KatibaNews

Towards a new constitutional dispensation in Kenya

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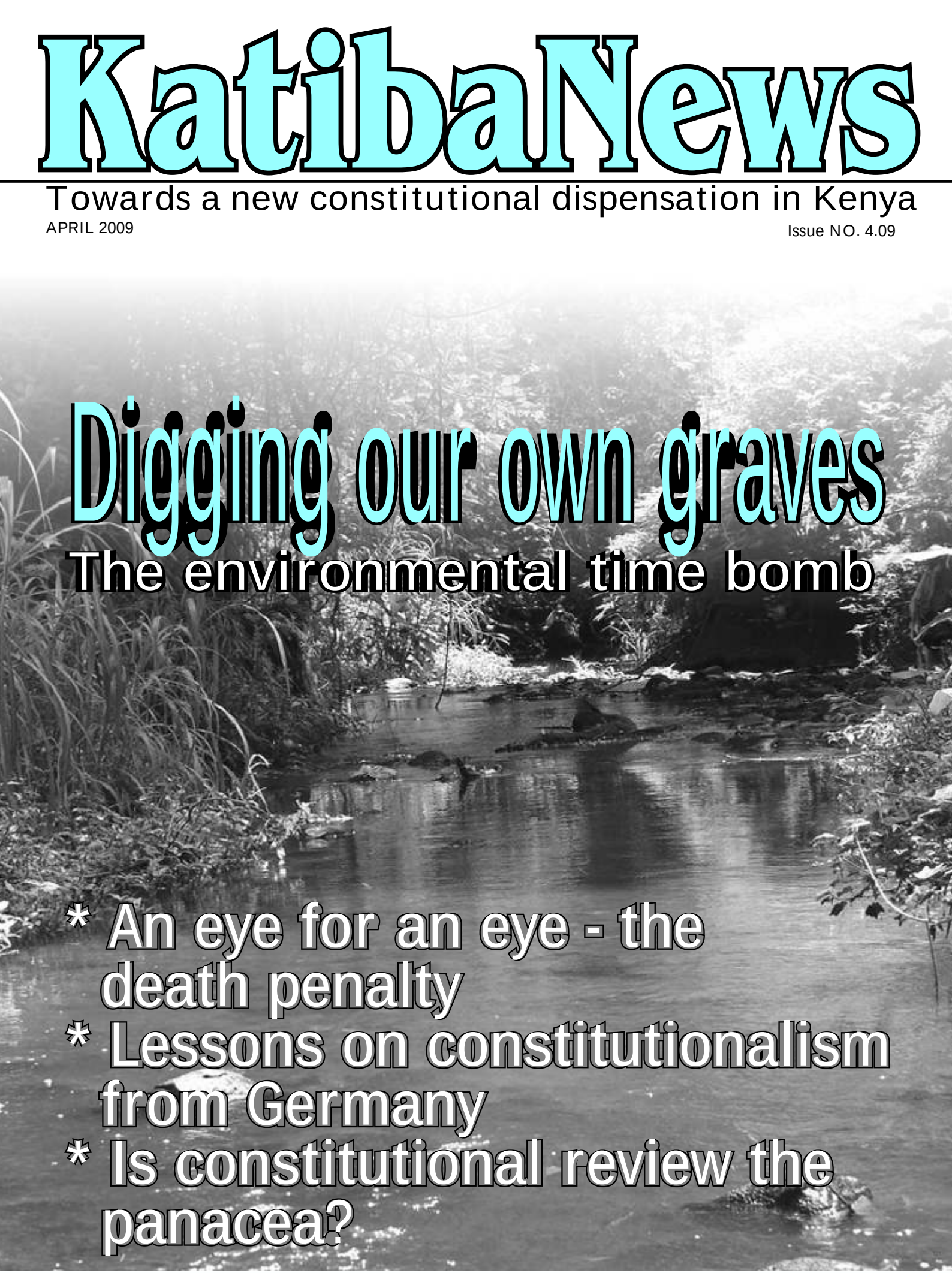

Digging our own graves

The environmental time bomb

* An eye for an eye - the death penalty
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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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The case for abolition of the death penalty

By Katiba News Correspondent

'Punishment of a prisoner can be achieved with less harsh means. The means adopted to carry out the death penalty constitutes extreme physical and mental assault on a person already rendered helpless by the government'

Chief Justice Evans Gicheru

Kenyan criminal laws provide for a mandatory death sentence for treason, murder and robbery with violence. Whereas the trials for suspects of murder and treason are conducted in the High Court and the suspects are provided with an advocate by the state, trials for robbery with violence are conducted in the magistrates' court with the rank of Senior Resident Magistrate and above. Further, there is not legal aid for suspects of robbery with violence.

In the 1970s, there was a public outcry over increased cases of robbery with violence in Kenya which led to Parliament amending the law to convert the crime into a capital offence. The last known executions in Kenya were carried out in 1986 after the 1982 coup attempt whereby the three coup leaders were found guilty of treason by Military Court and were executed. Kenya seems to have adopted a moratorium on carrying out of death penalties. However, courts still sentence convicts to death penalty.

During the National Constitutional Conference in Bomas of Kenya in 2004, there were calls for the abolition of the death penalty in Kenya through an amendment to the constitution. However, this was rejected by a majority of the delegates. It therefore seems the Kenyan public is in favour of retention of the penalty.

However, sufficient debate has not taken place in Kenya on the need to abolish death sentence especially given the human rights concerns that the sentence has elicited internationally. Indeed, given that Kenya has not executed any convicts for the last 20 years means that the deterrent or retributive effects of the sentence cannot be justifications for retaining the sentence in our laws.

