

KatibaNews

Towards a new constitutional dispensation in Kenya

DECEMBER 2009

Issue NO. 12.09

So near, yet so far

- * **Losing the Presidency**
- * **The long road to harmony**
- * **What consensus!**

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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;
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- Advancing the training of journalists in specialised areas of communication;
- Create a resource centre for use by

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 - 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.

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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
World Wide Web

Art Direction & Design
Khafre Graphics
khafregraphics@gmail.com

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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



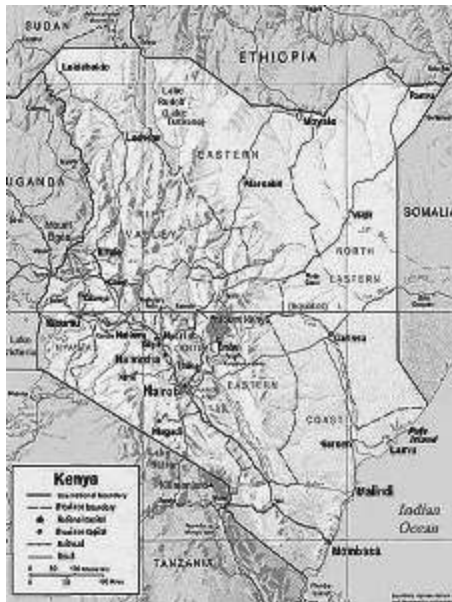
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It is now or never. Period!

It is more than two decades now and the song called the *Constitution review process* continues. Well, we all love music but too much of a good thing, as our radio stations can attest to the fact, can be outright annoying. Listeners will switch off to other stations when they hear the same song or songs played day in, day out.

Kenyans are known for their resilience, but I think it is a high time we all started cultivating a spirit of impatience; nay, righteous anger. It is our so called resilience that has driven this country to the dogs economically, politically and socially. It is our tolerance with mediocrity, outright abuse and impunity from our leaders that has seen us stagnate when countries that were hitherto a laughing stock rise up from their ashes and have now become objects of envy to a people who blew their trumpets as the regional giants.



So, what am I going on about? While the cliché goes that Rome was not built in a day, Kenyans dithering with enacting a new Constitution cannot be termed anything but extreme sloppiness. We started by blaming former President Daniel arap Moi of being afflicted with the anti-change malaise. Come 2002 when this country should have changed forever but our leaders, even those who we thought would be our saviours, turned their back on us and continued with usual business of misgovernance.

In their campaigns to ouster Moi and his crop, the then mish mash opposition, the National Rainbow Coalition (Narc), could not have got a better hook. They promised that a new

Constitution would be in place in 100 days after taking over power. The new kids on the block did take over power alright, but what happened thereafter is what shattered dreams are made of. As usual, the 'resilient' Kenyans we are just complained until the cows came back home. Do not even mention what happened after the 2007 general election.

But everything, yes everything, must come to an end. May be out of sheer exhaustion or out of the effectiveness of the non-political Interim Independent....., we are now standing at the threshold of a brave new world. Have we stopped to think about the mental energies and manhours that have been wasted fighting and haggling over this all important document? If we had got over with this business and continued thinking about other important issues, especially the economy, we would now be talking about Vision 2020, for once fast tracking a national goal rather than postponing its realisation.

This simply means that Kenyans must decide what they want by taking over the destiny of the nation in their hands, rather than waiting for politicians to lead the way. We should have woken up to the fact that politicians are an extremely selfish breed that is wont to hijack any and all agenda to suit their political designs.

If we allow ourselves to fall prey to the whims of politicians this time round, we should rest our case and let ourselves be driven to the doldrums. If we let ourselves to be taken down the garden path, we should simply keep our peace and continue with our miserable lives.

Editor

So near, yet so far

We have come this far in our quest for a new Constitution. For once, the Mr Nzamba Kitonga-led initiative looks like the one with the greatest chances of success. Were it not for the politicians, Kenyans would be sitting pretty knowing that one of the greatest national challenges is almost overcome. But, the road ahead is still fraught with hurdles that need exceptional genius to overcome. We revisit the current roadmap and analyse the dynamics that are informing the process going forward.

By Maina Kimondo

According to observers, the road travelled thus far by the Harmonised Draft Constitution since it was unveiled to the public on November 17, 2009 may have been the least challenging section of the multi-phased constitutional review process.

Indeed, the main political players in the coalition Government, the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) gave an indicator of the rough waters awaiting the harmonized draft in the remaining phases as they took extreme positions during the 30-day public debate period, nearly derailing the process.

Despite the political tug-of-war that stretched the public debate to the edge of incompatible disagreements, the phase was wrapped up, but not without indicators that political interests will await the process further down the road. The process now moves into a phase of intense work by the Committee of Experts (CoE).

The CoE, after the closure of the 30-day period on December 17, requires 21 days to work to incorporate the public views in the harmonized draft. This phase has massive logistical implications for the committee given that members of the public, according to CoE chairman, gave over one million views.



President Kibaki and Prime Minister Raila Odinga with the Committee of Experts on Constitution members.

After this task, the CoE will hand the process to the Parliamentary Select Committee (PSC) on Constitutional Review. This phase involves deliberations and consensus building on contentious issues. But it is also the phase that is expected to bring out competing political interests carried over from public debate. The PSC is made up of members from both PNU and ODM who have already played out their opposing views in public.

Separation of powers

ODM prefers a Parliamentary system with an executive Prime Minister while PNU sees a Presidential system, modeled on the Tanzanian way, as the best. Tanzania has a strong President and a PM with less power. Here the president hires and fires the PM.

The PSC on the Constitution has 14 members from PNU and its affiliates, while ODM and its affiliates has 13 members. But notably in PSC are also members of the Parliamentary Caucus for reforms under the chairmanship of Garsen MP, Danson Mungatana, which prefers a hybrid system with clear separation of powers.

Apart from Mungatana, the caucus has about three self-declared members in PSC, and other members cannot be ruled out from sharing the caucus' views. Just a few days before the lapse of the 30-day period, the caucus invited all MPs to a two-day retreat at Hotel La Mada, Nairobi to bridge the gaps in the harmonised draft. During the retreat, more than 15 MPs endorsed the hybrid system. Said Mungatana, "The

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problems we have had in this country are because of the mixing of powers of the State and those of government."

