KatibaNews

Towards a new constitutional dispensation in Kenya

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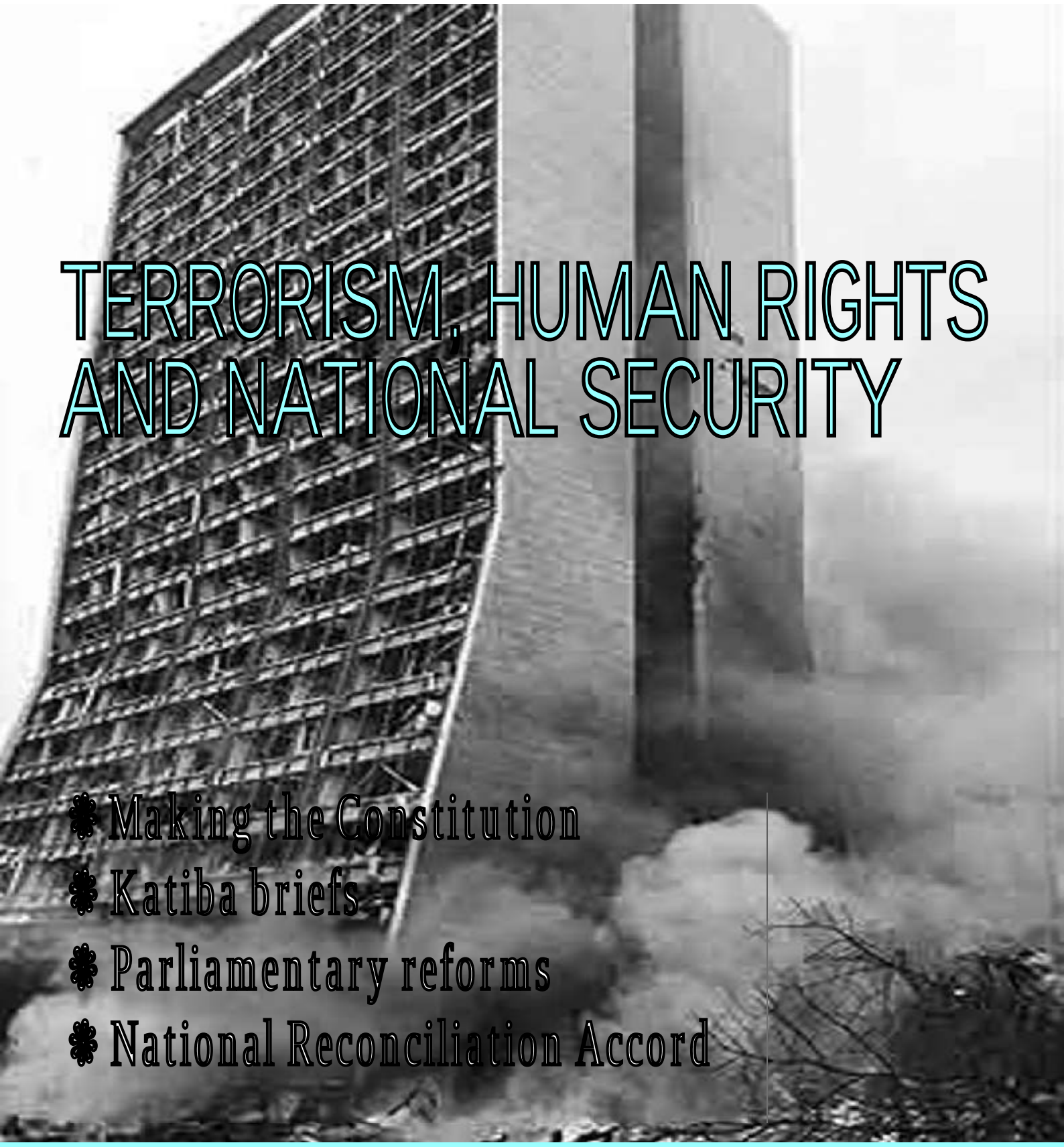

TERRORISM, HUMAN RIGHTS AND NATIONAL SECURITY

- Making the Constitution
- Katiba briefs
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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 liking 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.

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THIS MONTH AUGUST 2008

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EDITORIAL

Will it be piecemeal, or the whole hog?

As journalists are wont to say, the Constitution review process in the last month took another twist - or is it turn! This time the debate has been hinged on an issue that former President Daniel arap Moi had tried to address with little success.

And it looks like the battle lines are being drawn between politicians and the civil society. Former Kabete Member of Parliament and prominent lawyer, Paul Muite, was quoted in the Press saying that the way forward in the review exercise now is to call in the experts.

To Muite, going the whole hog is taking the process back several years and wasting the gains that have already been made in the previously people-driven exercise. His view seems to have resonated well with Prime Minister Raila Odinga. According to Odinga, the people already spoke at the Bomas of Kenya and their reviews should now only be synthesized by a select group of both local and international eminent persons.

On the other side, as usual, is the civil society, who most people refer to as non-governmental organisations. In this seemingly parting of ways between former bedfellows, Constitution review advocates have insisted that it will be nothing short of going back to the people. That it should be a Constitution of the people, by the people and for the people.

According to Muite and Raila, the best approach is to 'thrash out' the contentious issues as most of the other document has already been agreed upon. Consequently, we do not also need to go through another referendum.

Sometimes one is tempted to think that we should just forget about this whole process. It is the self same politicians who gave Moi sleepless nights when he said that the review exercise should be left to a group of experts and let 'Wanjiku' continue to till her land in peace! But now that the shoe is on the other foot, they have seen the light and the people can now take a break.

Anyway, both arguments have their advantages and disadvantages. We live to Kenyans to decide. But whichever way it goes, we reiterate that the process has taken an inordinately long time and it is a high time we had closure. We all know that the main problem has been our politicians who have perfected the art of doublespeak.

Unfortunately, it is them that exclusively hold the reins of leadership. And so I suggest that you do not hold your breath on their promises. To make matters worse, the previously vibrant civil society has almost gone mute on this issue.

We cannot pretend to have any solutions here. But we can suggest that the Government now stands up to be counted by conclusively and immediately jumpstarting the process. This topic forms the theme of our August issue. Read on…

Stephen Ndegwa
Managing Editor

Making the Constitution

Is piecemeal review the final answer?

By Esther Wayando

Agitation for a new constitutional dispensation in Kenya has been going on for the past twenty years. The process has taken centre stage for the last ten years after the minimum constitutional reforms undertaken under the aegis of the Inter Parties Parliamentary Group in 1997. The last attempt to complete the process culminated in the referendum in November, 2005.

After the referendum, there has been reduced political will to support completion of the process. Indeed, minimal effort has been exerted to resolve the contentious issues that led to the rejection of the Draft Constitution at the referendum. It is with this in mind that Hon Paul Muite and some civil society organisations have called for piecemeal constitutional reforms as a way of realising incremental constitutional overhaul and unlocking the review stalemate. This call has been informed by the diminishing political will to drive and conclude the reform process. The political class has deeply vested interests in the outcome of the process and may not be eager to take leadership of the process since the outcome may run counter to their political interests. The most visible contentious issue has been the Executive, especially whether Kenya should adopt a parliamentary or presidential system of Government.

There have been lost opportunities in the quest for reforms. The constitutional moment after the 2002 and 2007 General Election was not sufficiently utilised to realise a new constitutional framework in Kenya. Further, the government has not taken decisive steps to redress the underlying causes of political and structural fragilities in Kenya. Likewise, the calls for reforms by the citizenry have been disconcerted and disorganised.

Why Piecemeal constitutional reforms?

Kenya must break down the review process into manageable stages that will not polarise the nation like the November 2005 referendum. This piecemeal process will reduce vested interests and elicit consensus on contentious issues. From the experience in 2005, there is scant understanding of the review process by the citizenry. By breaking down the process into easily identifiable reform issues, the public will be better placed to associate with and participate in the process. It has been publicly stated that the contentious issues in the Constitution constitute a partly 20 percent. By undertaking piecemeal reforms, the citizenry will be able to benefit from the rest of the document as consensus is sought on the remaining issues.

