

# A People Centred Community: How We Lost the EALA Debate on Representation



By Cyril Kubai

## Introduction

As a regional economic bloc, the main objectives of the East African Community (EAC) is the "widening and deepening cooperation among its Partner States in among other areas the political, economic, social and cultural fields."<sup>1</sup> In order to achieve these objectives, the Treaty for the establishment of the East Africa Community (Treaty) sets out fundamental and operational principles to govern the achievement of the objectives.<sup>2</sup> In the context of Law of Economic Integration, principles founded in a Treaty are generally regarded both as a source of law and guidelines on which states in an integration bloc are expected to adhere to.<sup>3</sup>

The fundamental principles alluded to above include; "good governance including the adherence to the principles of democracy, the rule of law...transparency, gender equality as well as the promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples Rights."<sup>4</sup> On the other hand the operational principles which are aimed at governing the practical achievement of the objectives include among others "a people centred and market driven economy."<sup>5</sup>

The East African Legislative Assembly (EALA) is currently in the process of constituting its membership for the fourth Assembly since its inception. Entry into EALA (membership is drawn from each of the Partner States)<sup>6</sup>, follows a process of election, conducted by the Parliament of each Partner State, in accordance with the rules developed by the Parliament of the Partner State.<sup>7</sup>

In Kenya, the election of the members to the EALA has hit a deadlock on account of the failure by the Minority Coalition (Cord) to submit more names for election,<sup>8</sup> as proposed by the Joint Parliamentary Select Committee on Election of Members to the EALA (JPSC).<sup>9</sup> Although the formula on the sharing of slots by the both the Majority and Minority Coalition has been agreed, the present impasse threatens to derail the entire process.

This piece challenges the formula adopted by Parliament on the sharing of slots. The argument propounded here is that the formula largely ignores the participatory role

of the people of Kenya in the election process, notwithstanding the dominant recognition that the people enjoy in the framework of the Treaty.

## Membership of the EALA

The EALA comprises of 62 members, 54 of which are drawn from the 6 Partner States, with each Partner State contributing 9 members to this pool. The remaining 8 members are ex-officio consisting of the Ministers responsible for EAC affairs from each of the Partner State; the Secretary General and Counsel to the Community. Regarding the election of its members, Article 50 of the Treaty provides that:

**The National Assembly of each of the Partner State shall elect, not from among its members, nine members who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the Assembly may determine.**

It was long held in the case of *Prof. Anyang' Nyong'o & 10 others versus The Attorney General of Kenya & 2 others*,<sup>10</sup> that in discharging the obligation under Article 50 of the Treaty, "the National Assembly constitutes itself into an 'electoral college' for electing the Partner States representatives into the Assembly."<sup>11</sup>

And further that the phrase elect means "to choose or select to hold political positions" and that the election contemplated in Article 50 in the context of the National Assembly, means election by voting.

Although the process of election itself may not be as contentious, what remains debatable is the sharing of the 9 slots by Parliament and whether the formula adopted for this purpose meets the letter and spirit of Article 50, in as far as the "representativeness" nature of persons elected to the EALA by Parliament is concerned. As commanded by Article 50, the election must take into consideration, shades of opinion, gender and other special interest groups in that Partner State. This is the enduring question that ought to have informed the debate on the election process, rather than the focus on politics by the political parties. In order to put the debate in its proper context, an assessment of the election process is in order.

## Election Members to the EALA

At the regional level, the legal framework on the election of the EALA members is governed by the *East African Legislative Assembly Elections Act 2011*. Section 12 of this Act

1. Article 5(2) of the Treaty.

2. See generally, Articles 6 and 7 on the fundamental and operational principles, respectively.

3. Khoti Kamanga and Ally Possy, "General Principles Governing the EAC Integration" in Emmanuel Ugirashebuja et al, (eds.) *East African Community Law Institutional, Substantive and Comparative EU Aspects* (Leiden: Brill Nijhoff, 2017), 202.

4. Article 6 (d) of the Treaty.

5. Article 7(1)(a) of the Treaty.

6. See generally Article 50 of the Treaty.

7. Ibid.

8. Laban Wanambisi "House team meets Friday after Cord unyielding on regional assembly" June 7 2017. [www.capitalfm.co.ke/news/2017/06/house-team-meets-friday-after-cord-unyielding-on-regional-assembly/](http://www.capitalfm.co.ke/news/2017/06/house-team-meets-friday-after-cord-unyielding-on-regional-assembly/)

9. Report by the JPSC on Election of Members to the EALA tabled in the Senate on 25th May 2017. See generally, Senate Hansard on Special Sitting Convened on 25th May 2017. Available at <http://parliament.go.ke/index.php/the-senate/house-business/hansard> last accessed 30 May 2017.

10. EACJ Reference No. 1 of 2006.

11. *Prof. Anyang' Nyong'o & 10 others* supra at page 29.



mandates the "National Assembly of each Partner State ... [to] make rules governing the procedure of election of members, [to the EALA] subject to the Act and Article 50 [of the Treaty]." In compliance to this mandate, Parliament of Kenya, promulgated the *East African Legislative Assembly Elections (Election of Members of the Assembly) Rules, 2017* (EALA Election Rules 2017) to govern the process of election of members to the EALA.

