KatibaNews

Towards a new constitutional dispensation in Kenya

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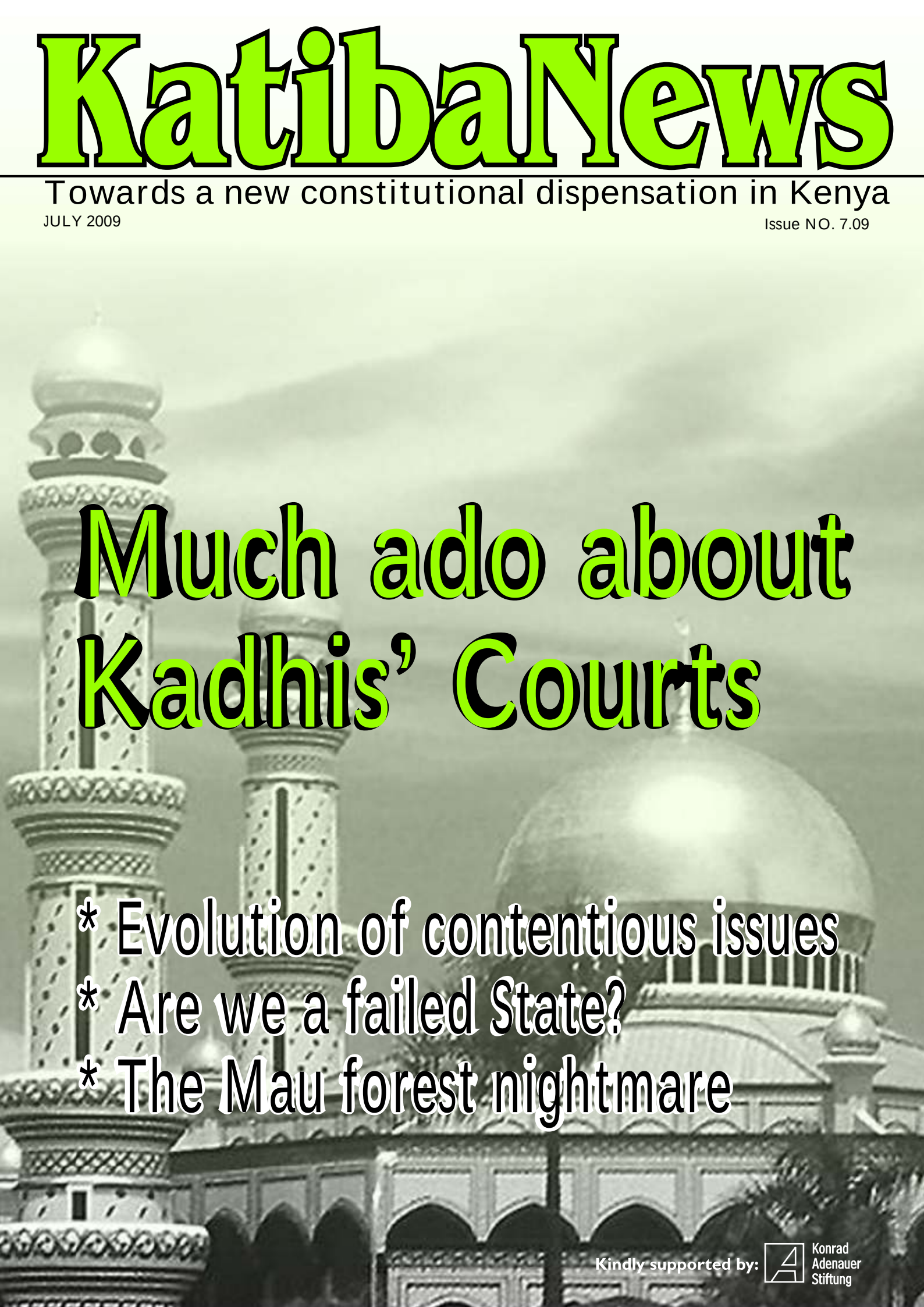

Much ado about Kadhis' Courts

* Evolution of contentious issues
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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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JULY 2009

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Much ado about Kadhis' Courts

The issue of Kadhis' Courts has generated heated debate over the last few months, but of course emerges from the past constitutional review process. The current debate is about whether or not these courts should be or should not be entrenched in the new constitution, as Kenyans seek to write a new one for the second time. The grandstanding witnessed by some Christian and Muslim groups in favour of either has been seen before: in Bomas (the National Constitutional Conference), which run from 2003-2004 and later on, during the 2005 pre-referendum debates on the Proposed New Constitution. Our writer tries to analyse what the heat is all about.

By Albert Irungu

One of the expressions of personal liberty is the ability to practice or worship a religion or God of one's choice. Everyone must also have the freedom to observe and to practice their faith without fear of, or interference from others. It is in this context that the issue of Kadhis Court has risen.

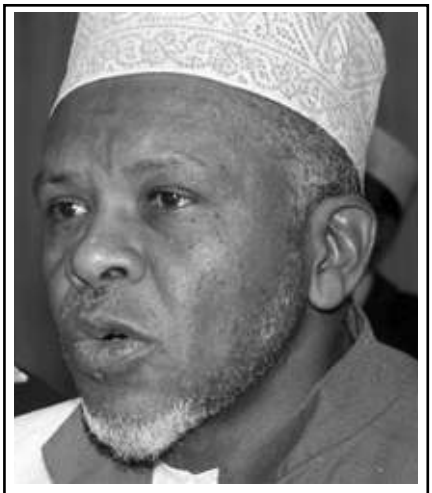
Before the agitation for a new Constitution and the creation of the draft Constitution, the Kadhis courts had never been in the limelight. But after the formulation of various drafts, pressure has been mounting on the political class to deliver one document that will satisfy every citizen's needs. However, there are contentious issues that have to be addressed before this can become a reality.

The Committee of Experts on Constitutional Review in accordance to Section 23 (b) and 30 (1)(b) of the Constitution of Kenya Review Act 2008 has been engaged to look into the contentious issues in the draft Constitution, top of which has been Kadhis Courts. This has mainly pitted Christian religious leaders and Muslim clerics.

