

CIVIL SOCIETY AND THE POLITICS OF CONSTITUTIONAL REFORMS IN KENYA: A CASE STUDY OF THE NATIONAL CONVENTION EXECUTIVE COUNCIL (NCEC)

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Introduction

This paper examines and analyses the role of the National Convention Executive Council (NCEC) in engaging the Kenyan state for constitutional reforms. It argues that although NCEC (through mass action) was able to force the regime to initiate dialogue with the opposition and civil society formations, it did not succeed in engendering state commitment to the letter and spirit of accords emergent out of these engagements.

The paper attributes this to two core factors: that is the regimes ability to divide and successfully isolate the radical formation from the mainstream opposition and the religious sector co-optation, economic motivation and diplomatic duplicity and the inability of NCEC's leadership to interpret social process correctly, to the extent of evolving right institutional design and programmatic responses for mobilisation; and engagement of state.

To this end, the paper is structured in seven parts. The first part is a restatement of theoretical positions on social movements. The second part takes a historical perspective and seeks to put into context the state NCEC sought to deconstruct. The third part traces and analyses the politics surrounding the rebirth of protest movements in Kenya. Part four on the other hand examines and analyses NCEC's activities in its quest for constitutional reforms. The sixth part looks at NCEC's attempts to anchor its organisational successes and failures. The seventh part examines the regime's success in out-manoeuvring the entire reform movement to the extent of getting its way. The final part attempts to put NCEC's activities in perspective.

Social Movements Revisited: A Redundant Note

Social movements can be defined as spontaneous large groups constituted in support of a set of purposes or beliefs that are shared by members. A social movement represents an effort by a large number of people to solve a common problem collectively ¹. Thus, contrary to the contagion theory of

¹ See Hanstoch Social Movements in Lindzey and Arronson: Handbook of Social Psychology, Volume 4 page 584 (1969).

crowds, which argues that those joining organised crowds descend several ranks in the ladder of civilisation and for all practical purposes are barbarian creatures living by instinct² to the advantage of the cynical manipulating leader hypnotised by the idea whose apostle he becomes. Studies in the evolution of social movements point to convergence as opposed to contagion. Floyd Allport, taking this position, observes that crowds attract specific types of people pre-disposed to act in a wayward way of the crowds. Thus, crowds attract untypical barbarians rather than transforming good people into barbarians³.

Other recent theories dispute those that emphasize on irrational and atavistic aspects of crowds, arguing that their behavior is a mere modification and extension of group behaviour⁴. Those who take this position see crowds as far more purposive, rational and organised groups of people evolving towards a new consensus on norms upon which society's organisation should be premised. Thus, indeed whereas they might attract misfits that does not de-emphasize objectives and background planning by individuals seeking certain objectives in society. In essence, the salient factors to be looked at are the circumstances under which social movement emerges. These are normally a reflection of institutional dysfunctionalities at one level, and the inability of political leadership to interpret social process correctly, consequences of which are that existing institutions fail to provide social values to the society. This endangers attempts aimed at reorganizing them outside the existing institutional frameworks.

In his analysis of the development of social movements, Neil Smelser⁵, compartmentalizes this into six stages. Under the structural conduciveness, Smelser outlines several questions social movements grapple with. These include those that seek to respond to issues such as how stratified and differentiated the society is for the growth of the movement and how the movement responds and structures itself to the prevailing social milieu. In the case of societies in transition, polarization and stratification that are either class or ethnically defined must be analyzed and responded to effectively at the level of structure and institutional design if the movement has to succeed. Essentially, the success of the movement revolves around the ability of the leadership to read and interpret correctly the social strain in the society and subsequently respond to these social processes positively through institutional and programmatic responses. Salient in this therefore, is the evolution of new organizing ideas that seek to deconstruct existing hygeonization of ideas. Successful construction of this opposite ideas then

² This is the position of Gustav Lebon, *The Crowd* New York, Viking Press 1960, p 32

³ Floyd Allport, *Social Psychology* Boston, Houghton Mifflin, 1924 p 313

⁴ This is the position of Stanley Milgram, *Crowds*, in *Handbook of Social Psychology*, Vol. 4 edited by G. Lindzey and E. Aronson, 2nd Edition, Reading, Mas, Addison Wesley 1969

⁵ Neil J. Smelser, *Theory of Collective Behavior*, New York, Free Press, 1962, p. 12 – 17

engenders the evolution of new forms of attitudes and beliefs that contribute to incongruencies between political culture and institutions⁶.

Smelser argues that social movements develop more readily in open society than where the government is willing and ready to use repressive forces, and notes that many incipient social movements have been nipped in the bud by jittery but strong governments. However, whereas strong governments using force can indeed successfully kill some initiatives, organisational, leadership and strategic issue than facilitate their death more by the mere application of force by the government. The very emergence of the movement is a function of the inability of existing institutions to respond positively to social needs. Thus, whereas they may take advantage of an organising open political space, that in itself does not guarantee them success if the movement lacks an intelligent leadership that can not only positively respond to social processes but also set institutional and programmatic counters to the existing ones.

Under his second stage is the structural strain stage. To Smelser, this emerges when groups feel some sort of change in their view of the world, social position or economic security. He attributes ambiguities, deprivations, conflicts and discrepancies as the main sources of cultural strain. This compares well with Tedd Gurr's⁷ incremental and decremental deprivation upon which Gurr predicates the reason why men rebel. Depreciation will continue to exist at a subjective level, but to the extent to which subjective factors of leadership do not emerge to link this to the objective factors, the same can persist without necessitating the emergence of social movements.

To Smelser, structural strain prepares the ground for the spread of generalized beliefs. This constitutes his third stage for the development of movements. Accordingly, the spread of generalized beliefs identifies the source of strain, attributes certain characteristics to this source, while also prescribing certain responses deemed as countering⁸. Accordingly, it is this that provides instant diagnosis and remedy to the existing social maladies. This is essentially the role of the leadership of the movement. It is the movement that must seek to generate organizing ideas and also mobilize and convince the society on the possibilities of their success. This is more a function of the ability to operationalize the social exchange mechanism of the society. Herein, people must be convinced that the struggle is worth the while and that it will transform their lives to the extent that they sacrifice their lives.

⁶ Katumanga 1999

⁷ Tedd Gurr, *Why Men Rebel*, Princetown University Press, 1971

⁸ Smelser *Ibid* p16

Smelser also points to the precipitating factors that explicate the final outbreak of social phenomena such as movements, wars and revolutions. These, he notes might normally pass without great stir, but, in a supercharged atmosphere of the general belief, have strong casual impact. The precipitant, whether a riot, a killing or an economic burst, does engender the concrete immediate substance for a generalized belief. To Smelser, a social movement then takes shape in an apparently spontaneous manner. This only partly explains the emergence of movements. As a matter of fact, there are movements that emerge out of planned efforts to stimulate conditions for confrontation with the system they seek to change. In Kenya, the NCEC sought to advantage of generalized beliefs and to general what it called the zero option⁹ milieu. Such a milieu is a function of concerted efforts of mobilizing groups, geared towards generating conditions that lock and motivate core actors in society in the reform process. Once this situation is achieved, constitutional reform is seen as rational, tenable and therefore a desirable activity to participate in.

Smelsers fifth stage is what is referred to as mobilization efforts; the movement merely fizzles out. How the leadership structures the movement and attracts certain constituencies within which it seeks to base its support salient to successful mobilization. Equally important is the question of how it responds to institutional and programmatic responses of the state. This can determine its survival or death, especially if the movement confronts a very clever state that has the capacity to read the social processes correctly and is willing to provide responses however flawed they may be. This is how the NCEC in Kenya was short-changed by the unexpected state's decision to seek negotiation for constitutional changes in Kenya. This it did by successfully de-linking the religious and the political class sector from the NCEC (We shall come to this.)

Smelser's sixth stage is what he calls the operation of social control. This can be analyzed at two levels. The first social control measures revolve around those counter determinants, which prevent, interrupt, deflect or inhibit those factors producing social movements¹⁰. Social control becomes salient as the state seeks to nab the emergence of full-scale social movements. The second level of social control emerges once the movement surfaces and revolves around the questions of how the system responds to counter the movement by using force or instituting social reforms. On the overall, the success or failure of a movement revolves around the nature of the movement itself (the issues it seeks to fight for the structures it builds), the nature of the state (its reactions towards the movement and social process) and the attitudes and perception of social groups in the society.

⁹ See Willy Mutuga (1999), constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992 - 1997, SAREAT Nairobi, p 147 . Here, Mutunga acknowledges the role played by the Institute of Policy Analysis and Researchers on constitution making, David Ndii, Mutahi Ngunyi, Wachira Maina, Musambayi Katumanga, on their positions on constitution making. He notes that the Katumanga/Ndii model of zero option which called for the generation of the crisis influenced the 4Cs and formed the basis upon which mass action and mobilization were predicated.

¹⁰ Smelser Ibid p 17

If a movement leadership is strategic in thinking and sets out clear objectives with the proper strategy of realizing them, it is bound to succeed if it is confronting a “stupid regime”. That is, one that does not have the capacity to respond positively to challenges. The former is a function of reading correctly societal concerns and seeking to interpret them. Whether the society responds positively to this is a function for the extent to which it is convinced the movement has the capacity to not only confront the state but force it to realize its objectives. To this extent therefore, if a movement does not outline clear and realizable objectives, and seeks to apply wrong strategies while confronting a clever state, it is bound to fail.

In other words, those designing social movements must from the onset seek to determine what kind and extent of changes they want to institute. On this basis, evolve a strategy. In so doing, they must also take into cognizance the nature and the strength of the state. To the extent to which the level of state institutions collapse is extensive, and the movements in question are well organized and entrenched in terms of setting up alternative structures.

A good strategy that seeks the overthrow of the regime and indeed thus sets in motion institutional construction to facilitate this is likely to be successful in its objective. To the extent to which the regime’s main institutions of coercion and base for support remain intact, a social movement devoid of strong organizing infrastructure, leadership and ideas is bound to fail if it seeks the regimes collapse merely through mobilization on the streets. Equally imperative is the presence of a well thought-out organizing ideology, political cadres, and a leadership committed to the achievement of wider societal interests. In an environment where these factors are lacking, the process becomes amenable to manipulation by Satanist elements to the detriment of change.

Reacting to these stages by Smelser, Paul Meadows¹¹ notes that the first four respond to the incubation period, while the fifth corresponds to the action period. Some other students of social movements point to the third level known as the institutionalization period. In this level, movements lose their drive and become not only tamed but also widely bureaucratized in organization. Such a stage is prone to many risks especially if the movement does not have first of all, an organized secretariat and leadership that can take advantage of this stage to maneuver, strengthen and seek to organize at a later stage. If not, the bureaucratization stage can literally paralyze the movement and lead to its death. This is the kind of near paralysis that the NCEC is suffering from currently. (We shall come back to this.) Seeking to respond to the three categorizations of incubation, action and institutionalization sequencing, Erick Hoffer outlines three types of leadership that corresponds to the three. The first stage is facilitated by what he calls the men of words. Accordingly, their main task is that of setting the ground for the mass movement maximizing on the spoken or

¹¹ Paul Meadows, Sequence in Revolution: The American Sociological Review 6 (October, 1941),702-8

written skills and words. These are usually the intelligentsia or ideologues¹². These are the people who use their intellect to point out the problems that exist in the society while seeking also to evolve a generalized belief on how these can be sorted out. To Hoffer, the men of words seek to undermine the existing beliefs and institutions at one level while promoting “hunger for faith” in susceptible people at another. They also go out of their way to weaken the beliefs of the “better people”. This is done mainly to neutralise their impact as a new fanaticism evolves. Their most salient role is that of providing a body of organizing thought and slogans around which people are mobilized for action¹³.

It is imperative for the success of the movement that the ideas which evolve are clear and able to connect the problems with the system while evolving alternative solutions that seem indeed realizable. In Kenya, the National Convention Executive Council (NCEC) had a substantial number of such men of words. Their only problem lay in the fact they seemed to talk essentially for the English-speaking external and middle-class audience. It was only in the later stages of the movement’s maturation that they sought to talk for the constituency whose manpower they needed for their street battles with the state¹⁴. Such lapses spell doom for movements.

The second type of leadership is what Hoffer calls the fanatics, whom he regards as important at the action stage, more so for their skills and temperament. These, he contends, are helpful in hatching and animating the actual movement. It is these individuals who, using the ideology and words of the intelligentsia, translate the ideology into terms that are easily grasped by people under stress. We can equate this crop of individuals to what resistance movements in Africa refer to as cadres. The salience of cadres lies in the fact that they can easily reach the society through their ability to use and talk the language of the people. Thus, how the movement is able to train and pass its objectives to a cadreship and how it is able to convince and motivate them, can determine its capacity to survive especially in environments wrought with repression and duplicity as is the case in Kenya. On this front, the NCEC failed to develop such a cadreship. Yet it is the ability to build cadres that has continued to help groups like the resistance movement in Uganda to undercut its opponents¹⁵.

¹² Erick Hoffer, *The True Believer*, New York, Mentor Books 1958, p 120, See also Lewis M. Killian *Social Movements in handbook of modern Sociology*, Ed. R E L Farice (Chicago: Rand-Macnally, 1964).