Another challenge likely to affect the PSC is likely to come from the Grand Coalition Management Committee, which draws its membership from ODM and PNU. Eight Ministers, who also sit in the PSC, are in this committee. Though the committee is yet to agree on the functions of the president and the PM, it is in agreement that the hybrid system should be adopted. Cabinet ministers sitting on the committee include Musalia Mudavadi, Uhuru Kenyatta, Amason Kingi, Charity Ngilu, William Ruto, Moses Wetangula, Beth Mugo, Mutula Kilonzo, Sam Ongeru and James Orenge.

During the public debate phase, the management committee, after four consecutive meetings, agreed to support the hybrid system that would see the President elected via universal adult suffrage and the PM appointed from the political party with the biggest majority in parliament. The members, however, did not agree on the functions of the President and the PM and on who appoints the cabinet.

Public submissions

Other contentious issues within the committee include whether or not to have a bicameral parliament. The harmonized draft Constitution proposes a National Assembly and the Senate to constitute Parliament. But the public's views will be of great importance too, since as the CoE chairman stated, his committee's report to Parliament and the consensus by PSC would be based on general trends established from public submissions.

"For example, they (PSC) cannot say the consensus we have received is that Kenyans want a military dictatorship," said Kitonga. If the PSC reaches an agreement on the harmonized draft, the CoE shall revise the draft taking into consideration the achieved consensus. The CoE will then be required by law to submit the revised draft to the PSC within 21 days. PSC will then be required to table the draft in Parliament for debate and approval within seven days.

Parliament may approve the revised draft as tabled or propose some amendments, in which case the amendments must sail through with a vote of at least 145 MPs. The National Assembly shall then, within 14 days, submit the draft Constitution to the Attorney General for publication. But

Parliament may seek expert opinion on any issue in the draft before submission to the AG.

The AG shall, within 30 days after receipt of the draft Constitution from Parliament, publish the draft. The AG shall not effect any alteration to the draft Constitution, except for editorial purposes in consultation with the PSC. After publication, the baton will then be passed to the Interim Independent Electoral Commission (IIEC) which shall, within 60 days of publication of the draft, hold a referendum on the proposed Constitution. In the meantime, the CoE shall facilitate civic education on the proposed law for a period of 30 days.

The IIEC will frame the question for the referendum in consultation with PSC, having a Yes or No vote. Should the draft be ratified in the referendum, the President shall then proclaim the proposed Constitution the supreme law of the land.

Transition

However, the harmonised draft Constitution shall not send Parliament and the Executive home, and neither shall it immediately negate the existing Constitution. Though some sections would be implemented immediately after proclamation, the President, Cabinet as well as members of parliament

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All eyes are on the August house

Interim

Losing the Presidency!

As our politicians are wont to, they have turned the quest for a new Constitution into a battle for power. This is a rather myopic way of doing business for the 35 million plus Kenyans who have employed them as custodians of the country's future. Unfortunately, that is the reality we are living in even at this critical moment when it's do or die in this unending search for a new constitutional dispensation. We break down the proposed roles of the President and Prime Minister for you to decide who will yield the big stick and how this is playing out in the political arena.

By Macharia Nderitu

Debate on the Harmonised Draft in the political class has centred on the offices of the Prime Minister and the President. The two offices will share Executive power, with the President being the Head of State and the PM being the Head of Government. Under the current Constitution, Executive authority is vested in the President. Though a principal in the Grand Coalition, the PM is a delegate of the President.

The Harmonised Draft delineates the constitutional roles for the President and PM. The two popular systems of government are the Presidential system where a President is elected directly through adult suffrage. The President is in charge of the Executive, which is totally delinked from Parliament. Members of the Cabinet are appointed from persons who are not MPs. An example of this system is found in the United States of America.

The other system is Parliamentary where the leader of the party with the largest number of MPs becomes the chief executive. Such an appointee may become the President or the PM of the State. Parliament and the party can remove the PM or President. When the PM is removed by Parliament through a vote of no confidence, fresh parliamentary elections are held whereas where the party removes the PM, he is replaced by

another party official without the necessity of elections. This system operates in the United Kingdom, India and South Africa.

The Harmonised Draft proposes a hybrid system where the President will be directly elected by the people while the PM will be the leader of the party with the greatest number of MPs in Parliament. A similar system is adopted in France, where the PM is appointed by a directly appointed President. The structure of the Executive has generated a lot of debate.

Proposals

State President

The Harmonised Draft provides that Executive authority shall be exercised in accordance with the Constitution by or on the authority of the State President, the PM and the Cabinet. The Draft provides that the President shall exercise the following functions:

- a. Head of State. This is a term used to refer to the individual or collective office that serves as the chief public representative of the Republic. His or her role includes personifying the continuity and legitimacy of the State and exercising the functions



At the helm: President Mwai Kibaki

- and duties granted in the Constitution and laws.
- b. Commander-in-Chief of the armed forces. This refers to the military competencies that are reposed in the Executive.
- c. Appoint high commissioners and ambassadors, diplomatic and consular representatives with the approval of Parliament.
- d. Receive foreign diplomatic and consular representatives.
- e. Confer honours in the name of the people and the Republic.
- f. Sign instruments of consent of the Republic to be bound by treaties and international agreements.

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- g. Declare war and a state of emergency with approval of the Cabinet.
- h. Appoint commissions of inquiry. The reports submitted by the commissions of inquiry shall be laid before Parliament within 21 days of receipt of the report by the President.
- i. Submit a report to Parliament on progress made in fulfilling international state obligations
- j. The President may propose legislation and refer it to the Cabinet to approve its introduction to the National Assembly.
- k. Chair the National Security Council.
- l. Appoint the Attorney General and the Director of Public Prosecutions with the approval of the National Assembly.
- m. The President is a symbol of national unity.
- n. Address the opening of each newly elected House of Parliament, address Parliament in a special gathering of the House once a year, address the nation once a year and publish in the Gazette details and measures implemented to achieve national values, principles and goals.
- o. Appoint and dismiss in accordance with the provisions of this Constitution, the Cabinet, including the PM, Deputy PM and ministers, deputy ministers, Judges of superior courts, and other state officers appointed by the President.

