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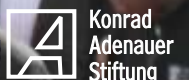
KatibaNews

Towards a new constitutional dispensation in Kenya

The last word...

- * Who's hating on whom?
- * Post referendum settlement of disputes
- * Hurdles on the way to the referendum
- * Katiba briefs

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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 linking up with other journalists' organisations locally and abroad.

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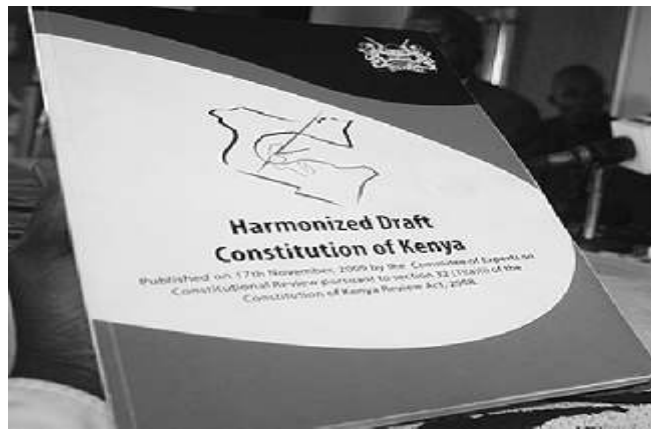
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All are welcomed to send their observations on the constitutional review process to be the Editorial Board.

Views expressed in this newsletter do not necessarily reflect those of MDA, KAS or partners. Reprinting of materials permitted provided the source is acknowledged.

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*Whichever way you
decide to vote on
August 4th, do so
PEACEFULLY. Let us
not go back to the
dark days of post
election violence. YES
or NO, we are all
Kenyans. Let us keep
it that way even after
the referendum.*

The last word...

As we enter the home stretch towards the forthcoming August 4th referendum, our writer takes this opportunity to take us back in time and warns us that those who forget the past are bound to repeat it. We can only hope that Kenyans have learned their lessons the hard way.

By Patrick Mwangi



President Mwai Kibaki: victory on his mind

Kenya stands at one of the most important junctions it will ever arrive at in its history. On August 4, 2010 the country will decide whether the long and tortured search for a new constitutional dispensation will come to an end. This is when Kenyans will vote to adopt or reject the Proposed Constitution, now in its final lap.

However, it is not going to be smooth sailing, and the tally of lives lost over the years in the search for a new Constitution looks likely to go down to the wire. Just when Kenyan thought things were going to glide smoothly to the finishing line, they were rudely jolted by three blasts at Uhuru Park in Nairobi during a prayer cum Constitution rally hosted by church leaders and politicians on the NO camp.

These blasts killed several people and injured tens of others. Sadly, the police are yet to arrest the perpetrators. The Uhuru Park incident is highly unfortunate. For the first time since the Constitution making process started almost 20 years ago, Kenya has its best chance of getting a new document. The omens are really positive.

Polarisation

One, the contentious (read deal breaking) issues have been reduced to a handful, thanks to the work done by the Committee of Experts on

the Constitution, the Parliamentary Select Committee on the Constitution, and the MPs. It will be recalled that in the last attempt at enacting a Constitution in 2005, various political actors had diametrically opposed views on critical issues like the Executive and Devolution.

This led to a Government that was at war with itself. The final outcome was a complete polarisation of the country along political party and ethnic lines. Two, the Executive - the real deal breaker in the last attempt at getting a Constitution, has been sorted out to the satisfaction of the protagonists on both sides of the political divide.

Three, and perhaps most critical, the key protagonists of the last referendum are both rooting and campaigning for the Proposed Constitution. President Mwai Kibaki and Prime Minister Raila Odinga, the so called principals in the ruling coalition, are solidly in support of this draft.

This has generated a huge groundswell of support from their supporters and politicians in their respective camps. Majority of our

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politicians are speaking in one voice. Again, it will be remembered that these two politicians led parties that held positions that were irreconcilable in the last referendum.

The Church

And even for those minority politicians opposed to the current draft law, they have had to seek shelter under the umbrella of the church, meaning that alone, their effect would be quite minimal.

However, tensions have been growing as the date for the referendum nears. Politicians have been arrested and charged with hate speech and incitement. Politicians must, therefore, eschew the temptation for chest thumping, dismissive and divisive rhetoric.

