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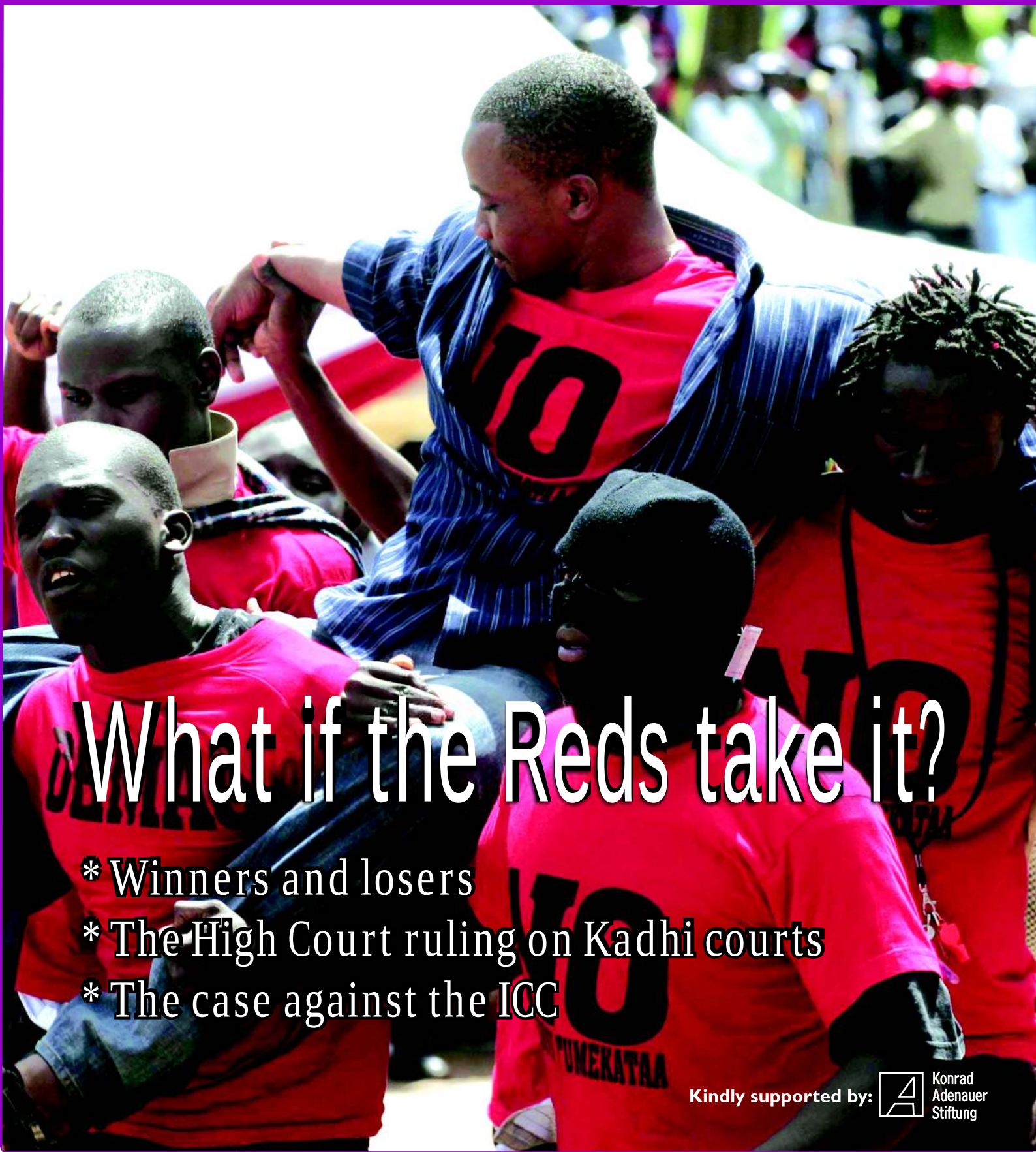
Towards a new constitutional dispensation in Kenya



What if the Reds take it?

* Winners and losers
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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.

JUNE 2010

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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Voting Yes in the August 4th referendum as one Nation

What if the Reds take it?

In Kenyan politics, they say a day is like a month. While the forthcoming referendum on the Proposed Constitution is not supposed to be a political exercise, the August 4th polls have all the markings of a General Election. This article looks at the ramifications if the Interim Independent Election Commission announces that the No vote has taken the day, thereby rejecting the draft.

By Guandaru Thuita

Hon. William Ruto, political leader of the No campaign.

There is presently a lot of optimism especially from senior Government officials that the Proposed Constitution shall be ratified in the forthcoming August 4 referendum. The optimism is so high that no one in Government, the 'Yes' camp or even the Committee of Experts seems to be bothered with contingency plans incase of a 'No' win. In fact, the only voice, albeit passive and unrealistic, is that of Higher Education Minister William Ruto, who promises to take necessary steps to ensure a better draft is in place by December 2010.