Tuesday immediately preceding 21 days before the expiry of the term of the President. The qualifications for nomination to vie for election as President are that the candidate must be a citizen by birth and qualified to vie in elections of the National Assembly. He or she shall be nominated by 100, 000 voters including 5, 000 voters from each region.

All voters in the parliamentary elections will be eligible to vote in the presidential elections. After counting of votes at the polling station, the Independent Electoral and Boundaries Commission (IEBC) shall count and declare the results. The winner must garner more than half of all votes cast and 25 per cent votes in majority of the regions. If there is no outright winner, fresh elections shall be held within 30 days where the candidates shall be the candidate with the greatest number of votes and the candidate with the second greatest number of votes.

Results of the election shall be declared within seven days by the chairman of the IEBC and delivered to the Chief Justice and the President. Any person who wishes to challenge the results may file an electoral petition in the



Prime Minister Raila Odinga

Constitutional Court within seven days of declaration of the results. The court shall hear and determine the petition within seven days, and its decision shall be final. If the election is invalidated, a fresh election shall be held within 60 days.

The President shall be sworn in by the Chief Justice or the Deputy Chief Justice in public on the first Tuesday following the 14th day after the date of declaration of the results. The term of the President shall be five years from the date of assumption of office. A person shall not hold office as President for more than two terms. Service for a period of two and a half years shall be deemed to be a full term.

An MP, supported by a quarter of members of the National Assembly may move a motion to investigate the President's physical and mental capacity. Such motion must be supported by half of the members. The Speaker shall inform the Chief Justice of the decision to enable him appoint a tribunal.

The President may be impeached for various reasons including a serious breach of the Constitution or the law, where there is a reason to believe that the President has committed a crime under national or international law, and for gross misconduct. If the motion is supported by two-thirds of the members of the National Assembly, the Senate shall convene in seven days to hear the charges made against the President.

The Senate may constitute a special committee to investigate the allegations. Such committee shall report to the Senate within 10 days. If two-thirds of the members of the Senate approve the report, the President shall cease to hold office.

If a vacancy occurs in the office of the President, the deputy President

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Election of the President shall be by direct adult suffrage through secret ballot. Elections shall be held on

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shall assume office. When the period of the term remaining is more than two-and-a-half years, fresh elections shall be held within 60 days. But if the term is less than two-and-a-half years, the deputy President shall complete the remaining term. Where the deputy is unable to act or the seat is vacant, the Speaker of the National Assembly shall act in his stead or if unable, Speaker of the Senate shall act.

The President shall nominate a running mate during the elections, who will then be appointed the deputy President on election. Where there is a vacancy in the office of deputy President, the President shall nominate a candidate for approval by the National Assembly.

Prime Minister

Functions of the PM shall include:

- a. Head of Government. This is the chief officer of the Executive branch of a government, often presiding over a cabinet. In semi-presidential systems, as proposed in the Harmonised Draft, the head of Government will be answerable to both the head of State and Parliament
- b. Nominates deputy PM, ministers and deputy ministers for appointment by the President.
- c. Direct and coordinate the work of ministries and the preparation of legislation, and shall be responsible to Parliament.
- d. Chair and preside over the meetings of the Cabinet.

In the absence of the PM, the deputy PM shall perform the functions of the PM. The PM, who will be appointed by the President, will be a member of the National Assembly who is a leader of the largest

political party or coalition of parties in the National Assembly. Where such a leader is unable to command the confidence of the National Assembly, a member of the National Assembly who is the leader of the second largest party or coalition of parties represented in the National Assembly shall be appointed PM. During the elections, each party shall designate a leader of the party.

Where the above mechanism for appointment fails, the President may recommend the name of a member who in his opinion may be able to command the confidence of the National Assembly. The National Assembly shall confirm the proposed PM within seven days. If the National Assembly fails to confirm the person proposed by the President, the National Assembly may by a vote supported by a majority of members nominate a member of the Assembly for appointment as the PM. Where no person is appointed as PM within 60 days of the first nomination, the National Assembly shall stand dissolved and fresh elections shall be held.

The Prime Minister shall serve for a maximum of two terms. The Cabinet shall be composed of the PM, the deputy PM and 15 to 20 ministers. There shall be 15 to 20 deputy ministers. The PM may include the names of not more than 10 persons who are not MPs but are qualified for election to be appointed ministers. The composition of the Cabinet shall reflect the diversity of Kenya. Persons appointed as ministers but who are not MPs may attend Parliament. Such ministers will not



Attorney General Amos Wako

vote or be remunerated for such attendance.

The President shall dismiss the deputy PM, ministers or deputy ministers on the advice of the PM. The members of the Cabinet shall be collectively and individually responsible to Parliament for exercise of their powers and performance of their functions and for implementation of legislation assigned to them. The Cabinet shall meet at least once a month. The quorum of the Cabinet shall be half of its members. The decisions of the Cabinet shall be in writing.

The National Assembly may pass a vote of no confidence on a member of the Cabinet, supported by half of the members. The motion of no confidence in the PM shall be supported by half of the MPs. If the motion is endorsed, the PM, the deputy PM and the ministers will resign. Where the PM does not resign, the President shall dismiss him or her within seven days.

Secretary to the Cabinet

The PM shall keep the President regularly informed on the general conduct of the government and furnish him or her with any information requested in regard to

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any governmental matter. The PM shall assign responsibility for implementation of legislation. The Secretary to the Cabinet shall be appointed and dismissed by the President on advice of the PM.

The Secretary to the Cabinet shall be in charge of the Cabinet Office, arrange the business and keep minutes of its meetings, convey decisions of the Cabinet to the relevant authorities and perform such other duties as directed. The Secretary shall cease holding office on assumption to office of a new government. There shall be Principal Secretaries in each ministry. The Principal Secretaries shall be nominated by the Public Service Commission and appointed by the President, who may dismiss them on advice of the PM.

The sharing of Executive authority between the President and the PM has been cited as a weak link in the Harmonised Draft, especially if the two officials are elected by different political parties. The President may be unable to fulfill his election pledges where the PM is a member of a different political party.

