

# KatibaNews

PUBLISHED BY MEDIA DEVELOPMENT ASSOCIATION  
MARCH 2008 NEWSLETTER

Your Free Copy Issue NO. 03.08



## COMING IN FROM THE COLD!

The National Dialogue and Reconciliation Committee

GETTING DOWN TO BUSINESS  
IN THE 10TH PARLIAMENT

## THE BIG ISSUE

Executive versus non-executive Prime Minister

## THE LAND QUESTION IN KENYA

A historical account of Kenya's demographic trends and population settlement

# ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

The Media Development Association (MDA) is an alumnus of graduates of University of Nairobi's School of Journalism. It was formed in 1994 to provide journalists with a forum for exchanging ideas on how best to safeguard the integrity of their profession and to facilitate the training of media practitioners who play an increasingly crucial role in shaping the destiny of the country.

The MDA is dedicated to helping communicators come to terms with the issues that affect their profession and to respond to them as a group. The members believe in their ability to positively influence the conduct and thinking of their colleagues.

The MDA aims at:

- Bringing together journalists to entrench friendship and increase professional cohesion;
- Providing a forum through which journalists can discuss the problems they face in their world and find ways of solving them;
- Organising exhibitions in journalism-related areas such as photography;
- Organising seminars, workshops, lectures and other activities to

discuss development issues and their link to journalism;

- Carrying out research on issues relevant to journalism;
- Organizing tours and excursions in and outside Kenya to widen journalists' knowledge of their operating environment;
- Publishing magazines for journalists, and any other publications that are relevant to the promotion of quality journalism;
- Encouraging and assist members to join journalists' associations locally and internationally;
- Creating a forum through which visiting journalists from other countries can interact with their Kenyan counterparts;
- Helping to promote journalism in rural areas particularly through the training of rural-based correspondents;
- Advancing the training of journalists in specialised areas of communication;
- Create a resource centre for use by

journalists;

- Reinforcing the values of peace, democracy and freedom in society through the press;
- Upholding the ideals of a free press.

Activities of MDA include:

- Advocacy and lobbying;
- Promoting journalism exchange programmes;
- Hosting dinner talks;
- Lobbying for support of journalism training institutions;
- Initiating the setting up of a Media Centre which will host research and recreation facilities;
- Working for the development of a news network;
- Providing incentives in terms of awards to outstanding journalists and journalism students;
- Inviting renowned journalists and other speakers to Kenya;
- Networking and linking up with other journalists' organisations locally and abroad.

This newsletter is meant to:

1 Give critical analysis of democracy and governance issues in Kenya.

2 Inform and educate readers on the ongoing Constitution Review Process.

*KatibaNews* is published by Media Development Association (MDA). This publication has been made possible with the kind support of the Konrad Adenauer Stiftung (KAS) in Kenya.

MDA is not-for-profit organisation registered under the Societies Act.

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*KatibaNews* is published monthly and is distributed free to all media houses, civil society organisations, and the public. All are welcomed to send their observations on the constitutional review process to be the Editorial Board.

Views expressed in this newsletter do not necessarily reflect those of MDA, KAS or partners. Reprinting of materials permitted provided the source is acknowledged.

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## THIS MONTH MARCH 2008



A woman prepares a meal in a camp for the internally displaced.

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# EDITORIAL

## The cat and mouse game is back in town

It is now one month since President Mwai Kibaki of the Party of National Unity (PNU) and erstwhile political foe, Raila Odinga, of the Orange Democratic Movement (ODM) signed the Kenya National Dialogue and Reconciliation (NDR) accord in Nairobi.

For ordinary Kenyans like me, this was the best New Year's gift I could ever dream of getting from our leaders. That peace is priceless is something none of us needs to be lectured about today. Events of the post December 2007 elections awakened us from our deep national slumber.

But we are not back in paradise yet. There is the small issue of the composition of the expected new look Cabinet which is causing mumblings in the grand coalition. According to our omnipresent media, there is now a tug of war between PNU and ODM on the sharing of what is perceived as powerful ministerial portfolios and other public service appointments.

On the one hand, PNU feels that it should retain the prime slots they allocated themselves after the presidential swearing-in while on the other, new kid on the block ODM feel that these slots were theirs in the first place anyway! My two pence is that ODM wants to go the way of the German grand coalition. How?

After elections in 2007, no leader emerged as a clear winner in Germany, thereby necessitating the formation of a grand coalition. This set Germany on the brink of a new and volatile political era. The two leading parties agreed that the conservative leader, Angela Merkel, becomes the country's first ever woman Chancellor. The deal came after three weeks of wrangling over the indecisive election. Consequently, Merkel became Chancellor and leader of a grand coalition between her Christian Democratic Party and its Bavarian allies, the Christian Social Union and Social Democrats.

Doubts were expressed over how long such a coalition would last. Resignation of the immediate former Chancellor, Gerhard Schröder, came with conditions. His party, the Social Democrats, emerged from the negotiations with eight seats in the country's new cabinet and virtually all the big portfolios - including Foreign, Finance, Health, Environment and Transport.

Merkel's conservatives, by contrast, were allotted only six cabinet posts. They include the Industry, Defence, Home Affairs and Education ministries. The Conservatives denied that the Social Democrats had got all the best jobs and hailed the distribution of posts as "fair", describing the coalition as a "new beginning for Germany".

I believe the basic understanding during the signing of the NDR accord in Kenya was that there would be a spirit of give and take in any future negotiations in the governance of this country. It was not supposed to be about who will have plum government jobs so that they can call their kith and kin for the 'it's our time to eat' party.

What am I saying? That Kenyans really care less about who holds what ministerial or public service portfolio. They simply want the job done and can ill afford the luxury of these power games. While our leaders are busy wrangling our roads continue to deteriorate, our hospitals continue getting run down, criminals continue to run amok, farmers are still stuck in the mud with the onset of the long rains, inflation continues to sky rocket and so on.

Kenyans are now demanding closure on all post election issues so they can get on with the business of living. Whatever it takes, the Kenyan engine must now run full throttle uninterrupted. That is not much to ask for from the people supposed to be our servants.

Stephen Ndegwa  
Managing Editor

# COMING IN FROM THE COLD!

## The National Dialogue and Reconciliation Committee

This article goes beyond the ink that put pen to paper and deeply analyses what the February 28, 2008 accord signed between President Mwai Kibaki and the then opposition leader, Hon Raila Odinga, means for the current and future Kenyan politics.

By Alex Kipsang

**K**enya conducted its General Election on December 27, 2007. The elections were a combination of the Civic, Parliamentary and Presidential polls. Whereas the civic and parliamentary elections were generally viewed as free and fair and reflective of the will of the electorate, the presidential elections were 'too close to call'. Soon after the pronouncement of the winner by the chairman of the Electoral Commission of Kenya (ECK), there was an eruption of widespread violence in which more than 1,000 people were killed and over 300,000 people displaced in various parts of the country. The ensuing dispute pitted President Mwai Kibaki of the Party of National Unity (PNU), who had been immediately sworn in office and Hon Raila Odinga of the Orange Democratic Party (ODM).

The nature and scale of political violence prompted Kenyan citizens, civil society, religious groups, the business community and the international community to immediately commence efforts to bring the PNU and ODM sides together and to craft a solution to solve the political crisis. The diplomatic efforts were led by the European Union, which had sent an elections observer team to Kenya, the Commonwealth, the United States of America and the African Union (AU). The then chairman of the AU and Ghanaian president, His Excellency John Kufuor, flew into the country in the heat of the political violence to try and mediate a solution to the crisis between the two parties.

After two days of intense diplomatic efforts and shuttle diplomacy, John Kufuor left the country indicating both sides were willing to resolve the political crisis and put to an end the raging post election violence. After consulting the two parties he then appointed former United Nations secretary general and fellow country man, His Excellency Dr Kofi Annan, to lead the mediation efforts in Kenya. Dr Annan was joined in the mediation initiative by retired Tanzanian president, Benjamin Mkapa, and former South African first lady, Graca Machel, to form the international mediation panel of eminent persons.

Each of the two protagonist parties, ODM and PNU, appointed a four-member team to participate in the Annan led mediation process. The PNU side was represented by Hon Martha Karua, Minister for Justice and Constitutional Affairs, Hon Moses Wetangula, Minister for Foreign Affairs, Hon Mutula Kilonzo and Hon Professor Sam Ongeri, Minister for Education. The ODM side was represented by Hon William Ruto, Hon Sally Kosgei, Hon Musalia Mudavadi and Hon James Orengo. Each of the team also appointed a liaison person.