Rule 6 of the EALA Election Rules 2017 require that the each of the political parties entitled to nominate candidates for election must nominate a number of candidates "not exceeding the figure arrived at by multiplying the number of elected Members of Parliament of that party by such number as JPSC shall determine and dividing the result by the total number of elected Members of Parliament." The political parties must also ensure that the nomination of their candidates, "shall as much as feasible, take into account the need for fair representation of the various shades of opinion, regional balance, gender and other special interest groups in Kenya and shall ensure that at least one third of its nominees are women."<sup>12</sup>

In accordance with the aforementioned mandate, the JPSC determined that; five (5) of the nine (9) seats will be taken by Jubilee Party (the Majority Coalition), with the remaining four (4) seats reserved for the Cord Coalition (the Minority Coalition). Members of Parliament who are independent of any political party were left out, as the JPSC arithmetic computation did not favour them.

From the moment the two political outfits – Jubilee and Cord - started submitting the names of their candidates to Parliament, it became clear that the process was largely political with the debate on the "representativeness" nature of the EALA receiving a wide berth. The political parties made it clear that the sharing of the slots was a party affair. During the Senate debate of the Report by the JPSC on election of members of the EALA, the Majority Leader had no qualms about this when he said that "the slots for EALA should be shared on the ratio of 5:4 between the majority party and the minority party."<sup>13</sup> He made it clear that "the independents will not be able to get a slot because their ratio [according to the JPSC computation] is 0.1%."

12. Rule 6(2) of the EALA Election Rules 2017. (Legal Notice No. 58 of 2017). Although the rule mirrors the provisions of article 50, the rule is somewhat inadequate as it does no more than to command with no mention on the sanctions for non-compliance.

13. Senate Hansard on Special Sitting Convened on 25th May 2017, *Supra*, at 14.

Such regressive statements connote a clear intention by Parliament to exclude "other groups" (not represented in the two main Coalitions) from taking part in the elections for membership to the EALA. This exclusion not only offends the dictates of Article 50 of the Treaty but also undermines one of the fundamental principles underlying the Treaty, i.e. "people centeredness."

### A People Centred Community

A conceptualisation of the 'people centred principle' as enshrined in the Treaty will make little sense if homage is not paid to the overtures that led to the collapse of the erstwhile East Africa Co-operation 1967. As correctly

which process was concluded in a record two weeks. The contention by the Applicants was that the amendments were done without "adequate or any consultation of the people on the proposals for amendment, as envisaged under the Treaty." In holding that the failure to involve people in the amendment of the Treaty constituted an infringement of the Treaty, the court observed that, "the people's participation in cooperation activities set out in, and envisaged under the Treaty, is ranked high among the operational principles [under article 7 the Treaty]" and further that:

**construing the Treaty as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for**



captured in the Preamble to the Treaty, one of "the main reasons for the collapse of the [previous] East Africa Community" in 1977 was "lack of strong participation of the private and civil society in the co-operation activities...of the Community."<sup>14</sup> It is only when we understand the risk that we stand to suffer should we turn a blind eye to the people, that we may rightly appreciate the participation of the people in the activities of the Community.

The East Africa Court of Justice (EACJ) has come out strongly defend the participation of people in the Community activities. The case of *East Africa Law Society & 4 others versus The Attorney General & 3 others*,<sup>15</sup> occupies a special place in the echelon of this jurisprudence. In the instant case, the Applicants challenged the hurried process of amendment of the Treaty in the year 2006,

**regression to the situation lamented in the preamble of "lack of strong participation of the private sector and civil society that led to the collapse of the previous Community."<sup>16</sup>**

In the context of the EALA, the court in the *Anyang Nyongo* case (supra) correctly noted the importance of the "representativeness" nature underpinning Article 50 when it found that;

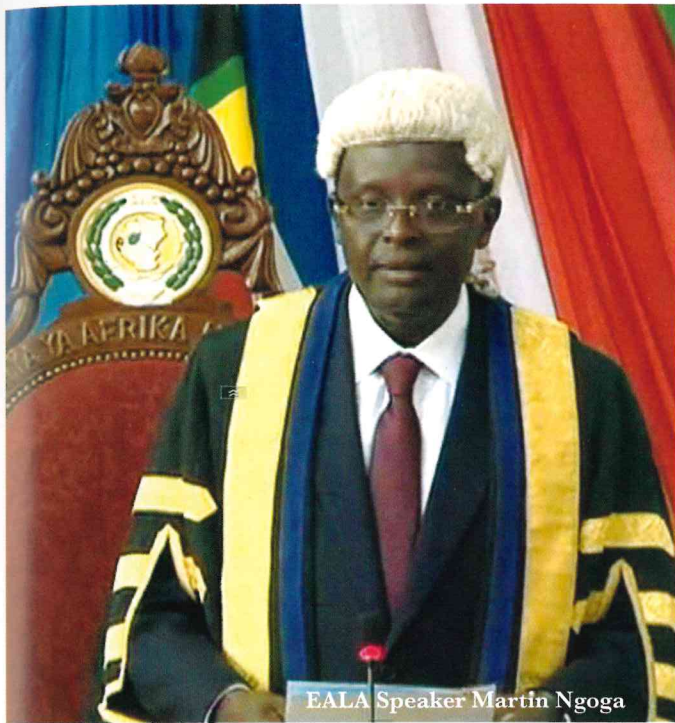
**the apparent absence of any provision [in the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001] to cater for gender and other special interest groups is a significant degree of non-compliance notwithstanding the discretion of the National Assembly in determining the extent and feasibility of the representation.<sup>17</sup>**