In light of the fact that recent opinion polls show a steady rise in numbers of those who would vote against the Proposed Constitution, it would be prudent to plan for such an eventuality.

Opinion polls

Opinion polls are not new in Kenya, as they have been conducted in the past to predict referendum and election results. In the period preceding the 2005 referendum, pollsters such as Synnovate Research International (formerly Steadman Group) conducted an opinion poll one month before the plebiscite, which predicted 42 per cent votes for 'No/Orange', 32 per cent for 'Yes/Banana camp, 22 per cent undecided and 4 per cent of those who couldn't answer the question.

The actual results in that referendum was that 57 per cent voted against the draft while 43 per cent voted for it. Queried on the accuracy of their earlier poll, the Steadman Managing Director asserted that they had conducted another poll on the eve of the voting, obtained results similar to the outcome of the referendum, but withheld them so as not to influence the outcome of the results.

For that poll, the pollster received heavy criticism on the ground that it was being used and manipulated by the Government to portray the Orange side as having less support than it appeared. Elements in the Government also criticised the pollster, arguing that it was a tool of the rebel members of Government as well as an instrument of some foreign powers.

In the period preceding the 2007 General Election, a poll published on December 18 just ten days before the election showed Raila Odinga leading by 45 per cent, President Kibaki following closely with 43 per cent and Kalonzo Musyoka trailing with 10 per cent. Other candidates shared the remaining 3 per cent.

The predictions were close to the final tally and in fact, going by the report of the Independent Review Commission on the General Election otherwise known as the Kriegler Report, which concluded it was not possible to tell who won the presidential elections, the opinion poll cannot be said to have been too far off the mark.

Pollsters have also been busy conducting opinion polls with respect of the 2010 referendum. Synnovate Research International conducted a poll

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between December 24 and 28, last year and released the results on January 8 showing that 34 per cent were in favour of the then harmonised draft, 29 per cent against and 37 per cent undecided. In April 2010, Synnovate released results of yet another poll showing that 64 per cent were in favour of the Proposed Constitution, 17 per cent against and 19 per cent undecided.

According to a progress survey released on May 18 by the Kenya National Dialogue and Reconciliation Monitoring Project led by mediator Kofi Annan, a total of 66 per cent of Kenyans said they would vote for the Proposed Constitution, 10 per cent would reject it, while 24 per cent were unsure of how to vote.

Immediately after the High Court declared the Kadhi Courts unconstitutional, another opinion poll was conducted by pollster Infotrak Harris with the poll results showing 63 per cent voting 'Yes', 21 per cent 'No' and 15.7 per cent undecided. This poll was consistent with the one done by the Annan group and that of Synnovate.

The most recent poll by the time of going to press was the one released by Synnovate on June 4. The prediction was that 57 per cent would vote 'Yes', 20 per cent 'No', 19 per cent undecided while 4 per cent would not vote at the August 4 referendum.

The poll was carried out between May 22 and 28 and it showed that abortion (55 per cent), Kadhi courts (37 per cent) and land (32 per cent) were the major reasons that the 'No' respondents cited for opposing the new law.

The first referendum on November 21, 2005 was preceded by an intensive period of campaigning pitting supporters of the draft Constitution (Banana camp) with those against the proposed constitution (Orange camp).

Are the Opinion Polls a true reflection of the situation on the ground?

The practice of polling opinions is controversial in Kenya and is known to raise temperatures each time results are announced. Pollsters are often accused of acting at the behest of unspecified paymasters with the intention of influencing the results of what is being polled.

However, if the existing polls are anything to go by, it would not be sound to reach such a conclusion. Those recent opinion polls of Infotrack Harris, Kenya National Dialogue and Reconciliation Monitoring Project and Synnovate Research International bear results that are all within the same range and since doctoring all is almost impossible, the suspicion that they are doctored is dispelled. Further, these pollsters are internationally recognised and their integrity has not and has never been successfully questioned.

Additionally, one would obviously relate the results of the opinion poll with developments in the political circles. Ever since Parliament passed the Draft Constitution, it is in the public domain that the Church and other members of the 'No' camp have intensified their campaigns. Conversely, the 'Yes' camp has been afflicted by a series of slips, goofs and political errors that may have swayed most of the undecided voters towards their rivals.

The 'Yes' camp appears to lack unity and word going round is that its secretariat has been receiving competition from another group called “The Green alliance” made up of individuals not comfortable with a Raila Odinga-led campaign. The delayed funding to the Committee of Experts for civic education meant that the 'No' team had unrivalled field days winning voters to their side.