The political players

The Party of National Unity (PNU) and its coalition partners have expressed support for a system where there is one centre of power whose occupant shall serve as the chief executive. The office holder is directly elected by and is answerable to the electorate. In the 2007 elections, PNU garnered 4.5 million votes for the presidential candidate but the party managed only 43 MPs while Orange Democratic Movement (ODM) with 4.3 million votes had 99 MPs. PNU has argued that past delimitation of constituencies was gerrymandered in areas where the former ruling party, the Kenya African National Union had support.

These regions were inherited by ODM. ODM supports a parliamentary system where the President shares power with the PM. The system proposed in the Harmonised Draft is the entrenchment of the National Accord which was signed by the President and the PM in February, 2008. However, the powers of the PM have been radically expanded at the expense of the presidency.

Beyond vested interests?

Two centres of power in an ethnically polarised nation can be a recipe for instability and chaos. This was evidenced in the Democratic Republic of Congo where there was a power struggle between President Joseph Kasavubu and the PM Patrice Lumumba. The struggle precipitated a military intervention and seizure of power by General Mobutu Sese Seko, who ruled the country dictatorially for more than 30 years. Kenyans may lose faith in democracy where power is exercised by an office whose occupant is not directly elected. The PM will wield more executive powers, have control of the running of the Government and performance of the Cabinet and determine and implement public policy.

Political parties in Kenya are ethnicised, transient and fickle. About 300 political parties had been registered at the Registrar of Societies prior to the enactment of the Political Parties Act. The Registrar of Political Parties, established under the Act, has to date registered about 50 parties. In a parliamentary system, the PM is sourced from a political party. The parties need to be strengthened to ensure they reflect the diversity of Kenya, are de-ethnicised and have appropriate management and structures to promote internal democracy. The public must be engaged in the expanded

importance of the political party in the structure of government.

Body language of the current office holders

The President is yet to state publicly his views on the Harmonised Draft. Given the political overtones that have marked the review process, the requirement that the Draft must be subjected to a referendum and the role that a new Constitution will play in the outcome of the General Election in 2012, the President must ultimately take a stand on the Draft. The PM has been cautious not to influence the course of debate. Politicians want to avoid responsibility in case the Draft is rejected at the referendum.

Lieutenants of the principals, through their political parties and affiliates, have been making public statements on the sections of the Draft that require revision. The debate is expected to take shape once the Harmonised Draft is debated in Parliament and the referendum campaigns start in earnest.

Conclusion

The PM and the Cabinet will be sourced from the majority party in Parliament. If a parliamentary system is to be implemented, it is imperative that political parties be strengthened. A presidential system would work better where there are weak political parties as the fate of the President will be determined by the electorate at the elections. The constitution review process has been driven by the need to check the powers of the Executive.

The Harmonised Draft provides the checks by creating the office of PM, reforming the Judiciary and expanding the powers of Parliament. But the Draft must be clear on the leadership and accountability of the Executive. **KN**



CoE Chair Nzamba Kitonga

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would continue in their offices to finish their terms.

However, constitutional offices like those of judges would be affected. Office holders will be required to make fresh applications and be vetted before being considered. The next general election would be held under the new law and the government that comes in would be constituted under the same.

Says former MP and lawyer Paul Muite: "Constitutions made during peace time are implemented in phases, waiting for some established government offices to run their full term before they are phased out. That is the case with Kenya. But those that are enacted during crises like war maybe implemented immediately and in totality".

By the close of the 30-day debate the CoE had received about a million memoranda and petitions on the draft. Already, the CoE chairman has warned that will be no special favour for any group during the collation of views and in deliberations with the PSC.

"All views presented including by Parliament hold equal weight and none will be given preferential treatment. The Committee of Experts will not be swayed by any interest groups," said Mr Kitonga.

Addressing the media, a day after the close of the debate period, Kitonga said his team would treat equally all the memoranda, including those

from political parties, when they compile the report for the PSC on reform on or before January 8th, 2010.

"The PSC will build consensus in terms of what Kenyans said. What PSC proposes must match what the people told us," said the CoE chairman. According to Kitonga, the CoE

published and distributed six million copies of the Harmonised Draft Constitution in English, Kiswahili and Braille across the country following its publication on November 17, 2009.

PSC members include Uhuru Kenyatta, Martha Karua, Mutula Kilonzo, Moses Wetangula, Danson Mungatana, David Musila, Mwangi Kiunjuri, Peter Munya, Abdikadir Mohamed, Amina Abdallah, Kambi Kazungu, Ekwee Ethuro, and Wilfred Ombui. Others are Jeremiah Kioni, Musalia Mudavadi, Charity Ngilu, William Ruto, Najib Balala, Sally Kosgei, James Orengo, Joseph Nkaissery, Omingo Magara, Isaac Ruto, Ababu Namwamba, Chachu Ganya, Millie Odhiambo and Sofia Abdi.

Though some Kenyans wanted the 30-day period extended, it is could not be done short of Parliament amending the Constitution of Kenya (Review) Act, 2008 that outlines the constitutional roadmap.

"Extension is not possible because we are operating within a strict timeline. The 30 days (period) was not a matter of choice for the committee," said Kitonga.

Political myopism

However, alongside the well laid down road map, political maneuvers are expected to be afoot given the opposite sides the main political parties have taken. But experts have

warned that most MPs have been arguing from the situation of the current coalition government which has shrouded their reasoning for a better future for the country.

'They have been thinking like ODM and PNU instead of focusing on the future and what broad picture the new Constitution will have for Kenya,' said Njeri Kabeberi of Centre for Multiparty Democracy in a media interview.

Examples of short term thinking by politicians were glaring during the public debate phase. PNU, which has its bedrock mainly in the Central Kenya region, made it clear during the public debate that they were banking their hopes on going for the Presidency given the region is populous. Some apparently reason that this may work for the party should it get support from the North Rift which is also vote-rich.

PNU MPs have been crusading for the delimitation of electoral boundaries on the principle of one-man-one vote, a system that would see Central Kenya have more constituencies given its massive population. But the party seemed to have lost hope in this crusade after indications that the Interim Independent Boundaries Review Commission may be guided by geographical features, population, community of interest and infrastructure in its work.