The controversy

Before this, the Kadhis' Courts have never been a problem as such. However, after the commencement of the many attempts to review the country's constitution, the Kadhi's courts have repeatedly come into the limelight. The fervour against anything Islamic in the context of the Kenyan constitution has reached an all time high in a post September 11 World. The arguments brought forward by all sides are; the draft Constitution gives precedence to Islam above all other religions by referring to it and the Kadhi's Courts. Furthermore, Kenya being a secular state should have no religion given reference in the draft Constitution. In addition, the Kadhis Courts can easily be legislated against by Parliament if they are not entrenched in the draft Constitution. In addition, the Kadhi's Courts have been entrenched in the current Constitution since independence and they have caused no harm.

The Kadhi's Court debate stems from proposals in the draft Constitution to extend the scope of these courts from dealing with civil matters only to include criminal litigation. The draft Constitution provides for expansion of these courts from



Chief Kadhi Kassim Hamad

District and Appeal Court levels.

Christian leaders and the MPs who support them have come out strongly rejecting these proposals. On one side, the opponents of these proposals, majority of them Christians, argue that Kenya is a secular state. Thus, the elevation of one religious group or denomination will bring inequality. The elevation of Kadhi's Courts they argue will bring about full-fledged Sharia Law courts and establish a parallel court system for Kenyan Muslims. Things have not

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been made easy especially with the Muslim phobia that is being experienced worldwide.

The fight has been taken into the media with Evangelical Fellowship of Kenya, an organization vehemently against these proposals, running paid advertisements in the Nation one of the local dailies arguing that the draft constitution granted special privileges to Muslims by creating two parallel judicial systems; one for Muslims and the other "for everyone else". The advertisement asserts that this move would legitimize Sharia Law in an otherwise secular state. It also took issue with the elevation of the Chief Kadhi, to the same status, privileges and immunities as a High Court judge. The advert appealed to Kenyans to ensure that the draft constitution be neutral on region and freedom of worship.

Muslims argue that since the Kadhis Courts are in the current Constitution, they do not understand why it should not continue to be so in the draft Constitution. This fight has pulled in all and sundry as the Council of Imams and Preachers in Kenya has accused some foreign embassies of sponsoring churches to fight sections of the draft supporting Islamic law. Muslims further state that their faith should be protected in the Constitution in such a way that they can freely practice their religion and observe all-important functions.

Case in point is the Muslim religious holidays. Muslim workers should be able to take paid leave for functions like Maulidi, Idd-Ul Haj even when these days are not recognised as national holidays. Putting aside religious affiliations in the whole matter, some fundamental issues of these additional provisions come to play. With the creation of a new hierarchy of Kadhis courts this means that essentially, Islamic Law would except for criminal matters govern Kenyan Muslims. It is uncertain whether this is desirable for the country particularly when we consider that for one to be appointed as a Kadhi, he or she must have a degree in Islamic Law from a recognised university, yet no Kenyan university offers degree courses in Islamic Law.

Secondly, it is proposed in the provisions that the jurisdiction of the Kadhis courts be extended to cover civil and commercial law in cases where all the parties profess the Muslim faith. There is no reason why the State, quintessentially all taxpayers should incur the expense of running Kadhis courts in matters of civil and commercial law. These are not matters of personal law; hence, there is nothing offensive or wrong for Muslims to be governed by the same courts as people professing other faiths. Furthermore, entrenching separateness for any religious or ethnic community may prove detrimental to attaining national unity.

Thirdly, the draft Bill proposes to remove Kadhis Courts from the supervisory jurisdiction of the High Court since the Kadhis Court of Appeal will be the final appellate court unless a dispute involves a constitutional issue arises. This means that specified matters, Muslims will have a court system parallel to the regular courts. It can be observed that the supervisory jurisdiction of the High Court over the Kadhis courts under the current constitutional dispensation ensures a coherent development of a national jurisprudence. Establishing parallel jurisprudence might prove detrimental to the rule of law and national unity. The draft bill does not contain a mechanism to minimize or resolve conflict of laws, which would be unavoidable under such a dual system.

Facing Mecca

Taking into consideration that Islam is a way for life to those who profess it, the objectives of these provisions are to broaden the powers and structures of the Kadhis Courts. Then, nothing will stop a Muslim from demanding that criminal disputes among them be dealt with in accordance with Islamic Law.

Jurisdiction of Kadhis courts

Muslims in Kenya are a religious minority of between 15 to 33 percent of the total population. Muslims are required to fulfill Sharia Law both individually and collectively. The Kadhi's Court existed in East Africa coast long before the arrival of the British. Before Kenya's independence, the country was ruled by two monarchs - the Queen of England and the Sultan of Zanzibar. The coastal strip was under the reign of the Sultan. The interior of part of Kenya was a British colony.

The relationship between the British and the Sultan pertaining to the coastal strip was governed by a treaty that was signed on December 14th 1895. The agreement was entitled the 1895 Agreement between Great Britain and Zanzibar respecting the possession of the Sultan of Zanzibar on the mainland and adjacent islands, exclusive of Zanzibar and Pemba. The Sultan signed the treaty under one condition; the British Administration would respect the Kadhi's Court and allow the Muslim minority to bring legal issues of personal law to it. The Sultan, however, was to retain sovereignty.

When Kenya was seeking independence in 1961, the issue of the strip came up again. An agreement in the form of exchange of letters took place in October 1963 whereby the Sultan of

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Zanzibar relinquished his claim of sovereignty over the coast to Kenya in exchange for the guaranteed existence of the Kadhi's courts to decide all matters between Muslims in matters of personal law. The 1963 Constitution and The Mohammedan Marriage, Divorce and Succession Act and The Kadhis' Courts Act of 1967 establish a venue to have personal law cases adjudicated on Islamic law. Thus, Article 66 of the Constitution provides for the establishment of Kadhis' courts.

This Law is pertinent only where "all the parties profess the Muslim religion" in disagreements relating to "questions of Muslim law relating to personal matters of marriage, divorce or inheritance." Articles 65 and 67 make it clear that Kadhis' Courts are "subordinate" courts, meaning that the High Court has jurisdiction to oversee any civil or criminal proceedings before a subordinate court. It also indicates that if a constitutional or legal interpretation question arises in a Kadhis' Court proceeding, any party involved in the proceedings may refer the question to the High Court.

