November/December 2010

KatibaNews

The birth of a new Republic

Reconstituting the TJRC

* Rendition and extradition in Kenya
* For real or for show?
* Was it gerrymandering?

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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.

Nov/Dec 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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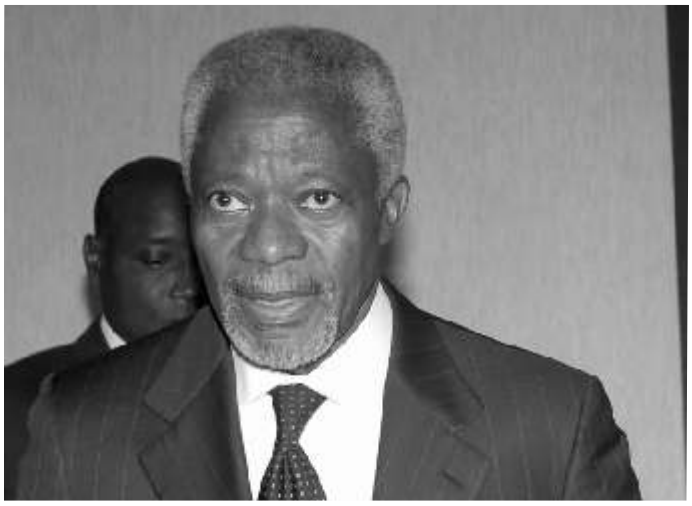

Contents

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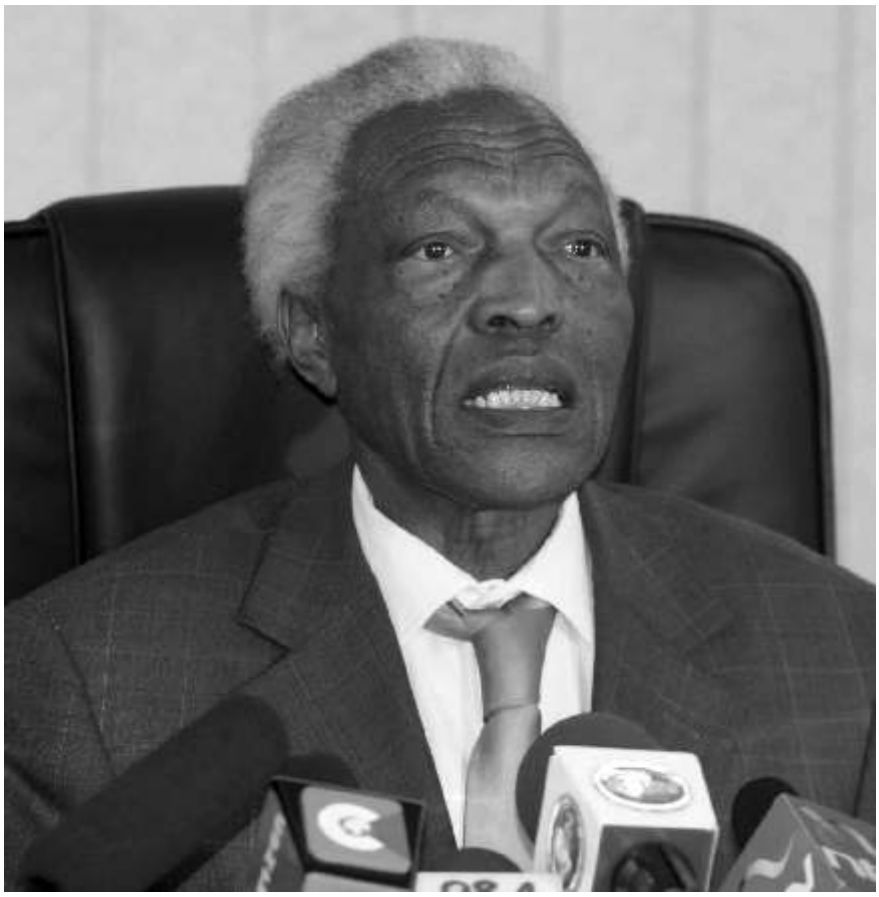
Reconstituting the TJRC



Former TJRC Chairman, Amb. Bethwell Kiplagat

By Katiba News correspondent

The events that followed the hotly contested 2007 presidential elections that pushed the country to the brink of collapse brought to the fore numerous underlying issues. These have been the main causes of the prevailing social tensions, instability and cycle of violence in Kenya.

Gross violations and abuses of human rights and historical injustices suffered by many under the previous regimes were neither acknowledged nor addressed. To address this situation, the Truth, Justice and Reconciliation Commission (TJRC) was established by an Act of Parliament No 6 of 2008 as part of the accountability component of Agenda Four of the National Accord signed by the two principals to specifically investigate, analyse and report upon all gross human rights violations and other historical injustices in Kenya between December 12, 1963 and February 28, 2008.

These include cases of disappearances, detentions, torture, sexual violations, murder, extrajudicial killings, ill treatment and expropriation of property: economic crimes including grand corruption and exploitation of natural or public resources; irregular and illegal acquisition of public land and of communities, among others.

Addressing the causes and effects of these violations and injustices was perceived as one of the long-term measures towards the realisation of national unity, reconciliation and healing.

In pursuance of its mandate, TJRC is required to inter alia identify State and non-State actors both as individuals and institutions responsible for, or were involved in the past violations and abuses; identify and specify the victims and make appropriate recommendations for redress, including reparations and prosecutions; create a historical record of violations of human rights abuses; and more importantly, make recommendations for systemic and institutional reforms to ensure that such violations and abuses do not occur in the future.

Mandate

Under section 20 of the TJRC Act, the commission is required to finalise and present its report to the President by November 2011, but it can seek for an extension of up to six months to do so. Three months subsequent to the submission of the report, the commission shall stand dissolved. As per the current schedule, it shall stand dissolved as at the end of February 2012.

