

# KatibaNews

April 2010

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Towards a new constitutional dispensation in Kenya

## To abort or not to abort?

- \* A second radical surgery?
- \* Changes within changes
- \* In the wrong hands

# 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 linking 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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All are welcomed to send their observations on the constitutional review process to be the Editorial Board.

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# The answer is YES; but Kalonzo has a point too!

**T**he conflict between the Church and the State over amendments to the proposed draft Constitution is becoming nasty by the day. While the government maintains that Kenyans are good to go with the just published draft document, the church is calling for some stay of execution on two issues.

We already mentioned the issues of abortion and Kadhi's courts in the last editorial so we will not belabour the point. Listening to various church leaders on television and radio and reading their views in the print media, I would say that they have depth (not necessarily right) in their stated arguments opposing the inclusion of these two items in the Constitution.

As the feature story on abortion in this issue shows, it is an extremely volatile matter that has far reaching ramifications both medically and socially. Those who argue that we should hear our women's side of the story are simply missing the point. The practice touches the very soul of a person. No wonder the women are not being vocal about it. They know it is a matter of life and death.

As for Kadhis Courts, still the church leaders have justifiable fears. But here the people who are really failing us are lawyers. These are the professionals who should come out and tell us the exact position of these courts in the

Constitution and whether their enactment poses a threat to both our legal and judicial system in future.

As usual, our politicians never disappoint! Instead of facing the facts and helping in resolving the

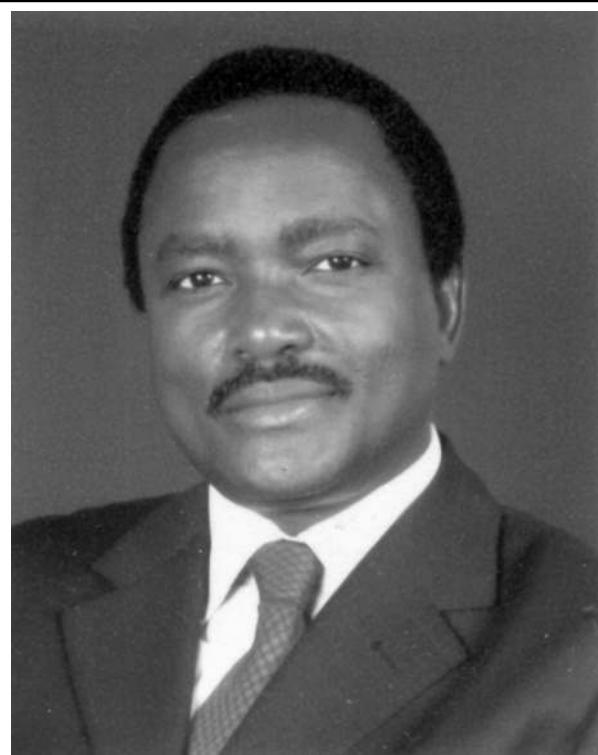
years of tomfoolery on Constitution review but let us do it soberly understanding the impact and/or consequences of every clause contained therein.

At the risk of sounding like a preacher (which anyway is still part of media!), let us avoid going to the referendum with two such polarised groups. If the church and the State go to the polls with such bad blood, methinks the draft Constitution will be voted out. Do your maths: Muslims are against abortion and Christians are against the latter and Kadhi's courts.

Whatever can be done to make sure we get sufficient consensus, let us move mountains to do it. We repeat that it is never too late to do the right thing. We might be sounding like Hon Kalonzo Musyoka here but that is the point. It makes no sense to totally ignore the pleadings of the largest stakeholders – by sheer numbers of Christians and Muslims. Our leaders should

get out of that political competition mode and seek a solution to this dilemma. As for those in the No camp due to clauses on land, we have now words for them.

If all sides concerned decide to stick to their guns regardless, it is Kenyans who will ultimately lose. Consensus consensus, and again we say consensus! That should be the only game in town as we go to the referendum. **KN**



*Vice President Hon. Kalonzo Musyoka*

conflict, they have engaged in needless name-calling. Even if one is an atheist, it does not add value to belittle and insult someone's faith or beliefs. That only goes to prove that you are impervious to reason.

Anyway, the aim of a Constitution is to act as a light house of the direction the collective conscience and vision of a people lie. Again I say yes, but let us stop being that dismissive. Sure, we need closure now from former President Moi's

# To abort or not to abort?

The world over, abortion has been and still is a very controversial subject. While some countries especially in the West have allowed liberal abortion arguing that it is part of personal freedom, others are more cautious saying that it is a right of last resort. Our correspondent looks at a subject that threatens to derail the quest for a new Constitution as the Church says a resounding NO to the practice.

By Albert Irungu



A crowd looking at aborted foetuses in dumped in an open sewer in Nairobi

**K**enya is on the verge of a new constitutional dispensation and counting days to the referendum that will see citizens vote for or against the proposed law.

This time the referendum is not a battle between oranges and bananas as it was in 2005; it looks like it is a duel between the State and the Church. The Church is disgruntled about two issues it considers fundamental. The twin issues of abortion and Kadhis' Courts threaten a draft that, even though not perfect, is the closest Kenyans have ever come to a consensus.

So what is abortion? There are many different definitions of this term. However, there is no consensus to its precise meaning. Some people will define abortion as occurring only during certain stages of pregnancy while others use the term at any stage after conception. Some confine the term to medical terminations of

pregnancy while others use it to refer to miscarriages.

*Wikipedia*, an online encyclopedia defines abortion as “the termination of a pregnancy associated with the death and expulsion of the embryo or foetus from the womb. In medicine, all terminations of pregnancy not resulting in live birth are defined as abortions. In common parlance, the terms miscarriage or stillbirth are applied to spontaneous (non-induced) abortions.”

In medicine, an abortion is the premature exit of the products of conception (the foetus, foetal membranes, and placenta) from the uterus. It is the loss of a pregnancy and does not refer to why that pregnancy was lost.

