



# People Power in the 2010 Constitution: A Reality or an Illusion?

By Willy Mutunga



*“Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34 [of the Constitution]. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would be both subverted.” - Communications Commission of Kenya & 5 Others v Royal Media Services Limited & Others [2015] eKLR, para 381.*

## **The role of constitutions and law in social transformation**

The role of law in social transformation has a long genealogy when posed as a question about whether law and the courts can advance, stagnate or impede transformation and revolution. This question, once the source of serious and continuous jurisprudential debates, has acquired a consensus that law, indeed, has a role to play in societal transformation and revolution. This multi-disciplinary consensus is shared by lawyers, economists, policymakers, politicians, international organisations, and think tanks.

The debate on the new phenomenon of transformative constitutionalism has been both enriched and transformed by this consensus. The very idea of a transformative constitution (such as those of India, Colombia, South Africa, Ecuador, Venezuela, Bolivia, and Kenya) is the idea that the constitutional superstructure is embedded in a theory that it will be an instrument for the transformation of society rather than a historical, economic and socio-political pact to preserve the *status quo* as the earlier constitutions did. Constitutions and law have a **class** content. The superstructure does not merely conform to the economic base **passively**.

Issues of base and superstructure need creative and undogmatic re-analyses given the changing contexts and circumstance of the world. It should be argued that the dialectical relationship between the base and superstructure will need creativity, innovation, lack of dogma in the varying economic, political, social, ideological, cultural, and intellectual contexts without losing sight of the original revolutionary messages and expected revolutionary outcomes. This approach takes into account the limitations of transformative constitutions and constitutionalism as a basis for understanding revolutionary constitutions of the past, such as the Bolshevik, Chinese, Cuban, and Vietnamese ones. Meanwhile, transformative constitutions are about mitigating the status quo that societies find unsustainable and unacceptable.

While still on the issue of relations between base and superstructure, the constitution and law are part of the superstructure as is politics. The base determines the long movement of history. Most African states were governed by laws that did not recognise Africans as citizens. In my view, these vital aspects of the superstructure are significant forces in the short to immediate term. I would add, however, that they play either a progressive or a retrogressive role depending on the way they are used to fight the base (in our day and age, imperialism) or reinforce it. Whether these aspects play a progressive role, whether they have transformative potential depends on who uses them and how. And this depends mainly on the quality of political leadership and authentic opposition in all countries.

Judicial leadership is integrated in such leadership. I believe progressive forces in the Judiciary can use the constitution and law in moving society towards fundamental transformation. They will do that by developing progressive jurisprudence out of the constitution and the law, accepting that judicial officers do politics, and that their institution, the judiciary, is an institutional political actor.

### **We, the people of Kenya**

Modern transformative constitutions - under which the Kenyan one falls - address two fundamentally critical pillars that anchor societal development: the equitable distribution and use of political power and land and natural resources of the country. The two pillars are the basis of survival, promise of democracy, equity, and prosperity in a nation. They impact the struggles for freedom, emancipation, struggles against exploitation, domination and oppression. These struggles are internal as well as external. It is these struggles that capture, going forward, a new nation, and a new planet that is peaceful, non-militaristic, free, just, equitable, ecologically safe, prosperous, and in my books, socialist. It is only the people the world over who can make this vision a reality. The 2010 Constitution puts Kenyans in this trajectory of struggle. It seeks to mitigate the status quo that is unacceptable and unsustainable while becoming a basis for further struggles towards freedom and emancipation.

The constitution-making process that birthed the 2010 Constitution was people-driven. The consultations with the Kenyan people were robust. The debates on whether the people's will was reflected in the many drafts that were considered was an extension of the struggle to ultimately guarantee that the Constitution was a people's constitution. Once in place, the implementation of the Constitution triggered yet another struggle in the constitution-making process. The Constitution

Implementing Constitution, Parliament, and courts became central in the struggle to breathe life into the new Constitution. That struggle still continues.

There can be no doubt in the provisions of the 2010 Constitution about the centrality of the Kenyan people in its implementation. In the **Preamble** it is **We, the people of Kenya** that **ADOPT, ENACT and give this Constitution to ourselves and to our future generations**. Chapter One of the Constitution is appropriately titled **Sovereignty of the People and Supremacy of the Constitution**. **Article 1 (1) & (2)**, respectively, provide that “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution” and “The people may exercise their sovereign power either directly or through their democratically elected representatives.”

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Kenyans are further called upon under **Article 3 (1)** “to respect, uphold and defend this Constitution.” Although English and Kiswahili are the official languages of the Republic of Kenya under **Article 7**, the State is obligated to “promote the development and use of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities.” Under **Article 10**, participation of the people is one of the national values and principles of governance. In reinforcing this value, other relevant values are patriotism, national unity, human dignity, democracy, equity, human rights, rule of law, non-discrimination, protection of the marginalised, integrity, transparency, accountability, and sustainable development. Under **Article 11** the “Constitution recognises culture as the foundation of the nation and the cumulative civilization of the Kenyan people and nation.”

