

# KatibaNews

Towards a new constitutional dispensation in Kenya

JUNE 2009

Issue NO. 6.09

## Fact or fiction

### GENDER VIOLENCE AGAINST MEN?

- \* Divide and rule
- \* Interview with Muthoni Wanyeki
- \* Katiba briefs
- \* Getting it right

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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.

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- 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.

JUNE 2009

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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Managing Editor  
Stephen Ndegwa

Associate Editors  
Susan Kasera  
Patrick Mwangi  
Henry Owuor

Office Assistant  
Monica Muthoni

Photography  
Carnelian Pictures

Art Direction & Design  
Khafre Graphics

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**All Correspondence to:**

The Editor  
Katiba News  
P.O. Box 64254-00620  
Tel. 2712309  
Nairobi, Kenya  
Email: mediakenya@yahoo.co.uk



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# Fact or fiction

## GENDER VIOLENCE AGAINST MEN?

Recent months have brought to the fore issues that most men would rather sweep under the carpet. That some men were actually suffering domestic violence from their spouses is something that would pass for comedy, was it not stranger than fiction. We take a look and analyse the factuality of this claim or whether somebody is just buying cheap publicity.

By Kwamboka Mogaka



Mr. Nderitu Njoka (centre), Chairman, Maendeleo ya Wanaume with other members.

**V**iolence against women occurs in all countries and transcends social, economic, religious and cultural inclinations. A survey in 36 developing countries established that 10-50% of women in the reproductive age (15 – 49 years) had been physically assaulted by an intimate partner. According to the 2003 Kenya Demographic and Health Survey, 49% of women reported having experienced violence since the age of 15. One in four married women reported emotional violence, 40% reported physical violence while 16% reported sexual violence by their intimate partners. Prevalence, perception and tolerance levels of gender based violence vary along

ethnic and cultural groups. Gender violence in Kenya has been marked by violence of men against women. Victims of gender based violence have limited access to help and care. The police are seen as enablers of violent behaviour and are riddled with corruption. The public is ill educated on sexual violence and on the law, especially the Sexual Offences Act, 2006. The communities must be aware of the law to enable them to adequately assert the rights. High poverty levels have forced victims to tolerate abusive relationship due to lack of alternative sources of income.

A research conducted in Kibera Slums in Kenya revealed that the relationship type between the victim and the abuser helped explain the level of violence. Where the woman was living in a vague relationship with a man, there was more likelihood of physical and sexual violence. The public awareness

programmes should assist the public to understand that violence is not acceptable, is not part of a normal relationship and that it is criminal.

In situations of conflict, like the post election violence in Kenya in December, 2007 to March, 2008, women and men respond differently. Men are the main perpetrators of armed violence and women are particularly vulnerable in spaces where arms and violence are used to intimidate, control, hurt and kill. Peace building initiatives should seek the voice of women in ensuring sustainability of the programmes implemented and long term. Intimate partner violence is a common form of gender violence which is hidden and subject to social and cultural norms of the society. Some women often perceive violence against women as acceptable and justifiable. These views are often rooted in the traditional gendered roles of men and women.

### Emerging dimensions

Gender based violence is deemed a domestic affair that does not warrant Government intervention. However, due to the advocacy efforts of civil society, the public is aware of their rights and the negative nature of gender based violence. Though the civil society organisations have been dominated by organisations advocating for rights of women, a

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new organisation named Maendeleo ya Wanaume has been launched to champion the rights of men and the male child. Some of the underlying causes for discrimination against women have been identified as:

- a. Poor participation by women in politics and public life. Appointments to public office reflect representation of women at the middle and lower levels and low numbers in the higher levels. The Government should implement measures of affirmative action aimed at increasing women participation in politics and public life. In 2007, the Government promised to reflect 30% representation of women in all public offices. However, this threshold has not been achieved.
- b. There are inadequate laws to address gender based violence. The enactment of the Sexual Offences Act has not been matched with adequate training and dissemination of the Act to law enforcement officers and judicial officers and prosecutors. The Government has a duty to ensure the citizens are aware of any new laws. Poor investigation results in acquittal of offenders. The Act does not address female genital mutilation for persons over 18 years and domestic violence.
- c. Inequality of ownership of matrimonial property. The Government is yet to enact an appropriate Bill to determine the administration and sharing of matrimonial property. Disputes on matrimonial property are determined based on case law that is contradictory.
- d. Lack of national legal aid scheme. The government has not set up a national legal aid scheme. Due to the complexity of accessing the judicial system, it is important that the Government sets up the legal aid scheme to assist indigent

litigants to access justice in courts of law.

- e. Inadequate machinery to address gender issues. The National Commission for Gender was established by statute in 2006. The Commission has not been allocated sufficient resources to carry out its work. The Government appointed a Secretary for Gender in the Ministry of Gender, Culture and Social Services.

Review of the Research Report by Maendeleo ya Wanaume

The Maendeleo Ya Wanaume Organisation published a report in May, 2009 stating that over 1.5 million men in Kenya are battered by their wives. The report was met with disbelief. Men are physically stronger than women. However, due to the changing social circumstances in Kenya, the report stated that many men get abused and in some cases battered by their wives when the woman is older, financially stable than the man and where the husband is jobless and the wife is the sole breadwinner.

The Maendeleo ya Wanaume organisation said even men find it difficult to report domestic violence by their wives to authorities for fear of social ridicule. Police generally are averse to investigating cases of domestic violence whether perpetrated by men or women. The findings show the campaign for the rights of the women has led to a reverse of the scenario where men are at the centre of violence. The group carried out a survey in 40 selected districts in Kenya's provinces from August 2008 and has found out that between 1 and 1.5 million men are domestically abused by women daily.

The report was not sufficiently detailed to explain the reasons why there is sudden surge in the violence. The research methodology adopted by the Organisation was not explained. The findings of the report were not circulated to the public.