The review process stalled after the referendum. The referendum was divisive and was an underlying trigger to the violence that erupted soon after General Election in 2007. The contentious issues that were identified during the referendum were devolution; religion and the Constitution; the Executive and; land. The post election mediation talks led by former United Nations secretary general, Kofi Annan, partly resolved the debate on the Executive by creating the post of prime minister in the Constitution, whose responsibility is supervising government functions. The National Dialogue and Reconciliation accord also created two posts of deputy prime minister. The Accord was accepted across the political divide demonstrating that the contentious issues can be resolved if there is genuine political will.

The devolution structure is intended to create an appropriate platform for sharing of resources equitably across different regions. The inclusion of Kadhi's Court and later the Christian and other religious courts in the proposed new Constitution created divisions. Whereas Kadhi's Courts are well established and are part of our legal system, the role and functions of the Christian and other religious courts was not understood at all. On Executive powers, the question was whether Kenya should adopt a parliamentary system where the leader of the political party with majority seats in parliament would form the government, or retain the presidential system where the president is directly elected by the people in elections. To resolve the land issue, there is need for grassroots consultation to ensure that the land tenure and registration system implemented under the new Constitution will not create anxiety on continued ownership of land.

President Mwai Kibaki

The review process has suffered from over politicisation and exploitation of the ignorance of the masses by the political class. Kenya needs focused negotiations among the political class that will ensure the public approve the draft in the referendum, if the latter takes place. The contentious issues must be debated and a common ground developed.

Arguments for piecemeal reforms

Piecemeal reforms can be carried out expeditiously and cost effectively. The comprehensive review process has been painstakingly slow, yet it has not borne fruit to date. The piecemeal review process can be used to revitalise key State institutions to ensure that they are functional, independent and impartial. The High Court ruled that the referendum is compulsory in the Njoya and Yellow Movement cases. However, Parliament can amend the Constitution to create a different method of realising a new Constitution if the referendum is deemed

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divisive.

Indeed, one of the most effective ways is to implement the non contentious parts of the draft Constitution as we seek an interim Constitution with a clear framework for negotiation of contentious issues. During the Constitution making process in South Africa, the country operated with an interim Constitution awaiting promulgation of the new Constitution into law.

Piecemeal reforms can also be used to resolve the contentious issues. For example, the creation of the post of PM has partly resolved the controversy relating to the structure of the Executive. Piecemeal reforms are useful in revitalising key state institutions that came under intense scrutiny during the post election crisis, particularly the Electoral Commission of Kenya (ECK) and the Judiciary.

There is an urgent need to amend the Constitution to set up mechanisms for Constitution-making and succession. This could be done by amending Section 47 or inserting a new Section after section 47 to provide for a referendum or a Constitutional Assembly, as well as the procedure for promulgating a new Constitution. We also need to lay an appropriate legislative framework for the review process, including a setting up a review commission through an Act of Parliament. These two measures are proposed under the Bills published by the Minister for Justice, National Cohesion and Constitutional Affairs, Ms Martha Karua, on June 20, 2008.

Arguments against piecemeal constitutional reforms

Opponents of piecemeal reforms argue that Kenyans are opposed to minor amendments to the Constitution. Since independence, the Constitution has been amended more than 30 times without any public participation or consultation. Consequently, Kenyans are now eager to participate in Constitution making either directly or through elected representatives. The call for "minimum reforms" is an indication that there is no demonstrated effort by the government to complete the comprehensive review.

The momentum for a new constitutional order spanning almost 20 years may be lost if we continue with miniscule amendments without re-examining the entire constitutional framework. Substantial resources have been invested in the process including intellectual, financial and human resource. These resources will be lost if Kenyans do not insist on realisation of a new Constitution.

The High Court has held that Kenyans have a sovereign right to a referendum in Constitution making. Since the decision has not been overturned, the thrust is that a referendum is mandatory. Furthermore, there is no universal agreement on the contentious issues in the constitutional drafts. There is also no clear procedure for resolving these issues. The proposed Act confers this mandate on the Committee of Experts. It is not clear how the committee will navigate the political labyrinth to achieve consensus. The contentious issues will continue to haunt and paralyse the reform effort unless they are comprehensively addressed in an appropriate context and framework.

Urgent and necessary reforms

Some of the institutions targeted for reform are at the core of the reform process. For example, the Judiciary is important in resolving any disputes that may arise in case of a referendum. Disputes may arise on the review process that require independent and impartial decisions by the courts. At the moment, public confidence in the independence and impartiality of the Judiciary to adjudicate on political matters has been eroded. The judgement in the *Rev Timothy Njoya and Others v. the Constitution Review Commission of Kenya and Others* confirmed the centrality of the Judiciary in resolving suits on Constitution making.

The public does not view the ECK as independent and competent electoral authority given the appointment criteria of a majority of the Commissioners and the handling of the 2007 presidential elections. The commission is mandated under the law to carry out the referendum. The outcome of such a referendum may be rejected on the basis of a compromised commission. Further, there is need for operational restructuring of the commission to enhance its efficiency. Reform of ECK must of essence precede the review process. The commission is currently being probed by the Independent Review Committee (IREC) and the recommendations for reform may be drastic and an indictment on the body's competence. IREC's report may further erode the confidence of Kenyans in the commission.

Prime Minister Hon. Raila Odinga

Revisiting the National Dialogue and Reconciliation (NDR) proposals

The Kenya NDR talks agreed on a framework to realise a new Constitution in 12 months after enactment of the review framework. This was also supposed to serve as a solution to the underlying political crisis in the country. The Ministry of Justice, National Cohesion and Constitutional Affairs has proposed a constitutional amendment to create a mechanism for replacing the Constitution and provide details of the holding of a referendum. To achieve the foregoing, the Constitution of Kenya Review Bill, 2008 proposes the creation of four organs of review. These are the Committee of Experts; the Parliamentary Select Committee; Parliament and; the Referendum. The Bills were debated and agreed on during the mediation talks at Serena Hotel I Nairobi.

Constitutional review falls under the controversial Agenda Four which addresses the long term issues in the NDR. However, it has been noted that there is no monitoring framework for the review process. The Panel of Eminent African Personalities has very little role to play in ensuring that the long term issues are resolved through the review process. Since there is no monitoring mechanism, the civil society must be vigilant to ensure that the process is completed speedily and that the views of the public are incorporated into and reflected in the final constitutional draft. The public must monitor the goodwill exercised by MPs in completing the review process.

Public participation

The main ways for the public to be included in making the Constitution is by participating and voting in a referendum to ratify the new Constitution, or by electing delegates to a national constitutional conference. For public participation to be effective and meaningful, there is need for a massive and focused civic education programme during the entire process. Such a programme can reduce or even eliminate

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the influence of divisive politics in the process. The Kenyan scenario during the 2005 referendum demonstrated the close link between politics and the constitution.

During the process from 2003 to 2005, the public was invited to give views and memoranda on the Constitution. The team which will be completing the process must re-examine these submissions and ensure the draft Constitution conforms to the public's expectations. However, collection of views must only be done only in relation to the contentious issues and not the entire Constitution.

Essential reforms prior to the 2007 General Election

The parliamentary committee on administration of justice and legal affairs proposed some minimum reforms before the 2007 elections. These reforms were intended to reform key State institutions and level the political playing field for all candidates. The arguments in support of piecemeal reforms at that time, a majority of which remain valid, include the need to create a level playing field for fair political competition. The proposed minimum changes are needed to stabilise democracy prior to completion of comprehensive reforms.

The proposed piecemeal reforms included reforming the ECK by securing its financial, operational and administrative independence, streamlining the number of its commissioners to enhance its efficiency, establishing a fully fledged and equipped secretariat, professionalising the commission by reforming the process of appointing the commissioners, banning the use of state resources in election campaigns, allowing voters abroad to have dual citizenship, and a right to vote.