Justifications for abolition of the death penalty: the International Human Rights Law

During 2007, at least 1252 people were executed in 24 countries and 3347 persons sentenced to death in 51 countries. China is the world's largest user of the death penalty. Due to strict governmental control of information, it is very difficult for researchers to establish the exact number of cases of death penalty imposed and carried out in China. Free debate has not taken place in China on the appropriateness or otherwise of the death penalty.

Under international human rights law, death penalty is deemed a violation of the rights to life, to protection from torture, inhuman and degrading treatment and to right to fair trial. The carrying out of the death penalty deprives life to an individual who is already a captive of the state and incapable of carrying out any further criminal acts. The manner in which the penalty is carried out constitutes inhuman and degrading treatment or punishment of the convict. Further, most of the trials in which suspects are convicted are conducted without the assistance of lawyers and cannot be deemed to conform to internationally accepted standards of fair trial.

Death penalty has not been shown to have any special powers to reduce crime. It is

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disproportionately used against ethnic and racial minorities and the poor. It has been used as a tool for political repression whereby it is imposed and inflicted arbitrarily. It is irreversible, resulting in punishment of innocent people. Death penalty offers no further protection from brutalisation by the convicts. Death penalty can be seen as premeditated and cold blood killing of a human being by the state. The state can exercise no greater power over a person than that of deliberately depriving him of his or her life. The debate on abolition therefore hinges on whether the state has the right to deprive persons of their lives.

The Universal Declaration of Human Rights was adopted in 1948 to promote fundamental rights as the foundations of freedom, justice and peace. The right to life is recognised as a fundamental human right that should not be withdrawn for bad behaviour. Further, no persons should be subjected to cruel, inhuman or degrading treatment or punishment. The Declaration is viewed as an embodiment of the customary international law on human tights and is thus binding on all states.

Self defence may justify the taking away of live, for example when the country is engaged in warfare or where law enforcement officers act to save their own lives or those of others. Such use is regulated by internationally accepted standards to prevent abuse. The death penalty does not respond to an immediate threat to life.

Punishment of a prisoner can be achieved with less harsh means. The means adopted to carry out the death penalty constitutes extreme physical and mental assault on a person already rendered helpless by the government. The penalty imposes physical pain through the means it is carried out and psychological suffering caused by the prior knowledge of death at the hands of the state.

The ICC

The International Covenant on Civil and Political Rights provides death penalty shall be imposed for the most serious offences in countries which have not abolished the death penalty. Death penalty is therefore an exceptional measure. The UN Economic and Social Council has stated that death penalty should not go beyond intentional crimes that are lethal or have extremely grave consequences.

The Statute of the International Criminal Court which was adopted in 1998 and which came into force in 2002 has not provided for death penalty for the most serious crimes of genocide, crimes against humanity and war crimes. If the death penalty has been excluded for the most serious international crimes, it can hardly be countenanced for lesser crimes. The provisions of the Statute are a clear testimony that the international community is in favour of abolishing the death penalty.

Some categories of people have been excluded by international law from imposition of death penalty. Such persons include:

1. Juvenile offenders. Persons under 18 years of age at the time of the commission of the offence are exempted from death penalty. This principle is approaching a norm of the customary international law. The Convention of the Rights of the Child, which abolished death penalty among juvenile offenders, has been ratified by all but two UN Member states- which are Somalia and United States. Between 1990 and 1998, there were recorded 18 executions of juvenile offenders worldwide with half of the executions being carried out in the United States. United States entered a reservation to the ICCPR to permit it to continue imposing death sentence, including to juvenile offenders.
2. Pregnant women, new mothers and persons aged above 70 years
3. Persons who are or have become insane

International human rights standards stipulate that death sentence should only be imposed after a fair trial. Convicting prisoners without a fair trial is a denial of the right to due process and equality before the law. The irrevocability of the death sentence denies the convict the opportunity to challenge the wrongful conviction and avail an opportunity to judicial officers to correct their errors.

The deprivation of life denies the victim the opportunity to enjoy all the other rights. No derogation is permitted from the right to life even when a state of public emergency has been declared. Two thirds of the countries in the world have abolished death penalty in law or in practice. In 2006, 91% of all known executions took place in China, Iraq, Pakistan, Sudan and the United States. In Africa, only six countries carried out executions.

Alternatives

The victims of death penalty are often represented by inexperienced lawyers or no lawyers at all. They may not understand the charges or the evidence against them, especially if they are not conversant with the language used in court. Facilities for interpretation and translation of court documents are often inadequate. In some cases, cases are heard before special or military courts using summary procedures thereby undermining the right to fair trial.

The importance of human rights in the abolition debate is that some means of punishment may never be used to protect society as they violate the very values that make society worth protecting. There is no evidence that death penalty has any special deterrent value than

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other forms of punishment. There is no way to ascertain that the victim would have committed other crimes had he or she been allowed to live.

Further, dangerous offenders can be kept safely away from society without resorting to execution. In the words of the South African Constitutional Court in the case of *Republic v. Mwakwanyane & Another* (1995), 'We would be deluding ourselves if we believe that execution of...comparatively a few people each year.....will provide the solution to the unacceptably high rate of crime...The greatest detergent to crime is the likelihood that the offenders will be apprehended convicted and punished'.

States which retain the death penalty argue that death penalty is necessary to meet a particular need in society. This need is mostly retributive and deterrent nature of the death penalty as a punishment. Some of the crimes for which death penalty is imposed include murder, drug trafficking, acts of political terror, economic corruption or adultery. In other countries, it is used to eliminate political threats to the authorities. Some moral views posit that no man has the right to take the life of another. The imposition and carrying out of the capital punishment is therefore an affront to morality.