In spite of the numerous challenges that TJRC has faced since its establishment, it had collected more than 9,700 statements as at mid-October 2010. This exercise is expected to continue until January 2011, when the commission anticipates to have covered all parts of the country and hopes to have had

page 3

from page 2

direct engagement with at least 30,000 Kenyans. However, not much has been done as far as civic education is concerned.

Since its establishment, TJRC has faced numerous challenges that have not only hampered its progress, but have also threatened its existence and successful completion of its mandate within the specified period. Most of the challenges have arisen as a result of questionable legitimacy of the commission's leadership under Ambassador Bethwel Kiplagat, whose integrity and credibility as the chair of the commission has been under severe scrutiny. From the onset, there were repeated calls for his resignation both from within the commission itself and from other quarters, particularly from pro-human rights civil society organisations.

Tribunal

The saga surrounding the legitimacy and credibility of the chair has inevitably slowed down the operations of the commission. This not only led to a rift between the chair and the commissioners, but also to erosion of the ability to marshal enough resources to facilitate its operations. Other than being allocated limited funds by the Treasury, the Government has been less enthusiastic in the stakeholders' trust and confidence in the commission thereby inhibiting its releasing the funds required by the commission.

Meanwhile, other development partners have deliberately kept off TJRC's operations and activities. In April 2010, TJRC filed a petition to the Chief Justice requesting him to set up a tribunal to investigate the conduct of the chair in accordance with section 17 of the TJRC Act of 2008. Despite the immense pressure, Kiplagat defiantly remained in office until November 2, when he stepped aside to pave way for investigation by a five-person tribunal appointed by Chief Justice Evan Gicheru in October.

The tribunal is required to investigate allegations that the chairman's past conduct erodes and compromises his legitimacy and credibility to chair the commission; investigate whether his past is riddled with unethical practices and absence of integrity; establish whether he has been involved in, linked to or associated with incidents considered to be abuse of human rights and whether he is likely to be a witness in the same matters that the commission is mandated to investigate.

Upon completion of its task, which is slated for April 2011, the tribunal is required to submit its report and recommendations to the CJ. In the meantime, the commission continues with its operations under the stewardship of Ms Tecla Namachanja Wanjala as the acting chairperson.

New constitutional order

The work of the TJRC remains important under the new constitutional dispensation. Whereas TJRC should help in reviewing our past to identify the wrongs committed, the victims involved and the perpetrators responsible, the new Constitution offers the country an opportunity to put in place the constitutional and legal framework through which these issues can be redressed while guarding against such future occurrences.

For the TJRC, the promulgation of a new Constitution at this time enhances the likelihood of its recommendations being implemented for the ultimate benefit of the people of Kenya against whom atrocities were committed.

TJRC's mandate to look at the long-term issues and recommend for long-term solutions fosters progressive implementation of the new Constitution, particularly as regards the issues of accountability and the fight against impunity.

These complementarities are critical if

page 4

TJRC Commissioners with Justice & Constitutional Affairs Minister Hon. Mutula Kilonzo (third left) and Chief Justice Evan Gicheru (second right)

from page 3

long-term national unity, peace, reconciliation and healing are to be achieved. Kenya can only get to the 'promised land' that the new Constitution envisages if everyone is on board, which then requires us to deal with our past so as to lay a strong foundation for our future.

Successful completion of TJRC's mandate and its full implementation relies largely on the support of the other key governance institutions such as the Legislature, the Judiciary, the Executive, law enforcement agencies, State and non-State human rights organisations, among others. Its role of providing an opportunity for inter-person and inter-group dialogue in search for reconciliation and healing perfectly complements the role of the National Cohesion and Integration Commission, which must therefore be nurtured if long-term stability and tranquillity is to be attained.

Benefit

The well-documented predicament of TJRC not withstanding, it is important that the commission is retained and allowed to complete its work for two main reasons. One, it will save the country against wastage of public resources because the commission has already consumed a lot and must, therefore, be held accountable and deliver as per its mandate.

Two and more importantly, it will be unfair to disband or weaken the commission because of questions raised against one person. This will be no better than throwing out the baby with the bath water. The current commission still comprises of individuals with integrity and proven track record, both nationally and internationally, on matters relating to conflict management, transformation and peace building from whose knowledge and experience Kenya stands to benefit.

On his way out? Chief Justice Evan Gicheru.

The fact that the commissioners themselves were uncomfortable with the allegations levelled against the chairman and called for investigation into his conduct underscores their commitment to the mandate and values of the commission.

However, Kiplagat should remain outside the commission irrespective of the outcome of the tribunal for the sake of the larger commission and in the interest of the people of Kenya, if indeed TJRC's objectives are to be achieved. To date, there is a case pending in court that is challenging the legality of the commission particularly as regards the impartiality, integrity and credibility of the chair.

Public ownership

His continued stay or comeback to the commission will greatly undermine the work of the commission, as it will remain on perpetual public trial. Technically, the establishment of the tribunal with a mandate to complete its work in April 2011 has to a great extent sealed the fate of Kiplagat's tenure in the commission.

Assuming TJRC's mandate is not extended as provided for under section 20(3) of the TJRC Act, there will be only seven months remaining for the commission to submit its report to the President, which is too short a period for Kiplagat's stewardship to be felt even if he is cleared of all the allegations by the tribunal and retained as the chair.