It is important to understand what the Kadhi's Courts do. Kadhi is an Arabic term that refers to a judge. In the Kenyan context, it means a Muslim Religious Magistrate whose mandate is adjudicating on matters according to the Islamic Law otherwise known as Sharia. These courts have been in business since Kenyan independence, albeit with limited authority. They have operated under Kenya's current constitutional dispensation. The courts work in a similar manner to those in the regular courts.

Does the church feel threatened?

Prospective applicants apply to the registry of courts. A court clerk assists in completing the necessary documentation and payments made to accompany these documents. The litigants are allowed to represent themselves or engage the services of an attorney. These courts operate on the same court calendar as ordinary courts.

Place of other religions in the Constitution

The current Constitution has several provisions in the draft that recognises religious traditions. The law acknowledges marriages conducted under any traditional or system of religious personal or family law' as well as systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. However, no other religion is given any further reference in particular in the current constitution other than Islam under the Kadhis courts.

What about freedom of worship?

The Constitution has provisions that guarantee religious liberty. These provisions run from Sections 70 to 83. They protect a person's right to freedom of expression, conscious, religion and association. In Section 78 (1), for example:

> "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance."

In Section 78 (2), it continues to state that:

> "Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage a place of education which it wholly maintains, and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided at a place of education which it wholly maintains or in the course of any education which it otherwise provides."

Section 83 provides the enforcement of these provisions.

The way forward out of this religious dilemma is riddled with pits and boulders. Every aspect of consensus building should be approach with one objective in mind, National Unity. A Constitution should never be created for particular individuals, groups, religions, tribes or races. This is a document or understanding that is meant to serve Kenyans equally for generations to come. Importantly, there is no need to create a problem that will divide the nation into religious factions. This will be the birth of religious intolerance for years to come.

In my opinion, I believe this poses no great threat. No one has ever been subject to Sharia Law against their will and there is no evidence to show that the Kadhis Courts have resulted to any harm for individuals or groups that do not adhere to it. For Sharia to be the State religion, it would never be a hidden process. It would have to be declared explicitly in both the law of the land and Government policy. The debate has involved largely emotional rhetoric and for anything meaningful to come out of it, the arguments should be handled soberly. KN

The writer is a journalism graduate from USIU-Kenya

Evolution of contentious issues in the Constituion review process

Mr. Nzamba Kitonga: Spearheading the review process.

By Macharia Nderitu

The Committee of Experts was constituted under the Constitution of Kenya Review Act, 2008. The Committee Members were sworn in by the Chief Justice on 2nd March, 2009. The role of the Committee of Experts is to identify the issues agreed upon in the existing draft Constitutions; identify the issues which are contentious, solicit and receive from the public written memorandum on the contentious issues; undertake thematic consultations with caucuses, interest groups and other experts; carry out studies and evaluations concerning the Constitution and other constitutional systems; articulate the merits and demerits of options for resolving the contentious issues; make recommendations on the resolution of the contentious issues; prepare a harmonised draft Constitution for presentation to the National Assembly; facilitate civic education to stimulate public discussion and awareness of constitutional issues; and liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution.

The Committee is made of nine members, including six Kenyans and three foreigners who were selected by the Parliamentary Committee on the Constitutional Review Process in a competitive interview and appointed by the President. The Director of the Committee and the Attorney General sit as *ex officio* members.

The Committee will make concrete proposals for the resolution of the contentious issues. The review of the Constitution is a key component of Agenda Four, established by the Kofi Annan mediation team that worked out a peace deal following violence in early 2008 that erupted after a disputed presidential election. Agenda Four deals with long term reforms including Constitution review, Judicial, Electoral and Police reforms. Realisation of the reforms is anchored on completion of the review process.

The Committee has defined what it deems as the contentions issues and is collecting views on their resolution. Parliament amended the Constitution to insulate the review process from legal challenge and to provide for a mandatory referendum and the mechanism for replacement of the Constitution. Religious groups have been advocating for exclusion of religious courts from the Constitution draft and treatment of the Kadhis court as a contentious issue.

Defining the issues

There is no clear definition of what constitutes contentious issues. The Executive has defined the contentious issues to be power sharing and devolution. The protracted debate has been partly contributed by the notion that the reform process is intended to streamline presidential powers and disperse authority from the central government to regional authorities. The contentious issues contributed to the rejection of the draft Constitution in November, 2005. Other issues identified as contentious include land reform and Kadhi's court.

The resolution of the issues has been inhibited by poor understanding of the draft Constitution by the public. Civic education should a continuous and depoliticised process with the aim of enabling the public to understand the constitution and contribute effectively to the drafting of the new Constitution through submission of memoranda and participation in the referendum. Civic education in Kenya has largely been *ad hoc* and conducted by civil society organisations. The Government has shown little interest in civic education and its financial support has been minimal. The choices at the referendum have been largely defined by the political elite and not the contents of the Draft Constitution.

The Government has failed to demonstrate the necessary political will to complete the process. The harmonisation of available draft Constitutions can take few months to complete with the necessary political will. The Parliament and the Presidency

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have shown minimal support for process and demonstrated poor leadership in the review process. The drafts include the Bomas Draft, the Kilifi Draft, and the Proposed New Constitution and other unofficial drafts submitted by civil society organisations and the Law Society of Kenya.

The Committee of Experts has defined the contentious issues as:

1. The Executive and Legislature
There is agreement that the Executive and legislative authority must be exercised for the benefit of the people and communities in Kenya, the persons and institutions exercising executive authority must not act in a manner incompatible with and inimical to the principle of service to the people and that the Executive and legislative power should be exercised within clear limits and subject to proper checks and balances.
The contentious issues in regard to the Executive are:

a. The relationship between Parliament and the Executive. Should Kenya adopt a parliamentary system where the president is directly elected by the people and is the Head of State and Government or should there be a parliamentary system with the Prime Minister as the Head of Government chosen from parliament, or should there be a hybrid system with the President and Prime Minister sharing power? The present system is a hybrid system that shares powers between the President and the Prime Minister. Views submitted to the Constitution of Kenya Review Commission show a paradox. Whereas Kenyans wanted to elect the Chief Executive, they wanted the powers of the President reduced. The proposal on the Executive must recognise the present set up and ensure accountability of the Executive to the people.
b. Representation of Communities. How do we ensure that all Kenya people and communities are properly represented and served and that the Executive is accountable?
c. What should be the name and the powers of the Second House of Parliament? The primary mandate of the Second House will be to protect interests of the devolved units

2. Devolution of Powers
The agreed issues on devolution are that the new Constitution should not concentrate powers on the central government, that powers of Government must be shared between the central government and one or more devolved levels of Government and that the devolved governments should be democratic and participatory.