For instance, though the appointment of ECK commissioners is a prerogative of the President, in 1997 parliament established an informal consultative and bi-partisan process where major parliamentary political parties recommended persons to sit in the commission. In 2007, the president reconstituted the membership of the commission by appointing eighteen new commissioners without consulting the parliamentary parties. Currently, the number of commissioners can be between 4 and 22. The current number is 22. Such a number can result in operational difficulties of the nature experienced during the 2007 General Election.

Other proposed reforms included harmonising provisions on formation of opportunistic coalitions of political parties to avoid them being a threat to

Lawyer Paul Muite

multiparty democracy. The government of national unity formed in 2004 by the president and which included members of the official Opposition Kanu seemed aimed at weakening the Opposition. Other institutional reforms were intended at securing judicial independence by establishing an independent Judicial Service Commission, including clear and transparent criteria in appointing judicial officers.

Parliament was also to be empowered to determine and set its calendar. A requirement was to be inserted in the Constitution for a presidential candidate to garner more than 50 percent of all votes cast in addition to the 25 percent in five out of the eight provinces. A presidential candidate would also be required to nominate a vice presidential candidate prior to the election; parliamentary approval of presidential appointees to constitutional offices; creation of mechanisms for balanced distribution of State resources to all regions; continuous voter registration; enactment of both the Political Parties and Elections Bills and; amendment of the Local Government Act.

The courts would be required to hear and determine all election petitions within six months from the conclusion of an election. Other proposals were to increase the number of High Court and Court of Appeal Judges, increase the number of MPs to 300 and authorise review of constituency boundaries by the ECK. Few of the proposed reforms were realised.

The Political Parties Act, which was enacted by Parliament in 2007, creates a framework for registration and funding of political parties. The Act has been gazetted to operate from July 1, 2008. Another reform measure proposed was to enhance affirmative action by increasing representation of women, youth and other vulnerable groups through both the Affirmative Action and Gender Equality Bills. Indeed, a proposed amendment to the Constitution recommended the setting of parliamentary seats for women to 50. Unfortunately, this was not passed by parliament due to lack of the necessary quorum for constitutional Bills.

The proposed minimum reforms seem to target reforms in the political landscape and the processes of political competition. Kenyans are wary of reforms initiated and led by politicians. There is need to enhance inclusion and public participation in constitutional reform. However, we have to keep in mind the fact that parliament has the power to make laws under both Sections 47 and 30 of the Constitution. Given the ever changing political landscape in the country, it is perilous to anchor constitutional making on elections. The process should be undertaken soberly and in the interest of all Kenyans. Kenyans should be willing to pay the price of a delay in realising the Constitution to ensure the Constitution is acceptable to the majority.

The writer is a Constitution reform advocate.

The prime minister has also constituted an inter-ministerial committee to probe the matter. However, some of the members of this committee are potential witnesses or participants in the sale of the hotel. For instance, as the chief government legal adviser and prosecutor, the AG has all along been in charge of prosecuting 'Goldenberg cases' without much success. KACC director Justice Aaron Ringera who was present at the handing over of the hotel and participated in the negotiations for amnesty with the alleged principal architect of the Goldenberg scam and former hotel owner Kamlesh Pattni. Another example is Hon James Orengo, who is the Minister for Lands and whose ministry officials registered the transfer of the land

Parliamentary assertiveness

Parliament has increasingly asserted its independence from its rubberstamp role in the 1970's and 80's. The vote of censure on the former Minister of Finance Hon Amos Kimunya is evidence of this assertiveness. Kimunya had proposed that the allowances of MPs and other constitutional office holders should be

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The connection between terrorism, human rights and national security

By Al Masjid Muhamad

Terrorism has been an unspoken fact of life in Kenya. This has become even more evident with the recent cat and mouse game in the search for prime terrorism architect, Fazul Mohamed, who was holed up at the Coast. This article looks at the dynamics of terrorism and analyses the Suppression of Terrorism Bill as published in 2003 in Kenya.

The first incident of terrorism witnessed in the country was the bombing of Norfolk Hotel back in 1981. Recent incidents include bombing of the American Embassy in August, 1998 where more than 250 persons died, and a similar attack in October, 2002 against Paradise Hotel in Kikambala at the Coast.

These attacks have demonstrated that Kenya is vulnerable to terrorist activity. After the November, 2001 attacks on the twin towers in the United States of America, the Security Council passed a resolution requiring all members of the United Nations to implement legislative and other measures to curb terrorism. Ten years since the bombing of the American Embassy in Nairobi, it is now important to review and re-examine the laws proposed to combat terrorist related activities in the country.

The anti terror law in Kenya

In an attempt to comply with Resolution 1373 of 2001 of the UN Security Council, the government has been pushing for the enactment of an anti-terrorism legislation since 2003. But the draft Suppression of Terrorism Bill was immediately opposed by civil society groups on the basis that its implementation would curtail the rights and freedoms of Kenyans, especially persons suspected of supporting terrorism. Provisions of the Penal Code are deemed inadequate in successfully prosecuting persons suspected of supporting or perpetrating acts of terrorism. Currently, the police charge terrorism suspects with murder.

The proposed Bill also seeks to create new offences in line with global technological developments. The Bill supports implementation of preventive measures to curb terrorism. It has provisions that seek to create mechanisms for international co-operation on terrorism.

Kenya published the *Bill* on April 30, 2003 but outrage by the public and civil society forced the attorney general to shelve it. The outcry was based on the perception that *it infringed* on certain aspects of *human rights* and that *its enactment and implementation would result in discrimination against* Kenyans, especially *Muslims* as a whole.

Aftermath of the August 1998 terrorism attack in Nairobi.

Amnesty International sent a memorandum to the Government in September 2003 in which it voiced its concern regarding the draft *legislation's* apparent *incompatibility with international human rights standards, which Kenya is a signatory*. Subsequently, in September, 2004 the AG hinted that a new version of the Bill that takes into account issues raised by the various parties concerned would be published.

Suppression of Terrorism Bill

The Bill was published with the aim of implementing international obligations on terrorism imposed by international conventions and resolutions. But while there have been reports of attempts at revising the Bill to ensure enhanced protection of human rights, the Bill has never been published and the process is still in limbo.

The definition of terrorism has been as controversial as the action itself. A basic constitutional rule is that criminal offences must be defined in clear, precise and unambiguous terms. Where the definition is vague and imprecise, it is not possible to criminalise legitimate forms of enjoying fundamental rights and freedoms. Imprecise definitions also make it impossible to ascertain what constitutes the offence.

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In the Suppression of Terrorism Bill, 2003 terrorism has been defined in clause 3 as the use or threat of action where:

a) The action used or threatened involves serious violence against a person; Involves serious damage to property; Endangers the life of any person other than the person committing the action; Creates a serious risk to the health or safety of the public or a section of the public or; Is designed seriously to interfere with or seriously disrupt an electronic system;
b) The use or threat is designed to influence the government or to intimidate the public or a section of the public;
c) The use or threat is made for the purpose of advancing a political, religious or ideological cause.

Where the use or threat of action involves the use of firearms or explosives; chemical, biological, radiological or nuclear; or weapons of mass destruction in any form, such act shall be deemed to constitute terrorism whether or not paragraph (b) is satisfied.

The definition uses an extraordinarily wide choice of possible criteria and circumstances. This method may inescapably classify virtually every kind of unlawful conduct as terrorist conduct. The result of this kind of legislation is the sanctioning of arbitrary rule of law by enforcement agents who decide what crime to charge suspects with and whether to classify the criminal act as terrorism or ordinary crime.

The definition part of the Bill does not define what constitutes an action for the purposes of defining terrorism. The definition of terrorism in the Bill encompasses ordinary criminal acts such as assault, damage to property, trespass, and offences under the Public Health Act (Chapter 211 of the Laws of Kenya). An act or omission under the Bill constitutes an action.

a) Freedom of association and assembly

Clause 5 provides that any person who directs the activities of an organisation involved in the commission of acts of terrorism *at any level* shall be guilty of an offence. This means that a person can be charged with the offence of terrorism for associating with members of a purported terrorist group even if he did not indeed know that such persons were engaged in terrorism activities. Section 6 makes it an offence to possess articles related to commission, preparation or instigation of acts of terrorism.