TJRC's problems can be attributed to the poor vetting process of its membership and the lack of critical sense of public ownership of the commission. The success of such a commission relies heavily on the goodwill, trust and confidence of the people, which can only be achieved through an all-inclusive, clear and transparent appointment and vetting criteria. One hopes that this will not ultimately dilute and undermine the quality of the work of this important commission. KN

Rendition and extradition in Kenya

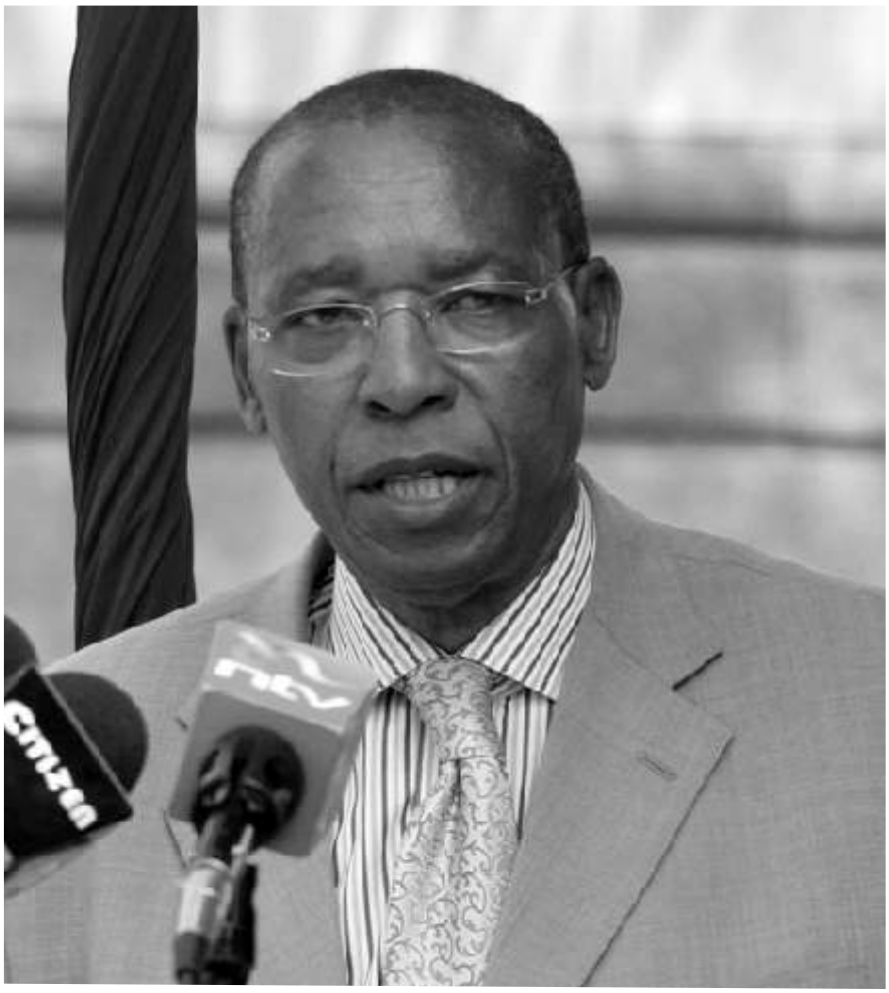
By Macharia Nderitu

Extradition is an official process, regulated by treaties, where a nation surrenders a suspected or convicted criminal to another country. The suspects are sought for an offence over which the requesting State wishes to exercise jurisdiction.

Where extradition is compelled by law, it is known as rendition. Rendition is a surrender or handing over of persons or property, particularly from one jurisdiction to another. Extraordinary rendition refers to an extrajudicial procedure in which criminal suspects are sent to other countries for imprisonment and interrogation with a view to extracting information.

An extradition request is based on existing extradition agreements or enabling law. The extraordinary or illegal extradition can occur where the treaty does not cover the alleged offence, the State of refuge is unable or unwilling to prosecute the alleged offender or due to widening reach of a State's law in response to transnational crimes.

Under international law, a State cannot exercise jurisdiction in another State without consent. International law preserves the principles of state sovereignty and territorial integrity and prohibits enforcement functions, including abductions, without consent.



Justice & Constitutional Affairs Minister Hon. Mutula Kilonzo

Sovereignty

States are obligated to desist from interfering with internal and external affairs of other states under the UN Charter. The arrest in the territory of another State constitutes interference in the internal affairs of a State. Sovereignty denotes the authority of a State over persons within its borders. Where there is a violation of the international law, such State may seek reparation and demand cessation and demand return of the abducted individual.

However, no violation occurs where a State grants permission to the foreign agents to arrest a person within its borders. Extraordinary extraditions have been justified on the basis that use of force is not aimed against the political independence and territorial integrity of the State and hence there is no violation of State inviolability.

The apprehension of international criminals is consistent with the objective of promoting human rights and that the extraditions are a means to deterring future attacks against the State or its nationals. The war against terrorism and the ability of powerful States, like the US, to act unilaterally has undermined the rule of law in relation to rendition.

page 6

from page 5

The extraordinary extradition is a violation of human rights due to actual physical abuse, violation of freedom of movement, threat to personal integrity, deprivation of liberty, subjecting the detainees to torture, inhuman and degrading treatment, arbitrary detention and abuse. This contravenes articles 7 and 9 of ICCPR and 6 of the African Charter on Human and Peoples Rights, which Kenya has ratified.

The articles provide for protection from torture and ill treatment and the right to liberty and security of a person.

Further, it contravenes customary international law, especially articles 3, 5, 8, 9 and 10 of UDHR. It undermines the right to a fair trial before an independent and impartial court. Article 2 (6) of the Constitution provides that any treaty ratified by Kenya shall be part of the laws of Kenya.

Complicity

Renditions are only legal when they coincide with internationally accepted rules of law and are regulated by treaties. In extraditions, governments are culpable. Renditions disclose cooperation between intelligence services. The participation of the Executive ranges from limited knowledge to full complicity, resulting in presidential oversight and responsibility.

The US Attorney General opined in the aftermath of 9/11 that the President had a broad constitutional mandate to take military action in response to terrorism. In Kenya, the High Court in Mohamed Aktar Kana vs the Attorney General has ruled that extraordinary renditions impugn the oath of office by the President to uphold and obey the Constitution, including the Bill of Rights. The court ordered that the applicant should not be extradited to Uganda and that the President should be served with the ruling through the office of the Secretary to the Cabinet.

