



A Short History of Constitutions and What Politicians Do to Them

By Yash Pal Ghai



THE ELEPHANT

1963 and Jomo

Kenya has gone through multiple systems of governance, starting with the British and their occupation of our country. There is little point in discussing the British period, though in some important ways it seems that our rulers have been inspired by the ethos of the colonial British. Britain did try, at the demise of its rule, to establish in Kenya, a Westminster parliamentary system but at the same time incorporating special provisions for the protection of minorities. Despite the resistance of the leaders of dominant tribes, particularly Jomo Kenyatta, they had to accept the rights of minorities (mostly indigenous), even though the proceedings took an enormously long time.

The major difference in the negotiations for the 1963 Constitution was over whether Kenya should be a unitary state or divided into regions (*majimbo*). It became clear to those opposing *majimbo* that this was the price for independence. The deep divisions among Kenyans (divisions created to a considerable extent by colonial policy) might have led to Kenya's disintegration, but for pressure from Britain. Jomo realised that it was worth conceding to the British terms: so long as he became prime minister (with Britain out of the way), when he could dispense with *majimbo*. This he did within a year, with other major changes, making the state highly centralised—and under his control,

not as prime minister but as executive president. Jomo, it has to be said with sadness, set an extraordinarily bad example for a head of state, with no respect for democracy or integrity. We still suffer from these ailments, which his son has promised to remove—with BBI?

1978 - 2002 and Moi

Daniel arap Moi, successor to Jomo (accepted only on the understanding that the Kikuyu politicians would be dominant), set no better example, adopting largely his master's style of administration and lack of integrity. Jomo and Moi had no respect for the Rule of Law, a central virtue of the constitution giving us independence. Politics ceased to be about policies but instruments of violence (of even honest and nationalist Kikuyus). The popular Tom Mboya, a minister regarded by many as the rightful successor to Jomo was killed. It was widely believed by government agents.

2002-5 Kibaki and the Bomas Draft Constitution

The end of the Cold War and considerable agitation from the younger generation of Kenyans and pressure from West (formerly supporters of corrupt and cruel politicians rulers, here as elsewhere) led to the preparation of a new democratic and fair constitution. There were considerable discussions among the public on the values of the new constitution in which some kind of consensus emerged. But there was little discussion at first among politicians, but in due course, the then opposition parties came around to the idea of moving towards a new constitution. Moi's party remained scrupulously out of any discussion.

Eventually, a committee of scholars and activists was appointed to undertake the process of wide consultations and to draw a draft of the constitution for consideration of a constituent assembly, consisting of a wide cross-section of Kenyans, in regional and professional terms. After nearly four years of consultations and negotiations, a draft constitution was agreed—and adopted, by the constituent assembly ("Bomas" after its venue, the Bomas of Kenya cultural centre). Its values included: national unity, rule of law, democracy, participation, a wide range of human rights (with special provisions for the marginalised), good governance, integrity, transparency, and accountable development.

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Needless to say that it received wide acclamation but not from that eminent Kenyan, Mwai Kibaki. Kibaki provided a very good example of the self-centred Kenyan politician. A senior minister once (in Kenyatta's time), he had fallen out with President Moi by the time the process for adopting a new democratic constitution.

Initially, Kibaki probably thought that his chance of getting back into power was through the parliamentary system. He and his party (assisted by Kiraitu Murungi) were among the first to make submissions to the Constitution of Kenya Review Commission (CKRC). He urged it to adopt the parliamentary system—even though he had been the beneficiary of presidential system politics under Jomo and Moi. He made a spirited denunciation of what he called "the imperial presidency". He appeared to stick to this position during much of the Bomas Constitutional Conference process.

Meanwhile the members of Bomas were debating the CKRC proposals - made after intensive consultations with Kenyans of all kinds, throughout the country. The membership of Bomas (officially 629) comprised all the parliamentarians (222), representation of all the districts (chosen by the District Boards), and civil society and professionals (with fair representation of women and people

with disability). A broad consensus was emerging in favour of a parliamentary system: with a President having a largely formal role except for minimal powers to counterbalance possible abuses by the government, and a Prime Minister, with the support of Parliament, as head of government.

