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KatibaNews

Towards a new constitutional dispensation in Kenya

Human trafficking now in Kenya?

* Justice delayed is justice denied
* Looking towards the referendum
* Demutualising the Nairobi Stock Exchange

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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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It's never too late to do the right thing

In the run up to the 2002 general election when political realignments were the only game in town, there is one person whose statement inadvertently became the voice of sobriety. Although the turn of events came as a shock to many people, it just went on to show that things are not always what they look like.

The man who captured the mood of the moment was Prof George Saitoti, then vice president and perceived former president Moi's puppet on a string. At the Kasarani Sports Stadium after being passed over as Kanu's preferred choice for presidency, the good old professor declared: "There come (sic) a time when the nation is more important than an individual."

I have used that analogy because we are currently faced with a dilemma as the Constitution review process enters its last and most delicate phase. After we have painstakingly slaughtered and eaten more or less the whole bull over the last 20 years, we are in danger of being unable to successfully partake of the tail. Why? Because of two major emotive issues to Christians.

First, there is the issue of abortion. I must criticise the Committee of Experts (CoE) on the Constitution for fumbling with this issue. The initial amendment to the clause on abortion was enough. What the final draft has come up with was bound to cause controversy. While we may want to live in denial, abortion is an extremely sensitive issue in African societies. Yes, it is a woman's body and all but the ramifications go beyond the individual since it impacts on the society's collective psyche about life and death.

Second is Kadhi's courts. For me this is really not an issue that Christians should be mulling over the way they are doing now. These courts have been in our Constitution for as long as we can remember and have really no potential to cause national or social instability. This is not a country like Nigeria where Muslims are almost equal in numbers to the Christians.

On the issue of abortion we are not going to pass any judgement. We leave it to the country to decide what is in its best interest as far as the moral-religious-medical fabric goes. The CoE should have known this is a live wire and avoid tampering with it. We should think the way it was was good enough if for nothing else but to avoid this controversy. But definitely there is need for medical removal of a foetus where the life of a mother is in grave danger or where a pregnancy has been got through a traumatic experience, for example, rape or incest. How to ascertain this is another Pandora's box altogether.

As for Kadhi's courts, we do not find the problem really. Apart from whom we follow – Jesus Christ or Mohamed – Christians and Muslims worship one God, even sharing many tenets in their faiths. So, we think Christians should go slow on this one! Unlike Christians, some decisions in Islam are legally binding and to avoid being abused, it is alright to have them enshrined in the Constitution for reference.

Bottomline, let us not wish away these concerns. This is more so a disease of the politicians who are very dismissive of anything they cannot control. The church in Kenya has serious issues that need to be effectively addressed. The argument that nothing can be changed now in the draft is just good on paper. We must all seek compromises for, WE MUST HAVE A NEW CONSTITUTION BY THE END OF JULY THIS YEAR! KN

Editor

Human trafficking now in Kenya?

By KN correspondent

There is a growing concern that Kenya is fast becoming a hub of human trafficking. Media reports indicate that the country has become both a source market and transit route for hapless people duped into the quest for a better life. Our writer looks at what is happening and whether we should be afraid.

Most people believe that slavery ended in the United States with the passage of the 13th Amendment. But the trafficking of people for purposes of forced labour and the sex trade continues in the 21st century.

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, also known as the Palermo Protocol that supplements the UN Convention against Transnational Organised Crime and to which Kenya acceded to in January 2005 states:

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

According to the Counter Trafficking Programme Officer for the International Organisation for Migration (IOM), Alice Kimani, the following acts should have occurred for a person to be seen as a victim of human trafficking: coercion, recruitment, transportation and exploitation. In addition, she points out that there is a difference between human smuggling and human trafficking. In trafficking there has to be an element of deception and exploitation while smuggling is an individual's decision to be moved across a national border, without proper documents and sometimes under dangerous conditions.

In Kenya, no comprehensive study has ever been conducted to ascertain the extent of trafficking in the country due to the clandestine nature of the trafficking process. Further, there is lack of a centralised system of collecting data despite the fact that there a number of organisations involved in anti-trafficking initiatives. Research and funding always go hand in hand and none of the anti-trafficking organisations has managed to attract sufficient funds. Without dedicated research, implementation of strategic long-term anti-trafficking programmes will be impractical.

However, increasing media reports can give us an idea of how bad the situation has become. Sexual exploitation of young girls at the Kenya coast, physical abuse of Kenya's women in domestic servitude in some Arab countries and Congolese and Rwandese trafficked into Western Province for

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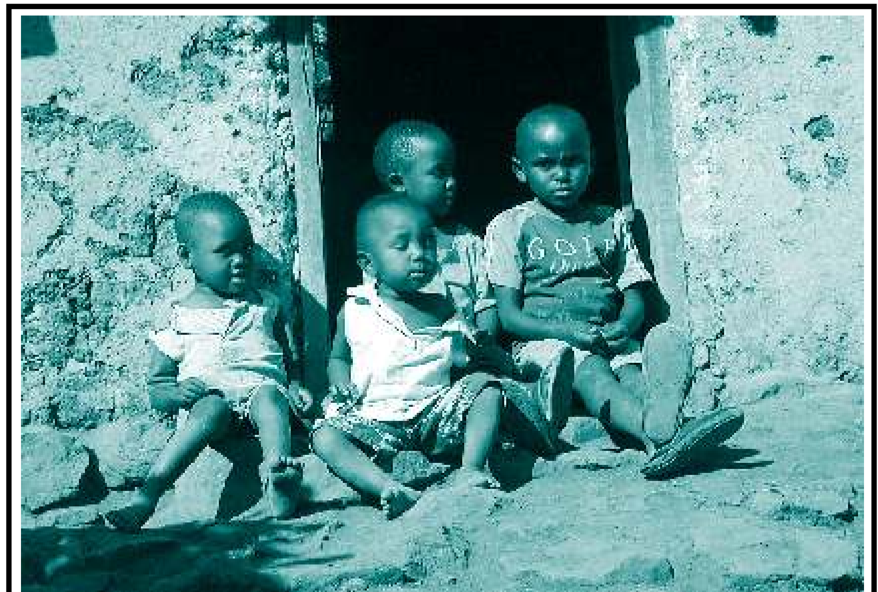

Orphaned and vulnerable children are the main target for human trafficking. (Globalexchange.org)

Media reports

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exploitative labour in the agricultural sector provide an insight of the extent of the vice.

