

# Constituting The State Territory, Citezenry And National Philosophy In A Constitution.

By PLO-LUMUMBA, Lecturer in Law, University of Nairobi and Advocate of High Courts of Kenya and Tanzania

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"When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to separation [change]..."

## A. INTRODUCTION

The Constitution of Kenya Review Commission established under Section 6 of the Constitution of Kenya Review Act<sup>2</sup> (hereinafter referred to as "CKRC") is the principal organ through which the Constitutional Review process is being conducted.

The process of reviewing the Constitution has started from the premise that the existing Constitutional framework, despite having served the country for the some thirty odd years needs alterations and changes. This is to ensure that the Constitutional framework guarantees freedom and democracy and is in tune with modern realities.

Section 3 of the Act provides that the object and purpose of the review and eventual alteration of the constitution is to secure the following:-

- (a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
- (b) establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;
- (c) recognizing and demarcating divisions of responsibility among the state organs of the executive, the legislature, and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;
- (d) promoting the people's participation in the governance of the country through democratic free and fair elections and the devolution and exercise of power;

(e) respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities;

(f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national resources; and (g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights.

Section 5 of the same Act then spells out principles that shall operate as a guide to the organs through which the review process shall be conducted. It provides thus:

5. In the exercise of the powers or the performance of the functions conferred by this Act, the organs specified in section 4 shall-

(a) be accountable to the people of Kenya;

(b) ensure that the process-

(i) accommodates the diversity of the Kenyan people including socio-

economic status, race, ethnicity, gender religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;

(ii) provides the people of Kenya an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution.

(iii) is, subject to this Act, conducted in an open manner; of basic human rights, gender equity and democracy; and ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya.

Conscious of the objectives and guiding principles, this paper attempts to deal with the issue of territory, citizenry and national philosophy. This is done from the premise that for any meaningful review to be realized, a clear understanding of the basic constitutional structure is mandatory to allow for a careful and thorough analysis of the advantages and disadvantages of the Kenyan Constitutional system and an evaluation of the issues related to the design and purposes of the Kenyan Constitution. Such clarity then lays a basis for viable suggestions and or recommendations for change and improvement. The presentation briefly discusses each of aspects, territory, citizens and philosophy separately within the context of the workshop's aims and objectives. These three issues are not only important but also basic as they form the bedrock upon which the rest of the Constitution springs. We commence the presentation by dealing with territory.

## B. TERRITORY

On the 24th day of May, 1963, while addressing the African Heads of State Summit in Addis Ababa, Ethiopia the Late Kwame Nkurumah speaking on the potential territorial disputes among the emerging African nations observed:-

"There is hardly any African state without a frontier problem with its adjacent neighbours. It would be futile for me to enumerate them because they are already familiar to us all. But let me suggest that this fatal relic of colonialism will drive us to war against one another ... Unless we succeed in arresting the danger through mutual understanding on fundamental issues and through African unity.... We shall have fought in vain for independence."

Nkurumah's words remain true today as they were when they were spoken. Indeed, owing to the significance of territorial delimitation it (territory) inevitably is an important center piece in the jigsaw of Constitution.

Because territorial sovereignty is exercised within a given geographical area, a

defined territory is one of the attributes of a State.<sup>4</sup> There are however no prescribed minimum geographical sizes. Besides, the requirements of territory may be satisfied even if the entity's territorial boundaries are not precisely defined or are to some extent disputed.

Kenya is characterized by a defined territory. The development of the Kenyan

territory, formally the East Africa Protectorate, can be traced back to the instruments signed by the colonial masters in the process of delimiting spheres of influence in East Africa.<sup>6</sup> Each of the Kenyan territorial boundaries is as a result of agreements signed during the delimitation exercise. For example, the Kenya-Tanzania boundary is the result of a series of Anglo-German Agreements. The region constituting the Kenya-Uganda border was recognized as a British Sphere and the boundary description results from the boundary description in the Order in Council of 1926 supplemented by other descriptions which can be found in modern Kenyan and Ugandan legislation.

Territory is also important because in International law, jurisdiction which is an attribute of state sovereignty is exercised primarily on a territorial basis. The 'territorial principle' is also important because of a state's jurisdictional competence. This principle confirms the position that events occurring within a state's territorial boundary and persons within that territory-even if temporarily -are as a rule subject to the application of the local law of the state.

It is noteworthy that one of the key steps taken by African states on attaining political independence was to recognize the inviolability of colonially defined boundaries. This action was taken despite the fact that boundaries were drawn arbitrarily. The justification for this was to preclude conflict that would be generated if a redrawing of boundaries was attempted.

While it is true that the inherited boundaries have given birth to problems particularly ethnic tension, the territories have remained largely unchallenged. In implementing its mandate, CKRC should take a leaf from the Uganda Constitution which pursuant to Article 5 (3) and the 2nd Schedule of the Constitution defines the boundary of Uganda in comprehensive detail.

