

**NORTH EASTERN PROVINCE & THE CONSTITUTIONAL  
REVIEW PROCESS - Lessons from History**

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## INTRODUCTION

For the first time in Kenya's history, the people of Kenya have been given an opportunity to take part in the Constitution making process since the Lancaster house Constitutional talks that produced the Independence Constitution of 1963. The Constitution of Kenya Review Act 1997 (hereinafter called the "**Review Act**", Chapter 3A of the Laws of Kenya (as amended in 1999, 2000, 2002 and 2004) clearly states that it is an Act of Parliament to facilitate the comprehensive review of the Constitution of Kenya by the people of Kenya. The Review Act sets out in great detail the objects and organs of the review process, the guiding principles and repeatedly underscores the right of the Kenyan people to freely and meaningfully participate in the review process and for the final document to reflect the wishes of the people of Kenya. This process of Constitution making is a marked departure from the conventional way of effecting Constitutional change in Kenya. Under S.47 of the Constitution of Kenya, Parliament alone has the power to amend the Constitution. All the 38 amendments to the Constitution of Kenya since Independence in 1963 were done in and by Parliament. The people were not part of that amendment process. The Review Act was enacted by Parliament in response to the clamour for people-driven Constitutional reform, which started in the 1990s.

For the people of North Eastern Province (hereinafter called "**N.E.P.**") and indeed of the former Northern Frontier Districts (hereinafter called "**N.F.D.**") the present Constitutional review process is like a second opportunity which they cannot afford to miss out. It is a historical fact that they did not take part in the Lancaster House Constitutional talks that produced the Independence Constitution of 1963. There have been

consequences that followed that failure which is manifested in the state of the socio-economic, political and human development of the people and the region. Consequently, in the on-going Constitutional Review Process the full and effective participation of the people in the process and at all levels is a categorical imperative. This is their best chance to articulate their views and wishes for the new Kenya and to use the review process to recover lost time and opportunity to address and redress past historical injustices, imbalances and inequities. They must and should not allow history to repeat itself. This time round they should not be left behind by the Constitutional reform train.

### **HISTORICAL BACKGROUND**

North Eastern Province which now comprises Wajir, Mandera, Ijara and Garissa districts was part of the former N.F.D. (Northern Frontier Districts) which also included Isiolo, Moyale and Marsabit. Most of the inhabitants of this region were ethnic Somalis and others allied to them. They had a lot in common; (in terms of religion, language, customs, Nomadic way of life, etc) with the other Somali regions under Italian, British, and French occupation than with the rest of other Kenyans. This fact was apparent to the British colonial officials in East Africa much earlier when in 1902, the then Commissioner of the East Africa protectorate, Charles Elliot stated that, "if it were possible to detach the districts inhabited by the Somalis it would be an excellent thing to form them into a separate government". This did not happen and after the completion of the partition of Africa by the Colonial Powers, N.F.D became part of Kenya while the rest of the areas inhabited by the Somalis came under the French (Djibouti), Italy (Southern Somalia),

British (Northern Somaliland) and Ogadenia now under Ethiopia. Ethiopia, under Menelik, took an active role in the partition of Africa. He wrote to the European Colonial Powers stating that, "If powers at distant come forward to partition Africa between themselves, I don't intend to be an indifferent Spectator." He was then given large areas of Somali inhabited areas which today form Zone 5 of Ethiopia. By 1925, the size of N.F.D was reduced when 12,000 square miles of territory was ceded by the British to Italy and the border was pushed back from the Juba River in Somalia to where it is today. This followed a 1915 treaty in London between the two colonial powers wherein Britain promised this Land as quid pro quo for Italian support in World War 1.

The colonial government in Kenya, in an effort to control the movement of the Somalis into the hinterland of East Africa and of their integration with others in Kenya, enacted several legislations specifically targeting N.F.D. The first was the Outlying District Ordinance 1902 which applied exclusively to N.F.D. The effect of the Ordinance was to declare N.F.D. a closed area. Movement in and out of the area was restricted and only under a special pass. The second was the Special Districts (Administration) Ordinance, 1934, which together with the Stock Theft and Produce Ordinance, 1933, gave the colonial administrators in the region extensive powers of arrest, restraint, detention and seizure of properties of "hostile tribes". The definition of what constitutes a hostile tribe was left to the Provincial Administration to determine.