National security

Further, the 'Yes' campaign seems lukewarm compared to the one by the 'No' camp. Infighting between 'Yes' leaders as was seen in the booing of Vice President Kalonzo Musyoka at a Uhuru Park Rally, the illegal insertions of the words 'National Security' in the Bill of Rights and the recent High Court ruling declaring Kadhi Courts unconstitutional may have swayed more people, especially the undecided, to the Red camp.

Relating these opinion polls with day-to-day developments on the referendum debate makes one to safely conclude that they are, indeed, a true reflection of the situation on the ground.

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Winners and losers

In every deal there are winners and losers. Well, ideally a new Constitution should be to the benefit of all Kenyans. But that is better said than done. Needless to say, there are people who have placed their 'bets' on either outcome of the August 4th referendum. Our writer discusses the different facets of the draft and how a Yes verdict is bound to affect different people.

By Dorothy Momanyi

As the principal law of a State, a Constitution sets out the core principles governing the relationship between the State and its people, as well as the relationship between the people themselves.

The Proposed Constitution of Kenya properly fits into this description. Unfortunately, being a compromise between divergent interests, its final outlook is a subject of great controversy between those who are for it ('Yes' camp identified by the colour green) and those against it ('No' side identified by red).

Each camp has its strong points and it is these points, together with the challenges sought to be addressed by the Proposed Constitution that this article seeks to examine.

However, before delving into the said examination, it is imperative to first highlight the basic outline of The Proposed Constitution.

Outline

The Proposed Constitution is divided into 18 Chapters and six schedules, each dealing with a distinctive area of governance. The first chapter introduces the Constitution and declares its supremacy over all the other laws, including customary law.

The second declares Kenya as a "Republic", assigns Kiswahili as the national language and outlines the National Symbols and days. Kenyatta Day is under this Chapter renamed Mashujaa Day.

President Mwai Kibaki, leading the Yes campaign

Chapter 3 is on Citizenship and the most prominent change is the adoption of the principle of dual citizenship. A win for women under this chapter is the ability to pass Kenyan citizenship to their children for as long as they still hold Kenyan citizenship, notwithstanding that they may be living or married abroad.

An unsung but very progressive development is in Chapter 4 on The Bill of Rights. It covers the already existing Civil and Political Rights and adds two other categories namely the Economic and Social Rights such as right to health care, right to adequate food, and right to safe water, right to social security and education as well as the third generation rights of entitlement to development and to a good environment.

The fifth chapter sets out the principles of land ownership, gives a classification of land into public, community or private land, restricts the ownership of land to foreigners, sets up a National

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Land Commission and empowers Parliament with the powers to both prescribe minimum and maximum land holding acreage and also the power to facilitate a review of all grants or dispositions of public land to establish their propriety or legality.

The whole of Chapter Six is dedicated to principles of responsible leadership while the Electoral system and Processes are provided for in Chapter Seven. In this chapter lies the greatest win for women who shall henceforth make up at least 1/3 of membership of all elective public bodies. Another milestone in this chapter is the provision giving liberty to individuals to stand for election as Independent candidates.

New outlook

The most comprehensive chapters relate to the three arms of government - the Legislature, the Executive and the Judiciary. These are provided for in Chapters 8, 9 and 10. Each one of them shall have a new outlook in a number of ways. The Legislature shall be made up of both Parliament and the Senate.

For the Executive, the position of Prime Minister shall be no more. The Executive shall consist of the President, the Deputy President (who must have been a running mate of the president) and the Cabinet made up of technocrats who are not Members of Parliament.

A Supreme Court is introduced in Chapter 10 on the Judiciary and all the other courts have been retained. The most radical change in the Judiciary is the requirement in paragraph 23 of Schedule 6 for all magistrates and judges to undergo vetting.

Chapter 11 establishes counties as a system of a devolved government with the aim of decentralising State organs and their functions. Chapter 12 deals with public finance, Chapter 13 on issues pertaining to Public Service while Chapter 14 creates institutions of National Security namely the Kenya Defence Forces, National Intelligence Services, the National Police Service and the National Police Service Commission.

Restrictive

Chapter 15 governs the objects, processes, appointments and composition of Commissions and Independent offices, Chapter 16 deals with the mode of amending the Proposed Constitution while Chapter 17 deals with the mode of enforcement and interpretation of the Constitution.

This latter chapter may be taken for granted, but hindsight shows us how restrictive the courts have

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Did Parliament do enough to ensure consensus in the proposed Constitution?

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been in the application of the constitutional rights.

Chapter 18, which is the last, deals with the transition from the present to the Proposed Constitution.

Addressing challenges

It is without doubt that the clamour for a new Constitution has stemmed from the challenges that have faced the country in the past. Socially, many groups including women, the youth, persons with disabilities, people in the Diaspora, and marginalised communities in far-flung areas have always felt left out in the sharing of national resources and during deliberations on issues of governance.