At its initial meeting, the mediation team intimated that it was important for the parties to recognise the Panel of Eminent Persons as the mediators and to commit the parties to the mediation process and its outcome. The next phase in the mediation process was identification of the key issues that the team would address and resolve. The main issues that formed the core of the negotiations were identified. The issues included the immediate cessation of political violence; solving the puzzle of the disputed presidential elections and closure of the 2007 General Election; correction of the unequal distribution of resources; resolution of the land question; agreement on a political solution to both the immediate crisis and the longer term issues such as establishing the truth, justice and reconciliation mechanism; and a comprehensive review of the Constitution.

The process and strategy in the mediation process

The mediation team held meetings on a daily basis at

At the height of the crisis, the government banned live radio and television broadcasts and holding of public rallies, a move human rights activists claimed was an infringement of the freedoms of both expression and assembly. Soon after the NDR agreement, the ban on live broadcasting and holding of public rallies was lifted.

Serena Hotel, which came to be known as the peace house. Initially, Dr Annan indicated that the team would develop a road map to the solutions in seven days. The Panel of Eminent Persons also personally visited the political violence hotspots and witnessed the extent of the skirmishes and consequent humanitarian crisis. This was intended to enable the team to appreciate the extent of the crisis that they were mandated to resolve. On the issues under deliberation, each of the parties was expected to present its case, after which a common ground would be identified and a solution negotiated. Indeed, Dr Annan had indicated on arrival that he had not come to impose a solution on Kenyans but to assist the country to generate a home grown solution to the crisis.

The goal of the National Dialogue and Reconciliation (NDR) was defined as to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights. On February 4, 2008 the team reached an agreement on immediate measures to address the humanitarian crisis and measures to promote peace and reconciliation. Some of the measures agreed on included provision of adequate security in the camps for the internally displaced persons (IDPs) with special focus on vulnerable groups, women and children, provision of safe passage for displaced persons to return to their homes, provision of basic services to IDP camps, establishment of information centres to enable the



Former UN Secretary-General, Kofi Annan (second left), and successor Ban Ki Moon (right) shake hands after meeting in Nairobi at the height of the political crisis. Looking on are members of the peace and reconciliation committee Musalia Mudavadi and Martha Karua.

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## ACTING TOGETHER FOR KENYA

### AGREEMENT ON THE PRINCIPLES OF PARTNERSHIP OF THE COALITION GOVERNMENT

#### **Preamble:**

The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long-standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country. The Kenyan people are now looking to their leaders to ensure that their country will not be lost.

Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process.

With this agreement, we are stepping forward together, as political leaders, to overcome the current crisis and to set the country on a new path. As partners in a coalition government, we commit ourselves to work together in good faith as true partners, through constant consultation and willingness to compromise.

This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all.

To resolve the political crisis, and in the spirit of coalition and partnership, we have agreed to enact the National Accord and Reconciliation Act 2008, whose provisions have been agreed upon in their entirety by the parties hereto and a draft copy thereof is appended hereto.

Its key points are:

- There will be a Prime Minister of the Government of Kenya, with authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya.
- The Prime Minister will be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party does not command a majority.
- Each member of the coalition shall nominate one person from the National Assembly to be appointed a Deputy Prime Minister.
- The Cabinet will consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers. The removal of any Minister of the coalition will be subject to consultation and concurrence in writing by the leaders.

- The Prime Minister and Deputy Prime Ministers can only be removed if the National Assembly passes a motion of no confidence with a majority vote.
- The composition of the coalition government will at all times take into account the principle of portfolio balance and will reflect their relative parliamentary strength.
- The coalition will be dissolved if the Tenth Parliament is dissolved; or if the parties agree in writing; or if one coalition partner withdraws from the coalition.
- The National Accord and Reconciliation Act shall be entrenched in the Constitution.

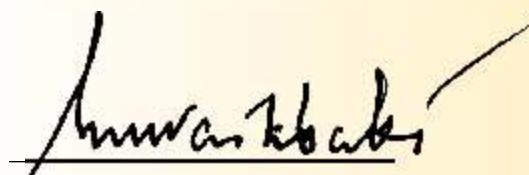
Having agreed on the critical issues above, we will now take this process to Parliament. It will be convened at the earliest moment to enact these agreements. This will be in the form of an Act of Parliament and the necessary amendment to the Constitution.

We believe by these steps we can together in the spirit of partnership bring peace and prosperity back to the people of Kenya who so richly deserve it.

Agreed this date 28 February 2008

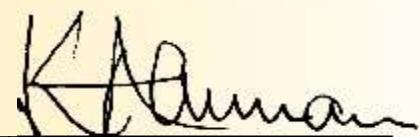


Hon. Raila Odinga  
Orange Democratic Movement



H.E. President Mwai Kibaki  
Government/Party of National Unity

Witnessed By:



H.E. Kofi A. Annan  
Chairman of the Panel  
of Eminent African Personalities



H.E. President Jakaya Kikwete  
President of the United Republic of  
Tanzania  
and Chairman of the African Union

displaced to get easy and timely information, operationalise and set up bipartisan structures for the Humanitarian Fund for Mitigating the Effects and Resettlement of Victims of Post 2007 Election Violence.

On promoting peace and reconciliation, political leaders were requested to convene joint rallies, establish peace building committees at the grass roots level, protect the rights to freedom of assembly and freedom of expression, offer counselling support to affected communities, develop a national resettlement programme and establish a truth, justice and reconciliation commission. At the height of the crisis, the government banned live radio and television broadcasts and holding of public rallies, a move human rights activists claimed was an infringement of the freedoms of both expression and assembly. Soon after the NDR agreement, the ban on live broadcasting and holding of public rallies was lifted.

In the course of the mediation process, the mediation team welcomed and received representations from different sectors of the Kenyan society. Presentations were received from the civil society, professional

On the February 28, 2008 the principals reached a political compromise that set Kenya on a path of returning to normalcy. The agreement set the stage for the formation of a grand coalition government. The agreement came hours after talks between the two principals under the eye of Dr Kofi Annan and the Panel of Eminent African Personalities. The process was substantially aided by the presence of President Kikwete.

In the agreement, the parties recognised that neither side of the political divide could realistically govern the country without the involvement of the other. They acknowledged that the political crisis had the potential of threatening the very existence of Kenya as a unified country. The parties undertook to work in good faith as true partners, through constant consultation and compromise. The agreement provided the means to implement a coherent and far reaching reform agenda, to address the root causes of recurrent political conflicts in the country, and to create a better, more secure and more prosperous Kenya for all.

Under the agreement, it was proposed that an office of Prime Minister be created with authority to co-ordinate and supervise the execution of the functions and affairs of the Government of Kenya. The PM will be an

The removal of a minister of the coalition will be subject to the concurrent in writing by the leaders, while the PM or his or her deputies can only be removed through a vote of no confidence in Parliament. Composition of the coalition will take into account the principle of portfolio balance and will reflect the parliamentary strengths of the respective parties. The coalition will be dissolved if the parties agree either in writing, if the 10<sup>th</sup> Parliament is dissolved or if one coalition partner withdraws from the coalition.

take into account the principle of portfolio balance and will reflect the parliamentary strengths of the respective parties. The coalition will be dissolved if the parties agree either in writing, if the 10<sup>th</sup> Parliament is dissolved or if one coalition partner withdraws from the coalition.

The signing of the accord set the stage for its entrenchment into the Constitution and the enactment of a facilitative Act of Parliament. The process was, therefore, subject to parliamentary procedures of legislation. Subsequently, President Kibaki reconvened Parliament on March 6, 2008. In his opening address, he highlighted that the enactment of the necessary laws to implement the accord was a top priority for the Government. Parliament has already passed a resolution to fast track debate on the two Bills by reducing the mandatory period for their publication before debate from 14 to five days. The Bills were published on the same day the House reconvened. The Constitution of Kenya (Amendment) Bill required a two-thirds majority of all MPs for enactment whereas the National Accord and Reconciliation Bill required a simple majority.

**Influences to the mediation process**  
The two parties were subjected to increased international diplomatic pressure to resolve the crisis. Respected Nobel laureate, Archbishop Desmond Tutu, arrived in the country and urged for a quick resolution of the dispute. Soon thereafter, former



The National Dialogue and Reconciliation Committee in one of their various meetings in Nairobi.

associations, business lobby groups, workers representatives and religious groups.

#### The National Accord and Reconciliation

As expected, the negotiation for a political solution to the crisis was the most drawn out and protracted item in the agenda, with both parties presenting their different versions of their proposed solution to the crisis. Ultimately, Dr Annan suspended the mediation talks at the Serena Hotel and opted to deal directly with the two leaders of the protagonist parties, whom he described as the principals. He was joined in his efforts by President Jakaya Kikwete of Tanzania, who had just been elected as AU chairman.

elected member of the National Assembly and the parliamentary leader of the largest political party in Parliament - or of a coalition of parties - if the largest party does not command a majority. Each member of the coalition will nominate one person from Parliament as Deputy Prime Minister.