The arguments of punishment as deterrent or incapacitation are not a justified reason for imposition of death penalty. Modern penal reform initiatives are aimed at rehabilitating and reform the convicts and not merely using prisons as a means for penal reform. In Kenya, there has been increased use of community service orders and probation as a means of rehabilitating offenders back to society.

Use of imprisonment has been blamed for increased recidivism and delayed integration of convicts back to society. Further, the increased number of prisoners and remandees stretch the available facilities beyond the limits. All criminal justice systems are vulnerable to discrimination and error. Expediency, discretionary decisions and prevailing public opinion may influence proceedings at every stage from arrest to determination of eligibility for clemency.

Kamiti Maximum Prison

The determination of upon whom the death penalty shall be imposed is based on the nature of the crime and the ethnic and social background, the financial means and the political opinion of the victim. Human uncertainty and arbitrary judgements are factors which affect judicial decisions.

Execution is irrevocable. States will continue to execute people who are innocent. The irrevocability of death sentence makes the penalty tempting to states as a tool of repression. Abolition of death penalty can ensure that such political abuse of the penalty does not occur. The imposition of the penalty is a symbol of terror and a confession of weakness. The death penalty negates the internationally accepted penological goal of rehabilitating the offender.

Torture

When the UDHR was adopted in 1948, eight countries had abolished the death penalty for all crimes. The abolition of death penalty is a precondition of admission into the European Union. The UN Commission on Human Rights has called on States to establish a moratorium on executions with a view to completely abolishing the death penalty. States recognise that punishment for crimes can be achieved through other means and not necessarily the death penalty.

Like torture, an execution is an extreme physical and mental assault on a person already rendered helpless by the government. Judges and prosecutors face moral dilemma where imposition of mandatory death penalty conflicts with their ethical views. The Parliamentary Assembly of the Council of Europe has noted that it considers that death penalty has no legitimate place in the penal systems of modern civilised societies and that its application may well be compared with torture and be seen as inhuman and degrading treatment or punishment.

The United Nations has developed

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Diggging our own graves

In Kenya, public environmental education is extremely low and most of the strategies adopted in conservation are Government-led, thereby excluding community participation.

By Joyce Muthama

The conservation and proper management of the environment is a prime responsibility of the Government. Environmental sustainability has been defined as the ability of the environment to function properly indefinitely while the other hand, sustainability is defined as development that takes the impact on the environment to account and tries to minimise environmental damage.

Sustainable development is development that meets the needs of the present without compromising on the ability of future generations to meet their own needs. Kenya is the host to the United Nations Environmental Programme since 1972. However, the country has neglected proper environmental conservation and management for a long time. Indeed, conscious efforts to establish coordinated system of managing the environment have been initiated in the post 2000 period.

In Kenya, public environmental education is extremely low and most of the strategies adopted in conservation are government led thereby excluding community participation. By excluding community participation, such efforts have barely borne fruit. Environmental conservation and management is linked to the competition for resources. The Government needs to promote sustainable use of land. Proper environmental conservation must be accompanied by proper land use and adoption of an appropriate land use policy.

In the past, land on major water towers for example the Mau Forest and the Ngong Forest, has been allocated to politically correct individuals. To say the least, the Government has not demonstrated political will to address the environmental problems in Kenya.

The Government of Kenya has been revising the policy and legal framework on the environment. In 1999, Parliament enacted the framework law on environmental conservation in Kenya. The Environmental Coordination and Management Act, 1999 (EMCA) was a ground-breaking law that consolidated provisions on environmental conservation. However, Kenya partly retained the sectoral approach to environmental conservation and has in this regard enacted the Water Act and the Forests Act.

Degradation

The sectoral approach is a legacy of the colonial resource management which was primarily concerned with resource allocation and exploitation. The EMCA seeks to coordinate the activities of various government agencies involved with the environment.

The EMCA provides that the polluter pays, a principle in which a person or entity who

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An aerial view of the Mau forest.

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is responsible for environmental degradation or pollution is obliged in law to correct the detrimental effects of his or its activities on the environment. Further, the law requires that all new projects must undergo an environmental impact assessment whereby their potential impact on the environment is analysed to mitigate harmful effects on the environment. One of the most innovative and progressive provisions in the Act is the right to a clean and healthy environment with recourse for redress lying directly to the High Court.

The Act establishes a number of key organs, among them:

a. National Environmental Council. The Council is responsible for policy formulation and direction, setting goals and objectives, determining policy and priorities in environmental conservation and promoting cooperation between the public and private sector on conservation. The Council appoints the Members of the National Environmental Management Authority. The Council is chaired by the Minister in charge of matters of the environment.

b. National Environmental Management Authority. NEMA's roles can be summarised as ensuring sustainable management of the environment through general supervision and coordination and be the principal instrument in the implementation of all policies relating to the environment. NEMA works closely with other lead agencies in implementing its mandate. Such agencies include the Kenya Wildlife Service and the Kenya Forest Service. NEMA coordinates various activities and programmes initiated by the lead agencies; establishes and reviews land use guidelines, and advises the Government on implementation of its international obligations. NEMA is managed by a Board of eight, with the President appointing the Chairman and the Minister appointing the other Members in consultation with the Council.

c. The Provincial and District Committees of the Authority. The Committees are intended to facilitate discussion and decision making on matters of the environment. They are chaired by the Provincial and District Commissioners and allow for the participation of local leaders in environmental management and conservation. These mechanisms allow the local communities to be involved in management of natural resources in their areas.

d. National Environment Trust Fund. The Fund is intended to facilitate research on environmental management, assist in building capacity, environmental awards, publications, scholarships and grants. The sources of funds include donations, endowments, grants and gifts and such monies that may be designated to the fund.

e. Public Complaints Committee. The Committee is part of NEMA. The Committee reports directly to the Council which is obliged to act on the reports. The Committee investigates allegations against any person or NEMA in regard to environmental degradation. It has quasi-judicial powers to summon witnesses. The Committee submits its reports to the Council after investigations. The Committee wax intended to act as an environmental ombudsman. However, by being placed under the direct control of NEMA the operations of the Committee have been hampered thereby reducing its efficacy in discharging its mandate.

f. The National Environmental Tribunal. The Tribunal has five Members and is chaired by a person qualified to be a judge of the High Court, nominated by the Judicial Service Commission. The Tribunal's functions are to hear disputes of a technical nature on implementation of the Act and appeals against administrative action taken by NEMA. Appeals may be filed by aggrieved persons. Appeals from the Tribunal lie to the High Court. The Tribunal has been very active of late and has delivered decisions of disputes filed before it.