These ordinances not only applied to N.F.D. but also to Tana River, Lamu, Kajiado and Samburu districts. Further the Stock Theft and Produce Ordinance legalized collective punishment of tribes and clans for the offence

of their member once that tribe was declared "a hostile tribe" by the Provincial Commissioner.

The long title of the said ordinance stated thus:- "An ordinance to provide for the recovery of fines imposed on Africans (including Somalis) for the theft of stock or produce by levy on the property of the offender or his family, sub-tribe or tribe....." The meaning of what constitutes "stock" was as defined in Section 278 of the Penal Code. Under this Section stock is defined as to include any of the following that is to say; horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether goat or pig or the young thereof.

The net effect of this early colonial legislation was to turn N.F.D. into a closed zone, which had no contact or relation with the other parts of Kenya. Indeed, the other Kenyans did not know much about N.F.D. This situation continued even after independence and is best captured by the statement of the American writer, Negley Farson, that, "there is one half of Kenya about which the other half knows nothing about and seems to care even less". The European Minister for African Affairs, while contributing to a motion on setting aside Land in either Gilgil, Naivasha or Isiolo for Somali stock traders, on 28th October 1954, spelt out the colonial government's position on the Somalis as follows:- "Now Sir, the policy of the government towards these men has always been that although we recognize their fine qualities, and I yield to nobody in my admiration of their Powers of Leadership, their hardihood, their physical courage and their epic skills as bush Lawyers, we can only absorb a few of them. Government has always taken the view that it will be wrong to establish a reserve for them". The

Late Eliud Mathu, while contributing to the same motion, said, "This Council regrets that the government has not accepted the minority recommendation of the Somali Committee that Land should be made available for Somali stock farmers and requests government to reconsider their decision. I do think that these Somalis require the same treatment that would be accorded to any other bonafide resident of Kenya". Mr. Cook, another Member of the Legislative Council (legco), while contributing on the same motion also said; " I know that Somalis are in many ways vexatious people because they stand up for their own rights and certain number of government servants do not like non-Europeans to stand up sturdily for his own rights. I have noticed that in the past and perhaps other people have noticed it as well. But I personally think that it is that virile type of African that we need most in the development of this country".

### **INDEPENDENCE OF KENYA AND N.F.D**

By the time political activities were legalized in Kenya in 1960, the Somali people of N.F.D, with the active moral, diplomatic and material support of the newly independent Republic of Somalia, formed the Northern Province Peoples Progressive Party (N.P.P.P.P.) whose main agenda was the secession of N.F.D. and re-union with Somalia. Somalia offered the Leadership of N.P.P.P.P. a base in Mogadishu and offered diplomatic support for their cause by putting it in the international scene under the right to self-determination Principle.

Somalia became Independent on 1st July, 1960 and it was made up of the former British Somaliland Protectorate and Italian Somaliland. One of the objects of the new Somali government as stated in the Independence

Constitution (article 6(4) was, "the union of Somali territories by legal and peaceful means". The Provisions for citizenship under the Somalia Constitution was as broad and liberal as to include all ethnic Somalis wherever they were. Independent Somalia's ambition was to achieve the union of all Somali territories not yet independent in Kenya, Ethiopia and in Djibouti to form Greater Somalia. It's first President, Dr. Abdi Rashid Ali Sharmarke, justified this position in his speech to the U.N., when he said, "Our misfortunes do not start from unproductiveness of the soil, nor from lack of any material wealth. These limitations on our material well being were accepted and compensated for by our forefathers from whom we inherited among other things cultural prosperity of inestimable value. Our misfortune is that our neighboring countries with whom like the rest of Africa we seek to promote constructive and harmonious relationships are not our neighbors. Our neighbors are our Somali Kinsmen whose "citizenship" has been falsified by indiscriminate boundary arrangements. How can we regard our own brothers as foreigners".