Therefore, the new government would be reconstituted to include the Cabinet, President, Vice President, PM, two deputy PMs and other ministers. The removal of a minister of the coalition will be subject to the concurrent in writing by the leaders, while the PM or his or her deputies can only be removed through a vote of no confidence in Parliament. Composition of the coalition will

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# GETTING DOWN TO BUSINESS IN THE 10TH PARLIAMENT

By Mathias Kembo

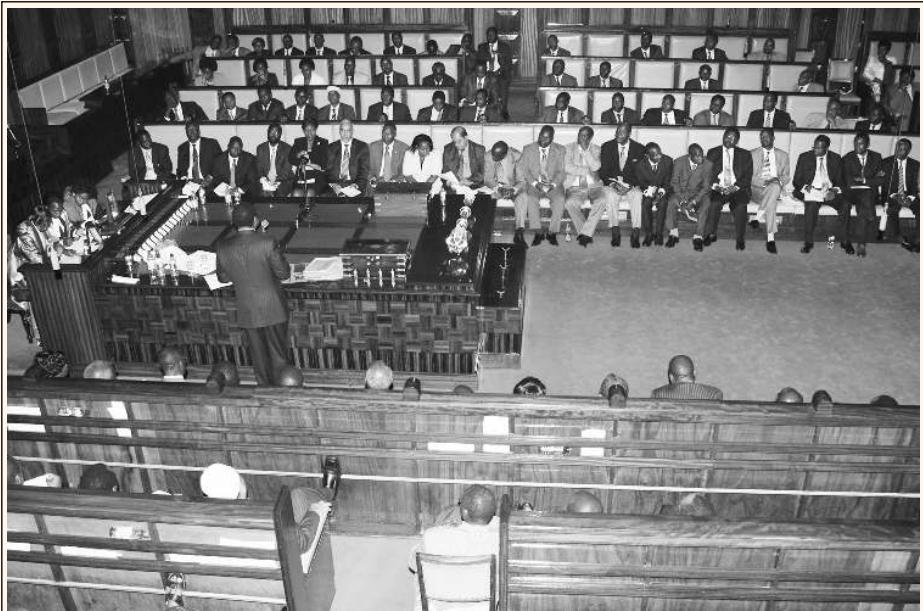
**T**he 10<sup>th</sup> Parliament was reconstituted after the 2007 General Election held last year. Though the results of the Presidential elections were disputed leading to an unprecedented political crisis, results of the Parliamentary elections were largely not controversial.

Elections of three constituencies, Kilgoris, Kamukunji and Wajir West, were cancelled by the Electoral Commission of Kenya (ECK) due to the widespread violence that undermined the holding of free and fair elections in the first two constituencies whereas in Wajir West there was a tie in the elections. Unfortunately, the 10<sup>th</sup> Parliament has lost two members of Parliament - for Embakasi and Ainamoi Constituencies - who were shot dead in January, 2008 at the height of the post election violence.

Emuhaya constituency, which was represented by the new Speaker of the National Assembly, Hon Kenneth Marende, will also undergo a by-election. Twelve MPs have already been nominated by eligible political parties under Section 33 of the Constitution and sworn in by the Speaker. In terms of gender representation, 14 women MPs were elected while six more have been nominated by their parties.

The first session of the 10<sup>th</sup> Parliament was convened on January 15, 2008 by the President in the heat of the political crisis and post election violence. The first agenda for the House was the election of a Speaker and Deputy Speaker, and thereafter the swearing-in ceremony for all MPs. This session of Parliament was very protracted with points of order being raised on the mode of electing the Speaker and the Deputy Speaker and whether it was appropriate for MPs to swear an oath of allegiance to the President while results of the Presidential elections was still in dispute.

Hon James Orengo, who argued the point of order, stated that MPs would rather swear allegiance to the Constitution. However, attorney general Amos Wako stated that it was important to distinguish between the role of the President as head of State on one hand and as Head of Government on the other. He stated that the President convenes the national assembly and the oath must, therefore, be interpreted as swearing to the President as the head of State.



The 10th parliament in session.

The argument on the mode of election was based on whether they should be by secret ballot or by show of hands. The Clerk of the National Assembly, with guidance from the AG, ruled that the elections should be held by secret ballot. The Speaker ruled that the MPs were bound to the Oath of Allegiance for Members of the National Assembly as provided in the Promissory Oaths Act. If the MPs were not satisfied with the oath as stipulated in the Act, then they had to amend the law. Parliament was then prorogued after this session.

President Mwai Kibaki of the Party of National Unity (PNU) and Hon Raila Odinga of the Orange Democratic Movement (ODM) who were the principals in the election dispute, signed the National Reconciliation and Dialogue Accord on February 28, 2008. Implementation of the accord requires constitutional and legislative amendments to ensure that it is in consonance with the law. This requires that Parliament exercises its legislative mandate under the Constitution. Therefore, it was necessary to reconvene Parliament to enable MPs debate and enact the necessary reforms.

Parliament reconvened on March 6, 2008 where the President delivered the customary speech. The opening speech is an exposition of the Government legislative and policy agenda for the session of the national assembly. As is the tradition, the first week is

preserved for debating the President's speech for the first session of the new House. However, in the interest of entrenching the accord in the Constitution, this has been suspended to give priority to the crucial amendments encompassed in the two Bills introduced in the House.

On signing the accord, a committee of five persons was constituted to assist the AG to draft the necessary Bills required to entrench the accord in the Constitution. The minister for Justice and Constitutional Affairs, Ms Martha Karua, published the Constitution of Kenya (Amendment) Bill, 2008 on March 6, 2008 seeking to establish the posts of prime minister and two deputies. The AG published the National Accord and Reconciliation Bill, 2008 on the same day. This Bill will give further clarity to and extrapolate on the constitutional amendment.

Parliament has, with the consent of the Speaker, resolved to limit the period of debate on the presidential address from the usual seven days to two days and to prioritise the tabling and enactment of the two Bills that will put into law the political settlement signed by the two principals. In his opening address to parliament, the President urged MPs to prioritise the Bills. Other Bills that are necessary to implement the mediation agreements are the Establishment of Truth,

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Justice and Reconciliation Bill and the Establishment of the Ethnic Relations Commission Bill. The Ethnic Relations Commission will be established to enable Kenyans appreciate the strengths of ethnic diversity and heal the negative ethnic undertones that have been fuelled by the political crisis. The Independent Review Committee (IRC) that will investigate the conduct of the 2007 General Elections and the Commission of Inquiry into the post election violence will be established under a notice in the Kenya Gazette by the President as provided in the Commission of Inquiries Act.

#### Other priority legislative agenda

Prior to the opening of the second session of Parliament, a Parliamentary Group meeting of the coalition was held at Parliament Buildings. The meeting was chaired by President Kibaki and attended by the PM designate Hon Raila Odinga and vice president Kalonzo Musyoka. The meeting resolved to form a 10 member committee to negotiate on the mechanics of sharing of seats and harmonise party manifestos. Each party was represented by five MPs.

During the presidential address, the President stated that the Government had put together an Inter Parties Committee to synergise, harmonise and highlight priority policies and programmes proposed by parties through their manifestos during the last General Election. The harmonisation committee will include a total of 10 members equally shared between PNU, ODM and ODM-Kenya that are part of the coalition government. The issues identified will form a joint policy and programme strategy that will be implemented by the government.

The President stated that the strategy will give priority to activities that target poor populations and which enhance equitable distribution of resources. Examples of such activities include slum upgrading programmes, building of public markets and support for small businesses. Parliament will, therefore, be called upon to enact certain laws that will support the implementation of the programme. Already, the unequal distribution of resources has been identified as a main cause of the political crisis.

Parliament must prioritise debate on approval and establishment of a framework for resettlement of the more than 300,000 internally displaced persons and funding of a reconstruction programme to rebuild infrastructure destroyed during the violence. This will include passing a supplementary budget to provide for the funds necessary to implement the programmes. During his address to the House, the president stated that the government had established a National Humanitarian

Assistance Fund with an initial endowment of Kshs 1 billion to provide humanitarian assistance and resettle displaced people. Among other interventions, the fund will finance the provision of seeds and farm inputs to enable farming activities to resume in the affected areas. The president stated that the Government was designing an emergency programme for economic reconstruction and restoration. These two programmes will require parliamentary approval of budget estimates.

Some of the laws and policies that the president highlighted for reform include the Coffee Act, the Sugar Act, the Tourism Bill, the Wildlife Bill, Co-operative Development Policy, the Savings and Credit Cooperatives Bill, National Commission on Science and Technology Bill, Information and Communications Technology Bill, Housing Bill, Landlord and Tenant Bill, Organised Crimes Bill and Anti Money Laundering Bill. The president's speech usually highlights the Bills and policies that the government considers most important in its policy agenda. Such Bills have priority listing in parliament. This is partly because the House Business Committee, which sets the agenda for parliament, has membership drawn largely from cabinet ministers and is chaired by the vice president. The House Business Committee has been constituted with 10 MPs drawn from the PNU coalition and 10 MPs from ODM.