#### Medical, cultural and religious (moral) dimensions

From a medical point of view, practitioners in this field are of the opinion that abortion should not be in the constitution. An Act of Parliament would have been a

more appropriate avenue to address this health issue. The practitioners' argument is that this being a woman's reproductive health issue, women should be in the forefront in any form of debate regarding abortion.

Medical practitioners are of the opinion that the amendments being advocated for by the clergy would contravene women's rights to protect their lives, welfare and health. Many medical professionals feel that abortion, being a medical procedure, has no justification for its express provision within the constitution. In their understanding, cigarettes, for example, are a leading cause of cancer. However, nothing is in the Constitution regulating their usage.

It is also a feeling in the medical profession that even though abortion is not legal under the current constitutional dispensation specifically under the penal code, pregnancy terminations are continually done albeit under risky conditions. Criminalisation has in fact led to more deaths, as pregnant women acquire backstreet abortions, which more often than not turn to be life threatening to the woman. Government statistics put the figures at 300,000 illegal abortions every year.

A report by the Centre for Reproductive Rights called “*In Harm's Way*” put the figure of women who die annually from unsafe abortions in Kenya at 2,600. With such unavoidable deaths occurring, solutions have to be found and hard stances softened.

According to both medical and legal experts, the Proposed Constitution does not support abortion, but the right for a woman to terminate her pregnancy where it becomes life threatening. To the medical fraternity, the Church and its supporters have made extreme interpretations of the framing of the document that creates a view that it supports abortion.

Although the Bible does not explicitly condemn abortion, the Church has strong views that it is murder. The religious dimension has two aspects when it comes to the issues of abortion. One aspect is if the foetus is a person or a potential person. The second is does this foetus have rights? If so, how are these rights balanced against the rights of the mother? Religious scholars argue that to kill a foetus is to murder a human being. In 1869, Pope Pius IX stated that a foetus is a human being from conception and therefore abortion is murder.

The argument is based on the premise that all necessary genetic material is present at conception and the foetus continues development from conception until birth as a human being. Religion considers conception to be the point in which life begins. It is by this principle that opponents of abortion argue that a pre-embryo is a human being and aborting it is murder.

Culture and tradition is more inclined towards the religious perspectives on abortion. In addition, the Church feels the legalisation of abortion promotes a culture of loose morals and irresponsible behaviour. This, according to the Church, will be the final straw on the already endangered moral fabric.

The moral dilemma is that abortion is allowed in many countries under exceptional circumstances up to birth. After birth, deliberate killing of the child is murder. However, a foetus of 34 months can survive outside the womb on its own and with the progresses in medicine, continue to live. Thus, do we accord such a foetus moral rights? A criteria used to define a human being is rationality and self-value. There is a moral dilemma when it comes to embryos and foetuses as such standards when used do not define them clearly as human beings.

*In medicine, an abortion is the premature exit of the products of conception (the foetus, foetal membranes, and placenta) from the uterus. It is the loss of a pregnancy and does not refer to why that pregnancy*

#### Current Constitution vs proposed law

In Kenya, the Penal Code, as amended in 1973 (Sections 158-160), generally prohibits abortion. Any person who, with intent to procure the miscarriage of a woman, unlawfully administers to her any noxious substance or uses any other means is subject to 14 years' imprisonment. A woman who undertakes the same act with respect to herself or consents to it is subject to seven years' imprisonment. Any person who supplies any thing knowing that it is intended to be unlawfully used to procure a miscarriage is subject to three years' imprisonment.

However, under other provisions of the Penal Code an abortion may be performed to save the life of a pregnant woman. Section 240 of the Code states that "a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon an unborn child for the preservation of the mother's life if the performance of the operation

is reasonable having regard to the patient's state at the time, and to all the circumstances of the case." Thus, the only situation that abortion has been legally allowed is when a woman's life or health is severely threatened and only a doctor can determine whether there is need to carry out the procedure.

Article 43 of the Proposed Constitution states: (1) Every person has the right- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; which in essence allows abortion. Section 26 states that every person has a right to life, and that life begins at conception. However, this is totally negated by the next section, which allows abortion when, in the "opinion of a trained health professional (not necessarily a physician), there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law".

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*Kenyatta National Hospital, Kenya's biggest referral hospital.*

# A second radical surgery?

In a move reminiscent of what happened in 2003 when then Minister for Justice Kiraitu Murungi sanctioned the so called radical surgery of the Judiciary, the proposed new Constitution also proposes a kind of overhaul of the current judges. Our correspondent looks that what the new law proposes as the panacea of the ills that plague our Judiciary.

By Dorothy Momanyi



*Hon. Kiraitu Murungi, the architect of the first radical surgery*

The Proposed Constitution seeks to give a bold new beginning for the people of Kenya. To achieve this objective, it is important to undertake radical changes in the structure and composition of the key institutions of the State. It is in pursuance of this goal that gave rise to the need to overhaul the staffing of the courts.

To borrow from the Biblical proverb, a new constitution shall like new wine require to be placed in new wine skins. The provisions relating to the vetting and removal where necessary, of all Judicial officers are to be found in paragraph 23 of The Sixth Schedule to the proposed Constitution. This Schedule deals with the Transitional and Consequential Provisions and paragraph 23 is part of the provisions under the heading, Administration of Justice.

Under that provision, Parliament is mandated with the responsibility of establishing within one year after the effective date of the Constitution, a legislation that shall establish the mechanisms by which the suitability of all judges and magistrates who shall be in office on the effective date shall be vetted.

The Proposed Constitution has not outlined the qualities to be sought during the process of vetting. It has, however, mentioned that the process of vetting shall take into account the contents of Article 15(a), which provides for the paramount need for service of justice to all persons irrespective of status, the avoidance of delays, the encouragement of alternative means of dispute resolution and the delivery of justice without much regard to issues of procedures and technicalities.