¹³ Hoffer *Ibid* p128

¹⁴ See Willy Mutunga p19 -20. According to Mutunga, two contestations seem to take place in the constitutional reform movement, that is the radical, and the liberal components. The liberal and the neo-liberal line sought to emphasize the lawyer paradigms in constitution making, namely the process and procedures that end up in an immensely useful minutiae but which are politically barren. Here, constitution making assumes a narrow project crafting structures of good governance, free and fair peaceful elections, etc. A radical line avoids the nominal form and emphasizes the implantation of reform in the preoccupation of quotidian activities. These included existential issues such as creation of jobs, production and equitable distribution of foodstuffs, health needs, issues of ethnicity, regionalism, racism, religious bigotry and sexism.

¹⁵ Katumanga 1999

The third type of leadership is what Hoffer calls the practical men of action. These are necessary as the movement grows in age and size while attracting different types of elements of the society. The necessity for organization and co-ordination of branches demands certain administrative skills for the increasingly routinized activities. Here, the emergence of a bureaucratic type of skill and organization becomes imperative. Yet, it must be noted, these differentiations are only valuable in terms of the analytical role. As a matter of fact, they are mutually exclusive and where movements have individuals who can merge the three, they have tended to succeed. This is the case of individuals like, Lenin, Mao Tse Tung, Amilcar Cabral, Yoweri Museveni and Fidel Castro.

Another important variable in movements is the constituencies it seeks to attract. Here Hoffer suggests three types of characterizations: The disciples, militant followers and passive sympathizers. They can correspond to the initial cohorts who plot and design the movement. While a movement's success is predicated on the ability of the disciples to work together while submerging their personal differences, egos and ambitions, they also contribute to the failure as a result of the converse. Indeed, movements have been disemboweled by petty and unprincipled rivalries predicated on the pursuit of ambition, ethnicity and opportunism (we shall show how NCEC was unruffled by this and especially how the regime took advantage of such ethnic bigotry, opportunism and unbridled ambition to puncture the wind out of the reform balloon in Kenya.)

Two positions are discernible in discussions on the militant followers. The first one is the orthodox approach that seeks to posit that movements attract psychologically maladjusted individuals, seeking what Sigmund Freud called a crowded cure for their neurotic or psychotic symptoms. Taking this position, Hoffer argues that economic factors play a secondary role in the emergence of movements. He argues that a social movement does not therefore give followers absolute truth or solutions to their social problems. Rather, it merely frees them from their ineffectual selves by attracting them into a closely-knit and exultant corporate whole¹⁶. To Hoffer, mass movements draw adherents from the same type of humanity and appeals to the type of minds. Accordingly, social movements are therefore competitive given the limited number of recruits. The gains of one movement are the losses of another. He also points to interchangeability. Herein, nationalist, religious or revolutionary movements can have individuals transiting to either and this is where their weaknesses lie. First, it is not true that movements merely attract misfits or those seeking Freud's crooked cure. NCEC's ability to mobilize both the middle class and the lumpens in Nairobi points to a totally different picture¹⁷.

¹⁶ Hoffer Ibid p44

¹⁷ See Mutahi Ngunyi's Comparative Constitution Making in Africa - critique of the Kenya process from seven countries, p264 - 271, in Willy Mutunga Ibid, 1999

It is also not true that movement participants are interchangeable to the extent to which Hoffer tries to argue. Indeed, as revisionists point out, movements are a collective response to objective problematic situations than a melange of personally frustrated fringe elements of the society. They indeed contain a wide range of humanity¹⁸. Pointing out to categorizations of representation in movements, Rudolf Herble applies Max Weber's typology of motivation and notes the types as revolving around value rational motivation, traditional motivation, emotional affection motivation, and purposive rational motivation¹⁹.

Under the value rational motivation, Rudolf places those committed to universal sets of values and whose action is dictated by a desire to realize the goal of the value system. Here he places those attracted to ideology or religion and whose joining is rational in the consequence of religious or ideological value system. Traditional motivation on the other hand operates when actors pursue prescriptions of immemorial tradition and seek to defend traditional values and cultures. This is common among nativistic movements.

Emotional affection motivation on the other hand, is closer to Hoffer's account of misfits, while purposive rational motivation revolves around those who seek personal goals such as safety, power and income. There are categories of individuals who join movements less for the ideology or myth, but more for the opportunistic value likely to be derived. These characterizations are important in understanding the levels of commitments and the speed with which movements are unruffled. Yet, it must be noted that the regime types and style of response to a social movement agitating for reforms does influence the mode of contestation adopted by the latter.

2.1 **The Kenyan State that NCEC sought to Fight**

The regime type and response to contestations for an open associational space have over the years not only determined the nature of social movements, but also the modes they use to apply in their struggles against the state. Essentially, social movements have over time emerged in Kenya consequent to economic and political exclusion. Underlying their emergence has been the attempt to pressure the regimes in power for inclusion by mobilizing outside existing social-political institutions or the deconstruction and reconstruction of alternative institutions. While the former has been favoured by moderates, the latter model has been preferred by radical formations. Those controlling the state on the other hand have tended to respond to any such challenges by seeking to co-opt moderates while isolating radicals.

The successful application of this strategy through economic mutation and application of violence has allowed them to not only maintain control over

¹⁸ See Toch, *Ibid Social Movements* p584 - 588

¹⁹ Rudolf Hberle *Social Movements* New York, Appleton Century Crofts, 1951 p95 – 99

the reigns of power, but also sustain its nature. Consequently to the foregoing, the state has remained a contested space, as the leadership and captured institutions have remained incapable of responding positively to social processes. In the colonial period, state institutions and politics had been shaped by the decision of the British government to settle Europeans in Kenya. This decision also had its roots in the attempt by the British government to settle Europeans in Kenya. This decision had its roots in the attempt by the British treasury to have the Ugandan railway pay for its existence through revenue accruing from settler agrarian activities. The success of this scheme entailed the setting up of social-economic, legal and political institutional dispensations that could undergird European agrarian production at one level, and state extraction at another.

Thus, to compel Africans to work for European settlers, a primitive legal regime made up of laws such as the Outlying and Contiguous District Ordinance and Special Districts Administration Ordinances Act, had to be put in place. These Acts were used to restrict and monitor movements. To augment their effectiveness, labour and taxation laws were promulgated. At the core of this was the *kipande* (pass), which was used to monitor and regulate the movement of African labour deserters. Complementary to this, labour reserves monitored and administered by African chiefs were established. They operated within the ethnically defined framework that constituted the District boundary (Von Zwanenbert 1975, Ghai Mac Auslan 1970). Agents selected for these roles were those who could deploy violence effectively to facilitate the realization of the colonial states' objectives. In the end, there emerged high forms of centralised despotism that reproduced violence mediated by Africans themselves (Mamdani 1996:37).

This state construction germinated socio-economic and political institutions that favoured Europeans and Asians to the detriment of Africans. It engendered the evolution of a dual economic system in which islands of capitalist modernity co-existed parallel to the pre-capitalist traditionalism. This not only worked against rational institutional integration, but also fostered the logic of exclusives and favoured inimical to capitalist development. Henceforth, groups would seek to capture state institutions of power as a means through which they could not only access resources, but also wage punitive wars against their perceived opponents.

In the second realm, the padlocking of ethnic groups prevented the evolution of a nationhood feeling. Without freedom of movement and association, political organisation was curtailed. This then spawned the desire for not only grabbing but also retaining a sustained control. In the rank of the excluded lay pent up frustrations that also reproduced ethnic identities that facilitated the reproduction of perverted institutions.

It is in this state of violence and politics of economic marginalization that midwives pioneer social movements. Their objectives were two-fold: that is to ameliorate the rigors of the colonial labour system, and to preserve their imperiled tradition. Their modes of contention were mainly through petition to the colonial regime. Indeed, in their nascent moments, they sought inclusion in the mainstream social-political dispensation. However, when these demands were rejected with no corresponding institutional and programmatic responses, these groups assumed a much more militant

profile. Instead, they organised outside mainstream institutions and indeed sought to reconstruct their traditional values, which the colonial regime had perverted. Core among these groups were the Kikuyus *karinga* (authentic Kikuyus) among the Kikuyu, and the Dini ya Msambwa (traditional religion) among the Abaluhya and Pokot of western Kenya and North Western Kenya respectively.

The core rallying cry of these movements was the discretion of their tradition by European values and religion, and the Kikuyu alienation of their land. Kikuyu *karinga* not only protested the banning of female circumcision but also went ahead to set up their own independent schools.

Salient in these movements were their models of organisation. They evolved an ideology that sought to counter colonial hegemony while de-legitimizing the Christian religion as articulated by missionaries. They successfully recreated the Old Testament theology and infused it with the African creation myth and religious beliefs.

They pointed to the robbery of their God given land and the construction of an exclusive system and thus sought to legitimize any form of struggle that would reverse this trend of things. In this initial stage, rejectionism and reversion was deemed an appropriate options. Their hymns foretold of the coming deliverer. It is this mode of legitimization built around a felt sense of injustice that found resonance in many of their followers. It was thus not strange that groups like Dini ya Msambwa could manage to cut across ethnic groups²⁰. Their modes of expression, through traditional vectors such as songs and traditional circumcision, most of which were exclusivist (they excluded the Christian converts), ensure that they organized successfully outside the colonial state and its structures. In any case, besides more violence mediated by chiefs, the colonial state's penetration of the society was limited, given the span the chief was expected to monitor.

The colonial regime responded to this challenge by bypassing fighter controls on organization registration, and carrying out of rituals of activities such as oathing. The promulgation of the Chief's Authority Act, which granted powers to chiefs to monitor and control traditional dances, ceremonies, brewing of traditional liquor was critical.

Most social movements responded to this shrinkage of the associational space by continuing to organize more discreetly. Informal social groups emerged to assume salient roles as important arenas for political activism. Such groups like the **Riika ria Forty** (the age group that got circumcised in 1940) were later to provide the initial organising base for the remedial movements, like the Mau Mau. On the other hand, the shrinkage of associational space further reinforced ethnic differentiation, a process that assumed further polarization as the Mau Mau resistance emerged. At this point, we must pose to observe that the migration of traditionalist from

²⁰ Luhya origins into Pokot areas where the latter's grazing fields in parts of Trans Nzoia had been grabbed by colonial settlers.

mainstream churches and their eventual marginalization at one level, and the absence of organised political articulation, forced mainstream churches to emerge as mouthpieces and essential components of legitimate politics (Through 1994). However, this is not to argue that the church was homogeneous in nature or that it could escape ethicization. Essentially, it was polarised around the official church (the Anglican) and Catholics divide. This divide was further reinforced by the differentiated predominance of given denominations in certain areas. Henceforth, the church was forced to reflect the ethnic tendencies predominant in their areas of residence.

Continued marginalization, for eviction of Kikuyu squatters from Olenguroini settlement area and exclusion of war veterans from the state institutions, led to increased oathing and eventually armed resistance against the state. This had the objective of bringing to an end the colonial state and reconstituting the state along de-recialized lines. The colonial regime's responses to this new threat were threefold. These were both institutional as they were pragmatic. At the military level, it forcefully sought to counter the guerrillas through the detention of GEMA²¹ nationalities and a vigilization programme that locked off the villages. These went hand in glove with the increase of the level of British troops brought in to combat the former.

At a political level, it sought to institute minimum institutional and political reform programmes. These included well-organized schemes that locked out the radical elements as the state was put on a constitutional road map. District based representation was allowed and followed up by political inclusion through the Legislative Council.

At the economic level, the Swyneton programme was put into place. This instituted minimum agrarian reforms that allowed for land consolidation and the parceling out of the same to loyalists. It was assumed that allocations would produce a pliable land class with interests identical to those of the British and to whom power could be safely handed. Such a hand-over process would ensure that colonial interests were safeguarded in the post independence era. It is thus in this context that political actors in the Legislative Council went to the Lancaster House Conference to negotiate for independence. It can be argued that, while Lancaster was seeking to negotiate the future institutional and political dispensation, a sizeable voice of the Kenyan public was excluded. This exclusion ensured that those who sought the maximum programme of political change, that is, redesigning of the state's institutions especially its agrarian and economic formats, were excluded with their mission.

Given the little time representatives were given to organize, most tended to reflect ethnic interests of the delegating nationalities than national interests of the state, whose independence they had gone to negotiate. Indeed, the whole logic of flexing ethnic muscles as a bargaining chip for key positions

²¹ Gema national include the Gikuyu, Embu and Akamba

in the soon to emerge political space was in line with the attempt of the elite to reproduce itself and its own position by promoting ethnic politics (Ngunyi 1998).

The elite later perfected this through the harambee system²². In other words, instead of the Lancaster Conference providing a milieu through which a new form of design for the nation could be engendered, it instead constituted the base within which further seeds of suspicion and politics of exclusion were reproduced and reinforced. Actors did not negotiate in good faith to arrive at a consensus. They were bullied and were in turn forced into signing a cease-fire document whose main winner was the British government²³. The main contentious issue at Lancaster revolved around the land question and which institutions of the post-independence state would best safeguard the interests of the so-called minority groups. In other words, it was not about resolving the squatter problem but the fencing of certain nationalities to protect the interests of mainly the nouveau landed elite. Equally contentious was the nationality question. This was characterised by concerted attempts made by the Somali nationality to opt out of the state. When this was rejected, they opted to wage war against the state.