National courts have held that a person abducted in violation of international law may be tried in the courts of the abducting State. Kenya has routinely carried out extraordinary renditions. Examples include the 1976 extradition of two Palestinian suspected terrorists handed over to Israel. The suspects were arrested near the Jomo Kenyatta International Airport in Nairobi for attempting to bomb a plane. Some terrorist attack suspects of the US Embassy in Nairobi were extradited to US in 1998.

Abdalla Ocalan was captured and extradited in Nairobi in 1999. About 100 men, women and children were extradited to Somalia in 2007 and 13 men were extradited to Uganda in 2010 without following due process. There were no warrants of arrest and no judicial hearings were conducted. The detainees were not given the remedy of habeas corpus before rendition.

Cross border crimes

There is an established but unofficial cooperation between East Africa States to exchange criminal without compliance with extradition laws since the establishment of the EAC in 1967. This has led to violation of the rights of the citizens. However, Tanzania has refused to extradite a suspect it is holding over the July 11, 2010 Kampala Bombings without compliance with the law.

International law requires that such cooperation must be defined by law clearly to ensure the rights of suspects are respected. The applicable law is the Extradition (Commonwealth Countries) Act. A fugitive is defined as any person who is in Kenya and whose surrender is requested under the Act on the ground that he is accused of an offence or has been convicted of an extradition offence committed within the jurisdiction of the requesting State.

Such an offence must be an offence punishable by imprisonment for more than 12 months. The offence should not be of a political character and the fugitive should not have been previously acquitted or convicted. The fugitive should not be punished on the basis of race, religion, nationality or political opinions. The request should be issued by the Attorney General on behalf of the requesting government accompanied by an overseas warrant of arrest and a certificate of conviction or sentence.

The fugitive shall be brought to court promptly and shall have the right to apply for habeas corpus. The court shall issue a notice of committal to the Attorney General. The fugitive shall not be surrendered before the expiry of 15 days from the date of arrest. On appeal, the High Court may discharge the fugitive due to the trivial nature of the offence, passage of time between the request and the conviction, and if the application is not made in good faith.

The East African States are separate and sovereign states. The laws applicable to extradition should be complied with. If a special mechanism is to be established, it must accord to

page 7

from page 6

international human rights treaties, which Kenya is party to.

Human rights

The recent extradition of 13 Kenyans to Uganda has led to the violation of international human rights law and the Bill of Rights. This is due to the failure to follow the due process whereby the suspects have no opportunity to challenge the process in court, arbitrary arrests, illegal searches, incommunicado detention, and extradition to countries where they may be tortured.

The illegal extradition violates protection offered by the Extradition (Commonwealth Countries) Act. These are oversight by the independent and impartial court and not board room agreement on exchange of alleged fugitives, protection against extradition for political offences, the right to make an application for habeas corpus, the right not to be extradited before the expiry of 15 days and the right to appeal against the decision to extradite.

Before the warrant of arrest is issued, the court must be satisfied that an extraditable offence has been committed by the fugitive in the requesting State. The renditions have carried out swiftly where charges relate to terrorism.

Extradition cannot proceed where there is failure to fulfil dual criminality, that is the offence must be an offence in the country of refuge and the requesting State, political nature of the offence, where the suspect may be subjected to ill treatment, for example torture, where the requesting State lacks jurisdiction to punish the suspect and citizenship of alleged offender. States prefer to hold trials for their citizens rather than extradite them to foreign countries.

America

In the United States, extradition is regulated by a treaty concluded with a foreign country. Interstate extradition is mandated under article 4(2) (2) of the Constitution. States should deliver a fugitive for justice who has committed treason, felony or other crime to the State which the fugitive has fled. Such a request is made through a demand by the Executive Authority of the requesting State to the authorities of the State where the fugitive has fled accompanied by the indictment which initiated the criminal charges against the fugitive.

The fugitive must be received by an agent of the receiving State within 30 days from the making of the order.
Extraditions to foreign countries are based on treaties. The Constitution permits the extradition of persons, excluding nationals and citizens of the US, who have committed crimes of violence against nationals in foreign countries. The requests for extradition are forwarded through diplomatic channels.

The Attorney General reviews the application for sufficiency. The fugitive is arraigned before a magistrate and a hearing conducted. If proved, the court enters an order of extradition and notifies the Secretary of State. The fugitive can petition for habeas corpus.

Australia

The Commonwealth Parliament has power to make laws for peace, order and good government with respect to the service and execution of the criminal and civil process and judgements of the courts of states. These laws regulate interstate extradition. Extradition to foreign countries is regulated by Extradition Act, 1988, which ratified treaties that Australia has signed with other countries.

Kenya

The High Court sitting in Mombasa in Republic vs Chief Magistrate, Mombasa Ex Parte Mohamud Mohamed Hashi alias Dhodi & 8 others has ruled that Kenyan courts do not have jurisdiction to try persons for acts of piracy committed in the High Seas. Until September 2009, the Penal Code provided for the offence of piracy jus gentium.

The section was repealed by the Merchant Shipping Act, 2009 without a saving clause. The 2009 Act is not applicable to this case since it came into force after the offences were committed. The applicants were charged with the offence of piracy contrary to section 69 (1) as read with 69 (3) of the Penal Code. At the close of the prosecution case, the court put the applicants on their defence.

During trial, the applicants objected that the court did not have jurisdiction to try them since the offence was committed in the high seas in the Gulf of Aden outside the territory of Kenya. The court ruled that it had jurisdiction and continued hearing the case. The High Court held that the alleged offence of piracy jure gentium was not committed in territorial waters within the territorial jurisdiction of Kenyan Courts.

Jurisdiction

The court defined the high seas as the

page 8

from page 7

equivalent of no-mans land, which is open to all states. Article 89 of the UN convention of the Law of the Sea provides that no State may validly purport to subject any part of the High Seas to its sovereignty. Section 5 of the Penal Code provides that the jurisdiction of courts of Kenya extends to every place in Kenya including territorial waters. The courts are not conferred with any jurisdiction to deal with matters which have taken place outside Kenya except where such jurisdiction is established clearly in the defining law.

