

KatibaNews

Towards a new constitutional dispensation in Kenya

SEPTEMBER 2008

Issue NO. 09.08

Going back to the polls

- Interview
- Katiba briefs
- Amnesty or not
- Tackling inequalities in Kenya

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.

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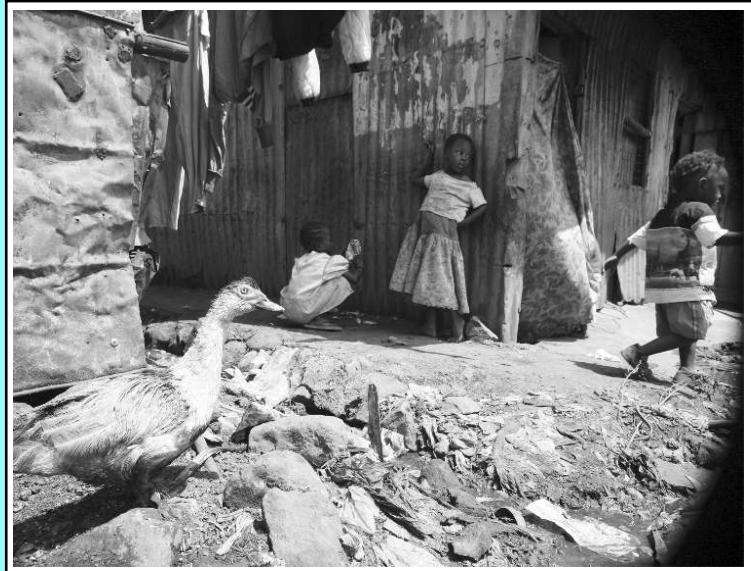
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THIS MONTH SEPTEMBER 2008



Contents

2. Going back to the polls.
Can the referendum work again?
6. Interview
6. The connection between terrorism, human rights and national security
10. Katiba briefs
11. Amnesty or not? The last word.
13. Tackling inequalities in Kenya

Going back to the polls

Can the referendum work again?

By John Muyeshi

In a constitution-making process, the method used to draft, discuss, adopt and implement a constitution determines the success rate of the democratisation process. Effective public participation legitimises the constitution. The participation is through consultation on the framework; consultation on the appointment of the officers who lead the process, including a requirement for approval of names by Parliament; collection of views from citizenry, and the final approval of the Constitution through a referendum or an elected constituent assembly.

The High Court of Kenya held in *Rev Timothy Njanya vs Constitution of Kenya Review Commission* that the power to make a new constitution belongs to the people of Kenya, who have an inherent right to participate in a referendum on any proposed constitution. The court further stated that a constituent assembly must consist of elected membership for the process to be termed participatory. An entity constituted in a manner that excludes elections cannot qualify as a constituent assembly.

A referendum can be defined as a direct vote in which the electorate or the citizenry is required to accept or reject a particular proposal. This may result in the adoption of a new constitution, a constitutional amendment, a law or simply a specific government policy. A referendum is akin to an election, but is a form of a direct democracy.

Analysis of Kenya's referendum on the Constitution
Kenya held its first referendum in

November 2005. The referendum required the electorate to accept or reject the Proposed New Constitution. The process of negotiating the Draft Constitution was marked with mistrust in the political class, with some politicians arguing that the Proposed Constitution sought to preserve the *status quo*. Matters came to a head when, on the last day of the National Constitutional Conference at Bomas, some delegates led by then Vice-President Moody Awori and the then Minister for Justice Kiraitu Murungi stormed out of the hall and declared that they would oppose the resolutions reached by the delegates.

Earlier, attempts to resolve the contentious matters in Naivasha through the chairmanship of Bishop Suluheti floundered. The draft Constitution adopted at the Bomas Conference was modified and presented at the referendum as the Proposed New Constitution.

Prior to the referendum, a campaign was conducted by the two sides, which were political camps for or against the draft constitution, thus stirring bitter and sometimes violent debate that divided the nation and the Government. The campaign exhibited deep-seated political and ethnic divisions with seven cabinet ministers joining forces with the Opposition to campaign against the draft. The supporters of the Draft Constitution led by President Kibaki projected it as progressive and reformist. The symbol for the camp supporting the draft was a banana while an orange was the symbol for those opposed to the draft.

Conduct of the referendum

The mandate to conduct the referendum was reposed in the Electoral Commission of Kenya. Section 42 of the Constitution provides that the Commission is mandated to conduct elections and perform such other functions that are assigned to it by Parliament. The Constitution of Kenya Review Act provided that the Commission shall conduct the referendum. The Commission's agents provided the voting materials, supervised the voting and counting of the ballots at polling stations and later announced the results. The final referendum results were to be announced by ECK within 48 hours of receiving them from all constituencies. The results were announced on November 22. Any person wishing to challenge the results was required to do so within 14 days. There was no petition preferred as the President conceded that Kenyans had made their choice by rejecting the draft Constitution.

The use of laws relating to elections to conduct the referendum was criticised. The Commission did not have sufficient teeth to deal with negative ethnicity and prosecute inciters of violence during the referendum. The referendum was a highly charged and politicised event. The two camps were organised around the differences in the implementation of the Memorandum of Understanding signed between the Liberal Democratic Party and the National Alliance Party prior to the 2002 General Election. It had been agreed that government jobs would be shared out equally between the partners. The LDP camp complained that the MoU had been ignored. The referendum was a 'mini election' in

preparation for the 2007 General Election.

Types of Referenda

1. Mandatory or obligatory referendum

A mandatory or obligatory referendum is a vote of the electorate, which must be held under circumstances defined in the Constitution or in the legislation. For example, in Kenya in 2005, the Constitution of Kenya Review Act required that a referendum must be held to ratify the Proposed New Constitution prior to its adoption. The consequences of the vote are usually binding, hence if a proposal is approved at referendum, the Government is compelled to implement it. Mandatory referendums may be required in relation to pre-determined issues of major national significance, for example taxes, adoption of international treaties or transfer of authority to international bodies. A referendum may be conducted in presidential systems where there is a disagreement between the President and the Legislature.