Lasting solutions to gender violence

Law Reform: Family Protection Bill, Marriage Bill and Sexual Offences Act

Civil society organisations that advocate against gender violence have recommended law reform measures through the enactment of the Family Protection Bill and revision of the marriage laws. Most Kenyans undergo customary marriage which is vague and does not offer adequate legal protection for women. The Marriage Bill will create a framework for registration and recognition of customary marriages. The Government has largely been an unwilling partner in combating gender violence.

The Marriage Bill, 2007

The Marriage Bill, 2007 seeks to consolidate laws relating to marriage and provide a mechanism for registration of customary marriages. At present, the marriage laws are the Marriage Act, the African Christian Marriage Act, the Hindu Marriage Act and the Mohammedan Marriage Act. The provisions on separation and divorce are set out in the Matrimonial Causes Act. All these Acts will be consolidated into the new Marriage Act. The nature of the relationship between a man and a woman in a marriage has been found to determine the levels of domestic violence in a relationship. The registration of a marriage provides security to the spouses and enables them to stake a claim in the marriage. The Bill provides that the couple must demonstrate to the court that efforts to conciliate them have failed.

Marriage is defined in the Bill as the voluntary union of a man and a woman intended to last for their life time. Monogamous and potentially polygamous marriages are recognised in and are eligible for registration under the Bill. The Bill provides that where it is proved that a man and woman having capacity to marry have lived

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together openly for at least two years in such circumstances as to have acquired the reputation of being husband and wife, there shall be a credible presumption that they were duly married. A marriage shall be contracted in the presence of at least two witnesses. No person shall be competent to act as a witness to a marriage who is below the age of eighteen years, or who is unable to understand the nature or purport of the ceremony by reason of mental illness or intoxication, or who is unable to understand, whether through an interpreter or otherwise, the language in which the ceremony is held.

There shall be two witnesses to the marriage excluding the presiding officer- that is a Kadhi, minister of religion or Hindu priest. The parties to the marriage and their witnesses shall sign a certificate in the prescribed form. A 21 day notice shall be issued in relation to an intended marriage. Either spouse shall have the responsibility of maintaining the other spouse and to pledge credit of the other spouse for necessities. Spouses shall have the right to enter into an agreement to live apart. The customs and traditions of a community shall not be applied to restrict the choice of residence of a widow or to prevent her from marrying a person of her choice. An agreement to pay dowry shall not be enforceable as a breach of contract. Cases of divorce and separation shall be heard in the Kadhi's court for marriages under Mohammedan law and the Resident Magistrates Court in all other cases. At present, divorces for marriages under the Marriage Act are heard in the High Court.

A court before which a petition for divorce is presented may require the party presenting the petition to establish that efforts have been made to reconcile the parties before religious leaders, counsellors, or other person or conciliatory body and that such effort have failed to reconcile the parties. A court, when or after granting a decree of annulment, divorce or separation, may order a division between the parties of any assets acquired by them during the marriage by their joint

efforts, or may order the sale of any of those assets and a division between the parties of the proceeds of the sale.

The court may order a person to pay maintenance to his or her spouse or former spouse. The amount of any maintenance ordered by the court to be paid by one spouse to the other shall ordinarily be assessed according to the needs of the parties. The court shall consider the degree of responsibility apportioned to either party for the breakdown of the marriage; the customs of the community to which the parties belong; and the capacity and ability of either party to earn a living.

#### Family Protection Bill, 2007

The civil society has designed a legislative framework to curb the prevalent domestic violence in Kenya. These efforts culminated in the Family Protection Bill, 2007. The Bill defines economic abuse to include the unreasonable deprivation of economic or financial resources to which an applicant is entitled under the law or which the applicant requires out of necessity, including household necessities, medical expenses, school fees, rent, mortgage expenses or other like expenses and denying the applicant the right to seek employment or engage in any income generating activity.

The Bill defines emotional, verbal and psychological abuse as a pattern of degrading or humiliating conduct towards an applicant, including repeated insults, ridicule or name calling; or repeated threats to cause emotional pain; or repeated exhibition of obsessive possessiveness which is such as to constitute a serious invasion of the applicant's privacy, liberty, or security.

Clause 3 of the Bill defines domestic violence as violence against a



person, or threat of violence or of imminent danger to a person by any other person with whom that person is in a domestic relationship. A person shall be deemed to be in a domestic relationship with another person if the person is married to that other person; has previously been married to that other person; is living in the same household with that person; has been in a marriage with the other person which has been dissolved or declared null; is a family member of that other person; is or has been engaged to get married to that person; or has a child with that other person or has a close personal relationship with the other person.

In determining whether a person has a close personal relationship with another person, the court shall have regard to the nature and intensity of the relationship (not necessarily a sexual relationship), and in particular the amount of time the persons spend together; the place or places where and in what manner that time is ordinarily spent; and the duration of the relationship.

The objectives of the Bill are to recognize that domestic violence, in all its forms, is unacceptable behaviour; and to ensure that, where domestic violence occurs, there is effective legal protection for its victims by empowering the courts to make orders to protect victims, ensuring that access to the courts is speedy, inexpensive and simple, and requiring respondents to attend programmes that have the primary objective of stopping

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# Divide and rule

## The boundary review process

*Kenyan politicians have perfected the art of musical chairs in order to gain political mileage. One strategy of keeping people on their feet is through meddling with all manner of boundaries, starting with constituencies to, lately, provinces! Our writer looks at the rationale the government uses to shift boundaries and the gerrymandering involved.*

By Macharia Nderitu

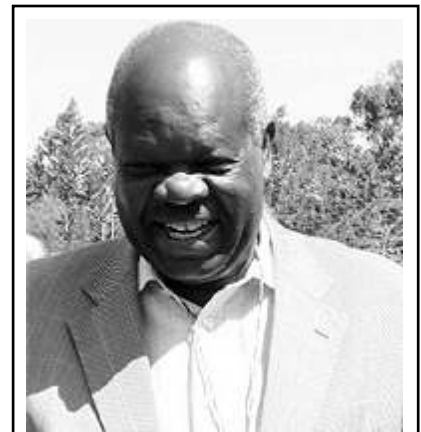
**P**olitical districts or constituencies should encompass equal number of voters. The phrase - 'one person, one vote' - denotes the essence of a democratic system. The electoral units should be delimited in a manner that achieves the objective of according equal weight to each vote to the largest extent possible to ensure effective representation. The redrawing of the constituency boundaries was a contentious issue that fostered the post election violence in Kenya.