In the end, the colonial state structure remained near intact, except that the actors had changed. The spirit of marginalizing opponents was inherited afresh as the state sought to route out the radical voice from its midst using constitutional and extra legal methods. However, unlike in the colonial state whose exclusion was racially defined, this one was ethnically defined.

2.2 SOCIAL MOVEMENTS IN THE HARAMBEE AND NYAYO STATES

Kenyatta²⁴ had been forced to accept a quasi-federal system. He and his colleagues in the Kenya African National Union (KANU)²⁵ thus swore right from the onset to deconstruct it and replace it with a unitary system. Underlying this drift to centrism were challenges his regime was facing from the onset. These ranged from Somali irredentism to the re-emerging radical within his ruling party KANU. In addition to these threats, centrism was meant to create an environment conducive to the economic growth model the regime sought to institute.

It not only dismantled the quasi-federal system, but also adopted colonial legal instruments and laws, such as Outlying District Act (cap 104), Special

²² Self help financial contributions for infrastructure development. This institution was later appropriated by state and deployed at one level as a vehicle for extracting taxes from peasants form rural development and as a means through which alternative political voices could be bastardized.

²³ It has managed to successfully disengage itself out of Kenya while safeguarding its interests by handing power to a friendly elite.

²⁴ The first president of Kenya

²⁵ Its main support base was among the Gema and Luo nationalities.

District Act (cap15), Public Order Act (cap 56), Preservation of Public Security and Chiefs Authority Act (cap 128). With this, the state was able to maintain its grip over the associational space. In addition to this, the state sought and succeeded in muzzling both the opposition, which it banned in 1969, and the trade union movement. The latter was achieved through the Trade Union Disputes Act which illegalized industrial action at one level and the unification of unions in to the umbrella of Central Organization of Trade Unions (COTU) whose leadership it had to approve (See Goldworthy 1985).

Kenyatta completed the centralisation process through the Constitution Amendment Act no. 16 of 1969. This not only allowed him to control the civil service²⁶ (making it directly accountable to him), but also local government (whose main functions were transferred to the central government). Thus, with a re-strengthened provincial administration, the Kenyatta regime was able to establish control over regions. The regime monitored and controlled the registration of associational organizations like co-operatives, through the Societies Act.

The centralization of power provided an environment germane to accumulative activities of the GEMA elite to the detriment of other nationalities. Indeed, the failure by the state to create institutions that could evolve independent capitalist development resulted in the capture of formal institutions of power as an apriori condition for facilitating access to resources necessary for advancing the interests of those outside the formal realm of power. It is this resultant marginalization that has influenced future factional struggles in Kenya. Not only were institutions ethnicized, but that they were also perverted, making it hard for them to deliver social values. The resultant violence spawned the "what is in it for me" and "this is mine" logic, detrimental to national integration.

Indeed, literature on the political economy of Kenya points to the lack of common ideology of accumulation by elite factions²⁷. It demonstrates the presence of accumulators much more than purposeful entrepreneurs. The patrimonial orientation is at the core of the "success" of various factions at a given time. By inference, utilization of state structures to contain opponents not only demonstrates the presence of patrimonial capitalism, but also explains the delay in the emergence of a Weberian state in Kenya. Notably, inclination towards perverting institutions is geared towards providing insurance to various factions of the elite. The net impact of this is the unpredictability, arbitrariness and the brittleness of state politics in Kenya.

²⁶ Odhiambo Mbayi 1999. <The nature of Public Policy Making in Kenya, 1963 - 1996, in Ng'ethe/Owino (ed) from Sessional Paper No. 10 to Structural Adjustment. Towards Indignizing the Policy debate. > Institute of Policy Analysis and Research (IPAR), Nairobi

²⁷ See Steve Langdon (1981), Raphael Kaplinsky (1980) Colin Leys

Emergent laws are meant to service the interests of an exclusive group and thus from the onset, spawned the logic of exclusivism in which laws and subsequent constitutional amendments were not meant to build an inclusive state, but rather to reproduce and reinforce structures of state control. Worse still, given the fact that most of the post-independence leadership was socialized in this rule inconsistent politics that celebrated the denigration of laws, they have tended to see institutions of governance as an extension of the "strongman".

The Kenyan State has in essence remained a contested space. Those who capture the state seek to barricade themselves and their economic interests to fend off opponents while preying on any alternative and independent sources of capital. Since the state rose and has sustained itself in the entices of elite conflict, it remains at any given historical moment, an instrument of the dominant functions of the elite. In this context, institutional changes have been pursued and used for exclusion. Those left out of the state have continued to strive to capture the state to reverse their fortunes hence the nation state crisis. Fundamental cleavages in society thus cease to be those between one social group and another, and instead become those between factions in the ruling elite. Given the foregoing therefore, the Kenyan State is nowhere near the weberian State.

It is in this context that social movements were pulverized in the *Harambee* state under the onslaught of ethnic and accumulation logic. While the reconstituted land freedom army was vanquished in the initial years of independence, the next armed social movement, the Northern District Frontier Liberation Front (*Shifta*) was militarily vanquished. Where threats to the state were manifested through individuals, they were either dealt with by assassinations²⁸ or detentions, thus curtailing the possibilities of organizing social movements. Those that survived after being banned were the milineriam type movements such as Dini ya Msambwa. Their continued operation after proscription was informed by the fact that they no longer constituted a credible threat to the state. Ethnicization of the church meant that the only alternative opposition was the academia.

Among the most prolific social movements that stood out in opposition to Kenyatta's economic policies and the nature of the state, was the Kamiothu theatre group. However, it was not long before the state clumped down on this too. It also detained Ngugi wa Thiong'o²⁹ (Mutunga 1999:3). An equally prolific oppositionist social movement then was the University Academic

²⁸ Among those assassinated as a result of elite power struggle were Pio Gama Pinto (1965), Tom Mboya (19169), Argwings Kodhek (1966) JM Kariuki (1975), See Goldsworthy.

²⁹ It was Ngugi wa Thiongo who had organized peasants of Kamiaothu into a prolific anti-state theatre group.

Staff Union (UASU), which stood out in opposition to the regimes economic and pro-western foreign policies.

Ethnically defined economic marginalization (that favoured certain factions of the ruling elite) political exclusion and violence, animated the ethnic question. This was made buoyant by the imminent death of Kenyatta. Given that opposition within the state had been stamped out and that the only alternative institution for doing politics, the Kenya African National Union (KANU), had been muzzled up, the succession question was not only animated but also played out in ethnically charged public rallies. It was hoped that this would generate popular support for a parliamentary resolution to bar the vice president from acceding the presidency. Hopefully then, this faction in power would entrench itself. Indeed, it is an attempt to stamp out their opposition to this capture of the state that other nationalities put their support behind the then vice president.

The death of Kenyatta facilitated Daniel arap Moi's take over as acting president. Once confirmed in his position, Moi sought to entrench his regime by stamping out opposition from among those who had stood in his way to succession. This meant the continuation of the logic of exclusion. For starters, he sought to reverse the gains of the Kenyatta elite. Having taken over power in a political milieu without a strong capital base, (on which to build its own patron-client network), in addition to a shrinking frontier of economic opportunity, attempts to deconstruct the Kenyatta elite meant robbing Kamau to pay Patel (See Ny'ong'o, 1996). This merely generated the basis on which initial opposition to the new regime began to emerge. The entire process encompassed the reconfiguration of existing financial, legal, political and administrative institutions. These had the effect of augmenting the already strong presidency and thus transforming Kenya into a personalized state.

In the legal framework, the Constitutional Amendment Act No. 7 of 1982 was passed to legalize the one party state. Personalization was further enhanced by Constitutional Amendment Act No. 14 of 1986, which removed security of tenure for judges of the High court, the Attorney General, Controller and Auditor General. This, in effect, made holders of this office beholden to the president. The next effect of these amendments was that of undermining not only institutions of accountability, but also those law and order and by extension, the entire legal framework that had sought to protect freedom of expression, association, representation and movement. The entire logic of ethnicity took further entrenchment. It increasingly evolved into a political ideology manifesting itself not only in slanted predominant recruitment of administrators from certain ethnic enclaves and the removal of others, but also through increased ethnic consciousness. The fact that it was intertwined with state power generated the strong sense of "we", and "they" as the villains outside.

Not even the increased level of corruption or repression would engender the unity of purpose among excluded elite. Underlying this was their mode of

articulating and organising politics. None tried to defy the state to mobilise the people. If and when most of these elite expressed their position, they did so in a manner suggesting that they sought to perpetuate the logic of ethnic exclusion by replacing the incumbent with themselves. The only credible threats against the regime thus emerged from the radical left wing lecturers of the university, church and the umbrella organisation of the legal fraternity.

The intelligentsia had kept up the pressure against the regime through its mouthpiece, the UASU. In a bid to embrace other sectors (students unions, and other workers) UASU remained itself a university staff union. It articulated the terms and conditions of service of staff at the university, interests of students, added a voice against foreign military bases in Kenya, the state's economic policies and the overall state of governance in the society. The fact that it went out of its way to organize other workers and university students made it a potent threat to the state, which refused to register the union (See Mutunga 1999:3). The modes of articulation of the intelligentsia were mainly through public allies at the university, and street demonstrations by students and lecturers of the university.

These essentially failed to spread out to embrace the general public. This can be attributed to the fact that the opposition to governance was not geared towards taking over the process, but merely to provide alternatives on how this ought to be done. The state's response to their attempt at delegitimising its policies was through mass crackdowns, characterized by closures of universities, detention and jailing of lecturers and students³⁰.

These movements then responded by going underground. Their objective changed to that of seeking to overthrow the regime by armed means. The first formation in this setting was the December 12th Movement³¹. It set up a mouthpiece known as *Pambana* (struggle). DTM was preceded by *Mwakenya*, which articulated its positions in *Mpatanishi* (the reconciliator).

Both movements failed to evolve a serious leadership that could organise and lead an underground movement. They failed to train military and political cadres. Their core leadership remained marooned in Europe and were thus unable to provide a leadership informed by actual existential experiences in Kenya. Worse still, they failed to set up credible organizational structures through which they could organize and mobilize the masses in the liberation struggle. It is indeed partly due to this immaturity that most of their activists were rounded up, tortured and jailed

³⁰ Among those detained were Dr. Willy Mutunga, Prof. Alamin Mazrui, Dr. Mukaru Ng'ang'a, Prof. Edward Oyugi, Kamaji Wachira (these were also UASU officials). Students jailed in this period include the late Titus Adungosi, Wafula Buke, Mwandawiro Mghanga.

³¹ December, 12th was named after the day Kenya gained independence, which apparently was betrayed on the same day.

between 1986 and 1987 (See the Weekly Review). With underground social movements, only the church and the constitutionally mandated Law Society of Kenya remained to articulate an alternative voice against bad governance, corruption and human rights abuse.

3. THE REBIRTH OF THE PROTEST MOVEMENTS

The rigging of the 1988 general elections not only reinforced discontentment towards the Nyayo regime, but also created a situation in which many excluded elite found themselves on the same side against it. Underlying this "unity" of purpose was the fact that their economic and political survival became intertwined with the removal of the Nyayo regime. Notwithstanding this, the process of organizing policies to generate a united front still evaded them given the high levels of ethnicization of the political realm.

However, events at the external and internal milieus helped to reinforce some "unity" at the external level: the end of the cold war ensured that the Nyayo regime would no longer count on western support for financial, political, military and regime legitimization. Kenya's erstwhile friends instead called for economic and political liberalization. These had a net effect of not only legitimizing but also emboldening those opposed to the regime.³²

However, what galvanized the masses against the regime was the assassination of the then Minister for Foreign Affairs, Dr. Robert Ouko, in February, 1990. The state was rocked by spontaneous demonstrations against the regime. Yet, as long as these demonstrations could not be canalized into a effective movement of opposition, the regime remained firmly secure though shaken. It lacked an organized leadership, ideology and structures. This is what Kenneth Matiba and Charles Rubia³³ attempted to do when they not only called for the right to form alternative parties,³⁴ but went ahead to state their intentions of holding a *kamukunji* (a public rally of defiance) at Kamukunji grounds. Both Matiba and Rubia were immediately detained. Yet, this did not stop people from turning up for the rally on 7th July, 1990.

The *Sabasaba* (7th July) spirit was taken up by the Forum for Restoration for Democracy (FORD)³⁵. FORD was an attempt by young radical lawyers to

³² As a matter of fact, the American ambassador in Nairobi, Smith Hempstone provide moral and material support to the regime opponents who took refuge in the embassy in Nairobi.

³³ Both Kenneth Matiba and Charles Rubia had been ministers in Moi's cabinet before resigning.

³⁴ Such calls had been made by reverend Timothy Njoya on his 1990 New Years eve delivery. Jaramogi Oginga Odinga had even gone ahead to attempt to register an alternative party known as National Democratic Party, but had been denied registration.

³⁵ Headed by Jaramogi Oginga Odinga, Masinde Muliro Martin Shikuku, and Ahmed Bamariz.

beat constitutional requirements that demanded permits to hold rallies. FORD sought to organize an umbrella national alliance and hence its decision to turn to seasonal and highly popular oppositionists who had been shut out of the system but who still carried popularity both at national and ethnic level.

