



The March of Folly: Why the Referendum Will Bury the 2010 Constitution

By Francis Omondi



"To the man who only has a hammer, everything he encounters begins to look like a nail." - Abraham Maslow.

The fervour for constitutional change among a section of the political class and national leadership has gained momentum. A cursory view of Kenya's history indicates a propensity to revert to legal solutions for Kenya's political problems or moral dilemmas. Our history demonstrates that tinkering with the constitution to accommodate the challenges facing the political class has rarely borne any fruit.

Seldom have we delved into successes political solutions afford us. The "handshake" of 9 March 2018 between Raila Odinga and Uhuru Kenyatta, they say, swerved Kenya away from the edge of the precipice of chaos. It took intriguing political turns and twists to cut the deal. Inclusivity! The courageous turns by President Kenyatta and Hon. Odinga, and the twisted, and cryptic yet surprising pact, somersaulted their lost and bewildered supporters into alignment in the new arrangement. So, Kenya is at peace today, after the grueling duel of the 2017 election, through a political solution.

But there are whispers among politicians that Kenyatta and Raila are threading the needle to solidify

the handshake by anchoring it in the constitution and inevitably forcing a referendum on Kenyans. They should have stayed on this path and should never have capitulated. What a window of opportunity, not only to engrave an alternative approach to resolving our political complications, but also to transform and sanitise our politics.

The obtuseness with which this referendum is being mooted raises questions. In the early 1990s, we knew the reasons for holding a referendum. Though a referendum was not held then, public opinion and donor pressure forced President Daniel arap Moi to repeal Section 2A of the constitution (the section that made Kenya a one-party state). This precipitated the multiparty political dispensation that led to the proliferation of political parties and the eventual ouster of Moi's Kanu party in 2002.

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Similarly, the 2010 referendum on the new constitution was clear: Yes for change, No for the status quo. The push was to overhaul the old constitution to reflect our new realities. The changes sought included bringing voices on the margins to the centre and to institute a dramatic shift in how to share power and resources. Genuine inclusivity. For this, we found the formula in a devolved structure of government. The new constitution guaranteed a Bill of Rights that guaranteed freedom of expression, among other fundamental rights. Hence the Constitution of Kenya 2010 was promulgated.

NCK's proposals to amend the constitution

We live in an enchanted country under a spell of the referendum for a change in the law. The National Council of Churches of Kenya (NCK) made a proposal mainly seeking to change the executive, which appears to voice certain politicians' whispers. The NCK is seizing the moment to inject into the constitution some issues they could not include during the last referendum.

During the NCK Executive Committee meeting on 27th February 2019, participants reached the conclusion to propose a [wide range of changes](#) to the 2010 Constitution. They suggested amending Article 130 of the 2010 Constitution by inserting the words "Prime Minister" and "two Deputy Prime Ministers" immediately after the words "Deputy President".

They also recommended inserting a new clause (3) to read: "130 (3) The President, Deputy President, Prime Ministers, and Deputy Prime Ministers, shall all be from different ethnic groups." They recommended giving both the Prime Minister and Deputy Prime Ministers executive authority.

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NCK also recommended amending Article 131 (1) (b) by inserting the words "Prime Minister and Deputy Prime Ministers" immediately after the words "Deputy President". They reasoned that introducing the Prime Minister and Deputy Prime Ministers as members of the National Executive will enshrine greater inclusivity in the government's structure. The Prime Minister, Deputy Prime

Ministers, and Cabinet Secretaries are to be accountable to both the President and Parliament through the amendment of Article 153 by: a. Inserting in Clause (2) the words “Prime Minister, Deputy Prime Ministers” immediately before the words “Cabinet Secretaries” and b. Inserting in Clause (2) the words “and Parliament” immediately after the word “President”.

Reforming the executive structure is evidently the thrust of the NCKK’s recommendations. I have since found out that the NCKK conducted several seminars at the grassroots to garner support for the referendum. But in many places, the membership refused to drink this “Cool Aid”. They rejected these recommendations.

Ambassador Francis Muthaura, the former Head of Public Service, while making a submission during a Building Bridges Initiative (BBI) event on 10 July 2019, suggested bold changes to the 2010 Constitution. Amb. Muthaura rooted for a power-sharing government of the two protagonists, with Cabinet positions shared equally once in power, an arrangement reminiscent of President Mwai Kibaki’s and the then opposition leader Raila Odinga’s Grand Coalition Government of 2008. He proposed that both the winner and the runner-up candidates in the presidential election share in a coalition government as the President and the Prime Minister, respectively.

“Once the results of the presidential elections are announced by the electoral commission, the candidates having the highest number of votes and the second-highest number of votes will form a government of national coalition,” he said.