The exercise was last carried out in 1997. In the 2007 General Election, the Party of National Unity won about 45 parliamentary seats while the Orange Democratic Movement won 99 Parliamentary seats. However, the candidate for the Party of National Unity was declared the winner of the presidency. The inequitable delimitation of constituencies and the first-past-the-post electoral system were at the centre of the electoral dispute and precipitated the consequent post election

violence in which more than 1133 persons were killed and over 600,000 were displaced.

Different sets of electoral boundaries can produce different electoral outcomes, even where underlying voting patterns are identical. The key principles applicable to boundary delimitation are:

1. Impartial, independent, professional and non partisan boundary delimitation authority. Many countries have established independent boundary authorities or rely on non partisan electoral commissions to carry out delimitation. The Commissions must be politically neutral. The final report of the Commission is usually subject to executive or legislative approval. Some countries have abolished the powers of the legislature to dictate boundary delimitation, for example New Zealand, Australia and India, where the boundaries delimited by the Commission are final.
2. Equality of voting strength. Constituency populations



*Hon Andrew Ligale, Chair,  
Interim Independent  
Boundaries Review Commission*

and the ratio of representatives to voters should be as equal as possible to ensure that votes carry the same weight. Article 21 of Universal Declaration of Human Rights states that the will of the people shall be the basis of the authority of government. The will shall be expressed in periodic and genuine elections defined by universal and equal suffrage and held by secret vote or other free voting procedures. All votes should be granted a vote of equal weight in the election of representatives.

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The numbers used in calculating the equality may include total resident population or the number of registered voters. A boundary authority may make a conscious decision to draw constituencies that vary dramatically in population or avoid to redrawing the boundaries at the stipulated periods. Boundary delimitation should be carried out at established intervals.

3. Equal representation. The boundary authority should be obliged to take into account criteria relevant to representation such as administrative boundaries, geographical features, and other factors related to communities of interest. If electoral districts unite cohesive communities of voters who share common interests, they are easier to represent. Community of interest can be defined by administrative divisions, ethnic or racial neighbourhoods, or natural communities such as islands delineated by physical boundaries. It may be difficult for one candidate to represent the entire constituency with different communities of interest.
4. Non discrimination to safeguard minorities. Constituencies should not be drawn in a manner which discriminates against disadvantaged minorities. Electoral boundaries configurations can be discriminatory by fragmenting geographically concentrated minority groups across constituencies to dilute or discount their votes. Only minorities that are sufficiently large and

geographically compact can be affected by placement of boundaries. Special provisions beyond prohibition against fragmenting minority groups that are not sufficiently large and geographically compact to benefit from remaining united within a single constituency.

5. Transparency. The boundaries should be delimited in a transparent manner and the procedure should be accessible to the public through a consultation process. The criteria for delimitation should be made public. The public should be availed an opportunity to submit comments and concerns on boundaries. An explanation should be given concerning the final assignment of boundaries where objections are put forward. The public consultations are important as delimitation is a technical process. Transparency in the delimitation process promotes public confidence in the outcome and offers credibility and legitimacy.

Recommendations of IREC on boundary review

The Independent Review Committee recommended the redrawing of constituency boundaries due to the disparities in the voter numbers in different constituencies. According to IREC, serious anomalies in the delimitation of constituencies impaired the legitimacy of the electoral process even before polling started. The Interim Boundary Commission must be availed the necessary legal, administrative and financial tools necessary to carry out the delimitation process devoid of

partisanship.

Overlaps in the review process: Administrative versus Constituency boundaries

The Government has increased the number of districts. In boundary delimitation, the Interim Boundary Commission is required to consider administrative boundaries when redrawing constituency boundaries. The total number of districts is about 200. These districts have been established through Presidential Directives and are yet to be approved by the National Assembly as required under the Districts Act. There have been suggestions in the past that each constituency should be converted into a district. In the past, the implementation of the national budget has been carried out at the district level. With the establishment of the Constituency Development Fund, a new centre of expenditure was established. The conversion of each constituency to a district would therefore merge the two centres of public expenditure.

The challenge for the government is to ensure the appropriate infrastructure is set up for operationalising the districts, including building of offices for government officers, posting the required officers and setting up related services such as hospitals, police stations and courts. The supervision of the Constituency Development Fund and other devolved funds by public servants would assist in improving the governance structures for the funds which are currently controlled by MPs and their cronies. Since the new



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districts reflect a community of interest, the Interim Commission will have to consider the newly established district boundaries while setting up the new constituency boundaries.

#### Role of the Interim Independent Boundaries Review Commission

In 2008, the Constitution of Kenya was amended by Parliament to create the Interim Independent Boundaries Review Commission, which shall consist of a chairman and not more than eight other members. The Interim Boundaries Commission has already been constituted and members appointed. The Commission is chaired by Hon Andrew Ligale, who is a former MP. The chairman and other members of the Commission were nominated through a competitive process by the Parliamentary Select Committee on Constitution Review. Upon approval by the National Assembly, the members were appointed by the President in consultation with the Prime Minister. The members of the Commission reflect political plurality and were appointed in a consultative process involving approval by the National Assembly.

The qualifications for appointment to the Interim Boundaries Commission are that the member should be a citizen of Kenya; should hold a degree from a University recognized in Kenya; should be a person of high moral character and integrity; and has knowledge and proven experience in public administration and management of public affairs. Members of the National Assembly; local authority; the

executive body of a political party; or persons holding any office in the public service or in the armed forces are not qualified for appointment to the Commission.