During the start of the Lancaster House talks on the Independence Constitution for Kenya, a delegation of leaders from N.F.D. met with the then British Secretary for colonial Affairs in London stating the N.F.D. position of secession from Kenya to Somalia. Abdi Rashid Khalif who represented the region in the talks stated that he was neither a member of KANU nor of KADU but a secessionist. At the Kenya Constitutional Conference of 1962, the Secretary of state for colonies proposed to arrange for an Independent Commission to be appointed to investigate public opinion in the N.F.D. regarding its future. This Commission, called the N.F.D. Commission, consisted of two members, G.C.M. Onyiuke and Major

General M.P. Bogert. Their terms of reference was, "To ascertain and report on public opinion in the N.F.D. (comprising of Garissa, Wajir, Mandera, Isiolo, Marsabit and Moyale) regarding arrangements to be made for the future of the area in the light of the likely course of Constitutional development in Kenya". They were also to direct inquiries towards ascertaining the people's opinion in relation to the period of internal self-governance in Kenya and the period after Independence. The Commission visited every district in the N.F.D. It heard oral submissions from 134 delegations and received 106 written submissions. It also held meetings in Nairobi with the leaders of other political parties. There were two predominant opinions then - Pro-Kenya and Pro-Somalia. The division of the opinion was influenced very much by the tribe and religion of the communities. Majority of the people of N.F.D. of the Somali and non-Somali Muslims were in favor of secession to Somalia while the others supported being in Kenya.

The British Government was unwilling to abide by the result of the Commission on the grounds that it was not prepared to take a unilateral decision on the future of the territory so close to the date of Kenya's Independence. However, the Regional Boundaries Commission set up by the British Government in 1962 recommended that the pre-dominantly Somali occupied Districts of Garissa, Wajir and Mandera be constituted into the 7th region and the North Eastern Province was then born. The Colonial Secretary, while announcing the creation of the Province in March 1963, made the following statement: - "We are not so foolish as to imagine that the creation of a seventh region will be hailed as providing satisfaction, but I do trust that it will be received by the Somali as an expression of sincere

goodwill, not only from the British, but also from the Kenya Government. We, not only the British Government, but both Parties in Kenya, understand the desire of Somali people to express their own identities, particularly when you get people of one race living in a country with people of another. But Kenya is a country which depends for its future on being able to recognize people of different races and prove it is capable of providing a home where people of different races can live honorably and amicably" (The Times, 9th March, 1963). This was seen as a betrayal of the wishes of the people of N.F.D. in general and N.E.P in particular. Consequently they boycotted the elections of 1963 and the Leaders of N.P.P.P.P. started what came to be known as the "shifita war". Somalia on its part broke off diplomatic relations with Britain in protest and started its overt and covert support for the N.F.D. secessionists. The Government of Kenya led by Mzee Jomo Kenyatta was firm on its stand that it will not cede an inch of Kenya's territory. He is reported to have said about those fighting for secession - "Let them pack their camels and go to Somalia". A fortnight after Independence, the Government declared a state of emergency over the N.F.D. following increased attacks on government officers and institutions. In an address to the Parliament, the Prime Minister of Kenya, Jomo Kenyatta, explained the government's action to declare the state of emergency when he said, "Our action declaring a state of emergency is intended to handle the source of the trouble by providing the security forces with the powers they need to deprive the shifita of the element of surprise attack. The government's action is purely defensive and we have taken emergency powers under the extreme provocation of violence". This state of emergency lasted for close to 30 years leaving behind a trail of death, destruction and violations of human rights.

## **AMENDMENTS TO INDEPENDENCE CONSTITUTION AND EMERGENCY LAWS IN N.F.D**

Kenya became Independent on 12th December, 1963. The instruments granting the Independence were contained in an extra-ordinary issue of the Kenya Gazette vide legal notice No. 69 of 10th December, 1963. Acting under the Provisions of the Kenya Independence order in Council, 1963, the Queen of England granted Independence to Kenya by virtue and in exercise of the Powers granted to her by the British Settlements Acts, 1887 and 1945 and the Foreign Jurisdiction Act, 1890.

Section 29 of the Independence Constitution provided for the procedure to be followed in the event of a declaration of a state of emergency. However, Section 19 of the Kenya Independence order in Council (Kenya subsidiary legislation, 1963) provided that the Governor General, "may, by regulations which shall be published in the Kenya Gazette, make such provision as appears to him to be necessary or expedient for the purpose of ensuring effective government or in relation to the North Eastern Region and without prejudice to the generality of that power, he may by such regulation make such temporary adaptations, modifications or qualifications or exceptions to the Provisions of the Constitution or of any other Law as appear to him to be necessary".