Presumably, these aspirations shall be taken into account during the vetting and possibly, the judges who will be noted as having promoted these principles in the past may well be considered suitable for retention under the proposed law. Nonetheless, Parliament shall promulgate the required criteria to be adopted in the vetting process.

The proposed Constitution has not defined what vetting means, but borrowing from the English language, the term can be considered to refer to a process by which a person's past life, career and character are examined for the purpose of ascertaining whether the person is suitable to hold a particular post.

In our context, vetting may involve examining the academic qualifications of the judges and magistrates, analysing the contents of their past judgements and orders given in the past, digging into the ethical conducts, evaluating the general character of the officers and reviewing the average timeliness in performing official duties.

## Why yet?

By the nature of its work, the Judiciary acts as the custodian of the Constitution and a guarantor of the rule of law. Its duties are so sacrosanct such that like Caesar's wife, it must be above reproach or suspicion.

In Kenya today, it is common knowledge that the public, the corporations, practitioners, and institutions have lost confidence in the judicial officers who are responsible for settling disputes. This lack of confidence has been exhibited in the numerous government reports, including the Report of the UN Special Rapporteur on Extra-judicial, Summary and Arbitral executions and the Report by the Commission of Inquiry into the Post-Election Violence.

The lack of complete confidence has been so serious that the majority of submissions to the Committee of Experts (CoE) who drew the Proposed Constitution recommended a complete overhaul of the judicial officers.

Recent incidents by which judges have been prosecuted on allegation of criminal conduct, the opaque nature of judicial appointments, the lethargy in the execution of duties and the need for a strong Judiciary that will efficiently check on the strong presidency has also informed the resolution to have all judicial officers undergo vetting.

In essence, in order to give Kenya a new bold beginning, the Judiciary must start from a clean slate and the "wheat" must be separated from the "chaff". In proposing the process of vetting, the CoE must have acknowledged that there is considerable number of good judicial officers while an even greater number is unsuitable to continue holding those posts.

In the circumstances, it would not be just to undertake a wholesale dismissal of all judicial officers and neither would it be acceptable to the public for the entire Judiciary to be retained. As a compromise to the two divergent positions, it was a laudable step to undertake a process by which the good elements shall be separated from the bad and the good retained.

#### **The 2003/04 "Radical Surgery" of the Judiciary**

There is a widespread feeling within the public and practitioners and policy makers that the 2003 reforms in the Judiciary famously referred to as the radical surgery was not fully effective in weeding

out the unsuitable elements in the Judiciary.

When the National Rainbow Coalition (Narc) government came into power, it felt comfortable to undertake governance alongside a Judiciary that was seen as Kanu oriented. There was also a feeling that the new government would not perform effectively as long as one of its arms had not undergone a change of regime. The Narc government also desired to fulfill its electoral promise of weeding out the bad elements in the Judiciary.

It is for these reasons that during its first year of reign, the government constituted the "Integrity and Anti-Corruption Committee" headed by Justice Ringera to examine the extent of corruption and levels of integrity in judicial officers. The committee in its report recommended the dismissal of 82 of the 254 magistrates, the appointment of tribunals to investigate the conduct of five of the nine Court of Appeal Judges and 18 of the High Court Judges in the event

that they were not willing to voluntarily retire.

The magistrates were not accorded an opportunity to defend themselves and they were all dismissed. As for the judges, 16 of them opted to retire while seven chose to face their accusers in the tribunals. The seven were Justices Philip Waki, Moijo ole Keiwsa, Msagha Mbogholi, Daniel Aganyanya, Vitalis Juma, Tom Mbaluto and Roselyn Nambuya. Of the seven, only two, namely Juma and Mbaluto were dismissed pursuant to the recommendations of the tribunals investigating them.

In a number of rulings of the tribunals and recently in a decision of the High Court challenging the appointment of a tribunal against appellate judge ole Keiwsa, the procedure adopted by the Ringera Committee was severely attacked for not according judges an opportunity to respond to allegations that were submitted before the committee. The tribunals

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*Chief Justice Evans Gicheru poses with a group of Kenyan judges.*

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also remarked that the evidence that the Ringera committee had relied upon was shoddy, devoid of merit and completely unreliable.

The Narc government may have been so obsessed with getting rid of what they presumed to be unreliable elements in the Judiciary such that caution and due process was thrown out of the window in favour of a named enterprise to get rid of the judicial officers.

As a result of the purge, the chronic delay of cases was experienced. A substantial number of matters including criminal cases could not take off due to lack of judicial officers and the ones partly heard had to commence afresh to the detriment of the parties involved.

Subsequently, the President appointed 28 acting judges in a process that was less than transparent. The independence of the acting judges was questionable more so in light of the fact that they lacked security of tenure. Without that independence, they were not free to act in a manner that was adverse to the Executive interests.

### Challenges

Based on the experience gathered from the radical surgery, it is safe to predict challenges that are likely to be encountered during and as a result of the vetting process.

First, an air of uncertainty shall hang on the judicial officers and as a result their confidence and independence shall be eroded. Another challenge will be on the ways of obtaining concrete evidence against the officers. Unless an officer is extremely careless, it is normally difficult to obtain incriminating evidence as unethical practices are done in secrecy.

In their submissions to the CoE, the judges expressed reservations that if all of them opt to resign rather than undergo vetting, then there would be a constitutional crisis and the breakdown of the rule of law. There would be nobody to hear the

matters in court. Indeed, it would be a constitutional crisis.

However, considering that most judicial officers have embarked on maintaining a judicial career, it would be unlikely that all of them would resign. Further, a number of judicial officers detest association with a tainted institution and they would be happy with any process geared towards recapturing the lost image.