The office of a member of the Commission shall become vacant if circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified for appointment. A member of the Commission may be removed from office only for inability to exercise the functions of his office or for misbehaviour or if the National Assembly resolves that such member be removed from office by a resolution supported by a majority of all its members (excluding the ex-officio members).

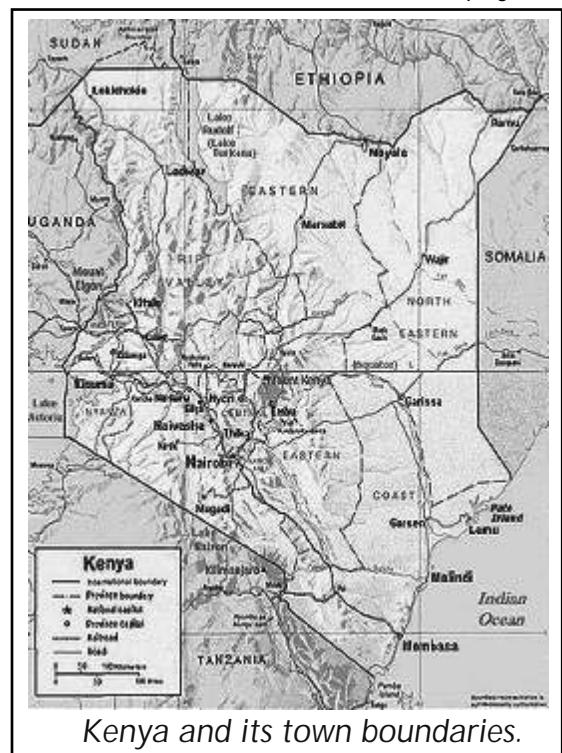
The Commission shall not be subject to the direction or control of any other person or authority. Parliament may provide for the orderly and effective conduct of the operations and business of the Commission and for the powers of the Commission to appoint staff and establish committees and regulate their procedure. The Commission may act notwithstanding a vacancy in its membership or the absence of a member, and its proceedings shall not be invalidated by the presence or participation of a person not entitled to be present or to participate in those proceedings. Any decision of the Commission shall require the

concurrence of a majority of all its members. The Commission shall stand dissolved twenty four months after the commencement of this section or three months after the promulgation of a new Constitution, whichever is the earlier.

Functions of the Interim Independent Boundaries Review Commission include:

- a. To make recommendations to Parliament on the delimitation of constituencies and local authority electoral units and the optimal number of constituencies on the basis of equality of votes taking into account the density of population and the need to ensure adequate representation of urban and sparsely populated rural areas; population trends; means of communication; and community interest;

- b. To make
- continued page 12*



*Kenya and its town boundaries.*

or preventing domestic violence. A person who is in a domestic relationship with another person may apply to the court for a protection order in respect of that other person. An interim protection order may be made on an application without notice and outside ordinary court hours or on a day which is not an ordinary court day, if the court is satisfied that delay would be caused by proceedings on notice or might entail a risk of harm; or undue hardship to the applicant or a child of the applicant's family.

A police officer may arrest the respondent without warrant, on the request of the applicant or applicant's representative, at any time within five years after the day of issue of a protection order, or such extended period as the court may order, if the respondent breaches any term or condition of the order. A protection order shall remain in force for such period, not exceeding five years, as may be specified by the court. There shall be a desk at every police station which shall be managed by at least one police officer with relevant training and expertise in dealing with domestic violence or family-related matters.

#### Sexual Offences Act, 2006

In 2006, Parliament enacted the Sexual Offences Act which was sponsored as a private Members Bill. The Bill had initially raised controversy with MPs failing to fully support the Bill. After effective lobbying by the sponsoring MPs with the support of civil society, the Bill was eventually passed. However, some parts of the Act have not been operationalised due to lack of technical support and the necessary equipment. For example, the lack of a well equipped forensic laboratory has affected the investigation capacity of the police.

Sexual Offences Bill provides protection from harmful and violent sexual acts through expansion of existing definition of crimes and creation of new offences. The Attorney General published a Reference Manual for use by the police, prosecutors and medical practitioners. Section 38 provides

that making false allegations in regard to offences in the Act is an offence. The investigators and prosecutors who handle sexual offences are not adequately trained and sensitised. Some sections of the Act have not been operationalised. The Attorney General has appointed a Task Force to develop a National Framework for Implementation. Some sections are yet to be operational as the requisite rules are yet to be made by the designated officers.

Section 39 places the onus of keeping a register and data bank of convicted sexual offenders on the Registrar of the High Court. The Minister is empowered to promulgate rules to facilitate the setting up of the registry and data bank. The rules have not been made. The Attorney General should establish a Gender Unit under the Department of Public Prosecutions to monitor cases prosecuted under the Act. Gender focal points manned by specialised police officers should be established in all police stations.

The police force should undergo gender mainstreaming including through promotion of female officers to senior positions in the force. The provincial administration should take lead in sensitising the public about gender based violence. Women rights groups should be trained on human rights standards. Simplification of court procedures and human rights awareness among the public would assist in demystifying the court process in Kenya and ensure enhanced delivery of justice.

#### Engendering Police reforms

The police are an essential department in tackling gender violence since they have the statutory duty to investigate all crimes and possess delegated prosecutorial powers. The attitudes of police officers have served to discourage abused men and women from reporting cases of domestic violence to facilitate investigation, arrest and prosecution of the perpetrators. Where reports have been made, the police have ridiculed the victims or failed to collect and preserve

evidence as appropriate. The police treat gender based violence as acts that should be settled within the domestic set up without involvement of the police and the courts.

The police officers should therefore be sensitised on gender based violence. Programmes aimed at mainstreaming gender in the police force should be implemented, including recruiting sufficient numbers of female officers into the force and setting up gender desks in police stations. This should be supported by training on human rights for the police officers.