The Minister is granted the power to declare an organisation as a terrorist organisation. A clear procedure of appeal or conducting a hearing before the decision is made or soon thereafter is not provided for. There is no set criterion in the Bill for determining whether an organisation is a terrorist organisation. The procedure for obtaining judicial review or appealing against the Minister's decision is not provided in the Bill.

b) Right to property

The Bill permits seizing by the government of terrorist property which is defined as money or other property which has been, is being or is intended or likely to be used for the purposes of terrorism including proceeds of the commission of acts of terrorism and of acts carried out for the purposes of terrorism (Clause 13). Fundraising for terrorist activities is an offence. The Bill also outlaws use, causing or permitting persons to use terrorist property.

The Attorney General has the powers to make *ex-parte* applications for attachment of terrorist property (section 20). The seizure is permitted even though only part of the money is intended for terrorism. If the suspects are convicted, they forfeit the property to the government. Pending the hearing and determination of the trial, the property is managed by a court sanctioned receiver. The Bill should provide the necessary guarantees such as automatic expiry after a specified period unless the court directs otherwise. The application for attachment of such property should be *inter partes.*

The wide discretion given to investigators to request and obtain freezing orders in *ex parte* proceedings in respect of assets of suspects even before they have been formally charged, tried and convicted may lead to collective punishment where innocent and vulnerable family members or group members can be deprived of support or their property without recourse to the court.

c) Right to protection against arbitrary search and entry and from unlawful interference with privacy, home and correspondence

The constitutional provision prohibiting searches and seizures seeks to ensure a balance between the individual rights and legitimate government law enforcement authority to satisfy protection of human freedom while accommodating legitimate law enforcement concerns.

Investigatory measures must respect the offender's privacy. The Bill permits police officers to search premises, persons, vehicles, aircraft or vessel and seize remove anything, which he considers to be evidence of commission of an offence under the Act. Persons found in such premises can be detained pending the completion of the search (Clause 25&26). Searches and interception of correspondence must be done within the confines of established law and under judicial control.

d) Right to personal liberty

Lengthy detention on grounds of national security requires justification in terms of its reasonableness and proportionality. A relevant factor is the availability of judicial review and effective remedy to the detention. The suspects must be availed an opportunity to consult confidentially with an advocate of their choice during the period of detention.

Accused persons must be held in official places of detention and a record kept of their identities. Lawyers and family must have access to such records. The right to apply for *habeas corpus* and communicate with lawyers must be guarded at all times. The suspects must at all times have the right to a judicial remedy to contest the legality of any deprivation of liberty and the right to

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take proceedings before a court to decide without delay on the lawfulness of detention.

Unofficial and/or incommunicado detention must be prohibited. Kenyan police have been known to hold suspects for long periods. For example suspects in the Paradise Hotel bombing case were incarcerated for a lengthy period. The officers can detain suspects for up to 36 hours without the right to consult an advocate or their relatives (Clause 30).

e) Right to access a legal counsel of the offender's choice

Consultation with a lawyer should be allowed without delay, interception or censorship, in full confidentiality, and not within hearing of law enforcement officers. The accused must have the right to appoint a legal counsel of his choice. The Bill allows investigators to prohibit consultation with a lawyer by the accused if that is likely to lead to destruction of evidence, will lead to alerting of other suspects or will hinder the search, seizure or tracking of terrorist property (Clause 30). If the right to consult with an advocate is to be deprived even for a short period then the police must ensure that investigations are done expeditiously and suspects are arraigned in court.

f) Freedom of movement

Extradition procedures must comply with international law especially the right to an effective remedy by way of reference of the dispute to an independent and competent tribunal. The constitution of Kenya provides for immunity from expulsion from Kenya's territory for citizens except grounds of interests of defence, public safety or public order (Clause 81(1) and (3) (a).

Deportation and/or *refoulement* should not be used to violate the protection afforded by extradition laws. Article 13 of ICCPR provides that an alien lawfully in the territory of a state party may be expelled only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, a competent authority or a person or persons especially designated by the competent authority.

Persons suspected to be involved in terrorist activities could be excluded from the Kenyan territory on orders of the Minister (Clause 31). There is no provision for the procedure to be followed in appealing from or challenging such an order in a court of law or the procedure in case the suspects are citizens of Kenya. A person who is subject to an exclusion order should have the right to have the order judicially reviewed in the High Court pending its implementation. Citizens of Kenya should not be subject to the exclusion orders. The Bill should provide that citizens of Kenya should not be subjects of extradition proceedings under the Bill as they can be charged tried and sentenced in Kenya under the new law or existing penal statutes.

g) Protection of the inalienable rights

In practice, the safeguards granted by the Constitution on the conduct of fair trial must be observed. These include prohibition of torture and ill treatment; prohibition of discrimination solely on the basis of race, colour, sex, language, political opinion, religion or social origin; prohibition of arbitrary deprivation of life; right to be presumed innocent until proved guilty and to be treated as such; right to be informed as swiftly as possible in a language the offender understands and in detail the nature of the charge and to be granted medical and consular assistance where applicable and; right to question prosecution witnesses and to call and question defence witnesses on the same conditions as prosecution witnesses.

Kenya should streamline its procedures for and adopt international standards in dealing with public emergencies by incorporating international guidelines for derogating from its human rights obligations. The criteria include:

- The State must establish the existence of a public emergency threatening the life of the nation.
- The public emergency must be officially proclaimed.
- Measures taken which derogate from the obligations must meet the needs of the situation.
- The measures must be consistent with other obligations under international law and not discriminatory.

Use of the laws treating to public emergencies within the prescribed legal limits and proper enforcement of existing penal provisions in our statutes would obviate the need to enact legislation that aims at repressing gains made in promoting human rights and civil liberties.

The Prevention of Organised Crimes Bill and The Proceeds of Crime and Anti- Money Laundering Bill

The Prevention of Organised Crimes Bill is intended to provide a legal framework for the prevention, detection and investigation and punishment of organised crime and provide for the recovery of proceeds of organised criminal group activities. An organised criminal group is defined in the Bill as a structured group of more than three persons, existing for a period of time and acting in concert with the aim of committing a serious crime.

The Proceeds of Crime and Anti-Money Laundering Bill is intended to criminalise money laundering which is deemed prevalent in Kenya. Proceeds from money laundering have been blamed for sponsoring terrorist activities in Kenya. The Bill creates the offence of money laundering. Clause 3 provides that a person who knows, ought reasonable to have known or suspects that property is or forms part of the proceeds of crime and enters into any agreement in connection to that property or performs any act in connection with the property that is likely to conceal or disguise the nature or ownership of the property, or enable a person top avoid prosecution shall be guilty of the offence of money laundering. Other crimes in the Bill include assisting a person to benefit from proceeds of crime and use of proceeds of crime. KN

The writer is a professor of Law specialising in intercultural dialogue.

Justice and Constitutional Affairs Minister Martha Karua

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taxed during this year's budget. The vote of censure came soon after the reading of the budget and it is clear that many MPs oppose taxation of their allowances. There is a possible link between MPs displeasure with Kimunya as the Finance minister and the unanimity in the vote of censure. This was evidenced by the references by MPs to the minister's perceived aloofness to other MPs during the debate on the motion of censure.

Parliament has shown its potential in keeping the Executive in check through a vote of censure. This is the second vote of censure in Kenya's parliamentary history after the one passed to former Vice President, Dr Josephat Karanja, in 1989. It was clear that the vote and subsequent resignation of Dr Karanja was orchestrated by forces high up who had used MPs to achieve their objectives.

The selling of Grand Regency

The Central Bank of Kenya (CBK) disposed off the hotel in exercise of chargee's statutory power of sale. This charge on the hotel by CBK was irregular from the beginning as the government's banker has no statutory mandate to lend money to individuals or private enterprises. The charge was created after Kamlesh Pattni, the owner of the hotel through Uhuru Highway Development Company Limited, presented three cheques in payment of a debt owed to CBK but which were dishonoured. He subsequently deposited the title of the hotel as security for the debt.