Proponents of the Proposed Constitution, whose fortunes have looked on the ascendancy, need to temper their rhetoric to cool tempers. They need to be reconciliatory in their approach.

This is critical. As Kenyans, we suffer from collective amnesia when it comes to history. We seem to have forgotten, all too soon, that the seeds of the violence that was witnessed during the 2007 elections and its aftermath were sown during

These blasts killed several people and injured tens of others. Sadly, the police are yet to arrest the perpetrators. The Uhuru Park incident is highly unfortunate. For the first time since the Constitution making process started almost 20 years ago, Kenya has its best chance of getting a new document. The omens are really positive.

the fractious and highly divisive referendum campaigns in 2005. We must guard against going back to those dark days. Yes, we need a new Constitution but it must not be born at national cost.

Indeed, the work of bringing on board those opposed to the draft must continue to the end. Civic education is important not just because of the referendum, but because a Kenyan populace empowered by knowing their rights and obligations under

the Constitution are an integral component of building the new, equitable, fair and just society that the Proposed Constitution envisages.

It is not too late to engage the Church, the main force opposed to the Constitution. The Church's opposition boils down to the Kadhis Courts and abortion, issues that should not be allowed to derail what is generally agreed to be an acceptable document.

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Prime Minister Hon Raila Odinga: Seems also to be smelling victory.

Who's hating on whom?

Kenyan political discourse is usually a minefield. With the heating up of political temperatures close to the referendum, politicians and citizens at large are engaged in passionate debates and discussions that could easily be misconstrued as abusive language. But what really constitutes "hate speech"? Are there double standards of the law being applied across the YES and NO sides in the ongoing referendum campaigns on the Proposed Constitution? We look at the bigger picture and leave you to judge who is guilty.

By Albert Irungu



Hon. William Ruto:
Is he fighting a losing battle?

Defining "hate speech" in Kenya is not usually an easy task. As the clichéd saying goes, "one man's meat is another man's poison". Statements a person makes in jest, may be offensive to another. Many are the times people hide under the cover of "free speech" when accused of hate speech in all its forms.

In our national context, hate speech can be defined as use of ethnic slurs, insulting language, name-calling, derogatory references, inciting speech, and many other forms of language that marginalise and denigrate either individuals or a group of people.

The media plays a crucial role in forming and reflecting public opinion and also communicate the image of society. The media too has deliberately or uncannily disseminated stories or broadcasted messages that are hateful in nature. Recently, a local daily printed a story and an editorial claiming that politicians on one side of the

forthcoming referendum had threatened certain communities in the Rift Valley and Nyanza provinces with ethnic cleansing.

Kadhis courts

Coverage of the story only aggravated it by giving it a public platform by disseminating potentially hateful messages. To worsen the situation, the coverage went on to name both the potential perpetrators and victims of these threats.

Religious intolerance has also exacerbated matters. The clergy have claimed that the inclusion of Kadhis Courts in the Proposed Constitution will provide an avenue for the introduction of Sharia law and Muslim dominance in the country. These claims, without any logical argument, add on to the already tense campaigns and only serve to legitimise intolerance against the Muslim faith.

Already the National Cohesion and Integration Commission that is monitoring and cracking down on hate mongers has

summoned more than 20 people, among them members of the clergy on hate speech-related utterances related. Among those summoned are the operators and editors of three FM stations whose hate speech cases are so serious that they face imminent closure.

Facebook

The use of social media to spread hate speech has also not gone unnoticed. On the popular social network Facebook, a fan page purportedly set up on behalf of Higher Education Minister Hon William Ruto, has come under scrutiny for inflammatory posts.

In the run up to the 2007 General Election, statements like "take out the weeds in our midst", "our land, our birthright" and "Mongoosees" who had come to "steal our chickens" must be "run out of the farm" were among the many broadcasted by local vernacular radio stations. These statements

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were meant to incite people against voting in a particular manner and evoke a feeling of “us” against “them”. The culmination of such actions was the post election violence that led to the death of over 1,500 people and injury of thousands others. It also led to the internal displacement of over 50,000 Kenyans.