Internal human trafficking occurs for purposes of domestic labour/servitude, agricultural labour and for sexual exploitation as is evident in the sex tourism industry at the Kenyan coast. Regional and international trafficking occurs for the purposes of forced labour, domestic servitude and sexual exploitation.

The Kenya government is at task to control its borders and counter human trafficking. However, the resources to manage these borders have been stretched thin. Many of our borders are highly porous. More so, the perception that Kenya is at peace and a land of opportunities has led to the increase in human trafficking.

Although laws on human trafficking and related offences are provided for in the Sexual Offences Act, The Children Act, The Penal Code, The Immigration Act and The Employment Act, lack of a comprehensive legal framework to deal with the vice holistically has led to the blossoming of the vice in and out of Kenya's borders. Arrested traffickers are not dealt with to the full extent of the law.

According to the Counter Trafficking Programme Officer for the International Organisation for Migration (IOM), Alice Kimani, the following acts should have occurred for a person to be seen as a victim of human trafficking: coercion, recruitment, transportation and exploitation.

Local manifestations

The human trafficking problem in Kenya is multi-faceted. IOM has identified the country as a major international player in human trafficking. It is a transit, source and destination point for human trafficking. It is a very lucrative trade and regional smuggling cartels have an in-depth understanding of the border terrain. Hence, it is easy for these cartels to avoid detection from authorities as they bring in their human cargo.

Human trafficking especially of women and children for sex exploitation is rampant. Victims are trafficked from all over East Africa to local and international destinations. Children are trafficked to Kenya from Burundi, Ethiopia, Rwanda, Somalia, Tanzania and Uganda for forced labor and commercial sex exploitation.

Most trafficked girls are forced to work as barmaids where they are vulnerable to sexual exploitation, or are forced directly into prostitution. Women are trafficked from Burundi, Democratic Republic of the Congo, Ethiopia, Eritrea, Nigeria, Rwanda, Somalia, Tanzania, Uganda as well as India to the Kenyan coast for sexual exploitation. Others are lured to Nairobi for domestic servitude.

The traffickers usually use a scheme known as debt bondage. They invoke this sense of debt by threatening, defrauding and coercing their victims to work in order to pay back for the cost of immigration.

In addition, unscrupulous Kenyans working with foreigners set up dubious employment agencies that perpetuate trafficking of Kenyans to the Middle East, Western Europe and America. Kenyans rescued from these countries, have establish that they are forced into domestic servitude. They worked for more than 16 hours a day, ate leftovers and were physically abused.

Children like these are extremely vulnerable to trafficking.

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Justice delayed is justice denied

By Guandaru Thuita

The need for expedient justice cannot be gainsaid. This paper seeks to briefly examine the justice system in Kenya, its history and colonial legacy, the causes of the chronic backlog of cases, the ailments afflicting the Judiciary in general, the requisite reforms and whether such are embraced in the Harmonized Draft Constitution.

This popular adage on dispensation of justice is credited to William Gladstone, a British Politician (1809-1895), from which Martin Luther King Jnr adopted in many of his speeches. The phrase implies that when the pursuit of justice or fairness is prolonged the expected justice, when ultimately delivered, will have lost its value or significance.

In the Kenyan justice system, there exists a chronic backlog of all cases with most cases taking inordinately long periods of time to conclude. This has been acknowledged by the relevant authorities in government reports notably the Waki Report, the Constitution of Kenya Review Commission Report, The Report of the Integrity and Anti-Corruption Committee of the Judiciary (2003) commonly referred to as the Ringera Report, The Report on the Committee on the Administration of Justice (January 1998) also known as the Kwach Report, Economic Recovery Strategy for Wealth & Employment Creation (2003-2004) and the Poverty Reduction Strategy Paper PRSP (2001-2004), Ministry of Finance and the Strategic Plan for the Judiciary (2005 – 2008).

The Kenyan Judiciary traces its roots to the East African Order in Council of 1897 and the Crown Regulations made thereunder. This Order in Council established a segregated and tripartite division of the Justice system. Initially, there were Native Courts, Kadhi's Courts and courts for the settlers.

Native tribunals

Village elders, headmen and chiefs were in the early days empowered to hear and settle disputes. These traditional organs eventually developed into tribunals with the promulgation of the Native Courts Ordinance in 1907 and Native Tribunals Ordinance 1930. Later in 1950, however, the African Courts Ordinance abolished the Tribunals and replaced them with a system of African Courts.

Kamiti maximum prison - the home of hardcore criminals.

For non-Africans, English and Indian Laws were applied and the administration of this justice was entrusted to the expatriate judges and magistrates. Kadhi courts were distinguished from Native Tribunals in that they were classified as subordinate courts and their appeals went directly in the Supreme Court.

This segregated system prevailed until 1962 when the African courts were transferred from the provincial administration to the Judiciary. Later after its enactment, the Constitution set up the Judiciary as we know it today. Subsequently, the independence Constitution established the Supreme Court, the Court of Appeal and the Kadhi's Court while others statutes namely the Judicature Act (Cap 8), the Magistrate's Court Act (Cap 10) and the Kadhi's Court Act (Cap. 11) were passed with the intention of streamlining the administration of Justice in Kenya.