The High Seas are not a place in Kenya or within the territorial waters of Kenya. High Seas are deemed to be outside jurisdiction of all states unless some law in that State brings it into their local jurisdiction, whether municipal law or international convention. The trial process was thus null and void ab initio. The defining section 5 of the Code is juristically paramount and overrides section 69(1) of the Code to the extent of that inconsistency.

This does not affect the prosecution or trial of suspects of the offence in territorial waters. The judge did not consider that Article 2(6) of the Constitution provides that treaties which Kenya has ratified are part of Kenyan law. Kenya has ratified the United Nations Treaty on the Law of the Sea.

What next?

The suspects illegally extradited to Uganda can claim damages from the Government of Kenya since there is a glaring failure on the part of the Government to accord with the law. Further, the suspects can seek declaratory orders that their rights have been infringed with the consent and acquiescence of the Government. Indeed, no rendition can be carried out without the tacit approval of the Government.

These declarations and the payment of reparations to the families will act as a deterrent to violation of the law by the Government. If the Commissioner of Police disobeys the orders of the court not to extradite the suspects, contempt of court proceedings can be filed against him. KN

Suspected Somali pirates in a Kenyan court.

For real or for show?

The renewed fight against corruption

Guandaru Thuita

Kenya's struggle with corruption has been long and unimpressive. Senior Government officials have in the past engaged in chest thumping and issuing of threats on how they'll decisively deal with the corrupt. However, experience has shown that those threats are mere bluffs which are rarely followed up with significant action.

In his inauguration speech during his first term of presidency, President Kibaki expressly stated that corruption would cease to be a way of life. That statement was music to the ears of nearly the entire population, as Kenyans had grown weary of issuing bribes to access almost every basic service from the Government.

This optimism was raised to higher levels when the President set up a special office of the Permanent Secretary in charge of Governance and Ethics, which was occupied by the internationally acclaimed anti-corruption crusader, Mr John Githongo for the first and only time. Other decisive actions such as the radical surgery of the Judiciary demonstrated the Government's seriousness in addressing the ills of corruption.

Unfortunately, this steam to fight corruption lost momentum on the way when close confidantes of the President also dipped their fingers in the till. From this moment, large-scale corruption of the grand type was to dot the remainder of President Kibaki's first term. The scandals collectively known as Anglo Leasing scams were the most prominent.

The recently appointed KACC Director Dr. P L O Lumumba.

Investigations

The Executive was taking little action on his own Motion and it was only after public and international pressure caused by the surprise resignation of Githongo that some powerful ministers, including Kiraitu Murungi, Chris Murungaru, George Saitoti, Amos Kimunya and David Mwiraria were forced to resign to pave way for investigations.

page 10

from page 9

However, this act of stepping aside was later established to be a mere public relations gimmick intended to cool the heat since the ministers were later returned to the Cabinet, albeit to different portfolios. Numerous reports of the Controller and Auditor General and those of commissions such as that investigating the Goldenberg scandal and sale of the Grand Regency Hotel were rarely made public and even if they were, their recommendations were never acted upon.

With regard to the Kenya Anti-Corruption Commission, nothing of significance was being undertaken by it and the only memory that Kenyans have of the commission is the unjustifiably fat salaries the commissioners were receiving and the Shakespeare flavoured empty threats that Director Aaron Ringera fancied uttering.

Ultimately, recurrence of grand scandals and overall incidents of corruption reached a point where one would safely state that the more things had changed in Kenya, the more they had remained the same.

Recent events

By 2010, Kenya was listed as No 159 out of 178 in the Corruption Perception Index by Transparency International. The initial hope and optimism was now a dim memory in the minds of those who had witnessed the dawn of the second liberation. Citizens had by now completely despaired in ever winning the battle against corruption.

Then out of nowhere and with no systematic series, a number of occurrences relating to the fight against corruption took place in such a way that seemed to re-ignite the morale in fighting the vice. At first, PLO Lumumba, a renowned lawyer particularly due to his great oratory skills, was in July 2010 appointed to head the Kenya Anti-Corruption Commission (KACC). The welcoming of Lumumba was lukewarm as many had doubts as to whether he could match his smooth talking with decisive action.

A few months later, a flurry of activities by nearly every agency mandated with checking corruption gathered momentum. The Treasury based Internal Audit Directorate, the Public Procurement Oversight Authority, Kenya National Audit Office, the Efficiency Monitoring Unit and the Inspectorate of State Corporations have all been competing to catch corrupt officers.

In a move that was highly symbolic and heavily publicised in the media, KACC officials were seen arresting the dreaded traffic police officers on the Nairobi-Limuru highway who were notorious for extorting bribes from motorists.

At the same time, Parliamentary Committees were upping their game in grilling ministers and senior officials suspected of improprieties. The Minister for Foreign Affairs Moses Wetang'ula and Mwangi Thuita, the PS in the same ministry, were forced to step aside by Parliament amidst allegations involving the acquisition of properties for embassies in Japan, Nigeria, Egypt and Pakistan at inflated prices.

Pretext

Around the same time, the then Minister for Higher Education William Ruto was suspended from Cabinet after the High Court ruled that he must stand trial in a case where he is accused of fraudulently obtaining money from the Kenya Pipeline Corporation by purposing to sell to it land which was part of Ngong Forest.

The dust had barely settled when KACC officials pounced on Geoffrey Majiwa, the Mayor of Nairobi, and charged him and others with the offence of corruptibly receiving Sh283,000,000 from the Ministry of Local Government on the pretext that they were obtaining cemetery land for the city.

Former minister Hon. William Ruto (right) and former president Moi ally Mr. Joshua Kulei facing corruption charges in a Nairobi court.

page 11

from page 10

A mini reshuffle in the Cabinet triggered yet another saga in the Ministry of Water Services whereby Ms Charity Ngilu was accused by her erstwhile Assistant Minister Mwangi Kiunjuri of engaging in the corrupt practice of awarding inflated tenders to her cronies and relatives. Mr Henry Kosgey, the Minister for Trade suffered the same fate when he was grilled extensively over allegations of corruptly allowing old vehicles to be imported into the country, and impropriety and nepotism in the appointment of the Kenya Bureau of Standards boss.