The patriarchal nature of all Kenyan communities has ensured that women are sidelined in holding positions of power or acquiring properties even through inheritance. The express declaration in the constitution that customary laws contrary to the ideals of the constitution are void is a great win in addressing this existing inequality and so is the rule requiring a maximum 2/3 representation of any gender in public bodies.

The youth, persons with disabilities, children, older members of society, minorities and marginalised groups are also given prominent acknowledgement of their rights and the State is required to take action, including affirmative action, to ensure that they are treated with dignity to enable them to effectively participate in the affairs of the State.

The interests of future generations are guaranteed by decreeing the rights to sustainable use of resources, particularly land and the environment. Economically, Kenya has been lagging behind in economic development due to various factors including poor leadership, corruption, little incentive to investors due to poor policies, a moribund Judiciary, lack of transparency and inappropriate use of resources.

Marginalised areas

Each one of these issues has received some form of attention in the chapters on leadership, land and environment, judiciary, public finance, devolution, and the provision of an equalisation fund for the purpose of providing services including roads, water, health facilities and electricity to marginalised areas.

Politically, the Proposed Constitution desires to address past challenges by curtailing the powers of the president, professionalising and reducing the size of the cabinet, improving the structures relating to elections and essentially enhancing the bar of standard for leadership.

Political parties shall also be checked by the requirement of regular party elections and such internal democracy shall necessarily extend to matters of public governance.

Yes and No scorecard

Both the '*Yes*' and 'No' command a substantial portion of support from the population and both have been advancing strong points to woo voters. The proponents of the new law argue that having yearned for a new constitutional dispensation for over two decades, it is now high time the issue was finalised so that the country can focus its energies elsewhere.

They also assert that the benefits envisaged in the Proposed Constitution far

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The whole of Chapter Six is dedicated to principles of responsible leadership while the Electoral system and Processes are provided for in Chapter Seven. In this chapter lies the greatest win for women who shall henceforth make up at least 1/3 of membership of all elective public bodies.

Prime Minister Raila Odinga addressing Yes supporters at Uhuru Park. He is the leading light of the campaign.

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What if it's a No?

The possibilities of events that may take place if the Proposed Constitution is rejected are many and varied. President Kibaki is pegging his legacy on the passage of the document. Similarly, Raila who appears as the obvious face of the 'Yes' campaign would score great political mileage against his archrivals in both camps if the constitution is passed during his tenure as Prime Minister.

In light of the immense political will from the two principals of the Grand Coalition Government, this is the most optimum time for the constitution's passage. If rejected, the President may despair after having offered Kenyans two opportunities for a new constitution and they rejected it on both occasions. The Prime Minister may likewise abandon the whole project and resort to campaigning for his future political career.

It would take spirited statesmen upon a 'No' win to jumpstart the process. All opinion polls indicate that nearly all Kenyans, even those in the 'No' camp, desire a new set of laws. The only discord is in the content, with particular regard to the issues of abortion, Kadhis Courts and land.

A 'No' win would not symbolise an end of the review process since all that would be required would be to put in place new mechanisms of re-igniting the process. The first such mechanism would be to view comprehensive reforms as unachievable and, therefore, settle for minimum reforms either by enacting requisite legislations or making piecemeal changes to the present Constitution.

Another alternative would be to enact another Constitution of Kenya Review Act, modify the contentious issues to suit what groups in the 'No' camp sought and submit the draft to another round of a referendum. This may not go down well with some groups since if certain provisions such as that relating to Kadhi Courts are omitted; the Muslims and their sympathisers would turn against the new draft.

The other alternative would be to repeal or modify Section 47(A) of the Constitution to pave way for alternative methods of passing the Constitution other than through a referendum.

Constituent Assembly

The section vests the power to replace the Constitution in the people of Kenya through a referendum. Appreciating that it would be impossible for a draft to pass in a referendum, a Constituent Assembly may be appropriate.

Another possibility would be to modify Section 47(A) and any Review Act in such a way that people would have a choice of several drafts in the referendum and the most popular would carry the day. Similarly, legislation may be passed to allow the people vote on the contentious issues only. KN

The High Court ruling on Kadhi courts and its implication on the Constitution review process

The ruling had the potential of being a spanner in the works. But by the look of things, this was a mere side show and it's business as usual. Well, we try to see beyond the smoke created by the ruling and whether this was much ado about nothing!

By Albert Irungu

The Kadhi Court sign post at Upper Hill, Nairobi.

On June 24, a three-judge bench declared the Kadhi Courts unconstitutional. The ruling by High Court Judges Roselyn Wendoh, Mathew Emukule and Joseph Nyamu has since generated controversy. The Green side, the proponents of the Proposed Constitution, read mischief in the ruling while the Reds, the opponents, believe it was a return of sobriety in the chaos that has been towards the search for a new constitutional dispensation.

