defined as seeking the views and input of the people who will be most affected by a policy or law, in this case, the students. Stakeholder consultation, its neoliberal substitute, is not the equivalent of public participation, because stakeholders are the people whose profits and power are affected by the law or policy, unlike the public which is the people whose lives are directly affected by that law or policy.

Indeed, the government's evidence of public participation reads like a who's who list of people with an interest in suppressing the democratic voice of students, namely employers, government and university administrations. According to government affidavits cited by the High Court, the stakeholders called to a workshop were the Association of Professional Societies of East Africa, the Commission of Higher Education, the Federation of Kenya Employers, the Kenya Private Sector Alliance, the Kenya Universities and Colleges Central Placement Service (KUCCPS), the Higher Education Loans Board (HELB), vice chancellors of public and private universities and principals of university colleges.

Sadly, the High Court accepted that this list of "stakeholders," and an announcement in the *Daily Nation* of 25th February 2016 by the National Assembly, were reasonable effort in involving the public in discussing the amendments. The Court also agreed with the government that the inclusion of the two-thirds gender clause in the rules on student elections was enough proof that the elections were, in fact, more democratic than the previous system of student elections. It is ironic that the gender clause was used as evidence of democracy in universities, while Parliament is yet to implement the same clause.

Although the Court argued that public participation should meet a certain level of reasonableness, it is amazing that the counsel for the students argued that the stakeholder workshop and a single announcement in a newspaper hardly constitute reasonableness. Since the government knew that the primary affected constituency is the students, it should have required, at the very least, that the university administrations announce the discussions of the amendments to their entire student bodies. Sending letters to vice chancellors' offices, with no requirement for dissemination of the information, is a cynical wink at university administrations to keep students in the dark and deny them participation in a law that so directly affected them. The decent thing for the government and university bodies to have done would have been to actually visit some of the universities and have town hall discussions with the students. Instead, they met with fellow stakeholders in a workshop. Probably in a hotel.

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All in all, the amendments to the Universities Act, and the requirement for students to abide by them, is a sad testament of how the older generation continues to undermine our youth’s opportunities to fully exercise their rights as citizens. The height of cynicism is to require students to write and promulgate a constitution which denies themselves their own rights.

The struggle must continue

I hope that in the near future, a more robust case challenging the amendments to the University Act will be presented that will leave the courts no option but to declare the amendments unconstitutional, because accepting this disenfranchisement of our youth will eventually evolve into the wider disenfranchisement of the Kenyan people.

Until then, students will have to employ their creativity to find ways to ensure that their voices remain heard. The current Universities Act negates the struggles that led us to the constitution which the Kenyan people promulgated after decades of struggle, blood, sweat and tears. And worse, it reifies the painful legacy of slavery that still haunts Africa and her descendants in the world’s most powerful country.

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