This was what may have informed the party's quest for a presidential system where the President would be elected by universal adult suffrage. On the other hand, ODM prefers a parliamentary system with an executive PM given that the party enjoyed a great following in six out of the country's eight provinces. In a parliamentary system, the party proposes that the PM comes from the party with the majority of Mps.

Churches and NGOs have been exhorting the two sides to see beyond current office holders and to detach from the coalition government mentality which they mistakenly view as a lasting situation.

The long road to harmony

Twenty years have passed and we are still at it. A child born when Kenyans started yearning for a new Constitution in earnest could now as well be in campus. It has been a journey that, to say the least, has been torturous and disappointing. But, Kenyans never say die! We retrace our footsteps back in time for a better understanding of where we are today in this process and try to search for some light in this dark tunnel.

By Dorothy Momanyi

The quest for a new Constitution in Kenya started during the agitation for re-introduction of a multiparty State. The Independence Constitution had been amended more than 30 times, gradually strengthening the Presidency and removing checks and balances by Parliament and the Judiciary. The rights of citizens were violated with abandon. When elections were held in 1992 and the splintered Opposition was defeated by former President Daniel arap Moi, calls for constitutional reform resumed.

The then President opposed an inclusive process. In 1995, he promised that experts would be contracted to draft a new Constitution. This promise never came to pass. In 1997, Parliament



Former President Daniel Arap Moi

and the civil society agreed to carry out minimum amendments to level the playing field for the General Election due that year. A framework to undertake the review process was developed, which ultimately led to the National Constitutional Conference held at the Bomas of Kenya in 2003-4. The conference drafted the Bomas Draft.

This Draft was later amended and presented for approval in a referendum in 2005. The draft, popularly known as the Wako Draft, was rejected. The review process went into a lull. After the post election violence in 2008, the review process was identified as necessary in solving the underlying issues that caused the widespread political violence. The Constitution of Kenya Review Act, 2008 and the Constitution of Kenya (Amendment) Act were enacted to

entrench the review process in the Constitution, provide for a referendum, create the Committee of Experts (CoE), to isolate and solve the contentious issues and harmonise the existing constitutional drafts. The CoE published the Harmonised Draft on November 17, 2009. The Draft was exposed to public debate for 30 days. CoE identified the Executive, devolution and transitional clauses as among the contentious issues in this phase of the review process. Other issues which have emerged include Parliament, the Judiciary, Bill of Rights, land and electoral reforms.

Proposals at a glance

Parliament

Parliament shall comprise the Senate and the National Assembly. The National Assembly will be elected from single member constituencies. Each County will convert into single member constituency to elect a woman candidate. Seven nominated MPs will represent persons with disabilities and seven MPs will be elected to represent marginalised communities and workers. Each County will elect a member of the Senate. Each region will elect two women to the Senate. The County assemblies will act as electoral colleges. Senators should be elected directly with the counties forming single member constituencies.

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The legislative authority will be shared between the Senate and National Assembly. The roles of Parliament include enacting legislation, amending the Constitution, resolving issues of concern to the people, approving revenue sharing, ensuring equity in distribution of national resources and opportunities, scrutinising actions of state organs, approving treaties and international agreements, approving appointments, and approving declarations of war and state of emergency.

The Harmonised Draft provides that not more than two-thirds of the members of the National Assembly shall be of one gender. The electorate will have the right to recall MPs and Senators. The term of Parliament shall be five years from the date of the first sitting after an election. The maximum number of MPs is not provided. The Constitution provides that Parliament shall have a maximum of 222 members.

Judiciary

The Harmonized Draft provides that all judicial officers will be vetted before reappointment by an Interim Judicial Service Commission, made up of two foreign judges, two retired Kenyan judges and one advocate nominated by the Law Society of Kenya. The serving judges may opt to retire within 60 days of the effective date. To ensure continuity in delivery of judicial services, judicial officers will continue to serve in an acting capacity.

The Chief Justice will serve for a fixed term of 10 years and retire at the age of 70 years. The Harmonized Draft creates the Constitutional Court and the Supreme Court. Petitions relating to presidential elections shall be heard in the Constitutional Court and determined within 14 days from the date of the election. The President shall not be sworn into

office until all disputes are determined.

This demands expedition in the determination of any electoral dispute by the court. The delay in determining petitions was a catalyst for the post election crisis in 2007. The Harmonized Draft provides a window period to facilitate determination of disputes prior to announcement of the winner. The swearing-in of the State President shall be in public. If the election is nullified, a new election will be held within 60 days.