The contentious issues on devolution are:

a. Levels of Devolution. Should there be one or more levels of devolved government and what powers should each level of devolved government have? Given the size of the Kenyan economy, it is proposed that devolution should be one or two levels. The main political parties have agreed that autonomous regional units should be created.
b. Supervision of Devolved Units by Central Government. Who should be vested with the supervisory powers to supervise the devolved government? How much power to supervise devolved governments to ensure equity should be vested in the central government? The Draft Constitution should create a constitutional commission with powers to distribute resources earmarked to the devolved units and resolving potential conflicts between the units or between the units and the Government.

3. Transitional clauses
The agreed issues are that a new Constitution should create a fresh start by establishing the rule of laws, protection of human rights and respect of every person irrespective of gender, ethnicity, disability, age, religion, culture or political persuasion; that the office bearers in the new Constitution must have confidence of the people and be accountable; and that all government action and every exercise of power should be based on the new Constitution.

The contentious issues are:

a) How should the adoption and coming into force of the new Constitution affect holders of political constitutional offices such as the President, Prime Minister, Vice President, Deputy Prime Ministers, Cabinet and Members of Parliament? Should the office holders complete their terms? It is important that public leaders be permitted to complete their terms. This will facilitate smooth flow in the process and prevent manipulation of the process to favour the incumbents. However, according to the National Dialogue and Reconciliation Agreement, once the new Constitution is adopted, the Grand Coalition Agreement will stand terminated and fresh elections will follow as a matter of course.
b) How should the adoption

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and coming into force of a new Constitution affect unelected constitutional positions such as Attorney General, Auditor General and Judges of the High Court and Court of Appeal? Due to implicit role of these public officers in entrenching incompetence and corruption in public service, it is preferable that all constitutional office holders step aside and any person interested in being reappointed under the new Constitution to reapply.

c) A new Constitution will require new laws. What measures should be put in place to ensure that parliament passes these laws? Parliament must be ready to enact the large number of laws that will be required to implement the new Constitution. Truncated procedures can be introduced in the National Assembly Standing Orders to facilitate quick enactment of the necessary Bills. However, Parliament should have an opportunity to scrutinise all the Bills as the sovereign body with legislative powers.

Contentious issues both pre and post 2005 Referendum

The contentious issues remain unresolved since the referendum in 2005 and they have derailed completion of the review process. The failure to resolve the issues can be attributed to diminished political will and the capture of the review process by politicians. For example, the debate on the Executive has turned on whether we should adopt a parliamentary or presidential system. During the referendum, the Government advocated for the Presidential system and retention of the *status quo* while the Opposition rooted for an Executive Prime Minister.

With the establishment of the Grand Coalition Government in 2008, the Constitution was amended to create the office of the Prime Minister and two Deputy Prime Ministers. Where there has been political will, the offices of the two Principals have functioned well and reached consensus on matters of national interest. The Constitution should be redesigned to eliminate power struggles between the two offices and streamline their functions.

The debate on devolution has centred on the levels of devolution. Devolution is misunderstood to mean the expropriation of property by other communities and repatriation of communities to their regions. Devolution must be implemented in a manner that protects the right to property and eliminates ethnic polarisation. No sufficient civic education has been conducted to facilitate proper understanding of devolution by the public.

The inclusion of religious courts in the Constitution has generated debate. The Kadhi's courts are part of the Constitution. The courts have the mandate of resolving domestic disputes between Muslims. Since the courts have been part of the Constitution since independence, Muslims have acquired the right for the inclusion of the courts and they should be part of the Constitution. However, other religious groups can be likewise permitted to establish religious courts.

The land tenure system established at the dawn of independence has been a trigger for ethnic violence in Kenya in 1991-93, 1997 and 2007. The National Land Policy was approved by the Cabinet in June, 2009 but it yet to be tabled and approved by Parliament. Further, implementation of the Policy will require wide ranging reform to the enabling legislation. With the political elite being the largest land owners, Kenyans are hoping that there will be the necessary political will to drive the reform agenda. Kenyans must form a coalition of civil society organisations to spearhead the demand for land reforms in light of reluctance by the Government to implement new policy.

Lessons learned

Some lessons can be discerned in the Constitution making process in Kenya since 2001. These include:

Participatory review process

Participation generates significant economic costs and social disruption but is necessary for legitimacy. Its benefits depend on the political and social contexts. A constitution should a product of integration of ideas from all major stakeholders in a country. A constitution imposed on a large segment of the population or adopted through the manipulation of the process can be rejected in the referendum. Other advantages of participation include availing the drafters with input about the citizen's needs and values and promoting public interest and buy-in.

Broad participation generates costs in expense, time and opportunity costs for other legislation. The referendum

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Prof. Yash Pal Ghai, former CKRC chairman.

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process in 2005 was divisive and accompanied by moderate violence and exacerbated ethnic polarisation. The use of a review commission and a National Conference was cumbersome and costly and undermined the coherence of the final document, weakened lines of accountability and led to political fights among the delegates. Few draftsmen will lead to reduced costs, promote coherence in the final document, and promote accountability.

Risk of capture

The political elite can collude and revise the draft after it has been adopted by the delegates where the draft Constitution is not to their advantage. The Constitution of Kenya Review Act, 2001 excluded covert participation by Parliament and the President who were perceived as anti reforms. The review process was altered midstream in the face of proposed reforms that the government saw as potentially weakening its power. The rules should ensure equal representation, transparency and consultation in development and adoption of the draft Constitution. The capture by the elite stems from control and management of the review process by the very government whose powers are under review. A review process should include mechanisms for transparency and publicity so that politically motivated variations from the rules are public.