Use of selected traditional customs to isolate certain communities ranks high in the use of hate speech as a political campaign tool. For instance, ethnic communities that do not practice circumcision have been deemed as unworthy of any leadership roles as they are seen as “boys”. Some ethnic communities known to be entrepreneurial are perceived to be thieves who use unscrupulous business practices to fleece people.

Such stereotyping has in the past been used in a satirical way. However, since the advent of multiparty politics in Kenya, this has taken a dangerous trend.

FM stations

Before elections it has become the norm for politicians to polarise the already strained relations between different ethnic communities. Through references to sensitive issues like land and historic injustices, they influence citizens to vote for them. Politicians have also perfected the art of retreating into tribal cocoons every time their names are mentioned in corruption cases.

During the last elections short messages and blogs were used to inflame tension and incite ethnic hatred. FM stations were also used to fan ethnic animosity. Nearly all these stations have highly popular talk shows and phone-in programmes, often in morning prime time. For example, Ramogi FM, a Nairobi based Luo language station had a talk show called, “Baraza” meaning “informal assembly”.

Lake Victoria FM, another Luo language station, christened its morning talk show “Just Say It!” The Kikuyu language Inooro FM had “Hagara” (“Sharpen”) and Kameme FM, had its own called, “Arahuka” (“Wake-Up!”).

Unfortunately, many presenters working in these stations hardly have any journalism training and thus do not conform to standards or ethics. Training of media personnel in elections coverage has become of importance if hate Speech is to be countered.

Harass

The National Cohesion and Integration Act of 2008 makes discrimination based on ethnic or racial grounds a criminal offence. It bars comparison of persons of different ethnic groups and makes it illegal to harass another person based on his race or ethnicity.

Any person or persons that make utterances that incite feelings of contempt, hatred,

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Taking oath of office: Dr. Kibunja, Chairman of the National Cohesion and Integration Commission.



Dr. Wilfred Machage (extreme right) and others in court over hate speech.

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hostility, violence, discrimination against any person, group or community on the basis of ethnicity or race commits an offence whose punishment is imprisonment for a term not exceeding 5 years or a fine of KES 1,000,000 or both. It also stamps down on media that propagates hate speech. A newspaper, radio station or media enterprise that publishes such utterances referred to above shall be liable to a fine not exceeding KES 1,000,000.

Most international human rights instruments and international jurisprudence recognise that speech can cause severe social harm and that suppressing hate speech is necessary when other rights need protection. For example, Article 19 of the International Covenant on Civil and Political Rights states that: Freedom of speech may be subject to restrictions when they are necessary to guarantee respect for the rights of others.

Hate propaganda

In Germany, the Penal Code contains sections on hate speech. Sections 86, 86a were introduced to defend against the ideas of National Socialism. Section 130 states: "(1) Whoever, in a manner that is capable of disturbing the public peace: 1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years.

Canada has a comprehensive legal mechanism with regard to freedom of speech and hate propaganda. Article 2 of the Canadian Charter of Rights and Freedoms protects the freedom of speech. Similar to the limitation clauses found in international instruments, Article 1 of the charter recognises that fundamental rights such as freedom of expression are nonetheless subject to limits which need to

be reasonable, prescribed by law, and justified in a free and democratic society.

Willful public incitement to hatred for any identifiable groups is a criminal offence in Canada. Inciting hatred against any distinct group, or advocating genocide, is an offence under the Criminal Code. One found guilty of hate speech risks prison terms of two to 14 years.

However, in United States, the First Amendment does not allow any law to be made that can infringe on or limit freedom of expression. It is considered unconstitutional to suppress any form of expression based on content. The only restrictions that can be imposed on expression are if there is a threat of physical harm.^{KN}

The writer is an associate consultant with Apex Communications Limited.

The kind of hubris and arrogance that was exhibited by politicians initially and that led to the Church adopting its current hard line stance must not be allowed to creep back into the referendum debate. The National Cohesion and Integration Commission must not relent in its job of keeping the referendum campaign free of hate speech and inflammatory talk.

The Commission must also realise that being seen to act with impartiality is part and parcel of keeping down any tensions. All sides of the debate should be dealt with firmly if they are deemed to have engaged in hate speech. The Commission is a new factor in the current referendum campaigns, one which should see the incendiary rhetoric of the 2005 referendum campaigns neutered, if not eliminated altogether.