The MPs will be influential in peace building and conflict resolution given that they are important opinion leaders in the areas they represent. They can also be instrumental in breaking down the shackles of tribalism that have threatened to tear the country apart by threatening social order and national security. The proposed Ethnic Relations Commission will be important in ensuring negative ethnicity is neutralised by restoring social cohesion. The post elections crisis nearly broke down family units due to the emotive ethnic undertones that underlay the elections and interfered with government delivery of social services such as education and health.

The MPs will be expected to demonstrate statesmanship and political maturity while debating the implementation of the accord and the resettlement and reconstruction programmes. Kenya is still in a delicate state. It behoves parliament to provide leadership in implementation of the accord.

#### The Constitution of Kenya (Amendment) Bill, 2008 and the National Accord and Reconciliation Bill, 2008

The Constitution of Kenya (Amendment) Bill, 2008 proposes to establish the office of the PM and two deputy PMs. This amendment seeks to diffuse executive

authority of the Republic from the president to the three offices being created. The insistence by ODM on a constitutional amendment to entrench the accord was necessitated by the lack of trust between the protagonist parties. This was informed by the history of the then National Rainbow Coalition where the president had signed a memorandum of understanding to appoint Hon Raila Odinga to the office of the PM after the 2002 General Election.

The memorandum was not implemented leading to an acrimonious relationship between the National Alliance Party of Kenya (NAPK) and the Liberal Democratic Party (LDP). This disharmony hit fever pitch during campaigns for the 2006 constitutional referendum where the government was literally split with NAPK supporting the ratification of the Proposed New Constitution and LDP opposing the draft. The entrenchment of the agreement in a constitutional amendment is supposed to cushion either party from renegeing from the accord.

It has been argued that the current Constitution allows the President to create the office of the PM without the need for an amendment. Section 24 of the Constitution grants the president the power to create offices in public service in the Republic of Kenya. The president establishes the ministerial portfolios and assigns them to ministers. These provisions give sufficient powers to the President to create such offices and confer to them the necessary duties. The argument, therefore, is that the office of the PM can be created without amending the Constitution.

It is important that the powers of the PM be defined clearly to eliminate power struggles between the President, the PM and the VP, and ensure effective implementation of Government functions. This means that a clear definition of what is meant by 'coordination and supervision of the execution of functions and affairs of the Government of Kenya' in regard to the role of the PM as proposed in the Constitution of Kenya (Amendment) Bill, 2008. This will eliminate duplication of roles and avoid any clash in mandates. It is important to redefine the role of the VP vis-à-vis the PM. A recent attempt by the head of Public Service to define the powers of the office of the PM and his deputies has been met with mixed reactions, with ODM MPs stating that it is only the two principals who can define the role of the PM in the reconstituted Government.

Consequently, there is a danger of misinterpretation of the National Accord and Reconciliation Bill. Indeed, ODM argues that the basis of power sharing is on the

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parliamentary strength and portfolio balance as indicated in the agreement. It demands 18 ministerial positions, 36 assistant Ministers, 18 PC's, 22 ambassadors, 94 DC's and key parastatal heads. If created, these offices will no doubt overburden the tax payer in terms of salaries, pensions, security, housing and so on. In reaction to ODM demands PNU maintain that such appointments are the prerogative of the president

Other issues that may arise during debate of the Bills by MPs include the meaning of portfolio balance, the provision that a Minister can only be sacked with the concurrence of the principals in writing, the dissolution of the coalition through an agreement in writing and whether the collapse of the coalition arrangement will result in an automatic election. The president still retains exclusive power to dissolve parliament.

### Conclusion

It is important to underscore the fact that resolution of the political crisis and the underlying causes will require comprehensive constitutional reforms especially restructuring the institutions of governance such as the ECK, the State Law Office, the Police and the Judiciary. In an address to the East African Legislative Assembly, Ugandan president Yoweri

Museveni attributed the Kenyan crisis to a combination of constitutional, political and ideological differences. He pointed out that the country needs long term and speedy resolution of the issues. He stated that the situation portrayed short sighted political architecture. The underlying causes of the political crisis can only be resolved through a consultative and comprehensive constitutional reform process.

Parliament will be at the centre of designing an appropriate framework for the completion of the constitutional review process. Some of the stages that have been identified by the mediation team for completion of the process are establishment of a statutory constitutional review legislative framework, enactment of a referendum law by Parliament, preparation of a draft by stakeholders and experts, approval of the resulting proposals by Parliament and the holding of a referendum. Parliament must entrench the process in the Constitution to ensure that it is protected from legal challenges that plagued the previous review process between 2003 and 2005. The constitutional amendment will also provide for replacement of the current Constitution by the draft ratified at the referendum.

The content of constitutional reforms will be informed by the outcome and recommendations of the commissions and committee that will be set up under the

accord. These Commissions include the Truth, Justice and Reconciliation Commission that will be established under an Act of Parliament; the IRC that will analyse the constitutional and legislative framework for conduct of elections in Kenya, the organisational structure of the ECK and investigation into the conduct of the 2007 General Election.

The Commission of Inquiry on Post Election Violence will investigate the facts and circumstances of the violence that followed the 2007 General Election, recommend measures to redress the violence and investigate acts of commission or omission by state security agencies that contributed to the escalation of violence. Already, the IRC which has been established under the Commission of Inquiry Act is expected to complete its work in six months and submit a report.

Finally, parliament must remain vigilant to ensure that the recommendations of these commissions and committee are made public and the proposals for reform are incorporated in the comprehensive constitutional reform agenda. Parliament must also support these processes that will assist Kenyans to examine themselves introspectively and establish the underlying causes that were exposed by the political crisis. **KN**

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jobs and revenue due to collapse of key industries such as manufacturing and tourism. The political crisis punctured the country's reputation as a haven of peace and prime tourist destination. After the first three weeks of the crisis, Finance Minister Amos Kimunya estimated the loss of revenue to the country at over Kshs 60 billion. Consequently, there was a burning need to reassure investors and tourists that Kenya was still a safe destination to visit and do business in. The power sharing agreement has provided the opportunity to put the economy back on track.

### Ultimately

The real return to peace and stability will be realised by negotiating and enacting far reaching constitutional reforms, formulating a credible truth, justice and reconciliation process and resolution of other delicate issues such as devolution, ethnic relations, land reforms and establishment of a just and equitable society. Indeed, the president has proposed the enactment of an Establishment of the Ethnic Relations Commission Bill by parliament which will establish an Ethnic Relations Commission. The mediation team has also agreed on the framework of establishing the truth, justice and reconciliation commission through an Act of Parliament. **KN**

The writer is a Correspondent for international news agencies

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presidents from African countries including Benjamin Mkapa, who later joined the panel of eminent personalities, Joachim Chissano of Mozambique, Kenneth Kaunda of Zambia and Ketumile Masire of Botswana arrived and met leaders of the two parties to the dispute. They also visited the hot spots of the political violence.

The United States of America sent Under Secretary of State Dr Jendayi Frazier who insisted that the relations between Kenya and the international community could not proceed in the pretext that it was business as usual, and it was imperative for the protagonists to actively and urgently seek a solution to the crisis.

Just a few days to the agreement the US Secretary of State, Dr Condoleezza Rice, arrived in the country with a special message to the principals from President George Bush, who was then visiting neighbouring Tanzania. This intense diplomatic pressure from America and AU put more urgency on resolving the political crisis and no doubt expedited the process.

Another factor that highlighted the urgent need to resolve the crisis was the growing number of IDPs and escalating humanitarian crisis. Members of the two political divisions also put pressure on the principals to settle

the dispute. Whereas ODM was initially interested in a rerun of the presidential election, this was deemed impractical given the rising political tension and the high number of IDPs who would be disenfranchised if an election was held. Again, the credibility of ECK had been seriously dented by their handling of the election. On the other hand, PNU insisted on a power sharing formula grounded on the current Constitution, with President Kibaki indicating his willingness to form a government of all parliamentary parties. The insistence on these hard line positions by the party functionaries left little room for manoeuvring for the two principals in the initial stages of the negotiations.

The business community also added their voice in the quest for return to normalcy. The Kenya Private Sector Alliance advocated on the need to recreate an enabling environment for conduct of business across the borders. The organisation asked the government to ensure the re-opening of imports and exports transport corridors that had been completely sealed off by protestors, particularly the export corridor to Uganda, Rwanda and Democratic Republic of Congo. Marauding mobs had dug trenches on the roads and destroyed the railway line.