#### Relevance of international human rights standards on gender

States are required under international law to promote and protect human rights of persons living in their territories. The obligation to ensure and protect the rights of individuals is vested in the State. The Convention of Elimination of All Forms of Discrimination against Women forbids discrimination against women and prohibits negative cultural practices. Kenya is a state party to the Convention. Most of the provisions in the Convention have not been ratified in Kenya. The African Charter fails to deal comprehensively with the issue of discrimination and violence against women. The Charter's provisions on women rights are limited as women rights are conceptualised as relating to familial duties.

The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa has been ratified by more than 15 states and came into force in November, 2005. The Protocol places obligations on state parties to take measures to address violence against women including marital rape and other forms of forced or unwanted sex. Kenya is yet to ratify the Protocol. **KN**

The writer is a gender activist based in Nairobi.

# Interview with Muthoni Wanyeki

## No going back!



Ms. Muthoni Wanyeki,  
Executive Director of Kenya  
Human Rights Commission

**S**ince independence, Kenya has had her fair share of human rights abuses through the curtailment of various freedoms by the powers that be. So much so that a group of human rights advocates decided there was need for an organised approach to tackling this problem. Our correspondent talks to the Executive Director of the Kenya Human Rights Commission (KHRC), Ms Muthoni Wanyeki, on her organisation and the bigger picture of its mandate.

**KN:** Give us a brief background of KHRC.

**Wanyeki:** The KHRC was established in the early 1990s by Kenyans concerned about human rights violations experienced under the moi regime and wishing to contribute to the democracy movement in Kenya.

**KN:** Has the mandate of the commission changed since its formation? Has the organisation undergone any major changes?

**Wanyeki:** In its early years, it focused on civil and political rights - the rights to the freedoms of association and expression, for example, as well as the rights to freedom of conscience, to be assumed innocent before proven guilty before a court of law and so on. Towards the end of the 1990s, however, as those rights came to be more respected, it shifted towards focusing also on economic, social and cultural

rights - rights affecting the majority of the population.

It also shifted from more traditional monitoring, documenting and reporting on human rights violations to working on reform and working with communities (both geographical and of interest) in using rights-based approaches to claim rights. We now have two main programmes. The research and advocacy programme focusing on monitoring, documenting and reporting on human rights violations as well as engagement with the state on reform. And the civic action programme supports the work of 21 community-based human rights networks across the country who partly engage with the national reform issues we work on but mostly work on rights relevant to their on communities.

**KN:** Is there any confusion created as a result of the similarity

of name between KHRC and the government's KNCHR? Please comment on the effectiveness of the latter.

**Wanyeki:** Yes, of course, there is constant confusion about the two organisations. But we work well with the KNCHR—and its clear that its first round of Commissioners broke ground in several ways. From the rights worked on (for example, linking corruption with rights) to evidencing that a statutory body can work independently in the public interest, rather than in the interests of the government of the day. That was, no doubt, aided by the leadership of its first Chair, maina Kiai.

**KN:** What would you say are the major human rights issues in Kenya?

**Wanyeki:** All the issues spelt out under the four agenda items of the

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# Katiba briefs

June 2 - Lands Minister James Orengo and former Kabete MP Paul Muite urge Kenyans to push the Government to deliver a new Constitution. The two agreed that only pressure from wananchi would stop some leaders from frustrating the reform agenda.

June 8 - Former President Moi calls for civic education to enlighten citizens in the search for a new Constitution. He also challenged leaders to explain the various system of government being advocated.

June 9 - President Kibaki reaffirms that a new Constitution is attainable if all stakeholders set aside partisan interests.

June 11 - The momentum for reform is unstoppable says Vice President Kalonzo Musyoka. He also said that no leader can sabotage the delivery of crucial constitutional changes. Speaking to a team of senior editors from US media houses in his office, Kalonzo said it was too late for anybody to attempt to block the intended reforms.

June 19 - A new Constitution might be in place by August 2010, concluding a two-decade effort to rewrite Kenya's Law. According to a timetable issued by the recently formed committee of experts reviewing the Constitution, a referendum will be held in June next year and a draft will be ready in 2011.

June 21 - Twenty MPs meeting in Naivasha express confidence that a new Constitution could be achieved by next year. The legislators, meeting under the umbrella body of the National Democratic Institute, praised the new Constitution roadmap unveiled by the committee of experts.

July 2 - The committee of experts on Constitution making has identified enemies of the process who are determined to derail the process. Committee chairman Nzamba Kitonga singled out NGOs, politicians, religious leaders, lawyers and "general busy bodies". He said, "All they want is to make a fortune out of a delayed process by moving to court to contest any move we make with selfish motives. The duty of the media is to assist Kenyans to separate the chaff from the wheat".

July 17 - Legalisation of abortion and entrenchment of religious courts in the Constitution are now the contentious issues in the ongoing review process.

These two issues overshadowed discussions on other contentious issues during a meeting between religious groups and the committee of experts on the review process.

The civil society wants Kenyans to vote for either a presidential or parliamentary system of government in a future referendum. They are advocating for a Yes-Yes referendum as the best option in the search for a new Constitution.

July 22 - Kenyans are urged to take an active role in the reform agenda to prevent the country from sinking again in to turmoil during elections. Chairman of the Institute of Surveyors of Kenya, Mr Mwenda Makathimo, appealed to patriotic citizens to take part in the implementation of Agenda Four.

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mediation process are priority. Disarmament, demobilisation and reintegration of all armed groups and militias, together with security sector reform. Basic civil and political rights. Electoral reform. Constitutional reform. Land reform, including finding a permanent solution to internal displacement in Kenya. Equality. Un(der)employment, particularly of young men. And so on. We're moving backwards on all these issues, with impunity and succession driving the government of the day.

**KN: You have been accused of being anti-government but keeping a loud silence when other people or organisations like Mungiki abuse the human rights of other citizens. What is your response?**

Wanyeki: Human rights concern the role of the state vis a vis citizens. When citizens kill, for example, that killing is a crime and crime has not traditionally been the concern of human rights organisations because the expectation is that the state deals with crime. When the state kills indiscriminately, however, that killing is both crime and a human rights violation.