From the foregoing, one can safely presume the Kenyan Legal system is a product of the English system and continues to borrow heavily from the same. Most applicable laws in our Judiciary are adopted from Britain, the trial process is adversarial just like the English system, the dress code and mannerisms of judicial officers as well as advocates is almost identical to that prevailing in Britain. In addition, the English Common Law carries persuasive authority in decision making.

Mother tongue

In fact, the Judicature Act adopts English Laws for our courts. It asserts that the Laws to be applied include Acts of Parliament of the United Kingdom, substance of the Common Law, Doctrines of Equity, Statutes of General Application in force in England on August 12, 1897 and the procedure and practice observed in courts of England as at that date.

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Chief Justice Evans Gicheru

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The Judiciary's mission statement is: *"To provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of Law, and protect all rights and liberties guaranteed by the Constitution of Kenya."*

Bearing this statement in mind, the backlog of cases in the Judiciary is a sore toe in the judicial process. However, a variety of reasons explain this sorry state. For instance, court processes are manual. Magistrates and judges are not assisted by stenographers and have to record proceedings in pen on paper. This situation is not made any better when interpreters have to be used for most parties who express themselves best in mother tongue.

There is a serious shortage of judicial staff. The current number of High Court judges is approximately 45 against an establishment of 70, leading to a deficit of about 25 judges.

The approximate number of magistrates is approximately 221 and bearing in mind that magistrates perform the bulk of the judicial work, it becomes apparent that this number is hardly enough to serve about 40 million Kenyan. Consequently, the rate of filing cases ends up very high compared to the rate of their ruling.

With such a scenario, cases cannot get an early hearing date and end up clogging the system. The Magistrates' court at Milimani Commercial Courts in Nairobi is one of the busiest stations in the country. It deals with civil matters within Nairobi and year after year litigants cannot obtain a hearing date for their cases as the court diary is perennially full.

Lethargy

Secondly, staff attitudes are also very negative. Court officials hardly work from 8.00 a.m. to 5.00 p.m. Many magistrates, especially in stand alone stations, are often seen strolling to their chambers way past reporting time or fail to turn up altogether. In fact, activities at the Nyeri law courts grinded to a halt in 2009 when the local Law Society of Kenya (LSK) chapter boycotted the courts to protest the lethargy of judicial officers. A similar incident had taken place a year before in Nakuru. Subordinate staff have also been cited for failure to attend to their duties with diligence and dedication.

Thirdly, judicial staff lack requisite equipment to expedite the trial process. Handwritten proceedings are required in situations whereby an appeal is lodged or where a judicial officer has been transferred. In many courts the typing of proceedings is agonisingly slow and may take years to complete. There are no typing pools specialising in recording of proceedings. The typing is done by secretaries who are not only slowed down by other numerous duties but face the difficulty of handling illegible handwritings.

Use of outdated technology is not uncommon. In many courts outside Nairobi such as Gatundu and Kandara in Thika, this writer was shocked to find that the only typesetting equipment available were the good old manual typewriters.

With regard to the High Court and Court of Appeal, there are three unnecessary vacations for judges - the Easter, Summer and Christmas vacations. This is in addition to their annual leave. These vacations are an unnecessary colonial legacy in light of the massive case backlogs.

Frequent transfer of judicial officers greatly contributes to case delays. Adequate notice is rarely given to the officers concerned and any matter that was partially heard either has to commence all over again or proceedings have to be typed first before another officer takes over.

Petty bribes

Some litigants and their advocates also play a role in delaying cases. It is common to see lawyers asking for adjournments or raising frivolous objections in an attempt to frustrate the progress of cases. Public prosecutors also unnecessarily pray for adjournments for lack of preparedness.

The rules and technicalities involved also contribute to delays. Too much time is wasted in arguments on matters of form rather than those of substance. Lay people take a lot of time understanding the process, making their trials take so much time as everything has to be explained to them.

The Judiciary has failed to embrace the rapid results initiative required of public officers. Issuance of most basic court documents which can be done in a matter of minutes such as summons takes weeks or months.

Corruption is also a major force to contend with. Files sometimes go missing when litigants collude with litigants. Some staff members, particularly in the court registry, deliberately delay actions in order to receive petty bribes.

Case delay is not the only ill afflicting the Judiciary. Structural and organisational factors have also been blight facing the institution. For instance, there is lack of independence in the appointment and operations of judicial officers. Appointment of puisne and

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appellate judges has historically been shrouded in secrecy. The president is not required to consult anybody other than the Judicial Service Commission (JSC). There should be wide consultations with the stakeholders to ensure that the process is seen as being above board. In 2008, the then Minister for Justice and Constitutional Affairs, Ms Martha Karua, resigned as a minister alleging that she was kept in the dark over the appointment of some judges and only learnt of it in the media.

Political interference has also led to the infamous rules requiring all cases against the State to be filed in Nairobi. The composition of the JSC is also wanting and does not include important players. It is financially dependent on the Executive and its finances are subject to the control of the Ministry of Finance. For instance, the Judiciary cannot spend on improvement of the infrastructure, or hiring more staff without consent of the Executive and legislature.

Total autonomy

Kenyans no longer have faith in the Judiciary, a fact captured in a number of reports including the The Commission of Inquiry on Post Election Violence (the Waki Report) and the Report of the Independent Review Commission on the General Elections (Kriegler Report). To regain public confidence, therefore, the Judiciary must undertake reforms as a matter of urgency. Such reforms are well summarised in the Report of the International Commission of Jurist - Kenya Chapter known as "Strengthening Judicial Reforms in Kenya: Administrative Reforms" Volume X.

The proposed reforms include providing judicial information to the public, enhancing the remuneration of all judicial officers, systematic training for staff, development of policies to avoid personal decision making particularly by the Chief Justice, fully embracing ICT, establishing an effective legal aid scheme and small claims courts, reducing the powers of the Chief Justice, restructuring and strengthening the JSC and total autonomy of the Judiciary,

Prisoners doing hard labour during their time.