The law provides two modes of realisation of securities, such as land, charged to a bank. One method is sale through a public auction where the bank instructs an auctioneer to sell the property by public auction after advertising it. The other mode is sale through private treaty. CBK sold the property through private treaty explaining that it was convinced it could get a better price through this method rather than through auction. The sale was through invitation of selected international and local bids. Prior to fixing the reserve price, the hotel was valued by the chief government valuer and three consultancy firms appointed by CBK.

A charge does not confer proprietary right to the chargee. In essence, CBK never owned the hotel. The hotel was never transferred from Pattni's company to the bank. The bank was simply supposed to recover the debt due from the company. If the company paid the debt to CBK prior to the sale, the hotel would revert to it.

The Minister of Lands had no direct role to play in the approval or registration of the transaction. The registration of transfers is the sole prerogative of the Registrar of Titles, which is an office constituted by statute. The KACC has no mandate of terminating criminal prosecutions commenced by the AG. Their purported attempt to terminate criminal prosecution has no basis in law and is unconstitutional.

The main actor was the Central Bank who was the chargee of the property. The supervisory mandate of the Minister for Finance does not extend to directing CBK on its operations. The bank is operationally independent in its actions and the Governor has security of tenure.

Flouting of Laws

1. Public Officers Ethics Act

Section 8 of the Act provides that a public officer shall carry out his duties to ensure that the services that he provides are provided efficiently and honestly. Section 9 of the Act provides that a public officer shall maintain public confidence in the integrity of his office. Under Section 10(1) of the Act, a public officer is required to carry out his duties in accordance with the law. Section 11 (1) of the Act provides that a public officer shall not use his office to improperly enrich himself. By authorising the sale of the hotel, the CBK Governor, the former Minister for Finance and other officers involved in the sale could have breached the Act if it is proved that they or any of them did not adhere to the laid down legal procedures. However, investigations currently underway must be completed before passing judgement on their culpability.

Section 19 provides that a public officer shall not knowingly give false or misleading information to members of the public or to any other public officer. The former Finance minister made a statement in parliament that the hotel had not been sold when a contract had already been designed regarding its sale. If proved that the minister knowingly misled the House, he could be charged under this section.

2. Anti-corruption and Economic Crimes Act

Section 46 provides that a person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence. Section 47(1) provides that a person who deals with property that he believes was acquired in the course of or as a result of corrupt conduct is guilty of an offence. Dealing means entering into a transaction in relation to the property or causing such transaction to be entered into. If the hotel can be categorised as property falling under the section, any person who authorised its sale can be charged.

3. Public Procurement and Disposal of Assets Act; the Privatisation Act

The argument has been that the hotel was public property and hence could only be sold in compliance with these Acts. The Privatisation Act regulates mode of implementation of privatisation programmes by the government. Since the hotel was subject to a charge by the Central Bank, the legal position is that the hotel was never a public asset to which the Acts are applicable. Further, CBK could not manage the hotel as the Act prohibits it from undertaking commercial enterprises.

United and effective grand coalition in the run up to 2012

The passage of the vote of censure on Kimunya is an indication of a fractured government. Some of the ministers from the Party of National Unity who were in Parliament during the debate did not rise in support of the embattled minister, notably Hon Martha Karua, the Minister for Justice, National Cohesion and Constitutional Affairs. The minister, who sits in the house business committee, also chaired the committee session that approved the tabling of the censure motion and allotted parliamentary time for its debate.

Prime Minister Raila Odinga also denied he was briefed on the sale though he admitted meeting the CBK governor on the matter. But although his role is legally amorphous and perhaps would fall under the function of supervision of

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Katiba briefs

Aug 2 Prof Yash Pal Ghai, the respected legal mind that chaired the Bomas of Kenya review talks and saw his product torn to pieces by politicians before eventual defeat in the 2005 referendum says it is now or never. Reason? "Every Constitution-making process almost always comes at a critical moment for a country and this is it for Kenya".

Aug 5 Politicians should be locked out of the Constitutional-making process, says the International Commission of Jurists-Kenya. According to ICJ, their inclusion will politicise the process, thus jeopardizing Kenyans' quest for a new Constitution within the life of the current Parliament.

Aug 9 The cabinet approves changes to the proposed law on how to conclude the constitutional review exercise. While making the announcement, prime minister Raila Odinga also said the Constitution of Kenya Review Bill would equally be subjected to amendments on the floor of the House.

Aug 10 Deputy PM Musalia Mudavadi says the Constitution review process will not be derailed by Parliament's recess.

Aug 11 PM Raila Odinga assures Kenyans that a new Constitution will be subjected to a referendum similar to the November 2005 one when Kenyans rejected the Wako draft.

Aug 15 PM Raila Odinga calls for speeding up of legal and constitutional reforms to prevent the country from drifting back to the chaos witnessed after last December's elections.

Aug 17 The drive for a new Constitution dominated a function in Lugari constituency with 18 MPs, who included several cabinet ministers, saying reforms are a must. Similarly, the leaders pushed for a dual approach - the parliamentary and presidential systems during a planned referendum for Kenyans to choose between the two. Speaking at the function, Justice and Constitutional Affairs minister, Martha Karua, said the Government was committed to giving Kenyans a new Constitution but called for broad consultations.

Aug 21 President Mwai Kibaki and PM Raila Odinga declare their commitment to a new constitutional democracy in Africa, saying that the country has been promised a new Constitution for far too long.

Aug 23 PM Raila Odinga dismisses calls for inclusion of the civil society in the constitutional review. Raila's rejection of the civil society immediately drew opposition from participants in a regional constitutional conference at the Kenyatta International Conference Centre in Nairobi, thereby setting the stage for a bruising confrontation between the government and civil society activists.

Aug 24 More than 1,000 pastors criticise PM Raila Odinga's bid to exclude civil society in the Constitution making process. Speaking at the end of a five-day conference at Kabarak University in Nakuru, the 1,300 pastors, led by the National Council of Churches of Kenya general secretary, Rev Peter Karanja, said Constitution review should not be left to a few individuals.

Aug 26 A group of religious leaders have supported PM Raila Odinga's suggestion that the Government should not seek fresh views from Kenyans on Constitution making. Head of African Divine Church, Archbishop John Chabuga, and Nakuru-based preacher, Mike Brown, said experts should be mandated to undertake the review process in order to expedite the exercise.

Aug 31 Anglican Church of Kenya introduces a new twist to the Constitution review debate with the demand for a repeat referendum. Maseno West Bishop Joseph Otieno Wasonga says the Government must allow all Kenyans to participate in the making of the Constitution.

Compiled by Monica Gachui
Courtesy of The Standard and Nation newspapers

Parliamentary reforms now strengthening Parliamentary democracy in Kenya

By Kigame Kaburu

One of the most important functions of Parliament in the new dispensation (after formation of the Grand Coalition in the mediation agreement on February 28, 2008) is the watchdog role. The grand coalition created a monolith political system in which there is no recognised official Opposition in Parliament. This role is now exercised by MPs through the parliamentary committees as attempts by a section of MPs to form a 'Grand Opposition' are yet to bear fruit.

The most important parliamentary committees in the Westminster mode of government are both the Public Accounts and Public Investments committees. Departmental committees are also important in investigating topical subjects of controversy relating to their competences as prescribed in the Standing Orders. However, there are occasions where there have been parallel investigations by parliamentary committees and Executive-appointed bodies, leading to conflict and duplication. This happened in the recent past during investigation into secondary school strikes and the Grand Regency hotel scam.

Some of the ways in which MPs contribute to a parliamentary business are:-

- Initiating and revising legislation. In order to fulfil one of their cardinal responsibilities, MPs must endeavour to build their legislative competence by examining proposed laws and making informed contributions.
- Watchdog function. MPs are empowered to scrutinise public expenditure through specialised parliamentary committees. MPs also audit Government policies and programmes through departmental committees. Therefore, execution of the watchdog role requires MPs to have a clear understanding of public finance and the budget cycle.
- Contributing to debate in parliament. This responsibility ensures that the interests of the constituents are articulated in the House.
- Participate in party affairs. Policies proposed in parliament should of essence originate from political parties. The Political Parties Act heralds a new dawn in terms of relevance for political parties.