The framework law has adopted three important principles of environmental conservation. These are:

1. The right to promote maximum participation of the people in the development of policies, laws and processes for the management of the

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environment. This includes creation of environmental awareness and publication of information on environmental management and resource use.

2. Inter and intra generational equity whereby the conservation of the environment and cultural heritage and their equitable utilisation is for the benefit of the present and future generations. The resources must be utilised in manner that ensures equity among the present users and between the present and future users. Sustainability is ensured through reclaiming of lost ecosystems and maintaining the functioning relations between the living and non living parts of the environment.
3. The Act promotes international cooperation in environmental management and conservation. This recognises the trans-boundary impacts arising from activities carried out in other countries.

A section of the polluted Nairobi river.

Forests

The Forests Act establishes the Kenya Forests Service with the mandate of formulating policy and guidelines on the management, conservation and utilisation of forests, managing state forests, protecting forests, identifying research needs and applying research findings, drawing management plans for forests, managing forests in water catchment areas and assisting organisations and communities in forest management and conservation. The Service is managed by a sixteen member Board. The Act establishes a Forest Management and Conservation Fund for development of forests, promotion of commercial forest plantation, rehabilitation of forests and promotion of community based forest projects. All forests, other than private and local authority forests are vested in the State. The Minister may establish a forest on unalienated Government land with the approval of the Board. Variations in state or local authority forest must be approved by the Service and the Forest Conservation Committee of the area.

The Act adopts collaborative management of forests through community participation. Persons who are members of forest communities may register community forest associations for the purpose of participating in forest management. The associations, with the approval of the director of the Service, may participate in conservation, management and protection of forests, formulation of forest programmes, protection of sacred groves and protected trees, help in fire fighting and keep the Service informed of all developments in relation to the forest. The forest user rights include collection of medicinal herbs, harvesting of honey, harvesting of timber or wood fuel, grass harvesting and grazing, and ecotourism and recreational activities.

Wildlife

Wildlife contributes to the Kenyan economy by being a major tourist attraction. In 2006, the earnings from tourism were estimated at Kenya Shillings 56 Billion. The legal framework on wildlife management and conservation is codified in the Wildlife (Conservation and Management) Act. Some of the challenges facing wildlife conservation in Kenya include loss of biodiversity, loss of habitat, fragmentation due to land use changes, competing land uses, inadequate compensation and incentives for wildlife conservation, absence of mechanisms for equitable benefit sharing, increased human-wildlife conflict as a result of deaths, injuries and property loss inflicted by wildlife and non involvement of communities and land owners in wildlife

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a Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) which calls on States to abolish the death penalty. The Second Optional Protocol to the ICCPR is the only treaty with universal scope that prohibits executions and which provides for the ultimate abolition of the death penalty. At the domestic level, it virtually prevents the reintroduction of death penalty in domestic law. As of July 1st, 2008, 66 countries, that is nearly a third of UN members States, had ratified the Second Optional Protocol. 62 states that have signed the ICCPR have not signed the Second Optional Protocol.

Africa

The South African Constitution Court declared death penalty to be incompatible with the prohibition of cruel, inhuman or degrading treatment or punishment under the interim constitution. 8 of the 11 judges found that death penalty violates the right to life. The judgement had the effect of abolishing death penalty for murder. In September 2005 Liberia ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, providing for the total abolition of the death penalty. With the addition of Liberia, 13 African countries have now abolished the death penalty for all crimes; 20 countries retain the death penalty but are no longer carrying out executions; and 20 countries retain and use the death penalty. There is not regional treaty in Africa calling for the abolition of death penalty. Kenya is categorised as one of the countries that retain death penalty but have not used it in the last 10 years.

European Union

The European Union has demanded the abolition of the death penalty by potential and aspiring members as a precondition for admission into the Union. Most countries in Europe have abolished the death penalty. The first regional abolitionist treaty was adopted under the aegis of the Council of Europe, with the Sixth Optional Protocol to the European Convention on Human Rights (ECHR). All member States signed and ratified the treaty, with the exception of Russia. The protocol provides for the abolition of the death penalty, but allows States to maintain it for most serious crimes. The Protocol 13 to the ECHR was adopted in May 2002 and entered into force on July 1st 2003 after ratification by 40 out of 47 Member States. It abolishes the death penalty in all circumstances and without reservations.

Americas

The Organisation of American States adopted an optional protocol to the American Convention on Human Rights in 1990. Like the Second Optional Protocol, it aims at abolishing capital punishment, with the same possibility for States "to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature". However, the Protocol has been less widely endorsed, since it has been ratified by 9 out of the 35 member States of the Organisation to date.

The imposition of the death penalty in United States is authorized by 37 states, the Federal Government, and the U.S. Military. The States which have abolished the death Penalty include 13 states and the District of Columbia. The abolitionist States are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

In 2008, the Nebraska Supreme Court ruled that the use of the electric chair as a method of execution violated the Nebraska Constitution. With no alternative method of execution provided in the law, Nebraska is without a death penalty. In 2004, the New York Supreme Court ruled that the existing death penalty procedures violated the New York Constitution. The New York legislature has made no effort to change the procedures, effectively eliminating the death penalty in the state. The United States has executed a total of 1,099 persons between 1976 and 1st April, 2008 while a total of 3,263 persons were facing death row charges as of Jan 1, 2008.