The Powers granted in relation to N.E.P. were complimenting the already existing draconian legislations that applied to the region e.g. the Preservation of Public Security Act, the Outlying Districts Act, the Special District (Administration) Act, the Stock and Produce Theft Act, etc. This was in line with the report and recommendations of the Committee on the Bill of Rights

at the Lancaster House Constitutional talks, which recommended in its report under the heading of freedom of movement, as follows: -"The Committee considered whether it was desirable for the Bill of Rights to permit the continued imposition of such restrictions of freedom of movement as are now authorized under the special districts (Administrations) Ordinance and the Out-lying Districts Ordinance. The Committee recognizes that there may be certain objections to permitting the continuation of legislation of this type but on balance they consider that in present circumstances it is necessary to do so, provided that the Bill of Rights lays down certain limits within which such legislation may be operated. The Committee considers that this result might be suitably achieved in the following way. The two particular Ordinances in question would be specifically preserved until such time as the legislature decided that they could be dispensed with". The effect of these recommendations was to justify the continued application of all the colonial legislations that applied to the N.F.D. and they became part of the Laws of Independent Kenya.

When Kenya became a Republic in 1964, the powers enjoyed by the Governor - General under Section 19 of the Independence Constitution, were transferred to the President and this became Section 127 of the Republican Constitution giving the President the Power to rule N.E.P. by decree. There were several other amendments to the Independence Constitution since then. However, three (3) particular amendments affected N.E.P. and N.F.D very much. The third amendment vide Act No.14 of 1965 altered parliamentary majority required for approval of a declaration of a state of emergency from 65% to a simple majority. It also extended the period after

which a parliamentary resolution must be sought from 7 to 21 days. Declaration of the state of emergency was made valid for 3 months instead of 2. The Fourth amendment vide Act No. 16 of 1966 extended the President's Power to rule N.E.P by decree to Marsabit, Isiolo, Tana River and Lamu Districts. The regulations were published under the Preservation of Public Security Act, Chapter 57, Laws of Kenya as N.E. Province and contiguous Districts Regulations, 1966. The sixth amendment vide Act No.18 of 1966 had the effect of enormously enlarging the government's emergency powers. It completely removed existing legislation relating to parliamentary control over emergency legislation and the Law relating to Public order. Existing Constitutional Provisions were repealed and replaced by one which gave the President a blank cheque power, "at any time by order in the Kenya Gazette to bring into operation generally or in any part of Kenya, part III of the preservation of Public Security Act or any part thereof."

The possible duration of such emergency powers was extended from 7 to 28 days or longer and they could be approved by a simple majority; whereas to repeal them, unless the President so decides, a majority of all elected members of Parliament was required. At the same time the Preservation of Public Security Act, 1960 was amended to define the full scope and operation of the new powers. A distinction was made between public security measures and "special" public security measures. The former was available under part II of the Act and could be effected by the President without approval of Parliament.

The application of emergency Laws first in North Eastern Province and later in 1966 throughout the Northern Frontier Districts meant that in effect

Kenya had two separate legal regimes - one applied exclusively to N.F.D. and the rest of Kenya with another. In addition to the already existing Laws affecting N.F.D specifically such as the Outlying Districts Act, the Special Districts (Administration) Act, the Stock Theft and Produce Act, the detailed Provisions of the emergency Law was contained in the North Eastern Province and Contiguous Districts Regulations, 1966 made under the Preservation of Public Security Act, Chapter 57, Laws of Kenya pursuant to the Provisions of Section 127 of the Constitution. The Regulations formed the basis for the derogation of human rights and explicitly endorsed instances in which the fundamental human rights of the person could be violated. In the process, the government arrogated to itself in the region powers that could only apply to the rest of the country when Kenya was at war. The Northern region was thus technically a war zone and virtually became a Police state. The Regulations created certain offences that were punishable without the due process of the Law. It also created "prohibited" and "prescribed" zones in the region. The Regulations defined a "prescribed" area to mean the area comprising the North Eastern Province and the Isiolo, Marsabit, Tana River and Lamu districts and a "prohibited zone" as the aggregate of the areas within the prescribed area. In these areas the offence of possession of firearm, consorting or harboring one with a firearm was punishable by death. The offence of harboring anyone who may act in a manner prejudicial to the preservation of public security was punishable by life imprisonment. Even the owning, operating or use of boats or any other means of transport on Tana River was made a crime liable to imprisonment. Entry into the region by members other than Civil Servants and members of the Security Forces was prohibited. Members of the Armed forces were empowered to carry out the functions of a Police

Officer with wide powers of search, arrest, restriction and detention of persons in the region. Members of the Provincial administration and the security forces were given power to preside over "judicial trials". District administrators were at times sitting as "Magistrates" in Courts. The regulations also suspended the application of Sections 386 and 387 of the Criminal Procedure Code (which requires the holding of an inquest on the death of persons in Police custody or under suspicious circumstances) and instead stated that the Provisions will not apply in the case of persons dying or found dead in the "Prohibited" zone.