2. Optional or facultative referendum

These are referendums that are held after a formal demand, which may emanate from the Executive, from members of the legislature, from a designated number of citizens or from a defined agent. The law does not demand that the referendum is obligatory. It provides for petitioning for a referendum to be held to resolve the matter in controversy.

The consequences of the vote may or may not be binding. A government can decide to initiate a referendum on a major issue due to public pressure or if it is divided on a certain matter. For example, the United Kingdom held a referendum prior to joining the European Economic Community in 1973.

There is a further type of optional referendum called the abrogative referendum. This is a vote of the

electorate that may decide to retain or repeal a law or decree that has been promulgated by the legislature and implemented. The citizens force a referendum by collecting a certain number of signatures.

3. Binding and non-binding referendum

A non-binding referendum is consultative or advisory. The Government or the legislature has the liberty to interpret and implement the results of the referendum, including ignoring the said results. This type of referendum is common in countries that have adopted a parliamentary system of government. Parliament retains the sole power to draft, debate and legislate the proposal.

Most referendums require approval by a simple majority of voters to be carried. In some instances, a referendum may require approval by a super majority. For example in the Constitution of Kenya (Amendment) Bill, 2008, it is proposed that the Draft Constitution must be approved by more than 65 per cent of the votes cast. The Bill also requires that at least half of registered voters must participate in the referendum for it to be valid. There is a similar requirement in Italy. This is intended to ensure that the result is representative of the will of the electorate.

Viability

A number of factors must be considered in arguing the case for or

against the referendum, given the consequences of the 2005 event. The arguments against the referendum include:

1. The availability of financial and other resources

Kenya recently held a General Election for the presidential, parliamentary and civic positions. A lot of money was used in the



Checking a voter's registration during the referendum.

exercise for purchase of the voting materials, civic registration and education and to remunerate the officials. The financing of a referendum may prove a heavy burden on taxpayers. However, if the process is streamlined by concentrating the consultative phase of constitution making to resolution of contentious issues, it may not be expensive to finance the referendum.

2. Time and labour

Since 2005, there have been no concerted efforts to resolve the contentious issues and realise a new Constitution. The process to realise

continued pg. 4

a new Constitution has been going on for the past 15 years. Adequate groundwork must be completed prior to the holding of a referendum, especially in a politically polarised country. This may result in the public losing faith in the process.

3. The vulnerability of the Kenyan electorate

The 2007 General Election resulted in post-election violence erupting. The nation is politically and ethnically polarised and may not be ready for a referendum. During the 2005 referendum, the campaigns were ethnically charged. This is a healing phase and nothing should be done to actively reopen old wounds. The internally displaced people may be disfranchised as the process to resettle them is not complete and is progressing very slowly. We cannot rule out that negative ethnicity will erupt during referendum campaigns.

4. The Electoral Commission of Kenya

The ECK has been discredited for failing to ensure the 2007 General Election was free and fair. The Constitution provides that the Commissioners be appointed by the President for a prescribed term. Unless the ECK is reconstituted by appointing a fresh crop of commissioners and undertaking internal reorganisation, the electorate may not have faith in the referendum, whose outcome will be disputed.

5. Is a new constitution necessary at all?

It has been argued a new constitutional order may be realised in Kenya through amending the offending parts of the Constitution without resorting to a referendum. For example, the office of the Prime Minister has been entrenched in the Constitution.

Despite the polarising nature of the referendum in the Kenyan political

landscape, some arguments have been proffered in support of the exercise. These include:-

a. Constitution making must be an inclusive and participatory process

The High Court of Kenya has ruled that any adoption of a new Constitution must be preceded by a referendum. The referendum is a widely accepted participation structure for adopting a new Constitution since the electorate has a chance to directly participate in the approval of the draft Constitution.

b. Structured referendum on the contentious issues

The outcome of the 2005 referendum was determined by the divisions in regard to the contentious issues. These issues included:-

1. Executive authority. The Bomas Conference created a powerful office of the Prime Minister. However, the Proposed New Constitution retained a powerful presidency hence the debate on the best model for sharing Executive power. This has partly been resolved as the office of the Prime Minister was created as part of the political settlement in February 2008.
2. Religious courts: The Bomas draft retained Islamic courts.



Prof. Yash Pal Ghai

However, protests from Christian leaders led to amendments to allow for other courts, namely Christian, Hindu and traditional. It was not clear what jurisdiction these courts were expected to exercise.

3. Land reform: There has been intense debate on the need for radical land reform, which has stirred anxiety among owners of large tracts of land, especially in the fertile Rift Valley region.

It has been proposed that a team of experts can analyse these issues, consider the views of Kenyans and international best practices with a view to making recommendations on the appropriate model. This will minimise the points of divergence on the 'contentious issues' and facilitate a referendum with majority of Kenyans supporting the draft Constitution. The product of the experts' views will then be subjected to a referendum. The Government, in consultations with other stakeholders, can identify the experts who can prepare the draft for adoption. The Government has tentatively agreed on a nine-member team, seven of who will be Kenyans. Broad consultations aimed at resolving the contentious issues would lead to an acceptable draft acceptable to all Kenyans. The referendum would be held for the purpose of ratifying the draft Constitution to ensure its legitimacy and acceptability.

c. Referendum of two draft Constitutions

It has been proposed that two alternate drafts can be prepared and subjected to the referendum. Citizens will vote for either of the versions. The alternative versions would seek to explore middle ground on the contentious issues. This will result in a win-win situation as Kenya will be able to realise a new Constitution. This will require massive civic education to ensure the voters appreciate the differences in the two drafts and make an informed choice.

continued pg. 5

Some interventions have been proposed to ensure the referendum is not divisive and include:-

i. Judicial Certification of the Draft Constitution

The draft Constitution can be subjected to judicial certification whereby a panel of judges will assess the enforceability and practicality of the provisions in the constitution and render an opinion. This process should be undertaken prior to the holding of the referendum. The process will infuse added and independent expert opinion on the draft and boost its chances of acceptability across the political divide.

ii. Massive Civic Education

To enable the voters make an informed choice on the Constitution, it is important to carry out structured and intense civic education throughout the country.

iii. Constituent Assembly

We acknowledge that there are issues that need to be resolved in the draft. Recommendations have been made that delegates elected by the people can debate and reach a consensus. However, there are fears that this may result in another Bomas Conference where political interests were evidently placed before national ones. Another factor is the cost effectiveness of the intervention whereas the draft Constitution will be subjected to a referendum.