Our concern with the rise of armed groups and militias such as mungiki has therefore always been two-fold. What are the rights violations by the state that enable, give rise to armed groups and militias? And how is the state responding to such rise (is there an effective response that is within the boundaries of our Constitution and the law)? If you examine our positions, reports, actions on the same, you'll see those demands being consistently raised.

That said, it is clear that citizens, because of the failure of the state

to contain crime and insecurity, increasingly have an expectation that human rights organisations should take these issues on. We understand that. And we have done so, while remaining clear about where the responsibility for handling crime and insecurity rests—with the state.

**KN: What is the state of the reform agenda in Kenya? Would you say the coalition government has the political will to oversee the necessary changes?**

Wanyeki: No! The government of the day is obviously driven by the desire to ensure impunity (for what happened with the elections and for the violence, as well as grand corruption). And by succession concerns. Everything is stalling—what we are seeing is motion without movement.

**KN: What kind of proposals does KHRC have for the Committee of Experts (CoE) on the Constitution? Should Kenyans now have hope that they will finally see the birth of a new document?**

Wanyeki: We made a submission to the CoE that focused on what we consider essential, fundamental issues—separation of powers, checks and balances, the structure of government, decentralisation and equality. The CoE is doing the best it can, within a tight timetable. The difficulty, we suspect, will be with finding consensus in parliament.

**KN: Should those implicated in the 2007 post poll violence tried in The Hague or would you prefer a local tribunal?**

Wanyeki: It is not an either/or issue. The worst perpetrators of the three forms of violence (organised violence in the north

Rift, equally organised counter-attacks in the south Rift and violence committed by state security agencies)—those with command responsibility—may be tried by the ICC. But we will still need an acceptable trial process here for lower and middle level perpetrators. We therefore have always supported the formation of a special tribunal here, with the safeguards envisioned by the CIPEV. But we recognise that the individual personal and political interests of those within the government of the day mitigate against our achieving the same—so if the ICC acts first to remove the worst of the perpetrators, perhaps that will help.

**KN: What factors have led to the culture of impunity in Kenya and must be done to curb this trend?**

Wanyeki: Sheer personal and political interests of those in power. They are unrepentant about what they steal, whom they murder. They are so used to getting away with doing so, that they actually seem surprised that there is now an expectation that they should pay for their crimes by facing the law.

**KN: The threat of sexual and other forms of violence against children seems to be on the rise. Does the KHRC have any programme to help in addressing this vulnerability?**

Wanyeki: Many of the community-based human rights networks we support across the country work on women's human rights and are playing important roles in improving women's access to justice. Similarly, some of them work on children's human rights, particularly with respect to labour and sexual exploitation. **KN**

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recommendations to Parliament on administrative boundaries, including the fixing, reviewing and variation of boundaries of districts and other units; and

- c. To perform such other functions as may be prescribed by Parliament.

The legal framework on boundary delimitation should provide for frequent boundary delimitation, criteria for delimitation, degree of public participation in the process, the roles of the judiciary, legislature and executive in the process and vest the ultimate authority for final determination of electoral units. The Electoral Commission was required by the Constitution to undertake a delimitation exercise in durations of 8 to 10 years. The last such exercise was undertaken in 1997. While designing the new boundary delimitation framework under the proposed Constitution, an elaborate criterion must be set up for periodic, regular and participatory boundary delimitation in Kenya.

Viability of more districts, provinces etc in relation to allocation of resources.

The Government has adopted a budgetary devolution criterion where national resources are allocated in accordance with constituencies. In the past, the National Aids Control Council funds, the Bursary Funds, the Kenya Roads Board funds and the Constituency Development Fund have used the constituency as the site for expenditure and accounting. With the addition of new funds at the constituency level and the devolution of resources to the

grassroots using line ministries, there is need to harmonise the constituency boundaries with the administrative boundaries. The President has since 2005 created more than 100 new districts. Since the mandate of the Interim Commission includes delimitation of administrative boundaries, the Commission must devise a formula to harmonise the constituency boundaries and the administrative districts. The Interim Commission must ensure that the process of delimitation is adequately consultative and participatory to ensure buy-in by the public. The new units which will be the new sites for public expenditure must embrace improved governance and accountability structures, including for the Constituency Development Fund which is under review.

Boundaries review and long term reforms

The success of long term electoral reforms in Kenya will be anchored on the success of the boundary delimitation process. The process must be carried out in participatory and accountable manner to ensure public confidence. Due to the politicisation of electoral boundaries in the past, the Interim Boundaries Commission must carry out its work professionally and without covert or overt manipulation by politicians. The appointment criteria seem to have placed more emphasis on the political affiliation and not professionalism. However, the Commission can redeem this image by hiring qualified experts to advise it on the delimitation process. The setting up of the Interim Commission is a stop gap measure. The proposed

constitution must set out clear and elaborate criteria for boundary delimitation in specified periodic intervals.

Comparative analysis  
New Zealand

New Zealand uses a Representative Commission made up of seven members to draw electoral districts. The commission includes partisan representatives

United States of America

The legislature is responsible for drawing electoral districts in most states. Plans usually favour the political party in control of the legislature at the time of delimitation. The delimitation plans can be challenged in court making the process time consuming. In the case of Baker v. Carr in 1962, the Supreme Court that voters were entitled to equal protection claim where there were unequal legislative districts as a result of failure by the legislature to redraw constituency districts. In the case of Reynolds v. Sims, the Supreme Court declared that the equal protection clause in the Constitution required that as nearly as practicable one man's vote must be worth as much as another's.

Singapore

The Electoral Boundaries Review Committee creates constituency maps in which multimember electoral districts. Contesting parties must propose a slate that includes at least one member of an official minority. The party receiving a plurality of votes wins all the seats in the district. **KN**

The writer is an advocate of the High Court of Kenya.