The Kenyan Bill of Rights, under **Chapter 4**, is perhaps the most progressive in the world. It gives Kenyans the promotion and protection of their whole gamut of political, civil, economic, social, and cultural rights. (However, it must be noted that the Bill of Rights has its limitations. It is not clear on the protection of gay rights. Land rights are still based on the protection of private property under Article 40. Although there is a category of community land, the fundamental land regime is one that protects land as a commodity, making the ownership and use of land the root cause of poverty and gross inequalities.) **Article 22 (1)** in the Bill of Rights states “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or threatened.” **Article 258 (1)** provides that “Every person has the right to institute court proceedings claiming that this Constitution has been contravened or is threatened with contravention. **Article 22 (2)** and **Article 258 (2)** decree robust sovereignty of Kenyans as individuals and in the public interest.

All these provisions are the basis of Kenyan citizens and institutions developing robust jurisprudence of public interest litigation (PIL) in the protection of the Bill of Rights, in particular, and the Constitution in general. These provisions give Kenyans the responsibility to protect the Constitution from subversion by Parliament, state institutions, the executive, and/or external forces that could, through investment agreements or military pacts, subvert our Constitution. (We need to glorify the work of Katiba Institute and Okoiti Omtata for breathing life into these provisions. Katiba Institute works with individuals or social movements to take up cases in their interest. So does, Omtata. One hopes that going forward the Law Society of Kenya will take up serious and robust public interest litigation, as provided under the Law Society Act.)

The sovereign power of the Kenyan people is delegated or donated to Parliament (whose members

the Constitution decrees be individuals of integrity). The Constitution also provides for how political parties are to mobilise people. **Article 81** provides for “free and fair” elections that deliver electoral justice to Kenyans. So, the “legislative authority of the Republic is derived from the people” under **Article 94**. So are executive and judicial authorities “derived from the people” under **Articles 129 and 159**, respectively.

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All the structures under the national and county executive, such as finance and security, also derive their authority from the people of Kenya. Commissions created under **Chapter 15** have one of their objects “to protect the sovereignty of the people” of Kenya. The peoples’ sovereignty reigns supreme in matters of amending the Constitution under **Articles 255-257**. **Article 259** provides for a theory of interpreting the Constitution that is pro-people and cognisant of the people’s economic, social, cultural, spiritual, and political struggles that underpin the word and spirit of the Constitution.

### **Reality or lip service?**

I would like to comment on two case studies, namely, the Makueni County Experiment and the current political initiative called the Building Bridges Initiative (BBI). In my view, the former case study breathes life into the sovereignty of the people while in the latter case the political leadership subverts that same sovereignty.

### ***Case Study 1: The Makueni County Experiment***

There is no doubt that the Makueni County Experiment in the implementation of the 2010 Constitution has caught the imagination politicians, public intellectuals, civil society groups, and foreign interests represented by the diplomatic missions in Nairobi. There has been consistent bench-marking to Makueni by governors of other counties. The media could have participated robustly in these bench-marking trips, but that has not been the case.

Makueni is, indeed, a beacon of progress in the implementation of the Constitution. The robust public participation and civic education in matters of county governance are a reflection of the reality of the sovereignty of the people. Makueni County has a county agenda discussed right from the grassroots in a six-tier consultation process. In matters of governance, Makueni County has made a reality of the constitutional requirement of the people’s authority. The county has donated its executive political power to the grassroots in the County Agenda. The consensus reached in the Agenda cannot be varied by the County Assembly or the leadership of the County Government. Monitoring of budgets and the implementation of the Agenda is subjected to robust public participation.

The political leadership of Makueni County is known to be incorruptible. It accounts in a transparent manner the resources entrusted to it by people. Some key projects have become the talk of the country: universal healthcare; scholarships; factories; and other projects in compliance with the county agenda such as the mango and milk plants; and innovative research on education as a public good. Partnerships with foreign interests have been on the basis of the vision of the county, a good precedent in negotiation after the county clearly knows its interests.

It does not surprise me that the Makueni Experiment has not been glorified by the political leadership in this country. Recognising beacons of incorruptibility, progress, public participation,

and transparent accountability of resources is the last project the political leadership wishes to see.

Makueni County's narratives of incorruptibility, good governance, public participation, donating executive power of the county to the grassroots, implementing a county agenda borne out of people's participation, and allowing monitoring and policing of county budgets and projects should have been the case study the BBI engaged with seriously.

### **Case Study 2: The Presidential Taskforce on Building Bridges to Unity Advisory (popularly known as BBI)**

*"We must undertake a major consultation, in the form of an inclusive national conversation culminating in a major conference with the single aim of producing a vision of a unique Kenyan civilisation 100 years from today."* - BBI report, page 100.