Germany

Under Hitler nearly 40,000 death sentences were handed down, mainly by the Military Tribunal. Executions were carried out by beheading, using the guillotine, hanging, or using the short-drop method. A firing squad was reserved for military offenders. Treason, aiding and abetting treason, espionage, sabotage, murder, looting, insidious publishing or rhetoric, listening to foreign radio broadcasts, refusing military service as a conscientious objector, and hiding a person wanted by the government could all be punished by death in the Third Reich.

The last executions that took place in West Germany followed the collapse of Third Reich and captured World War II war criminals. In West Berlin, which was an independently governed zone under Allied control, the last execution in West Germany was carried out by guillotine in Moabit prison in 1949. The last execution in the German Democratic Republic (East Germany) is believed to have been the shooting of Werner Teske, accused of being a double agent, in 1981. The death penalty was not abolished in the East Germany until 1987.

South Africa

Death penalty was abolished by a ruling of the Constitutional Court in 1995 which held that the penalty was a violation of the right to life of the convicts and constituted cruel, inhuman or degrading treatment or punishment. There have been calls for reintroduction of the death penalty following increased cases of murder in the country. However, the prime cause is inadequate investigation and policing and not necessarily the imposition of the death penalty. KN

Lessons on constitutionalism from Germany

Kenya should learn from the German experience that Constitution making and constitutional reform is a lengthy and drawn-out process.

By Macharia Nderitu

German Prime Minister, Ms. Angela Merkel

In May, 1949, the Basic Law was adopted by the Parliamentary Council for the Federal Republic of Germany. This was four years after the capitulation of the Third Reich at the end of the World War II.

The Basic Law laid ground for the setting up of a democratic and representative government in Germany. Due to the negative attitude by Russia and the East-West politics at the time, only three Western zones were party to the unification- the American, British and French Zones. The Basic Law as adopted provided for its extension to other parts of Germany when and if the interested regions declared their intention to adhere to principles of democracy.

All the four occupying powers, including Russia, recognised the need for as unified Germany. The Allies had in 1945 signed the Potsdam agreement which envisaged an economically united Germany to facilitate rehabilitation after the World War II. The Federal Republic of Germany was made up from the United States, United Kingdom and French Zones while the German Democratic Republic evolved from the Soviet Zone. A united Germany would ensure the equitable distribution of essential commodities, ensure a balanced economy and reduce the need for imports.

The United States and United Kingdom reached an agreement in 1946 establishing bi-zonal agencies with jurisdiction over specified economic matters and with limited administrative functions. The two zones had earlier adopted constitutions through popular referenda. Further, Economic Councils had been established with coordinating functions in the zones. The German leaders pressed for greater self determination and formation of a representative body to supervise and make policy.

Parliamentary Chamber

In June 1947, the United States and British Governors issued proclamations in their regions providing for coordinated administration in the economic zones; the establishment of an executive committee to supervise the work of the economic administration; and the formation of a council with legislative functions, consisting of representatives elected by legislatures in the various states on the basis of one representative for 750,000 of the population.

In February 1948, the administration was reformed. The Economic Council was expanded to twice the membership and a second parliamentary chamber was established representing state

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governments. Provisions were made for the establishment of a High Court to adjudicate on the legality of legislation and for a Central Bank to coordinate economic activities of the zones. All efforts to reconstruct Germany had by then concentrated on the economy.

The propaganda and socialist policies adopted by Russia in East Germany deepened the chasm between East and West. The allies met in London and drafted an agreement that laid down the principles according to which the Western Germany Government was to be formed and the procedures under which it was to be established. The agreement covered political organisation of Germany, contained an outline of constitutional detail and the territorial reorganisation of German States. The agreed mode of Government was the federal type which would protect the rights of the participating states, provide adequate central authority and contain guarantees of individual rights and freedoms.

Berlin Wall

The London Agreement created an opportunity and the basis for the convocation of the constituent assembly and subsequent elections for the legislative bodies. West Germany soon joined Nato and the European Union. East Germany remained part of the Soviet controlled Eastern Bloc and was separated from the West by the Iron Curtain, whose most prominent part was the Berlin Wall.

The Berlin Wall was built in 1961 to stop East Germans from escaping to West Germany. It became a symbol of the Cold War. In 1989, there was widespread civil unrest in East Germany partly due to the collapse of the Soviet as democratisation of countries previously under Soviet control, for example Hungary. In 1990, Germany was reunited. After reunification, the Basic Law remained in force having proved a stable foundation for the thriving democracy in West Germany. Some changes were made to the Basic Law regard the reunification. Other modifications were made in 1994, 2002 and most recently in 2006.

Basic Law was intended to reject the Nazi ideology that the German people were a master race and establish an unequivocal commitment to the inviolability and inalienability of human rights. The participants during the drafting process were nominated by the States. After the draft was completed, it was ratified by parliaments in each state, with the exception of Bavaria. The promulgation of the Basic Law in May 1949 led to the establishment of the Federal Republic of Germany.

Unlike the Weimar Constitution, basic rights were included as a fundamental part of the Basic Law. The State has a mandate to respect human dignity and all state power is bound to guarantee the Basic Rights. Article 1 of the Basic Law provides that human dignity shall be inviolable and that human rights are directly applicable law. The General Principles of the State guarantee democracy, republicanism, social responsibility, federalism and right to resistance remain under the guarantee of perpetuity and cannot be altered through the amendment process. The right of the State to suspend the basic rights was abolished. In the previous constitution, the basic rights were listed as declaratory principles with limited enforceability.