The Central Organization of Trade Unions also demanded a cessation of the violence in order to allow workers to resume at their places of employment and to prevent loss of

# THE BIG ISSUE

## Executive versus non-executive Prime Minister

By Janet Some

*The fact that Kenya needs a form of power sharing now more than ever before is not in doubt. In this country, unfortunately, we keep running away from what needs to be done and some things just have to wait for a crisis of monumental proportions to be implemented. It took the unprecedented political crisis of the post December 2007 polls for us to wake up and smell the coffee. Now that we have a PM and two deputy PMs, we take a comprehensive analysis of the road ahead, including the experiences of other countries with this type of government.*

**A**t the dawn of independence, the Independence Constitution negotiated by the founding fathers of the nation at Lancaster House in London created an office of Prime Minister. The Governor, who was a representative of the Crown, was retained as the head of State whereas the PM would be the head of Government. The sharing of roles was implemented on June 1, 1963 when Kenya was granted internal self government.

But on declaration of Kenya as a Republic in the same year, the roles of the Governor and the PM were fused in the Office of the President, effectively abolishing the office of the PM. Since that amendment, Kenya has had a President who is both the head of State and Government.

Section 23 of the Constitution vests executive authority of the Republic in the President. This power may be exercised directly or through officers subordinate to him or her. Parliament is authorised to confer executive authority on other persons or authorities. Section 24 provides that the President has the power to constitute and abolish offices, make appointments to such offices and terminate such appointments. Section 25 provides that every person who holds office in service of the Republic of Kenya holds that office on the pleasure of the President.

This means that the President can appoint and dismiss public officers at will. Public service appointments are made by the

Public Service Commission, which is established under the Constitution. Appointments made directly by the president include ministers, ambassadors, permanent secretaries, attorney general, chief justice, commissioners of the PSC and those of the Electoral Commission of Kenya.

Section 16 provides that there shall be offices of ministers of the Government of Kenya as may be established by Parliament, or subject to such provisions made by Parliament or the President. Ministers are appointed from among the MPs. The office of minister shall become vacant if the President so directs, if the holder ceases to be an MP or if after a General Election the holder of the office is not elected to parliament.

The Constitution of Kenya (Amendment) Bill, 2008 proposes to effect three amendments to the Constitution. The first amendment is insertion of a proviso to Section 3 of the Constitution which provides that all laws that are inconsistent with the Constitution are void to the extent of that inconsistency. The amendment exempts the National Accord and Reconciliation Bill, 2008 from this proviso. This Bill is intended to amplify the powers of the PM and his deputies by implementing the new Section 15(A) of the Constitution and give details of the proposed grand coalition government. This essentially means that no legal challenge can be mounted against the Bill or the Act when enacted by Parliament on the basis of its inconsistency with the Constitution.

PM comes from the Latin name *Primus Inter Pares*, that is, first amongst equals or the most senior minister in the cabinet in the executive arm of the government in a parliamentary system. He can dismiss and select members and allocate posts within the government.



Prime Minister designate Hon. Raila Odinga.

They chair the cabinet in most cases. Though most PMs are appointed, they are inaccurately described as elected. In many nations, the word Premier is used interchangeably with PM, for example, in Italy, Peoples Republic of China, Bermuda, Turkey and Caicos Islands.

Premier is also the title of heads of government in sub national entities such as Canada, States of Commonwealth of Australia and Provinces of South Africa. A premier will normally be the head of government. An example of a country that has separate roles for both premier and PM is France. The second in command to a premier is designated as a vice premier or deputy premier. However, in Canada and France, the equivalent of the English word premier is *premier ministre*, which is also the word used for PM.

The second amendment that was done to our Constitution is insertion of the new Section 15(A). The section creates the office of the PM and two deputy PMs. The section further provides that parliament shall enact an Act that will provide for appointment and

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**This accountability requires that someone be chosen from parliament who has parliament's support (or, at least, not parliament's opposition - a subtle but important difference). It also gives parliament the right to vote down the government, forcing it either to resign or seek a parliamentary dissolution.**

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termination of office of PM, the deputy PM and ministers, the functions of these offices, and establishment of a coalition government. The section provides that the Act of Parliament enacted pursuant to this section shall be read as part of the Constitution while in force. The third amendment reconstitutes the cabinet by incorporating the PM and deputy PMs into government.

The National Accord and Reconciliation Bill, 2008 provides that the PM and his or her deputies shall be appointed by the president. The PM shall be the parliamentary leader of the political party that has the largest number of MPs or is the leader of a coalition of political parties, where the largest party does not command a majority in parliament. Clause 4(1) of the Bill provides that the PM shall have authority to co-ordinate and supervise the execution of functions and affairs of Government, including those of ministries; may assign any of the co-ordination responsibilities of his office to the deputies, as well as any of them to deputise him; and shall perform such other duties as may be assigned to him by the president or under any other written law.

Clause 4(2) of the Bill provides that in forming the coalition government, the persons appointed as ministers or assistant ministers from political parties that are parties to the coalition other than the president's shall be nominated by the parliamentary leader of the party in the coalition. Thereafter, there shall be full consultation with the president on appointment of all ministers. The composition of the coalition shall reflect the relative parliamentary strength of the parties and shall take into account portfolio balance.

Clause 4(4) provides that the office of the PM and the deputies shall become vacant only if the holder of that office dies, resigns or ceases to be a member of parliament otherwise than by reason of dissolution of parliament; the national assembly passes a resolution supported by a majority of all members, excluding *ex officio* members, and of which no less than seven days notice has been given declaring that parliament has no confidence in the PM or deputy PM, or if the coalition is dissolved. Although the president has power to appoint the PM, he cannot remove him from office. The removal of any minister nominated by a parliamentary party shall be made only after prior consultation and concurrence in writing by the leader of that party. These provisions share out the executive authority of the president with the PM and deputy PM. Under the current framework, however, executive authority is vested solely on the president.

Clause 6 provides that the coalition shall be dissolved only if the 10<sup>th</sup> Parliament is dissolved, the coalition parties agree in writing or if one coalition partner withdraws from the coalition by resolution of the highest decision making organ of that party communicated in writing. Clause 8 provides that the Act shall cease to apply upon dissolution of the 10<sup>th</sup> Parliament, if the coalition is dissolved, or a new Constitution is enacted, whichever comes first.

The Bill essentially converts the Agreement of Principles of Partnership of the Coalition Government which was signed by President Kibaki and Hon Raila Odinga into law. The Agreement is annexed as a Schedule to the Bill. By providing that the Bill shall be read as part of the Constitution and providing that it is exempt from the rule on legislation being inconsistent with the Constitution, this means the Bill can essentially be read as part of the Constitution. Once the Bill is enacted, the president will have to consult the leaders of the political parties forming the coalition and the PM-designate to reconstitute the cabinet.

In January, 2008 President Kibaki named what he called 'half' of the Cabinet. The ministers were named to what are deemed plum ministries such as Internal Security, Finance, Foreign Affairs, Local Government, Justice and Constitutional Affairs and Defence. Now ODM may demand to be given some of these ministries in order to achieve the portfolio balance envisaged in the Bill. If these demands are met, then a reshuffle is imminent and a possible increase in the cabinet positions from 34 to 36.

#### Losers and winners

Reconstitution of the cabinet means that some of the trusted lieutenants of the president will be eased out of the posts that they occupy to create room for ODM

appointees. The fate of the present PNU coalition made up of PNU, ODM Kenya and Kanu as well as the smaller parties such as Safina and Narc Kenya will have to be clarified.

The function and role of the vice president will also have to be clarified. Under the Constitution, he remains the principal assistant to the president. However, he also is in charge of the Ministry for Home Affairs. Therefore, it will be necessary to clarify if the power to co-ordinate and supervise government ministries bestowed upon the PM will include supervising the VP. Further, the VP would automatically ascend to the presidency for at least 90 days for the purpose of organising the elections if the president was to resign from or die in office.

#### Presidential versus parliamentary systems

In parliamentary systems, the PM can enter office either by appointment by the head of State after parliament nominates a candidate (Ireland), the head of State nominates but submits the name to parliament for approval (Spain, Germany), the head of state appoints a PM who has a set time scale when she must gain a vote of confidence (Italy, Romania), the head of state gets direction of parliament (Japan, Australia), where the head of State gets direct election by the people (Israel), or where nomination is by a State office holder other than the head of State or a representative (Sweden). The position, power and status of the PM differ depending on the age of the Constitution. In Australia and the UK, for example, there is no mention of the PM in the Constitution.

In parliamentary systems, the head of State may be merely the nominal chief executive officer of the State, possessing executive power (hence the description of the UK monarch's government as His/Her Majesty's Government, a term indicating that all power belongs to the sovereign and the government acts on Her Majesty's behalf, not parliament's). In reality, however, due to a process of constitutional evolution, powers are usually only exercised by direction of a cabinet, presided over by a PM, or president of the Government, who is answerable to the legislature.