### C. SOVEREIGNTY

Closely related to the issue of territory is the concept of sovereignty. Sovereignty simpliciter may be defined as the exclusive right of a state to govern the affairs of its inhabitants and to be free from external control.<sup>8</sup> One writer correctly defines sovereignty as follows:-

"...the power of modern states, the power of their governments to decide and to act without consulting others and without concern for any thing but their own interests as they themselves conceive those interests..."

Sovereignty is the quality of supremacy and authority over others and/or in respect of certain things.

In legal theory sovereignty is an important dimension of the international relations of states. Each state in international law is sovereign and relates to others as such. Sovereignty has two perspectives to it.

Sovereignty in its internal aspects is concerned with the bearer of supreme authority within the state. This may be an individual or a collective unit. It refers to the quality of supremacy in respect to certain competences e.g. making the law etc.

In contemporary politico-legal lexicon sovereignty is seen as the supremacy of the state, the totality of supreme rights belonging to the state as embodied in its supreme organs within the state and abroad.

The notion of state sovereignty has developed in juxtaposition with that of the basic rights of the human person. The state as a collection of individuals, must possess certain legal capacity rights competence and immunity. On analogy with individual, states participate in the society of nations on condition that their autonomy is not impaired. Consequently, the idea of state competence and autonomy has since the 19<sup>th</sup> century been summed up in two principles, namely;

(i) Principle of Independence, (ii) Principle of Equality

(i) Independence

Independence is a fundamental principle of International Law which implies that a State has the plenary competence to conduct its internal and international affairs without being subject to the authority or dominion of other states and no restrictions upon its competence are to be presumed whatsoever. However, the state is free to restrict its independence through treaty relationships including state communities such as the European Community (EC) or East African Community (EAC).

The principle of state independence is entrenched in the UN Charter by that of non-intervention in the domestic affairs of states, and the inviolability of the territorial integrity and political independence of states as follows:-

Article 2

4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence

of any state, or in any other manner inconsistent with the Purposes of the United Nations."

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

(iii) Equality

All states whether big or small, rich or poor, are equal in their international personality and each enjoys the rights inherent in full sovereignty and each is free to choose and develop its political, social, economic and cultural systems. It results from this equality that no state can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.

Sovereignty therefore exists when a state effectively governs its territory and populace. Jurisdiction is thus an aspect of State sovereignty. State sovereignty refers to the power or authority of the state to regulate the conduct of affairs within its territory.

A state will therefore be considered sovereign if it is able and has control over acts within its boundaries, be they acts of its citizens or of non-citizens.

However, even as we confine our presentation to the classical meaning of the word sovereign, it must be remembered that sovereignty, particularly in African states is constantly under assault leading some Afrophobics to observe that;

"when we speak of the state in Africa today, we are up to create an illusion.. Many so called African states are seriously lacking in the essentials of nationalism. They are ramshackle regimes... deficient in institutional authority and organisational capability.

While I do not share the views expressed by Jackson and Roseberg above, it cannot be denied that many African countries are today treated like the backyards of erstwhile colonisers. Multilateral institutions like the IMF and the World Bank in the quest to instill fiscal discipline in the management of African economies also appear to assault the sovereignty of many countries, Kenya included.

Because sovereign authority is ultimately tied to population, the concept of citizenship is our next focus.

D. CITIZENSHIP

The concept of citizenship has been defined as follows" :-

"...a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the

juridical expression of the fact that the individual upon whom it is conferred, either directly by law or as the result of an act or acts of authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state."

The term citizen has often been used interchangeably with the term national. This is despite the fine distinction between the two in law.

Granting of nationality/citizenship is exclusively a matter of domestic law. Nationality may be acquired in a variety of ways but the two most common ways of acquiring nationality are:-

- (i) by descent from parents - "jus sanguinis" or
- (ii) birth in the territory of the state - 'jus soli."

Nationality may also be acquired by naturalization and hence the terms and conditions may differ from state to state.

When dealing with the question of citizenship one must consider the following:-

- the meaning of citizenship in a state
- a description of the process of becoming a citizen (e.g. by the process of naturalization).
- The significant characteristic of an effective citizen for example civic virtue, common courtesy, respect for person and property, civic and personal responsibility and honest and fair dealing).
- The rights and obligations of a state's citizen.
- A comparison and analysis of the rights and responsibilities of citizens and non-citizens in a state.
- Civic responsibilities of citizens and non-citizens of a state.
- Civic responsibilities (e.g. voting, serving in the armed forces, paying taxes).
- The implications of not fulfilling citizen responsibility.
- Identifying important economic, personal and political rights and the scope and limit of these rights.
- The distinction between personal and political rights.