Equally, the Police and Provincial Administration must effectively nip in the bud any attempts to displace people on the basis of their support for the Constitution. There are disquieting reports that in some areas, especially violence flashpoints during the 2007 elections, supporters of the proposed Constitution are being threatened with eviction.

However, tensions have been growing as the date for the referendum nears. Politicians have been arrested and charged with hate speech and incitement. Politicians must, therefore, eschew the temptation for chest thumping, dismissive and divisive rhetoric.

Again, the collective amnesia of Kenyans leads us to forget that these were the very omens witnessed in the run up to the 2007 elections, and were precursors of mass eviction of people on the basis of their political affiliations after the polls.

A lot of work is currently going on in various parts of the country to educate Kenyans on the Constitution. This is the spirit. The media is playing a critical role in this effort. Its role is very critical as it sets the tone and tenor of the debate.

This needs to be maintained right up to, including and after the announcement of the results of the referendum. Those opposed need to be brought on board through sober reasoning and appealing to their sense of patriotism, fairness and the overall good of the country.

Kenyans must recognise that whichever way the referendum turns out, they will still be living in this

country, and hoping to bequeath it to their children, grandchildren and great grandchildren.

The Constitution effort is aimed at reconstructing the country to ensure that this generation bequeaths to others a better, equitable and more just society. This is the legacy that this generation can leave. It is a legacy that will guarantee peace and stability in future as it will have tackled most of the fractures that at present hold the country hostage to the shackles of negative ethnicity, corruption, poverty, misuse of power and impunity.

And that is why the process must be a win-win situation for all, whether they emerge winners or losers. All parties must, therefore, work to ensure that the passing of a new Constitution is a healing and rejuvenating event. **KN**

The writer is the managing director of Aquarius Media.

Post referendum settlement of disputes

After August 4th, some people will celebrate for days on end while others will be at a loss on what to do next. Our writer looks at the legal options available for people who will feel aggrieved by the outcome of the referendum.

By Guandaru Thuita

Only a few days remain before Kenyan voters embark on the referendum to ratify the Proposed Constitution. Progressively, many disputes have been arising in relation to the referendum and the process leading to it.

For instance, some individuals have been crying foul over the framing of the referendum question arguing that it limits the available options for those who are neither for NO nor for YES. Others accuse the

Committee of Experts on the Constitution of being biased in undertaking civic education. Recently a group of NO proponents claimed that their right to campaign freely was being muzzled by arrests in the name of clamping down on hate speech.

On an alarming note, there are recent reports that members of certain communities are leaving their homes following fears that the results of the referendum may trigger ethnic and sectarian wars. All these incidents point to the possibility of disputes arising following the referendum.

Repeat referendum

In the circumstances, it is in order to prepare for the foregoing eventuality. In order to be ready, one must examine the mechanisms of settling any disputes that are likely to arise, the nature of such disputes, the effect of such disputes on the rest of the processes and the remedies which may be available from the Interim Independent Disputes Resolution Court (IICDRC) to remedy any wrong that may have occurred and in particular, to establish whether an order for the repeat of the referendum is possible.

The organ exclusively given the mandate to hear and determine all matters arising out of the constitutional review process is the IICDRC and this jurisdiction is derived from section 60 A (1) of the current Constitution.

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IIEC commissioners with Chief Justice Evans Gicheru and Justice Minister Mutula Kilonzo.

In establishing this court during the negotiations on the National Accord in 2008, Parliament was alive to the likelihood of disputes arising out of the Constitution review process including the referendum. Also, it was aimed at shielding the process from a Judiciary that is susceptible to manipulation.

Disputes for IICDRC

Section 60 A of the Constitution grants the IICDRC power to hear and determine all disputes pertaining to the review process. One may imagine that this court has jurisdiction to entertain any dispute under the sun arising out of the referendum. But Section 44 (1) of the Constitution of Kenya Review Act (2008) expressly limits the kinds of disputes that may be referred to the court after the referendum to only two. These are either a challenge on the conduct of the referendum; or a challenge on the result of the referendum.