He further suggested that in Parliament, the president’s party should provide the leader of government business, while the prime minister’s party should provide the deputy leader of government business, which will make the government more consultative rather than the confrontational.

Enter Punguza Mzigo

The Third Way Alliance of Dr. Ekuro Aukot caught many by surprise when it got the Independent Electoral and Boundary Commission (IEBC)’s nod for a referendum. With over 1 million signatures, they had the people’s mandate for their reform bill, dubbed “*Punguza Mzigo*” Bill 2019.

At the core of the bill is relieving the public financial burden by trimming the government’s runaway expenditure. The proposed amendments aim to deal a fatal blow to corruption and theft of public funds, to redistribute national resources to the ward levels – which is a shift from the constituency level, as we know it today – and to rearrange presidential terms to only one, but for seven years. True to its name, the Punguza Mzigo bill plans on drastic austerity measures in both the government and in the legislature, which its proponents argue will spur economic growth, and percolate prosperity to ordinary Kenyans. David Ndi, a leading economist in Kenya, [submits that](#) it won’t boost economic growth as many argue.

It is disingenuous of Dr. Aukot, one of the Committee of Experts who birthed the 2010 Constitution, to now propose to overhaul it without a clear audit of what Kenyans gained or lost after its promulgation. For instance, reducing the number of legislators undermines the key gains of the 2010 Constitution on the principle of representation. The rationale for the present arrangement outweighs the populist reasons of cost-saving of taxpayers’ funds. This is sheer populism that won’t remedy the appalling state of the masses. Why change the law, when these changes are achievable through fiscal discipline and robust economic policies?

I am sceptical about whether changing laws to expand the government for inclusivity, either as advocated by the NCKK or Amb. Muthaura, reaches the depth of the issue. These proposals risk

engraving tribal politics in our laws, which breed exclusion. What the NCK suggests will distribute executive positions based on one's tribe, while Muthaura's winner and runner-up sharing positions may tie the positions to the same political groupings.

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Given how party politics in Kenya are tribally bent, these proposals may lead to an eternal exclusion of some communities. If we allow the changes as suggested, we would give birth to a bastard democratic order, with a government without the checks and balances that a credible opposition can offer. Doubtlessly, the changes will re-concentrate political power around a certain group in power and this will eventually bury the 2010 Constitution.

We may assume that the malaise is because of the defects in our institutions. Yet the problem lies elsewhere. A sound constitution would need a corresponding sound "structure". For instance, the Constitution of the Soviet Union also granted a Bills of Rights, but that did not prevent the centralisation of power in one person or in one party. And as soon as that happened, the constitution was dead. The party or the chief became supreme. Even banana republics have sound constitutions protecting rights and promoting inclusivity, but most of them end up being mere words on paper.

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Inclusivity cannot be achieved through a referendum

Addressing the US Senate Judiciary Committee, the late Justice Antonin Scalia refuted that American "exceptionalism" was embedded in the US constitution, as many assumed. On the contrary, he argued, it was in the structure of its government, the independence of its judiciary and the bicameral legislature.

In this system, Scalia explained, "legislation passes one house [and] it doesn't pass the other house; sometimes the other house is in the control of a different party; it passes both, and then this President, who has veto power, vetoes it. And they look at this and they say, 'Ah, it is gridlock'." This disagreement, he observed, is the key that provides the check and balances, and this is what makes American constitutionalism exceptional.

The "inclusivity" that supposedly came about as a result of the "handshake" between Raila Odinga and Uhuru Kenyatta or which is being proposed by the NCK and Muthaura pays little attention to this kind of accountability. Rather, it blurs this vital element of democratic government. (To their credit, the drafters of the Punguza Mzigo Bill 2019 recognised the need to improve the checks-and-balances role of the legislature. They propose reforming the legislature to increase the power of the Senate as the Upper House and so improve the role of Parliament as a government watchdog and people's representative.)

It is a cruel irony that we are now using a referendum to achieve inclusivity. A referendum, by its nature, is divisive. Every referendum we have held left us divided: In 2005, it was "Banana" or

“Orange” groups. In 2010, it split us between the “Yes” and “No” camps. We have observed a referendum sorely dividing the United Kingdom, between “Brexiters” and “Remainers”.

A referendum implicitly denounces those who are on the opposite side as enemies, and this extremism can lead to violence. A referendum does not allow us to walk the sensible middle of the road, or achieve compromise needed over complex social challenges, because it simplifies complex issues into sound bites. Referendums hinder a thorough and factual debate over issues. Our leaders claim to want referendums for the purpose of gauging public opinion, while in reality, what they really want is to make the public to parrot their untested ideas.