Executive

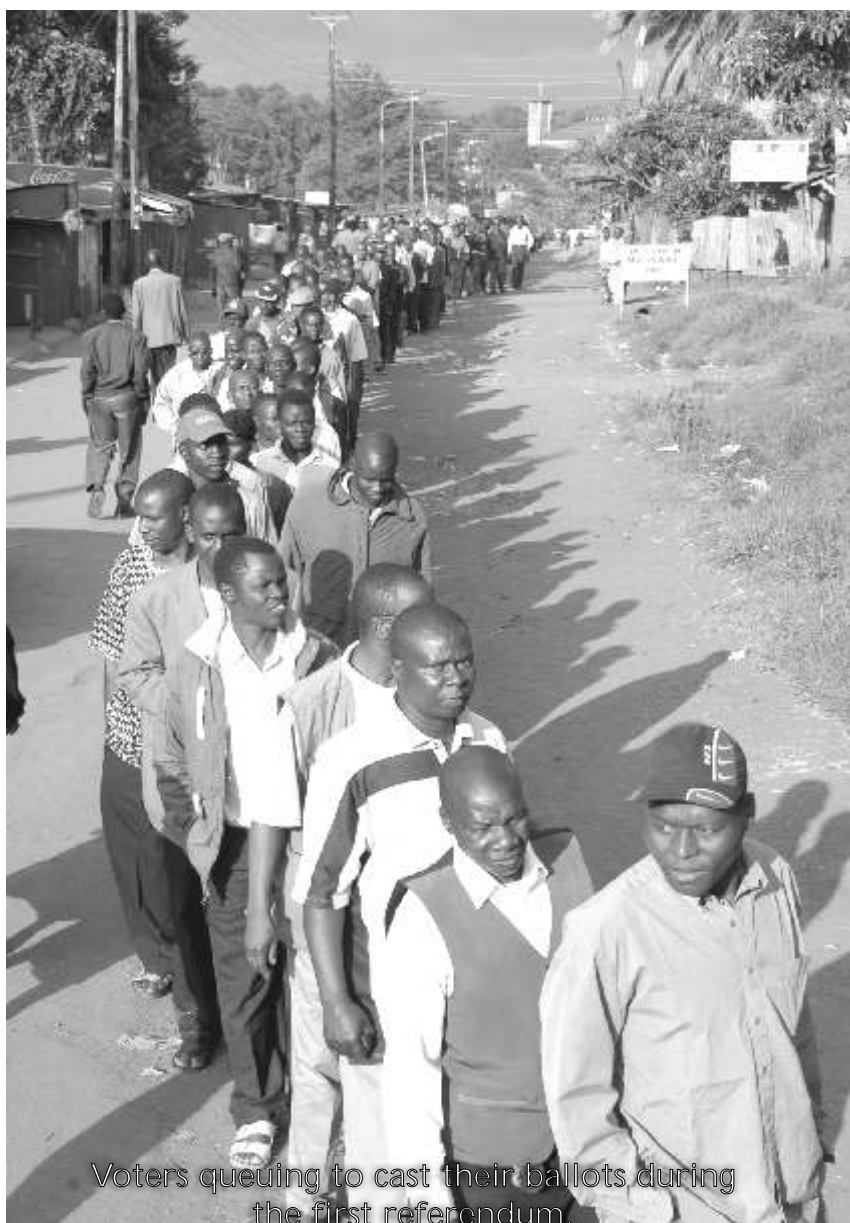
The executive authority shall be dispersed between the President and the Prime Minister. Parliament is empowered to check on the

exercise of executive authority by vetting appointments, through a vote-of-no-confidence on the PM and impeachment of the President. The Cabinet will comprise the PM, Deputy PM and 15 to 20 members. Up to 10 Ministers may be appointed from outside Parliament on recommendation of the PM. The roles of the Attorney General have been split into the Attorney General, the Director of Public Prosecutions and the Public Defender.

Bill of Rights

The Bill of Rights has been expanded to include social, cultural and economic rights. The Harmonized Draft promotes gender parity, inclusion of

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Voters queuing to cast their ballots during the first referendum.

minorities and diversity.

Land reform

The Harmonized Draft creates the National Land Commission. The functions of the commission shall be managing public land on behalf of the national and devolved governments, recommending National Land Policy, investigating disputes on land ownership, advising on the design of a comprehensive programme for registration of titles, conducting research on land and natural resources, assessing tax and premiums on land and property, and exercising oversight responsibilities on land use planning. Leases for land owned by foreigners shall be converted into 99 years. Parliament shall enact a law to set the minimum and maximum land holding acreage with regard to private land.

Elections

All candidates of political parties shall comply with the Code of Conduct promulgated by the Independent Electoral and Boundaries Commission. In the past, politicians have flouted the Code with impunity and the electoral commission has been unable to enforce the Code. Articles 114 to 122 of the Harmonized Draft provide for management and regulation of political parties.

The Political Parties Act was enacted in 2007 and has been implemented. The regulation of parties should be dealt with in legislation. The Harmonized Draft provides for independent candidates who shall be citizens, not members of a registered political party for six months prior to the election and are nominated by 1,000 registered voters in the National Assembly constituency or 500 registered voters for a County ward.

Devolution

Although the draft provides for

devolution at the national, regional and County level, the regional governments do not have a clear role. Moreover, the cost implication of the proposed devolved system has not been assessed. Some regions and counties may not raise sufficient resources to sustain their programmes. At present, only 40 out of 175 local authorities raise sufficient resources for their sustenance. Devolution should be limited to national and county levels.

Also, the criteria for establishment of the counties are not clear. The number of districts provided for and set out in the Schedule to the Act in the Districts and Provinces Act are 46. Any district created after 1992 is not recognised by law.

The use of pre-2004 administrative districts as the basis for the formation of the counties is unjustified, irregular and contrary to law. All districts created after 1992 have not been incorporated into the Districts and Provinces Act and are thus illegal and a nullity. There is no justification for including or excluding any district created contrary to the law.

Devolution should be at two levels - national and county. The regional governments may simply serve to duplicate and bureaucratise the role of County governments. The rationale and criteria for formation of counties is not well spelt out in the draft. The draft should create new set of counties based on the population and in cognizance of the principle of representation.

Major stakeholders and what they brought to the process

Civil society

The civil society has constantly pressured the government to complete constitutional reform to assist Kenya to redraw its political, social and economic corpus. The

post election crisis is evidence of failure of public institutions to solve political disputes and facilitate conduct of credible elections. The winner takes all presidential system has intensified political competition between the political leaders. The review gives Kenya an opportunity to reform the institutions to enable them resolve political disputes. These institutions need to be re-engineered to effectively carry out their constitutional functions. The civil society has constantly monitored the reform agenda and has engaged the public on the contents of the Harmonized Draft.

Religious groups

The National Council of Churches of Kenya (NCCCK) pioneered constitutional reform debate in the 1980s and constantly guides its members on the review process. After the release of the Harmonized Draft, NCCCK expressed concerns on the sharing of Executive power between the President and the PM and the inclusion of Kadhi's Courts. The evangelical Christians have equally opposed the inclusion of Kadhi's courts in the draft, stating that this amounts to discrimination of other religions.

The Supreme Council of Kenya Muslims insists that the courts must be part of the Constitution since they have been in existence and protected by the Constitution since independence. Muslims have a reasonable expectation that the courts will be included in the Constitution. Essentially, Kadhi's courts deal with family matters relating to Muslims and do not affect the rights of other religions.

Political parties

Political parties have put forward partisan positions which have slowed the pace of the Constitution making process. The submissions of parties are centred on creating positions for their party leaders.

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What consensus!

The Harmonised Draft of the proposed Constitution of Kenya is finally here with us. The twin words that have been the bane of the review process over the years are *contentious issues*. Although these words have been overused, they have never lost meaning as different parties and interests play out their stakes in the process. We analyse how these issues have evolved with the changing fortunes of the review.