This accountability requires that someone be chosen from parliament who has parliament's support (or, at least, not parliament's opposition - a subtle but important difference). It also gives parliament the right to vote down the government, forcing it either to resign or seek a parliamentary dissolution. Governments are thus said to be responsible (or answerable) to parliament, with the government in turn accepting constitutional responsibility for offering constitutional advice to the head of State.

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In parliamentary constitutional monarchies, the legitimacy of the unelected head of State typically derives from the tacit approval of the people via the elected representatives. Accordingly, at the time of the Glorious Revolution, the English parliament acted of its own authority to name a new king and queen (Joint monarchs Mary II and William III). Likewise, Edward VIII's abdication required the passage of a law in the parliament of each of the Commonwealth realms due to the independence of each country's monarchy. In monarchies with a written Constitution, the position of monarch is a creature of the Constitution, and could quite properly be abolished through a democratic procedure of constitutional amendment, although there are often significant procedural hurdles imposed on such a procedure (as in the Constitution of Spain).

In reality, numerous variants exist to the position of a head of State within a parliamentary system. The older the Constitution, the more constitutional leeway tends to exist for a head of State to exercise greater powers over government. In fact, many older parliamentary system Constitutions give heads of State powers and functions akin to presidential or semi-presidential systems, in some cases without containing reference to modern democratic principles of accountability to parliament or even to modern governmental offices.

For example, the 1848 Constitution of the Kingdom of Italy was sufficiently ambiguous and outdated by the 1920s to give King Victor Emmanuel III leeway to appoint Benito Mussolini to power in controversial circumstances. Some Commonwealth parliamentary systems combine a body of written constitutional law, unwritten constitutional precedent, Orders-in-Council, letters patent, and so on that may give a head of State or their representative additional powers in unexpected circumstances (such as the dismissal of Australian PM Gough Whitlam by Governor-General Sir John Kerr).

Other examples of heads of State in parliamentary systems using greater powers than usual either due to ambiguous Constitutions or unprecedented national emergency include the decision by King Léopold III of Belgium to surrender, on behalf of his State, to the invading German army in 1940 against the will of his government. Judging that his responsibility to the nation by virtue of his coronation oath required him to act, he believed that his government's decision to fight rather than surrender was mistaken and would damage Belgium. Leopold's decision proved highly controversial. After World War II, Belgium voted on whether to allow him back on the throne. It did so, but he ultimately abdicated because of the ongoing controversy.

The parliamentary system typically has clear differentiation between the head of government and head of State, with the former being the PM and the latter being the president. The PM is the chief executive, and together with the Cabinet, exercises executive authority to form and implement policies and programmes. The PM is usually the leader of the political party that wins the majority of the seats in the legislature or parliament. Members of the cabinet are

**The shot gun marriage organised between the two parties through the mediation process under intense international pressure may provide an opportunity for the parties to rearm for the real battle in 2012 when the next elections are scheduled. This may compromise and stall government programmes which are supposed to be implemented during this term.**

chosen by the PM from MPs and may be drawn from a party or coalition of parties.

The head of State is the President who is often elected by a defined electoral college, for example, the national assembly. He is a figure head with ceremonial powers. In some cases, the president can play a significant role, for example, during a constitutional or political crisis. In a parliamentary system, there is fusion of powers between the legislative and executive functions. The union serves to facilitate the exercise and co-ordination of government powers and functions to formulate policy and implement programmes of government.

The success of this fusion is dependent on the state of the country's political parties and the electoral system. The government can be stepped down through a vote-of-no-confidence initiated by opposition parties or through a political party vote, in which the PM can be deposed as the leader of his party - which does not force a new round of elections. The parliamentary system may create particular problems for Kenya since political parties are ethnicised and ill developed. The electoral system also needs to be reformed as it has marginalised some minority groups from representation. The constituency boundaries may also need to be

reviewed.

"Presidential" in this context does not automatically imply a president but any head of state - elected, hereditary or dictatorial. Some Constitutions or fundamental laws provide for a head of State who is not just in theory but in practice the chief executive, operating both separately and independent from the legislature. This system is sometimes known as a "presidential system" because the government is answerable solely and exclusively to a presiding, acting head of State, and is selected by and on occasion dismissed by the head of State without reference to the legislature.

Some presidential systems may also include a PM but, as with the other ministers, they are answerable to the president, not the legislature. In many such instances the office is of minimal political importance, sometimes even held by some administrative technocrat rather than a politician. A PM in a presidential system lacks the constitutional and political dominance of a PM in a parliamentary system and is often seen as simply a politically junior figure who may run the mechanics of government while allowing the president to set the broad national agenda.

The most striking difference between the presidential and parliamentary systems is the election of the chief executive. In a presidential system, the president is the head of both government and State. The incumbent is elected through universal suffrage and on timing that is stipulated in the Constitution. The president therefore enjoys direct popular mandate from the electorate for a fixed term. The executive is distinct from the legislative and judicial functions of the State. While MPs are elected, cabinet ministers are appointed by the president and may require confirmation by the legislature. The ministers are not members of the legislature. The review and formulation of laws is the sole mandate of the legislature. The executive can propose legislation or veto a Bill passed by parliament. The legal way of removing a president is through impeachment.

Countries usually customize these textbook definitions of the systems to suit their particular circumstances and needs. United States of America has a presidential system while the UK and Australia have a parliamentary system. Kenya has a mixed system at present. The president is an MP and parliament is defined as comprising both the national assembly and the president. Cabinet ministers are appointed from elected and nominated MPs. There is fusion between the legislative and executive functions. This fusion has further been extended by the implementation of the accord where some executive authority will be vested in the PM and two deputy PM, who are all MPs.

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# THE LAND QUESTION IN KENYA

## A historical account of Kenya's demographic trends and population settlement

By Michael Nderitu

Starting with this issue of Katiba News, we start a three-part series of articles on one of the most volatile and controversial issues facing Kenya today. The issue of land has been at the very core of most socio-economic and political conflicts in this country since independence. This first instalment traces land settlement in Kenya both before and during colonialisation by the British.

The declaration of Kenya as a Protectorate, and later on a colony of the United Kingdom marked the beginning of the land question currently facing the country. During the establishment of colonial territories after the Berlin Conference in 1885, little consideration was given to the situation on the ground. Consequently, sections of ethnic communities were straddled between two

countries, for example the Maasai, Kuria, Teso, Luo and Somalis. The colonial powers were simply interested in parcelling out the territories for themselves with little regard to the residents and the African customary tenure systems.

During and after independence, customary tenure holders lost their right to land to private land holders who had acquired title by virtue of registration. This created a skewed pattern of land ownership and distribution.

Historical land claims are, therefore, deemed by many Kenyans as historical injustices that must be redressed to ensure there is national security, inter-ethnic cohesion, resolution of landlessness and the attendant poverty.

In the pre-colonial period, the ethnic demographics of Kenya constituted the Bantu who were essentially sedentary formers, the Nilotes who were mainly pastoralists, and fishermen and the Cushites who were nomadic pastoralists. The Nilotes and the Cushites moved from place to place seeking pasture for their livestock but engaged in limited sedentary agriculture. Indeed, this practice formed the basis of the argument by the Settlers that Africans did not hold title to land and were only interested in occupational and user rights. The Nilotes include the Luo, the Kalenjins, the Maasai and the Turkana while the Cushites include the Somalis and Boranas. On the other hand, the Bantu settled on the land and conducted farming from a central point, although they engaged in shifting cultivation. The Bantu groups include the Abaluhya, the Abagusii, the Agikuyu, the Ameru and the Akamba.

Land acquisition by colonialists Renowned Professor of Law, Professor H.W.O. Okoth-Ogendo, has



Internationally displaced people queuing for supplies which were donated by various organisations.

presented the scenario obtaining at the time of colonisation. Representatives of the Crown, the Governor or Commissioner, argued that it was impossible to negotiate sales or conclude treaties with Africans. For treaties to be meaningful, they were to be signed with several thousands of petty chiefs and headmen. The representatives demanded that the legalistic approach to land acquisition be abandoned and the Crown asserts the original title to land. The Protectorate authorities would then promulgate laws authorising compulsory acquisition of land for the construction of railways, among other purposes, both within the Sultan's dominions at the Coast and in other parts of the territory.

Such system of law provided a foundation for the purposes of developing agricultural potential in the region. The colonial authorities noted that since Africans owned land only in terms of occupational and user rights, it followed that all unoccupied land should revert to the territorial sovereign. Such a sovereign could not possibly be the small chiefs and elders but Her Majesty's Government.

Through the Crown Lands Ordinance of 1902 and more specifically the 1915 Crown Lands Ordinance, 'Crown Land' was defined as 'all public land within the East African Protectorate which for the time being are subject to the control of His Majesty by virtue of any treaty, convention, or agreement, or by virtue of His Majesty's protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise

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howsoever, and shall include all land occupied by the native tribes of the protectorate and all lands reserved for the use of the members of any native tribe.'