FORD's model managed to beat state obscurantism, but failed to evolve an organizing ideology at its formative stage. It indeed sought to counter the states ethnic logic by ethnic coalition formation. This strategy failed due to the fact that such vertical organization spawned ethnic fears, while failing to evolve a horizontal unifying dynamic. Indeed, the ability of the Nyayo regime to survive has been built around that expression and vertical polarization around ethnic lines, even though this is expressed in nationalistic economic terms hence its appeal to the broad section of the elite.

FORD's agitation's for reforms and indeed its decision to defiantly hold another *kamukunji* on 16th November, 1991, forced the regime to concede to reforms. The state responded by repealing Section 2A of the constitution through the Constitution of Kenya Amendment (2) Act No. 12 of 1991. This seemed to reinforce the constitution of Kenya Amendment Act of 1990 which had restored the security of tenure to judges of the High court, Chief Justice, Attorney General, the Controller, and Auditor General.

The impression that the regime was now embracing reforms was short lived when it instituted other crucial amendments to the constitution that sought to shield it from any possibilities of losing the impending elections. For instance, in July 1992, it introduced the 25% rule in the election of the president, demanding that each candidate acquire at least 25% of the votes cast at least in five of eight provinces, in addition to garnering a simple majority. It also amended Standing Orders of the Parliament, thrusting more obscurantism powers to the Speaker of the National Assembly. The regime used the public media to animate ethnic animosity and indeed instituted ethnic clashes that engulfed areas inhabited by opposition communities. This had the net effect of displacing over 500,000 people and the death of another 1,500. It seemed apparent that the only reforms the regime was willing to institute were those that did not threaten its hold onto power. In other words, while overtly professed to have embraced reforms, it in practice continued to practice politics in a manner inimical to the politics of pluralism.

The reaction of the regime opponents to these schisms was even worse. They failed to crystallize a national agenda within a well-organized political front. Instead, they rushed into forming political organizations that reflected their ethnic power base, hence reinforcing the polarization that was increasingly emerging in the political realm. This rush to seek registration in preparation for elections (which each actor believed they would win), without seeking to reform the state, worried most of the activists in the civil society and the church. Most of these activists had campaigned for far-reaching political and agrarian reforms. The excluded politicians had campaigned for a

system that would facilitate not only their inclusion but also their capturing state power. It is these divergent interests that laid the ground for the regime's manipulation of the opposition.

THE EMERGENCE OF NCEC

Attempts towards putting into place an institutional framework for pluralism prior to the elections were initiated by the National Council of Churches of Kenya (NCCCK).³⁶ Its central objective was to bring out opposition unity among the fast fragmenting opposition formations. For civil society organisations invited to the NCCCK symposia, the core issue at hand revolved around the release of political prisoners, and a national convention to debate a new constitution, the Coalition for National Convention (CNC), emerged prior to the second symposia with a view to mobilizing for a national convention from the effort of the Kenya Human Rights Commission (KHRC) and the Release Political Prisoners (RPP) pressure group. KHRC and RPP were later joined by the National Union of Kenyan Students (NUKS), Restoration of Workers Freedom and Rights (RWFR), the Kenya Exiles (KE), the Kenya Ex- Political Prisoner Organisation (KPPO), the Student Organisation of Nairobi University (SONU), the Matatu Vehicle Owner Association (MVOA), Kenya Youth Foundation Movement (KYFM), the Policy Advisory Foundation (PAF) and the February 18th Movement (FM)

Underlying the initial weakness of CNC was the fact that most of the constituting organizations were actor driven with limited registered numbers.³⁷ Few of them had done any actual mobilization in the society as the political space began to open. Thus, from the onset their agitation for a convention was predicated on the ability to woo dominant political formations to take up the reform agenda. Given the divergent interests being pursued by both the civil society organizations and the political formations, the latter could not be convinced to have a convention prior to elections. This failure stemmed from the fact that the emerging coalition of elite factions that had formed parties strongly believed in the ability to defeat the ruling party KANU. Like KANU, the opposition then did not see the constitution making process as a rational, desirable and feasible activity to engage in. Indeed, far-reaching reforms were as much a threat to them as they were to the regime with respect to their capacity to hold onto or capture state power. Fifteen of these organisations reconstituted themselves under the umbrella of the Kenya Human Rights Commission with a view to beginning the agitation for a new constitutional dispensation after elections.

³⁶ NCCCK organised two symposia for this purpose

³⁷ Most of these organizations had been hurriedly formed to take advantage of the expanding associational space. These was also a question of compatibility between those led by former leftist intelligentsia and those led by conservative forces that had been radicalized by agitation for reforms.

Their efforts were animated by the renewed calls for a new constitution by the Roman Catholic bishops and the Church of the Province of Kenya (CPK).

Taking up the challenge by the catholic bishops, the KHRC commissioned a constitutional lawyer to draft a model constitution, believing that such a model would form a basis upon which mobilization for a new constitution could be carried out. Consultations around the model constitution facilitated the formation of the Citizens Coalition for Constitutional Change (4Cs). To evade the government requirements for registration, 4Cs operated as a programme of KHCR and the International Commission of Jurists (ICJ-Kenya Chapter). It set up a secretariat with a steering committee of 42 members representing trade unions, student unions, NGOs and interest groups. 4Cs efforts to move the constitutional process remained basically paralyzed due to two factors: the inability of its constituting members to mobilize their members, and the over-dependence of 4Cs on the political formation to mobilize the public for reforms. Worse still, its preoccupation with the institutional aspect of the constitution that had little resonance in the mind of the public meant that it would not be able to mobilize the majority of Kenyans.

Factional fights within political formation³⁸ on the other hand ensured that neither would seriously offer any credible opposition to the ruling party KANU. Indeed conscious of the fast approaching second cycle of the re-introduction of pluralism, each faction began to legitimize itself by embracing a reform agenda, while seeking to isolate other factions³⁹, making it impossible for them to realize the requisite unity needed for confronting the state. Political formations' ability to organise a convention was constrained by their lack of requisite capacity and financial resources. They were thus forced to operate under the auspices of civil society organizations.

Notably, the society coalition under the 4Cs umbrella outlined what became known as the constitutional reforms. These were thought to be necessary for purposes of engendering any future free and fair elections. This included the reforms of the Electoral Commission, especially Section 41 and 42A of the constitution to allow for the control and check-in measures of the nomination of the Electoral Commission members. Minimum constitutional reforms also called for the removal of the 25% rule, amendment of the

³⁸ We refer to associations that emerged and sought to present themselves as political parties. We prefer the term because their modes of organisation, structures, leadership style reflected what can be termed as formations. We conceptualize political parties as organizations that go beyond mere political formations, through evolutions of an organising ideology. Parties set structures and evolve a leadership that is committed to taking up power. They are assisted in this through mass education of the public and organisation. More so, they must seem to go beyond the whims of an individual actor.

³⁹ Two, across the board coalition of various political formations emerged. National opposition alliance was made up of pro-Wamalwa Kijana MPs of FORD Kenya, Pro-Martin Shikuku MPs of FORD Asili and MPs of the Democratic Party. Solidarity Alliance was made up of Pro-Raila Odinga MPs of FORD Kenya and Pro-Matiba MPs of FORD Asili.

constitution Section 15, 16 and 19 to allow for formation of a coalition government, repeal of the Public Order Act (Cap56), Chief's Authority Act (Cap128), NGO Coordination Act (Cap 19 of 1990), Societies Act (Cap 108), the Penal Code (Cap 63), Preservation of Public Security Act (Cap 57), National Assembly and Presidential Election Act (Cap 107), among others .

This cocktail of reforms Acts was basically election driven and meant to provide a framework around which opposition parties could rally in a bid to compel the regime to institute reforms. However, instead of facilitating unity of purpose among the political formations, the entire reform agenda soon became a source of further polarization. Underlying this were attempts by each of the coalitions that had emerged to sideline and outmaneuver each other. But while the various opposition factions sought to legitimize themselves by monopolizing and owning the constitutional reform agenda (in preparation for the approaching elections), 4Cs and other civil society actors stood against this exclusivist model. 4Cs seemed to understand that without a united coalition of societal forces, the reform agenda would still remain illegitimate to the public. These in turn would make it easy for KANU to wriggle out of such efforts. Consequently, 4Cs opted to organise for a wider process by inviting a wider cross-section of interests to a consultative meeting on 31st May, 1996⁴⁰. It is this session that constituted itself into the National

Convention Preparatory Committee (NCPC). NCPC hoped to engender an inclusive process built around collective interests pertinent to the Kenyan society.

The management and control of the convention was to be delegated to credible persons to ensure neutrality, confidence and acceptability of all stakeholders. A panel of four convenors and a secretariat were established. The convenors were to come from the National Council of Churches of Kenya, the Episcopal Conference of Catholic Bishops, the Supreme Council of the Kenyan Muslims, the National Status of Women / *Maendeleo ya Wanawake*, while the fifth convenor was to be nominated by the 4Cs and the National Council of NGOs. NCPC's task entailed the drawing up of minimum constitutional legal and administrative reforms (that would constitute the framework around which reform agitation would be built prior to the general election of 1997), proposing means and strategies for attaining this minimum agenda, suggesting the methodology for holding the convention to deliberate comprehensive reforms, proposing modalities for participation, drafting a programme for the convention and drawing up the time frame for holding the same. In the initial stage, NCPC received

⁴⁰ Those who attended included representatives of political formations, Human rights organizations, students unions, representatives of the National Council of the Status of Women. KANU did not turn up even though it had been invited. A total of 32 delegates attended the NCPC meeting. For details, see, Mutunga Will, *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992 - 1997*, SAREAT - Mwengo, 1999, Chapter 6

grudging support from all political formations⁴¹. It must also be noted from the onset, that even though the organisations sent individual delegates to the NCPC, little attempt was made to mobilise the constituencies from which they had come for this process. The tendency was thus that of individuals speaking more for themselves than the organisations they claimed to represent.

Despite the fact that NCPC had slotted two convenors for the church organisation, it is only the Methodist Church that took up constant presence, while the NCK and the Catholic representation remained lukewarm. The labour movement and the Federation of Kenya Employers (FKE) refused to join completely. Several factors explicate the reluctance of the labour sector from participating in this process. Foremost of this was the absence of organised independent labour movements, thanks to the 1965 Labour Amendment Act that emasculated trade unions in Kenya. This Act had the net effect of demotivating the business community to clamour for property rights, protection of investments and the institution of a lesser state. On the other hand, the alliance between the sector and the government that enabled businessmen to gain access to bureaucrats in the Treasury and the Central Bank, thus influencing budgetary policies in their favour, constrained the former from pursuing any policies that would seem anti-government. This was not withstanding the fact that the state was not necessarily pro-business *per se*, but certain supported elements in the business circles. An equally not so less a factor, is that the business sector is dominated by multinational corporations and Asians who are not disposed towards the reform process itself.

The reluctance of the Catholics and the CPK bishops to take active participation was predicated on their false perception that they could be called upon to act as neutral arbiters of the stalemate between the opposition formation and civil society on one side, and the government on the other. The religious leaders had been led into this decision by the regime, through its divide and rule tactics. These had all through been aimed at preventing any unity of purpose between the religious sector and the opposition. As a result of constant meetings between the president and the bishops, they pointed out their intention to participate in the NCPC activities as observers.

With the support of finances from Westminster Foundation, NCPC successfully managed to hold the first national convention in April 1997. In attendance were all opposition leaders, except those of Solidarity Alliance, led by Kenneth Matiba and Raila Odinga. The NCK and the Catholic Episcopal Conference opted to send observers. They contended that they were in the process of organizing an inclusive convention that would include

⁴¹ Among those formations that provided both financial and actual political support was Safina party, whose leadership kept NCPC secretariat financially afloat.

all sectors of the political spectrum (Mutunga) Ibid:133⁴². The basis of initial discussions was the 4Cs minimum constitutional reform agenda, which had been adopted by the NCPC at Limuru on 15th November, 1996. This meeting had expanded to include Films and Stage Act, Plays Act, Public Collection Act, Election Code, resettlement of ethnic victims, prohibition of illegal presidential degrees on elections, prevention of provincial administration from interfering with the electoral process, release of all political prisoners, registration of unregistered parties, replacement of the 25% with the 50% rule. While this election driven reforms agenda seemed to excite political parties, it did not attract much support from most Non Governmental Organisations (NGOs) and youth constituencies that assembled in Limuru for the first National Convention. The youth especially called for the adaptation of resolutions calling for maximum constitutional reforms. That is, an actual constitutional overhaul and the restructuring of the state, especially its resource and productive factors. The political formations rejected this option outright, arguing that there would be no time for such a wide range of changes when more platforms were added.

These included, provision of water, infrastructure, and end to insecurity in North Eastern District, de-politicization of food distribution, repeal of Outlying Districts and Vagrancy Acts, creation of job opportunities, an end to harassment of squatters and hawkers and an end to land grabbing. It is this National Convention Assembly that transformed the NCPC into its Executive Arm, henceforth referred to as the National Convention Executive Council (NCEC).

The NCEC on the other hand, has a management committee, which is answerable to the council. It also has standing committees on credentials, technical issue, finance, implementation, task forces and a secretariat. The secretariat on the other hand is composed of an acting co-ordinator, secretary, and volunteers. The NCEC equally has a chief spokesperson. The NCA, being the main decision-maker, mandated the NCEC to ensure for the establishment of a new constitution in the country. Fundamental to this was the need to pressure the government through mass action if need be, to realize these objectives. NCEC was also expected to organize seminars and consult with other interested sectors of the public for the same, research and development of alternative proposals on public bills relating to constitutional reforms issues, and organize public rallies for information dissemination purposes.