In this context, conduct may refer to questions as to whether the voting at the referendum was free and fair, whether it was transparent, whether it was free from intimidation or violence or whether adequate facilities for the voting and counting of votes were provided by the electoral body. A challenge on the results of the referendum would relate to matters such as whether the counting of votes, rejection of votes and tallying of votes was properly done in any single place or, overall, whether the same is a true reflection of the votes cast.

Approaching the interim court

However, the section is silent on who can approach the court.

Rule 12 of the IICDRC (Procedure) Rules 2010 states that: "Any person who is aggrieved by a matter related to the Constitutional Review Process as specified under the Act may petition the Court in accordance with these Rules".

The usage of the phrase "any person" in the rule denotes any individual citizen or non-citizen, human or legal persons including corporations, societies, political parties or either public or private Institutions. In essence, as long as anybody has capacity to sue and has sufficient interest – locus standi - or is materially aggrieved by the conduct or result of the referendum, then he or she can institute an action.

The opening up of the IICDRC doors to all and sundry is potentially dangerous as it is inviting to vexatious litigants and busy bodies with frivolous complaints. To protect the court from such individuals, Section 44 (3) & (4) of the Constitution of Kenya Review Act 2008 requires every petitioner to deposit KSh two million within seven days of filing the petition as security for costs. In default, the petition is to be dismissed.

While this requirement of security for costs positively protects the process from obnoxious abuse, it is equally counter productive as it ensures that an average Kenyan cannot file a petition after the referendum due to the prohibitive security costs. In the circumstances, only the wealthy can file and maintain the petition.

Post referendum disputes
With the heated campaigns, accusations and counter

accusations of preparations of rigging and all major indicators showing that the possibilities of a dispute arising is high, it is imperative to consider what would happen if indeed a dispute arises. Would all other processes relating to the review be stopped or suspended?

The answer is found in Section 43 of the Constitution of Kenya Review Act 2008 and Article 263 of the Proposed Constitution. Pursuant to this section, the Interim Independent Electoral Commission (IIEC) is required to publish the results in the Kenya Gazette within two days of holding the referendum. If there is no petition filed challenging either the conduct or result of the referendum, then the referendum results shall become final and in accordance with Article 263 of the Proposed Constitution. The new Constitution shall come into force upon its promulgation by the president or upon the expiry of 14 days from the date of publication of the final results of the referendum.

However, if a petition is filed, Section 43 (3) of the Review Act directs that the published results shall not be considered as final unless all petitions that may have been filed are disposed off. Essentially, if a dispute involving the referendum is raised, the coming into force of the Proposed Constitution will be suspended or stayed until such a time that the dispute or disputes are all determined.

It is important to note that under section 44 (1) a petition is required to be filed within 14 days after publication of the



The High Court of Kenya.

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results and, subsequently, a notice of the petition given to the Attorney General and the IIEC within seven days. The Attorney General is then obligated to publish a notice of each petition received.

Thereafter, the court is required to hear and determine the dispute(s) on a priority basis, meaning that the cases must be determined with maximum of speed and minimum of delay. In fact, it is decreed in the Review Act that once hearing commences, it must be concluded within 14 days.

Remedies

One wonders on which options the IICDRC has in hearing a dispute. Can it order a repeat of the referendum? Section 60 A (g) of the current Constitution gives Parliament the right to provide the IICDRC with powers to issue Orders.

Parliament complied with this requirement by enacting the provisions of Section 46 of the Review Act which gives the IICDRC the power to either dismiss the petition, declare the results incorrect, order IIEC to repeat polling in any place or places or annul altogether the result of the referendum.

However, there is a proviso to the effect that an annulment shall not be a resort unless the court is satisfied that the applicable law was not complied with and the non-compliance materially affected the result of the referendum.

Under the provisions of Section 46 of the Review Act, it is not expressly provided whether a referendum would be ordered in the event that the results are annulled. It is also not clear whether the power of the IICDRC to order the IIEC to repeat polling in “any place or places” includes the power to call for a repeat of polling in “every” place.

However, considering that the IICDRC is granted the same status as that of the High Court by Section 45 (4) of the Review Act and the High Court has inherent powers to grant any order to remedy a wrong, then it follows that the IICDRC also has such inherent power to ensure that no wrong will be suffered during the Constitution review process without a reciprocate remedy. As such, the court may order another referendum under its inherent powers.

