

On what issues do we need a referendum?

By Ken Nyaundi¹

I have read, with interest, Prof Nyong'o's article in the Sunday Standard of December 13, 2015 in which he elaborates on the merits of Okoa Kenya's initiative on constitutional amendments. Prof Nyong'o, in with his usual clarity, premised his article on the proposition that the Okoa Kenya draft Bill is the surest route to amending the constitution.

As Prof Nyong'o correctly observes, the Okoa Kenya draft Bill covers issues that require a referendum in order to be effective as well as other matters that may be dealt with without undertaking a referendum.

As was observed in 2005 and in 2010, a referendum is both a constitutional requirement (in the process of constitutional change) and also a political contest that has little to do with the issues at hand. As we prepare for the challenges that a referendum poses we should be honest and clear to present for the plebiscite only matters that are mandatory and essential under article 255 (1). There are many good reasons for this.

Conducting a referendum on a multiplicity of issues poses a challenge to the voters and the electoral body. Experience has shown that voters do not always have the capacity or information to make informed decisions on complex, multiple issues and may make ill-informed decisions based on partial knowledge of the matters for determination or on the basis of unrelated factors such as political party affiliation. Further, it

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cannot be overstated that the ordinary voter does not have the expertise and know how to appreciate the bigger picture of how different issues inter-relate. In its substance a referendum is ordinarily initiated to tackle single issues one by one without concern to this larger canvass. In presenting to the voter many issues for analysis the complexity of the arguments and technical detail could get lost thereby receiving an answer that does not necessarily relate to the gist of the question.

For the electoral body the framing of the questions and gathering of responses on several questions is problematic. For this reason a referendum should deal with as few issues as possible. The Okoa Kenya draft Bill should isolate those matters that are capable of amendment without a plebiscite so as to reduce the load on the ballot paper and make the processing of the vote feasible and achievable. This is really because in ordinary terms a referendum should attract a 'NO' or 'YES' answer. It cannot call for the expression of opinions or arguments.

The debate on what should be presented for referendum should not be limited to the Okoa Kenya Draft Bill. Since the promulgation of the constitution, there are issues that have emerged that require attention. The first is the manner of undertaking any referendum and the second the constitutional threshold for a referendum. In terms of article 255 (1), amendments of the constitution to deal with these issues require a referendum.

In many countries, questions, which require a referendum, are presented during a general election so that voters give their

opinion as they vote. In this way, you reduce the cost of the exercise and obtain a high voter turnout for the referendum question. As I recollect, the IEBC has stated that running a referendum will cost 8 billion shillings. But the suggestion to conduct future referendums during a general election is not only an issue of costs. The fact that a referendum is held during a general election will attract more voters, which will further legitimize the results.

On the question of the threshold, article 255 (2) provides that a referendum shall stand approved if at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum and that those voters return a simple majority in support of the questions. This threshold is miserably low. In reality amendments on the constitution, even on those provisions that embody the fundamental issues that define the bedrock of the constitution, is fairly easy. Let me demonstrate.

IEBC figures show that Kenya had in 2013 14,337,399. Out of these 12,330,028 or 86% voted. The county with the highest voter registration is Nairobi with 1,778,903 voters and the lowest is Lamu with 51,830 voters. Except Nairobi, no other county has more than a million registered voters. Nine counties have a registration of less than two hundred thousand voters. Twelve counties lie in the three hundred thousand to four hundred thousand bracket, while three are in the five hundred to six hundred thousand group. Bungoma and Meru have registered voters in the six hundred thousand to seven hundred thousand bracket. Only Kakamega, Kiambu and Nakuru have more than seven hundred thousand registered voters. According to the 2013 IEBC figures, twenty-one counties had less than four hundred thousand voters.

For argument's sake, if you take counties with a maximum voter registration of 400,000 then 20% of that works to 80,000; Half of the counties would be 24; thus 80,000 times 24= 1,920 Million. But the constitution requires that the referendum obtain a simple majority of the votes and therefor 960,001. That is how easy it is to change the constitution through a referendum; even on art 255 (1) issues.

Why is it necessary to re-look at the threshold for constitutional change? We admit that the constitution is the source, the jurisprudential fountainhead from which all other laws flow. For this reason, it must be protected from partisan, short-term interests for amendment. Yet the constitution is not intended to be immutable. The constitution of India, for example has been amended more than one hundred times since it was enacted in 1950. In South Africa, there have been sixteen constitutional amendments since 1996 but all of these have been directed at clarifying or altering the operation of the constitutional rules rather than changing the standards. The USA has been more conservative. In more than two hundred years, the constitution has been amended only twenty seven times. But for those who think that it is too early to amend our constitution, the first eleven amendments to the USA constitution, which form the Bill of Rights, were undertaken within four years of its promulgation.

I posit that before any party rallies its troops to partisan attempts at constitutional change, there should be candid attempts at obtaining an inclusive process that addresses common difficulties in self-governance and aligns theory and practice. In the face of the obviously easy and simple procedures for constitutional amendments we do not know when the formula may be used by a temporary political

majority to insulate itself against future political competition and even overrule the shield in article 255(1) of the constitution.

In the long run it is evident that Parliament needs to take a neutral bi-partisan position on the matter of the referendum so as to command leadership on these critical issues. In a viciously divisive environment then existing, the IPPG demonstrated that Parliament can rise to the occasion to salvage the country from an acrimonious political contest. Today, the country needs such leadership. The country does not need an expensive and politically divisive referendum.