

The Battering of the Constitution

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The constitution

Uhuru Kenyatta inaugurated his presidency, just over a year ago, by the following declaration, “Achieving peace and strengthening unity will be the goal of my government. This work begins now”. These objectives, he said, “will be confirmed when the rights of all citizens are protected through legislation that upholds the spirit of our constitution...When all communities in Kenya are confident that they have a Government that listens to and addresses their needs”. He welcomed “all Kenyans to hold us accountable”. Here is an ordinary Kenyan reminding him of his pledges and trying to hold him accountable.

I begin with the goals and spirit of the constitution. When President Kibaki promulgated the constitution on 27th August 2010, he reminded the nation of “all those patriotic Kenyans who suffered injuries or lost their lives, freedom and property in the struggle for the New Constitution”. Extolling its virtues, he described the constitution as “an embodiment of our best hopes, aspirations, ideals and values for a peaceful and more prosperous nation”. Reminding the people of our diversity, he urged them to embrace a new spirit “of national inclusiveness, tolerance, harmony and unity”. Drawing on the constitution, he said that our leaders will now have to be “individuals of integrity, willing to be held accountable by the people and the institutions and laws of our country”.

As both Kibaki and Uhuru Kenyatta recognised, the constitution seeks to make a fundamental break with the old regime of Jomo Kenyatta and Moi. State violence, central to the rule by the colonial power and the first two presidents, cannot have any place in Kenya. All institutions, state or private, are bound to respect the fundamental rights of citizens and residents. A new scheme is set out for the security services emphasising their responsibility to protect the fundamental rights of the people—and given considerable autonomy of management and operation. Very high standards of integrity are essential for holding state office. The political system is to be democratic, participatory and consultative. Considerable emphasis is placed on national unity and political integration, in which all citizens and communities are given equal rights, with special provisions for minorities, marginalised groups, traditional communities and women and children.

Most politicians, steeped in a culture of corruption and tribalism, have not liked the constitution. Kibaki's government was hostile to it. But in no period since August 2010 has the constitution been battered as savagely as in the last few weeks, led by the president.

Violations of the constitution

Unconstitutional use of state coercive power

The most important violation of the constitution lies in continued use of state violence as the bedrock of the authority of the state. Uhuru has pushed through a law increasing his authority and that of the Inspector General (IG) over the police, giving the IG and the police greater authority to kill people they describe as "suspects", and weakened the Police Service Commission—all against the constitution, upsetting the delicate balance between policy and administration, and the accountability of the armed forces. Kimaiyo has already made several unconstitutional orders negating human rights--premonitions of a police state. Under his authority, corruption and police killings have escalated. The President, on his part, has shielded the armed forces from their proper accountability to the people (as in the failure to investigate Westgate).

Uhuru is using the same system of brutality and oppression as the colonial power once used against his community, including concentration camps. Except that this time the community singled out for this treatment is not his—it belongs to a different religion and ethnic origin. The singling out of the whole community as he has done has led to the violation of many human rights of its members—including citizenship, equality, dignity, family, religion, personal liberty, freedom of movement, and the due process of law. The suffering of the Somali community at the hands of the security forces is truly heart breaking.

The alienation of the Muslim community goes against another fundamental constitutional objective: the obligation of the state to foster inter-community harmony, respect for minorities, and the building of national unity. Ethnic discrimination is practised at other levels, in employment in public service (including at senior levels), procurement and generally in access to the state. We see the dominance of two ethnic groups, threatening the constitutional agenda of nationhood.

Corruption and fiscal mismanagement

The revival of the sordid Anglo-Leasing saga, with a soft corner for the corrupt, is the metaphor of this regime. The dalliance with China, steeped in corruption, is testimony to its preference for the lack of accountability. A large part of the enormous loans that the government incurs (the word "negotiates" is surely inappropriate) no doubt finds its way into private pockets, increasing yet again the burden on the nation. For borrowing money to borrow even greater sums is hardly a recipe for sound management. Especially when the economic stupidity of loans and projects is widely argued by distinguished economists like David Ndii.

Quite apart from corruption, many economic acts of the government seriously violate the constitution, including its framework of public finance. However Rotich justifies it, belatedly, the validity of the payment in respect of Anglo-Leasing, without the consent of parliament, as “contingency” payment, his payment (and the President’s instruction to him) is unconstitutional. How can he justify that “an urgent and unforeseen need” for payment has arisen, as required by the constitution? The President in another capacity, and many parliamentarians, have said before and now: no payment for Anglo-Leasing. The President and the Treasury have wanted for some time to float a Euro Bond, and the issue of Anglo-Leasing has plagued Kenyans for so long that it can scarcely be said to be “unforeseen”. To allow transfer and expenditure of money like this from one vote to another is a fundamental breach of parliament’s prerogative.

President’s disregard of constitution

President’s other acts, in respect of yet another “crisis”, to shore up the tourist industry runs foul of the constitution. He cannot: waive a tax, as he has decreed, tell employers that they must give employees a paid holiday at a hotel, and authorise this payment be set off against their tax. The constitution gives these powers to other authorities. The constitution says that a state officer cannot keep his job if his acts conflict with personal interest (it is well known that the Kenyatta family own several hotels and resorts).

He thinks, incorrectly, that his agreements with China, involving huge sums and projects, are law. They must be approved by parliament, after proper consultations with the people, before they become law. Some violate the constitutional rule on procurement. No one in the administration seems to worry about this.

He has delayed in gazetting members of the Judicial Service Commission and a significant number of judges, for reasons unknown, thus greatly slowing down the processing of cases. In neither case has he any discretion in relation to their appointment, for reasons of independence of the judiciary. As administrators routinely ignore judgments inconvenient to them (as regards evictions or refugees)—and the Attorney-General does nothing about it.

The President’s county commissioners, with their new powers (and old hats), are so reminiscent of a British governor, Sir Evelyn Baring, who centralised the entire structure of provincial administration. He considered that the only way to defeat Mau Mau was for him to have firm control over all bureaucracy in districts and provinces, thus side lining his ministers and senior administrators in Nairobi. Governors and presidents since then have retained this system, and ensured the lack of their responsibility to anyone except themselves. The CKRC proposed to do away with this system, but Bomas and the CoE retained it, although “restructured”. Now it has this new lease of life.

An underlying principle of the constitution is the separation of powers, more like the US than the UK model. But there is some reason to believe that the President would like the other two

branches of the government to submit to the executive. And the executive has threatened the autonomy of the media and civil society—against the rights they enjoy under the constitution.

The disappearing People

The people of Kenya proclaim, in the preamble, the constitution as their own. The very first Article reiterates that all sovereign power belongs to the people, and that sovereignty must be exercised only in accordance with the constitution. The responsibilities and authority of all state organs flows from the people. The constitution established a democracy based on people's participation; constant consultation with them is recurrent theme. Alas, the people have been completely sidelined by the government, most of all the president. Vast schemes are planned, huge debts incurred, long lasting agreements are made with foreigners, all affecting people's lives and future, perhaps for generations, without any consultation with them, and generally without their knowledge (though sharing information is a constitutional obligation of the government).

Road side directives are back. There is no rule of law. Impunity thrives. We are rapidly slipping into the Kenyatta-Moi era.

The writer chaired the CKRC and the Kenya National Constitutional Conference (Bomas).