In addition, the wording of section 46 (1) of the Review Act is to the effect that “the Court may” The use of the term “may” is indicative of the fact that the remedies provided are not exhaustive as the court may grant any other remedies other than those specified. **KN**

The writer is an Advocate with Murage & Mwangi Advocates in Nairobi.

Hurdles on the way to the referendum



Work well done! Members of the Committee of Experts on constitutional review.

By Dorothy Momanyi

For the last two decades, Kenyans have dedicated their time, energy and resources in pursuit of a new constitutional dispensation. When the Constitution of Kenya Review Act - 2008 was enacted, this pursuit seemed to have reached its last lap. Presently, the only thing standing between Kenyans and a new Constitution is the Referendum scheduled for 4th August.

Individuals unhappy with the Review progress have embarked on all sorts of activities be they legal, financial, political or legislative to prevent the referendum. The favoured of these methods is the legal one with courts being the arenas.

A recent landmark ruling by the High Court declaring the inclusion of the Kadhi's Court in the present Constitution as illegal gave mileage to those agitating for removal of clauses on Kadhi's Court from the Proposed Constitution. The High Court in Mombasa,

dealt with a matter filed by Bishop Joseph Kimani of the Mombasa Pastor's fellowship complaining that the Committee of Experts (CoE) failed to accommodate their views in the draft. The Court referred the claimants to the Interim Independent Dispute Resolution Court (IICDRC).

Question

Kamau Daniel Chege and Cosmus Kipkemoi Ng'eno filed a case in the High Court against the Interim Independent Electoral Commission (IIEC) challenging the referendum question as limiting and sought to have the referendum halted till the question is rephrased.

Recently, one Edris Omondi an eight others filed a case in the IICDRC claiming that the CoE exceeded its mandate in altering

clauses that were not cited as contentious. The case is also yet to be determined. Activists Omtata Okoiti and six others have also filed a case in the IICDRC asking that Kenyans living abroad be allowed to vote in the referendum.

Financial hurdles have seen key institutions in the review process starved of funds allegedly to paralyse their operations. The CoE was denied funds to conduct civic education on time while the IIEC has had difficulties obtaining funds to register voters or to conduct the referendum.

The illegal insertion of the words "National Security" in the Article 24 (1) of the Bill of Rights heightened calls, especially from the "NO" camp, for stoppage of the referendum pending authentication of the entire document.

The recent explosions during a church crusade at Uhuru Park in Nairobi marred a NO rally. Observers saw this as an attempt to intimidate voters and create an environment in which the holding of a peaceful referendum will be impossible.

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The illegal insertion of the words "National Security" in the Article 24 (1) of the Bill of Rights heightened calls, especially from the "NO" camp, for stoppage of the referendum pending authentication of the entire document.

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MPs

Political columnists and politicians have been used the media to push their campaigns for halting of the referendum. For instance, columnist Mutahi Ngunyi published an article titled “Why MPs should stop referendum” in the Sunday Nation of June 12, 2010.

The Legislature has also served as an extra arena in attempts to stop the referendum. Recently, a Bill was sponsored by the Kigumo MP, Hon. Jamleck Kamau, seeking to amend the Review Act (2008) in order to stop the referendum. The Bill was, however, was left out by the House Business Committee and therefore not debated on. The MP has since abandoned the NO crusade and crossed over to the YES camp.

One wonders whether these attempts to stop the referendum are honestly made or whether they are actuated by ulterior motives.

Without prejudice to cases pending at the IICDRC, it is notable from a glance that the various petitioners are not the most affected by complaints made. For instance, the case for the registration of prisoners was not filed by an inmate but by an activist. Similarly, all the other cases have been filed in the names of activists, busy bodies or persons heading organisations opposed to the Constitution. Pursuit of donor funding, search for cheap publicity and seeking to remain relevant may be greater driving forces than complaints against the referendum.

Detriment

Financially, the fact that the Minister of Finance is a person who is a political competitor of the Prime Minister is seen as a reason why funding of the review process is erratic. It is argued in some quarters that success for the YES camp would bring glory to Raila Odinga to the detriment of his competitors.