Further, LSK should subject advocates to a strict code of ethics, police prosecutors should be replaced with lawyers, creation of a supreme court, increase physical facilities for judicial officers, establish a monitoring, evaluation and appraisal system, embrace alternative dispute settlement systems, introduce stenographers and allocate research assistants to judicial officers, establish mobile courts, establish clear recruitment and dismissal procedures, vetting of all judicial staff and abolishing of court vacations.

The Proposed Harmonised Constitution submitted by the Committee of Experts on February 23, 2010 captures radical reforms in the Judiciary in Chapter 10. Independence of the JSC is enhanced as the body is only subject to the Constitution. On financial independence, the Judiciary is set to benefit from what is called a Judiciary fund which will be directly charged on the consolidated fund.

The Chief Justice's term will be for a maximum of 10 years. This is unlike the present situation where he enjoys an indefinite security of tenure. Membership of the JSC has been increased and its functions expanded. The Commission shall have the mandate of advising the national government on improving the efficiency of the administration of justice.

Weaknesses

A supreme court to hear presidential petitions, appeals from the Court of Appeal and matters of substantial public importance has also been proposed. In addition, all judges are under the transitional provisions of the proposed Constitution and will be required to undergo a vetting process. This is quite a radical proposal and, if implemented, will ensure that the weak elements of the judiciary are removed and the public confidence in the body enhanced.

The proposed Constitution expressly provides that judicial authority shall be exercised with neither delay nor regard to technicalities, while alternative forms of dispute resolutions are to be promoted. With these express provisions, delaying of a matter in court shall be tantamount to violating a constitutional right.

But the document still has some weaknesses. For instance, the President still retains the power to appoint judges pursuant to recommendations of the JSC. To prevent political interference, it would have been prudent to allow the vetting to be done by parliament.

The proposed Constitution should also have acknowledged the backlog of cases by specifically mandating the JSC to reduce the backlog. To enhance accountability and accelerated reforms, there should have been another body appointed to deal specifically with judicial reforms. Calls have been made for the establishment of a National Council on the Administration of Justice to oversee the policies of the judiciary and to constantly review those policies. That way, the JSC would concentrate on the human resource tasks. KN

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"Much emphasis has been placed on international trafficking such that we forget about the domestic aspect of it," says Ms Kimani.

The most notable cases are the exploitation of house helps in Kenya. Many people can attest to a situation where they have heard or witnessed the physical and psychological abuse of maids. Some have been scalded with hot water while others have been thrown out of storied houses by their employers. This is similar to what happens to Kenyan women in the Middle East.

Young trafficking victims in a halfway house in Manila, Philippines. (Getty Images)

find themselves forced into prostitution.

The Kenya government does not adhere to the minimum standards set for the eradication of human trafficking. After the 2007 post election violence and subsequent restructuring of government institutions, many anti-human trafficking initiatives were abandoned. The most notable was the enactment of anti-trafficking legislation and the passage of a draft national action plan which took a back seat as more urgent legislative and political issues took centre stage.

The hotspots

"Dark figure" is a term defined by criminologists as the difference of reports of a particular crime to authorities and the actual number of instances that the crime goes unreported. Such is the problem associated with human trafficking - a vice with high rates of dark figures. What goes unreported represents a huge percentage of the crime than the official numbers. Hence, countries known to be hotspots of the vice are most likely as a result of more reported cases than in other parts of the world.

South and East Asia, West Africa and Eastern Europe are havens of human trafficking. India, North Korea and China are among the countries that have the most severe cases of trafficking in children especially to work in mines, the sex trade and begging. For example, in impoverished North Korea, the only place to run to is China. Traffickers know this and usually pounce on their victims once they are in China. However, if caught by Chinese authorities, the victims are repatriated back to their country where they are imprisoned for illegal emigration.

Young women from Eastern Europe who travel to Western Europe in search of jobs often

Internal human trafficking occurs for purposes of domestic labour/servitude, agricultural labour and for sexual exploitation as is evident in the sex tourism industry at the Kenyan coast. Regional and international trafficking occurs for the purposes of forced labour, domestic servitude and sexual exploitation.

Duped

Although law enforcement agencies continue to arrest perpetrators of these crimes against humanity, the legal system has been a let down as prosecutions fail to progress. While Kenya does not prohibit all forms of human trafficking, it has however criminalised the trafficking of children and adults for sexual exploitation under the Sexual offenses Act of 2006, Section 13 to 15 and 18.

It prescribes minimum sentences of 10 to 15 years for anyone found guilty of such a crime. In addition, the Employment Act of 2007 outlaws forced labour and contains additional statutes relevant to labour trafficking. It envisages situations where Kenyans could be duped into phoney foreign jobs. Sec 4(3) of the Act condemns as a crime the recruitment and trafficking of forced labour.

A *Counter Trafficking in Persons Bill* has been around since 2006. The Bill, which was introduced as a private members Bill, has oscillated between Parliament, anti-human trafficking crusaders

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Looking towards the referendum

By Dorothy Momanyi

According to the timetable of the Committee of Experts (CoE) on the Constitution, Kenyans should be heading again to the ballot boxes in July this year. This time it will not be about electing their MP or president. There is a new serving coming up called the Harmonised Draft Constitution of Kenya. Our correspondent looks at the concept of a referendum holistically and hypothesizes what might happen in July.

Man of the moment: IIEC chairman Hassan Ahmed

A referendum may be described as the process by which measures proposed or passed by a legislative body are subjected to a vote of the electorate for approval or rejection. This process is normally undertaken either when there is an amendment to the Constitution, when there is enactment of a new Constitution or when there is an intention to create a law or policy on an issue of considerable public importance.