Under the 1902 Crown Lands Ordinance, the Commissioner had the power to grant interest in land to settlers. Under Section 4, the Commissioner had the power to 'sell' freeholds in the Crown Land to any purchaser in lots not exceeding 1000 acres. Any sales above this size required the consent of the Secretary of State. The Ordinance also gave power to grant leaseholds for unspecified sizes not exceeding 99 years. The Ordinance also gave power for grant of temporary licences which were not applicable to Europeans and Americans. Therefore, the Settlers had the assurance of the best terms that notions of property could offer. The Ordinance gave unfettered discretion to colonial administrators on the type of land they could lawfully dispose.

Three categories of Settlers appeared at the scene. First were the relatively wealthy small, upper middle class types, many of whom came from Britain. These Settlers were able to acquire land and establish farming enterprises with little or no subsidy from the government. The second category was the South Africans. These were the most dominant politically as well as in numbers before the First World War. The third group were large multinational syndicates based in Britain which were engaged in land speculation and prospecting and later on large scale farming.

The entire Kenyan territory constituted Crown Land. The Ordinances regulated the allocation of land for agricultural, residential, commercial and other purposes. These ordinances provided the legal backing for appropriation of large tracts of land, especially in the Central and Rift Valley parts of Kenya for use by White Settlers. The 1902 Ordinance prevented the eviction of Africans from land that they occupied. The settlers raised objection to this saying it amounted to an encumbrance on the land which had already been issued with a title by the colonial authorities. The settlers advocated for freedom to enter into agreements for the removal of natives. They also sought a permanent solution where Africans would be grouped into definite reserves far removed from European centres or from any lands likely to be suitable for European occupation.

The authority to allocate land under the Crown Lands ordinances of 1902 and 1915 was vested in the Governor (representing the Crown in the colony), and under him the Commissioner of Lands. Under their prerogative, grants of agricultural leases, initially for 99 years and later in the

1915 Ordinance to 999 years, were made to settlers. Commercial plots in townships and urban areas were initially allocated through a system of public auction while residential plots within municipalities were allocated through public tender. The system of public auctions was subject to capture by wealthy cartels and was abolished in the 1940's. The commercial plots were thereafter allocated through direct grants by the Commissioner of Land with the assistance of a local committee.

The appropriation of the land disenfranchised



Minister for Special Programmes  
Hon. Dr. Naomi Shaban.

local communities who had customary land tenure systems. The pastoralist communities, which at the time moved from place to place in search of water and pasture, were particularly affected by the actions of the colonial regime. Communities practicing sedentary agriculture were hurried into villages and taxed in order to provide cheap labour to the Settlers. Until the later stages of this regime, Africans were prohibited from growing cash crops such as coffee, tea and pyrethrum. The ordinances did not recognise customary land tenure systems which were prevalent in Kenya at the time.

#### Native Reserves

Reserves had been established through the use of questionable quasi-legal mechanisms such as treaties and declarations. The most famous ones are the 'Maasai Agreements' of 1904 and 1911. In 1904 the Maasai, acting through their ritual heads, allegedly agreed of their own free will that it was in their best interests to remove their people, flocks and herds into definite reserves away from any land open to European settlement, and to move to Laikipia. The agreement was stated to endure as long as Maasai as a race shall

exist and that Europeans shall not be allowed to take land in the reservations. Over 11,000 Maasai and their two million livestock vacated the land to pave way for 48 European settlers.

Despite the provisions in these agreements, the Maasai were removed from Laikipia in 1911 from this high potential area to the more arid southern Rift Valley. The validity of these agreements is in doubt since it is debatable whether the Maasai ritual leaders had the capacity and authority to sign treaties on behalf of the community. In addition, 'treaties' are usually signed between two or more sovereign States. Were the Maasai a sovereign State at the time capable of signing a treaty with the colonialists? Further, it is doubtful if the contents of the 'treaties' was understood by the Maasai before they were signed. The colonialists may have simply taken advantage of their illiteracy to impose a 'treaty' on them.

Creation of the reserves was for the purposes of making way for European settlement. The inclusion of the native reserves in the Crown Land as defined in the 1915 Ordinance completed the process of land dispossession of indigenous people. While responding to criticism of this expanded definition, the Legislative Council responded that, "It must be remembered that many, if not most of the native tribes, have no individual or even tribal tenure of land as tenure is generally understood in England, and it is of utmost importance that the land in the reserves or occupied by native tribes should be definitely vested by the statute in the Crown, thereby giving the Crown power to afford the natives protection in their possession of land".

According to Professor Okoth-Ogendo, these views of the Committee amounted to pretentious paternalism. When two Africans referred a tenancy dispute to the court, the Chief Justice Barth held that since the 1915 Ordinance vested all land in the Crown, then 'all native rights in such reserved land, whatever they were .... disappeared and natives in occupation of such Crown Land become tenants at the will of the Crown of the land actually occupied, which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier'.

The implementation of this law generated organised opinion from Africans through establishment of regional political groupings like the Kikuyu Central Association and the Young Kavirondo Association, and a growing feeling of insecurity and frustration among Africans. This was politically counter productive for the Settlers. It led to reorganisation of the African tenure system through gazettlement of the reserves in 1926, bringing the reserves within a statutory system of administration in two ordinances

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Prospects for the Grand Coalition  
PNU (and its coalition partners) and ODM have appointed a 10 member committee which is supposed to harmonise the manifestos of both sides. This is intended to inform the policies that the government will pursue. The government will be constituted largely by members of the National Rainbow Coalition which swept to power in 2002. Though there was a lot of promise then as it is now, a grand coalition government has proved very difficult to manage and function in Kenya due to competition between coalition parties, lack of common interests and infighting. This translates to intra-government misunderstandings and power plays. Therefore, it is important that the reconstituted government seeks shared understanding and commonality of interest and develops an agreed policy platform for the country for the next five years.

The grand coalition will be grounded on a legal framework. This creates a mechanism for both parties to exercise good will and transparency. Kenya will operate without an official opposition since all the major parties are now part of Government. It will be difficult to constitute the watchdog committees in parliament such as the Public Accounts and Public Investments committees. These committees are essentially chaired by the opposition to examine government expenditure plans and ensure the recommendations of the Kenya National Audit Office, headed by the Controller and Auditor General, are implemented and queries are sufficiently explained.

The shot gun marriage organised between

the two parties through the mediation process under intense international pressure may provide an opportunity for the parties to rearm for the real battle in 2012 when the next elections are scheduled. This may compromise and stall government programmes which are supposed to be implemented during this term.

How the others do it

France has both a president and a PM. The president is elected for a term through direct suffrage. He is mandated to ensure the Constitution is observed and ensure proper functioning of public authorities and continuity of the State. The President appoints the PM who is usually approved by the legislature. The PM is responsible for carrying out the directives of the president and managing the civil service. Appointment of the PM is terminated once he tenders a resignation of the government. On advice of the PM, the president appoints other members of government and terminates their appointments. The president chairs the Council of Ministers. He can also dissolve parliament in consultation with the PM and the President of the Assemblies, the equivalent of the Speaker of the National Assembly. The government is responsible to parliament for implementation of its programmes and policies.

The PM is responsible for directing the operations of government and has the power to make appointments to the both the civil and military services. Members of the Government cannot hold parliamentary offices. The national assembly can pass a motion of censure occasioning the resignation of the PM.

The French system works well when both the

president and PM belong to the same political party. This is because there are usually clashes of opinion in policy direction of government where the PM and the president are from a different party. This relationship is usually described as 'cohabitation' and the two must seek to accommodate each other in order to implement government programmes. The French model (presidential system) is akin to that of Russia and South Korea. In China, the premier is appointed by the president but requires no approval of the legislature.

In Tanzania, the president is the head of State, head of Government and commander-in-chief of the armed forces. The president, who is elected directly, has power to constitute offices of government. However, he or she may be impeached by parliament.

The PM is appointed by the president from the party that has the majority of MPs in parliament. The appointment must be confirmed by parliament. The PM has authority over the control, supervision and co-ordination of daily functions and affairs of government. He is the leader of government business in parliament. The PM may be removed through a vote-of-no-confidence in parliament. Ministers are appointed by the president in consultation with the PM but they and their deputies hold office at the pleasure of the president. Edward Ngoyayi Lowassa resigned on February 14, 2008 as the 10<sup>th</sup> Tanzanian PM due to probe on a power generation contract in which accusations were levelled that he had irregularly influenced the award of the contract. He was replaced by Mizengo Pinda. KN

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enacted in 1930 and 1938. The gazettlement of the reserves offered an opportunity for Colonialists to determine the reserve boundaries.