The Constitutional and legislative framework for the application of emergency Laws in the northern region can be said to have been completed in 1970 with the passing of the Indemnity Act, Chapter 44 of the Laws of Kenya. This Act, which came into force on 5th June 1970, was meant to indemnify government agents and members of the security forces working in the region against any claims on account of any loss or damage occasioned by their actions. The objective of the Act is clear in the long title of the Act. It states that it is an, "Act of Parliament to restrict the taking of legal proceedings in respect of certain Acts and matters done in certain areas between the 25th December 1963 and 1st December 1967...." Section 3 of the Act states that, "No proceeding or claim to compensation or injury shall be instituted or entertained by any Court or by any authority or tribunal established by or under any Law for or on account of or in respect of Act, matter or thing done within or in respect of the prescribed area, after the 25th December 1963 and before 1st December 1967... If it was done in good faith or done in execution of duty in the Public interest by a Public Officer or member of the armed forces.....". Section 2 of the Act defines the

prescribed area as to mean the N.E.P. and Isiolo, Marsabit, Tana River and Lamu Districts. It is instructive to note that a lot of human rights violations occurred in the N.F.D. after 1967 and those responsible for those violations cannot claim indemnity under this Act.

### **EFFECTS OF EMERGENCY LAWS IN N.F.D**

The application of emergency Laws in N.E.P. in particular and N.F.D. in general have had serious consequences for the people and the region. The effects of these Laws can be grouped into three (3) distinct categories, namely:-

1. Gross Violations of fundamental human rights.
2. Discrimination of the people of the region.
3. Marginalization and underdevelopment of the people and the region.

#### **(a) HUMAN RIGHTS VIOLATIONS**

Among the plethora of grievances, which the people of the region have raised is the one directed against the operations of the security forces. Members of the security forces, including but not limited to the army, Police, the paramilitary G.S.U. and the anti-shifita force, have been accused of committing gross violations of human rights in the course of their duties, including instances of genocidal killings, mass murders and rape, extra-judicial killings, arbitrary arrests and detention of persons and communities and illegal confiscation and theft of properties. The following cases and

incidents illustrate the foregoing:-

1. Bulla Kartasi Estate Massacre in Garissa in November 1980. This was the first well-documented massacre that occurred in Northern Kenya and was blamed on the members of Kenya Army. Following the killing, in an ambush, of six (6) government officials in Garissa town by one bandit known as Abdi Madobe, the security forces, in retaliation burnt the whole of Bulla Kartasi Estate in Garissa town killing people, raping women and herded the town's residents to a mini-concentration camp at Garissa Primary School play ground where they kept them for 3 days without food or water. Human rights organizations' estimates put the dead at over 3000 with an equal number unaccounted for.
2. The Wagalla Massacre in Wajir in February 1984. This was the second documented incident this time blamed on the General Service Unit (GSU). In February 1984, the security forces launched an operation in Wajir targeting the Degodia sub-clan of the Somali. Most of those rounded up in the swoop were summarily executed after days of incarceration at the Wagalla airstrip. Close to 5,000 people are said to have lost their lives during this incident.
3. Other instances of extra-judicial killings, and collective punishment of Communities in Malka-mari, Garse, Derakali, Dandu and Takaba areas of Mandera District.

**(b) DISCRIMINATION**

Kenyan Somalis in general and those from N.E.P and indeed N.F.D, complain of discriminatory Laws, regulations, practice and procedures that apply to them only and not to the other Kenyans. This is especially acute in

the area of citizenship and immigration Laws i.e. in the issuance of Birth Certificates, Identity Card and Passports. Their complaints have centered on the fact that they have to produce more documents and undergo additional scrutiny and procedure to acquire these documents which is not the case with other Kenyans.