Piecemeal amendments proposed by LSK

The Law Society of Kenya argues that there is no need of having to wait for a new Constitution that may take a long time or may never be realised yet the legislature may incrementally amend the existing law, which shall continue to operate. Further, LSK contends that this will be a win-win situation in that people will test the applicability of the law before it becomes operational. The drafters will have an opportunity to make the necessary amendments.

The approach is also cost effective.

How the referenda are carried out in other countries

Australia

An amendment of the Constitution requires approval in a referendum. A Bill must be passed by Parliament prior to its submission to a referendum. If a majority of voters, as well as separate majorities in each state (and where appropriate a majority of people in any affected state) vote in favour of the amendment, it is presented for Royal Assent given in the Queen's name by the Governor General. Due to the specific mention of referendums in the Australian constitution, non-constitutional referendums are usually termed plebiscites.

Italy

The constitution provides for two kinds of binding referendums: A legislative referendum can be held to abrogate a law totally or partially at the request of 500,000 electors or five regional councils. This referendum is valid if a majority of electors vote. A constitutional referendum can be held to approve a constitutional law or amendment when it has been approved by the Chambers (Chamber of Deputies and Senate of the Republic) with a majority of less than two thirds in both or either Chamber, and at the request of one fifth of the members of either Chamber, or 500,000 electors or five regional councils. It is valid regardless of the voter turnout. Any citizen entitled to vote in an election to the Chamber of Deputies may participate in a referendum.

United Kingdom

Acts of Parliament may permit referendums to take place. However, the doctrine of parliamentary sovereignty means any Act giving effect to a referendum can be reversed by a subsequent Act. Referendums in the United Kingdom are not constitutionally



Voters queue to vote for the referendum

binding, although they have a persuasive political effect. Referendums are rare. The only referendum proposal put to the electorate was in 1973 on continued membership of the European Economic Community. Referendums have been held in individual parts of the United Kingdom on issues relating to devolution in Scotland and Wales, a regional assembly for the North-East of England, and two separate polls on the status of Northern Ireland. Since 1973, only eight major referendums have been conducted. In 2004, the UK Government committed to holding a referendum on the new EU Constitution. This was postponed in 2005 after the Constitution was rejected in France and the Netherlands.

In summary, the best practice demands that constitutional amendments be approved by referendum. The amendments are first adopted by the legislature, then submitted to a referendum and assented into law by the President. The role of the President is ceremonial. The prerequisites for a free and fair referendum must be present, including:

continued pg. 9

Interview

Human rights in Kenya is a subject that seems permanent. But with a new Chair at the Kenya National Commission on Human Rights, Florence Simbiri-Jaoko (pictured), we may expect a new perspective. Katiba News correspondent, John Mukhwana, had a chat with the human rights advocate on both her mission and vision. Following are the excerpts.

KN: What kind of background do you bring to KNCHR?

A: I am a lawyer by training; I have worked as a judicial officer, lecturer and consultant on governance issues. I love my country and I am proud to be a Kenyan and consider it a privilege to serve my country in my current position. I have a passion for seeing that the rule of law is guarded and I believe that solution to human rights abuses largely lies in creating institutions that are strong, independent and are manned by individuals who are committed to fair and equal treatment to citizens in a transparent and accountable manner all the time.

KN. Where do you want the organization to be by the end of your tenure? Can Kenyans expect a different approach from your predecessor?

A: I would like KNCHR to be the premier institution that deals with human rights in a professional, responsive and accountable manner. I would like KNCHR to have a wider reach especially amongst the rural communities; I would also like to see a better understanding amongst Kenyans of what KNCHR is, in terms of mandate, powers etc. At the end of my tenure I would like KNCHR to be

viewed as an equal partner by government agencies that are charged with protecting and promoting the rights of Kenyans. I would like our role to be clearly understood and appreciated particularly the watchdog role.

KN: People usually view KNCHR as duplicating the work of KHRC. What differentiates the two organizations?

A: I am not sure in what respect KNCHR is seen to be duplicating the work of KHRC; however, it is clear that the similarity in names is a major cause of confusion. Both organizations are committed to the promotion and protection of human rights of Kenyan citizens and so there are times when there is a convergence in the kind of activities that they carry out and indeed there are cases where the two organizations collaborate. In this regard I would see the roles of both institutions as being complimentary. The difference between the two organizations lies in the fact that KNCHR is a public body created by



Florence Simbiri-Kaoko, Chair of the Kenya National Commission on Human Rights.

statute. KNCHR is part of a family of National Human Rights Institutions that have been created in compliance with what are known as the Paris Principles of 1993; these are United Nations guidelines that were developed to enable member states deliver better on the various human rights conventions and treaties through the establishment of special agencies supported by state funds for the sole purpose of addressing human rights protection and promotion. The Kenya Government created KNCHR as part of its obligation

continued pg. 7

to Kenyan's to ensure that there is a specific body whose role it is to monitor as well as advise the government and other state organs on matters relating to human rights. KHRC on the other hand is a Non Governmental Organization that to the best of my knowledge was started by a group of Kenyan individuals during the darker days of our history, to hold government accountable on its constitutional and international obligations. Together with other civil society organizations KHRC pushed for the creation of a National Human Rights Institution in Kenya. These efforts bore fruit when Parliament in 2002 passed the Statute that establishes the KNCR and the subsequent appointment of the first commissioners in 2003. Both the Paris Principles and the Kenya National Commission of Human Rights Act of 2002, recognize the key role that civil society organizations such as KHRC play in the promotion and protection of human rights; and therefore National Human Rights Institutions are expected to work closely with civil society.