14. See Paragraph 4 of the Preamble to the Treaty.

15. EACJ Reference No. 3 of 2007.

16. *East Africa Law Society & 4 others* supra at page 30.

17. *Anyang Nyong'o & 10 others* supra page 37.



EALA Speaker Martin Ngoga

The importance of this pronouncement is that the decisions made for and on behalf of the people for the Community ought to be made by taking into consideration the views of the people and not at the whims of those who have been mandated to do so on behalf of the people. Regard should also be made to article 10(2) of the Constitution which recognises "participation of the people" as one of the national values and principles of governance. Given that political parties are required "to abide by the democratic principles of good governance"<sup>18</sup> a final issue that the discourse pursues is whether the political parties as presently constituted can be used as a perfect scale for the determination of the will of the people of Kenya.

### Political parties as representative of the people

Are the political parties in Parliament representative of 'shades of opinion, gender and other special groups for the people of Kenya? This is debatable. While the last two requirements – gender and other special groups – may not be in issue,<sup>19</sup> it is doubtful whether the political parties as they are reflect the various shades of opinion of the masses in Kenya.

Let us face it; for a start Kenya has a total of 67 registered political parties.<sup>20</sup> Of the 67 political parties, only 12 have representatives in Parliament.<sup>21</sup> This means that the views and ideologies of the people who are affiliated to the remaining 55 political parties are not represented in Parliament along the political parties' mandates.

Secondly, even assuming that all the political parties had representatives in Parliament, it is an open secret that not all Kenyans subscribe to the views or aspirations of the

existing political parties. An apt pointer to this, is the 2013 General elections in which, according to the Independent Electoral and Boundaries Commission (IEBC) only 14,388,781 people were registered as voters out of an estimated figure of 22 Million eligible voters.<sup>22</sup> This was a representation of 63% of the total number of eligible persons in the country. Come the voting day, of the 14,388,781 registered voters, only 12,221,053 turned up to vote.<sup>23</sup> In other words, an approximate 55% of the total estimated 22 million eligible voters in 2013, participated in the elections, with the remaining 45% largely falling to express their opinion.

Although the percentage of 55% of the total number of people who voted, includes the number people who voted for independent candidates contesting in the elections, (3 of whom were elected to the National Assembly)<sup>24</sup> it nevertheless underscores the point that the political parties in Parliament cannot be said to be an accurate reflection of the shades of opinion of all the people of Kenya.

This is more so given that only 12 political parties have representatives in parliament with the rest of the registered political parties lacking representation, notwithstanding the fact that they have members who are also part of the "people of Kenya." In addition, the recent mass defections by candidates from political parties after the primaries reveal the weak link that members have with their political parties. Some of these candidates will now run independent of their former parties, a further indictment as to why relying on political parties as agents of the attainment of the "shades of opinion" in the process of election of members to the EALA, offends the very principles that the Treaty seeks to achieve, namely a "People Centred Community."

### Conclusion

Article 50 of the Treaty, seeks to promote "representativeness" in the EALA, to include not only the political parties aspirations but also other "shades of opinion, gender representation and special interest groups." The recent party primaries in Kenya, which saw a huge number of candidates decide to contest as independent candidates, could be a pointer that perhaps Kenyans no longer have qualms to having political parties monopolise popular representation in the EALA. If this assessment is right, then it is perhaps time that the country should insist on a strict interpretation of the "representativeness" nature of the EALA as envisaged in the Treaty. This will involve a focus on the participation of all social groups from the bottom to the top. Going forward the country must move beyond the mere parochial interest of political parties and extend to other groups of the society who may not be affiliated to the political parties in parliament, or who are otherwise dissenters to the aspirations that the existing parties seek to achieve.

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18. See article 91 (d) of the Constitution of Kenya.

19. The assumption here is that all political parties meet the requirements of Article 91(e) and (f) of the Constitution which enjoin the political parties to respect the rights of minorities and marginalized groups as well as principle of gender equality, as basic requirements governing the operations of the parties.

20. See <http://www.orpp.or.ke/index.php/en/political-parties/list-of-political-parties> last accessed 30 May 2017.

21. See generally Parliament website at <http://www.parliament.go.ke/> last accessed 30 May 2017.

22. Independent Electoral and Boundaries Commission "4th March 2013 General Election: Election Data", 6. <https://www.iebc.or.ke/docs/4TH%20MARCH%202013%20GENERAL%20ELECTION%20DATA.pdf> last accessed on 30 May 2017.

23. Ibid

24. Parliament website (supra note 19) above.