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Referendums generally tend to inhibit us from carrying out an independent evaluation of issues. They are likely to deny us opportunities to listen to experts who would give a general assessment of national interest and enable us to balance multiple perspectives. Further, a referendum will obstruct compromise, especially because it will produce a result in which a majority, by any margin of votes, feels entitled to speak for the whole nation and to stifle the voice of the minority.

Fixing our politics

So, investing more in politics than the law remains our most viable option. During the BBC’s 2019 Reith Lectures, [*In Praise of Politics*](#), (the retired Justice of the UK’s Supreme Court, Lord Jonathan Sumption, criticised the law’s expanding of the empire into our lives. He observed the law’s corroding influence on democracy, and argued that politics, not the law, holds the solutions for the crises in society. He warned, “Every human problem or moral dilemma can’t call for legal solutions.”

Justice Sumption makes the case for strengthening the political process through representation, which is the role of Parliament, for it is difficult for all citizens to vote over and decide over a matter. The masses often have insufficient data and information to reach an informed decision.

Besides, as Sir David Hume, a prominent figure of the 18th century’s Scottish Enlightenment observed, there is an incurable narrowness of soul that makes people prefer the immediate to the remote and to safeguard parochial rather than national interests. Sumption, therefore, supports taking this process away from the electors who have no reason to consider but a desire for the immediate and narrow opinion of their own. He insists that political decision-making should stay in the hands of politicians because they can accommodate the widest array of opinions and act in the national interest.

It’s a tragedy that our lawmakers are strangers to this principle of representation. At best, they only listen to the concerns of the constituents but do not promote among their constituents a broader view of public interest.

James Madison, in *The Federalist Papers*, made the strongest justification for representative politics, which he argued, is to “refine and enlarge the public views, bypassing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.”

Regrettably, our legislature operates as a creation of the executive, and/or their political party heads. Nothing goes without them saying so. Sir Edmund Burke, an Anglo-Irish politician, political

theorist, and philosopher who served as a member of parliament reminds us, "Parliament was not a congress of ambassadors but its members were there to represent the national interest than the opinions of the constituents."

We will remain torn apart by the submitted adjustments unless these motions undergo a process of refinement and enlargement through the broad workings of the legislative process. Here, such ideas are transformed from private persuasions at public hearings or at a local level, to the deliberative proceedings in Parliament. And from the contests and accommodation of interests in legislative committees to the representatives' open declarations to their constituents.

The representation principle was intended to prevent such narrow interests and unjust views from determining public decisions. Thus the job of the representative is not to follow daily polls or sudden breezes in popular opinion, which Madison thought were too often the result of prejudice and partial interests. Rather, the representative should promote a consensus grounded in justice and the common good.

The Kenyan ordinary political process is murky and treacherous, devoid of true representatives. Can we fix this? We must demand deliberation within the legislature of the proposals by NCKK, Muthaura, *Punguza Mzigo Bill 2019* and any others that will be put forward, and seek a two-way process of communication between the representatives and their constituents. Within this milieu of public communication and deliberation, perhaps a kind of civic education will take place. Maybe this then will contribute to forming and settling public opinion based on what is right, and therefore, will justify "the respect due from the government to the sentiments of the people."

I opine that this madness to tinker with the code may become our "march of folly". Mrs. Barbara W. Tuchman, in *The March of Folly: From Troy to Vietnam*, gives a stark warning on decisions leaders make without referring to the facts and which end up harming ordinary people. In some of her conclusions, she asserts that folly is sometimes caused by people's "wooden-headedness" or ignoring their earlier history. Just folly.

This is not a situation where leaders make an error in judgment due to ignorance; it is a situation where decisions are made out of foolishness. Mrs. Tuchman sets out three conditions for such decision-making. First, the leaders and those responsible were warned about the potential for a disaster. Second, there were workable alternatives to the course they took. Third, it was groups, not individuals, who perpetrated the foolishness.

Mrs. Tuchman supported her assertions with four major acts of folly in human history. These are: 1) the Trojans' decision to move the Greek horse within the walls of their city; 2) the refusal of six Renaissance popes to arrest the growing corruption in their church and their failure to recognise the increasing restiveness that would lead to the Protestant secession; 3) the British misrule under King George III that eventually cost England her American colonies; and 4) America's mishandling of the conflict in Vietnam.

We must halt urgently this referendum march. For there is nothing new about our present crisis and the suggested constitutional reforms are usually irrelevant to the problem that provoked them. The peril Kenya faces lies not in our laws or institutions, but in the decline of our character as a community. Without a powerful sense of community, even the best laws and institutions will remain a dead letter. The facade will stand, but there will be nothing behind it. The rhetoric will be loud, but it will be meaningless.

And the fault will be ours.

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