The veil of Ignorance

There is severe risk of promoting selfish political interests when it is clear how individual parties will benefit from the new constitution. The design of the review process should promote a veil of ignorance. The perception of selfish political interests by drafters in Kenya played an important role in the draft's ultimate defeat. Clauses meant to promote parliamentary accountability were out rightly rejected at the Constitutional Conference. The process was marked by power and succession struggles. Selfish political interests made compromise difficult as participants pursued personal interest rather than common good. The rules should limit the drafters' eligibility for public office in the new constitutional dispensation. The drafting should take place during times of political uncertainty, for example at the end of an election cycle.

Mitigating ethnic tensions

There is general risk in multiethnic societies that constitutional review could lead to ethnic polarisation undermining the legitimacy of the draft. The review process must be designed to mitigate ethnic tensions and to avoid possibility of capture along ethnic lines. Political conflict can engender ethnic violence. Voters responded to appeals by their leaders during the referendum. The risk of heightening ethnic tensions is a significant cost of highly participatory processes such as elections and referenda.

Production of a coherent design

The number of participants and the structure of the drafting choices can affect the coherence of the draft. The Kenyan process faced logistical difficulties due to the large number of drafters and need to bargain to accommodate interests that were fundamentally at odds. The Review Commission was paralysed by political and personal struggles. A negotiated process has the potential to produce an internally inconsistent document. While the review process was largely motivated by the need to curb the powers of the presidency, the draft Constitution subjected to referendum did not offer any checks on the presidential powers. The Committee of Experts has the potential to produce a coherent Draft as it made up of few drafters who will be accountable for the Draft Constitution.

Dynamism of political environments

There is a possibility of quick changes in the political environment. The review process should aim at creating generally applicable incentives rather than mitigate the influence of a particular person, party or group. Political change can also shift ethnic alliances. The review process should be insulated by changes in political leadership.

Proposals on resolving the contentious issues and the role of the Committee of Experts

The Committee of Experts is collecting views on resolution of contentious issues and should be proactive in seeking resolution. The mandate of the Committee includes commissioning studies on the contentious issues with a view to suggesting how to resolve them. For example, the Committee should develop and present scenarios on the Executive and give suggestions on the best model for Kenya given the social, political and economic circumstances.

The Committee will present its proposals on the contentious issues to the Parliamentary Committee on Constitution Review Process and subsequently to Parliament. The issues that will not be agreed upon by the Committee will be resolved by Parliament. MPs must be monitored by the public to ensure they facilitate realisation of the new Constitution in the shortest time possible.

Without external influence, the Government has not demonstrated any political will to complete the review process. Most politicians have put their personal and political selfish interests before the interest of the nation thereby capturing and paralysing the review process. The public should build a constituency outside the politicians essentially made up of the civil society and religious groups that will drive the reform agenda in public interest. KN

The writer is an advocate of the High Court of Kenya

Going down the drain

Are we a failed State?

It is not a new accusation. Due to the morass that we perpetually continue to find ourselves in, questions are increasingly being asked about our legitimacy as an independent and sovereign nation. But how far down have we gone and can we get back up on our bootstraps as soon as possible and move on?

By Kwamboka Mogaka

Failed state can be defined as a condition of state collapse where the state is unable to perform its basic functions and does not reproduce the conditions for its own existence. Failed state denotes a state perceived as malfunctioning in the basic conditions and responsibilities of a sovereign government. This may include loss of physical control of territory and the monopoly or legitimacy to use physical force; erosion legitimate authority to make collective decisions; an inability to provide reasonable public service and an inability to interact as full member of the international community with other states.

Real development of mere PR?

The characteristics of a failing state include a weak central government with little control over its territory, wide spread corruption and criminality, non provision of public service, refugees and involuntary movement of populations and sharp economic decline. The loss of legitimate use of physical force by a state can be precipitated by dominant presence of warlords and paramilitary groups. A state can be considered ineffective where it has nominal military or police control over its territory and is unable to enforce laws uniformly due to high crime rates, extreme political corruption, extensive informal market, impenetrable bureaucracy, judicial ineffectiveness, and military interference in politics.

Characteristics of a failed State

Some economic, political and social indicators have been identified as parameters for measuring a failed state. These include:

Economic Indicators

a) Uneven political development. There is real or perceived inequality along ethnic, political, racial or other lines in education, jobs and economic status. This can be determined through assessment of poverty levels, infant mortality rates and education levels among different demographic groups. The 2007 General Election and the aftermath is an indication of the ethnic polarisation in Kenya and a perception that some ethnic groups have benefited from government resources unfairly due to their closeness with the Government. The massive displacement of people in the Rift Valley was partly fuelled by the perception that some communities were settled in the region to the exclusion and detriment of local communities.

b) Sharp or severe economic down turn. This is measured by a progressive assessment

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of economic decline of the society. A sudden drop in commodity prices, trade revenue, foreign investments or debt repayments, collapse or devaluation of the national currency and a growth of hidden economies. The economic decline was precipitated by the post election violence leading to stagnation of the economy with the projected growth at 2 – 3% for 2009. In 2008, the economy grew at 1.7%. The prices of basic commodities are high in Kenya due to high rates of inflation and shortages of food and water.

Political indicators

a) Criminalisation and delegitimation of the State. Endemic corruption or profiteering by the ruling elite and resistance to transparency, accountability and political representation has led to loss of popular confidence in state institutions and processes. Despite establishing mechanisms to fight corruption, Kenya has performed dismally in detection and prosecution of high end corruption. This is a demonstration of lack of political will to fight corruption and official propagation of impunity.

b) Deterioration of public service. The disappearance of basic state functions that serve the people including failure to protect citizens from terrorism and violence and to provide essential services, such as health, education, sanitation, public transport use of state apparatus for agencies that serve the ruling elite, such as security services, Central Bank, diplomatic service, customs and tax collection agencies. There are reports by the Kenya National Commission on Human Rights and the UN Special Rapporteur on Extra Judicial Killings which have shown that many Kenyans have lost their lives in the hands of the police. Provision of security is a primary duty of the State.

c) Widespread violation of human rights. The indicators include the emergence of authoritarian, dictatorial or military rule in which constitutional and democratic institutions and processes are suspended or manipulated, outbreaks of politically inspired violence against innocent civilians, abuse of political, civil, social and economic rights. There have been reports of violations by police squads resulting in deaths. The post election violence is an example of politically instigated violence against innocent victims.

d) Security apparatus. The failure by the security apparatus is evidenced by rise of vigilante groups and the emergence of security forces that operate with impunity, emergence of state supported militias that terrorise political opponents, and emergence of rival militias in an armed struggle or protracted violent campaigns against security forces. There has been gradual rise in the presence and influence of Mungiki and other vigilante groups thereby compromising state security in rural areas and urban slums.

e) Rise of factionalised elites. The indicators are the fragmentation of ruling elite and state institutions along group lines. The call by the Orange Democratic Party that power sharing must include the ranks of the civil service was an attempt to divide provision of public service along partisan lines.

f) Intervention of other states or external factors. Parameters include military engagement in the internal affairs of the state at risk by outside states, identity groups or entities that affect the internal balance of power or resolution of conflict, intervention by donors where there is overdependence on foreign aid and peace keeping missions.

