



BBI: Uhuru Should Heed the Lessons of History

By Nicholas Githuku and Robert Maxon



The rapprochement of March 2018 between Uhuru Kenyatta and Raila Odinga, now famously referred to as “the handshake”, which kick-started the BBI consultation process and culminated in the [Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report](#), is emblematic of the rough-and-tumble that is the country’s tumultuous political history.

The report of the taskforce provided long-awaited principles and recommendations for the construction of “a new Kenyan nation,” including several changes in the current constitution. But a portion of Kenyatta’s *Mashujaa* Day speech on 20 October 2020 suggests a need for caution. It was rather ahistorical, and unfortunately, oblivious of numerous imposed top-down attempts at constitution-making and other general attempts to foist government declarations or policy documents on ordinary people.

Hoping to, perhaps, prepare the ground for elite-led changes to the 2010 constitution, the president’s speechwriters sought to arrive at this end by using a portion of the speech to remind citizens that constitutions are not static but often change. This process, the writers asserted, should be a product of “constant negotiation and renegotiation of nationhood”, and *building a constitutional consensus*. The italicized end of the president’s paraphrased speech is instructive, and erroneous in

the light of the country's constitutional history.

Moreover, referring to the Steering Committee's report, the speech sought to prepare the ground for constitutional and other changes by calling for the building of "a sense of national ethos" that will emphasize belonging and inclusion. This, as the committee rightly observed, must include "documenting our history honestly". But not so the president as per his speech, notably.

Most historians and citizens would agree that a key element in such an honest history must be factual accuracy regarding past events and interpretations solely based upon such facts. It is this latter point that the speechwriters disregarded in putting forth an account of constitution-making. While correctly emphasizing the need for a constantly moving exercise requiring, again, note, *a consensus* among political leaders and *wananchi*, the examples from which they drew during the colonial era demonstrate no such thing. Neither the Lyttleton Constitution of 1954 nor the Lennox-Boyd Constitution (announced in 1957 and implemented in 1958) were the product of *a consensus*.

First, both constitutions were imposed by the secretaries of state for the colonies after whom they are named, and the terms were dictated by the then governor Sir Evelyn Baring and his advisors—does this ring a bell yet? Elitist. Moreover, the Kenyan population, and particularly Africans, had no input whatsoever in the Lyttleton Constitution, which was imposed even though all six of the Africans appointed to the Legislative Council (LegCo) refused to accept the Lyttleton plan. That plan was not about inclusion at all, but its main purpose was to create a multiracial council of ministers in which, in the early stages of planning, no African would hold a portfolio. Lyttleton eventually agreed for one ministry to be headed by an African, but it ought to be recalled that the constitution provided for three European settler ministers to join the two settlers already holding the important portfolios of finance and agriculture.

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The key group for Lyttleton and the governor in Kenya's racial politics of the time was thus the European settler politicians. The acceptance of the plan by most of them constituted Lyttleton's success and left the African population, among whom none could vote for representatives to the Legislative Council, totally excluded. While there was little inclusion, African LegCo members did gain a promise from Lyttleton that the colonial government would take steps to provide for African representation. The promise, imposed without the agreement of settler representatives, led to the first African elections of March 1957. The eight African Elected Members (AEM) immediately launched a campaign for change that would produce a more inclusive constitutional order (European voters elected 14 LegCo members and Asian voters 6).

Amazingly, Kenyatta's speechwriters cast this as *consensual* by the statement that if the Lyttleton Constitution "was wrong, it was made right" by the Lennox-Boyd Constitution. This interpretation has no basis in fact as all the European settler members of LegCo opposed the AEM campaign, which included a refusal to accept the two ministerial positions reserved for Africans in 1957. Significantly, most Asian political leaders came to support the AEM demands. Just as in 1954, then Secretary of State Alan Lennox-Boyd, in response to the AEM campaign, flew to Nairobi in late 1957 to implement constitutional changes suggested by Baring. He was prepared to increase the number of AEM in the LegCo and determined to make them accept ministerial portfolios and introduce what came to be known as specially elected members to the LegCo. AEM rejected these proposals, including the six additional LegCo seats for Africans and the creation of a council of state.