KN: What would you say is the current status of human rights in Kenya? What is the cause of the shortcomings?

A: There is no doubt that the state of human rights in Kenya has improved greatly compared to the 1980s and early 1990s. A key contributing factor has been the expansion of democratic space, pluralistic politics has enhanced the capacity of Kenyans to exercise greater freedoms; a more liberalised and freer media

has made it possible for citizens to articulate their rights. Nonetheless we still have a long way to go in terms of real enjoyment of rights particularly economic and social rights, in respect to civil and political rights we have also noticed a downward trend especially attempts by state organs to limit the freedom of expression e.g. denial of the right to assembly; we still numerous reports of excessive use of force by some security officers.

While it is recognized that all states experience constraints in Kenya the main causes of lack delivery on human rights have been; lack of/ inadequacy/ misallocation misappropriation of resources are serious constraints to state delivery. At KNCHR we have repeatedly indicated that some of the worst enemies to human rights are corruption and impunity whether from security forces, state actors, politicians or other powerful individuals who rest in the knowledge that the long arm of the law will remain just that and will never catch up with them. This lack of respect for democratic principles such as the rule of law, and the incapacity by state organs to deliver to citizens poses serious challenges; indeed the post election violence that we experienced was not unexpected and yet we did nothing to prevent it.

KN: There are long standing accusations that you are usually quick to condemn the police when they shoot suspects but remain quiet when gangsters kill their victims. What is your response?

A: First and foremost let me state

that the police in Kenya on the whole have a tremendous task and that they work under extremely difficult conditions. As a commission and as an individual I believe that everyone who kills another other than in self defence as accepted in law or in execution of a court order is a criminal. In this regard it does not matter whether the killer is a police officer or a gangster or an ordinary citizen. The only difference with police officers is that they are public servants and in the course of their duties it is expected that they would act with more restraint than ordinary citizens. So we are not silent on gangsters, in fact we believe that unless we have a system that addresses organized crime in a comprehensive manner, not only are we endangering our lives but we are also putting in question the legitimacy of our security forces as the only bodies authorised to deal with law and order. If the police are not supported in their functions we must be ready to surrender our claim to being a democratic society.

KN: What are the safeguards for human rights in the current Constitution? What would you like to see entrenched in a new constitutional dispensation?

A: Our current constitution has safeguards particularly on civil and political rights; that echo those found in the ICCPR, however it is thin on issues relating to minorities, children, women and people with disabilities the prohibition of

continued pg. 8

discrimination on these grounds are the only safeguards; secondly, there are no explicit provisions on economic, social and cultural rights. Both the Bomas and the Wako drafts of the proposed constitutions have done an excellent job of covering human rights concerns.

KN: What is your view on current calls for the resignation of the entire ECK team? Would you say the Commission was the trigger of post election violence?

A: Clearly the Kriegler report is an indictment on ECK in its entirety; the intricacies and details of the massive institutional failure that occasioned the declaration first by ECK Chairman and then by Kriegler that we will never know the winner of the presidential elections 2007 can only be explained by ECK. The constitutional basis and independence of ECK must be anchored to accountability, having failed the accountability test; it would be fraudulent for us as lawyers in particular to hide behind the constitution to protect such massive failure and incompetence on the part of constitutional office holders. In my view the indictment must not be seen to extend to only Mr. Kivuitu, under whose watch ECK had gained public confidence.

Whereas, the infrastructure and ideology for violence had nothing to do with ECK, the immediate trigger to the post election violence was undoubtedly the manner in which ECK conducted

itself in the tallying of votes and the eventual announcement by ECK that President Kibaki had won the election amidst clear suspicion that all was not well.

KN: Do you think all Kenyans have access to fair justice in the Judiciary? If not, what should be done to ensure everybody is equal before the law regardless of his or her status in life?

A: In principle the Kenyan Constitution guarantees a fair and equitable justice system to all. In practice, most Kenyans even the well to do rarely experience fairness and equity. In my view the fact that most cases take inordinately long to resolve does not ensure fairness to all concerned. In reality it is the parties who do not wish to see matters resolved that benefit from a justice system like ours. The erosion of public confidence in our judiciary is linked to the delays, unpredictability, inconsistency and the obvious lack of mechanisms to hold judicial officers accountable and to measure their outputs.

No doubt it is the most vulnerable are the most affected by these inefficiencies, the small scale traders whose disputes cannot be resolved and whose monies end up being tied in a judicial process; the professional whose precious time is wasted as they pace the court corridors for years instead of spending such time in nation building activities; the poor whose inability to afford un reasonable bail terms means spending years in custody only to be released for lack of evidence. It is also true that to a large extent

there is no clear mechanism for accountability by judicial officers; most Kenyans especially those who are unrepresented do not participate in very simple decisions that judicial officers make e.g. adjournments are often made without any reference to witnesses or accused persons; where they are dissatisfied with the behaviour/conduct of judicial officers there is no mechanism for complaint and even when they complain no weight is given to their complaint. The most unfortunate thing about the Kenyan judiciary is that some excellent judicial officers whose attempts to be proactive and reformist are completely eclipsed by the general malaise in the institution.

There is need for reform in the manner in which the judiciary renders services to the public, it must become more sensitive and more accountable. There is also need to provide more resources to enable judicial officers operate with modern facilities and to adopt modern management styles. There must be continuous education and exposure for judicial officials of all cadres. A mechanism for accountability in terms of deliverables as well as integrity of judicial decisions must be put in place; a clear and working complaints system included. Along side judicial reforms we must also have reforms in the investigative and prosecutorial arms of the justice system. The whole justice system must be made more accessible particularly to the most vulnerable by simplifying the procedures and processes as well as making provision for legal aid for all serious cases. KN

Katiba briefs

Sep 3: Justice Minister Martha Karua rejects calls for minimum reforms targeted at key institutions. The idea was floated by the International Commission of Jurists-Kenya at a constitutional forum in Nairobi.