It has been six years since members of the clergy filed the case at the High Court. A Miscellaneous Civil Application case No. 890 of 2004 was filed to contest the entrenchment of the Kadhi Courts in the Constitution. The application, filed by 26 clergy from different religious institutions, sought to challenge the inclusion of the Kadhi Courts in the Bomas Draft Constitution. At the time, the Bomas Draft had been a creation of various delegates from all regions representing different interests.

The suit was filed against the Attorney General and the now defunct Constitution of Kenya Review Commission (CKRC). The applicants had 16 assertions that they felt would be infringed by the inclusion of the Kadhi Courts in the Proposed Constitution.
The applicants also served the Supreme Council of Kenya Muslims and the Hindu Council of Kenya to participate in the suit under any capacity.

Foundation

However, only the Hindu Council responded by filing a sworn statement supporting the Christian clergy. The statement in essence questioned the constitutionality of having Kadhi Courts in the Bomas Draft thus favouring one religion over the many others in the country. In the 114-page ruling, the three judges explored the Kadhi courts in their historical, social, legal and political context.

The foundation of this declaration is that Section 66 - which allows for the creation of Kadhi Courts and its accompanying infrastructure - is in conflict with Section 65, which gives Parliament the power to establish courts subordinate to the High Court and Section 82 that outlaws discrimination in law making.

As a result, those opposing the Proposed Constitution have

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acquired momentum in advocating for the discontinuation of the referendum until the Kadhi Courts issue is revisited. However, legal experts argue that the ruling can only affect Section 66 of the current Constitution, which mandates the realisation of Kadhi Courts in Kenya.

It does not affect Section 170 of the Proposed Constitution. By extension, the ruling only affects the CKRC, which became redundant and has no connection with the current Committee of Experts (CoE). This means the three-judge bench overreached its mandate.

Expunge

The High Court, which is itself a creation of the current Constitution, lacks authority to declare any provision or body unconstitutional. Its mandate is to interpret law as it is. By giving that ruling, the Judiciary went against the grain of modern constitutional jurisprudence by usurping the supreme will of the people as represented by the Constitution. In the ruling, they pointed out as much - that the court has no mandate to expunge sections of the Constitution. However, they went ahead to declare the same sections null and void.

In the court of public opinion, there is a feeling that the timing of the ruling was suspect. The arguments in this case were concluded last year. The court was to give the ruling within 42 days after the summations. For the Judiciary to have sat on the ruling for more than a year then deliver it three months before a national referendum on the Proposed Constitution is perceived as an attempt to influence public opinion towards the rejection of the document.

The High Court, which is itself a creation of the current Constitution, lacks authority to declare any provision or body unconstitutional. Its mandate is to interpret law as it is. By giving that ruling, the Judiciary went against the grain of modern constitutional jurisprudence by usurping the supreme will of the people as represented by the Constitution.

The judges were aware of the prevailing socio-political climate in the country and the reactions that would emerge with such a ruling. It would not be wrong to conclude that the aim of the ruling was to influence the referendum campaigns currently taking place in favour of the opponents of the proposed new laws.

Validity

The judges were also fully aware that one of the significant defendants in the case, the CKRC, had wound up its operation. The fact that the case continued in light of such facts has had many a legal expert questioning its validity.

As part of the ruling, the judges declared public funding of the Kadhi Courts "discriminatory" and "sectarian". Kadhi Courts are an integral part of the Kenya Judiciary system and like any other part of the Government system, it is and have been legitimately funded. Thus, such a ruling can only mean the judges intended to inflame the citizenry against these courts.

Immunity

Through past experiences of attempted disruptions of the constitution making process, steps were taken to avoid any future attempts. The Constitution of Kenya (Amendment) Act No. 10 of 2008 established the Interim Independent Constitutional Dispute Resolution Court (IICDRC) by inserting Section 60A into the current Constitution.

This court has the exclusive and original jurisdiction to handle and resolve disputes related to the constitution of Kenya review process. It is this court that should be left to handle all matters related to the Kadhi Courts case, as such matters squarely fall under its jurisdiction.

Presently, there is a case in the High Court where the former chairperson of the disbanded Electoral Commission of Kenya, Mr Samuel Kivuitu, has challenged the disbandment of the commission. Would the success of his suit make the Interim Independent Electoral Commission illegal? Like the ruling of the case by *Jesse Kamau & 25 others v Attorney General & the Constitution of Kenya Review Commission*, it

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Ready for the battle royale: church leaders arrive for a No rally at Uhuru Park, Nairobi.

would have no impact on the IIEC. By now, it has been determined that it is impossible to declare any provision or body that falls under the Constitution illegal. As stated earlier, the Constitution represents the supreme will of the citizenry.