Speaker of the National Assembly Hon. Kenneth Marende

Parliamentary independence

But parliament must now undergo more constitutional reforms in order to create further operational autonomy and enhance its capacity to carry out its representative, watchdog and oversight roles. A Constitution of Kenya (Amendment) Bill was published in 2004 as a Private Members Bill to confer the control of parliamentary calendar to MPs. The Bill, which was sponsored by Hon Charles Keter, sought to separate the parliamentary calendar from the presidential elections calendar. Further, the current powers of the president to prorogue or dissolve parliament at will were to be removed. The Constitution requires that parliament holds a minimum of one session a year. A session of parliament can last even for one day! If MPs pass a vote of no confidence in the Government, parliament stands dissolved and both the MPs and president must contest in the ensuing elections if they intend to retain their seats.

For reforms to be effective, parliament needs more internal human resource capacity. The Parliamentary Service Commission (PSC) has, to its credit in the last five years, established a research department for MPs, an office of Parliamentary Draftsman and established a legal department in Parliament. Other interventions implemented by PSC so far include recruitment of professional and support staff for MPs, establishment of offices of MPs at the Continental House, and allocation of more resources for the work of committees.

Reforms in the Standing Orders are underway in an effort to make parliament open, independent and efficient in its work. Parliament has been seeking an expanded role in budget making through the Fiscal Management Bill published in 2006. These efforts are intended to avail MPs with relevant and update information on the business they are expected to transact in Parliament.

Standing Orders are part of the operational hiccups that hamper delivery and effectiveness of parliament.

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The Orders were last reviewed in 1997 to align them with the multiparty democracy dispensation. However, efforts to reform them have not yet succeeded. Speaker of the National Assembly, Hon Kenneth Marende, indicated soon after his election that he would support the review of the rules to ensure parliamentary practice complies with new developments and international best practice. This is now underway as recently MPs held a workshop to approve the draft Standing Orders proposed by the Standing Orders Committee.

Among the highlights of the new proposals are live broadcasting of parliamentary proceedings; provision of a weekly forty-five minutes slot for the prime minister to address parliament; opening up parliamentary committee proceedings to public scrutiny; expanding the role of MPs in budget making by requiring ministers to present their annual work programmes before departmental committees; abolishing the requirement that a Bill be republished for introduction after the expiry of a parliamentary session and; removing the requirement that MPs intending to introduce Private Members Bills seek leave of the House prior to its publishing and introduction.

The Standing Orders also propose the formation of an Implementation Committee which shall monitor the implementation of decisions of the House by the Executive. The revised rules intend to extend parliament's current sitting hours on Tuesday afternoon, Wednesday the whole day and Thursday afternoon to include Thursday morning. The revised Orders will facilitate faster completion of parliamentary business and reduce the backlog of pending legislation currently before Parliament.

The proposed new Constitution, popularly known as the 'Wako Draft', sought to strengthen parliament by introducing a right by members of the public to petition the House to either repeal, enact or amend any legislation. The draft also required parliamentary affairs to be open and accessible to members of the public. It also created a fixed term for parliament by providing that the House shall stand prorogued on the 30th day of November each year and shall commence business on the second Tuesday of February the following year. At the moment sessions of parliament commence at the time when the president decides.

Fate of the constitutional review

The recess by Parliament in July 2008, which was opposed by the 'Grand Opposition', is likely to delay the realisation of a new Constitution in the near future. The mediation agreement proposed that a new Constitution should be realised within 12 months from the date of legislation of the legal framework by Parliament. Without the legal framework, therefore, the process cannot commence. Parliament was granted up to August 2008 to enact the facilitative legal framework. Consequently, parliament's recess does not demonstrate adequate and sustained political will to conclude the review process given the expected acrimony in the process of debating the Bills in the House.

More power to the people through Parliament.

Parliament will reopen next month. This means that two months have been lost in terms of setting up structures for the review process, in addition to the likelihood of rejection of some parts of the review framework by MPs. For example, the definition of a district is not agreed on across the political divide. The approval of the draft Constitution in a referendum requires a 25 percent vote in favour of the draft from at least 65 percent of the districts. The Draft must also garner a national approval of 65 percent. The President created about 70 new Districts last year just before the General Election but the districts are yet to be approved by parliament as required by law.

Completion of the review process is central in resolving the underlying causes of the December 2007 post elections violence. The underlying issues which were identified as the land question, ethnicity, poverty and inequitable distribution of wealth need to be resolved as part of the framework for a new Constitution.

Strengthening parliament

While the supreme legislative authority is vested in parliament, the president can veto legislation by declining to assent to Bills passed by the House. If he or she does so, he is required to give reasons for the move to the Speaker within 134 days. Subsequently, parliament may approve the recommendations of the president or return the Bill in its original form to the president supported by a resolution of at least 65 percent of all MPs.

The Judiciary can also strike out Bills which are unconstitutional. This power is derived from section 3 of the Constitution which provides that the Constitution shall prevail where another law contradicts it. These two mechanisms are the only checks and balances mechanisms over parliament by other arms of government.

While overall there is evidence of increased parliamentary assertiveness since the re-introduction of a multiparty State in 1991, a lot more needs to be done for parliament to be a true representation of the people's dreams and aspirations. KN

The writer is a legal officer with a Nairobi based civil society organisation.

Whither the Kenya National Dialogue and Reconciliation accord

By James Kang'ang'a

We were in a sorry state early this year after Kenyans decided to settle it out on the streets. Reason was the December 2007 presidential results that everybody thought they had won. Fortunately, we were in luck and some of our friends decided to help us get back on track. The big question is, have we kept the promise?

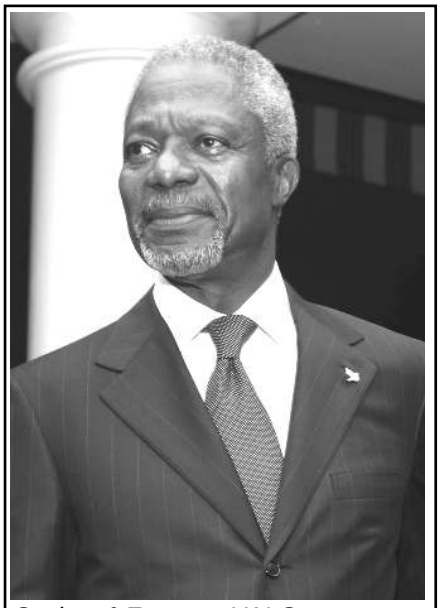
The mediation talks after the Kenyan political crisis January, 2008 began at the height of post election violence that erupted soon after the announcement of presidential results in December, 2007. The talks were chaired by the immediate former Secretary General of the United Nations, H.E Kofi Annan who was mandated by the African Union to serve as the mediator.

The Chair of the AU at the time was Ghanaian president John Kufuor. The Orange Democratic Movement party was represented at the talks by Hon William Ruto, Hon Musalia Mudavadi, Hon Sally Kosgei and Hon James Orengo while the Party of National Unity was represented by Hon Martha Karua, Hon Mutula Kilonzo, Hon Moses Wetangula and Hon Prof Sam Ongeri. The mediation talks were hosted at the Serena Hotel in Nairobi. The first item on the agenda of the talks was that the parties had to seek an immediate cessation of violence. Violence at the time was still raging in the Rift Valley and other towns to the West of the country including Kisumu, Kericho, Kakamega and Eldoret. Further, there were intermittent outbursts of violence in Nairobi in response to the political developments at the time.