The screening exercise of the Kenyan Somalis and their issuance with a Pink Card by the Government in November 1989 is also cited as a clear case of discrimination of the people of N.E.P. and N.F.D. The justification for the screening of the Kenyan Somalis was contained in a government statement which stated thus; "The Government is to register all Kenyan Somalis and expel those found to have sympathy with Somalia. The Government cannot tolerate citizens who pretend to be patriotic to Kenya while they involve themselves in anti-Kenya activities. The Government has therefore found it necessary to register Kenyans of Somali ethnic group to make them easily identifiable by our security forces." The Provisions of the Registration of Persons Act, Chapter 107, Laws of Kenya, was used to implement the screening exercise. The Principal Registrar of Persons then issued a notice in the Kenya Gazette being legal Notice No.5320 of 10th November, 1989 which stated as follow:- "In accordance with Section 8 of the Registration of Persons Act, the Principal Registrar requires all persons of the Somali ethnic Community resident in Kenya who are of eighteen (18) years and above to attend before registration officers at the centers specified in the second column of the schedule and furnish such documentary or other evidence of the truth of their registration between 13th November, 1989 and 4th December, 1989". The long title of the Act declares it as an Act of Parliament to make Provisions for the registration of persons and for the

issue of Identity Cards and for purposes connected therewith. Section 2 of the said Act also states that it shall apply to all persons who are citizens of Kenya and who have attained the age of eighteen years or over or where no proof of age exists, are of the apparent age of eighteen years or over. Section 18 of the Act which the Principal Registrar invoked to order for the screening exercise, empowers a Registration Officer to require any person registered under the Act to furnish such documentary or other evidence of the truth of the information given by that person. The screening exercise, which was in effect a mass verification exercise, was carried out through the use of vetting committees made of some selected elders and members of the Provincial Administration and Civil Service. All those who appeared before the committee were basically required to show course why their previous registration should not be cancelled. They were under a burden to proof their citizenship or their right to claim such. Those who satisfied the committee were issued with a pink registration card that bore their names, family, sub-clan, clan and tribe. Those who failed to satisfy the committee were either denied registration or had it cancelled if they had one before. They were thus effectively declared non-citizens and indeed stateless. Those affected were deported to Somalia while others opted to settle elsewhere in East Africa.

The screening exercise of the Kenyan Somalis and the attendant requirement of the production of their screening card in addition to their Identity Card as proof of their citizenship was seen as a discriminatory exercise against them and a violation of their fundamental rights to protection from discrimination as enshrined in Section 82 of the Constitution of Kenya which states that no Law shall make any Provision that is discriminatory either of itself or in its

effect and that no person shall be treated in a discriminatory manner by a person acting by virtue of any written Law or in the performance of the functions of a Public office or a Public authority. The expression, "discriminatory" has been defined to mean, "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence, or other local connation, political opinions, color, creed or sex or whereby persons of one of such descriptions are subjected to disabilities or restrictions to which persons of another such description are not made subject to or are accorded privileges or advantages which are not accorded to persons of such description." The legality of the exercise was also questioned by many legal experts who felt that since the process of acquisition of Kenyan citizenship was provided for under the Constitution the Principal Registrar had no power to determine the citizenship status of a person since his mandate under the Registration of Persons Act was to register Kenya citizens of 18 years and issue them with an Identity Card but not to confer citizenship or deprive one of the same. Nairobi Lawyer, Mohamed Khadar Ibrahim, refused to be screened and to pick the Pink Card on the grounds that he felt that he was being treated as a second class citizen. He was subsequently detained together with other Multi-Party activists and later released after a short stint as a state quest in Kamiti Prison. The instrument of his detention dated 5th July, 1990 and issued by the Minister of State in the office of the President states as follows:- "IN EXERCISE of the powers conferred by regulation 6 (1) of the Public Security (Detained and Restricted Persons) Regulations, the Minister of State, being satisfied that it is necessary for the preservation of public security to exercise control, beyond that afforded by a restriction order, over IBRAHIM MOHAMED (hereinafter referred to as the

detained person) **HEREBY ORDERS** that the detained person shall be detained". It is still unclear whether his detention was either provoked by his refusal to submit to government efforts to screen him or because of his association with the then Multi-Party activists or both.