Kibaki and his team, however, changed tone at this stage and started arguing for the executive presidential system. Having defeated Moi's chosen successor (Uhuru) in 2002 he had begun to realise the "virtues" of the presidential system that gave him as President so much power.

Kibaki and his team started more or less to boycott Bomas. And rumours suggested that Kibaki and his team were engineering a challenge to the entire Bomas draft - and as Chair a leading lawyer warned me, confidentially, that this was taking the form of a court case, which would go against the Bomas process. I increased the pace of the Bomas discussions, even at the cost of foregoing refinement of the provisions of the draft constitution on devolution.

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The remaining Bomas members worked extremely hard, burning the midnight oil, with good discussion, to conclude the agenda and in the presence of a large audience (in addition to the Constitutional Conference members themselves), the draft constitution was adopted in accordance with the prescribed rules, by an overwhelming majority.

The court case and its consequences

Sure enough, a few days later, the High Court decided that there was a fundamental flaw with the whole Bomas process. There were major problems with the litigation. It was started three and a half years after the start of the process, when the draft constitution was nearly done.

The identity of the presiding judge caused a good deal of comment. At the time he was in the running for one of two prominent positions: as head of a new post of a new anti-corruption body, carrying the highest salary in the land, or promotion within the judiciary. After the case he was offered, and accepted, the former, a position essentially in the gift of Kiraitu Murungi who held a senior ministerial post. That judge's lengthy judgment designed to demonstrate the faults in the procedure of Bomas, was full of references to cases and arguments that had not been raised by the plaintiff.

Bomas was killed thus. This enabled the government to take over the whole process, amend the document to take away the parliamentary system - returning to a largely presidential system. But the government's butchered version of the constitution was rejected by the people in a referendum - as much motivated by disappointment with the regime as by the detail of the constitution. Nevertheless, no-one in the government mourned this referendum result: it left them with the old, discredited constitution, complete with its imperial presidency.

Returning to the old authoritarian system led to discrimination, ethnicity driven deceits and conflicts. Elections under the old system predictably gave rise to disputes. The 2007 elections were the most critical, with Kibaki and Odinga as the front runners—Odinga the supporter of Bomas constitution and Kibaki favouring the old model. The campaign was organised purely on ethnic lines (Kikuyu versus Luo). The campaigns of Odinga and, especially, Kibaki were conducted largely in their own tribal areas, each carefully avoiding the other's territory. It is generally accepted that Odinga ran an impressive campaign, supporting the values implicit in the Bomas draft, not

narrowing his support to his own tribe, travelling widely.

As the historian Charles Hornsby put it: Odinga personified a popular movement for radical change, while Kibaki was positioned as leader of a reactionary, tribalist, old guard that had mismanaged Kenya in the past. Odinga fought hard for integrity, while Kibaki was suspected of corruption.

Outwardly, it seemed that Odinga was winning by a huge majority, with wide national support, while Kibaki's support was restricted to Kikuyu, Embu and Meru areas. Odinga's team had won widely throughout the country. The mode of the counting of votes seemed increasingly dubious as the results were announced—or not announced till the last minutes. Gradually Odinga's huge initial lead over Kibaki started to give way to Kibaki's lead. In the elections for Parliament, the victory of Odinga's party, the ODM was overwhelming (presumably the counting was at this level). It was widely believed that Odinga had been cheated of his victory; there was ample evidence to this effect, acknowledged by the head of the electoral body itself. But the false result prevailed.

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Kenyans were so shocked by the extent of this deceit and it led to the greatest outburst of anger—and, shortly after, violence. As the historian Hornsby noted, “Kenya cracked apart in the worst outbreak of ethnic violence in the country's history”—ironically in the interests of the candidate who had destroyed the Bomas draft which sought to eliminate ethnic conflict in our country. There was vast destruction of property—and worst, enormous number of killings. Kibaki had succeeded not only in killing Bomas constitution; but in nearly destroying the state of Kenya. Kenyan “leaders” were completely unable to bring the country under control. As a scholar said, “Kenya had seen the increasing use of violence as a political tool and the emergence of mono-ethnic youth militia”.