The motivations of the Church are also not honest. Some of their demands are unattainable and they know it. There would be no way Muslims would consent to the removal of the clause on Kadhi's Court. It is also the height of folly to imagine that land owners and squatters can sit down and agree on clauses on land.

The referendum is being held because of lack of consensus. To attempt to stop it in order to achieve consensus is an irrational act and serves no purpose except as a delaying tactic.

Abortion

As the Referendum day comes close, many issues remain unresolved and contentious. Prominent of these are the inclusion of the Kadhis' Court in the Constitution, the Right to Life (Abortion), Land issues, Counties, and Amendments to the Proposed Constitution.

Abortion is proscribed by Article 26 (4) of the Proposed Constitution unless in the opinion of a trained health professional 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”. Many insist that the phrases “trained health professional” and “if permitted by any other written law” are open to abuse.

However, these fears are not justified since the NO proponents prefer to read the said Article outside the context of Article 20(3) (a), which requires the Bill of Rights to be interpreted in a manner that most favours the enforcement of a right.

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An Orange supporter (opponent) during the 2005 referendum campaign on the constitution.



Back to the polls.

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Kadhis' Courts are established to determine questions on Muslim law on personal status, marriage, divorce or inheritance between Muslims. The contention has been that Islam is being elevated over other religions. The provisions on Kadhi's court have been there since Independence and removing them is tantamount to taking away a guaranteed right. Further, no prejudice would be caused to non-Muslims by the retention of the clauses.

Capriciously

On land, the contention is that government may practice witch hunt by forcefully acquiring private land or prescribing minimum and maximum acreage for land holding. Indeed, it is true that the government shall by the Constitution be empowered to implement recommendations by the Commission of Inquiry on illegal and Irregular Allocation of public land (Ndung'u report). However, it is unrealistic to imagine that with all the checks being put in place, the Executive would act that capriciously.

On devolution, some argue that the number of counties is inadequate while others see devolution as expensive to taxpayers. Others are apprehensive that devolution is a recipe for ethnic conflicts. One may not predict with accuracy whether ethnic animosity will be a post referendum effect. However, with proper sensitisation measures being taken, recurrence of violence is unlikely.

Another contentious issue relates to the difficulty in attempting to amend the Proposed Constitution once it is enacted. Ideally, changing a Constitution should neither be too rigid nor too easy. A balance must be found bearing in mind that Law should change with the times. Article 255 requires amendments in the main chapters to be approved in a referendum or by an initiative signed by at least one million registered voters.

These requirements are too rigid bearing in mind that the Proposed Constitution has glaring editorial errors which would only be amended under

that same rigid and expensive procedure.

Glaring errors

Those pushing for a halt of the referendum want the proposed constitution taken back for re-drafting or have it stood over pending the achievement of consensus. The CoE has already drafted, re-drafted and submitted the draft Constitution to parliament with the requisite reports. To refer the issue back would appear futile.

However, the Proposed Constitution contains glaring errors that the AG failed to notice while editing. For instance, in Article 20 (3) (a), the document erroneously states that in applying the Bill of Rights, a Court shall ..." (a) develop the law to the extent that it does NOT give effect to a right or fundamental freedom..."

The CoE would come in handy to remedy these defects before ratification but would not achieve much in re-drafting the other matters of substance.

Doubtful

The mechanism created by the Constitution of Kenya Review Act 2008 to achieve a new Constitution is self driving and without a "braking system". The CoE has submitted its draft, the AG has published the Proposed Constitution and the IIEC has registered voters and set a date for the referendum. It is doubtful whether the IICDRC has the power to suspend the Review Act or halt the referendum.

The only organ that can stop the referendum is Parliament by amending the Review Act. And this is not bound to happen. **KN**

Katiba briefs

June 18th

The National Cohesion and Integration Commission (NCIC) has dismissed claims that the commission is only targeting leaders opposed to the Proposed Constitution - the "NO" camp.

- ❖ A somber mood marks a requiem service for six people who died after a grenade attack at Uhuru Park during a NO rally held by the Church. The prayer service was held at All Saints Cathedral after the Nairobi City Council denied church leaders a permit to hold it at the venue of the blast.