The Charterhouse Bank scandal involving tax evasion and money laundering reemerged once again and concerned ministers and senior officers were grilled by a parliamentary committee on the issues relating to the bank's closure. Though many officers exonerated their agencies over the closure, a dossier was allegedly handed over to KACC by the American government, which will enable KACC to launch fresh investigation.

Complicity

The hitherto untouchable fellows in the Defence Council have also been grilled in a military scam involving the short circuiting of procurement regulations in order to award a Sh1.6 billion tender to a South African firm for the purpose of acquiring Armed Personnel Carriers (APC).

Recently, eleven senior Immigration Officers were suspended for issuing work permits and Kenya citizenship to undeserving foreigners. In addition, the issue of drug barons has been revisited with a former Commissioner of Police and anti-corruption director being accused of complicity in the drugs trade.

Former Foreign Affairs Minister Hon. Moses Wetangula

These events coupled with the revelation by the KACC director that they are investigating four Cabinet ministers and the presidential statement that swindlers of public funds don't deserve to be alive has sent shivers down the spines of beneficiaries of corruption. The ground seems now all set for the slaying of the dragon of corruption.

Whistle blowers

The new Constitution has the entire Chapter 6 dedicated to the issue of leadership and integrity. This chapter underscores the importance of ethics in leadership by stipulating at Article 73 (2) (b) that one of the guiding principles of leadership is ensuring that decisions are not influenced by corrupt practices.

While we must appreciate that the new Constitution has reinvigorated the anti-corruption crusade, we cannot entirely hold it as the only reason for the increased fight against the vice. For one, the recent events were discrete, unrelated and it is only by coincidence that they happened at nearly the same period. In addition, Kenya seems to have come of age as far as bursting corruption is concerned. The media is no longer afraid of highlighting suspicious transactions and due to the understanding of the ill effects of corruption, whistle blowers have also become commonplace.

When an organisation is headed by one individual for a lengthy period, that head often falls into the tendency of being complacent on the job. Dr Ringera, the pioneer director of KACC, may have fallen under this category for during his time the commission had little to show as results. He kept blaming the AG and

page 12

from page 11

the courts for frustrating his work yet his experience in both the Judiciary and AG's chambers would have enabled him to manouvre or sway these departments to his side.

Prof Lumumba on the other hand has a point to prove. He is accused of being a man of poetically sounding words only. To prove his critics wrong, he must ensure that KACC performs under his watch. Other than the Majiwa case and the Charterhouse scandal, which originated from his office, the other recent incidents cannot be attributed to him as the new KACC director.

Politics

When Ngilu was challenged on some of the dealings in her Water ministry, the Prime Minister and also ODM leader indicated that he would stand by her side. The minister is not only a close ally of Raila Odinga, but also his point man (woman) in Ukambani where he would want to keep a check on the Vice President, Kalonzo Musyoka.

Probing her especially at the instigation of a PNU stalwart could be seen as a calculated move to trim ODM's influence in her area. The probing of Minister Kosgey also started to be seen as targeting not only an ODM member, but a Kalenjin. Members of Kosgey's community were wondering aloud why he was being singled out yet ministers from the central region especially were fond of appointing their own.

To be certain on whether such probes are politically motivated is almost impossible in the circumstances. We can only hope that they are not and pray for sobriety and rationality to guide the process.

Pubic officer

The question of who is a public officer gained significance when the former Mayor Majiwa was arrested and charged with corruption. He initially refused to resign as mayor by stating that since he was an elected rather than an appointed official, he could not be asked to step aside pursuant to the Anti-corruption and Economic Crimes Act.

Pursuant to a request from the Ministry of Local Government, the Attorney General delivered an opinion categorically stating that a mayor was a public officer. Subsequently, the mayor stepped aside pending the hearing and determination of his criminal case.

Under the definition section of The Anti-corruption and Economic Crimes Act, a public officer is an employee or member of a public body. A public body in this regard includes a local authority. Since a mayor performs duties as an officer of a local authority, he falls squarely within the definition of a public officer and whether he is elected or not isn't a consideration.
However, another question that may crop up soon is whether persons elected as Members of Parliament are public officers.

The definition section seems to suggest that a "member" of a public body, Parliament included, must be suspended upon being charged with an economic offence. If that happens to be the case, then such Members of Parliament like Gidion Mbuvi alias Sonko must be suspended from performing their functions pending the hearing of the fraud cases pending against them.

Stepping aside

Mr Wetang'ula, Mr Majiwa and Mr Thuita were officers who did not wait to be suspended like Mr Ruto. They decided to do what is now being referred to as "stepping aside". This phrase is neither found in the Anti-corruption and Economic Crimes Act nor in the Constitution. In fact, no legislation refers to it and its origin must be in the realm of morality rather than law.

This term gained significance when on November 1 this year, Keriakor Tobiko, the Director of Public Prosecution opined that officers who step aside to pave way for investigation are entitled to their full pay. This unlike situations where a public officer suspended under Section 62 of the Anti-corruption and Economic Crimes Act only gets half his pay.

It is not clear from what authority Mr Tobiko issued such a directive. A close examination of section 62 reveals that it is couched in mandatory terms. Once an officer is charged with corruption, then he must be deemed as suspended from the date of the charge. There is no room for giving the public officer a choice to maneuvre in order to get his full emoluments by stepping aside. Allowing them to do so is making Kenya a haven for the corrupt and creating an easy way for the corrupt to avoid suspension and get all benefits. KN

Was it gerrymandering?