5. THE NCEC AND THE STRIFE FOR CONSTITUTIONAL REFORMS

NCEC's first rally on 3rd May 1997 was preceded by intense council discussions on how to approach the regime and the public with respect to conventional resolutions passed at Limuru. Indeed, the council appeared divided into two camps; there were those who believed that the council

⁴² Mutunga observes that the church's initiative for an alternative convention was encouraged by foreign interests threatened by new forms of politics. Mutunga Ibid: 134

should proceed to call a public rally at Kamukunji in line with the demand by the National Convention Assembly mandate without any reference to the regime. The opposing camp felt that there was need to seek a permit from the state. Eventually, the consensus was that seeking such permits legalized the illegality of the Public Security Act, which the regime had been using to curtail freedom of association and assembly.

However, underlying the push for a defiant opposition against the regime, was a section of the NCEC which had gone through 4Cs sessions on the zero option. The thrust of the zero option model was that constitutional reforms are a consequence of a crisis. In the Kenyan context, given the fact that there existed no crisis, the regime did not perceive the process of constitution making as rational, desirable and at all tenable undertaking. In any case, it had a wide latitude within which it could wriggle out of the process. Thus, reform movement needed to engender a crisis that would not only narrow the regime and elite's latitude of maneuver, but that would also force them to see the constitution making process as a rational, desirable and tenable endeavour. The underlying argument carried by the 4Cs brigade was that as long as there was no crisis, the regime appeared legitimate in the public realm. It had to be engaged directly to not only demystify it, but also delegitimise it through its likely violent reaction to defiance.

It was hoped that through defiance, the public would understand not only the type and nature of regime that ran the state, but that the issues under contestation would also find resonance in its "mind". Equally the 4Cs brigade hoped to lock the elite in the regime and outside the constitutional process, while at the same time attempting to bring about a consensus on the need for reforms. The regime's reaction to the May 3rd meeting was violent. The paramilitary forces were unleashed in their thousands on citizens who defiantly turned out at the Kamukunji grounds. In the end, NCEC achieved more than it had expected. It had achieved this in counter opposition to some of the opposition leaders who thought they owned ethnic crowds and some religious leaders who believed their moral authority would not only dissuade the public from turning up for the rally and in this manner, thrust them on the pedestal of the process of reform. By defying the regime, it delegitimized it in the "mind" of the public. On the other hand, it forced the elite both in and outside the regime to seriously review their position on constitutional reform. Indeed, for the opposition, constitutional reform became an agenda each sought to identify with. Their mistrust of each other allowed the civil society intellectuals to continue to manage the process. Henceforth, the organizations of public defiance would be organized by the taskforce.⁴³

Notwithstanding state violence, the NCEC went ahead to call for a second mass action rally on 31st May following the state's refusal to enter into dialogue on constitutional reform. This rally was held at Central Park,

⁴³ This was chaired by John Muvu, a former student leader in Nairobi University before he was forced into exile in the early 1980s.

Nairobi, on 31st May, 1997. The decision to hold this rally on the 31st of May seemed as a consensus aimed at placating the sections of the NCEC that were opposed to holding a parallel rally on 1st June, (Madaraka Day). The decision to hold the rally in the town center was driven by the need to force Nairobi's business community into embracing constitutional reform that they had shunned all the way through. In the resultant rally, two people were shot dead by the paramilitary General Service Unit (GSU). In protest to this violence, and as a follow-up to this rally, the NCEC called for the disruption of the national budget reading, should the government refuse to initiate constitutional reforms. It called on Kenyans to turn up in large numbers on the budget day (19th June, 1997), in a bid to prevent its reading and passing. NCEC contended that the reading of the budget was illegal to the extent that the state had over the years continued to read budgets without tabling its expenditure statements.

NCEC equally contended that by refusing to institute reforms, the regime lost the legitimate right to table budget estimates. By taking its debate into the August house, the pro-reform movement had several objectives in mind; that is, to put the debate not only before the Kenyan public and to the president himself, but also to the entire world, (represented by ambassadors accredited to Kenya.)

Secondly, it aimed at demonstrating to the nation at large and the diplomats assembled that the president was not in charge of the political process as he pretended to be. In a bid to respond to threats of disruption by the NCEC, the state privatized its violence by not only garrisoning Parliament, but also by hiring private thugs to prevent pro-reforms crowds from assembling at the sealed off Parliamentary precincts. Hence, for the first time, a private vigilante group known as *Jeshi la Mzee*, (the Old Man's Army) was unleashed on the public at the Parliamentary precincts. But while the state thought that it had managed to contain the NCEC by unleashing *Jeshi la Mzee*, it was surprised to find itself faced by demonstrators within the house itself led by opposition members who sought to listen to heckling from their Parliamentary colleagues, and for the first time in the history of Kenya, the budget speech had to be switched off from national radio. The rejection of government to institute reforms was followed up by the fresh rally called by the NCEC to coincide with the 7th of July 1997. In the ensuing demonstrations, more than 14 Kenyans lost their lives, 5 of them students. The disorder itself was an embarrassment to the Head of State and the Intergovernmental Authority of Drought and Desertification, EGAAD, conference that was taking place in Nairobi. The 7th July mass action had the net impact of achieving what the NCEC had sought from the onset; that is, to legitimize the reform process while conversely de-legitimizing the state as a result of its anti-reform activities, especially predatory violence against civilians.

Not only was the state condemned from within because of this violence, but it also received condemnation from its traditional allies in Britain and the USA. The United States Secretary of State observed for instance, that the

real source of violence in Kenya was not just the government's unacceptable strong-arm tactics, but also its failure to take serious steps towards creating a free and fair electoral climate. In responding to the effects of this 7th July rally, the Kenyan shilling plunged 7.1 points against the dollar, exchanging at 62 instead of 54.0 as it had been on 4th of July 1997. The Central Bank had to inject US \$ 29 billion to stabilize the currency at 58. This generated fears that inflation could easily generate capital flight should the crisis worsen. Retail trade, manufacturing lines, tourism, public transport, and advertising sectors reported slump downs in their business. The Federation of Kenyan Employers cautioned against this fluid political situation and its impact on the economy and called for immediate dialogue between the opposition and the government (*The East African*, 14th - 20th July 1997).

While these mass protests had succeeded in tarnishing the regimes image, they had not succeeded in forcing the extremists (in the regime) to commit themselves to constitutional reforms. If anything, the regime merely changed strategy. Instead of remaining obstinate to its initial refusal to consider constitutional reforms as an issue, the regime principally accepted reforms and indeed called the ruling party's National Executive Council into session. These was however aimed at circumventing donor pressure and public opinion at one level, and driving in a wedge between moderate legislators and the NCEC. NCEC on the other hand did not have a clear strategy on how to deal with any change of strategy by the regime.

Worse still, once the mass action, subsequent newspaper headlines and consultations with donor, had thrust its leadership onto the pedestal of politics, the latter believed that that in itself was enough. The NCEC leadership navel believed it had the opposition on board, and would not consider the possibility of the regime's infiltration and its effects. On the other hand, it had emerged from Limuru on a minimum reform platform grudgingly accepted by radicals. However, the success of mass action now emboldened them to push for the adaptation of the maximum programme. The radicals contended that KANU would never accept constitutional reforms that endangered its hold onto power, and thus, instead of focusing on minimum reforms, the struggle should be widened to include the total overhaul of the state structure.

However, what was to be of great cost to NCEC was its inability to propel its leadership as an alternative to the existing opposition leadership. While the collegiate style had worked in the initial stage prior to mass action, contests aimed at instituting the maximum programme entailed that there was a leadership ready to lead and for which people would be willing to sacrifice for. Equally, NCEC action had drawn out workers and middle class professionals, yet at this point, it had failed to outline a concrete programme of its objectives and vision for the state that these different forces could all collectively embrace.

As it became increasingly clear that the regime would have to be forced out if changes were to be instituted, the NCEC did not openly prepare to organize and rally the nation for this eventuality would have demanded a clear vision, on what changes would portend for each force supporting it

were stated out. Worse still, NCEC did not set up organizational structures that could allow it to mobilize beyond urban centers like Nairobi, Embu, Thika, Nyeri, Nyahururu, Nakuru, Kisumu and Mombasa. These towns also happen to be predominantly inhabited by pro-opposition nationalities (The GEMA and Luo) notably other bigger towns like Eldoret, Kakamega, Bungoma and Garissa etc. Towns inhabited by the Kalenjin, the Luhya and the Somali remained totally unmobilized, hence proof to the regime ethnic propaganda. Also unmobilized and uninvolved were the rural frontiers of Kenya. This was a function of both the interests of the core factions the NCEC sought to attract and the ethnic logic of organizing for politics in Kenya by the political elite. To a wider extent, even though the NCEC sought to use the presence of workers, lumpen groups and peasants, it was very careful to avoid incorporating their demands especially those dealing with land reforms, the coffee and tea industrial sectors, where the dominant interests of the elite abound. It must also be pointed out that the NCEC made little effort to impress on to delegates representing various constituencies to not only mobilize their members.

It did not also attempt to impress on them the need to expand the executive council to incorporate members of the green formations, especially groups like *Mungiki* which sought to pursue land reform programs in the rural frontier and *Muungano wa Wanavijiji*, which sought access to land in the urban areas and an end to elite predation activities on urban land. Reluctance to incorporate *Mungiki* and other millenarian groups was a function of wide level opposition and NCEC's concession to the mainstream religious groups, which while being opposed to the these groups' traditional modes of expression,⁴⁴ ⁴⁴had so far provided lukewarm support to the NCEC.

By organizing mass action successfully as it had done, NCEC threatened the power base of political parties, but yet failed to go all out to provide that alternative leadership. To most political party leaders, organization of politics outside the traditional framework of

ethnicity threatened not only to usher in a new leadership but also to end their careers⁴⁵ and this had to be resisted by any means, and at the fastest opportunity possible. It is at the point that NCEC's successes began going against it even before had succeeded in forcing the regime to institute reforms. NCEC's position was not made any better by the increasingly open

⁴⁴ In one NCEC council meeting three researcher attended representatives of the mainstream religions opposed the inclusion of the traditionalists. Interview with Kepta Ombati who heads the NCEC secretariat on the 6th October 1999, notes that this orientation continues to persist even now.

⁴⁵ Many young MPs been elected the 1992 on the basis of their career built around opposition to the state. These included Paul Muite, George Kapten, Makhisa Kituyi, Kiraitu Murungi, Kachuni wa Karenga and Anyang' Ny'ong'o.

attempt by the religious sector to carve out its own independent niche as neutral facilitators, as opposed to its initial ambivalent position on reforms and mass action. NCECs demands that economic and defense related agreements Kenya had entered into with some foreign interests equally had a net effect of disentangling foreign interests from supporting it. Most of these nations began rationalizing their support for constitutional changes on what they considered as a likely power vacuum should the regime be forced out of power while there existed no credible alternative leadership. Notably, states like Britain and Germany began calling for and indeed directly began cajoling and blackmailing some of the actors into some form of dialogue and compromise with the regime.

Taking advantage of these emerging fissures in the pro-reform constituency, Moi sought to romance the leader of the official opposition and the clergy in a bid to divide the pro-reform forces without conceding to serious reforms. As a follow-up to this, KANU published a list of reforms it intended to pass to the government for implementation. They included the repeal of the Public Order Act, the Chiefs Order Act and the Presidential Elections Act. Moi announced that he had lifted requirements for permits for public rallies. He also called upon religious leaders to take up a facilitative role to initiate a dialogue between him and pro-reform movements. The president then requested the religious sector to impress on the NCEC to call off a national strike scheduled for the 8th of August, 1997. The Attorney General on his part published a new bill seeking to establish a commission to review the constitution. Under his envisaged Bill, the commission was to collate views from Kenyans on the constitutions and subsequently make recommendations to the national assembly. It was to be appointed by the president in consultation with other interested institutions and to finish up its work within 24 months. While this was a mere public relations exercise by the regime, the religious and diplomatic sectors saw it as an indication that the regime had finally accepted to embrace constitutional reforms.

Thus the two began exerting pressure on the NCEC leadership and moderate members of Parliament to call off the strike that had been scheduled for the 8th August, 1997, and instead give dialogue by the bishops a chance.

NCEC went ahead with the strike despite this opposition. Its success was however, marred by emerging ethnically driven divisions in NCEC itself, especially within the ranks of the opposition politicians. This had been brought about by suspicion, ascribed to the meeting between Moi and the leader of the official opposition, Wamalwa Kijana. In a meeting called at the county hall to deliberate on the discussions between Moi and Wamalwa, aspersions were cast on this initiative. Interpreting this as an ethnic onslaught on his Luhya candidature, Wamalwa and his FORD Kenya and FORD Asili allies increasingly shunned the NCEC, and thus despite having taken part in declarations for further mass action in Mombasa at the end of July, he increasingly took an anti NCEC position. The two opposed any attempts at calling for a national strike on the 8th of August as had been slated by the NCEC. Interestingly however, the strike went ahead with the

support of Raila Odinga, Mwai Kibaki, James Orengo and 30 other MPs who appended their signatures to the strike call (See the *East African Standard* 8th August 1997).