Any change to this document would have to be done by the legislature or through a referendum. Hence, any ruling to the effect that the IIEC is illegal will be tantamount to amending the Constitution.

Another example of the authority of the IICDRC is a petition filed in Mombasa High Court suit 699 of 2009, which was heard in January, this year. Bishop Joseph Kimani and two others filed the suit against the Attorney General, the CoE and the Chair of the Parliamentary Select Committee.

Dispute

The petitioners filed the case under Section 84 (1) of the Constitution. The case founded its objections on the view that some sections of the Constitution Review Act of 2008 are faulty and should be nullified. The petitioners were of the opinion that sections on contentious issues, approval of the draft by the Parliamentary Select Committee and the publication of the draft constitution were flawed.

In his response, the Attorney General pointed out that to begin with, the High Court lacked jurisdiction in the dispute generated by the Kenya Review Act. He pointed out that under Section 60A of the Constitution, only an Interim Independent Constitutional Dispute Resolution Court had the authority to adjudicate any or all matters related to the constitution review process.

He went on to state that all the listed objections in the petition challenged the mandate of the review process. By dealing with the case, the High Court would be usurping the Constitutional Court's mandate to deal with such petitions. The case is still in court. KN

The writer is a freelance journalist based in Nairobi.

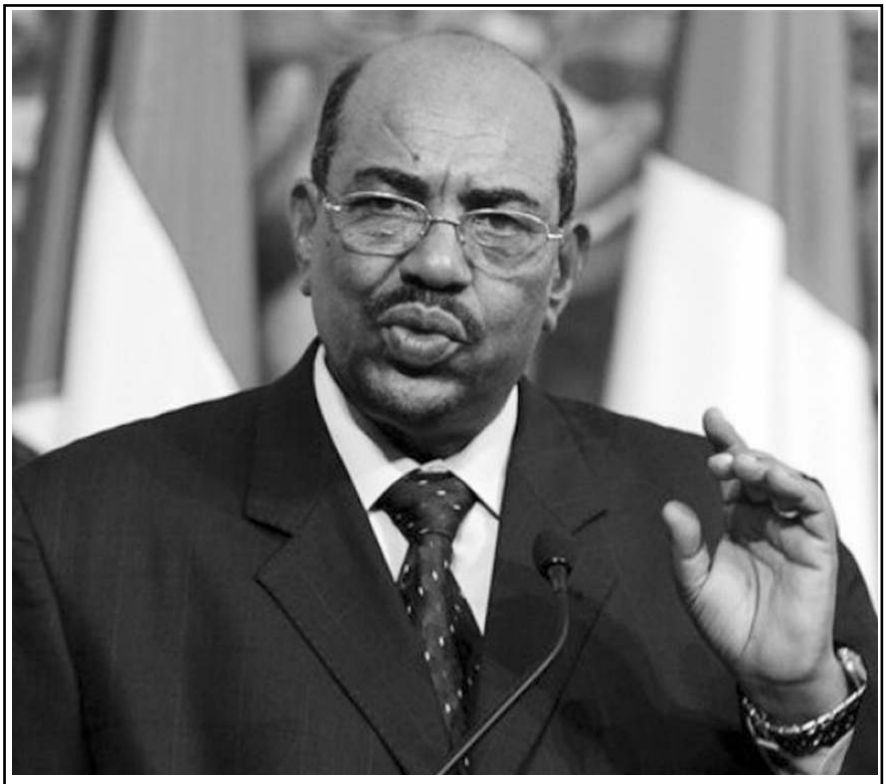
There is simmering conflict with and in particular reference between the rights of others and the reproductive rights of women. The state and other individuals assert that an unborn baby is a person like any other and is in need of being protected from deprivation of its right to life.

The case against the ICC

On 11 June 2010, the Review Conference of the Rome Statute concluded in Kampala, Uganda, after meeting for two weeks. Around 4600 representatives of States, and intergovernmental, nongovernmental organisations attended the Conference. The Conference adopted a resolution by which it amended the Rome Statute so as to include a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime. But may be there are more reforms needed at Ocampo's house...

By a Correspondent

The International Criminal Court (ICC) was established on July 1, 2002, by the Rome Statute of the ICC as a permanent tribunal to try individuals suspected of the most heinous crimes namely genocide, crimes against humanity, war crimes and crimes of aggression.



Southern Sudan President Omar El Bashir who the ICC has given an international warrant of arrest.

The court is headquartered at The Hague, Netherlands, and has about 111 member States. Thirty-seven States have signed, but not ratified the statute while others such as China, India and Russia refused to join.

ICC was not established to take away the powers of the existing national judicial systems in prosecuting such crimes, but was meant to complement them in situations where they are unwilling or unable to do so.

By June 18, 2010, the Court had opened investigation in five cases only - Northern Uganda, the Democratic Republic of Congo, the Central African Republic, Darfur in Sudan and Kenya.