There are various forms of referendums and in this regard we may borrow from the distinctions used in America. Referendums in the USA are categorised into mandatory and optional referendums. The mandatory types are the ones by which a vote of the electorate is required under legislative circumstances. The result of this referendum is binding such that if a proposal is passed, the government or appropriate authority is compelled to implement it.

Mandatory referendums are required in relation to issues of major national significance. These include adoption of international treaties, transfer of authority to international bodies and, taxes and public expenditure commitments. In Kenya for instance, the Constitution of Kenya Review Act 2008 requires the proposed Constitution to be affirmed through a referendum, the outcome of which will be binding to the government. This means that the referendum is mandatory.

Sharp divisions

The second category is the optional or facultative referendum. Here no legislation or rule is required to undertake the referendum. The call may come from either the Executive, from a number of members of the legislature, from a number of citizens or from some other defined agent. The consequences of the vote may or may not be binding but may be of advisory use to the government.

A government can decide to initiate a referendum on a major political issue. It might do so out of intense public pressure to hold one or as a result of sharp divisions on a pertinent issue. Optional referendums initiated by the government are usually held in Europe on European Union integration (although in some cases, such referendums have been mandatory because they involve an amendment to a country's Constitution). Although these referendums may not be legally binding, it may be politically difficult for a government to ignore the outcome.

A further type of optional referendum is the abrogative referendum. This is the type where the electorates' vote is required to determine whether to retain or repeal a law or decree that has been agreed on and promulgated by the legislature and already implemented. Usually, citizens force a vote by collecting a certain number of signatures.

The 2005 referendum

Kenya had its first referendum on November 21, 2005. Unlike what would happen two years later in the 2007 general election, the referendum was conducted in a peaceful and orderly manner. The voting was free and fair and the general agreement was that the defunct Electoral Commission of Kenya (ECK) organised and administered the referendum independently and professionally.

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The speed of voting, the well managed counting process, and the rapid announcement of the results by the ECK significantly reduced tensions present in the immediate aftermath of the voting.

There are various forms of referendums and in this regard we may borrow from the distinctions used in America. Referendums in the USA are categorised into mandatory and optional referendums.

The campaign was organised in two referendum camps namely, bananas ("yes") and oranges ("no"). Disgruntled members of the National Rainbow Coalition government including Raila Odinga, Kalonzo Musyoka and Kanu leaders such as Uhuru Kenyatta, the retired President Daniel arap Moi as well William Ruto were the most prominent leaders who spearheaded the "No" vote.

On the other hand, President Mwai Kibaki, some members of his Cabinet and his supporters mainly from the Central province spearheaded the "Yes" campaign. A considerable number of individuals including the Nobel laureate Professor Wangari Maathai abstained from voting or taking sides and attempted to lobby the warring sides to reach a compromise.

The results indicated that the proposed new Constitution was rejected by 57 percent of the votes cast, while 43 percent voted in favour. The turnout of voters was approximately 52 percent.

However, a fact acknowledged by all players was that the results did not mean that Kenyans wished to retain the existing Constitution. On the contrary, it demonstrated that the voters wanted a new Constitution but one that was fundamentally different from the proposed one.

Violence

Even though the referendum was managed professionally by the ECK, the run up period was marred by a number of irregularities. Mainly, there was unwarranted use of state resources in an attempt to sway the voters. For example, in an attempt to woe voters, President Kibaki arbitrary created new districts, made promises about development projects, distributed food aid and is alleged to have given financial incentives to delegations who visited him at State House.

Another irregularity was the prevalence of violence at several rallies. Eight people were reportedly killed and many injured during the campaigns. It was alleged that the police provoked rally participants into violence particularly in Kisumu and Mombasa, leading to the death of the eight. Concern was also raised by the Kenya National Commission on Human Rights (KNCHR) that certain political utterances from both sides of the yes-no divide amounted to "hate speech".

In fact, it is observed that the referendum campaign re-ignited the *majimbo* debate particularly with threats of possible evictions of persons from other regions living in the Rift Valley. This threat was actually carried out after the 2007 elections.

The referendum campaign also confirmed that Kenyan politics and voting patterns whether in a referendum or a general election is based on ethno-political considerations. It is unfortunate that the referendum was turned into a political contest for power between Raila Odinga and Mwai Kibaki.

According to opinion polls, media coverage of the referendum as a whole was balanced and fair apart from the State-controlled Kenya Broadcasting Corporation which was biased in favour of the "yes" campaign.

Incumbent

While it is reasonable to interpret results of the 2005 referendum as an unsatisfied demand for an alternative Constitution, people voted No as a result of a plethora of reasons, many of which were remotely related to the contents of the draft. A large number of voters had scanty knowledge about the core issues and were swayed more by the appeals of their leaders. Some, particularly those allied to the "no/orange" side were quoted stating that even though they had not read the draft Constitution, their leader Raila Odinga had read it and concluded that it is bad and hence they had to reject it!

The contentious issues mainly revolved around the powers of the Executive. Many people

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Still waiting to exhale? Former CKRC chairman Yash Pal Ghai.

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believed that the president was amassing dictatorial powers in preparation for the 2007 general election. The referendum became a contest between those in support of the position of the executive prime minister and those in support of a strong presidency. The former was fronted by Raila Odinga while the latter was supported by Mwai Kibaki the then incumbent president.

Forthcoming referendum

The planned referendum on the harmonised draft is anchored in the Constitution of Kenya Review Act (2008). Under Section 37 (1) of the Act, the Interim Independent Electoral Commission (IIEC) is required within seven days of the publication of the draft Constitution by the Attorney-General to frame and publish the question to be determined at the referendum. The question shall require a voter to indicate whether he approves or does not approve the Proposed New Constitution and shall be so framed as to require the answer “Yes” or the answer “No.” Voting at the referendum shall be by secret ballot.