In the ensuing rally at Nairobi's Central Park, a policeman was killed and demonstrations held in Nairobi town, Kiambu, Nakuru, and Kisumu. It is at this point; that the governments attempt to paint NCEC as a violent organization spawning violence succeeded with the NCEC leadership backtracking with the violence that had taken place at the Central Park. The fact that some opposition leaders like Martin Shikuku and Norman Nyagah were unable to speak in this rally further undermined the NCEC with these leaders attributing their inability to address the rally to ulterior motives of certain individuals and actors of the reform movement in the NCEC especially the Raila Odinga faction.

It was in this ethnically polarized setting that NCEC went into its second national convention assembly plenary sessions held between 25th – 28th August 1997 at Ufungamano House, Nairobi. The tone in the sessions was charged and reflected the hardening and radicalized positions the civil society formations had taken. The convention made it known that it did not believe the regime was capable of initiating serious dialogue on reforms. It thus demanded that a transitional consultative forum be immediately set up, if not, NCA would demand the resignation of the Moi regime and the establishment of a transitional government by 15th September, 1997. It also demanded that comprehensive reforms be carried out through a national conventional or constituent assembly. NCA equally renewed its commitment to mass action and strikes called upon, dismissed service men to offer their knowledge to its activities.

It called for the removal of Moi's portraits from business premises and officially stated its intentions to mobilize Kenyans against the impending elections.

NCA demanded that any meaningful dialogue had to be representative and inclusive of all stakeholders. It also had to be driven by a sense of honesty, be within an agreed time frame and place, and be informed by national interest. It demanded for the release of all those jailed for participating in the reform agitation, an end to police torture and politically instigated ethnic violence, suspension of all preparations for electoral activities, and arrest of those involved in ethnic violence. Its economic programme equally reflected this radical mood. It contended that the 1963 constitution and its current mutations failed to address the issue of basic economic and social protection. It pointed out to the past regime's policies of marginalization and economic violence which had engendered economic disparities while spawning impoverishment. To this end, it called for the reopening up of the land issue frozen up in the Lancaster talks. It called for the amendment of the Government Land Act Cap 280 of the Laws of Kenya that gives the president and the Commissioner of Lands unlimited powers to dispose of government land without reference to Kenyans. It also called for the

expropriation with compensation of land owned by multinational corporations like the Delmonte Group and Brooke Bond. The NCA demanded that the government declared it a treasonable act, wanton acts of corruption by its cronies, that had spawned the collapse of economic institutions⁴⁶.

More than anything, the tone, mood and resolution of this convention not only convinced the regime of the seriousness that NCA /NCEC posed to its interest, but also helped to merge the tripartite interest of the regime, some opposition politicians and the western diplomatic corps in Nairobi. For some opposition politicians, threats against the impending elections threatened to put them out of business. Worse still, such threats seemed to allow their own marginalization by the NCEC. For the western diplomatic representation, NCEC's intention of opening up debate on the land and structural adjustment programmes (SAP's), threatened to plunge the state into chaos, given the fact that there would be no clearly established leader they could do business with.

For the regime on the other hand, demands by the NCEC of structural dialogue and demonstration of sincerity acted against its own avowed intention of only allowing such reforms that did not threaten its hold onto power. Implementing NCEC demands meant that it accepted the reality of losing its power. However, while NCEC had disciples charged and willing to engage the state directly if called upon, its leadership failed to grasp certain realities about leadership and institution building. The leadership had been carried away by the declaration of intent the politicians, in their bid to prevent the show being stolen by their opponents, had made, declaring NCEC their sole representative. It had thus, instead of leading by interpreting the social process correctly and anticipating the next moves of the regime, allowed itself to be maneuvered into seeking a higher maximum programme.

While there was nothing wrong in this, the problem with it lay in the lack of preparation of logistics, infrastructure, mobilization and the conscious development of the public for such a struggle. The regime was determined to use violence if need be as NCA threatened to declare itself a sovereign national conference.

The NCEC did not have a leadership committed to an all-out war or means for the same. Thus, when the state called its bluff, it did not even have the capacity to restrain the opposition MP's from migrating in the middle of the night to the state-initiated Inter-Party Parliamentary Group (IPPG) project.

KANU's response to NCEC on the other hand was as multi-pronged as it was swift. At a political level, the regime initiated ethnic clashes in Mombasa against upcountry people, especially the Luo's, given the predominant role the regime thought Hon. Raila Odinga, the most prominent opposition Luo MP, was playing in the agitation process. At the institutional level, the state sought to romance the disenchanted opposition members of the NCEC at one level, while refusing to dialogue with the NCEC on the other. It also killed the religious sector-led dialogue process and instead went out of its way to take the reform process to Parliament where it could effectively manipulate the process. This engagement between KANU MP's and the opposition took place under the auspices of what became known as the Inter-Party Parliamentary Group (IPPG).

⁴⁶ See Resolution No. 9/NCA/August, 1997

It was facilitated greatly by the initiative of the German ambassador in Nairobi who managed to attract into the process prominent NCEC members like Kiratu Murungi and Anyang Nyong'o. To entice a majority of the opposition MP's, the regime motivated them with financial incentives. This came in handy with the elections looming round the corner. With this turn of events, the most credible attempt at forcing the regime's hand into initiating serious reforms ended. Worse still was the fact that henceforth, the regime realized that it could easily manipulate MP's, then kill the NCEC. It would thus make promises without being compelled to implement them. It had succeeded beyond its expectations to divide the reform movement, excluded the radicals who threatened it, all the while securing a diplomatic backing for its position.

Despite caution from NCEC about the IPPG-led reforms, the Parliamentarians went ahead with the process⁴⁷. As the IPPG deliberation continued, the NCEC sought to continue with its mass action. Salient in it's programme was the *Tisa Tisa* (Ninth of September) rally in Kamukunji grounds, in which it sought to educate the public on the resolution of the second plenary session and the dangers of the IPPG initiative. It also went ahead to support demonstrations organised by MUHURI (Muslims for Human Rights) against the violence at the coast on 12th August, 1997.

In both cases, the paramilitary forces stopped the rally and demonstrations from proceeding. In both rallies, the NCEC's message was that Kenyans ought to be moaning their dead compatriots in Mombasa, and not celebrating Moi Day, marked on October 10. Holding the meeting on Moi Day was also meant to engender a show-down of strength between the movement and Moi. NCECs attempt to move to other towns like Kisumu, in a bid to mobilize the public, were violently disrupted as the regime deployed police officers to arrest some of the Members of Parliament that still supported it (*Sunday Standard*, 19 October, 1997). In the *kumi kumi* (October 10) rally, the NCEC's clarion call was that, there should be no election before the implementation of its reform program. The final mass action activity was on 20th October 1997. On this day the management went to Nyahururu on 19th October and to Nyeri on the 20th to celebrate the day in form of the death of genuine freedom fighters.

It has to be pointed out here that, despite NCEC's warning of the dangers of the IPPG reforms, the MP's went ahead and passed them, promising to institute comprehensive reforms after the elections. It must be noted that most of the reforms passed were those that had been passed at the Limuru Convention. These included the repeal of the Chiefs Act, Public Order Act, removal of restrictions to forming political parties, access to electronic media for the opposition, and some reforms on the Electoral Commission that

⁴⁷ Paul Muite, James Orenge, Gachuru wa Kareng'e, Raila Odinga, Otieno Karan, Otieno Mak Anyengo and later on Anyang' Nyong'o joined the IPPG crowd. Those arrested included, James Orenge, Otieno Mak' Anyengo, Clarkson Otieno, Philip Gitonga, Gichuru wa Kerenge and Onyango Madika.

expanded not only the membership, but also provided the opposition with the right to nominate some of the members.

These changes were eventually passed as the Constitution of Kenya (Amendment) Act of 1997 and the State Law Act of 1997. Parliament also passed the Constitution of Kenya Review Commission Act of 1997. Under this Act, a commission of 29 people was to be appointed by the president from amongst 40 persons nominated by various sectors of the society. The commission was to collate views from the public, draft a constitution and submit it to Parliament through the president for deliberation and enactment. The Act itself did not indicate whether this would be a minimum amendment process or a total overhaul of the constitution. Its independence was also highly questionable given the overriding powers the presidency had over it. The NCEC opposed this Act with vengeance, insisting on an inclusive process that was people driven.

It pointed out that the Act sought to evolve Parliament over people who were sovereign. This they observed, would put Parliament, itself a creation of the constitution, above the latter. The Act, NCEC observed, also omitted a crucial aspect in the constitution making process which demanded that the society agree apriori to re-examine its problems and decide on the basic minimum rules binding to all. The Act did not also provide options for review of the constitution other than what the regime and allies had defined as good. The Act gave the commission the chance to actually write its own position by reference to research. The final draft had to be examined by a Parliamentary select committee, the Speaker of the National Assembly, and the president, giving the president an opportunity to alter views expressed by the public. This, they noted, went contrary to constitutional jurisprudence which forbade alteration of collated views by any other person other than the originators through a sovereign forum. The Act equally failed to state categorically whether it was proposing a total review of the constitution or mere alteration of its section. NCEC opposed the fact that the Act gave the president the final right to decide the 29 commissioners out of forty-five nominated and submitted to him.

Underlying its rejection was the fact that the majority of the nominating organisations were unconservative types known for their progressive views. This gave the president the opportunity to simply throw out the individuals he deemed undesirable, hence directing the process where he wanted it. It demanded that nominating sectors once identified should proceed to make nominations that were binding. NCEC also pointed to the lack of independence of the commission raising out of the Act. It questioned the timeframe while pointing out to several ways in which the regime could seek to frustrate and manipulate the process through withholding of funds or refusal to vote for the constitution by either KANU or the opposition. This in turn made it hard to garner the required 65% of all MP's, through an

inability to meet the deadlines and through state-sponsored violence that was prevalent in the state⁴⁸.

It went ahead to propose its own National Assembly Bill to the government. In its bill the NCEC outlined the route that the convention process was to take including the structure it was to have. These included provisional, district, divisional, locational, sub-location, and village convention assemblies⁴⁹.

The fact that the IPPG failed to address the issue of the wider powers of the office of the president and the fact that these were election-tailored reforms undermined the reforms at the level of implementation. For instance, despite the presence on the opposition nominees, the Electoral Commission's ability to hold free and fair elections was constrained by the then prevailing political framework. The state equally refused to engender an environment for free and fair elections by refusing to clamp down on ethnic violence. It also refused to grant access to its opponents to media channels and state resources as it had promised. Neither did it agree to register certain political parties until it was late. What is however notable was the concerted media and diplomatic attempt to popularize the IPPG reforms as the NCEC position was increasingly given news blackout. Few groups thought through the organization's critique. Most civil society organizations and the religious sector were eyeing donor funds for elections as were the politicians, too much to seriously want to get bogged down with the flaws in the Review Act. In any case, they believed in the regimes "magnanimous act" of accepting reforms. They forgot the fact that this change of act, though strategic, had borne been out of a struggle, and without monitoring mechanisms the regime could not be compelled to honour its commitment. The regime on its part sought to maximize on this lapse of judgement by the majority of the opposition politicians and civil society organizations. It had not been compelled to demonstrate any commitment to reforms and could thus maximize on their polarized division on its overt declarations of intent, which were inconsistent with its actual behavior on the ground.

It is in this setting that from 26th to 28th October 1997, the NCEC held its third plenary session. It still emphasized the need for an election boycott agenda if genuine reforms were not instituted.

Thus once again, pursuit of raw power had seen to the hoodwinking Kenyans on actual reforms. The ruling elite had managed to forestall a

⁴⁸ See NCEC's statement: Why Kenyans Must Reject the Kenya Review Commission - *Katiba Mpya, Maisha Mpya*, NCEC Nairobi, January 1998.

⁴⁹ See NCEC National Conventional Assembly Bill, 1997. Most of these structures were later on incorporated in the new Constitution of Kenya Review Commission (Amendment Act) stipulating the constitution process which was signed in 1999 and which the president later on renounced.

serious threat to their hold onto power without being forced to institute genuine reforms. While it had appealed its approval to the IPPG reform plans, the opposition had failed to put into place check-in mechanisms that could force the regime to comply to any of the agreements. Thus overtly, it had accepted reforms and won itself a public relations coup for the elections. In reality, nothing had changed. Thus, not only did the state renege on the letter and spirit of the IPPG reforms, but it also went ahead to literally steal the elections. Worse still, it made not efforts to curb the spiraling violence across the republic, or the rampant corruption. It continued to pursue its logic of state banditism⁵⁰ in which rustling activities by the political elite and which affected the length and breadth of the north eastern and northwestern parts of the country were permitted. In the post elections period, the regime stood by as marauding bandits meted violence out on those it deemed to have voted against the regime in Molo and Laikipia. On the other hand, only NCEC and the Matiba faction of FORD Asili (Saba Saba Asili) refused to take part in the elections.

THE NCEC AND THE POST ELECTION PERIOD: SEEKING A NEW ANCHORAGE

The post-election period evolved with new political realignments that greatly affected NCEC. Its political sector which had been previously occupied by legislators had diminished a great deal as a result of the IPPG fall out. Despite the fact that the regime had reneged on the spirit of reforms, most of those who had supported the process could not bring themselves back to the NCEC fold. Underlying this shyness was the felt sense of betrayal, over blown egos, and regime schemes of divide and rule.