The controversy on electoral boundaries

By Bernard Nyogok

On November 10, 2010 the Interim Independent Boundaries Review Commission (IIBRC) announced that it had prepared a list of 80 new constituencies, thereby increasing the elected membership of the national assembly to 290 as required under Article 97(1) and 89 of the Constitution. This announcement stirred up an unprecedented flurry of activities in the political, judicial and social scene.

Reactions to the proposal were swift and different. Many areas perceived as Orange Democratic Movement (ODM) strongholds celebrated while hue and cry took place in Central, Eastern and Nairobi provinces. The controversy reached a crescendo when the head of the civil service allegedly barred the government printer from publishing the results and thereafter a court order was issued to bar the publication.

Unhappy with the failure to publish the new constituencies, MPs threatened to scuttle the Constitution implementation process ay rejecting the appointment of members to the Commission on the Implementation of the Constitution and the Commission on Revenue allocation.

Background

No comprehensive review of boundaries or administrative units has taken place in Kenya since independence which means that the units have not been reflective of the ever increasing population and its needs. Executive interventions such as the 24 Districts created by former President Daniel arap Moi and the 136 created by President Mwai Kibaki were not only declared illegal by a High Court ruling in September 2009 but were more of campaign gifts rather than a legitimate address to the problem of representation.

The distribution of constituencies was so skewed that the Independent

page 14

IIBRC Chairman Andrew Ligale

from page 13

Review Commission on the General Elections of 2007, commonly known as the Kriegler Commission, remarked that part of the failed electoral system in Kenya was brought about by the inadequacy of the constituency boundaries.

With the endorsement by the Kofi Annan led Kenya National Dialogue and Reconciliation Commission, the Constitution was amended by the addition of Section 41(B) to establish the IIBRC which was to perform two main roles. The first was to make recommendations on the delimitation of constituencies and local authorities electoral units and recommend the optimal number of constituencies on the basis of equality of votes.

This role was to be exercised taking into account both population density and trends, means of communication and community interests. The second mandate was to make recommendations on administrative boundaries including the fixing, reviewing and variation of boundaries of districts and other units. The IIBRC is also recognised by Section 27 of the Sixth Schedule to the new Constitution.

Work

This Commission was established in December 2008 but its members were appointed on May 12, 2008. They included Mr Andrew Ligale as the Chairman, Ms Jedidah Ntoyai, Ms Irene Cherop, Mr Mwenda Makathimo, Mr Joseph Kaguthi, Dr. John Nkinyangi, Mr Murshid Abdalla, Eng. Abdulahi Sharawe and Mr Roozah Buyu.

Upon swearing in on May 18, 2009 the Commission embarked on preliminary activities such as preparing work plans, preliminary visits to provincial headquarters, field arrangements for public hearings, civic education programmes and assessment of existing geo-spatial data. The commission is also reported to have visited other countries including India and Australia to conduct comparative studies in boundaries delimitation.

The above activities were rarely in the public domain but the public hearings of the 47 original districts, now counties, were very conspicuous as they were accompanied by intrigue, name-calling, shouting matches, heckling and near fist fights between leaders and their supporters. Highly charged public hearing took place in Nakuru, Isiolo, Trans Nzoia, Borabu, Koibatek, Narok, Molo and Taveta These public hearings commenced on February 1, 2010 in Turkana North, Taveta, Wundanyi, Mwingi North, Mwingi south and ended on or around May 10, 2010 in Bondo and Rarieda constituencies.

Upon concluding these hearings the IIBRC embarked on data analysis and preparation of the preliminary survey and mapping of electoral constituencies and local authority units. Thereafter, it prepared a list of 80 new constituencies which it attempted to publish in the Kenya Gazette before being stopped by the High Court.

Apparently, the list was prepared hurriedly that members of the public and MPs had no opportunity to comment on it. There is no mention of a review of other units such as wards, locations, divisions and districts. Its undone work will definitely form the scope of the work to be undertaken by the Independent Electoral and Boundaries Commission (IEBC) once it is constituted.

Gazettement

The storm raised by the proposed 80 new constituencies exploded into a crisis that touched every arm of government and the commission itself. Serious internal wrangles between commissioners were exposed, opposing camps have been formed in Parliament, while the Executive has been involved especially with the allegation that the government printer was prohibited from publishing the list by the Office of the President.

The most important issue arising relates to the mandate of the IIBRC and whether it exercised power in accordance with the established law. Section 41(c) of the old Constitution strictly stipulates that the function of the IIBRC is to make recommendations to Parliament on the delimitation of constituencies, wards and other administrative units. Therefore, there is no legal basis that warrants the IIBRC to make a final determination of the 80 new constituencies or to publish the list in the Kenya Gazette.

Some quarters have argued that Section 27(1) (b) of the Sixth Schedule to new Constitution confers power on the IIBRC to determine boundaries. However, that cannot be the case as the Executive mandate to determine boundaries was conferred on the yet to be constituted IEBC rather than the IIBRC.

page 15

from page 14

Article 89(9) of the new Constitution stipulates that the names and details of boundaries of constituencies and wards determined by the commission shall be published in the Kenya Gazette. Perhaps this was the provision which the Ligale team was relying on in purporting to determine the boundaries. However, this procedure is only available to the IEBC and not the IIBRC.

The spilt in the commission which led to Commissioners Joseph Kaguthi, John Nkinyangi and Mwenda Makathimo disowning the report brought out the issues of the formula used in determining the boundaries. It is reported that the IIBRC allegedly arrived at the distribution based on a formula agreed on in Naivasha by the Parliamentary select Committee on the Review of the Constitution. This formula is actually captured in paragraph 4.9 of the PSC report dated January 29, 2010.

Guarantees

In applying the formula, the IIBRC used the provinces as their unit of analysis and accordingly allotted the new constituencies based on the population size of each province. The IIBRC used the national population of 38,610,097 as outlined in the latest census and a population quota of 133,138 per constituency as agreed in the Naivasha talks. However, the Commission was allowed to deviate from the national quota by a margin of 40 percent upwards in cities, 40 percent downwards for sparsely populated areas and 30 percent for all other areas.