Sep 7: Leaders from Western Province call for reconciliation among Kenyans before the country embarks on the road to a new Constitution.

Nominated MP Musikari Kombo and former cabinet minister, Mukhisa Kitui, say leaders must first address the hatred and distrust which runs deep among various communities in the country.

Sep 9: Muslim leaders want the Constitution review suspended until the causes of the post-election violence are addressed. The Supreme Council of Kenya Muslims national chairman, Prof Abdulghafur El-Busaify, say the country is still deeply divided.

Sep 12: The proposed draft Constitution will only be subjected to a national referendum after consensus is reached on all issues, it has emerged.

Justice minister Martha Karua says that a group of experts and the Parliamentary select committee on the review process will ensure

that all disputes arising from the document are resolved.

Sep 14: ODM-K says it supports the presidential system of government but with devolved powers as spelt out in the Bomas Draft Constitution. Speaking at the close of a two-day retreat for the party at Karen, secretary general Mutula Kilonzo said the party also backs the review of constituency boundaries, and addressing of minority interests and geographical concerns.

Sep 21: Agriculture minister William Ruto says politicians should accept that they failed the country and give Kenyans a new Constitution that incorporates all their expectations.

Sep 23: Nairobi Metropolitan Development minister Mutula Kilonzo says the time has now come for Kenyans to have a new Constitution that would address pertinent issues including those which led to the chaos that hit the country after the December 2007 polls.

Sep 25: American Ambassador Michael Ranneberger urges the Government to ensure that it delivers a new Constitution. Ranneberger says he believed the coalition Government would deliver on reforms.

from page 5

1. Independent, impartial and fair Electoral Commission of Kenya. Voting procedures must be carried out in accordance with the law.
2. Massive civic awareness and constitutional consciousness. Communicating information to the public contributes to the legitimacy of the result.
3. Free and independent

4. media
4. All parties must be given adequate time for campaigns.

How does Kenya get it right? The Constitution should be amended to recognise the referendum and create a mechanism for constitutional succession. This should be undertaken simultaneously with granting the Electoral Commission power to carry out referendum. The

Commission must be reformed to ensure the integrity of the results of the referendum. The Krieger Commission Report has recommended reduction of the number of Commissioners and a complete institutional overhaul of the Commission. The underlying key to a successful referendum is compromise on the contentious issues prior to holding the vote. **KN**

The writer is a constitutional expert.

Amnesty or not

The last word

By Juliet Mukami

In many parts of the world, perpetrators of war, genocide, war crimes and crimes against humanity continue to evade justice. Following the political crisis and the widespread violence that was precipitated by the announcement of the Presidential election results last December, police arrested suspects. A debate ensued on whether they should be amnestied or not.

Granting of amnesty has been largely supported by MPs from ODM, especially from the Rift Valley, which was the epicentre of the political violence, while MPs from the PNU oppose the same on the basis that the crimes committed constitute crimes against humanity, and each case must be decided on its merits. The definition of amnesty is a subject of controversy. Amnesty has been defined as 'a general pardon, especially for those who have committed political crimes'. In international law, amnesty is defined as the act of effacing and forgetting past offences granted by the government to persons who have been guilty of neglect or crime. The term is applied to rebellious acts against the State. Amnesty differs from pardon in that amnesty causes the crime to be forgotten, whereas pardon, given after a conviction, exempts the criminal from further punishment. Amnesty is granted to a class of criminals or group of persons who may have committed a crime and is offered to restore tranquility in the State.

The Oxford Dictionary of Law defines amnesty as an act of erasing from legal memory some aspect of criminal conduct by an offender. It is

most frequently granted to groups of people in respect of political offences and is wider than a pardon, which merely relieves an offender of punishment.

The key elements that run through the definitions are that amnesty involves recourse

from legal responsibility for crimes and that it is often offered in relation to political offences. Kenya is a signatory to a number of international human rights instruments, which have defined and settled human rights standards, including the Genocide Convention of 1948, the Convention Against Torture and the International Covenant on Civil and Political Rights. These instruments oblige the State to investigate and prosecute all conduct by public or private actors that may result or has resulted in crimes against humanity, genocide, torture or any other serious violation against human and humanitarian law. For such crimes, the instruments do not permit amnesty.

The two sides of the debate

In societies like Kenya where people are informed on their fundamental rights and freedoms, differing attitudes and opinions on contemporary debates are inevitable. Rarely do such debates find a middle ground. The proponents for amnesty argue, firstly, that it



Protestors during the post election violence.

facilitates achievement of the objectives of criminal justice and promotes reconciliation and tolerance across the political divide. Reconciliation can be a useful tool in restoring tranquility in ethnically and politically divided societies, thereby fostering national unity. Secondly, the suspects who were arrested were supposedly acting at politicians' behest. To date, only a couple of grassroots politicians have been arrested. It is seen as unfair to prosecute the suspects while the inciters are let free. Accordingly, the politics seem to substantially influence such debate because of the role the politicians are believed to have played in inciting and funding the violence. Thirdly, the police have been accused of using excessive force to contain demonstrators during the violence. Very few police officers have been held to account. Further, the police, having been complicit, cannot

continued pg. 11

be expected to independently and professionally investigate the offences.

On the other hand the arguments against amnesty acknowledge, firstly, that the victims of crimes see justice as the trial, conviction and sentencing of the perpetrators. It is argued that whereas amnesty may be granted for perpetrators of minor offences such as road blockages and participating in unlicensed demonstrations, perpetrators of serious offences such as murder and arson must be held to account. Secondly, the political crisis was blamed on the culture of impunity that is ingrained in the national psyche and therefore offering amnesty to suspected perpetrators of the crimes would amount to further promotion and tolerance of this culture. Thirdly, in a rule of law state the function of determination of guilt or otherwise is vested in

the judiciary, which is expected to perform its functions independently. The procedure for granting of amnesty must involve the confession of the offender or the determination of guilt of the offender by a court of law or other forum. Thereafter, the offender can be offered amnesty. In this process, the views of the victims must be considered and taken into account.