June 19th

Defiant NO campaigners took their push for the rejection of the proposed Constitution to Nandi where they declared they will not be cowed by the Government's crackdown on alleged hate speech, which saw three MPs taken to court. Led by Higher Education Minister, Hon William Ruto, the NO campaigners, who included suspended Roads Assistant Minister, Hon Dr Wilfred Machage, hit out at President Mwai Kibaki's move to suspend the latter pending determination of his court case.

June 20th

Lawyers push to regain their position in the 20-year-old struggle for reform by actively participating in civic education ahead of the August 4th referendum.

A team of Israeli detectives arrives in Nairobi to help with investigations into the June 13th grenade attacks at a "NO" rally at Uhuru Park. The Israelis are to help Kenyan investigators drawn from different security agencies to piece together evidence and hunt down the attackers.

June 22nd

The Church rejects fresh efforts by the government to revive talks on dispute clauses in the Proposed Constitution. The religious leaders said they would only go back to the negotiation table if the August 4th referendum is called off.

June 23rd

The Independent Constitutional Dispute Resolution Court is asked to remove clauses on abortion and freedom of worship from the Proposed Constitution. Lawyer Edris Nicholas Omondi wanted the clauses, which have been opposed by

religious leaders deleted "because they do not represent the views of Kenyans".

June 24th

The ruling by the special dispute resolution court that prisoners should vote in the referendum puncture the confidence of the Interim Independent Electoral Commission (IIEC) 41 days to D-Day. In the landmark ruling, IIEC is expected to gazette prisons as polling stations and register inmates within 21 days.

June 26th

Registration of prisoners who will vote during the referendum is to last for only one week. However, their voter's cards will be withdrawn soon after the referendum because the present Constitution bars them from voting in a General Election.

June 29th

A group of Nairobi Christian leaders who won a petition challenging the inclusion of the Kadhi's courts in the Constitution demand to be enjoined in a case filed by Muslims in Mombasa.

from page 8

June 30th

The IIEC has registered seven referendum campaign committees for and against the Proposed Constitution. Chairman Issack Hassan said four of the committees have registered to campaign "YES" while three for "NO".

July 1st

Pope Benedict the XVI asked Kenyans to respect human life. "The respect for human life is at centre of the Catholic faith and is put at the centre of her teaching" said Pope Benedict the XVI.

Britain will not take sides in the referendum campaigns but will offer any technical assistance to facilitate civic education on the Proposed New Constitution.

July 3rd

United States Ambassador Michael Ranneberger continued to champion the need for Kenyans to endorse the Proposed Constitution despite criticism from the "NO" camp.

July 5th

President Kibaki assured the Church that the government would address their concerns on the Proposed Constitution. Addressing a congregation at Lavington United Church the president said that the government was taking the issues raised by religious leaders seriously.

July 7th

Displaced people in North Rift want their security assured before they can vote in the referendum. The internally displaced persons said they might not participate in exercise for fear of attacks.

July 8th - Politicians and clergymen who participated in the struggle for multiparty democracy have asked Christians to boycott churches opposed to the draft law.

July 9th

The government agreed to release more funds for the August 4th referendum. Although the IIEC had asked for KSh 4.6 billion from Treasury for the exercise, it was allocated a paltry KSh 2.6 billion.

July 12th

The deep involvement of foreign powers in Kenya's Constitution making process is causing an acrimonious for the national interest.

July 13th

The YES and NO referendum committees, together with 47 registered political parties, are to get the entire voter's register on July 21st in a move to enhance transparency in the electoral process.

July 14th

Churches invite legal and medical experts to explain to their followers reasons for opposing the Proposed Constitution. Former Law Society of Kenya chairman, Fred Ojiambo, Dr Ngatia Njogu, a senior Kenyatta National Hospital gynecologist, and Presbyterian University vice-chancellor, Kihumbu Thairu, gave powerful talks in separate church meetings asking Kenyans to reject the draft law.

July 15th

Peace teams are set up in at least four districts that an early warning system has identified as potential violence hot spots ahead of the referendum. The districts are Trans Nzoia, Wareng, Kisumu East and Tinderet.

A US congressman now accuses President Obama of running a political campaign in Kenya and failing to observe neutrality in the debate on the Constitution.

July 16th

Environment Minister John Michuki made an about-turn and joined the Green side of the review debate as chief mediator Kofi Annan separately said the new law held the key to preventing violence in future.

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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