According to the Rome Statute, a provision was made for a review conference to be held seven years after the Statute came into force. The review conference took place from May 31 to June 11, this year in Kampala, Uganda.

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A number of factors justified the review of the court. First, the Rome Statute itself had provided for review of some issues during the first Review Conference. One of these involved the definition of the Crime of Aggression since the ICC had remained non-operational with respect to this crime as a result of lack of an agreement on its definition.

Expounding

Another justification for the conference was the need to consider the inclusion of other horrendous crimes under the court's jurisdiction such as terrorism and drug trafficking.

In the same breath, there have been suggestions on expounding the crimes over which the Court already has jurisdiction. For instance, India, Mexico and Belgium have been lobbying to have the use of weapons of mass destruction, nuclear weapons, weapons of poison, chemical and biological weapons and land mines to be considered as war crimes.

Another justification was the need to review Article 124 of the Rome Statute, which allows a state to make a declaration avoiding the ICC's jurisdiction over war crimes for a period of seven years. This Article is controversial and seems contradictory to the purpose of the ICC.

Stocktaking was another factor and in this regard, there was need to evaluate global justice, re-examine the Rome Statute, and analyse the composition and workings of the ICC, its achievements, shortcomings, performance and impact on victims and affected communities.

The ICC has received stinging criticism from countries like the United States, Israel and institutions such as the African Union (AU), which claim that it only tries Africans.

The issue of indicting a sitting head of state - Sudanese President Omar Al Bashir - brought out the need to review Article 16 of the Rome Statute empowering the Security Council of the United Nations to defer investigation for a period of 12 months.

The Security Council's rejection of an application to defer investigation in Darfur made African countries acknowledge the need to confer that power to the United Nations General Assembly instead, since majority of the permanent members of the Security Council are not members of the ICC anyway.

Finally, there was need to examine the solutions available from the ICC and if possible, incorporate other mechanisms such as reconciliation and amnesty so that areas like Northern Uganda under the LRA's leader Joseph Kony can have peace.

ICC and Third World countries

The Third World countries are the developing nations of Africa, Asia, Latin America and Oceania. Many are member States of the ICC and their experiences with the worst of crimes such as the genocide in Rwanda may have motivated them to join the ICC in droves.

However, in its operations, investigation and prosecutions, the ICC has only dealt with situations in Africa. As a result, focus of ICC's relationship with the Third World can be deciphered from its relationship with African States.

African nations acknowledge the potentials and benefits of the ICC. No wonder three out of the five situations were self-referrals by the countries

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The Kenyan situation was actually opened by the prosecutor himself, having obtained consent of the two principals of the governing coalition.The Kenyan situation was actually opened by the prosecutor himself, having obtained consent of the two principals of the governing coalition.

The White House, America's seat of power. Can Ocampo arrest the occupant of this house for gross crimes against humanity?

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concerned—Uganda, DRC and Central African Republic. The Kenyan situation was actually opened by the prosecutor himself, having obtained consent of the two principals of the governing coalition.

However, none of these referrals has generated more heat than the one in Darfur referred to the ICC by the Security Council. In response to the Court's decision to issue an arrest warrant for Al Bashir, the AU Assembly of Heads of States and Government Summit in Libya (2009) passed the "Sirte Decision" declaring their refusal to cooperate with the ICC in respect to the arrest and surrender of President Al Bashir.

Some critics argue that the ICC is out to target African leaders only. However, this cannot be the case since three African States volunteered their country's situation to the ICC for investigation.

Arrest warrant

African States have pointed out that the ICC's mechanism may in many cases lead to the worsening of volatile situations. For instance, the arrest warrant on Al-Bashir has been said to lack sensitivity and sound judgement since securing peace ranks higher in priority than convicting the perpetrators. Execution of the arrest warrant would definitely cause instability in the entire region bordering Sudan.

Third World relations with the ICC at times become compromised by dominant, but hostile nations to the ICC. The United States is notorious in compelling Third World nations to sign Bilateral Immunity Agreements (BIAs) protecting US soldiers from ICC's prosecution.

Failure to execute these BIAs leads to withholding of badly needed aid. The US in this respect seeks to gain from Article 98 of the Statute, which excuses a State from proceeding with a request for surrender of a suspect if doing so is in conflict with an international agreement.

Third World countries also decry what they claim to be double standards in the application of justice at the international arena, especially when states like the US commit serious violations of international

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justice yet no action is taken against it while the slightest deviation by a Third World country attracts the full force of international law. They perceive this practice as a new form of neo-colonialism or judicial imperialism.

ICC and the superpowers

The US currently enjoys the status of being the only super power. Human rights groups have often accused American troops and coalition forces of committing the kind of atrocities envisaged by the Rome Statute in territories like Afghanistan and Iraq. These crimes include raping of women, killing of civilians, attacks on civilian objects, employing poisoned weapons, and torture of captured soldiers.