Collective responsibility

The Basic Law strengthened the powers of the Lander (State Governments). During the Third Reich, the powers of the States were delimited and later abolished and thus Germany was transformed into a unitary dictatorship. The decisions of the Government must be ratified by Parliament, which consists of the Lower House and the Upper House. If Parliament intended to pass a vote of no confidence, a new Chancellor must be elected. This was intended to provide more stability than under the Weimar Constitution, whereby extremists would remove the Chancellor without agreeing on the replacement, thereby creating a leadership vacuum.

All votes of confidence against the Government must be directed against the entire Cabinet and not a single Minister. This was intended to promote collective responsibility in Government since ministerial actions are assumed to be as a result of Cabinet approvals.

The Basic Law separated governmental powers among the executive, legislature and judiciary. Germany is a parliamentary democracy. The States were represented in the

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Upper House of Parliament while Members of the Lower Chamber are elected directly through a mixture of proportional representation and direct elections. The Chancellor is usually the head of the largest political grouping in the lower House while the head of State is a non partisan and largely ceremonial president. The President is subordinated to Parliament and the Cabinet. The President cannot dissolve the House or name a new Chancellor without a prior majority vote in Parliament. The Federal Constitutional Court oversees the constitutionality of laws.

The Federal Constitutional Court is an independent constitutional organ and is part of the judiciary. Its judgements have the status of the ordinary law. It can declare statutes void where they conflict with the Basic Law. The constitutionality of laws can be determined through individual complaints to the Court, referral by the courts, referral by a State or through a resolution by a third of the members of the lower House. Some aspects of the Basic Law such as the basic rights, the separation of powers and elements of the federalist state cannot be amended. In 1933, an Enabling Law was passed which permitted the Executive to promulgate laws. This led to the collapse of the Weimar Republic and the dictatorship of the Third Reich. Further, the Weimer Constitution was amended to curtail and limit review of executive and legislative decisions by the judiciary.

Political parties are recognised in the Basic Law as important players in politics. Parties must adhere to the democratic foundations of the German State and if they are in violation, they may be abolished by the Constitutional Court. Previous, parties were not controlled by law. The Basic Law allows referenda only on decisions relating to changing borders of States. The denial of referenda on other constitutional matters is intended to avoid populism and constitutional manipulation.

The German Parliament (Bundestag) in session

Amendments to the Basic Law

Since 1949, some of the changes that have been effected are reintroduction of conscription, modification of the formula for sharing taxes between the Federal Government and the States and minor changes during reunification in 1990. The changes included the recognition of five more states that were part of East Germany. These States were admitted into the Federation to complete the reunification process.

The citizens of East Germany were eager for their countries to merge with the West Germany where some of them had relatives. The Basic Law was deemed to have promoted harmony and democracy in West Germany. Only minor amendments were effected and the Basic Law was adopted to apply to the reunited Germany. Some of the challenges that were faced included provision of massive investments to the East German side to promote growth and provision of welfare, employment creation opportunities and similar support.

In 1992, the Membership of the European Union was institutionalised and in 1994 and 2002, environmental protection and animal protection were included as policy objectives of the State. In 2006, the Chancellor pushed major reforms. The upper House had been viewed as an impediment to reform as it could veto up to 60% of the Bills thus slowing down or blocking key proposals.

The amendment was intended to limit the number of laws that the upper House could veto to 25 per cent and establish a clear power separation between the States and the Federal Government. The reform measures were intended to remove the restrictions the Federal Government faced in pushing for

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conservation and management.

The Act predates EMCA and the Convention on Biodiversity, having been enacted in 1976. The Act created the Game Department which was charged with the duty of wildlife conservation inhabiting state land, trust land and private land. It was the responsibility of the Department to ensure that the wildlife gave the highest possible returns to individuals and the nation.

In 1990, through an amendment to the Act in 1989, the Kenya Wildlife Service was formed to replace the Department. The Service was intended to contribute to the welfare of the local communities and was charged with the task of managing 26 national parks and 30 national reserves. The Service implements a scheme of revenue sharing of park entrance fees with the local communities.

The coming into force of international treaties, like the Convention on Biodiversity and the inability of the government to integrate and harmonise land use policies and legislation has led to calls for revision of the Act. The Convention calls for conservation, not preservation, sustainable use and fair and equitable sharing of benefits emanating from biological resources.

The Service has created the community wildlife service department to minimise human wildlife conflicts through protection of human life and property from wildlife depredation, to discourage encroachment of wildlife protected areas and to encourage communities to assist in wildlife conservation and management.

To seal the gaps in the Act and infuse modern wildlife management strategies, the Government has initiated the process of revision the Wildlife (Conservation and Management) Act.

Water

The Government has been undertaking reforms in the water sector with support of the World Bank. The reforms aim at ensuring sustainable utilisation of water resources and private sector participation in water provision. The reforms were necessitated by chronic water shortages which were blamed on ineffective management of water resources. The reforms aim to transform the institutions involved in water governance into participatory and accountable to ensure public interest is taken on board. Water is a finite environmental resource that is prone to overuse.

Water is not evenly distributed on the earth's surface. Fresh water constitutes only five per cent of the total volume of water on earth. Kenya enacted the Water Act, 2002 to replace the previous policy regime on water management. The Act forms the Water Resources Management Authority with the mandate of developing policies, guidelines and procedures for water resource allocation, monitor and assess the national water resource management strategy, receive and determine applications for permits for water use, and regulate and protect water resource quality from adverse impacts.

The Water Services Regulatory Board issues licences for provision of water services, determines water provision standards, develops guidelines for fixing tariffs for provision of water services and promote water conservation and demand management.