By Albert Irungu

Kenya is on the verge of charting a new course in its history after the creation of the Harmonised Draft Constitution. The journey towards a new constitutional dispensation has been long and riddled with all manner of challenges. Before the days of the National Constitutional Conference famously known as Bomas which brought delegates from all over the country, the Constitution making process was largely a purview of the highly self-seeking political class out to serve their own interests.

The contentious issues identified to be resolved by the Committee of Experts (CoE) are core to the rule of law, governance and justice. The committee took up all the drafts that various political and civil organisations had previously created to produce what is now known as the Harmonised Draft. However, even after finding common ground in the previous contentious issues, public debate is still ongoing on these issues.

Although it is a commonly accepted fact that creating a Constitution that will please everybody is not possible, at least there is now space for



Chief Justice Evans Gicheru

Kenyans to air their views and suggestions on the pertinent issues. These issues have been core to how the citizens want to be governed.

Political derailment

From the start, Kenyans never owned the Constitution. The Lancaster House Conference that hastily canvassed a Constitution for the country was laden with suspicion. Nonetheless, the players managed to broker a consensus that gave Kenya a Constitution, hence paving the way for independence. Since then, the political class has always been an impediment to the Constitution making process.

Contentious issues are pertinent to the rule of law, democracy and governance. However, the political class has picked up on these issues to divide the country for their own benefit. The nature of Kenya's politics is the winner takes it all. Hence the Constitution making process has experienced many

wrangles and disputes as politicians fight for supremacy and push their own agendas.

The politicians have perfected the art of dividing Kenyans into ethnic, racial and religious groups. So, while Kenyans fight amongst each other, the political class is busy pilfering resources meant for the country's development. It was a sad tale considering that the trophy, the proposed draft constitution was a document that was envisaged to govern us for years to come. The contentious issues were and still are core to the democracy and governance of Kenya's citizen.

Harmonisation

One of the major reasons why Kenyans clamored for constitutional reform was the overbearing powers of the imperial presidency and the emasculation of the other arms of the government by the Executive. Kenyans wished to see the exercise

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Yash Pal Ghai, former constitution review leader.

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of Executive power and authority subjected to the law and vertical through creation of post of premier as well as horizontal checks and balances via power-sharing with legislature and judiciary.

The harmonised draft constitution is closest in similarity to that of Bomas draft. Considering that the Bomas draft was prepared after a wide consultation from Kenyans from every part of the country, the CoE considered it the best choice. However the Wako draft largely based from the Kilifi and Naivasha accord was drafted by undemocratically by a small group of politicians.

Executive authority

Bomas draft shared out executive authority between the president, deputy president, prime minister, deputy prime ministers and the cabinet, whereas Wako's draft is emphatic that the executive authority of the republic shall be vested exclusively in the president as per the current Constitution. The harmonised draft proposes that the powers shall be divided between the president and the PM and has clear lines drawn on what their responsibilities will be. It also checks the president's power by making sure that the person who will be

president after the realization of the harmonised draft will only act on the advice of the PM. The office holder can be sacked with the entire cabinet if the national assembly recommends so to the president.

Presidential powers

According to the Bomas Draft, the president shall be the head of state whereas the Prime Minister is proposed to be head of government. Wako's draft makes the president both head of state and head of government as per the current constitution. The harmonised draft picks on the proposals made by the Bomas draft. In addition, the President shall be elected by the people and shall be the Commander in Chief of the armed forces, Chairperson of the National Security Council and shall preside over the passing out parades of security forces.

Prime minister

Under Bomas Draft, the Prime Minister had an elaborate job description as head of government (including coordination of ministries). Wako's draft has removed these powers and reduced the PM into a leader of government business. However, the harmonised draft constitution reinstates the previous powers provided under Bomas draft and provides that he or she presides over cabinet meetings. He or she will run the cabinet daily calendar and no cabinet decision will stand without this office holder's signature.

Appointment of cabinet ministers

The Bomas draft gave the president power to appoint the leader of largest party in parliament as PM. The PM was provided with powers to nominate cabinet ministers from among Members of Parliament for

the president's approval. Wako's Draft gives the president powers to hire and fire not only the prime minister but his deputies and ministers. The president can appoint any Member of Parliament and the PM. The President can appoint utmost 20 percent of ministers outside parliament without any inhibitions whatsoever, for as long as they qualify to be MPs.

The cabinet

Bomas draft imposed a maximum number of ministries, whereas Wako's draft does not and follows the precedent of the current Constitution. In the harmonised draft, the cabinet shall comprise of not fewer than 15 and not more than 20 members of which half shall be Kenyans not elected as MPs. Wako's draft retains the Attorney General as a minister and Member of Parliament.

This is conflicting in terms of his authority and elevates government chief whip into the cabinet. Currently, the AG's powers are unchecked as first he advises the government on legal issues thus the government cannot limit his abilities. Then he is an ex-official MP who enjoys security of tenure. In addition his office decides whether cases especially cases touching on grand corruption and high profile criminal cases go to court.

Impeachment of the president

Bomas draft laid out an elaborate procedure for impeachment, which required a of 67 percent majority vote to remove the president. According to Wako's draft, parliament can only impeach a president via a 75 percent majority vote. In the harmonised draft, the President can only be impeached if a motion to do so is approved by two thirds of the National Assembly. However, he or she shall remain in office until the Senate determines the charges against him/her.

Devolution

Having endured an authoritarian

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State that severely limited meaningful participation of citizens in governance especially at the lowest level, Kenyans demanded devolution of power from the central government to the lower levels. Kenyans rejected the provincial administration and called for decentralisation of government functions which were to be managed by officials elected by and accountable to the people directly.

Structure of devolution

The four-tier government system proposed by Bomas draft was changed with two-tier government. Whereas the Bomas Draft had suggested that power be devolved from the centre of provinces (regions) to districts, divisions and to locations, Wako's draft identifies the district as the focus of devolution. The harmonised draft suggests a three-tier government with regional governments; national, regional and county systems.

Powers of district government: The Bomas draft placed the devolved units of government at the same level with the national government. The senate, which had veto powers over the executive and national

assembly, was meant to protect the devolved units from infringement by the national government. However, Wako's draft makes the district government subordinate to national government. The district government has no veto over the central government.