The recruitment of judges is unlikely to be free from politicisation and ethnicisation. In particular, the appointment of Supreme Court judges and those of the Court of Appeal must be vetted by Parliament. It is inevitable for political forces to desist from influencing the appointment of their cronies or influencing the defeat of those they perceive to be adverse to their interest. The disadvantage with politicisation is that the core considerations like

competence are lost and political expediency becomes the determining factor.

Finally, we must bear in mind that in an adversarial legal system like ours, there will always be persons aggrieved by decisions of a particular judicial officer and the likelihood of floods of complaints driven by a sense of vengeance rather than *bona fide* issues cannot be overruled.

Parliament must bear in mind the experiences gained from past attempts to reform the Judiciary and must prescribe a process by which the right of reply of the officers concerned must be guaranteed. In addition, it may be appropriate if the vetting is done in stages so as to avert a constitutional crisis or disruption of proceedings.

KN

The writer is a freelance journalist.



*Justice and Constitutional Affairs Minister Hon. Mutula Kilonzo. Does he have the guts to clean house?*

## What are the Churches against?

Churches on the other hand feel the ambiguity that could see the abortion rights expanded is unacceptable. The Committee of Experts drafted a clause stating that, "everyone has a right to life". However, the Church represented by National Council of Churches (NCCK) and Catholics have questioned that statement. They find fault in it for it does not define when life begins and ends. They would like the clause to be; all human life begins at conception and ends at natural death.

Also in contention is the Article 26(4) that states: "Abortion is not permitted unless, in the opinion of a trained health professional, there is a need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law." The Church faults this particular clause pointing out that "a trained health professional can be misconstrued and is subjective, thus open to abuse, in this case abortion.

*According to the Church this clause has introduced abortion in its entirely. First, the decision maker of who is eligible for an abortion is any "trained health professional" and not a "registered medical practitioner". Thus, any person trained in "health" whether certified or not can make the decision to have the abortion legally. Another argument that the Church has is that the Proposed Constitution permits the legalisation of abortion. Abortion may be legalised if "permitted by any other written law". In essence, this will invalidated the constitutional right to life simply by passing a new law, without changing the constitution thus watering down the right to life.*

In addition, the exception of "emergency treatment" is coded language for "emergency contraception". Emergency treatment does not make sense if it does not protect life or health of both the mother and the unborn child. "Emergency treatment is a way of introducing an early



Worst scene: An aborted foetus at 22 weeks.

abortion after conception has occurred.

Furthermore, a provision that further enforces access to abortion is under Article 43 that states: "Every person" has the constitutional right to "health care services, *including reproductive health care*." In the United States, the term "reproductive health care" is coded language for abortion. The affirmation that "reproductive health care" is a right will provide a social-welfare entitlement to state sponsored abortions.

#### Legal status of abortion in other countries

In South Africa, a physician in a government hospital must perform a legal abortion or other approved medical institution with the permission of the hospital superintendent. Abortion requires the approval of two independent physicians (besides the physician performing the abortion), one of whom must be a psychiatrist if abortion is sought on mental health grounds or a district surgeon if the pregnancy resulted from unlawful intercourse.

One of the consenting physicians must have practised medicine for at least four years. The law prohibits consenting physicians from participating or assisting in

the abortion. Authority for an abortion on the grounds of rape, incest or intercourse with a mentally retarded woman is granted from a certificate from the local magistrate.

The results of the Supreme Court's 1973 decision in *Roe v. Wade* created a right to abortion for any reason during the nine months of a woman's pregnancy. In the United States, this has placed America as the most pro-abortion country in the world. In America, a pregnant woman has a right to terminate pregnancy in the first six months of her pregnancy while the state has the right to in the last trimester. The state has a *right*, although not an *obligation*, to restrict abortions to only those cases in which the mother's health is jeopardised. America in essence has come up with laws that permit abortion on demand.

It is legal to have an abortion in England, Wales and Scotland under the 1967 Abortion Act. The Act allows termination up to 24 months of pregnancy. The Act states that two doctors must agree for the procedure to be carried out. However, there is no time limit if there is a substantial risk to the woman's life or if there are foetal abnormalities. The decision is usually based on social

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# Changes within changes

Legislation required upon adoption of the proposed Constitution

By Guandaru Thuita

**A** Constitution may be defined in simple terms as the supreme law of a state that establishes the principles upon which the government is founded and which regulates the relationship between the state and its people on one hand, and between the people themselves on the other hand.

As the definition states, a Constitution normally spells out only the main principles and rules relating to governance of a state and leaves the formulation of intricate details to other forms of legislation, including subsidiary laws and administrative rules.

The proposed Constitution of Kenya that was submitted to parliament by the Committee of Experts (CoE) on February 23, 2010 has stuck to the above norm. It has numerous references to legislation that shall require enactment in order to give to it the full effect in spirit and in its objectives.

## Specific laws requiring enactment

Particulars of the legislation requiring enactment are outlined under Schedule 5 of The Proposed Constitution in accordance with the specific Chapter that they relate to. No legislation has been envisioned under Chapter 1 of the proposed Constitution, but under Chapter

2 that deals with Republic, legislation is required to address the issues pertaining to the receipt of compensation by communities in regard to the utilisation of their culture and heritage. The legislation under this Chapter is also required to address the cognisance and protection of indigenous knowledge and products.

On Citizenship under Chapter 3, legislation is required to provide the conditions, procedures by which foreigners can acquire citizenship or the manner in which their citizenship can be renounced, revoked or deprived. The Bill of Rights under Chapter 4 is one of the chapters that shall either require the most pieces of legislation or otherwise comprehensive legislation to cover all the issues required.

Perhaps this is because the chapter is one of the most expanded one as it includes the new generation rights in addition to the classic fundamental rights and freedoms.