Of course, if the proposed Constitution is accepted by the majority, the government shall be bound by the vote and the draft shall subsequently be made into law. However, in the event that the draft is rejected, the government shall be bound by that decision, which will be the end of the road for the CoE initiative.

However, under Section 47 of the present Constitution, parliament still reserves the right to amend or re-enact provisions contained in the present Constitution. If Parliament opts to exercise this power then it may be possible to obtain a new Constitution or at least achieve minimum reforms. But it is still a controversial legal question as to whether Parliament can re-enact the entire Constitution rather than its provisions.

Delegates during the Bomas of Kenya Constitution review stakeholders forum in 2005.

The other option would be for parliament to enact a new Constitution review law that formulates a new procedure for the enactment of a new Constitution. For instance, the requirement of a referendum may be done away with altogether and a constituent assembly constituted to formulate and pass a new draft. Alternatively, the mode of conducting a referendum may be modified. In this regard, instead of subjecting the entire Constitution to a referendum, the government may opt to subject only the contentious to a vote. It may also be appropriate to submit several drafts to the electorate for selection of the best one.

> *While it is reasonable to interpret results of the 2005 referendum as an unsatisfied demand for an alternative Constitution, people voted No as a result of a plethora of reasons, many of which were remotely related to the contents of the draft.*

Voter apathy

On March 22, 2010 the IIEC launched a nationwide voter registration exercise to run until May 5, 2010. This exercise is being undertaken in preparation of the impending referendum.

But there are bound to be major challenges in the IIEC's mandate. First, there is a cash crunch as the current budget had no provision for a referendum while the next budget may be laid down after the expected date of the referendum. The IIEC is said to have requested for KSh 7 billion but has so far received only KSh 1 billion from Treasury. Unless parliament passes a supplementary budget or the government gets alternative sources of funding, it may not be possible to have a new voter register by the time of the referendum.

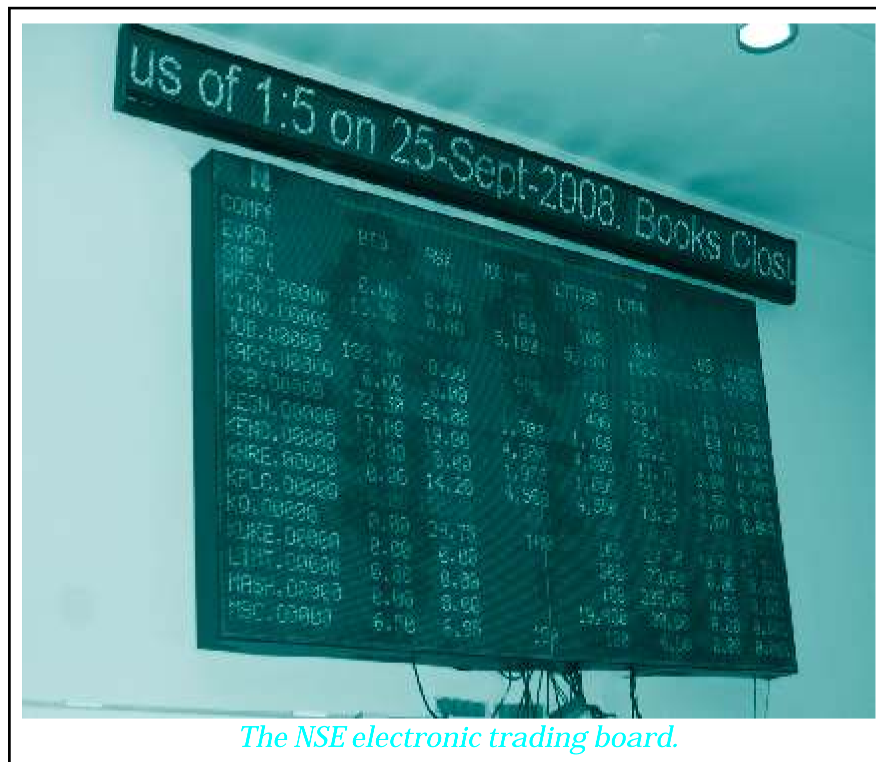
The other challenge revolves around voter apathy. As a result of the 2007 post election violence, many people are shunning registration on the ground that voting in this country is only a recipe for chaos. Unless this attitude is changed, there might be such a low number of registered voters such that issues of legitimacy might arise even if the proposed Constitution is passed.

Finally, the voter registration is taking place at a time when heavy rains are pounding most regions of the country, making some areas unreachable by the IIEC officials. With the limited time of conducting the exercise, some people may end up being disenfranchised. Unless those challenges are addressed expediently the voter register may not be ready by the date of the proposed referendum and it may be necessary to adjourn the referendum date to allow for a fairly complete registration. KN

Demutualising the Nairobi Stock Exchange

By John O'Maremba

The word *demutualisation* is the recent addition to the lexicon of most business media savvy Kenyans. Still, a lot of people are lost for what it is all about particularly as it is being touted as the next best thing to happen to the Kenyan stock market. Our business analyst takes us through the nitty gritty of the recent Demutualisation Bill and what it means for investors in shares and stocks.



The NSE electronic trading board.

For many years, most stock exchanges have operated as mutual companies. The main characteristic of a mutual company is that it has no share capital and is owned and managed by members. Further, the decision making process is usually consensus based and each member has one vote.

In the last twenty years there has been a growing trend where stock exchanges have been shedding their structure as mutual companies and adopting the form of companies with shareholders and a share capital.

This transformation of the legal structure of a stock exchange from a mutual association with one-member-one-vote into a company limited by shares with one-vote-per-share and with majority decision making is essentially what demutualisation is all about.