In the harmonised draft, the county shall have the power to create their own structures and address their own issues.

Principles of devolution: Bomas draft gave executive powers (i.e. power to implement policies for local development, law and order), which Wako's draft has taken away. Bomas draft provided for a compensation fund to cater for districts that cannot raise sufficient revenue, which was deleted in Wako' draft. Both drafts have scrapped provincial administration. The harmonised draft is in agreement with the both Bomas and Wako's drafts.

The Senate: Bomas draft created the Senate as the second chamber of legislature. The senate is part of an intricate system of checks and balances. All presidential appointments are meant to be vetted by the senate. The senate is

also meant to veto legislation from the lower house. It acts as a forum for negotiating and articulating concerns of the region in resource allocation and national legislation. The senate has been expunged from the Wako's draft. The harmonised draft gives legitimacy to the senate and places same responsibilities as done previously in the Bomas draft.

As every Kenyan wait with baited breaths when the harmonised draft will become the Constitution of Kenya, the question remains if the politicians will do what they have always done for years; serve their own selfish interests. They may decide that the old constitution serves their agenda better and thus mobilise Kenyans to vote against the harmonised draft.

The 30 days provided for Kenyans to air their views and suggestions on the harmonised draft are over and it is now the work of the CoE to reflect these submissions. With a deadline to have a new Constitution in the next six months and many hurdles to jump, *wananchi* have developed a wait-and-see attitude hoping that this time round, they will have a document whose search began four decades ago. **KN**



IIEC committee members with Constitution Minister Mutula Kilonzo (third left) and Chief Justice Evans Gicheru (fourth right)

Committee of Experts

The Committee must be commended for producing the Harmonized Draft. Its role was to examine the previous draft Constitutions, isolate contentious issues and collect views. After submission of further views on the draft, the Committee will forward a revised version to Parliament.

Panel of Eminent African Personalities

The Panel was chaired by His Excellency Kofi Annan. It prioritised completion of the constitutional review process to solve underlying factors in Kenya's political crisis. The factors identified for reform were land, the judiciary, electoral process, the Executive and equitable sharing of resources. The draft recommends measures to resolve these issues.

The quest for a new Constitution is premised on the need to recreate the Kenyan State. The Independence Constitution was negotiated by politicians in London's Lancaster House on behalf of Kenyans. The views of the public were not sought for inclusion in the draft and the document was not ratified in a referendum. To reinforce the people's sovereignty, a Constitution should be approved by the citizens. The Harmonized Draft will be debated in Parliament and thereafter subjected to a national referendum.

Education

Kenyans must be educated on the contents of the Harmonized Draft through civic education. Further, there is need for a culture of constitutionalism and respect for the rule of law. This must be supplemented by reform of institutions involved in administration of justice to ensure the public and public officials follow the law and that infringements are detected, investigated, prosecuted and punished.

The Harmonized Draft has been criticised for including matters that can be dealt with in legislation. Some of the provisions in the Draft should be relegated to Acts of Parliament. Examples include establishment of national holidays, inclusion of culture, leadership and integrity code, regulation of political parties, and the design of bank coins and notes.

The Harmonized Draft refers to religion and the recognition of heroes in the Preamble. This may cause divisions between different religious groups. There is no standard definition of national heroes. The Preamble contradicts Article 10 which provides that the State and religion shall be separate and all religions shall be treated equally. The inclusion of Kadhi's courts in the Constitution as part of the Judiciary protects the rights of Muslims while ignoring the rights of other religions.

The Draft has not provided any criteria or justification for delimitation for the regions and counties. This has led to disputes on how the regions and the districts were determined. The Draft creates nine constitutional commissions. These commissions need to be reviewed and harmonised to avoid duplicity of roles.

Basic rights

The Harmonized Draft has an expanded Bill of Rights. The social and economic rights included in the Draft include the rights of children, the rights of youth, gender equality, the rights of older members of society, rights of persons living with disabilities, the rights of minorities and marginalised groups, freedom of picketing and petition, right of refugees and asylum seekers, right to fair labour practices, right to education, right to health, right to food, right to housing, right to

water, right to a clean and safe environment, consumer rights, freedom to trade, occupation and profession.

The civil and political rights have been expanded to include right to fair administrative action, right to access justice, freedom of movement and residence, political rights, right to access information, freedom of the media, right to human dignity, right to equality and freedom from discrimination.

The State shall facilitate progressive realisation of these rights for all by providing the necessary monetary resources required for their implementation. The courts and the Human Rights and Gender Commission (HRGC) shall be responsible for protecting and realising the rights in the Harmonized Draft. The HRGC will replace the Kenya National Commission on Human Rights and the National Commission on Gender and Development, which are currently established under Acts of Parliament. The measures to reform the Judiciary will complement justiciability, enforceability and protection of the rights.

Conclusion

The Harmonised Draft includes many progressive provisions. However, the Constitution making process in Kenya is essentially political and requires that consensus be achieved among political leaders on the contentious issues. The coalition partners PNU and ODM have formed a committee to resolve the issues. The Committee of Experts must resolve the contentious issues in the Harmonised Draft before presenting it to the referendum. But Kenyans must take the initiative to study the draft to enable them make an informed choice at the referendum. **KN**

THE KONRAD ADENAUER FOUNDATION IN KENYA

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

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

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

Our aims

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

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

participating in the political, social and economic development of the country.

Our programmes

Among other activities we currently support:

Working with political parties to identify their aims and chart their development so that democratic institutions, including fair political competition and a parliamentary system, are regarded as the cornerstones for the future development in Kenya.

Dialogue and capacity building for young leaders for the development of the country. Therefore, we organise and arrange workshops and seminars in which we help young leaders to clarify their aims and strategies.

Reform of local governance and strengthening the activities of residents' associations. These voluntary associations of citizens seek to educate their members on their political rights and of opportunities for participation in local politics. They provide a bridge between the ordinary citizen and local authorities, and monitor the latter's activities with special focus on the utilisation of devolved funds.

Introduction of civic education to schools and colleges. We train teachers of history and government in civic education. In addition, we participate in the composition of a new curriculum on civic education.

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

Contact address

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

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