Legislation required under this chapter shall address the machinery of giving effect to the provisions of the Bill, the interpretation of the Bill; the standards required for the achievement

of the enumerated rights; the manner of adopting and fulfilling international human rights obligations, the manner and instances in which the subordinate courts can hear applications seeking redress for contravention of the rights; the setting out of limitation of time in respect to actions seeking redress for infringement of the rights; the promotion of affirmative action to address the imbalances that may have arisen as a result of past discriminations (upon persons with disabilities, old people, children and marginalised groups); the mode of granting asylum; the procedure and modes of land acquisition; legislation in respect of rights to a clean environment; legislation relating to consumer protection; the review of administrative actions; the humane treatment of persons; legislation in respect to the declaration of a state of emergency; and, finally, legislation establishing the Human Rights and Gender Commission.

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*Speaker Kenneth Marende.  
Looking towards post referendum.*

One of the greatest factors that necessitated the push towards the enactment of a new constitution has been the issue of land. Chapter 5 of the proposed Constitution is in respect to the issue of land and a substantial number of legislation shall require to be enacted in respect of community ownership of land, land holding by non-citizens, rationalisation of the existing land laws, the administration of the land fund and issues relating to land use.

With regard to leadership and integrity under Chapter 6, legislation shall be enacted to outline the manner and forms of oaths and affirmations to be taken by individuals upon assumption of public office. It will also establish the procedures and mechanisms of promoting the principles of leadership and integrity as set out under the proposed Constitution.

With regard to the chapter on representation, legislation is

required to address the issues relating to conduct of elections, settlement of electoral disputes, the establishment of an Independent Electoral and Boundaries Commission and matters pertaining to political parties.

There is also a requirement in the same chapter for the enactment of legislation to promote the representation of marginalised groups in Parliament and one to address the manner in which the electorate can recall their member of parliament.

In respect of the Judiciary under Chapter 10, legislation shall be required for purposes of outlining the powers and functions of the magistrate's courts, martial courts and other courts and legislation to address all matters pertaining to the Judiciary fund.

Chapter 11, which deals with issues of devolved government, shall require legislation outlining the manner of elections of mayors, the government and management of urban areas, the procedures for settling intergovernmental disputes and legislation establishing the government structure and management of Nairobi region.

A chapter requiring major legislations is chapter 15, which deals with issues of public finance. The legislation in this respect is required to address issues of waiver of taxes, exemptions from paying tax, concurrent taxation with other countries, revenue making powers of devolved government, withdrawals from the consolidated fund, management of the contingency fund, issues to



*As the clock in Parliament buildings shows, it is a race against time.*

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do with the annual budget of devolved government, procurement, audit of devolved government, establishment of structures and powers of the Treasury, National Revenue Authority, Commission on Revenue Allocation and the Central Bank.

The remaining chapters have a minimal requirement for legislation save for those touching on the code of conduct of public officers and those governing the structures of National Security organs such as the police.

Pursuant to the provisions in the proposed Constitution, existing legislations shall have to be modified, varied and/or repealed in order to conform to the constitution. In this respect, the Immigration Act, Copy Right Act, Interpretation and General Statute Act, Limitation of Actions Act, Children's Act, the Marriage Act, the Succession Act, the Government Secrets Act, the Media Act, the numerous Acts on land, the Penal Code, Criminal Procedure Code, the Married Women Property Act and many others shall have to be amended or replaced.

However, it is important to note that the proposed Constitution under Rule 7 (1) provides that

the existing laws shall continue to be in force, but will only be construed with the necessary alterations so as to bring them into conformity with the constitution.

#### **Who has the role of ensuring the enactment of these legislations?**

The proposed Constitution has in the Transitional and Consequential Provisions bestowed the duty to enact the legislation on Parliament. The attorney general is required to act in consultation with the Commission on the Implementation of the Constitution. This commission has specifically been established for the purpose of monitoring and overseeing the development of legislation and administrative procedures so as to implement the proposed Constitution.

The time frame required for the enactment of the legislations is provided for under Schedule 6 of the proposed Constitution and ranges between six months and five years depending on the matter the legislation is meant to address. There are those pieces of legislations that have not been specifically mentioned, but which inevitably have to be enacted to give full effect to the spirit and the letter of the Constitution.

These types of legislations are required to be enacted within five years from the effective date of the Constitution. Parliament is, however, granted power to extend the required period of enactment by one year if at all a resolution supported by two-thirds of all the members is passed in that regard.

In order to ensure that legislation is enacted within the given period, the proposed Constitution grants every person the right to petition the High Court for a declaratory order and the High Court may, pursuant to hearing the petition, grant an order directing parliament and the AG to take steps to ensure that the legislation in issue is enacted and a report on the progress be made to the Chief Justice.

In the event that parliament fails to enact the legislation, the president is required to dissolve Parliament and if the new parliament also fails to enact the required legislation, then the cycle of petitioning the High Court and dissolution of parliament continues.

With the passage of the proposed Constitution, the legislative drafting department in the Attorney General's office, the Law Reform Commission and parliament shall go through the busiest period ever with respect to enactment of hundreds of legislations. We can only hope that the said institutions shall have adequate resources and personnel to undertake that massive but noble task. **KN**

The writer is an advocate with Murage & Mwangi Advocates.

***With regard to leadership and integrity under Chapter 6, legislation shall be enacted to outline the manner and forms of oaths and affirmations to be taken by individuals upon assumption of public office. It will also establish the procedures and mechanisms of promoting the principles of leadership and integrity as set out under the proposed Constitution.***

# In the wrong hands

A serious look at the government's disarmament programme in Northern Kenya

By Janet Mburia

In May 2006, the Government executed an accord with the Ugandan government by which it committed itself to enhance the disarmament of Northern Kenya pastoral communities. Since that time, the government has made disarmament initiatives by requesting members of these communities to voluntarily surrender arms.

The government has in other instances sanctioned the use of force in disarmament. These disarmament operations have mainly targeted seven of the Northern districts of West Pokot, Turkana, Baringo, Marakwet, Samburu, Laikipia and Trans Nzoia.