Social indicators

a) Demographic pressures. The indicators include high population density relative to food supply and other resources necessary to sustain life, pressure from population settlement patterns and physical settings, including border disputes, ownership or occupancy of land, access to transportation outlets, control of religious or historical sites and proximity to environmental hazards. Environmental mismanagement over decades in Kenya has been blamed for the shortages of food and water and for the climate change. In the past, there have been skirmishes between communities living in fragile land in the arid areas over water and pasture.

b) Mass movement of refugees and internally displaced persons. The indicators are forced uprooting of large communities as a result of random or targeted violence or repression, causing food shortages, disease, lack of clean water, land competition, and turmoil spiralling into humanitarian and security problems. The Government has demonstrated lack of

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political will to resettle the persons displaced during the post election violence and to seek solutions to the underlying causes.

c) Legacy of vengeance seeking group over historical grievances. Such vengeance is motivated by recent or past injustices; atrocities committed with impunity against groups by state authorities or singling out of groups by dominant groups for persecution or repression, institutionalised political exclusion. The recently set up of Truth Justice and Reconciliation Commission may assist in dealing with historical injustices that were blamed for the violence in 2008. Its mandate covers the period from 12th December, 1963 to 28th February, 2008. Whereas the Cabinet resolved that its mandate be extended to trial of post election violence suspects, the Commission does not have prosecutorial capacity. Truth Commissions by their nature do not prosecute suspected criminals but have the power to make recommendations.

d) Chronic and sustained human flight. This is evidenced by brain drain of professionals, intellectuals and political dissidents and voluntary emigration of the middle class.

Evaluating Kenya's institutions on the parameters

Judiciary

The primary function of the Judiciary is to resolve disputes between private citizens or between the citizens and the Government. The judiciary has failed to be accountable and responsive to the needs of Kenyans resulting in massive delays in determination of cases. The removal and recruitment procedures for judges are not open and transparent to public scrutiny. Further and over the years, case back log of more than 800, 000 cases have accumulated in our courts. Lack of faith in expeditious dispensation of justice by the judiciary has contributed to vigilantism and violent resolution of disputes.

After the 2007 General Elections and the subsequent dispute over the presidential results, the Orange Democratic Movement stated that they would not refer the disputes to the High Court as they did not trust its capacity to arbitrate the election dispute and grant a fair outcome. The appointment procedures for judges of the High Court were cited as the major contributing factor to this view. The diminished faith by the public in the courts is a hallmark of a failing institution which is intended to protect the rights of the citizenry.

How sustainable are our country's finances?

Executive

In the aftermath of the violence in 2007, major reforms were outlined in the Kofi Annan mediation talks to put Kenya back to the path of constitutionalism and rule of law and restore public faith in state institutions. The Executive was expected to take a lead role but the reform agenda seems to have stalled. The implementation of the Commission of Inquiry on Post Election Violence report has been shelved by the Cabinet.

Six of the suspects listed in the report are members of the Cabinet and the requirement that the Cabinet approves the report amounted to an accused person presiding over his own cause. By rejecting the report, the Cabinet has denied the victims of the violence any avenues for justice as our courts have been deemed incapable of carrying out prosecution of international crimes. The Executive has therefore failed to provide leadership on reforms. Further, the Executive has shown little will in facilitating the realisation of a new Constitution. There is credible evidence of extra judicial killings by the police.

A Task Force to recommend reforms to the police was appointed and it's due to submit its report. We hope the Government will be willing to move with speed and implement the reforms in a necessary but at present dysfunctional police department. The Attorney General is a member of the Executive, whose powers include ordering investigations by the police and initiating prosecution. The office is a symbol of impunity and is in dire need of urgent reforms to ensure efficient and effectiveness in prosecutions.

Legislature

Parliament has asserted its independence since the establishment of the Parliamentary Service Commission in 2001. It has completed the redrafting of the

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Standing Orders which are currently in use. MPs are accused of unilaterally increasing their pay and pursuing narrow political interests. However, they have acted as a check on the Executive as the President and the Prime Minister have had to persuade MPs to vote for important reform Bills. MPS should be encouraged to initiate reform measures intended to benefit the public so as to increase the pace of reform and fast track the pace of legislation.

Measures to restore Kenya as a rule of Law State

Judicial Reforms

The judiciary must be reformed to restore public confidence in the judiciary. Reform measures must enhance operational effectiveness and efficient of the institutions, for example through computerisation ion recording of court proceedings, provision of equipment to judicial officers in remote outposts and setting up of a performance contracting scheme, including a reward scheme based on merit. The scheme of service for magistrates should be revised to ensure competent advocates are attracted to the judiciary.

The report of the task force on the judiciary formed by the Minister for Justice, National Cohesion and Constitutional Affairs has been submitted to the Minister and the Chief Justice for implementation. The report seeks to increase in number of Judges at the High Court and Court of Appeal. The High Court judges will be increased from 70 to 120m and the Court of Appeal Judges from 14 to 30. Whereas this is laudable, most judicial services are delivered by magistrates as the High Court is only located in major towns. There is therefore need to increase the numbers of magistrates and revise their scheme of service.

The report recommended the strengthening representation at the Judicial Service Commission by including representation from Law Society of Kenya, Kenya Private Sector Alliance, Kenya Judges and Magistrates Association and establishment of a full time secretariat. The Commission must implement performance contracting for judges and magistrates. There is no accountability mechanism for performance by judges. The recruitment of judges should be through advertisement of positions thereby enhancing competition. The courts will be required to sit for longer hours to clear the case backlog.