Lessons from Germany, Rwanda and Former Yugoslavia
After the Second World War, which Germany was largely blamed for igniting and after the uncovering of the atrocities that had been perpetrated by the Nazi regime, the international community resolved to establish a tribunal to try the suspects. This resulted in the famous Nuremberg Tribunal. The tribunal was the first attempt by the international community to exercise universal jurisdiction and establish international accountability over criminal matters.

In 1994, a conflagration erupted in Rwanda in which moderate Hutus and Tutsis were massacred. The international community did little to contain the carnage. A few French troops were sent to the country to supervise the departure of foreigners from the country. It is

estimated that up to one million people were killed in a period of three months. This is described as the worst incident of genocide in which the international community did not intervene. After the truth and extent of the atrocity, the United Nations set up the International Criminal Tribunal for Rwanda, which has been trying the suspects of genocide and crimes against humanity. The tribunal has been criticised for trying cases slowly. Indeed, the United Nations has given the court an ultimatum to complete all hearings by 2010. Rwanda has designed a community justice system whereby the suspects of genocide and other related crimes are given an opportunity to confess before their community and victims of the crimes they committed and an appropriate sentence is passed on them. This system, known as the *gacaca*, is designed to promote reconciliation between the suspects and the victims and attempt to integrate them into society. It is also a measure to decongest the Rwandese prisons, which currently hold about 120,000 suspects of the genocide. Rwanda recently abolished death sentence to comply with internationally recommended standards of sentencing. The maximum sentence allowable at the Tribunal is life imprisonment.

Similar atrocities occurred in former Yugoslavia. The United Nations formed the International Tribunal for Former Yugoslavia, which has been sitting in The Hague. During the conviction of the Serb commander Radislav Krstic for his role in the massacres of Srebrenica in 1995, the tribunal concluded that "genocide" meant the destruction of a 'substantial part' of a group, which the court defined as 7,000-8,000 Bosnian Muslim men from Srebrenica. Although the ICTY judgement would help qualify Darfur as genocide, some observers believe

continued pg. 12



President Mwai Kibaki and Prime Minister Raila Odinga shake hands after peace talks.

that 'genocide' means something far broader. It is a campaign under governmental control designed to physically eliminate a group — such as in Rwanda or Nazi Germany. The United Nations set up a peacekeeping mission in Kosovo to monitor implementation of the peace accord. The General Election in October 2006, were the first administered by local authorities. The elections showed that the electorate remained divided along ethnic lines. Widespread nationalist rhetoric included calls for a referendum on independence.

In former Yugoslavia, the Tribunal continued to try alleged perpetrators of serious violations of international humanitarian law. Former Serbian President Slobodan Milosevic died at the Tribunal Detention Unit. He had been on trial before the Tribunal for war crimes and crimes against humanity, and for genocide. Under a 'completion strategy' laid down by the UN Security Council, the tribunal was expected to conclude all cases in 2010. As a result of the tight deadlines imposed by the strategy, the Tribunal continued to refer cases involving lower level perpetrators to national jurisdictions in the former Yugoslavia.

From the experiences of these tribunals, the international community negotiated and drafted the Rome Statute establishing the International Criminal Court. The ICC is the first permanent international court dealing with criminal matters. Its jurisdiction extends to hearing cases of genocide, crimes against humanity and war crimes. However, states are required to exercise jurisdiction over the crimes and investigate and prosecute offenders. It is only when states refuse or are unable to prosecute the perpetrators that ICC

assumes jurisdiction. Kenya is among the more than 100 states that have acceded to the Rome Statute and is therefore expected to cooperate with the ICC. However, the implementing legislation, the International Crimes Bill, though published by the Attorney General, is yet to be passed by Parliament.

Justice for victims

Trials of low-level perpetrators of crimes are held in local courts. Questions confronting emerging democracies, including South Africa, include addressing the issues of dealing with past violations of human rights and how to deal with political leaders and influential individuals responsible for serious crimes. We must differentiate between persons who gave the orders and those who carried them out. Thirdly, how do new democracies deal with the fact that some perpetrators may remain part of the government or security forces or hold important positions in public life? These questions will be comprehensively answered by the Truth, Justice and Reconciliation Commission. In South Africa, for example, suspected perpetrators of crimes were permitted to apply for amnesty before the Truth Commission. These applications were considered on their merits and the perpetrators had to confess the crimes they had committed prior to being granted amnesty.



A car burns in the post election skirmishes.

Some of the measures that are proposed to ensure justice is done to the victims include:

1. Resettlement and compensation of IDPs

The process of settling displaced people has been excruciatingly slow. Indeed, the resettlement has sometimes constituted transfer of the IDPs to camps nearer their homes. Some IDPs are too traumatised to settle in the communities in which they were attacked and their loved ones killed. The Government must therefore design and fund an appropriate resettlement and reparation programme. The reparation must be adequate, effective and prompt and should be proportional to the gravity of the violation and the harm suffered. Where an entity other than the Government is found liable for reparation, such party should provide reparation to the victim. Whereas we understand the huge resources required to resettle the IDPs, the Government has not done enough to prioritise the resettlement programme and ensure that the reparation is adequate.

The communities can devise a mechanism for compensation of the victims by perpetrators in exchange for amnesty, especially for crimes like property destruction. These mechanisms can be formally

continued pg. 16

Tackling inequalities in Kenya

By Joab Magara

Since independence Kenyans have been grumbling over the mode of sharing the national cake. The cake consists of the revenue generated from taxpayers as well as from exploitation of the available natural resources.

It has been argued that areas that have produced political leaders with the most influence have generally been rewarded through projects financed by the Government. Likewise, political leaders and technocrats close to the holders of political powers have tended to amass personal fortunes. Communities that have been at the periphery of political dominance have therefore grumbled that the distribution of the national wealth was inequitable. The distribution of public service appointments has also been skewed to favour areas that provide political support to the incumbent president.