On March 31, 2010, a simultaneous disarmament programme of all pastoralist communities holding illegal firearms in Uganda and Kenya commenced. The government of Kenya stated that in pursuance of the programme, it shall open up 16 security posts along the Kenya-Uganda border to seal all entry points. The intention of securing these border posts was to prevent further cross border movement of arms and also to allay the fears that the disarmed communities are vulnerable and susceptible to attacks from outside the country.

#### The rationale

For many decades since Independence, the Northern

region of the country has never enjoyed peace. There is an ever recurrent practice of cattle rustling among the communities living in the North, a practice always accompanied by loss of human life, destruction of property, displacement of communities, disruption of the socio-economic activities of the communities, starvation and untold human suffering.

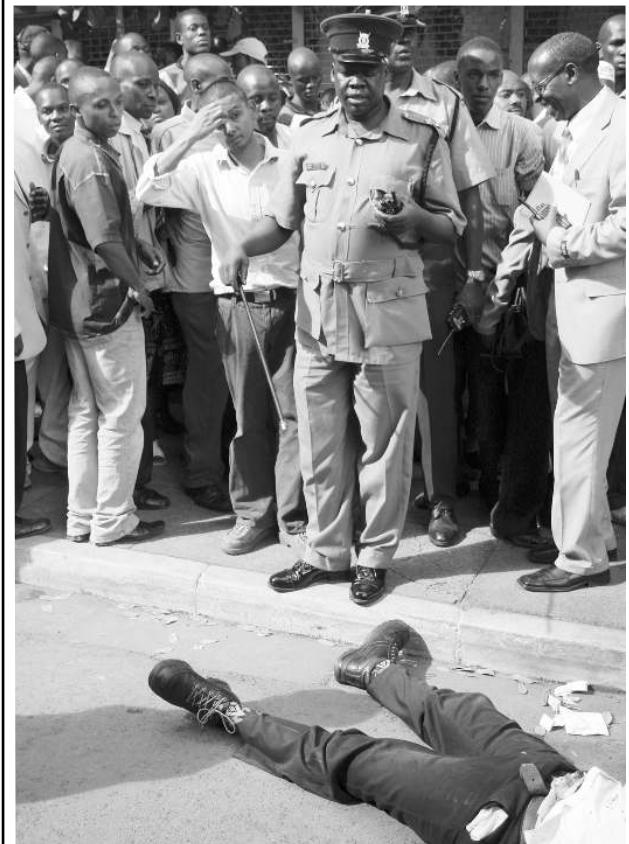
The proliferation of firearms in the North has encouraged these cattle raids and fuelled perpetual conflicts between the communities involved. Further, the availability of arms in civilian hands has posed a security threat nationwide. This is because the arms have often found themselves in the hands of gangsters in other parts of the country who have increased their

aggression in committing criminal actions.

Bearing in mind that one of the core purposes of the government is to provide security for its citizens, it is therefore imperative for it to carry out the disarmament so that there can be a restoration of the Rule of Law to bring forth an enabling environment for fostering development in this region.

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*The government has in other instances sanctioned the use of force in disarmament. These disarmament operations have mainly targeted seven of the Northern districts of West Pokot, Turkana, Baringo, Marakwet, Samburu, Laikipia and Trans Nzoia.*



*A suspected criminal shot dead by police in Nairobi. Increase in crime is associated with availability of illegal arms.*

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### Challenges

The carrying out of the disarmament exercise has not been without hitches or challenges. Many studies have shown that most individuals holding guns have been willing to give up their weapons, but only on condition that the Government guarantees and secures them from attacks by other communities within and outside Kenya.

It has been a tall order for the Government to demonstrate capacity to provide adequate security in these regions. Raids have continued to take place in these areas and the Government has not only been unable to prevent most of these raids, but has also failed to redress the loss accruing to the victims.

However, it must be recognised that the Government has opened up additional security posts along the borders with Uganda, Ethiopia and Southern Sudan. But due to their porous nature, manning them is difficult due to massive resources and personnel required to police them. This State is further compounded by the fact that raiders are so heavily armed that they have the potential of overwhelming the security forces.

Almost all the countries that Kenya borders in the northern region are experiencing or have been ravaged by conflict in the past. In Uganda, the ongoing battle between the Lord Resistance Army (LRA) and the Government has greatly contributed to the availability of arms amongst the nomadic communities.

Studies have shown that in an effort to annihilate the LRA, the Ugandan government provided numerous arms to the Karamajong community so that

they could assist it to counter the LRA. The Karamajong in turn applied these arms to launch attacks on other communities and also traded in the arms, making them easily available to neighbouring communities.

The conflict in Northern Sudan, Ethiopia and Eritrea, the collapse of government in Somalia and the arms aid by the mighty nations such as Russia, China and US has boosted the availability of arms. For the government to undertake a mopping of arms that are so abundant is a serious challenge.

The communities living in these areas justify their possession of arms on the ground that they have been neglected by the Government security wise and economically. It is true that development in these areas is extremely low and the idle youths find comfort by engaging in cattle raids as a form of economic activity. To address this situation, the Government must foster development in these areas. However, considering the low allocation of resources to these regions in the annual budget equitable development of these areas is still far from being attained.

The security organs are also seriously challenged in the pursuit of gathering intelligence. The northern communities are so tightly knit that their members are usually unwilling to disclose information on other members as that may be construed as betrayal. The Government is partly to blame for this state of affairs as the security forces have on many occasions carried out the exercises brutally and without regard to the fundamental rights of the residents. Cases of theft, rapes, torture and other forms of degrading treatments perpetrated by the security forces

have not been uncommon thus creating resentment to those carrying out the disarmament.

In addition, lack of sensitisation of the communities and failure to educate them on the intents and approaches to the disarmament has largely contributed to the slow cooperation between the communities and the Government.