**(c) MARGINALIZATION AND UNDERDEVELOPMENT**

One of the most visible legacies of the emergency Law period in the region is the state of underdevelopment in all aspects of life. The government's energies and resources were largely directed towards security and the maintenance of Law and Order. Its policy has been described as one of containment and not engagement. No constructive or meaningful development ever took place during this period. Indeed, over 80% of the region's budget was always spent on security leaving nothing for development. The net result is that the region is today the most underdeveloped and marginalized in Kenya. There are very few institutions of higher learning in the region. At Independence, there were only 2 Primary Schools in the whole of N.F.D. - one in Wajir and another in Isiolo. The level of illiteracy in the area is over 80% while over 85% of the people live below the poverty line (which is approx. USD.1 per day by U.N. standards). There are no major health facilities in the area. The infrastructure of the region is deplorable. While the region covers over 130,000 sq. kms, it has only 6 kms of tarmac road. Education standards in the region is poor due to the lack of adequate facilities. The performance of the students from the region in the National Examinations is consistent - the poorest results and lowest marks. The whole of N.E.P. sends to the Public Universities a fraction of what 1 school in Nairobi sends. Suffice to state that the region's cry for affirmative action and a marshal plan for

development is not without merit. The affirmative action required is mostly in the Education Sector and in the Public Service i.e. lower entry points for admission to Public Universities and middle level colleges, recruitment in the Public Service and disciplined forces, etc. The marshal plan for development entails quantitative and qualitative increase in educational and health institutions, the road network, tax incentives for investors in the region, etc.

The state of underdevelopment is often cited as evidence of marginalization. The lack of government support to develop the market for the livestock industry, which is the main economic activity of the region, and the location of the Kenya Meat Commission at Athi River, far away from the N.F.D, is cited as marginalization of the people and the region. Government Policy of declaring that Agriculture was the backbone of the Kenyan economy which excluded the livestock sector in the scheme of things was the key to marginalization. No effort was made to harness the potentials in the livestock sector. There are no marketing or development board or research institute for the livestock sector unlike in the other sectors of the Kenyan economy e.g. Coffee Board of Kenya, KTDA, Pyrethrum Board, NCPB, N.I.B., K.T.B., K.A.R.I., K.E.F.R.I., etc. Had the livestock sector been fully developed, the fortunes of the region would have been improved quite significantly. Botswana and Somaliland are often cited as good examples of countries that earn a lot from the livestock sector. The statutory definition of the boundary of Garissa District to exclude the River Tana from its territory (the "3-mile rule") is also said to manifest the marginalization that remained from the emergency period. Government control on the movement for sale of livestock from the region to other parts of Kenya and the lack of good

communication network such as tarmac roads for the border towns in the N.F.D such as Garissa and Mandera in N.E.P. and Moyale in Eastern Province which form the border towns for Kenya with Somalia and Ethiopia respectively as compared to the development of the road networks of other border towns such as Namanga and Taveta for Tanzania, Busia and Malaba for Uganda and Lodwar for the Sudan, has similarly been cited as evidence of Malignant marginalization. So too is the failure by government planners to group the Kenyan Somalis as one tribe like the others in Kenya instead of sub-dividing them into sub-clans and others during the National Population Census.

### **CONSTITUTIONAL REFORM, MULTI-PARTY POLITICS & REPEAL OF EMERGENCY LAWS**

The start of the clamour for Constitutional reform in Kenya in 1990's which led to the repeal of Section 2A of the Constitution, the introduction of Multi-Party politics in Kenya and the Inter-Parties Parliamentary Group (IPP G) talks that produced the minimum reforms to the Constitution, also saw the repeal of the emergency Laws affecting N.F.D in general and N.E.P in particular. Section 127 of the Constitution, which laid the foundation for the state of emergency, was repealed on the 29th November 1991. Similarly the North Eastern Province and contiguous Districts Regulations, 1966 made under the Preservation of Public Security Act, was also repealed in 1991. Later the Outlying District Act and the Special Districts (Administration) Act were also repealed in 1997 under the Statute Law (Repealed and Miscellaneous) Amendment Act, 1997. The repeal of the above Laws were

a big step forward in the restoration to the people of N.F.D of their fundamental rights and freedoms as guaranteed in Chapter 5 of the Constitution of Kenya. However, despite these gains, there are still some vestiges of colonial and post-colonial legislations that remain in our statute Books. The first is the Stock and Produce Theft Act, which is a colonial legacy that is still in force today having come into operation on 5th May 1933. The second is the Indemnity Act which was enacted in 1970 during the emergency period and yet is still part of the Laws inspite of the repeal of the other emergency Laws. Moreover, in the year 2001, the Safina Member of Parliament from Wajir West Constituency, Hon. Adan Keinan, brought a motion in Parliament to repeal the Indemnity Act, which Motion was passed by the Parliament. However, to date no bill has come to the house to repeal the said Act to implement the resolution of the house.