The relationship of citizens and the state and the relationship of a state's citizens to other nations and world affairs is of paramount importance.

Realizing the importance of the nationality/citizenship concept the international community gives it further impetus. Article 15 of the Universal Declaration of Human Rights provides that "everyone has the right to a nationality," while Article 24 (3) of the 1966 International Covenant on Civil and Political Rights declares that "every child has the right to acquire a nationality". This is because statelessness has the effect of placing one person in a civic void with no authority to look up to with regard to possible, civil, social, economic or political claims. The upshot is to wipe out the essential basic environment for the exercise the fundamental rights of the individual. Such rights, in operational terms have no existence in the absence of a superintending and implementing state authority. This is the reason underlying the 1951 convention relating to the status of refugees, to which Kenya is a signatory. The Convention provides thus:-

"The contracting states shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

This is a commitment in principle but is subject to individual-state discretion, exercised in the light of local circumstances.

What the foregoing discussion shows is the importance of citizenship in constitution making. There are legitimate concerns that current Constitutional provisions dealing with acquisition of Kenyan citizenship are anachronistic and discriminatory against women.

See Section 91 of the Kenyan constitution which provides as follows; "A woman who has been man-led to a citizen of Kenya shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya" [This provision does not grant a man who is married to a Kenyan woman the right to be registered as a Kenyan citizen and therefore offends Section 82 (3) of the Constitution which provides, "In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour- creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

It therefore behoves the Commission to examine these inadequacies and prescribe a regime that is in consonance with current thinking.

#### E. THE CITIZENRY AS A SOVEREIGN

Constitutional debates have often posed the question whether the constitution is supreme as against the people. The popular position is that the people are the ultimate authority from which the constitution and all governments and all organs of the state derive their authority. The people are therefore the makers of the constitution and ipso facto must retain the ultimate authority to repeal it and to replace it with a new one if they wish. As such, while the constitution is supreme over the three organs of state and the

individuals acting in their individual capacities, the people are on the other hand supreme over the constitution and consequently over all the other organs of state. Otieno Odek argues that when Kenyan citizens act as a group, that is as the citizenry of this country, they are supreme and independent and take precedence over the constitution. He goes further to state that the citizenry can thus legitimately abrogate, annul, revise, or rescind the constitution or call for and hold a national convention.

The understanding of the constitutional status of the citizenry as the sovereign has been accepted in constitutional theory for a long time. A number of constitutions have attempted to underscore this supremacy through preambles to their constitutions, for example, the preamble to the

German Basic Law declares that:-

"Conscious of their responsibility before God and humankind, Animated by the resolve to serve world peace as an equal part of a united Europe,

The German people have adopted, by virtue of their constituent power, this Basic Law.

The Germans in the Lander of Baden-Wurttemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Bremen, Hamburg, Hesse, Lowe Saxony, Mecklenburg-Western Pomerania, North-Rhine/Westphalia, Rhineland-

Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-

determination. This Basic Law is thus valid for the whole German nation."

While acknowledgement of the citizens supremacy is useful way of expressing the people's residual powers, it must be observed that in practical terms it is difficult to place mechanisms through which the people can ensure that their delegates do not usurp their power. The only effective tool is the referendum, hence the need to find a place for it in Kenya's new Constitutional regime.

See also the preamble to the Ugandan Constitution which in its preamble provides as Follows,

•"Recalling our history which has been characterized by political and constitutional instability, Recognising our struggles against the forces of tyranny, oppression and exploitation.

COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equahlv, democracy, freedom, social justice and progress,

EXERCISING our sovereign and inalienable right to determine the Form of governance for our country, and having fully participated in the Constitution-making process;



NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda;

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

See also the Constitution of the: Republic of South Africa.

Closely tied to sovereignty is a peoples philosophy of life, their national philosophy, this is our next point of discussion.

#### E. NATIONAL PHILOSOPHY

The Independence struggle in Africa was fought on the platform of intense nationalism, and in some cases clearly stated ideological positions. It must be remembered that the era of de-colonisation was in an environment of the intense post world war cold war. Many African Nationalists gravitated towards socialism simpliciter and later its other nuanced forms. This was true of Kenneth Kaunda in Zambia, Julius Nyerere of Tanzania, Nnamdi Azikiwe in Nigeria, Patrice Lumumba in Congo, Jomo Kenyatta in Kenya, Apollo Milton Obote in Uganda, Amilcar Cabral in Guinea Bisau, Modibo Keita in Mali and later Agostino Neto in Angola, Samora Machel in Mozambique and Robert Mugabe in Zimbabwe.