Whereas British and other allied forces are members and, therefore, subject to the Court, the US troops are not and cannot be investigated or tried by the ICC. Under the Rome Statute, the Court exercises jurisdiction under the following limited circumstances:

- Where a person accused of committing a crime is a national of a state party
- Where the alleged crime was committed on the territory of a state party or
- Where the alleged situation is referred to the Court by the UN Security Council.

The US not being a party means that its citizens cannot be subject to the ICC. On the second limb of jurisdiction, if the alleged crimes were committed by Americans on the territory of a state party, American troops would theoretically be liable and subject to the court.

However, to avoid this clause, the US aggressively lobbied/coerced nearly all party states to enter into Bilateral Immunity Agreements under Article 98(2) of the Rome Statute by which those states undertook never to surrender American nationals to the Court.

Finally, no situation involving the US may practically be referred to the Security Council by the Court since the United State has veto power. In addition, in December 2001 the US passed what is known as the American Service-members Protection Act that authorised the use of any means necessary, including force, to secure the release of Americans or other "allied persons" from ICC detention.

By virtue of this Act, the US demonstrated in no uncertain terms that it would not allow its soldiers to be subject of the ICC and the threat to use force certainly deters the ICC from subjecting Americans to the court.

ICC liaison in Africa

During the winding up of the ICC Review conference in Kampala, repeated calls were made for the establishment of an African Liaison Office for the ICC in Addis Ababa, Ethiopia. Such calls, particularly by Kenya's Attorney General Amos Wako, were criticised as an attempt by the Kenyan government to wriggle out of the ICC investigation relating to the 2008 post-election violence.

However, the criticism aside, it would be crucial to establish an ICC liaison office in Africa. The office would disseminate information relating to the Court to Africans, familiarise Africans with the Court, and provide support to the Court through the facilitation of interactions between it and the AU.

It would also assemble relevant information relating to events and developments at the AU and relay the same to the Court as well as establish formal and informal networks that would enable the ICC to keep abreast of developments at the AU. KN

The writer works for the Daily Nation.

Some critics argue that the ICC is out to target African leaders only. However, this cannot be the case since three African States volunteered their country's situation to the ICC for investigation.

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outweigh the perceived shortcomings.

The 'Yes' team accuses their 'No' antagonists of delving in issues that were not the motivation for the clamour for constitutional change such as Kadhis' Courts and abortion. On the merits of the Constitution, the 'Yes' camp states that the trimming and checks on presidential powers shall deter personal rule. Further, the exclusion of MPs from the Cabinet shall depoliticise ministries.

The 'Yes' camp also asserts that the provisions on leadership, public finance, right to information and freedom of the media will encourage transparency, accountability, deter incidents of corruption and render an equitable, fair and reasonable distribution of resources all over the Republic.

The major organs of the State including the Judiciary shall be overhauled to make them efficient and effective. Land disputes shall be minimised as a result of the policies requiring land to be held, used and managed in a manner that is equitable, efficient, productive and sustainable. Elections shall become more civilised and political parties will be forced to become ideological rather than parochial. Women are set to benefit immensely in terms of holding at least a 1/3 of positions in elective bodies.

Shortcoming

The 'No' camp has been categorical that it is not opposed to reforms per se, but is unhappy with serious shortcomings, which must be addressed before a new Constitution can be adopted. Leading proponents include the Christian clergy and politicians William Ruto and former president Daniel arap Moi.

For the clergy, the greatest shortcoming is the inclusion of the Kadhi courts in the Constitution and the wording of Article 26 (4), which they argue is framed in such a way that can permit abortions. The clergy further argue that inclusion of Kadhi courts under Articles 169 and 170 elevates Islam over other religions and contravenes the principle requiring separation of state and religion.

On land, the 'No' proponents argue that the Government is being granted powers to forcefully acquire private land, which may be used to witch hunt. They also assert that reduction of 999 years leaseholds to 99 years is without compensation and amounts to deprivation of property.

Taxpayers

On devolution, some of the Reds argue that the prescribed number of counties is inadequate while others see the devolution as an unnecessary expense to taxpayers. Another major contention by the 'No' camp is that amending the Proposed Constitution will be difficult, as most amendments must be sanctioned by a referendum, which is a tedious and expensive affair.

For such shortcomings, the clergy is justified in dismissing the suggestion by the Greens that the contentious issues can be ironed out once the Proposed Constitution is passed. KN

The interests of future generations are guaranteed by decreeing the rights to sustainable use of resources, particularly land and the environment. Economically, Kenya has been lagging behind in economic development due to various factors including poor leadership, corruption, little incentive to investors due to poor policies, a moribund Judiciary, lack of transparency and inappropriate use of resources.

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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