# Getting it right

## Perspectives on the electoral process in Kenya

Every election year since the advent of multi-party politics has been a time of great anxiety in this country. Our last few elections have been accompanied by violence and great political uncertainty. So, is the problem with us or with the system we have put in place to undertake this sensitive exercise?

By Wamba Kitonga

The choice of the electoral system is an important and political decision for any country. Most countries in Africa inherited their electoral systems from the departing colonialists. The electoral systems and election management and administration can create incentives and disincentives for violence. Elections are major sources of conflict in Africa. The electoral system should be designed in a method that promotes inclusiveness and popular participation. The electoral system has an effect on the potential of a political system to ensure effective government, fair representation, political party plurality and social harmony and peace. Where an electoral system is not considered fair, the losers may feel compelled to work outside the laid down democratic processes.

Four key ingredients have been identified as essential for free and fair election. These are an acceptable electoral system, a competitive party system, a

constitutional system and a credible election management system. Political parties and voters must have confidence in the electoral system. An electoral system must create a level playing field with equal right of participation and acceptance of outcome by all parties. Elections are useful in post conflict societies for fostering democracy and consolidation peace.

An electoral system has the following main functions:

1. To translate votes into legislative seats. An electoral system should produce proportional results.
2. The electoral system acts as a conduit of holding elected representatives accountable. Elections to representative bodies assume a degree of representation. An electoral system that limits the powers of party leaders to choose candidate produce more responsive representatives.



Mr. Ahmed Issack Hassan, Chair of Interim Independent Electoral Commission

3. It defines incentives for political competition.
4. It creates durable governments. The electoral system cannot produce the idiosyncratic opinion of every voter. A durable government promotes policy consistency and avoids the

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- instability that can result during interregna or creation of fragile and unpredictable coalitions.
5. It ensures the victory of candidate with the majority of the vote. The popularity of the winner should be preferred.
  6. It promotes inter-ethnic and inter-religious conciliation. The electoral system must provide politicians with incentives for moderate behaviour.

The first-past-the-post electoral system manufactures a majority and penalises minority parties. The Government elected through the system is strong and responsive and implements its policy framework through a parliamentary majority. The proportional representation emphasises on stability of governments and inclusion of minorities. The system enhances representation of different social groups and often leads to coalition governments.

An appropriate electoral system promotes democratic elections and a stable political environment. It promotes inclusiveness, representation, accountability and political stability. The choice of an electoral system is of critical importance and often remains fairly consistent as political interests often solidify around such system and the incentives presented by them.

Political violence has been defined as acts of disruption, destruction, injury, whose purpose, choice of victims, surrounding circumstances, implementation and effects have political significance that tends to modify the behaviour of others in a bargaining situation that has consequences for the social system. The objective of electoral violence is to influence the

electoral process due to objections on its legitimacy or the type of electoral process. Electoral violence may occur in different phases of the electoral process from the voter registration stage to vote counting. The post election violence results when contestants reject electoral results terming them as not free and fair.

Some of the challenges that mar free and fair elections in Africa are:

1. Elections are marked by uncertainty, are confrontational and tend to generate violent conflict. Winning or losing elections may impact on entire ethnic communities.
2. Democratisation opens up new channels for political entrepreneurship. This breeds new opportunities for breeding violence. Democratic elections require tolerant political culture.
3. The one-party state that has hitherto been dominant in African states is intolerant. Weak and politicised institutions are in charge of election management. The police officers demonstrate partisanship and most perpetrators of violence are never prosecuted. The political parties have weak internal structures leading to violence and splits.
4. The design of the system enhances the attractiveness of political violence and can be a cause of political instability.

The Electoral Commission must be and be seen to be independent, professional, efficient and impartial. The commission should undertake continuous voter registration and disputes regarding the electoral results must be determined expeditiously.

Mandate of the Independent Interim Electoral Commission (IIEC)

Parliament enacted the Constitution of Kenya (Amendment) Act, 2008 with a view to reforming the electoral system. The Independent Review Committee chaired by Justice Johan Kriegler recommended complete overhaul of the electoral system and deemed the Electoral Commission of Kenya (ECK) as incompetent and partisan.

Section 41 of the Constitution creates an IIEC, which shall consist of a chairman and not more than eight other members. This is a significant departure from the ECK which was made up of 22 commissioners. The section further provides that the IIEC shall be the successor to the (ECK). The rights, duties, obligations, assets and liabilities of the ECK existing at the time were automatically and fully transferred to the IIEC. All references to the ECK are deemed to be references to the Interim Commission.

The Interim Commission has been constituted and formally appointed by the President. The chairman and other members of the Commission were nominated through a competitive process by the Parliamentary Select Committee. The Commissioners whose names were recommended were then approved by the National Assembly and appointed by the President in consultation with the Prime Minister. The qualifications of the Commissioners are that the member must be a citizen of Kenya; holds a degree from a University recognized in Kenya; and is a person of high moral character and integrity. The chairman of the Commission is required to be a person who has held or is qualified to hold the office of judge of the High Court

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under this Constitution. Mr Isaak Ahmed Hassan was appointed as the Chairman of the Interim Commission.

A person is not qualified to be appointed a member of the Commission if he is a member of the National Assembly; a local authority; the executive body of a political party; or he holds or is acting in any office in the public service or in the armed forces of the Republic. A member of the Commission may be removed from office only for inability to exercise the functions of his office or for misbehaviour. A member of the Commission may be removed by a resolution of the National Assembly supported by a majority of all its members (excluding the ex-officio members).

The Commission shall be independent and shall not be subject to the direction and control of any other person or authority in the exercise of its functions. Parliament may provide for the orderly and effective conduct of the operations and business of the Commission and for the powers of the Commission to appoint staff and establish committees and regulate its procedure. The Commission may, subject to its rules of procedure, act notwithstanding a vacancy in its membership or the absence of a member, and its proceedings shall not be invalidated by the presence or participation of a person not entitled to be present or to participate in those proceedings. All decisions of the Commission shall require the concurrence of a majority of all its members. The Interim Commission shall stand dissolved twenty four months or three months after the promulgation of a new

Constitution, whichever is the earlier.