It is the idealism articulated by the African leaders that gave prominence to the Pan-africanists movement in the sixties. But no sooner had political independence been attained than its leading torch bearers started exhibiting qualities purged of national philosophy. One such leader was Kwame Nkrumah who started off popular but soon became authoritarian and developed a personality cult, which gave birth to the title "Osagyefo" (the redeemer). Ali Mazrui and Michael Tidy, in their book "Nationalism and new States in Africa" observed as follows on this development;

"...The personality cult gradually made Nkrumah less and less accessible to frank advice. Presidential flatterers soon monopolized the business of advising the Osagyefo. This was bound to harm the level of decision-making in the country. The Court of the Ghanaian Czar was soon intellectually impoverished - there were too few courtiers candid enough to warn the ruler against certain causes of action."

The ultimate fate of Nkrumah was the removal of his government by a military coup de etat while he was in Beijing on commonwealth which Decree. While mission personality cultism was growing in different parts of Africa, more doctrinaire African leaders started the conduct of National Affairs on a clear national philosophy. One such leader was Tanzania's J. K. Nyerere. Through the Tanzania African National Union (TANU), Nyerere articulated a unique form of National philosophy of socialism which he christened 'Ujamaa' (familyhood). This brand of socialism was designed to create an egalitarian state which would be devoid of exploitation and which would ensure that Tanzania was self-reliant and economically stable. In the preface to a collection of his writings and speeches J, K. Nyerere explains the basis of the Arusha Declaration in the following terms;

"The Arusha Declaration adopted by TANU in February 1967, supplied the need for a definition of socialism in Tanzania terms, and provided the necessary signposts of the direction in which the nation must travel to achieve its goals.."

The Nyerereist approach was a clear testimony to the view that a country must have a clearly defined national philosophy.

A similar approach was also evident in Zambia where Kenneth Kaunda believed that Nation building could only be achieved through a clear philosophy. In his book "a humanist in Africa-letters to Collin M, Morris" from Kenneth D. Kaunda, President of Zambia, published in 1966 Kaunda asked;

What happens to Nationalism as a movement of protest when the basic target of its protest - the colonial power has been removed? The withdrawal of colonial power whilst solving one great problem raises another, equally acute for the nationalist leader, the discipline and the solidarity of the national movement and impetus built upon during the freedom struggle are vital to the success and survival of the new nation. Yet, unless new existing and worthwhile goals can be proposed for nationalism there is danger of the movement of protest turning inwards upon itself and becoming destructive of the national goals.

Kaunda answered the dilemma by articulating a National philosophy of humanism which placed the church and institutions of higher learning into the position of initiating and stimulating discussion.

Kenya was not to be left behind. As early as 1964 Kenya's philosophy of nation building was developed under the title "African socialism and its application to planning in Kenya." In its introduction, Jomo Kenyatta wrote;

"Our entire approach has been dominated by a desire to ensure Africanization of the economy and the public service. Our task remains to try and achieve these two goals without doing harm to the economy itself, and within the declared aims of our society..."

The above position was articulated through sessional paper No. 10 of 1965 which described Kenya's national philosophy of African socialism in the following terms:-

"Political democracy in the African tradition would not, therefore countenance a party of the elite, stand test or discriminatory criteria for party membership, degrees of party membership or first and second class citizens. In African socialism every member of society is important and equal; every mature citizen can belong to the party without restriction or discrimination; and the party will entertain and accommodate different points of view. African socialism rests on full, equal and unfettered democracy. Thus African socialism differs politically from communism because it ensures every mature citizen equal political rights and from capitalism because it prevents the exercise of disproportionate political influence by economic power groups.

What is implicit in the positions articulated by the first generation leaders was the realisation that a nation without a national philosophy is like a rudderless ship.

While Nyerere remained consistently and faithfully wedded to his ideological orientation other leaders wavered and soon the fond national philosophies were relegated to mere slogans.

#### G. CONCLUSIONS

On the eve of the re-introduction of multi-party politics in Kenya the late Jaramogi Oginga Odinga when launching the National Democratic Party (NDP), 19 read the preamble to its manifesto which provided thus;

"a crisis has engulfed Africa. It is a crisis of governance. Everywhere established governments are being challenged from below to listen to the voices of people. Everywhere they are being challenged to deliver the fruits of independence where military dictatorships have held sway for decades, the masses have risen up to overthrow them, and to demand representative government. Where one party authoritarian regimes have survived on bankrupt ideologies, the multiparty democracy has demanded democracy. The one-party regime has been thoroughly discredited and only rear guard politicians with no new ideas to offer, and only ill-go then wealth to protect, can continue to defend the one party system of mis-governance".

The above statement captures the essence of the changes that have led to the Constitutional review process in this country. As we have stated, such changes must be effected in a systematic manner that is all-inclusive and comprehensive. Because the focus of change is the basic law of the land, its critical components, such as the territory of the Kenyan State, the sovereignty of the people and the chosen national philosophy must receive proper attention and treatment.