In the post election period, the regime sought to curtail the re-emergence of NCEC's potency by confronting the latter with several frontal strategies. The core schemes entailed the process of cooperation. Under this scheme, the regime successfully romanced⁵¹ the leaders of the National Development Party (NDP) and FORD Kenya. These left in the opposition were not only totally divided, but in the ethnic mode of organizing politics, it meant that the Luo and Luhya nationalities had effectively defeated the opposition, leaving the GEMA communities that had backed the Democratic Party (DP). This meant that NCEC would neither access the NDP, most of FORD Kenya, nor DP MPs. Its support was confined to the rebel FORD Kenya and NDP MPs on one side, and newly elected Safina party, FORD Asili, and SDP Members of Parliament on the other. The latter group sought to contain the former through the application of violence to the MPs, thus preventing them

⁵⁰ See Musambayi Katumanga 1998b, "State Banditism, Social Bandits and the Moral Economy of Violence: Contesting Peripheral Citizenship in the Cradle of Man", Paper presented at a colloque on Invention and Re-invention of Citizenship UPPA, France, See also Musambayi Katumanga (1998a),"0.4

⁵¹ It has been argued that this was done through bribes. For instance, EA Spectra owned by the Odinga family had its monopoly in manufacture of gas cylinders restored. It was alleged that Kijana Wamalwa was given land and money.

from caucusing with their constituents. The regime equally sought to demonize NCEC as a violent organization of uncompromising people.

On the other hand, NCEC was forced to seek reorganization under an extremely hostile internal and external milieu. Few donors were willing to fund it, most having migrated in the period prior to the elections to fund electoral initiatives and counter NCEC activities.⁵² Its position was worsened by its leadership's inability to chart out a new strategy for confronting the state. Its leadership remained reluctant to head to the rural frontier. It equally had to reckon with the lukewarm support it began to receive from most "English speaking" civil society organizations, which were now convinced that reforms would be initiated following the IPPG spirit, hence the inutility of NCEC.

It is in the foregoing context that NCEC called its fourth plenary session in February, 1998. Like the previous sessions, the fourth plenary session was attended by some representatives from the religious sector, professional groups, Matatu operators, a few industrialists, bankers, community based organizations, women and youth groups, the media, the labour movement, a few Members of Parliament and the smaller political formations⁵³.

This convention re-emphasized NCECs rejection of the review of the constitution through the Constitution on Kenya Review Act. Instead, it called for the replacement of this Act with the Constitution of Kenya Conference Act which would facilitate the emergence of a constitutional conference for democratic Kenya. The NCA demanded that NCEC organized nationwide strikes should the government proceed with the Kenya Review Commission Act. It also called for the disruption of the activities of the Review Commission. The NCEC also opposed any commencement of the constitution reform processes to the extent to which the regime was not willing to demonstrate goodwill. Such goodwill, it observed, had to be manifested through the ending of politically instigated violence, punishment of the culprits and compensation of the victims, an end to restrictions to the enjoyment of freedom of association, commitment of the government to play a merely facilitative role in the constitutional review process, implementation of the National Minimum Economic Recovery Programme, and acknowledgement by the government that the constitutional review was a sovereign Act of the Kenyan people which ought not to be manipulated by political or leaders of any given sector. NCA also demanded the establishment of a government of national unity as a means towards curbing the impending national disintegration and total economic collapse. The NCA equally mandated the NCEC to forthwith establish appropriate grassroots structures and forums for constitutional debates⁵⁴. It equally

⁵² Modan was formed and heavily funded by the Swedish embassy.

⁵³ SDP, Safina, FORD Asili, Saba Saba Asili, People Party

⁵⁴ See Resolution 15 NCA February, 1998, Ufungamano House, Nairobi

passed recommendations and resolutions on economic, civic education and security issues.

With no serious efforts seeming to take place, given the mistrust emergent out of the IPPG process, this effort was finally formalized when the Attorney General assumed the leadership of the 25-member informal group. This assumed the title 'Interparties Parliamentary Group'. It is this group that sought to convene a stake-holders session at Bomas of Kenya, Nairobi, to discuss amendments to the Constitution Review Act.

In response to this informal and exclusive process, NCEC issued a memorandum calling for a multi-sectoral forum on the establishment of a framework for the comprehensive review of the constitution. NCEC demanded that such a committee be made up of interest groups with a demonstrated effort that the forum acknowledged the right of Kenyans to make their constitution. It contested that such a forum committed itself to a structured and bonafide dialogue. It needed to agree on proposals regarding the nature of the constitutional review framework and reduced the same into a legislative bill to be passed by Parliament.

It would also help to evolve an environment inimical to the constitution making process by setting into motion a process for a national peace accord. NCEC provided a breakdown of representation to the religious sector youth groups, academic institutions, labour movements, professional societies, political parties, women organizations, National Council of NGOs and the Kenya Pastoralist Forum. NCEC also stipulated the activities of the form and outlined a framework for the process while warning of the pitfalls likely to befall it should it be driven by the self-centered spirit of IPPG. Amongst these were any attempts to block NCEC's participation and the inclusion of obscurantist groups aligned to the regime, if the process of creating a new law was made apriori to participation, if KANU and opposition successfully established IPPG 2 excluding other forces⁵⁵.

Once NCEC demands were taken up by church leaders, the state took cognizance of them and agreed to renegotiate the Review Act, hence setting stage for the Bomas of Kenya and Safari Park talks on the constitution review process. From the onset, the regime, through its Attorney General, sought to isolate NCEC. The discussions were organized under the auspices of the IPPG. The Attorney General was to chair the sessions, while Justice Ringera was designated to be Secretary. In a bid to lock out MPs, Mukhisa Kituyi was made the master of ceremonies. Only the groups which had indicated in writing their willingness to participate would be invited to send two representatives each. Bomas I was slated to debate the review process (*Daily Nation*, 9th May, 1999).

⁵⁵ See NCEC document; Towards a Multi-Sectoral Forum on the establishment of a framework for the comprehensive review of the constitution. Memorandum presented to the Hon. Amos Wako, Attorney General Nairobi, 20th April, 1998.

The NCEC pointed out its misgivings of the Bomas of Kenya process. It pointed out the impossibility of 400 people engaging in meaningful discussion of the process in a day⁵⁶. It suggested a month to allow for negotiation, adoption of the agenda, discussion of issues such as status, the future of IPPG, the way forward in relation to the discussion on the process of comprehensive constitutional reform, inclusion of sectors such as trade unions and other non Parliamentary political formations, and the discussion of an enabling environment for constitution reform process (10th May, 1998).

In the discussions that ensued, the Attorney General successfully managed to exclude NCEC out of the process thus prompting the walk-out of one of its officials. A total of 400 persons from political formations and NGOs attended this session. They proposed that the members of the constitutional commission be appointed by stakeholders and that they subsequently elect their own chairman as opposed to the Review Act⁵⁷.

They also called for the expansion of the commission forum and a pre-set timetable to regulate the process, liberalization of the media, security of tenure for commissions and its own independent source of funds (*Daily Nation*, 12th May, 1998). NCEC on its part demanded that the Attorney General delink himself from the process and that delegates be allowed to choose their own chair. It also demanded that Members of Parliament stop monopolizing the process. It called for a more democratic Bomas of Kenya II. NCEC's threat to disrupt the next session should the demands not be met was watered down by the qualified support the talks received from its allies such as Safina and other political formations such as DP, NDP and the Catholic Church. Only SDP and the Labour Party promised to skip the talks.

Eventually, the follow-up to Bomas II talks were held at Safari Park Hotel on 23rd June, 1998. In response to the civil society demands, each sector picked its delegates, and afraid that it could lose control of the process, the regime called for an expanded commission in which 65 districts of the republic would each nominate a representative. The NCEC on the other hand, while concurring with the principle of giving a voice to the people at the grassroots, called for the establishment of district forums. It called for the setting up of a legal multi-sectoral committee to spearhead the reform process.

Eventually, a 10-person drafting commission drawn from the civil society and IPPG was set up as suggested by NCEC, and was given the mandate to draft amendments to the structures and modalities of the review commission⁵⁸. There was a clear divide between the political formations

⁵⁶ 178 people had been slated to present positions between 11.30 and 12.30 p.m.

⁵⁷ Gave president the final decision to approve nominees and appoint the chairman of the Commission. Gibson Kamau Kuria walked out.

⁵⁸ This followed informed contributions of Prof. Kibwana of NCEC and Erastus Wamugo of the 4Cs who had summarized the Bomas I deliberations and drawn out alternative charts for the sessions at Safari Park.

(mainly those that had participated in the IPPG), and the civil society organizations (religious sector civil society organizations) and those pro-NCEC political formation actors. This was not a dialogically defined divide. Rather, it was predicated on the suspicion that civil society organizations nursed against IPPG. It was thus not a wonder that this divide would fall asunder.

Civil society organizations were represented by Catholic Bishop Phillip Sulumeti, Ms. Abida Ali (Muslim), Dr. Wanjiku Kabira (Women), Erastus Wamugo (Youth), Prof. Kivutha Kibwana (NGOs and professionals), while the IPPG chose Hon. Julius Sunkuli (KANU), Gitobu Imanyara (FORD K), Raila Odinga (NDP), Martha Karua (DP), and George Anyona (NSC). (See *Daily Nation*, 24th May, 1998). Eventually, a three-tier plan was adopted. It was thus agreed that a national consultative forum, commission and district committees, be set up to oversee the reform process.

The National Consultative Forum (NCF) was set up to accommodate the voice of those who favoured a conference method of constitutional review. It was to have 224 MPs, the speaker, Attorney General and two representatives from each district. The Districts' Consultative forums were to include councilors and MPs (*Daily Nation* 30/6/1999). But even as the regime continued to lock the opposition formations and the civil society organizations in the Safari Park talks, its behavior on the ground seemed to demonstrate a totally contrary thing. It continued to perpetrate violence on those opposed to it. Worse still, it continued to deploy private violence against communities it deemed to as pro-opposition.

The worst hit areas were the Turkana and Trans Nzoia districts. In the discussion arena, it turned out that obscurantism as a settlement seemed near, prompting the NCEC to pull out of those talks. NCEC had no alternative line of action for itself other than threatening to revive mass action⁵⁹.

Underlying this inertia was the ideological divide that characterized the management. The moderates characterized the management. These moderates in the management favoured talks and active engagement in the Safari Park process. The radicals favoured the setting up of the parallel process that would have allowed NCEC to take its case to the rural frontier and the public. They all along argued that KANU would never accept a reform process it did not control and manipulate. In the end, NCEC could not decide which route to take.

Eventually, the civil society organizations and the political class agreed to a new Constitution of Kenya Review bill, which was to be tabled in Parliament. They also agreed to set up a 21-member commission that was expected to collate views on the constitution reform in the Safari Pak IV and draft the

⁵⁹ Discussions with Dr. Willy Mutunga 24th September, 1999 at KHRC.

constitution. Its members were to be appointed by various sectors of the society. Political parties were to nominate 13 members to the commission. The religious sectors, (The Protestant, Catholic and Moslem) were to nominate the rest. Safari Park IV attempted to satisfy the demands of KANU which had insisted on district representation in the commission by allowing for the creation of a district for KANU had insisted on this as a means through which it could counter what it viewed as threats from majority ethnic groups.

NCEC on the other hand, was granted the national forum as a substitute to the convention it had been calling for. The political party nominees (in which KANU was allocated 5 slots, DP 3, NDP 2, FORD Kenya 1, SDP 1, Safina and the rest of the parties 1) was rejected by political formations which promised to share out the seats themselves.

This very decision was to haunt the process later, when KANU turned around demanding that it be allocated seven slots, given its majority in Parliament, a position contested vehemently by other political formations which argued that the majority was based on wrong boundary gerrymandering, and election rigging. NCEC pointed out these faults in the *apriori*, outlining several other faults in the Act. It pointed to the lack of mechanisms for conflict resolution. It also pointed out that the Act allowed the president to dissolve Parliament in the midst of the process, and that it did not provide for a referendum principle, tie-breaking procedures.

NCEC also observed that the Act had created duties without specifying the holders and monitoring mechanisms. But as usual, no group paid attention to them except the regime, but in an obscurantist manner. Once the bill received the mandatory Parliamentary and presidential approval and assent, a crisis emerged among the women caucus group who had agreed on its nominees. KANU manipulation saw some of them reject the nominees and head to court to block their appointment, disrupting the entire nomination process. The Protestants on the other hand bifurcated along the NCKK-conservative evangelist divide, with NCKK nominating Wachira Maina, while the evangelicals went for Jerry Kibarabara, of the Kenya Evangelical Businessmen Association.

Underlying the regime's fear was the realization that all women nominees were individuals aligned to the opposition. Those, they feared, would give the opposition a majority on the commission. The regime was further irked by the fact that the Kikuyu community seemed to have more representation than it hoped for. The regime also panicked from the realization that the process was no longer about laws, but geared towards ushering in issue oriented politics. This kind of politics portended danger to the existing political elite's in the country.

Indeed, according to Willy Mutunga⁶⁰, the whole question of party nomination crisis was merely a conspiracy between political formations to make the reform making process narrower in a bid to facilitate their controlling the process. Indeed, the preoccupation of political formations throughout this time has been that of political succession to Moi. Here, the tendency has been that of avoiding issues that are economically related while trying to carve out ethnic enclaves.