Another major challenge has been the fact that the practice of cattle rustling has acquired a cultural aspect whereby young warriors find it to be a process by which they can gain respect amongst their peers. For this group of youths, they would be the least willing to give up their guns.

### Cooperation

Affinity, trade and even conflict link the pastoralist communities in Kenya and the neighboring countries. These communities are nomadic and often cross the national borders in search of pasture. They carry along arms in the course of their movements, and trade in these arms.

When conducting cattle raids, the pastoral communities know no borders. They cross from one country to the other leaving a trail of destruction. In the circumstances, there must be simultaneous execution of disarmament programmes in the neighbouring countries of Uganda, Southern Sudan and Ethiopia for the exercise to be fully successful.

A disarmament exercise has been taking place in Uganda for a number of years and the Government of Kenya recently signed an accord with Uganda for a common and coordinated plan. The accord involves the formation of joint committees to follow up on the disarmament.

Uganda has in the past conducted a series of fairly successful disarmaments among the Karamajong that has led to the collection of approximately 27,000 illegally held weapons.

However, the Toposa of Southern Sudan and the Merille of Ethiopia pose the greatest threats to Kenyan communities such as the Turkana. The Toposa, in particular, have in the past made frequent and daring incursions into the country including a raid on a Kenyan military base near the disputed Nadapal border post.

In a recent arms survey conducted by the Danish Demining group entitled *Symptoms and Causes: The insecurity and underdevelopment in Eastern Equatorial*, it was established that local

communities in the Sudan's Eastern Equatorial State such as the Toposa, Torit, Ikoto and Magwi have aggressively continued to arm themselves. Besides the likely surge in cross border raids, there is likely to be a flow of arms through sales to criminals and bandits operating in Northern Kenya. The Oromos of Ethiopia too continue to pose serious dangers to Kenya and its communities.

Other than with Uganda, there is no indication of cooperation between the Government of Kenya on one hand and the governments of Southern Sudan and Ethiopia on the other. There is, therefore, cause to worry that the exercise may be futile. In fact, it may be counter-productive, as the disarmed Kenyan communities have been exposed to the heavily armed foreign raiders.



*Kenya Army personnel in an operation in North Eastern Province*

### Success

The office of the Public Communications Secretary otherwise known as the Government Spokesman has indicated that the exercise is successful. It has stated in its website that more than 66, schools which had been closed due to insecurity are now open, shopping centres have been revived and health centres are now operational. Reports approximate that so far 3,000 guns have been recovered through the exercise.

To some extent, the exercise in so far as it has recovered a considerable number of weapons and brought some semblance of peace can be termed as succeeding. However, reports, particularly those from the Justice and Peace Commission of the Kenya Episcopal Conference, indicate that there are still around 50,000 weapons in circulation. The recovered weapons are, thus, a negligible figure when compared to the target. Compared to the Ugandan exercise that has led to the recovery of more than 27,000 arms, the Kenyan programme is still far from successful and enhanced efforts must be put in place to capture more weapons.

The Government must also take more measures to guard the porous borders and lobby the governments of Sudan and Ethiopia to carry out a similar exercise. More funds must also be marshaled to the northern region to foster development as security and development are so intertwined that the lack of one definitely leads to the lack of the other. **KN**

The writer is a programme officer with a Nairobi-based civil society organisation.

# Katiba Briefs

February 4<sup>th</sup> - President Kibaki and Prime Minister Raila Odinga convene first cabinet meeting this year. Top on the agenda is fulfillment of their promise of a new Constitution.

February 6<sup>th</sup> - More Christian leaders opposed the inclusion of Kadhi's Courts in the new draft Constitution. They vow to mobilise their followers to reject the document in the referendum set for mid this year.

February 15<sup>th</sup> - The Constitution making process enters a crucial stage. The Committee of Experts (CoE) is set to meet members of the Parliamentary Select Committee (PSC) on the Constitution to agree on key areas before official handing over later in the week.

February 16<sup>th</sup> - Kenya moves closer to achieve its quest for a new Constitution when experts endorse recommendations made by MPs.

February 25<sup>th</sup> - The fate of the harmonised draft falls in the hands of the tenth Parliament after the CoE hands over the document to the PSC.

February 26<sup>th</sup> - Kenya could save billions of shillings in salaries annually if a proposal in the draft Constitution on a new government structure is adopted. The proposal would see the reduction of government members from current 98 to 24, including the president and vice-president.

March 2<sup>nd</sup> - Treasury allayed fears that the referendum would not be conducted due to lack of funds. A senior official said the Finance ministry was preparing a supplementary budget that would see the Interim Independent Electoral Commission (IIEC) allocate KSh 7 billion to fund the

referendum on the new Constitution.

March 3<sup>rd</sup> - Orange Democratic Movement planned to launch a countrywide campaign to urge Kenyans to support the proposed Constitution at the referendum.

March 4<sup>th</sup> - The Catholic Church said it will ask its followers to reject the proposed Constitution if the clause that could be exploited by abortionists remained.

March 7<sup>th</sup> - MPs asked church leaders to abandon their hard line positions as parliament begins debate on the proposed Constitution. The leaders had vowed to mobilise the faithful if the chapters on the Kadhi Courts and the right to life are not amended.

March 14<sup>th</sup> - The public show of unity by President Mwai Kibaki and Prime Minister Raila Odinga belies deep differences in the Grand Coalition Government. This was apparent from the different opinions on the way forward in the final stages of the Constitution review process.

March 15<sup>th</sup> - Justice and Constitutional Affairs Ministers, Mutula Kilonzo, appealed to President Kibaki and PM Raila Odinga to be in Parliament when debate on the proposed constitution kicks off.

March 17<sup>th</sup> - It will not be the end of the Law review if Parliament fails to pass the draft Constitution. The Kenya Constitution of Kenya Review Act which guides the stages for the review has an in built system that would seek to resolve any differences arising between MPs on the draft.