Convinced he knew best, and that the only views that mattered were those of the European settler population, an infuriated Lennox-Boyd went ahead anyway, giving up his attempt to build *consensus* and ignoring the opinions of most of the Kenyan population. The result was continued political exclusion, and a period of on-going political tension and racial hostility. The AEM boycott of the Lennox-Boyd innovations (except the six additional LegCo positions) by April 1959 forced the British government to accept that the Lennox-Boyd plan had become unworkable. The solidarity of the AEMs won the battle.

But it was a glaring distortion of history to single out Oginga Odinga, Daniel Toroitich arap Moi, and Masinde Muliro as heroes in the president's speech while at the same time seeming to say that as AEMs they consented to the changes desired by Lennox-Boyd and Baring. Nothing could be further from historical fact as the archival records of the discussions leading to the Lennox-Boyd Constitution clearly illustrate. Asian political opinion supported the need for constitutional change, but several of the European elected members of LegCo did not favour discussing constitutional changes. The years 1959 and 1960 brought an end to consensus among the settler political elite.

The first Lancaster House constitutional conference (LH1) thus brought together Kenyan LegCo members who viewed constitutional change very differently with few apparent grounds for agreement. While the settlers were divided, the 14 AEM delegates were united in a firm stand in favour of a rapid democratic transition for Kenya leading to self-government and independence within a short period of time. European delegates were, by contrast deeply divided, with the right-wing United Party favouring continued colonial rule and the New Kenya Party (NKP) delegates favouring a gradual transition to independence, and a multiracial executive and parliament with reserved seats for Europeans and fewer for Asians. The new Secretary of State Iain Macleod, like his predecessors, was unable to find or facilitate *consensual* agreement on a new constitution. Contrary to the claims of the speechwriters, therefore, there was no common ground negotiated among the delegates.

Macleod moved beyond this stalemate by putting a set of proposals before the by-now weary delegates that they were required to accept in full or reject. This was a quite different approach than in 1954 and 1957. Macleod then cleverly manoeuvred the African, Asian, and NKP delegates into acceptance of his terms that went some way toward meeting the demands of African delegates, but not others, for instance, universal suffrage, the appointment of a chief minister, and the release of Jomo Kenyatta. In a real sense, for that reason, the LH1 constitution was an imposed one, and indeed many living in Kenya at the time rejected it.

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Nonetheless, the AEM accepted it as ending European settler political predominance in Kenya and the new plan as a step on the way to independence. Over subsequent months, however, the *consensus* that had united the AEM disappeared as bitter divisions developed regarding the type of constitution Kenya should adopt as an independent nation. The competing visions of the two political parties, KANU (a unitary republic) and KADU (*majimbo* or a federal republic), were difficult to reconcile. This formed the background for the second Lancaster House conference in 1962. The absence of agreement on the basic constitutional structure was clear from the first meeting, and again, a British colonial secretary was forced to impose a settlement that did not take the form of a constitution but of a framework on which a coalition government in Kenya would work out the final document. This took a year and required the British government to draft the self-government

constitution and decide key provisions because the KANU and KADU ministers could, well, not agree.

This brief narrative serves to make it clear that there was no *consensus* here anymore than with the three previous constitutional talks. It is thus, rather puzzling, if not amusing in an odd way that, in a desire to promote negotiated and *consensual* constitutional innovation under the auspices of the BBI in the year 2020, and by the president no less, these should be the examples put before the Kenyan public in justification. Rather, an accurate account and analysis of earlier or past constitutional innovations demonstrate very clearly the need for wide consultations among the populace (unlike the episodes described above where only a narrowly defined political elite participated) and a broad-based *consensus*. In other words, the same message can be got across to the public by relating the correct facts. As the speechwriters noted: “The more we ponder our history in its truest form, the more liberated we become.” It is always best to heed the lessons of history, not to ignore it altogether, and repeat the same grievous mistakes.

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