After the violence had substantially subsided, the parties agreed on the formation of Independent Review Committee (IREC) and the Commission of Inquiry into the Post Election Violence (CIPEV). The two commissions were formed under the Commissions of Inquiry Act and were to investigate the proximate circumstances surrounding the political crisis. More specifically, IREC was mandated to examine the conduct of the Electoral Commission of Kenya in its handling of the General Election in 2007 and recommend measures to address systemic and institutional failures facing the electoral authority. The tallying of presidential votes and the subsequent announcement of Hon Mwai Kibaki as winner eroded public confidence in the hitherto respected electoral authority. CIPEV was set up to investigate the circumstances of the post election violence and the failures and role of security agencies in the violence as well as recommend institutional and policy reforms necessary to obviate recurrence of violence.

Other agreements included the establishment of the Truth Justice and Reconciliation Commission and a National Commission on Ethnic Relations. The two commissions will be set up through Acts of Parliament. Already, the Minister for justice and Constitutional Affairs has published Bills which are intended to set up the Commissions. The TJRC is intended to examine historical injustices including political assassinations, displacement of persons, land question, economic crimes and other ills in the period December 12, 1963 to February 28, 2008. The Bills were under scrutiny by the Parliamentary Committee on Administration of Justice and Constitutional Affairs prior to parliamentary recess in July, 2008.

The third agenda deliberated by the team was a political settlement. The two principals of the protagonist parties, Hon Mwai Kibaki and Hon Raila Odinga, signed a settlement to the political crisis on the 28th February, 2008. Parliament enacted the National Accord and Reconciliation Act and the Constitution of Kenya (Amendment) Act, 2008. The



Saviour? Former UN Secretary general Kofi Annan.

Acts created the post of Prime Minister and two Deputy Prime Ministers. Further, the Acts called for equal sharing of Cabinet posts among the two parties. As part of the implementation of the settlement, the Cabinet was reconstituted with ODM and PNU coalition sharing the posts equally. Each of the two sides also appointed a Deputy Prime Minister.

Agenda Four

The constitutional review process is part of Agenda 4 of the mediation agreement which relates to resolution of long term issues. Under the agreement, it was proposed that the Ministry of Justice, National Cohesion and Constitutional Affairs was to launch consultations to develop a legal framework for constitutional review which was to be enacted by Parliament by end of August, 2008. The legal

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Blame it on the politicians.

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framework is premised on the mediation agreement reached at Serena Hotel. The agreement proposed that the constitutional reform process was to be completed within 12 months from the date of enactment of framework by Parliament. The Minister has published two Bills which are intended to guide the process.

These Bills are the Constitution of Kenya Review Bill, 2008 and the Constitution of Kenya (Amendment) Bill, 2008. However, there are divergent views emerging from the civil society organisations who are demanding people participation in the review process. PM Hon Raila Odinga has stated that the process that generated the Bomas Draft was fully representative and consultative and, therefore, all views from the public have been collected. While closing a conference on Constitutionalism and Democracy in Africa in 21st Century, Hon Odinga said that the most economic route to a new Constitution was through a Committee of Experts and a Parliamentary Select Committee. Other institutional reforms envisaged under Agenda Four include police, parliament, judiciary, Executive and civil service. These institution reforms are anchored on the completion of the constitution review process.

The envisaged judicial reforms are financial independence and autonomy; transparent, merit-based, appointment, discipline and removal criteria for judicial officers, reconstitution of the Judicial Service Commission by inclusion of other stakeholders and enactment of the Judicial Service Bill which will streamline peer review and performance contracting mechanisms in the judiciary.

Parliament will be strengthened through a review of the Standing Orders, strengthening of the parliamentary research centre; introduction of live coverage and electronic voting; establishment of a Monitoring and Implementation Committee, strengthening of mechanisms for swift deliberations on reports by Kenya Anti Corruption Commission and the Kenya National Commission on Human Rights, State Law Office and Kenya National Audit Office; strengthening Public Accounts and Public Investments Committees to promote accountability and transparency in the utilisation of public resources, and opening up of parliamentary committees' proceedings to public. MPs have adopted the new draft Standing Orders in August 2008 at Safari Park Hotel, Nairobi. The Draft Standing Orders were presented to MPs by the Standing Orders Committee and are scheduled to be implemented in the Third Session of the 10th Parliament which will commence in March, 2009.

Reforms relating to land include the completion of constitutional review on land tenure and use, development and adoption of land policies that take into account linkages in land use, environmental conservation, forestry and water resources; finalisation of the draft National Land Use Policy, harmonisation of land laws into one statute, establishment of transparent, decentralised, affordable and efficient GIS based Land Information Management System and a GIS based Registry, document replacement for displaced persons, development of national Land Use Master Plan taking into account environmental considerations; strengthening local level mechanisms for sustainable land rights administration and management; and finalisation and review Land Disputes Tribunal Act.

The Accord sought to promote national cohesion and unity by finalising the National Commission on Ethnic and Racial Relations Bill, initiating and sustaining Parliament and the Executive advocacy role on ethnic and racial harmony; establishing a framework on Peace Building and Conflict Resolution and early warning systems on social conflict; extending the District Peace Committee framework and link it to District Security Committees, finalise hate speech Bill and review the Media Act to control incitement attempts by media organisations; undertake civic education on ethnic relations; inculcate a civic culture which tolerates diversity and encourages inter-ethnic cooperation through the school curriculum, and the operationalisation of the Truth, Justice and Reconciliation Commission.

The last item on agenda four was promotion of transparency, accountability and combating impunity. The proposed measures are development and adoption of a national anti-corruption policy, capacity enhancements at the National Audit Office, improved prosecution and adjudication of corruption and economic crimes, improved oversight and consideration of anti-corruption and audit reports by Parliament; monitoring of the Public Officer Ethics Act; review effectiveness of Public Procurement Authority, and review effectiveness of Privatisation Commission.

The twin Bills

The mediation agreement proposed to create two statutory commissions, the Truth Justice and Reconciliation Commission and the National Ethnic and Racial Commission. The two Bills were published by the Minister for Justice, National Cohesion and Constitutional Affairs on the May 9, 2008 and were subjected to the First Reading by Parliament. Thereafter, the two Bills were committed to the

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Parliamentary Committee on Administration of Justice and Legal Affairs in order for the Committee to give its recommendations and comments. The Committee has compiled its comments on the Bills and it is due to submit the same to the House.

The Truth, Justice and Reconciliation Bill proposes the creation of a commission that will deal with historical injustices. A similar commission had been recommended by a task force set up to interrogate the matter which was chaired by Professor Makau Mutua in 2004. The National Ethnic and Racial Relations Bill is intended to create a commission that will promote national reconciliation and healing and combat negative ethnicity.

The Commission will probe human rights violations in the period December 12, 1963 to February 28, 2008. Under clause 5 of the proposed Truth, Justice and Reconciliation Bill, the functions of the Truth Commission are to investigate violations and abuses of human rights relating to killings, abductions, disappearances, detentions, torture, ill-treatment and expropriation of property suffered by any person within the specified period; investigate the context in which and causes and circumstances under which the violations and abuses occurred and identify the individuals, public institutions, bodies, organisations, public office holders or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses.

The commission will also identify and specify the victims of the violations and abuses and make appropriate recommendations for redress; investigate and determine whether or not the violations and abuses were deliberately planned and executed by the state or person; conduct investigations relevant to its work and or seek the assistance of the police and any public or private institution, body or person for the purpose of an investigation; identify any persons who should be prosecuted for being responsible or involved in human rights and economic rights violations and abuses; and to investigate violations of economic rights.

The commission shall not grant blanket amnesty and may recommend reparations and rehabilitation for victims. The Commission shall submit its report to the president, which shall include recommendations for action. The Commission is to be formed in order to address and redress Kenya's historical injustices and combat impunity by bring the perpetrators of the violations to justice and holding them accountable.

One of the recommendations to strengthen the Bill is that perpetrators of gross human rights violations and crimes against humanity should under no circumstances be recommended for amnesty. The Amnesty International has stated that the proposed amnesty provisions in the Bill run counter to Kenya's obligations under international human rights instruments, which do not permit amnesty for serious crimes such as genocide, war crimes, crimes against humanity, and torture. The Commission have been granted a very wide mandate that it may not be well equipped to perform satisfactorily given the public expectations.