Other bodies created under the Act are the Water Service Boards, Water Service Providers, Catchment Area Advisory Committees., Water Users Associations, Water Services Trust, Water Appeal Board and the National Water Conservation and Pipeline Corporation. The water and sanitation services are provided by Water Service Boards which will be licensed by the Water Services regulatory Board to provide the services.

The Water Act was not aligned to the ECMA and therefore the principles of participatory environmental conservation and sustainability were not properly integrated into the Act.

International best practices and sustainable development on environmental conservation

The international community established the Global Environmental Facility to

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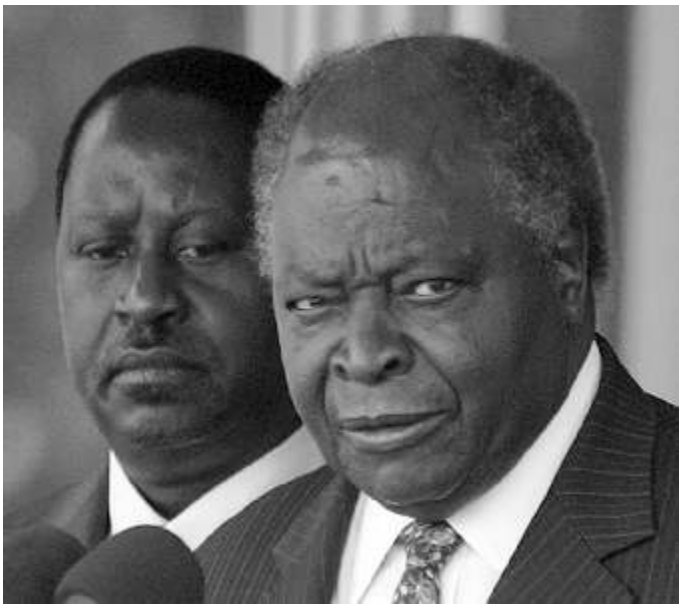
Is constitutional review the panacea?

Fwamba NC Fwamba

The constitutional review process has been a song sang since the early 1990s by majority of Kenyans under the leadership of a number of civil society organizations like the National Constitutional Executive Council. Activities of such organizations helped us attain an awareness level to most of Kenyans on the importance of reforms through constitutional review.

However, it is unfortunate that it's almost two decades since the introduction of multipartyism whose campaign was spearheaded by a number of the current people in government. The constitutional review process has instead become a serious impediment to any reforms in this country because Kenyans have been made to believe that real change can only come through a constitutional review.

This has also given opportunity to those who are anti reforms to have a clear picture of what would stand on their way in maintain the status quo. Therefore, the anti-reform forces who are beneficiaries of corruption which includes irregular land allocations to use all their energies and positions of power to ensure there are no reforms that might interfere with their comfort. It's also notable that most of those who agitated for change while in opposition changed their language immediately they got opportunities to serve in government.



The two principal players in Kenyan politics today. Are they really serious about reviewing the Constitution?

It is also a known fact that a number of non-governmental organizations exist on the sole reason of pursuing constitutional changes in the country and the general feeling is that they will be rendered insignificant once we have a new Constitution. Given these circumstances, Kenyans need to redefine a new way of implementing reforms or rather having a new constitution without involving the usual stakeholders who have been squabbling over the way to the reforms.

If we still believe that reforms can only be achieved through constitutional review then we need to have different players other than politicians or those with vested interests.

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It has been a daunting task for Kenyans who even went on to believe that by voting in pro reform leaders into parliament, it was going to be easier to have a people driven constitution which was eventually a proven futility citing examples of Prof Kivutha Kibwana's days in parliament and the current presence of the likes of Mutava Musyimi and others.

It's therefore evident that all Kenyans in positions of leadership are obstacles to constitutional change in Kenya. This is the same cause of our inability to attain this long fought potential historic achievement in 2005 when we went to the referendum because of tension and vested interest s by leaders from different sectors of political and civil society leadership. In the same vain was the national accord that was signed by the President and the Prime Minister in order to halt clashes that resulted fro a disputed presidential election. For the same reasons of the process driven by a political class, the Serena talks went into disarray immediately the agenda on power sharing was cleared. Agenda four which had a lot to do with the reforms is now being treated as a minor issue by the same political class that agreed on power sharing. It's for this reason that I believe that our political class will never address issues on agenda four.

Too hot to handle: Former constitutional affairs minister Ms Martha Karua

This is the reason as to why some people have decided to agitate for piecemeal reforms which have still been rendered useless because of legal arguments based on current constitutional references. It is therefore imperative that we have a radical approach on the process or else we will never have a new constitution in this country and that means we will never be able to address reforms in this country whose implementation is based on constitutional interpretation. When NARC government took reigns of power from Moi, Kenyans were very optimistic and Kibaki who those days seemed to still care about his reputation as the hope for change, created a number of commissions which included the Ndung'u commission on land that produced the report which can now only be termed as having been a public relations exercise.

It has since been a nightmare to implement because there is no mandatory constitutional obligation for its implementation. So it can authoritatively be argued that in a way the constitutional review process has in itself been an obstacle to reforms in this country. The same forces that have been ensuring that we don't get a new constitution are still very influential in the country.

Finally, if we divorced the Constitution from the political class, it may be easier for us to achieve change or alternatively, Kenyans have a duty to think of another way of achieving change other than the constitution. It is mind boggling conscientiousness to every progressive force in this country. Changing the process or the method is the only right direction we must take to achieve change. KN

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reforms through the upper House and increase the legislative competences of the States. The reforms were approved by Parliament and implemented.