This was later re-emphasised by the Hilton Young Commission in 1927 to 1929. In determining, the boundaries it was important to secure the titles of natives in beneficial occupation. The Native Lands Ordinance was enacted by the Legislative Council which established a Native Lands Trust Board and local advisory boards. These boards were expected to manage and control the reserves. The Carter Commission was established to interrogate the land needs of the native population, setting aside of further lands for the communities, nature and extent of claims exerted by the natives over land alienated to non natives and delineating the White Highlands. The 1938 Native Lands Trust Ordinance redesigned all native reserves as native lands. The lands were

excluded from the purview of the Crown Lands Ordinance, 1915. Additional lands, known invariably as 'native reserves', 'temporary reserves' and 'native leasehold areas', were made available out of the Crown lands.

The establishment of the reserves had repercussions on the systems of control and use of land resources. There were massive displacements of pastoral and agricultural communities which occasioned problems of human adaptations, including plagues, famines, and livestock diseases due to the struggle to adapt to the new ecological conditions. In agricultural communities, displacement led to widespread landlessness and discontent. These factors were responsible for the wave of insecurity and the intensification of political consciousness in 1950s and 60s.

The reserve boundaries were externally exclusive of non-African communities and internally restrictive to other African

communities. This introduced notions of fixed ethnic boundaries which defined land tenure and land relations of African communities in Kenya. It was impossible for an African to acquire permanent rights elsewhere, thereby affecting the farming systems of shifting cultivation and nomadic pastoralism. This led to rapid deterioration of land fertility due to overstocking, erosion and fragmentation, and increased out migration. About 60-70 per cent of migrant labour was sourced from the western and central parts of Kenya in which there were land shortages.

Land reform, rising nationalism and political consciousness: 1940s to 1960s  
By the 1940s, land scarcity in the reserves had become a critical economic and political issue. In an attempt to reform the African agriculture, a plan authored by R. J. M. Sywnerton in 1954 argued that the issue of accessibility of land was essentially a combination of land tenure and the technologies of production. The tenure

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issues could be dealt with by restructuring the system of property rights in the reserves in such manner as to confirm security of tenure through an indefeasible title.

The technology of production question would be resolved through intensification of agricultural production in more areas in addition to the reserves that were occupied by the Africans at the time. This would enable Africans to make sufficient returns from their plots and abandon demand for redistribution of land. The new tenure system proposed had to address the incessant disputes generated by communal tenure of land and the fact that Africans owned small pieces of land often situated at distances from each other. The inheritance procedure of Africans involved sub-division of land leading to sub-division of land into units of sub economic size. The cumulative effect of these issues was that proper agricultural husbandry was impossible.

The process of individualising land tenure for Africans commenced in 1952 in Central Province and had no real legislative basis until 1956. A 1954 Ordinance gave the Government the power to confiscate any land of persons leading or organising armed or violent resistance against forces of law and order after October 20, 1952. This was intended to seize the land belonging to Mau Mau freedom fighters. In 1956, the Native Land Tenure Rules were promulgated and applied to certain parts of central Kenya. The responsible minister was mandated to set up machinery for the adjudication and consolidation of native lands.

It was assumed that entry into the adjudication register conferred legal title on individual holders. The effect of individual tenure led to a great deal of structural reorganisation in the African society, especially in Central Province. Many people were uprooted from their familiar terrain and established social relations. This was mitigated through allocation as clan groups and subsequently, sub-division among the members. The reform programme exposed the true extent of landlessness. Persons who were accommodated under customary tenure were now exposed. Such customary rights were extinguished on the fact of registration.

In 1960, the Land Development and Settlement Board was established to devise and administer a resettlement scheme for all races. Africans were offered credit facilities to purchase farming land, especially in the White Highlands. The Board was succeeded by the Settlement Fund Trustees and a Central Land Board after 1963. The setting up of these mechanisms established the principle that land must be paid for. It was

important to create safeguards to permit Settlers to convert their agricultural leases to freehold, make property rights sacrosanct and outlaw expropriation except on payment of compensation.

The Crown had the right under the 1902 and 1915 ordinances to allocate land to any person of choice. The beneficiaries of these allotments were mainly the White settlers who had established Kenya as an agricultural based economy. After independence, the power to allocate land was transferred to the President. Whereas the power of the Crown could be justified on the basis that Kenya was a colony at the time, the power of the President could not be justified unless there was an overriding public interest on the allocation. The Constitution provided that any land appropriated by the Government must be for a public purpose and compensation must be paid to the registered owners of the land. This section prevented the Government from recovering the land which had been allotted to the Settlers. The resettlement programme after independence, which was funded by the United Kingdom and the Government, was therefore premised on a willing buyer willing seller criterion.

The settlement programme for the White farmers in the early stages of colonial rule caused displacement of a large African population. Africans were compelled by the colonial administration to seek jobs in the land owned by White farmers through measures such as limitation of land available in reserves, direct coercion by Government officers and the introduction of tax measures such as poll tax and hut tax. After independence, some of the workers in the settler farms purchased land and settled outside their original homes. Consequently, we have generations of Kenyans that was raised in areas outside where their ancestors once lived.

Land was therefore a major trigger for the violent uprising against the colonialists. In the 1950's the Government implemented a land consolidation programme where small and disparate pieces of land were combined and the owners issued with title deeds for the land. This programme was intended to revitalise African agriculture. The programme had some flaws such as non recognition of women as owners of property, the registration of the eldest sons to hold the land in trust for the rest of the members of the family and appropriation of land which belonged to freedom fighters as a punitive measure.

#### Conclusion

The land question has emerged as a major political issue that can explode and threaten the existence of the State. Part of the problem is the failure to resolve historical issues attached to land at independence.

Therefore, land will feature prominently at the Truth, Justice and Reconciliation Commission and during the Constitution review process. This is particularly so in the Rift Valley Province where land issues have been the underlying cause of ethnic clashes before or after elections for the past 20 years. The Coast Province has a huge landlessness problem where large chunks of land are owned by absentee landlords. This has occasioned invasions of these farms with the locals parcelling out portions of the land to themselves. Indeed, the Government initiated a land adjudication and registration programme at the Coast reassuring the residents that absentee landlords would lose their rights to the unoccupied land.

The resettlement programmes initiated by the Government, while successful in some areas, have become a source of insecurity. The latest ethnic clashes that have been going on in the Mount Elgon District are a clear indication that resettlement programmes must be well managed. In this area, two different ethnic groups, the Dorobo and the Soy, were settled in one scheme. Due to the different lifestyles, disputes arose between them leading to violence. Implementing the settlement schemes must be done in a manner that recognises ethnic divergences.

The land reform programme after independence was not sufficiently comprehensive to address the historical land questions that were generated by colonisation. There are feelings among some communities that some ethnic groups were favoured during the implementation of the settlement programmes at independence and soon thereafter. This has served to exacerbate tribal tensions and inter ethnic clashes, which typified the 2007/2008 post election violence.

The land issue was at the centre of the constitutional review process in 2003 to 2005. The Draft Constitution generated at Bomas guaranteed existing property rights but simultaneously placed a constitutional duty on the State to take reasonable steps to enable citizens to gain equitable access to land, to promote security of tenure, and provide redress to those who were dispossessed of property since the colonial times as a result of discriminatory laws. Ultimately, the Government must strive to modernise the economy and create employment opportunities for all Kenyans. This will reduce over reliance on land as the main source of income and wealth.

*In the April issue of Katiba News we take an in-depth look of the post-independence land situation in Kenya. KN*

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# THE KONRAD ADENAUER FOUNDATION IN KENYA

**K**onrad-Adenauer-Stiftung is a German political Foundation which was founded in 1955. The Foundation is named after the first Federal Chancellor, Prime Minister and Head of Federal Government of the then West Germany after World War II. Konrad Adenauer set the pace for peace, economic and social welfare and democratic development in Germany.

The ideals that guided its formation are also closely linked to our work in Germany as well as abroad. For 50 years, the Foundation has followed the principles of democracy, rule of law, human rights, sustainable development and social market economy.

In Kenya, the Foundation has been operating since 1974. The Foundation's work in this country is guided by the understanding that democracy and good governance should not only be viewed from a national level, but also the participation of people in political decisions as well as political progress from the grass roots level.

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Our main focus is to build and strengthen the institutions that are instrumental in sustaining democracy. This includes:

- ? Securing of the constitutional state and of free and fair elections;
- ? Protection of human rights;
- ? Supporting the development of stable and democratic political parties of the Centre;
- ? Decentralisation and delegation of power to lower levels;
- ? Further integration both inside (marginalised regions in the North/North Eastern parts) and outside the country (EAC, NEPAD); and
- ? Development of an active civil society participating in the political, social and economic

development of the country.

## Our programmes

Among other activities we currently support:

Working with political parties to identify their aims and chart their development so that democratic institutions, including fair political competition and a parliamentary system, are regarded as the cornerstones for the future development in Kenya.

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