Part of the mandate of the Commission has in the past been subject to investigation by Commissions of Inquiry such as the Ndung'u Commission on Illegal and Irregular Allocations on Land, the Justice Akiwumi Commission on ethnic clashes and Hon Kiliku Parliamentary Select Committee that probed ethnic clashes. These Commissions generated comprehensive reports that should be implemented. The Truth Commission does not need, therefore, to interrogate these matters further as this will amount to duplication. The Commission should follow up on implementation of the recommendations of previous probe teams.

The National Commission on Ethnic and Racial Relations Bill lists the functions of the proposed Commission to include promoting tolerance understanding and acceptance of diversity in all aspects of national life, promote equal access and enjoyment by all persons from all ethnic communities in public or other services and facilities provided by Government, investigate and make recommendations to the office of the Attorney General and the Kenya National Commission on Human Rights about complaints on ethnic and racial discrimination, and develop criteria for determining of a public officer has committed acts that amount to discrimination on the basis of race or ethnicity.

The necessity of establishing the National Commission on Ethnic and Racial Relations has been under intense scrutiny. Commissioner Lawrence Mute of the Kenya National Commission on Human Rights has stated that promoting ethnic harmony requires implementation of an allay of policy measures and not necessarily a singular legislative instrument. Further, the mandate of the Commission seems to be subsumed in the mandates of other statutory bodies such as Kenya National Commission on Human Rights and the Media Council of Kenya. Discrimination on the basis of race or ethnicity is essentially a human rights violation that falls within the mandate of the National Commission on Human Rights.

Implementing Agenda Four

The Accord creates a weak monitoring framework for the implementation of agenda Four. The public and civil society must be vigilant to ensure that the long term reforms are implemented since they are intended to resolve the underlying causes that resulted in the political crisis. The Commissions formed under the Accord are not well coordinated. Under the enabling law, commissions of inquiry have no legal mandate to supervise the implementation of their recommendations.

The problem in Kenya is not diagnosis of the problem but implementation of the recommended solutions. Kenya has an opportunity to redress the underlying causes of the political crisis once and for all and prevent future recurrence. Such resolution must restore the observance of the rule of law and respect for human rights by punishing perpetrators of gross violations of human rights. The Truth Commission is an important transition justice measure that will assist Kenya to revert to rule of law and root out impunity.

Political will

The principals, the president and the PM must demonstrate continued political will for the implementation of the

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agendas of the Accord. The principals indicated their commitment to the completion of the review process during a conference on 'Constitutionalism and Democracy in Africa' in August, 2008 in Nairobi hosted by the Ministry of Justice, National Cohesion and Constitutional Affairs. The PM stated that one of the main objectives of the Grand Coalition was to deliver a new Constitution for Kenyans, a process that has been pending for the past 20 years. He said that what was required was tactful resolution of the 'contentious issues' by a panel of experts in conjunction with the Parliamentary Select Committee.

Role of the international community

The role of the Panel of Eminent African Personalities is not clear in monitoring the implementation of long term reforms. The funding for the remaining phases is sourced from the Government of Kenya and the Trust Fund for Kenya Dialogue and National Reconciliation administered by the United Nations Development Programme. The African Union and the United Nations should be requested to play an independent and supportive role in monitoring the implementation of recommendations issued by the Commissions established under the Accord.

Ultimately

The Grand Coalition Government must demonstrate its will to pursue the long term reforms. Some of the reforms should be tied to the constitutional review process, which is likely to be protracted. The reforms that can be implemented under the current legal dispensation include the Freedom of Information Bill, redressing poverty and regional inequalities, addressing unemployment of the youth, improving transparency and accountability and parliamentary strengthening. The Constitution can also be completed if there is political good will across the divide. KN

The writer is a freelance journalist.

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government, it means that ministers are not updating him on their dockets as required by law. The vote exposed the possibility of MPs using parliament to settle political scores.

The vote of censure demonstrated evident collapse of principle of collective responsibility, without which the government cannot function. Under section 16 of the Constitution, cabinet decisions are required to be collective and collegial. Hon Orengo and Hon Kimunya have issued notices of intention to sue each other on the basis of defamatory remarks relating to the transaction. Initiation of such legal proceedings further undermines the principle of collective responsibility.

The role of the office of the PM is to supervise ministries and co-ordinate government operations. The PM also attends to cross cutting issues on government functions. For example, he chaired the inter-ministerial committee on the sale of Grand Regency and the inter-ministerial meeting on the Mau Forest. He also led a delegation on investments to London on behalf of the president.

The Constitution does not prescribe the mode of enforcement of his powers of supervision. He has to resort to political sanctions in enforcement of his decisions. Likewise, the standing orders and the Constitution do not envisage a role of the PM in Parliament. He is not the leader of government business and neither does he sit on the HBC. Though his party has dominant control of parliament, the PM has faced outright opposition from some MPs from his party.

For example, despite his opposition to the formation of a grand Opposition, rebel MPs in his party are still championing its formation. MPs from the South Rift have openly complained of not being rewarded with cabinet posts in the grand coalition government. No specific time is allocated to the PM to address parliament. Overall, his office has ineffective sanctions against ministers nominated by parties other than his own. Only the president, as the appointing authority, may discipline ministers from all parties.

Conclusion

The principal challenge in assessing political will in fighting corruption is the need to distinguish reform approaches that are intentionally superficial and designed only to bolster the image of political leaders, and substantial efforts that are designed on strategies to create change. An initial indicator is the degree of analytical rigor that is utilised to understand the circumstantial complexities that give rise to corrupt behaviour.

Another indicator is the extent to which the government has made the process of combating corruption participatory. The structure of combating corruption should have a system of incentives and sanctions. The record of failure is exceedingly high for measures that use prosecution as the principal tool for compliance.

An elected legislature is a fundamental pillar of any integrity system based on democratic accountability. Its task is to express the sovereign will of the people through their chosen representatives who, on their behalf, hold the Executive accountable. Watch dog, regulator and representative, parliament is at the centre of the struggle to attain and sustain good governance and to fight corruption. To effectively execute these roles, parliament must be comprised of individuals of integrity. An elected parliament is the essence of democracy. Indeed, democratisation in itself presents an opportunity to control systemic corruption by opening up the activities of public officials to public scrutiny. Democracies reduce secrecy, monopoly and discretion.

Public declaration of wealth by ministers and other public servants will enable the public to audit the wealth of public officials. Keeping public wealth secret defeats the overall and primary purpose of the Public Officers Ethics Act. The AG must condemn the corrupt acts and prosecute those mentioned or involved in such deals. The misappropriation and misuse of public resources by public officials amounts to corruption and contributes to further impoverishment of the population.

Corruption is a problem concerning individuals and may not be cured by amending the relevant laws or even the Constitution. In any event the current laws proscribe corruption yet it is still perpetrated with abandon by some public officials. Corruption at all levels of government can be effectively curbed if people have the knowledge and the ability to hold the government to account. Education is critical as well as access to information and freedom of the Press. Proper government systems must be put in place to enhance the capacity for strict financial management and monitoring. Parliament should have a statutory role of overseeing the spending of public resources. KN

The writer is a lawyer practicing in Nairobi.

THE KONRAD ADENAUER FOUNDATION IN KENYA

Konrad-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.

Our aims

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.
- Dialogue and capacity building for young leaders for the development of the country. Therefore, we organise and arrange workshops and seminars in which we help young leaders to clarify their aims and strategies.
- Reform of local governance and strengthening the activities of residents' associations. These voluntary associations of citizens seek to educate their members on their political rights and of opportunities for participation in local politics. They provide a bridge between the ordinary citizen and local authorities, and monitor the latter's activities with special focus on the utilisation of devolved funds.
- Introduction of civic education to schools and colleges. We train teachers of history and government in civic education. In addition, we participate in the composition of a new curriculum on civic education.

Our principle is: Dialogue and Partnership *for Freedom, Democracy and Justice.*

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MEDIA DEVELOPMENT ASSOCIATION

Promoting Democracy and Good Governance through the Media