The regime's intentions began to manifest themselves to the chagrin of some of the political formations when it reneged on a gentleman's format for selecting representatives of political formations implicitly agreed on at Safari Park IV. In the successive months, the regime changed course and demanded that the process be handled by Parliament, prompting protests from civil society organizations and the religious sector. NCEC responded to these reluctantly by calling for a Kamukunji on 7th July 1999. This Kamukunji was attended by thousands of Kenyans despite calls for its boot by mainstream political formations. This fact pointed to the popularity of NCEC's reform process. This fact was further vindicated by a public opinion poll in which a majority of Kenyans indicated their disagreement with KANU's methods of reform.

On the other hand, NCEC's capacity to impact on this process has been constrained by lack of a clear cut strategy. This stems from its inability to follow its declarations for instance, despite NCAs demand that the management sets up structures in the provinces and initiate parallel constrained by trifurcating in the management. The first function is made up of those who seek to force the regime into instituting concessions through peaceful and non-violent means. Though petit bourgeois in orientation, this constitutes the radical wing.

The second group is made up of those who are reluctant to take up the mass option and who seek and favour dialogue with the state and political formations. The third group in the management is that which straddles these two commitments without a clear-cut commitment to any. These oscillations between these options has seen some of the ardent mobilized groups in the NCEC like the Kenya Human Rights Commission and Release Political Prisoners, increasingly pursue independent programmes off the NCEC. Such programs have seen them go out of their way to engage green formations in their confrontations with the state.

Other than the Kamukunji Saba Saba, NCEC has confined itself to carry out consultations with various stakeholders. Foremost among groups it has been holding consultations with and to which it has extended support indirectly through its members of Parliament who supported it, are rice and coffee farmers. It has also sought to react out to Muungano wa Wanavijiji and Ilishe over land issues. One of its most successfully undertaken

⁶⁰ Discussions with Willy Mutunga, 25th September 1998 at the Kenya Human Rights Commissions Offices.

projects was the formation of a national farmers union, subsequent to a successful convention.

Despite its own calls for formation of an all-embracing national convention movement to spearhead reforms, and a government of national unity, NCEC has basically institutionalized itself and confined itself to issuing press statements at Chester House as it has confined itself around both the regime and other social formations. The regime on its part has used the respite of NCEC's lull to continue to constrain the freedom of association, and to facilitate cattle rustling violence in opposition areas. On the other hand, farmers in coffee, tea and rice sectors have borrowed a leaf from NCEC-led mass actions to engage in the same, as have trade unions.

Indeed the most successful aspect of NCEC remains its spirit of having engendered the spirit of resistance to repression. While this Act of protest has been taken up by groups, they have in the meantime left NCEC unable to coordinate and mobilize them to take on the regime. As a matter of fact, some of these groups have gone out of their way to attract support from the NCEC but with little success. NCEC's reluctance to embrace these green formations is indeed a function of the management committee's lack of ideological clarity. Despite the political vacuum that exists due to the failure of political parties to organize society for politics, the NCEC has remained reluctant and unable to take up the initiative of providing alternative leadership.

7. THE RETURN OF THE HARDLINERS AND NCEC'S FINAL LAUGH

NCEC's warning about the regime's insincerity with respect to constitutional reform become real when the president called on Parliament to take up what he termed as a stalled process arguing that it was the sovereign institution.⁶¹ Charged with the responsibility of amending the constitution, the president contended that ordinary Kenyans had no capacity to understand which sections of the constitution needed to be amended, also pointing to the flaws in the Constitution Review Act, and the financial cost Parliament ought to handle the process.⁶²

This statement aroused protest from civil society organizations, which threatened to restart mass action if the process was confined to Parliament. It also threatened to start its own parallel reform programme with the help of the religious sector. Mass protests by Catholics in Nairobi and across the republic at one level, and threats for mass action by Supreme Council OF Kenyan Moslems (SUPKEM) forced the regime to restate that it still favoured a people-driven process, but in an a mandated format. This time round, it called for a Parliamentary committee to collate views from the public.

⁶¹ See *Daily Nation*, 16th December, 1999

⁶² *Sunday Nation*, 7th November, 1999

This position was supported by NDP which sought to introduce a motion calling for the establishment of a Parliamentary select committee. This prompted further protests leading to the holding of parallel Jamhuri Day celebrations rally at Kamukunji grounds by 52 MP's opposed to the NDP-KANU proposal. Efforts by the president to co-opt the leaders of the opposition into parleys for a resolution of the process failed to resolve the statement on the sharing of the 13 slots allocated to political formation. A meeting called by the president on the 14th of December, in a bid to resolve the impasse equally failed with Moi stating that he could see both sides had stuck to their positions and, in Kiswahili, *basi kila mtu aende akaseme kile anachotaka* (let every one go out and say whatever they want) *Daily Nation* 15th December, 1999.

With those statements, the regime's MPs went out to Parliament to pass a motion calling for the establishment of a house select committee to spearhead the amendments on the Constitution of Kenya Review Act.

The committee was mandated to facilitate the formation of the commission, which would collect and collate views from the public. In this manner, it would determine the number of commissioners. It had no time frame within which to report to the House, thus effectively allowing it to manipulate it whichever way it chose. A 27-member committee made up of 14 KANU MPs and 13 from the opposition was set up. It was to be chaired by NDP leader Raila Odinga. Its attempts to have members of other opposition formations on board were turned down by DP, FORD Kenya, SDP, Safina and FORD Asili. It had to contend with Shirikisho party, KSC (*Daily Nation* 16/12/1999).

On 15th December, 400 people representing civil society organizations and political formations convened at Ufungamano House under Catholic, Protestant and Moslem and Hindu Leaders to initiate a parallel reform process. The promised to use mosques, temples and churches as forums for consulting and collating views for the constitutional review process (*Daily Nation* 16/12/1999).

NCEC on its part called on Kenyans to boycott the Parliamentary process and instead back the process led by religious leaders. Thus, after three years of talking, the regime had taken Kenyans for a long ride and eventually with the help of the opposition, managed to maneuver itself into controlling the process as it had initially sought to do. In the meantime, it had succeeded in punctuating the political realm, with mistrust, ethnic polarization, while failing to contain economic and institutional collapse due to corruption.

By pretending to back the reform process, it had also managed to receive commitments from the IMF over frozen aid funds. In all this processes, the regime had been served by its ability to isolate radicalized forces, co-opt moderates through outright economic bribes and positions in the regime

when need had called for the same, thus showing its ability to respond programmatically and institutionally to challenges, albeit negatively.

CONCLUSION

The greatest contribution of the NCEC has been in demystifying the state and its forms of violence and proving what it can carve under pressure. Thus, through the NCEC pressure mass action tactics, the regime was forced to repeal legal Acts that constricted associational space. Yet it must be pointed out that repealing of these Acts has not in itself engendered a free associational space. Here, the regime must be credited for its ability to re-invent itself and reclaim the political space it had been forced to concede. This, it has done by privatizing state violence and appropriating private and vigilante violence, co-opting opposition politicians and successfully marginalizing the radicals in the reform movement. It is violence from vigilante groups that the regime has used to mete on pro-reform actors especially those that have sought to contest state predation in the environmental sphere.

NCEC's inability to move to the rural frontier has enabled the regime to mobilize and appropriate traditional forms of economic reproduction such as rustling for purposes of meting violence and narrowing down the associational space in multi-ethnic environments in the country. This has been highly pronounced in areas like Trans Nzoia, Marakwet and Turkana districts. Here, Pokot nationality groups have been used to effectively camouflage state violence through cattle rustling and mete out predation on those deemed to be anti-state. Thus, while NCEC encounters with the state embolden other civil society organizations, it has also polarized the civil society itself between the radical and conservative sectors. While the radical groups like Kituo cha Sheria, KHRC and RPP have gone out of their way to embrace marginalized green formations like Ilishe, Mungiki, Kenya Pastoralists Forum, MUHURI and Muungano wa Wanavijiji⁶³, the conservative groups remain preoccupied with non confrontational marginal issues.

NCEC can be credited for keeping the regime on its toes, and taking advantage of its intellectual comparative advantage to expose state schisms aimed at manipulating constitutional Bills. However, it has remained low on capacity building, organizational skills and mobilization. This explained staticism in Nairobi. NCEC has emerged as the only civil society movement to sincerely expose the regimes' dishonesty and disinterest in initiating constitutional changes. However, even though its mass action compelled the regime to initiate dialogue with the opposition and other civil society organizations, the regime used this dialogue as an opportunity to legitimize itself, puncture the reform movement, and sustain its control over the structures of power.

⁶³ These are mainly formations that seek to restructure the state, to allow for reopening of the land question, an end to predatory activities on state properties and access of the same to marginalized groups.

Indeed, without the sanctions to motivate the regime to honour its commitment to accords agreed with civil society and opposition, the regime perfected the art of survival, that is overtly making declarations and public commitments of intent, but consistently acting to the contrary at the level of implementation. This consistent inconsistency between declarations and actual behavior on the ground has been facilitated by a polarized civil society and opposition formations, a gullible religious sector and lack of a serious alternative leadership ready to counter state violence through alternative institutional formation and mobilization of the excluded majority. Given the foregoing, the regime has continued to preside over institutional collapse,⁶⁴ and a polarized political realm.⁶⁵

Despite its declarations emphasizing commitment to environment protection⁶⁶, the regime continues to facilitate predation on public forestlands. In spite of its declarations of commitment to freedom of expression and association, the regime continues to engage in activities such as election rigging, violence, and disruption of opposition rallies⁶⁷ that work against such declarations.

Hence, from the foregoing, it turns out that more and more Kenyans are getting marginalized as a result of increasing institutional collapse, corruption and state violence. On the other hand, collaboration between political elite's, especially heads of political parties⁶⁸, continues to allow them to benefit from the regime as they trumpet politics of ethnicity. Such politicians remain preoccupied with ethnic succession to the presidency

⁶⁴ See for instance *Sunday Nation*, November, 12th 1999, where the Coffee Board lost Kshs. 26.6 million in meetings, 12.1 million to two directors as production in the sector declined by 47.7% over the last 10 years. See also *Daily Nation*, 16/12/99 on how the civil service has failed through a wrongful employment of cronies by permanent secretaries. A summary of controller and auditor general for past seven years shows government to have lost Kshs. 300 billion through waste/fraud and unconstitutional payments. Between 1987 and 1998, the government has been losing between Kshs. 6-7 million annually through waste and fraud (*Sunday Nation*, 19/12/1999)

⁶⁵ See *Daily Nation*, 24/11/1999 on increasing inter-ethnic violence. The same is discussed in detail in the special edition of *Expression Today* No. 14 September, 1999.

⁶⁶ See *Weekly Review*, 5/2/1999 on the allocations of Karura forest

⁶⁷ See *Daily Nation* 8/11/1999 - In one of the many incidences, this kind of organized thugs stoned SDP leader Charity Ngilu and 11 other opposition colleagues at Makueni.

⁶⁸ They have been appropriately christened "stomach politicians" by Makhisa, See *The People* newspaper, 6th September, 1999

than with grappling with day to day existential issues that affect members of the society.

Thus, while there exists a wider latitude to criticize the regime, the ability to compel it to good governance and accountability remains low. To this extent, it has willingly accepted to live with this phenomena lest it annoys the donors. This behavior raises several questions as to whether Kenya's nation-state is merely a function of institutional crisis, or equally that of leadership. Indeed, the constitutional reform fiasco points to the fact that leadership is a critical element that must be grappled with as the process of institutional design is grappled with. To the extent that bad leadership traits and interests percolate in the design process of institution, it must be borne in mind that the crisis will persist.

REFERENCES

Anyang' Nyong'o (1989), "State and Society in Kenya: The Disintegration of the Nationalist Coalition and the Rise of Presidential Authoritarianism" *African Affairs*. Vol. 88 No. 351.

Anyang' Nyong'o (1998), In Aberdare Seminar on Comparative Constitution Making and the Crisis of the Nation state (IPAR), Aberdare Country Club, 1997

Apollo Njonjo (1981), "The Kenyan Peasantry: A Reassessment", *Review of African Political Economy*

Cowen M.P (1982), "The British State and Agrarian Accumulation" in Martin Fransman (ed) *Industry and Accumulation in Africa* Heinemann, London

Kaplinsky Raphael (1980) "Capital is Accumulation in the Periphery: The Kenyan Case Re-examined" ed *Review of African Political Economy* No.17

Langdon Steve (1977), "State and Capitalism in Kenya" *Review of African Political Economy*, No. 8

Leys Colin (1975), *Underdevelopment in Kenya: Political Economy of Neo-Colonialism*, Nairobi Heinemann

Mutahi Ngunyi (1996), " Building Democracy in a Polarized Civil Society: The Transition to Multi-party Democracy in Kenya", in Onyango Kibwana and Peter (ed) *Law and the Struggle of Democracy in East Africa*, (Nairobi Claripress 1996)

Mutunga Willy (1999), *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* SAREAT Mwengo, Nairobi.

Swainson Nicola (1977), "The Rise of a National Bourgeois in Kenya", *Review of Political Economy* NO. 8

Van Zwanenberg R.M.A. (1975), *Colonial Capitalism and Labour in Kenya, 1914 - 1939*, Nairobi.