On March 4, 2010 members of the Nairobi Stock Exchange (a mutual company limited by guarantee) held an extraordinary general meeting and resolved that the NSE be demutualised. As the regulatory body in charge of the capital markets, the Capital Markets Authority (CMA) was mandated with the task of preparing the necessary legislation and legal framework for the process.

Procedure

Following this resolution, the CMA in conjunction with the Ministry of Finance prepared The Demutualisation (Nairobi Stock Exchange) Act and published it on its website. The aim of the proposed Act is aptly captured in its preamble which states that: “This Act is intended to provide for a conversion of the Nairobi Stock Exchange Limited from a Company Limited by Guarantee to a Company limited by shares and to provide for matters incidental thereto”.

The proposed Act provides an elaborate procedure which the NSE is to adhere to. The proposed Act first forbids the NSE from converting itself without seeking an approval of the Ministry of Finance. This approval will be based on recommendations of the CMA.

Thereafter, the NSE is required to lodge an application with the CMA accompanied by several documents including a valuation of the exchange, the proposed authorised and paid up capital of the Exchange with the number of

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“This Act is intended to provide for a conversion of the Nairobi Stock Exchange Limited from a Company Limited by Guarantee to a Company limited by shares and to provide for matters incidental thereto”.

It is important to note that under the proposed Act, the demutualised NSE shall not be considered as a new entity and its rights and liabilities prior to the conversion shall still continue.

shares to be issued, the names of members to be part of the initial shareholders and the value of the shares to be allotted to each, names of other initial shareholders who are presently not members of the bourse and names of the inaugural members of the board of directors.

Other requirements include the plan for segregation of the commercial and regulatory functions of the exchange, the draft memorandum and articles of association of the Exchange, a five year development plan of the exchange, rights and liabilities of existing members, a development plan for the Exchange's self regulatory function, draft amendments to the Exchange rules necessary to implement the demutualisation, the last audited accounts of the exchange and any other information that may be required by the CMA.

Under the proposed Act, CMA is accorded wide powers in supervising the process and ensuring that the NSE is ready for the transformed role. In this regard the CMA is empowered to make any amendments to the requirements mentioned above but in the event of substantial amendments, the NSE should be given an opportunity to make contributions before the amendments are effected.

Kenya Gazette

CMA is required to approve the NSE application within 30 days and may subject the approval to such terms and conditions as it may find necessary. After CMA's approval, the NSE is required to call a special meeting for purposes of adopting the memorandum and articles of association, the allotment of shares, the names of directors and the proposed paid up share capital.

Thereafter, the NSE is to apply for the conversion by lodging the minister's approval, the special resolutions approving the conversion, the amended memorandum and articles of association and CMA's approval with the Registrar of Companies. The draft Bill exempts the NSE from most provisions of the Companies Act cap 486 of the Laws of Kenya, payment of stamp duty, any tax or registration fee. The waiver of taxes and fees is important as the costs would be prohibitive to the NSE.

Within seven days, the Registrar is required to inform the Minister of Finance about the registration after which the minister may, by a notice in the Kenya Gazette, appoint a date by which the conversion shall take place. Subsequently, the Registrar is to issue a certificate of re-registration and, on that date, the NSE shall stand demutualised.

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Moving NSE to the next level. Chief Executive Officer Peter Mwangi

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It is important to note that under the proposed Act, the demutualised NSE shall not be considered as a new entity and its rights and liabilities prior to the conversion shall still continue. The CMA and any public officer have been given immunity from civil proceedings in respect of anything done under the Act. The minister has also been given blanket powers to modify any provisions of the Act if difficulties arise in its implementation.

Capital Markets Authority CEO Ms. Stella Kilonzo

However, the demutualised NSE is prohibited by the proposed Act from winding itself up without the approval of the minister. An important provision is that the CMA is empowered to take action to rehabilitate the NSE in the event the bourse faces financial or operational problems.

Why demutualisation?

The past decade has witnessed robust growth in the trade in equities and securities in Kenya. Therefore, the increased activity at the NSE requires a reciprocative and conducive environment for investment. As a mutual company, the NSE being has often been seen as a "members club" who on many occasions failed to police themselves.

The circumstances leading to the suspension of trade in Uchumi Supermarket shares, the collapse of brokers such as Francis Thuo & Partners, Nyaga Stock Brokers, Discount Securities Ltd and the placing of Ngenye Kariuki Investment brokers under statutory management are factors that have lowered investor confidence in the NSE. With demutualisation, ownership and control of the Exchange will become separate, making it possible to have self regulation and good governance in the management of the bourse.

In addition, a demutualised company has an independent board of directors that can transact business without the constant influence of stock brokers. Further, efficiency and responsiveness of the Exchange in its operations is improved as members who have in the past interfered with decisions due to vested interests will no longer have such an opportunity.

The structure of a mutual company hinders the acquisition of new capital. This is because mutual companies can only raise capital from their members as opposed to a demutualised company which can tap capital from shareholders, new entrants or through an initial public offering (IPO).

Remaining steps

One of the remaining steps in the NSE demutualisation is for the Minister of Finance to present the Bill before the Cabinet for approval. When approved, the Attorney General's office shall then publish the Bill and present it to parliament for debate.

After presidential assent of the Bill, the NSE will seek approval from the Minister of Finance for approval. Subsequently, the Exchange will make a formal application to the CMA for demutualisation. Once approved, NSE will apply for re-registration with the Registrar of Companies.

In past meetings of the NSE and its stakeholders, there have been indications that on demutualisation, the Exchange will change its name to Nairobi Securities Exchange Ltd and shall have an approved share capital of Kshs 1 billion. The Government will hold 10 per cent of the proposed shares while another 10 per cent shall be held by an

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Investor Compensation Fund to be administered by the Government. The remaining 80 percent shall be held by the current 20 members of the bourse.

It has also been indicated that after demutualisation, an IPO shall be held to sell shares to the public. Consequently, the current NSE members will offload their shares so as to remain with a total of 40 percent shareholding.