The amendment disbanded ECK by providing that a person who served as a commissioner or was a member of staff of the ECK established by section 41 (now repealed) shall cease to be a commissioner or a member of staff but a member of staff affected shall be eligible for redeployment in the Public Service. This provision did not affect Registrar of Political Parties who had been appointed under the Political Parties Act.

The functions of the IIEC are to spearhead the reform of the



A voter casts his ballot in a past election.

electoral process and the management of elections in order to institutionalize free and fair elections; to establish an efficient and effective secretariat; promote free and fair elections; undertake fresh registration of voters and the creation of a new voter register; to efficiently conduct and supervise of elections and referenda; to develop a modern system for the collection, collation, transmission and tallying of electoral data; to facilitate the observation, monitoring and evaluation of elections and referenda; to promote voter education and culture of

democracy; to settle minor electoral disputes during an election as may be provided by law; and perform such other functions as may be prescribed by law.

Pros and cons in the Constitution of Kenya (Amendment) Act, 2009

The Act disbanded the ECK and required the preparation of a new electoral register by registering voters afresh. The Act further reduced the total membership of the Commission from 22 to 9 and the Commission is required to set up an effective secretariat. This is intended to foster efficiency in the Commission. In the past, the

Commissioners have undertaken roles that are supposed to be carried out by the secretariat. These reforms are intended to streamline the functioning of the Commission. The board mandate of the Commission which includes voter education not be realised during the 24 months that the Commission will be in office. The delay in the realisation of a new Constitution may create an interregnum whereby the Commission will be

dissolved without an alternative electoral body on expiry of 24 months. The Commission should move with speed to establish the system and procedures in the Commission which will serve the country in good stead even after the enactment of the new Constitution. The Commission should champion the revision and enactment of the Elections Bill, 2007 which had been drafted by the ECK. The Bill will consolidate all electoral laws in one statute and reform provisions that have led to gaps in the system.

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Expediting the pending by elections: Role of the IIEC

The Interim Commission has announced 27<sup>th</sup> August, 2009 as the date for the holding of by elections in Bomachoge and Shinyalu Constituencies. The Constitution of Kenya (Amendment) Act, 2008 requires the Interim Commission to undertake a fresh registration of voters. The veracity and accuracy of the register prepared by the ECK was queried by the Interim Review Committee. The Commission has set dated for the by elections and has stated that it intends to register the voters afresh in the two constituencies and avoid inordinate delays in the holding of by elections for seats that have already been declared vacant by the Speaker of the National Assembly. The Interim Commission has announced that transparent ballot boxes will be used during the by elections.

Revisiting Kriegler's recommendations

The Independent Review Committee recommended overhaul of the IIEC. The Commission envisaged by the Committee would comprise few commissioners supported by professional staff. The reconstituted Interim Independent Commission has nine commissioners which is an improvement from the 22 commissioners in the disbanded ECK. The Commission is recruiting professional staff. Such staff must be recruited based on competence and professionalism and not extraneous considerations. The Commission, if it executes its mandate properly, will serve as a launch pad for long term reforms in the Kenyan electoral system. Long term reforms will be achieved through the adoption of the Proposed Constitution.

The IREC report recommended that the right to vote be enshrined in the constitution and the

consolidation of all electoral laws. The report recommended the setting up of a court to resolve disputes over elections. Since all issues could not be resolved by new laws, Kenya must undergo societal change and develop a culture for tolerance, fidelity to the law, honesty and transparency. The first-past-the-post electoral system was blamed for encouraging conflict and not conciliation. The president's unilateral appointment of commissioners, the ECK's unwieldy structure of many commissioners, and the lack of separation of functions between commissioners and the secretariat were identified as problematic. The report also found shortcomings in the lack of specific qualifications and qualities needed for appointment as commissioner, and poor training for staff who handled the elections. This has been remedied by the amendment as the Interim Commission was constituted through a bipartisan and consultative process. The qualifications of the commissioners are set out in the Constitution.

The report decried the pervasive levels of negative ethnicity that accompanied the electoral process. The finding that the ECK did not perform its role adequately with regard to redrawing constituency boundaries was misplaced. The current number of constituencies is the maximum allowed by the constitution. The ECK had called for changes and pleaded with parliament, but partisan politics ensured that the review of constituencies never took place. The failure to set up new constituencies should be blamed on the National Assembly to a large extent.

The report stated that it was impossible to know who won the presidential election since the results and the process of recording them were heavily

compromised. The ECK failed to guarantee that the results accurately reflected the votes cast.

Way Forward: The electoral system after the IIEC

It is expected that the Commission will be able to execute its duties in a period of twenty four months. A comprehensive framework for the electoral system will therefore be established in the new Constitution. The electoral design will partly be dictated upon by the choice of Executive system adopted. The principles that guide the choice of an electoral system are:-

- a. Representation. The basic function of an electoral system is to translate votes into seats.
- b. Transparency. The mechanisms of the electoral system should be known to voters, political parties and candidates.
- c. Inclusiveness. This includes allowing many citizens to vote and ensuring the system is not discriminatory.

It is recommended that while Kenyans may wish to retain the First-Past-The-Post system to elect MPs, there is need for a system of proportional representation through party lists to enhance representation of minorities in Parliament. The proportional representation will require the strengthening and democratisation of political parties. Further, such system will be determined by the design of the Executive- whether the system will remain presidential or parliamentary. Political parties must be reformed to ensure they genuinely represent national interests and are not ethnic enclaves. **KN**

The writer is a freelance journalist based in Dar es Salaam.

# THE KONRAD ADENAUER FOUNDATION IN KENYA

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

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

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

## 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.

## Contact address

Konrad-Adenauer-Stiftung  
Mbaruk Road No. 27  
P.O. Box 66471  
Nairobi 00800, Kenya.

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