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## **CONCLUSION**

With the repeal of the emergency Laws and the advent of Multi-Party Politics in Kenya, the people of N.E.P and N.F.D now appear to enjoy relative protection of their fundamental rights. The people are much freer than before and they are slowly becoming aware and assertive of their rights. Despite the many hardships in the area, the people have somehow managed to rise up to the challenges facing them in their endeavor to re-integrate with the larger Kenyan Society. While there is a lot to be done for the region and the people in terms of development in all aspects of life, there is no denying that the people of the region have found their way into the socio-economic and political systems of the country through sheer hard

work, determination, will power and commitment in what they do. They have made impressive progress in making themselves strong actors in trade and business in Kenya, in education, in their obtaining leadership positions in the government and public service, in political leadership and in every other aspect of Kenyan Society. Their potentials and morale was not destroyed by the colonial and post-colonial emergency legal regime applied to them. They have refused to regard or see themselves as inferior or second class citizens and proved right, Lady Eleanor Rooservalt's statement that, "no one can make you feel inferior except with your own consent". In spite of restrictions, Somali traders have managed to settle in Urban Centers in Kenya, even before the Independence period, to trade and do business therein. Indeed, despite the secessionist fervour in N.F.D, urban Somali traders who settled in urban centers such as Nyeri, Muranga, Juja, etc, even supported the Independence struggle of the Mau Mau as the words of the late General Mwariama testify, when he said, "You could be betrayed by your own brothers but never by the Somali. Somali traders fed, clothed and smuggled guns and ammunition to us." Today, Somali businessman and traders are known to be among the most enterprising business persons in Kenya's major towns.

The People of the N.E.P and N.F.D have also managed to rise to senior positions in the political field and in the public service. They have managed to rise to senior positions in the Armed forces, civil service, Provincial Administration, the cabinet, Foreign Service, etc. Persons of great character and integrity from the region have managed to become head of the army, Provincial Commissioner, District Commissioners, Ambassadors, Head of Parastatals and of Commissions, Political parties, etc. Indeed, in the Current

Succession debate going on as to the next leader of the country, some political leaders from the region have even been touted as potentials. It is therefore not an overstatement to say that the people of N.F.D. have been fully re-integrated into the Kenyan Society and that the former dream of secession to Somalia in the 1960's has been overtaken by the realities of the 1990s that they are part and parcel of Kenya. That dream of secession is to all intent and purposes as, "dead as a dodo". This is proved by the chorus of condemnation directed at the Somali warlord, Hussein Farah Aideed, by the leaders of the region, when he tried to revive the idea of secession. Indeed, during the short visits that the Constitution of Kenya Review Commission made to N.E.P and former N.F.D regions to collect views from individuals and organized groups at the Provincial and district levels, there was not a single view heard that called for the secession of N.E.P or N.F.D. On the contrary, the views of the people centered upon the past historical injustices inflicted during the emergency period, marginalization and underdevelopment, discrimination, and the need for the people to feel once more that they are Kenyans whose rights and interest must be protected.

The current comprehensive review of the Constitution is hoped will produce not only a new Constitution that reflects the wishes of Kenyans today but also a new United Democratic Kenya where human rights are protected, the rule of Law reigns supreme and there is equitable distribution of resources. The people of N.E.P. and indeed that of the former N.F.D, must redouble their efforts and go the extra mile, despite their problems, to fully participate in the review process. The participation is quantitative and qualitative in the number of those to take part in the process and in the substance of their presentations, submissions and participation in the National discourse.

Given the high levels of illiteracy, poverty and underdevelopment in the region, the poor communication network, difficult terrain and the absence of even an average level of civic education in the area, it is justified for one to doubt the capacity of the people of the region to effectively take part in the review process. While this is true, it cannot and should not be the basis for the region to miss out yet again on the Constitutional reform process. The Political and religious leaders, the intellectuals and Professionals from the region and those in the Civil Society must rise up to the challenge and help their illiterate masses in debating proposals to alter the Constitution right from the Constituency Constitutional forum through to the National conference. It will otherwise be a tragedy if history was to repeat itself in the year 2002, 40 years after the 1962 Lancaster House Constitutional talks. It is only through the aforesaid participation that the people of the region can contribute to the shaping of the new Kenya that will take into account their vision for the place of the region and its people in the new Kenya we all wish to build.

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