The country got into a situation in which its leaders could do nothing to bring it to peaceful resolution. African states and the international community had to intervene. An African team led by the former Secretary-General of the UN, Kofi Annan, was convened to bring the country to some order. We had no choice but to be guided by them. Kofi Annan himself advised strongly for the revival of the Bomas Constitution—which the local “leaders” had to accept. For the interim, Annan and his team were able, with great support from Western states, to overcome the resistance of Kibaki to form a coalition government in which Odinga would be the Prime Minister, and Kibaki remaining as the President—and Uhuru Kenyatta as Deputy Prime Minister! The Cabinet was formed by the agreement of Kibaki and Odinga! Meanwhile, discussions proceeded on a permanent constitution, mindful of Kofi Annan's advice to enact the Bomas draft.

Finalising Bomas

The Bomas draft formed the basis for the work of the Committee of Experts, which was formed to carry forward the constitution project. And the parliamentary system of government – because of its inclusive and ultimately more democratic nature – became again the central proposal, so far as the system of government was concerned. But at the final stage the politicians took over control—and unexpectedly and arbitrarily decided on a presidential rather than a parliamentary system of government. Calculations about who- meaning which individuals - would benefit from which system of government again figured prominently in the reasoning that led to these results. The parliamentary committee had the power to make recommendations, not make decisions. But the

Committee of Experts felt, unwisely, that it had to accept what the politicians “recommended” on the questions that touched on political power.

But why rehash this old history? Because history, again, seems to be repeating itself. A system of government established in a constitution is in danger of being radically changed for the benefit of politicians.

2018-20 The Building Bridges Initiative (BBI)

The government (or rather Uhuru and Raila) having created a so-called “Task Force” feel they or we are about to solve our problems.

At first it looked as though their mandate from Uhuru-Raila was broader than who held political power. What seemed to be needed was the fulfilment of the Constitution (which Uhuru and Raila professed to revere). And the Building Bridges Initiative (BBI) Task Force’s report is long and discusses much that touches on other issues. About nine of their proposals need changes to the Constitution; nearly 30 would require changes to ordinary law. Many others are just “let’s do what the law already requires”. The real concerns of our political leaders seem to be revealed by the decision announced at one stage to appoint a group of constitutional experts to assist the Task Force to “fine-tune” the BBI report (though this idea seems to have faded away). The discussion about a “referendum” also lays bare the real concerns. Under our law and Constitution the only situation that requires, or even contemplates, a referendum is constitutional reform. And the constitutional reform that is being focussed on is – and you have noticed it – is on the system of government. In other words, on who gets to hold political power – that political power that it is the sovereign right of the people of Kenya to allocate.

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A reasonably competent team, in the form of the Task Force, listed a large list of constitutional and other violations—but every Kenyan knows these violations and that are mostly perpetrated by the state (including politicians).

Instead of taking any action, the government has extended the life of the Task Force (in the New Year), to educate Kenyans on the problems facing Kenya and how they could be solved.

The outcome of all this is continued feuding among political groups of little significant interest to most Kenyans. The major issue concerns leaders of major tribes as to political, legal arrangements after the end of the present terms of office. And the current solution for our problems is to ensure a prominent, prestigious, post for the major 5 or 6 tribes or more accurately for their leaders (against the terms of the Constitution). What has been canvassed with vigour is the retention of the President, as at present, outside Parliament, one Prime Minister with two deputy prime ministers with, perhaps responsibilities of their own. Raila, having been vocal in support of a full parliamentary system with the Prime Minister as head of government, more recently seems to have shifted to favour the BBI’s Tanzanian model of a weak Prime Minister as a side-kick to the President.

2020 The real problems facing Kenya

In brief, we all know that there are repeated and gross violations of the Constitution. The strength of the current Constitution is clear from Art. 10, especially 10(b) which prescribes national values and principle of governance. Some key provisions are national unity, democracy (including participation

of the people, human dignity, equity, social justice, human rights - which include abolition of poverty and protection of the marginalised).

There is massive violation by political parties and the IEBC of electoral laws as well as of provisions on the nature of political parties under the Constitution. Article 91 sets out the rules governing political parties (such as having a national character, promote and uphold national unity; abide by democratic principles). A party cannot be founded on a religious, linguistic, racial, ethnic, gender or regional basis; engage in bribery or other forms of corruption, or use public resources to promote its interests or its candidates in elections.

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There are massive violations of the Constitution by state agencies, from the office of the President to the lowest public officer. This is now widely acknowledged by President Uhuru and many other state officials.