Electoral Reforms

A weak electoral system was the cause of the crisis in 2007. The Independent Interim Electoral Commission has been constituted with the mandate of reforming and strengthening Kenya's electoral system. The Commission's litmus test will be the Bomachoge and Shinyalu By-Elections set to be held towards the end of August, 2009. Part of the mandate of the Commission is to undertake fresh registration of voters and clean up the voters register to avoid rigging and revise the legal framework on elections.

Other reforms required include ensuring the independence of the commissioners in organising the elections and facilitation of utilisation of technology in election management. This will eliminate unnecessary human interface in voting and ensure efficient tallying of results. The Commission must consider reforming the electoral system. The First Past the Post system has been blamed for violence as the winner takes all. It has also eliminates representation of marginalised groups. A system which adopts Proportional Representation should be adopted to increase representation by marginalised groups including women in Parliament. The necessary electoral reforms were outlined in the Independent Review Commission chaired by Justice Johann Kriegler which led to the disbandment of the Electoral Commission of Kenya.

Executive

Constitutional reforms must be implemented to ensure accountability of the Executive. The executive, just like in the 1980s and early 1990s has failed to deliver and be accountable to the public and it is ripe for reforms. Indeed, the initial motivation for constitutional reforms in Kenya was accountability by the Executive. Some of the reform measures include establishment of constitutional commissions with powers binding on the Executive. The only accountability mechanism at present is elections every five years. A parliamentary system has suitable accountability mechanisms as the Executive reports to Parliament to ensure the Executive is responsive to the needs of the public. The office of Attorney General must be reformed to ensure effectiveness and fight impunity. The police reforms must also be urgently implemented to reinvigorate the department.

Conclusion

Kenya cannot be deemed a failed state. However, it has fundamental challenges which if not redressed will ensure its slide into a fail state. The reforms on the judiciary, the office of the Attorney General, the police and the electoral laws, which are part of the Agenda Four must be implemented carefully but urgently to ensure the stability of the country beyond the next elections slated for 2012. Crisis precipitated by the holding of elections provide a window for sustained instability in a state. Kenya must undertake institutional reforms to shield it from such instability. KN

The writer is an activist based in Nairobi.

The Mau forest nightmare

Like an echo from the dense bowels of a forest whose source is hard to trace, the controversy over the Mau Forest, which has become a national crisis, begun like an isolated noise by an aggrieved group claiming their land rights. We try to unearth some historical facts about this looming environmental catastrophe.

By Maina Kimondo

Few Kenyans may remember that the national wrangle that has tested the fabric of the Coalition Government, and is on the lips of every Kenyan, is traceable back to the late 1980s when the small Ogiek ethnic community persistently started petitioning the Government to settle them on their ancestral land – the Mau Forest.

The Ogiek, part of the larger Kalenjin community, had always claimed full recognition as an autonomous community with a formally demarcated administrative area that would cast away their generalization as 'hunters and gatherers'. Former President Daniel arap Moi, then presiding over the then single party Kanu government, heeded the call of the Ogiek to be settled permanently.

The creation of a desert in Kenya is now a reality.

Former Environment Minister Mr Francis Nyenze who would later oversee some of the forest demarcation when he took office in 1999, said in recent interview that the decision to excise a part of the Mau to settle the Ogiek had been reached by the Cabinet. "It was a Cabinet decision reached sometime in late 1980s and implemented from then until around 2001," Nyenze said recently.

But it never went the way it had been planned nor was it for the benefit of the Ogiek. Over ten years of continuous implementation of settlement into forest land would benefit 'politically correct' people, said Nyenze. The former Minister said: "The initial plan to settle the Ogiek would have taken just a small fraction of the Mau forest. They were to be provided with social amenities like schools, hospitals, water

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and other infrastructure."
Government land surveyors then confirmed that the Mau Forest comprised covered over 400,000 hectares. The portion that would be reserved for the Ogiek would take less than 10,000 hectares and would be located on edges that did not affect water catchment zones.

Mr Paul Ndung'u, who chaired the famous commission on irregular allocation of public land that came up with the famous Ndung'u Land Report, would later report that massive corruption and illegal allocation overtook the Ogiek settlement project.
The Ndung'u report that was never made public exposed glaring irregularities that took place during the allocation. What had been meant for the Ogiek resettlement became a land-grabbing exercise by politically connected individuals.

Illegal
Politicians, senior administration officials, top civil servants, high ranking members of the armed forces became some of the main beneficiaries of the illegal allocations.
In a recent interview carried in the Daily Nation, Ndung'u said: "Instead of carving out say, 2000 hectares, those handling the exercise would excision 10,000 hectares and allocate the extra land to themselves and other influential individuals in Government."

The Ndung'u Commission found out that apart from politicians, hundreds of other people from elsewhere were allocated land in the forest. Most of them embarked on tea-growing since the land is suitable for tea.

In the meantime, the Ogiek lost out and were never resettled on the initially ear-marked portion of the forest. Later efforts would be made to settle them on other forest lands, like one carved out of Olenguruone, Nakuru District, which only a few would grudgingly accept. The verdict of the Ndung'u report was that all the portions of land allocated in Mau Forest were excised but were never de-gazetted from forest land to farmlands as is the law.

"The allocations were therefore illegal and remain illegal since lawful procedure was overlooked, it does not matter who gave the directive, including the President, or that the anomaly was belatedly corrected in 2001," Ndung'u said in the recent interview.
Main settlements in the Mau, cited by the Ndung'u Commission as those established without de-gazetting forest status, include Kiptagich settlement, Saino on the South western side, Ndoinet, Tinet and to the Eastern Side, Sururu and Likia.

The report also stated that in the 1990s, when land buying companies and group ranches were ordered to sub-divide land among members, a few group ranches whose land bordered the Mau in Narok and Transmara sides extended boundaries illegally into forest land and sub-divided it. Some later sold what was forest land to ignorant buyers, mainly members of the Kipsigis community. Most of the ordinary settlers in the Mau forest land are members of the Kipsigis community who bought it from Maasai group ranch owners.

Facts
Former Commissioner of Lands Mr Sammy Mwaita, now Baringo Central MP, said in an interview carried in The Sunday Standard, that all excised Mau Forest Land was only de-gazetted in 2001 when he took over office. Mwaita, himself a beneficiary owning land in the Mau, was quoted saying: "Almost everybody who has land in the Mau got it before it was de-gazetted."