With the stagnation of the economy in the 1980s and 1990s, the youth have become increasingly marginalised. The availability of few job opportunities resulted in mass unemployment. The youth were gradually excluded from the economy, thereby nurturing deep resentment to the status quo. The skewed distribution of resources formed an important part of the negotiation for a new Constitution at the National Constitutional Conference at Bomas. The devolution structure was intended to bridge the gap in resource distribution throughout the country. One source of discontent in distribution of wealth is land ownership. A huge part of Kenya's arable land is owned by a handful of



Street food vendors preparing to start the day's business.

Kenyans. Again, the reform of the land tenure formed part of the most intensely debated parts of the Constitution. Most issues in Kenya surrounding wealth refer to land or positions of power that assist in the acquisition of land.

A new and growing perception of wealth in Kenya is communal wealth, which can be taken to mean the infrastructural developments in an area inhabited by the community. One of the grievances by Kenyan leaders has been that some regions have been favoured in allocation of government resources than others. The underlying causes of the political violence that gripped the nation after the General Election last year were identified as inequality and massive youth unemployment.

It is a staggering statistic that 80 per cent of the Kenyan wealth is held by an elite 20 per cent of the population. This is a glaring disparity. It is easy to understand why there is growing vocalised discontent among Kenyans on equality. For a holistic

discussion on issues arising from this social structure, it is important to analyse who and how this 20 per cent minority acquired their wealth.

First, the wealthy people in Kenya obtained their wealth, particularly land, from departing colonialists due to a number of factors such as influence or positions in the government, access to capital and the independence Government's policy of selling the available land through settlement schemes on willing-buyer willing-seller basis. Secondly, there is the group that gained their wealth through corruption. Many individuals who were in government used their positions and influence to appropriate wealth. Corruption has been widespread and invasive in most public sectors. Despite the creation of the Kenya Anti-Corruption Commission, the principle abusers of public resources continue to enjoy the 'fruits of their labour'. Lastly, there are the business people who admittedly have pursued

continued pg. 14



Part of Mathare slums in Nairobi.

from page 13

industry with fervour. Most business people have learnt the art of being politically correct.

The rest of the 20 per cent is divided between an increasing middle-class. The majority of Kenyans live in abject poverty. It is estimated that 45 per cent of Kenyans live on a budget of below US\$1 a day. There is an apparent and ostensible disparity that is leading to increased discontent, especially among the majority of Kenyans who live in abject poverty.

Presidential powers and distribution of wealth

The Constitution creates a Presidential system of Government with the President as the Chief Executive. The President appoints the ministers from the National Assembly. The President and the Cabinet design and implement economic policies. At the local levels, the President appoints the District and Provincial Commissioners who are in charge of government affairs. District officers, chiefs and assistant chiefs assist these officials. The Provincial Administration structure is managed under the Office of the President. These officers serve as the representatives of the President. The local authorities are managed by

mayors and chairmen, who are elected councillors. All executive decisions, including on spending, must be approved by the Chief Officers who are appointed by and are answerable to the

Ministry of Local Government.

The Constitution grants the President the power to make public appointments, including of ministers, PSs, ambassadors, Electoral Commissioners, judges of the High Court and Court of Appeal, members of the Public Service Commission, chairmen of state corporations, among other officials. This wide-ranging power has been used to reward areas where the President has most political support. The centralisation of powers in the presidency has led to the perception that the powers of the President need to be dispersed to other offices. It is contended that the manifestation of this discontent was witnessed during post-election violence. The root of the violence was because some Kenyans felt that some people have gained wealth unfairly to the exclusion of others.

Devolution and equitable distribution of wealth

Every region in Kenya has a specific economic potential. *Majimboism* is the exploitation of that potential in an attempt to make each region self-sufficient with a combination of limited political power. To assist in its financial programmes, each region receives funds from the central government, which have been collected in form of taxes. The

funds are distributed based on a formula defined by law. These funds are used to create and improve the social amenities such as education, medical care, availability of water and electricity. The improvement of social amenities will also attract industries and encourage the establishment of industries away from the traditional urban areas into the newly emerging ones. This will increase the level of employment within regions and thus help create a more independent self-sufficient economy in each region.

The Proposed New Constitution had proposed a devolved structure of Government in Kenya. The objects of devolution were to ensure democratic and accountable exercise of sovereign power, foster national unity by recognising diversity, give powers of self governance to the people and enhance participation of the people in exercise of the powers of the State. This would be done by recognising the powers of the local communities to manage their affairs, promote social and economic development and ensure access of services to the people as well as equitable sharing of national resources. The district was to be the unit of devolution. It was provided that in case of conflict between national and district legislation, the national legislation would prevail. A district council was empowered to formulate plans for the exploitation and management of the district resources. Each district was entitled to an equitable share of revenue raised nationally.

The merits of devolution include:

1. Devolution enhances mechanisms for equitable distribution of wealth. The national government is obliged to share out the national cake equitable among all regions. The local government has autonomy to design the expenditure programmes for the regions. Given the distinct natural endowments present in different regions, this

continued pg. 15

means that every regional government will be able to choose the best industries and projects that it should implement.

2. De-concentration of power of the Presidency. The regions will exercise limited powers, including legislative and Executive. This will result in devolution of political power from the presidency. Past presidents have been accused of channelling development projects in their areas. The devolution units will make decision that will impact on their residents without requiring the charity of the Executive.

The demerits include:

1. Corruption-. The culture of corruption in public service pervades even the proposed devolution units. For example, there have been allegations of corruption in the way the Constituency Development Fund, the Local Authority Transfer Fund and other devolved funds have been managed. Part of the problem lies in the patronising role that an elected official, be it the MP or the councillor, plays in design and execution of projects under the funds. This will be replicated in the devolved units.

2. Creation of bureaucratic outposts will not necessarily enhance the efficiency of Government. Autonomous devolved units will result in another layer of bureaucracy that will not necessarily result in efficient delivery of services. It will lead to further bloating of the public service.

