

The right of recall in Kenya is moribund

By Joshua Malidzo Nyawa

Third year law student

The right of recall as provided for in the 2010 Kenyan constitution is a right that I can equate to a seedling, that it solely depends to the farmer, it is the farmer who can decide as to whether to let it flourish or let it die .The drafters of the constitution, provided the seedling and unfortunately left it to the hands of the selfish members of the parliament.

But one may ask, why the right of recall?

It is to be noted that human beings used to live in solitude, and it was a society of each man for himself. A society that survived on the principle of survival for the fittest, to what Thomas Hobbes terms the life in such society as harsh, hostile and short, that was the state of nature where there was no government to control the affairs of the people.

Thomas Hobbes notes that the people realized the need for government and eventually formed the government through a social contract, which entailed that each individual relinquishes his sovereignty to a central body, and one can withdraw that sovereignty when the government fails to perform what it was created to do¹

That was the position that was shared by John Locke on his work, the two treatises of Government, therefore a right is such an avenue of withdrawing that sovereignty of the people.

¹ See leviathan

The right of recall is also a measure for checks and balances since power is subject to abuse whether in the hands of an individual or a group, and the notion by James Madison that

*"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."*²

But the reality is that men are not angels and are not ruled by angels but are rather ruled by their fellow greedy and unscrupulous human beings.

Power may be compared to a great river, while kept within its bounds, it is both beautiful and useful, but when it overflows its banks, it is then too spontaneous to be stemmed ; it bears down all before it and brings destruction and desolation wherever it comes. The only way to control a river is to dig tributaries in order to reduce the pressure³; right of recall is such a way of digging those tributaries.

As James Madison notes in the federalist paper no.49that;

The only legitimate fountain of power and it is from them that the power under which the charter forms the three institutions derives their power from.

He therefore seems to show that it is from the people that sovereign powers are derived from, and this can be evidenced in our Kenyan constitution starting from the preamble to various articles

We, the people of Kenya—

² Federalist paper no.51

³ Charles mwaura kamau (2014).principles of constitutional law. law Africa

EXERCISING our sovereign and inalienable right to determine

The form of governance of our country and having participated

*Fully in the making of this Constitution:*⁴

While Art.1 of The Kenyan constitution goes further to state that;

All sovereign power belongs to the people of Kenya and

*Shall be exercised only in accordance with this Constitution*⁵

It is from these premises that the right of recall as provided for in Article 104 of The Constitution of Kenya and section 27 of county governments act 2012, is premised on.

It is to be noted that under the repealed constitution, there was nothing like the right of recall, the legislature operated under the doctrine of parliamentary supremacy, since the constitution was also based on the Westminster constitution.

The Constitution of Kenya provides a novelty approach, a measure of checking those in power since no one is born a king by nature as Donald's Lutz, a constitutional scholar notes

*And since no one is born a king and no one is a king by nature, and since a king cannot rule without a people while a people can rule without a king then a king is created by the people, so it seems to follow that the people as a whole is greater than the king*⁶

⁴ Preamble of the Kenyan constitution 2010

⁵ Art,1(1)

⁶ Principles of constitutional design (2006) Cambridge university press pg. 78

Where did the constitutional drafters go wrong?

Article 104 of The Constitution of Kenya 2010; gives parliament the constitutional duty of making law on how a member of the same house can be removed from the house, thus forgetting the Ugandan proverb that says:

A monkey does not pass judgments over forest disputes as there will always be a conflict of interest.

It is line with this proverb that the Ugandans have provided for the procedure in their 1995 constitution, a member of parliament can be recalled in reference to Article 83 of their current constitution.

But this is how the Kenyan political scavengers found a way of ensuring that right of recall is curtailed, that's why I would add to what Eric mutua termed as

It will take nothing short of a miracle to for Kenyans who want to recall their MP to succeed⁷

It will not only need a miracle but more of divine intervention or the electorates to strike the wrath of their ancestors. The elections act at sect 45 makes it so hard for a citizen to recall an MP, it can only be initiated after 24 months, after being approved by the high court and at a cost of 500,000 while under sect 27 of the COG ACT, it can only be initiated once and after an approval by the high court.

It is seen that a Mca holds much higher threshold than a governor, this is a mischief by parliament on its selfish motives. The right of recall as currently legislated is moribund,

⁷ Eric mutual, why recalling an MP is no easy task (www.capitalfm.co.ke/news/2013/04/why-recalling-an-MP-is-no-easy-task) last accessed 10.07.2016.9.am

I would like to conclude by quoting Morris kiwinda and Osogo Ambani

While it was largely expected that the electorate would have the power to recall a non performing Representative, the right as currently legislated is wrought with numerous limitations⁸

Let it not be said that we made the bed so we should lie on it

⁸ The new constitution of Kenya(2013)