According to a report tabled in Parliament in July by Prime Minister Raila Odinga, main political beneficiaries of the Mau forest land include former President Moi, through tea farms he owns in the area and politicians, provincial administrators and other influential individuals closely connected to him. Some are close members of his family. Names of the key beneficiaries were contained

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in a report compiled by a task force chaired by Prof Fredrick Owino and appointed by Raila to gather facts on the excised forest land ahead of the planned eviction of settlers.

The report by the task force stated that 25 well connected people were allocated at least 500 hectares of the Mau forest land. Among those allocated more than 20 hectares each, the report said, were Mr Gideon Moi (Moi's son and former Baringo Central MP), Sammy Mwaita (current Baringo Central MP), Kuresoi MP and former Permanent Secretary in the Office of the President Mr Zakayo Cheruiyot, former private secretary to President Moi Mr Joshua Kulei, Mr Hosea Kiplagat, a former Co-operative Bank Chairman and nephew to Moi, former State House Comptroller Mr John Lokorio and former nominated MP Mr Mark Too.

Ruto

Many have denied irregular allocation saying they got the land legally while some, like Gideon Moi, have denied owning land in the forest zone. Other beneficiaries who received 7000 hectares of forest land combined are listed as company names whose directors are hard to trace at the Registrar of Companies. Kelewa Enterprises, Kapkembu Tea Factory, Kaptagat Tea Estates and Ololarusi Investment Farm are some of the large land owners, whose directors' names, however, are not listed at the Registrar of Companies.

Apart from the big owners, the task force report indicates that 2,500 families have settled in Mau forest land, most of them who bought land from original allottees.

A joint presentation by UNDP, Kenya Wildlife Service, Kenya Forests Working Group and Ewaso Nyiro South Development Authority, made at the beginning of August, painted the grimmest picture of the deforestation. The presentation titled, "Mau Complex Under Siege: Values and Threats" revealed a deteriorating trend of a fast diminishing forest complex.

Of Mau's 400,000 hectares of gazetted forest land, 100,000 have been settled on. Environment Minister John Michuki, however, said recently that only 1,962 hold genuine title deeds while the rest are squatters hoping to be compensated. As the issue snowballs into an indecision matrix for the Government, it has also developed into a political powder keg that on-and-off has threatened to explode in the face of the coalition government partners.

Agriculture Minister William Ruto, who has since mellowed his combative approach in defence of the Mau settlers, had earlier locked horns with Prime Minister Raila Odinga who has taken a stand that the settlers must leave forest land. MPs mainly from the Kalenjin community have been taking on Raila and pressuring him to speak in favour of compensation for 'all' settlers on the Mau land.

The political fallout among erstwhile allies, the Kalenjin MPs led by Ruto and Raila has lately been illustrated by the prime minister's visits into Rift Valley where local MPs have shunned him. On August 16, Raila visited Konoin constituency and held a public meeting that was boycotted by local MP Julius Kones. Regional MPs Charles Keter and Isaac Ruto later joined

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Kones to criticise Raila, saying he was undermining them by going to their areas uninvited.

Complex

It remains to be seen whether the government resettlement process, will that plans to compensate 'genuine' settlers, will take place now that Ruto and local MPs have told the affected farmers to agree to move. Apart from the Mau issue rocking the political scene, one of the most authoritative environmental impact reports shows that the leading of Kenya's five main water towers is dying as the Government dithers and politicians wrangle.

A joint presentation by UNDP, Kenya Wildlife Service, Kenya Forests Working Group and Ewaso Nyiro South Development Authority, made at the beginning of August, painted the grimmest picture of the deforestation. The presentation titled, "Mau Complex Under Siege: Values and Threats" revealed a deteriorating trend of a fast diminishing forest complex.

The report explained that the Mau forest, as big as Mt Kenya and the Aberdares combined, is the largest forest cover in Kenya. It forms all the upper catchments that include the main rivers west of the Rift Valley. They are Nzoia, Yala, Nyando, Sondu Miriu and Mara all of which drain into Lake Victoria. Others are Kerio, Ewaso Ngiro, Njoro, Nderit, Makalia and Naishi which drain into Rift Valley lakes.

The document highlighted the international nature of the water tower. Three of the lakes fed by its waters cross or touch borders - Lake Victoria, Lake Turkana and Lake Natron. The report demonstrated the hydro-power potential of the Mau rivers, citing key among them, Sondu Miriu hydro power project. It linked the complex to tourism since its rivers feed the world famous Maasai Mara, Lake Nakuru and other Rift Valley Lakes among other key tourist attraction sites. Others are Kakamega Forest, Lake Natron, Serengeti National Park of Tanzania, Kerio Valley national reserve and Lake Kamnorok National Reserve (the latter has dried up).

Ecosystem

Above all, Mau is key to millions of people's livelihoods. "Some five million people live in sub-locations crossed by rivers originating in the Mau complex. The complex provides environmental conditions essential to crop production, favourable micro climate conditions as well as many products. Grazing lands and farmlands lie on the path of Mau succulence, "read part of the report. The report concluded that in 2001, above other excisions made on the forest land, the government excised another 67,000 hectares. This affected Eastern Mau complex and South West Mau Reserve where large tracts of thick forest cover were turned into farms.

The sustained interference with the forest ecosystem tremendously affected the catchments of Lake Nakuru whose effect has been seen with its receding shoreline. These effects extend to as far as Njoro where boreholes are drying up and rivers becoming seasonal, the report notes. The report, as have done others concerned with the environment, called for strict legal safeguards against environmental destruction.

The Ndung'u report, were it to be implemented, creates the basis for the strongest point that could safeguard the environment.

The Ndung'u report, which has been left in the shelves, calls for drastic government action to settle landless squatters in government land or in lands owned by landlords who took them from public land leaving communities landless. Such communities, it they are to be settled, would reduce the risk of having them invade environmental preserves like the Mau. But the buck stops with the Government. KN

The writer works for a leading daily newspaper in Nairobi.

THE KONRAD ADENAUER FOUNDATION IN KENYA

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

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

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

Our aims

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

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

Our programmes

Among other activities we currently support:

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

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

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