But, yet again, our politicians have reduced our problems to “their” problems - those who call themselves politicians. The concerns are with who gets into power, not with how that power is used for the people of Kenya, in accordance with the Constitution in which Kenyans have placed so much faith, and into which they put so much effort. Our politics go no further than conflicts between politicians.

Handshake and BBI: Demise of the 2010 Constitution?

My view of Handshake and BBI is very different from what the President and Honourable Odinga claim it is—as creating peace and harmony among us all, moving away from ethnicity; catering to the needs of Kenyans. Perhaps I have become too cynical about politicians to believe that they are ever driven by the desire to help Kenyans—rather than only themselves. But I did work with them for four years, and met party leaders at least once a fortnight to report on and discuss the progress or otherwise of the constitution-making process. I could give you some examples of their selfishness (like claiming expenses for Bomas meetings when they did not attend the sessions—I did recover that in due course, under threat of going public!) and changing their strong position on a constitution proposal without any qualm or embarrassment if they see some advantage in doing so. The crude and embarrassing way they are changing their partners now over the BBI is an example.

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Knowing Raila as I have done, I was not surprised at the initiation of BBI. At that time BBI seemed to be a project to ensure the full implementation of the 2010 Constitution. He had identified 9 objectives and values of the Constitution, directly at the welfare of the people, that the Government had not implemented. That was it. This did not surprise me because I knew of his commitment to the welfare of the people. Over the years he has fought for their rights—and had suffered a long period in jail during the regime of Moi, because he fought for a fair administration, which respected the rights of Kenyans. He had been active in politics all his life for this cause. So my expectation was that, together with Uhuru, with his access to state resources and power, the Government would

immediately deal with those gaps, particularly the provisions on human rights, and scrupulously and diligently address those issues (an impression I got from the only meeting that I had with their technical team) that the nine areas of the violation of the Constitution would be covered—and we would all be happy thereafter. But this did not happen—clear and simple as this might be, and as the Government is bound by the Constitution to implement them. Instead he and Uhuru set forth on a complex, expensive, and (as it turned out) tortuous path to achieve a long and complex strategy—but strategy for what?

The fault for the misery of millions of Kenyans is surely with Uhuru and his government. It is extraordinary that the powerful President (in office over six years) with control over a huge bureaucracy and resources should say that they need to consult people on their needs. Surely we know, and the President knows, the hardships that the people suffer constantly—in defiance of the Constitution. What they would like the state do for them was conveyed to CKRC and is reflected in the Constitution, as the President knows well.

I am totally puzzled by his and Raila's strategy—if this is the objective. I could understand the appointment of a technical team—and several members are indeed well qualified for the job. I assumed that they were to liaise with the relevant ministries, responsible to make good the Nine Deficiencies in the implementation of the Constitution. However, it became clear soon that this was not the intention—the team were advisers to Uhuru and Raila (I should have known from their composition!). Meanwhile I saw little remedial policies from the relevant ministries. Instead shortly later, Uhuru and Raila embarked on a tour of the country, explaining to the people (and to other politicians) the purpose and nature of BBI (by which title the whole project became known). Their entourage was itself of no mean size. It was not clear to me what really was being conveyed to the audiences.

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Instead, what worried me most was the enormous expense that this exercise was incurring. It was not clear under what authority the huge sums of money were being expended. In any case funds were running out—until our benefactor, that sharp minded President of the USA, Trump, apparently voted us huge sums of money (gift or loan?). In the end, rumour has it, this became the major source of funds for this exercise—to keep up these tours, with huge audiences but less and less of any meaning.

Meanwhile their advisory team went around the country—with a clear mission. As I understand, they sought the views of ordinary Kenyans as to the hardships they face in everyday life and how their lives could be improved—for which purpose they could have examined people's submissions to the CKRC as how their lives could be improved as well as the Constitution (particularly the Bill of Rights).

Before long, the focus of the grand BBI project shifted away from the needs of the people to the concerns of politicians—led by Uhuru and Raila and their entourage. At this stage the sharp conflict between two wings of politicians—Uhuru versus Ruto, became fully clear. It seems that Ruto has not given much attention to constitutional reform/change, more to political conflicts. So his clashes with Uhuru lacked reference to what had become constitutional matters of debate. The debate between the two is truly abysmal. Perhaps even Uhuru has lost track of the many amendments to the Constitution proposed by other politicians. The BBI has moved to a new level—of critical

amendments to the Constitution—a long way from the politicians’ original apparent concern with fulfilling the Constitution to plans for fundamental changes in its structures. Whether the broad objectives of BBI have been replaced by other considerations or merely a complex system to achieve the same objectives, remains to be seen. We turn to that now.