*"If BBI has failed to unite 6 Kenyans [ethnic barons], [namely] Raila, Ruto, Uhuru, Kalonzo, Mudavadi, and Wetangula, how can it unite 47 million Kenyans?"* - Post on Twitter

On page 7 of its report, the BBI Taskforce states who it interviewed:

*"The Taskforce heard from more than 400 elected leaders past and present; prominent local voices from the community; and young people who added their voices to citizens in the Counties. This included more than 35 Governors and their Deputies as well as dozens of Senators, MPs, and MCAs in the Counties and in Nairobi. Submissions were given by 123 individuals representing major institutions, including constitutional bodies and major stakeholders in the public and private sectors; 261 individuals and organisations who sent memoranda via email; and 755 citizens who offered handwritten submissions during public forums in the Counties. Kenyans made their views heard as individual citizens, institutionally, and based on diverse interests and experiences. This report reflects their views and insights."*

The BBI, given the sample of consultations above, has the audacity to shamelessly announce from the rooftops that the "Kenyan people have spoken!"

After reading pages 7-17 and 100-126 of the BBI report, I have only come up with burning questions, all involving the implementation of the Constitution. It seems to me that this effort should have been restricted to the political leadership to account for the failures that the report narrates in the nine issues it focuses on. The political leadership could have been asked to give reasons for:

- Their continued politics of division and disunity;
- Their failure to implement national ethos in the 2010 Constitution;
- Their failure to guarantee the independence of national institutions;
- Their failure on the so-called war on corruption;
- The continuing gross violations of human rights of the Kenyan people by state authorities;
- Their failure to restructure the colonial provincial administration system, as decreed by the Constitution, and to reinforce county governance;
- Divisive, corrupt, unfree, not peaceful, unacceptable elections;
- The Executive seeking to claw back constitutional provisions that guarantee the decentralisation and democratisation of the imperial presidency through equitable distribution of political power, land and natural resources of the nation and the defence of devolution;
- The utter failure of political parties to comply with the provisions of Article 91 of the Constitution on the basic requirements for political parties; and the failure of the government to give capacity to the Registrar of Political Parties to police, monitor, deregister and hold political parties accountable in their obedience of the Constitution;

- The deliberate subversion of the national value and principle of inclusiveness through political alliances of the “Big Five” communities to the exclusion of all others;
- The continued wastage and theft of national resources and the failure to implement the many reports of the Auditor-General and other Commissions set to investigate the issue of corruption;
- Their failure to conduct forensic lifestyle audits that were to start with the President and his Deputy;
- Not entrenching of Article 43 on economic and social rights in political platforms and national policy;
- Their failure to reduce the mounting sovereign national debt and its disastrous economic, social, and political consequences;
- Their failure to submit development funds to the counties and to audit the effectiveness of the 15% currently given to the counties;
- Their failure to secure the lives and properties of the people of Kenya;
- The impotency of the Summit of the 48 governments;
- Their failure to make healthcare, housing, water, education, food and the environment public goods, as envisaged by Article 43 of the Constitution; and
- Their failure to transparently account for the authority that the people of Kenya donated to the political leadership.

The Taskforce could have focused on good practices (apparently there were not many) in the implementation of the Constitution. The Taskforce paid lip service to public participation, as is clear from the report.

It does not surprise me that the Makuani Experiment has not been glorified by the political leadership in this country. Recognising beacons of incorruptibility, progress, public participation, and transparent accountability of resources is the last project the political leadership wishes to see.

BBI reminds me of the Saitoti Committee tasked with finding out if Kenyans wanted multiparty democracy. Although the response from the people was in the affirmative, the Committee chose to report to President Moi that the people did not want political pluralism. Here the BBI did not ask the political leadership the reasons for not implementing the Constitution, but goes on to give recommendations that beg that question. The BBI put the cart before the horse. The BBI is a monumental political distraction and an abdication of the national interest for the interests of the ruling Kenyan elite. The BBI provides a golden political opportunity for those who are agitating for an alternative political leadership in Kenya to birth, nurture and consolidate it.

## **Conclusion**

One county governor told me once that the 2010 Constitution gave birth to a beautiful healthy baby whose protection and security was entrusted to a ruling Kenyan elite that was a master in trafficking children’s body parts! A great metaphor that I believe is as pessimistic as it is true.

BBI reminds me of the Saitoti Committee tasked with finding out if Kenyans wanted multiparty democracy. Although the response from the people was in the affirmative, the Committee chose to report to President Moi that the people did not want political pluralism.

However, the metaphor underestimates the resistance of the Kenyan people in the protection of their baby. While the Kenyan elite continues to pay lip service to the implementation of the Constitution, the people of Kenya resist this elite and focus on making the 2010 Constitution a reality in its economic, social, cultural, political, and ideological vision. It mitigates the current status quo in Kenya that the people find unsustainable and unacceptable.

Implementing the 2010 Constitution can be the basis - if given the right political party or environment - of our imagination and thinking of a Kenyan society that is just, free, peaceful, non-militaristic, ecologically safe, equitable, prosperous, and socialist.

*This lecture by the former Chief Justice, Dr. Willy Mutunga, was delivered on 10 February 2020 to post-graduate students at The East Africa Institute of the Aga Khan University (EAI) in partnership with IGLUS ([iglus.org](http://iglus.org))*

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