March 21<sup>st</sup> - A doctors organisation warned that some methods of infertility treatment and

emergency contraception will be deemed illegal if the proposed Constitution is adopted as it is. The chairman of the Kenya Obstetricians and Gynecologists Society, Prof Joseph Karanja, said complications arising from conception such as ectopic pregnancies may not be terminated unless there is proof that the embryo is dead.

March 24<sup>th</sup> - MPs started debate on draft Constitution. Chairman of the PSC on Constitution review, Mr Mohammed Abdi Kadir, moved the motion on the debate.

25th March - MPs lost their attempt to make it easier to change the draft Constitution. MPs wanted the rules of the House interpreted to allow them to make changes by a simple majority. The review act requires a two-third majority.

March 28<sup>th</sup> - PM Odinga and Vice-President Kalonzo Musyoka pitched for the draft Constitution and promised to campaign for its adoption in the referendum.

March 30<sup>th</sup> - Parliament was to start debating amendments to the proposed Constitution with no consensus yet between the main political parties that make up the grand coalition government. The cabinet, MPs and political parties had all failed to agree on suggested changes to the proposed Law.

March 31<sup>st</sup> - The day marked a turning point on the long road to a new Constitution if Parliament injects 150 amendments already floated in the proposed Constitution or if the document sails through without alteration.

April 1<sup>st</sup> - United States President Barrack Obama is scheduled to tour the country in November this year if the Constitution review process sails through.

## Abortion

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circumstances of the pregnant woman and if there is greater risk to the woman's mental or physical health if she continues with the pregnancy than if she has an abortion. At the time of enacting the Abortion Act in 1967, the time limit was 28 weeks. However, the Human Fertilisation and Embryology Act amended it in 1990, which reduced the limit to 24 weeks for most abortions.

In Germany, termination or abortion of a pregnancy is allowed on medical and criminal grounds and on demand on the following

terms. On medical grounds, it may be terminated up until the 22<sup>nd</sup> week of pregnancy where the life of the pregnant woman is in danger, or her physical or mental health is threatened by the pregnancy. It must be proved that the danger to the woman can only be averted by a termination or if there is known or anticipated damage to the unborn child, due to chromosomal disorders.

On criminal grounds, termination must take place within 12 weeks of conception where a woman is pregnant because of rape. All the

above must be verified by an independent doctor who then provides a certificate proving this.

For termination of pregnancy on demand, the woman must first be counselled at least three days before the procedure. A written certificate from a recognised institution must be obtained affirming counselling took place. In addition, the pregnancy must not be more than 14 weeks old before a doctor can perform the procedure. **KN**

The writer is a freelance journalist.

## Briefs

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Sources at the US embassy hinted that preparations for his arrival are at an advanced stage.

MPs used theatrics to frustrate debate and even defeat amendments proposed to the draft Constitution. On many occasions MPs sat throughout the debate, only to troop out as soon as the Speaker called for the vote to be taken, effectively starving the House of the necessary 145 MPs required to pass such amendments.

April 2<sup>nd</sup> - The Supreme Council of Kenya Muslims has urged Muslims to support the proposed Constitution at the referendum. The announcement came after efforts to remove Kadhi's courts from the document in Parliament failed.

April 3<sup>rd</sup> - President Kibaki called on Kenyans to support the proposed Constitution at the referendum. He expressed confidence in the enactment of a new Constitution.

April 5<sup>th</sup> - The IIEC asked the Treasury for KSh 9.9 billion for the referendum to be held in July or early August.

April 13<sup>th</sup> - Attorney General Amos Wako said he is ready to publish the proposed Constitution but is

waiting to give time for voter registration.

April 14<sup>th</sup> - A group of ODM-Kenya members have threatened to oppose the proposed Constitution unless contentious issues are changed ahead of the referendum.

Voters can register anywhere in the country, then transfer to their preferred polling area after the referendum. Speaking at a meeting with Journalists in Nairobi, IIEC chairman Issack Hassan said the main purpose of the current drive was to enable Kenyans to vote during the referendum on the proposed Constitution.

April 15<sup>th</sup> - President Kibaki's tour of Rift Valley Province to drum up support for the draft Constitution was yesterday met with stiff resistance from the local leaders.

April 18<sup>th</sup> - Former President Daniel arap Moi asked Church leaders not to compromise on what they believe is evil in the proposed Constitution.

April 19<sup>th</sup> - The CoE has started educating Kenyans on the proposed Constitution. The civic education campaign kicked off in northern Kenya with the distribution of more than 100,000 copies of the draft law.

Retired Archbishop of the Anglican Church of Kenya, David Gitari, declared support for the draft Constitution.

April 20<sup>th</sup> - Police are ordered to investigate the source of hate messages being spread through mobile telephones and computers. The messages focusing on contentious issues in the draft Constitution surfaced after parliament passed the draft Constitution without amendment.

April 21<sup>st</sup> - More than 3.6 million Kenyans with intellectual disabilities will participate in both the referendum and general election. The IIEC and the Kenya Society for the mentally Handicapped form a partnership to ensure people with disabilities are registered as voters during the ongoing exercise'

April 22<sup>nd</sup> - Talks between the government and church leaders begin. At the same time, the AG said he will publish the proposed Constitution on May 6.

April 23<sup>rd</sup> - Deputy PM Uhuru Kenyatta broke his silence on the Constitution debate by declaring he will support the proposed Law. **KN**

# THE KONRAD ADENAUER FOUNDATION IN KENYA

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

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

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

## Our aims

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

Securing of the constitutional state and of free and fair elections;

Protection of human rights;

Supporting the development of stable and democratic political parties of the Centre;

Decentralisation and delegation of power to lower levels;

Further integration both inside (marginalised regions in the North/North Eastern parts) and outside the country (EAC, NEPAD); and

Development of an active civil society

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

## Our programmes

Among other activities we currently support:

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

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

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

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

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

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