The Basic Law placed German citizens at the core of the Constitution. The Basic Rights of the citizens are inviolable and the Government is obliged to respect, promote and protect the rights. Persons whose rights are infringed have inhibited access to the courts to have their rights enforced and protected. This is an improvement from the Weimer Constitution which listed the Basic Rights of the citizens as declaratory principles and not legally enforceable rights.

The Basic Law creates limits on the articles that can be amended. For example, the provisions relating to the Basic Rights and Federalism are not subject to review even by Parliament. This is intended to protect the state from possible disintegration.

During the Third Reich, there were uncontrolled amendments to the Constitution which facilitated the setting up of the dictatorship. By establishing the Upper House of Parliament, the Basic Law ensured that most states consented to the amendments being proposed to the Basic Law. Further, some responsibilities of the Federation are vested in the States. The re-establishment and strengthening of the federal system is intended to prevent the evolution of a centralised dictatorship. Germany was formed out of previously separate states in 1871. The federal state is widely accepted by the public and is understood as a means of separating powers. Germany is divided into 16 states.

Safeguards against a repeat of the rise of the Fuhrer (dictatorship)

Germany abolished the death penalty which was misused during the Third Reich. It is estimated that over 40, 000 Germans were executed under the regime under the pretext of imposition of death penalty. The atrocities committed during the Third Reich influenced the inclusion of the Basic Rights in the Basic Law with clear means of enforcement. The powers of States in the Federation are a clear check on the rise of a dictatorship.

The requirement that the Upper House must approve all legislative measures means that any reforms intended to promote a dictatorship must have wide approval. This is unlikely to happen with the disillusionment of States with the Third Reich.

The entry of Germany into the European Union with its stringent requirements for respect for human rights further acts as a check on any regime that may intend to create a dictatorship. The comprehensive Bill of Rights in the Basic Law grants the right of redress to the public through judicial intervention. The Constitutional Court has the power to declare a law passed by Parliament to be in contravention of the Basic Law.

Lessons for Kenya

Kenya should learn from the German experience that constitution making and constitutional reform is a lengthy and drawn-out process. For example, the reforms carried out in Germany in 2006 were initiated in and debated from 1998. However, there was no adequate political will in the two Houses of Parliament to implement the reforms.

The process requires compromise and placing the interest of the nation above partisan interests. Partisan interests in Kenya are largely to blame for the stalling of the reform process. The constitutional negotiations are give and take processes. Indeed, when political interests were put aside, for example during the 1997 Inter Party Parliamentary Group negotiations, many compromises on the necessary reforms can be agreed.

The need for change must be understood and accepted by the public and the politicians. The public must be sensitised on the reform process so that they are involved through out the process. In Kenya, the public was nominally provided with civic education a short period prior to the referendum. Many of the voters were unaware of the contents of the constitutional document which was the subject of the referenda. The important decision makers in the reform effort must be able to benefit from the new situation. Reforms must be a win-win situation for the politicians and the public. Constitutional reforms can be achieved incrementally and not necessarily through a complete rewrite of the Constitution. KN

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provide grants to developing countries for projects that benefit the global environment and promote sustainable livelihoods in local communities. The projects supported are intended to address climate change, biodiversity, international waters, land degradation, ozone layer and persistent organic pollutants.

The Facility has a secretariat headed by a Chief Executive Officer and a Chairman. The Facility is intended to support the developing countries to meet their obligations under international treaties on the environment, including the Convention on Biological Diversity named the United Nations Framework Convention on Climate Change.

Convention on Biological Diversity

The convention recognized that the conservation of biological diversity is a common concern of humankind and is an integral part of the development process. The agreement covers all ecosystems, species, and genetic resources. It links traditional conservation efforts to the economic goal of using biological resources sustainably. It sets principles for the fair and equitable sharing of the benefits arising from the use of genetic resources.

The convention reminds decision makers that natural resources are not infinite and sets out a philosophy of sustainable use. It recognises that ecosystems, species and genes must be used for the benefit of humans.

The convention also offers decision makers guidance based on the precautionary principle that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat. The Convention acknowledges that substantial investments are required to conserve biological diversity. It argues that conservation will bring us significant environmental, economic and social benefits in return.

Some of the issues dealt with under the convention include measures and incentives for the conservation and sustainable use of biological diversity; regulated access to genetic resources and traditional knowledge, including Prior Informed Consent of the party providing resources; sharing, in a fair and equitable way, the results of research and development and the benefits arising from the commercial and other utilization of genetic resources; access to and transfer of technology, including biotechnology; technical and scientific cooperation; education and public awareness and national reporting on efforts to implement treaty commitments.

Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC)

The objective of the Protocol is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The Inter-Governmental Panel on Climate Change has predicted an average global rise in temperature of 1.4°C to 5.8°C between 1990 and 2100. The Protocol is the first step required to meet the UNFCCC obligations. The treaty was negotiated in Kyoto, Japan in December 1997, opened for signature on 16 March 1998, and closed on 15 March 1999. The agreement came into force on 16 February 2005 following ratification by Russia on 18 November 2004. As of May 2008, 181 countries had ratified the agreement.

Although on a per capita basis, US power-sector emissions are still nearly four times those of China. The world's top-ten power sector emitters in absolute terms are China, the United States, India, Russia, Germany, Japan, the United Kingdom, Australia, South Africa, and South Korea.

The United States has not ratified the Kyoto protocol and is therefore not bound to implement its provisions. Similarly, China which is a rapidly industrialising country has opposed the protocol as having the potential to hamper its industrial growth.

Fifteen members of the European Union have deposited the relevant ratification paperwork at the UN. The EU produces around 22 per cent of global greenhouse gas emissions, and has agreed to a cut, on average, by 8 per cent from 1990 emission levels. The implementation of the Protocol has been stifled by the lack of international consensus on the necessity and priority of implementing its provisions in full. KN

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