Proposing Change to the Constitution

If BBI started with strengthening the Constitution, it ended by trying to weaken it. As mentioned earlier, the objective of their amendments was to move away from ethnic pre-occupation/ domination of politics and state structures (consistently with the Constitution). Whether their intentions changed is unclear—but you will see.

It seeks to change the Executive and Parliamentary system. The office of the Presidency and the Deputy would remain. There would be posts of Prime Minister and two Deputy Prime Ministers, chosen by the largest party in Parliament. If that party is that of the President, as is likely, it will greatly increase the authority of the President, compared to the current situation (in which the President is already regarded too powerful). A point to note is that the number of key posts for politicians will more likely be 5: from the 5 largest tribes? It is also interesting that the key actors in the BBI are from these 5 tribes!

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How the system will work is hard to foresee. Certainly not like the parliamentary prime minister—originally so dear to Odinga. In the event that the President and the Prime Minister come from different parties, because the dominant party in Parliament is not that of the President, there could be serious conflicts between two major political parties in the legislature—and more broadly.

There seems to be an assumption that, in order to prevent the rigging of elections, every leader of a major ethnic group should have an important office. This is a strange way to move away from ethnicity to nationhood - and hardly consistent with the sub-title of the BBI Report: “From a nation of blood ties to a nation of ideals”.

Another unsatisfactory proposal is that members of the IEBC should be appointed by political parties. This means giving up on the idea of an independent electoral commission, it assumes a fixed pattern of parties, but Kenyan parties change frequently. It is would almost certainly be unworkable, unstable, and prone to irregularities.

How democratically arrived at these proposals are is evident that the Speaker of Parliament prevented any debate on these proposals—no doubt not to give MPs of Ruto’s school an opportunity to voice their views.

There are various other proposals. One is to reduce the health responsibilities of counties, by establishing a National Health Service Commission to employ medical staff. True there have been counties in which health care has been deplorable. Others have provided a model for the national governments universal health care plans.

Appointing Ministers (a return to the old terminology rather than Cabinet Secretaries taken from the US system when we took their model of government) from Parliament responds to the ambitions of

MPs who hate being confined to the role of legislator.

A very revealing proposal is that the person who comes second in the presidential poll should get an automatic seat in Parliament and be Leader of the Opposition. This responds to politicians' frustration at failing to become president and then not even being an MP. There are various practical problems. First, the balance of parties in the National Assembly would be affected by the introduction of a member of a party who was not elected (a minor point unless numbers of MPs was very close for the two top parties/groups). But suppose the runner up in the presidential election is actually from the largest party in the National Assembly? It's not impossible. What happens? The presidential runner up is both PM and leader of the opposition? Surely not. People from the same party are PM and Leader of the Opposition? Ludicrous.

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Part of the problem is that the BBI recommended two solutions from similar problems - the sense of exclusion of the narrowly defeated.

I do not think that all the proposals have no merit. I think that a distinct status for Nairobi City as the capital of the country is not a bad proposal. It was actually recommended in the CKRC and Bomas drafts - but without details, these being left to an Act of Parliament.

But this and all the other ideas need very careful consideration, not the half-baked discussion in this report.

Need for a process

Whenever a constitution is to be considered for amendment there is need for a very thorough process. We would need much more detailed public participation, published proposals, giving Kenyans ample time to examine and discuss them. We would need national discussions, observing the best practices of public participation. In other words, something much more like the CKRC process, not this amateurish effort of a process and mishmash of proposals.

The whole process so far shows the tendency of politicians to mess around with the Constitution to their own benefit.

Raila Odinga has suffered for democracy in this country. He achieved a wider degree of public support, less pegged to ethnicity, than any other Kenyan politician in a democratic context. He has genuinely believed in ideologies and policies.

But is this where he would want to end his distinguished career in a shoddy and clumsy process, designed for the benefit of himself and a few others and for the exclusion of others?

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