Best practices

There has been a rise in the number of stock exchanges which have demutualised worldwide. The Stockholm Stock Exchange is credited as the pioneer of demutualisation after it did so in 1993. Others are Oceanic, Canada, Deutsche Borse, London Stock Exchange, Chicago mercantile Exchange, Chicago Stock Exchange, New York Stock Exchange, Hong Kong Stock Exchange and the Johannesburg Stock Exchange.

Despite its advantages, demutualisation has not been without regulatory challenges. One such challenge is managing conflict of interest. The for-profit nature raises the possibility that exchanges may be so preoccupied with profits that they may sacrifice effective regulation to maximise shareholder profits.

Conflict of interest can be managed by reorganising the corporate structure of the Exchange itself. For instance, the business arm should be separated from the regulatory branch, leaving the latter subject to governmental oversight. Legislation such as that limiting share ownership in a demutualised Exchange may also prevent conflict of interest by barring a single shareholder from unduly influencing the affairs of the company.

To achieve the full benefits of the demutualisation, Kenya must address the challenges of demutualisation in developing countries. This is because developing markets are not sufficiently liberalised to enable a for-profit stock exchange. Secondly, it is important to note that critical mass of stock exchange trading and related services does not exist in most markets.

With demutualisation, ownership and control of the Exchange will become separate, making it possible to have self regulation and good governance in the management of the bourse.

We must also acknowledge that the macro-economic setting of the country is not ideal as there are still high fiscal deficits, high and volatile inflation, volatile and fast depreciating exchange rates and high interest rates. Policy inconsistency and macro-economic instability undermine investor and issuer confidence, thus dampening business flow to stock exchanges.

Infrastructure

The country must enhance its regulatory framework by ensuring that there are experienced supervisors. Poor regulatory enforcement will create challenges in an environment with a demutualised stock exchange given the inherent conflict of interest found in demutualised structures.

African markets are characterised by a small investor base due to prevalent poverty, lack of a savings culture. In addition, there is also a low base of institutional investors. The limited investor base has implications for the financial viability of a demutualised exchange.

To achieve optimum benefits of the demutualised Exchange, major economic reforms need to be implemented. First, the government must undertake an accelerated improvement of overall infrastructure including roads networks, railway system, electricity and water. This will attract more investors leading to an increase in liquidity of the market.

There also needs to be acceleration in the integration of the regional markets in order to increase the volumes of trade and derive benefits of economies of scale. Therefore, integration of the East African countries should be expedited.

It is hoped that the proposed Harmonised Constitution shall introduce a sense of good governance, thus improving the country's macro-economic environment. Good leadership also means that issues of corruption and bureaucracy shall be dealt with, thus boosting investor confidence. Effective leadership is also critical in alleviating poverty, improving the creation of wealth and ultimately an investment culture. KN

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and the Attorney General's office. However, in February last year, the Government took a more concrete step towards fighting human trafficking after Parliament passed a motion to introduce the anti-trafficking Bill.

There might be no comprehensive legal framework on human trafficking, but some of the above-mentioned statutes would greatly help in curbing the vice. However, slackness in enforcing these laws has largely contributed to the increase in human trafficking.

Nipping the vice

In the fight against human trafficking, the United States came up with a tier system that has been widely accepted as a tool to fight and monitor the practice. This placement is based on the extent of each Government action to combat trafficking rather than on the magnitude of the problem. The tiers are from 1 to 3, with 1 being the most compliant and 3 being the least.

Most of the developed countries fall under category 1. Although it does not signify the absence of the problem in these countries it, however, meets the minimum standards required in the fight against the vice. The most notable in the fight against human trafficking are those countries in tier 2 who are making significant efforts to achieve minimum requirements. Countries in Tier 3 are subject to certain sanctions.

One country that is making significant strides in fighting human trafficking is Nigeria. It ratified the Palermo protocol in 2001 and passed a national law. By enacting the *Trafficking in Persons (Prohibition) Law Enforcement and Administration Act*, 2003, Nigeria has demonstrated its total commitment to the crusade. It is one of the few African countries to pass such legislation. Nigeria also passed the *Child Rights Act* in 2003 which deals comprehensively with the issue of child trafficking.

There have been economic empowerment and re-integration programmes of victims, coupled with vigorous awareness-raising. As further evidence of the country's leadership role in the war against human trafficking, the National Agency for the Prohibition of Traffic in Persons and other Related Matters was established in 2003 and is charged with the responsibility of investigating and prosecuting offenders, as well as rehabilitating victims of trafficking.

For Kenya to achieve minimum standards in the fight against human trafficking, the efforts should be three fold - prosecution of perpetrators, protection of victims and preventative measures. There is need to implement the Counter Trafficking in Persons Bill. This will facilitate and heighten prosecution through improvement of penal provisions that are deterrent and commensurate to the crime. The government should regulate employment agencies to weed out the dubious ones that are recruiting Kenyans into slavery.

Many of these crimes against Kenyans happen due to ignorance especially of those migrating to other countries in search of employment. Registration of Kenyans working in foreign countries should a pre-requisite. Further, a mechanism for communication between Kenyans abroad and their respective embassies should be established in case of emergencies. The government should also establish shelters to rehabilitate victims of human trafficking.

According to Ms Kimani, public information campaigns would dissuade potential perpetrators and prevent people from becoming potential victims. Involvement of grassroots government institutions like chiefs and district officers is essential in identifying dubious employment agencies at the local level. KN

In addition, unscrupulous Kenyans working with foreigners set up dubious employment agencies that perpetuate trafficking of Kenyans to the Middle East, Western Europe and America. Kenyans rescued from these countries, have establish that they are forced into domestic servitude. They worked for more than 16 hours a day, ate leftovers and were physically abused.

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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