3. The economic sustainability of some regions is in doubt. Some of the units will be unable to generate sufficient resources to maintain their programmes thereby necessitating the need for constant funds from the Government. Further, it is probable that there would be an eventual dissatisfaction and hostility among the regions that would be

performing the best economically, since they would be contributing the highest revenue for the Central government, which would then be distributed equally among the other regions.

4. Devolution may undermine nationalism. Kenya has just emerged from post-election crisis. One of the underlying causes was the perceived inequitable distribution of the national cake. The establishment of a devolved structure may lead to ethnic cleansing within the devolved units based on the ethnicity of the residents. There has been a grievance among some communities that 'strangers' have settled on their ancestral land. There are drawbacks to devolution such as the possibility of the stagnation and eventual decrease in a national identity and the affirmation of identities along ethnic and regional lines.

Tangible solution

The Constitution being the supreme law creates and defines public offices that exercise public functions. The appointment process should be reformed to ensure vetting of appointees by Parliament. Secondly, the Public Service Commission must be empowered to advertise and select on merit most of the public appointments to ensure that politicians do not appoint their protégés and political supporters to public offices. The results based management being implemented by the Government should be implemented in all public sectors and monitored to ensure compliance.

The Constitution has been amended to create the office of the Prime Minister and two Deputy Prime Ministers. These offices must be conferred limited, but real executive powers. This will ensure the sharing of Executive powers among other offices and tiers of Government, unlike in the past where all power was concentrated in the President. Parliament must also exercise its watchdog role more vigilantly to ensure the Government adheres to its oft-stated policy of equitable

distribution of wealth.

The Government must be supported in its implementation of the free primary and the proposed free secondary education programmes. A most effective way to bridge the gap is by ensuring access to education opportunities by children across the country. This should be supplemented by other programmes in provision of health care, building of roads and related infrastructure. There is a case that these services be delivered and managed centrally to enhance efficient service delivery. In this respect, the Public Service Commission, Teachers Service Commission and the security agencies should be managed from the national government.

Civil society forums have a crucial role to play as they personify the voice of the people and are in a better position to push for change without fear of prejudice or sanction.

There must be political will to implement the proposed changes to ensure their success. However, we have to accept that some regions are better endowed with natural and infrastructural resources to achieve self-sufficiency. Some areas are already more economically independent due to existing trade and thus have already established social amenities, which means, that any funds from the central government will cause these areas to improve at a faster rate than other areas. This is problematic because it means that the economic disparity in the various regions that exists now will continue to widen due to the fact that the various regions are not starting on a level playing field. Therefore, the very problem that devolution sets out to solve may be amplified by the same structure that sought to remedy the problem. **KN**

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recognised by the Government.

2. Public officers should be investigated for complicity in the violence

The Commission on the Post-Election Violence has completed its hearings and is expected to present its report this month. Whereas the intelligence agency stated that it predicted the outbreak of violence after the General Election, little was done to prevent and contain the violence, especially in the Rift Valley. The patterns of violence also show complicity by security officers in the violence. The report of the Commission should be implemented in full, through reforms in security agencies to ensure they are responsive, independent and accountable.

3. The perpetrators of serious crimes should be investigated and prosecuted

The Government has an obligation to investigate violations effectively, promptly, thoroughly and impartially and take action against those identified as being responsible in accordance with the law. The State has a duty to submit the persons responsible for the violations to prosecution and if the person is found guilty, punish him. Serious crimes and violations of international humanitarian law are not subject to amnesty and must be prosecuted by the State. All persons responsible, regardless of their public standing, should be investigated and held to account.

Human Rights Watch has reported on the devastating effect of amnesties for serious crimes and this can be seen in the example of Sierra Leone. In 1999 the Revolutionary United Front leader Foday Sankoh received an amnesty. He was alleged to be responsible for mutilations, murder and rape. He was rewarded with control of a government

commission in exchange for signing the Lomé peace accord, which was supposed to end Sierra Leone's brutal war. Sankoh soon went on to attack both government forces and UN peacekeepers, taking hundreds of them hostage. The revived conflict was not declared over until more than two years later. Meanwhile, prosecution was pursued under the Special Court for Sierra Leone and helped to marginalise the abusive leaders of the warring parties.

4. The Government should commence and sustain peace building and conflict resolution initiatives

The Government should initiate peace-building initiatives in the areas affected by the violence to ensure harmony and unity among the different ethnic communities. This should be sustained to ensure success. It has been noted that most of the violence hotspots have been experiencing violence every election year since 1992. The communities are best placed to identify the root cause of the violence and develop mechanisms for peaceful co-existence. These peace-building forums will provide an opportunity for debate on the best method of implementing the amnesty and victim compensation programmes.

5. The Government should enhance and sustain security presence in the violence hotspots

The Government has set up police stations in the affected areas. These security measures must be implemented to ensure sustained peace. The construction of the police stations must be supplemented with community policing initiatives to ensure sustainability of the initiative. Some returning IDPs have reported being attacked or threatened when attempting to resettle on their farms.

Conclusion

There is inherent tension between amnesty and justice. Some countries are locked in their past that it is almost impossible to deal with contemporary needs and future demands. One of the tasks of memory is to forget. However, for sustained peace and reconciliation, it is not possible to ignore the past, hence the adage, forgive but do not forget. The post-election violence was grounded on the assumption that the perpetrators of similar acts in the past were not prosecuted. The Government must, therefore, shift the paradigm by prosecuting the perpetrators. Failure to prosecute may lead to invocation of the universal jurisdiction of the ICC. Any grant of amnesty must be within the dictates of international law.

Justice for perpetrators of committed serious acts of human rights violations is right. However, there are limits to justice. As per the experiences of Rwanda, Germany and the former Yugoslavia, it is impossible to punish every perpetrator. Punishment may not be the only solution. We may therefore need reconciliatory measures that temper justice with mercy. Retributive justice and restorative justice must go together. The Truth, Justice and Reconciliation Commission, with its truth telling and informal procedures, will contribute in fashioning a mechanism that promotes reconciliation, justice and amnesty in a manner acceptable to victims and perpetrators. **KN**

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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.

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