Based on the formula, Nairobi with eight constituencies was found to need an additional nine, Coast seven more, Eastern seven more, Rift Valley 27 more, Nyanza ten more and Western nine more constituencies.

Whereas this formula guarantees the existence of the population level, it ignores the other criteria namely the population trends, means of communication, community interests and geographical features. There is also no legal basis for using the provinces as the base for distributing the new constituencies since the provinces are neither created nor recognised by the present Constitution.

In fact, using the provinces which are by their origin controversial is synonymous with perpetuating the historical mistakes on representation. Further, the Naivasha agreement did not recommend the use of provinces as the basic unit.

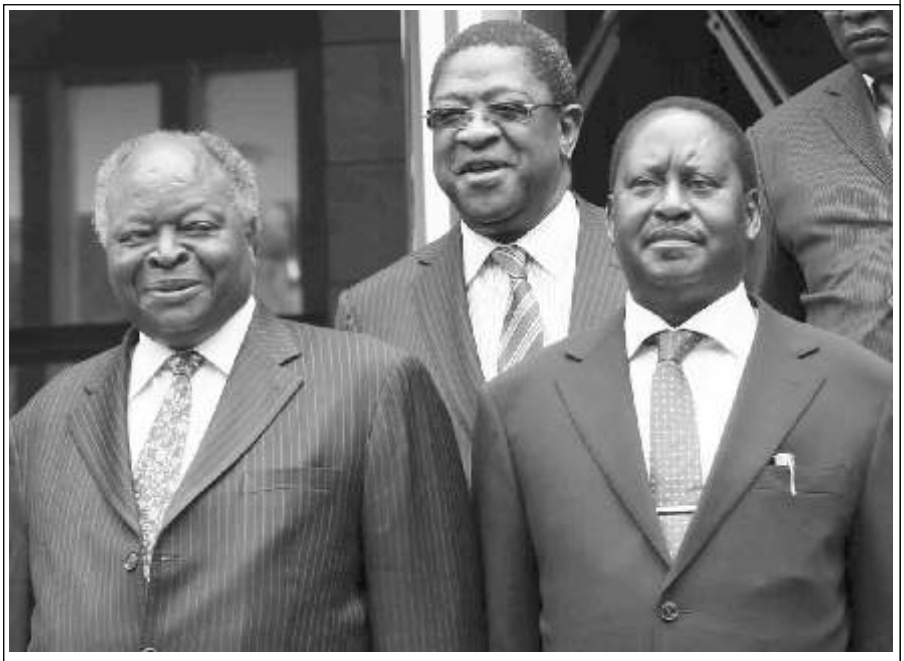
The Nairobi Petition no. 72 of 2010, John Kimathi vs. Hon. Andrew Ligale and others, raises other issues including the competence of the chairman to hold office in view of his past political activities, whether the publication of new constituencies without a sufficient determination of details of the boundaries was within the law and whether the IIBRC could legally use census results which had been cancelled.

Gerrymandering

Boundary delimitation is a process that often takes place in democracies in order to prevent the imbalance of

page 16

Johann Kriegler, former chair of the Independent Review Commission which investigated election fraud in Kenya following the PEV in 2007.



From left: President Mwai Kibaki, Attorney General Amos Wako and Prime Minister Hon. Raila Odinga

from page 15

populations across electoral units. Though there are no internationally agreed processes which guarantee fair delimitation, many organisations such as the Commonwealth Secretariat, the European Union and the International Foundation for Electoral Systems have proposed guidelines for effective delimitation.

Guidelines on the values to be taken into account include impartiality, equality, representativeness, non-discrimination and transparency. Other standards to be taken into account include number of registered voters, number of people actually voting, historical boundaries, regular reviews of not more than ten years, ensuring that constituency boundaries coincide with administrative boundaries, protecting national minorities, convenience, and avoiding gerrymandering at all costs.

Gerrymandering is the deliberate modification of electoral boundaries in order to achieve desired results for a particular party or person or in order to hinder a particular group from gaining proportionate power. The term owes its origin from the infamous redistricting of the State of Massachusetts in the US to favour the candidates of then Governor Elbridge Gerry resulting in one of the concocted district resembling the shape of a salamander.

The IIBRC has been accused of gerrymandering in order to favour ODM to which the Chairman Mr. Ligale belongs to. It is contended that ODM strongholds of Rift Valley, Nyanza, Coast, and Western were allotted many seats in order to outdo their counterparts from Eastern, Central and Nairobi.

These accusations don't seem to be farfetched considering that the result favoured bigwigs in the political scene including Dalmas Otieno, Anyang Nyong'o, Henry Kosgey, Fred Gumo, Charity Ngilu, James Orengo, William ole Ntimama, Samuel Poghishio, Moses Wetangula, Musikari Kombo, Gideon Konchella, Richard Onyonka, Chris Okemo, Kiema Kilonzo and Raila Odinga.

Explanation

It is mysterious if not suspicious how constituencies such as Vihiga, where Mr. Ligale hails from and which only has a population of 91,616, could be split yet larger constituencies including Kaloleni, Kinango in Kwale District, Bomet, Kieni, Mathira, Ntonyiri, Belgut and Dagoretti have not been considered for splitting.

Releasing the report in the last minute without appropriate consultations on the proposals smacks of ill motive, irresponsibility and lack of transparency. Unless a cogent explanation from the IIBRC is given, it may be sensible to conclude that the IIBRC engaged in gerrymandering.

If that is the case, then the commission has done a lot of disservice to Kenyans, wasted time and resources, caused disharmony that may plunge the now delicate country into chaos and also returned us back to the despotic days when electoral units would be created to favour charlatans and sycophants.

It is no easy feat to delimit boundaries especially when you have been given a specific number of constituencies to work with and prohibited from doing away with some undeserving ones. What the country needs is a total overhaul of the boundaries such that an optimal number will be created and in the process address the current imbalance and correct the errors caused by past gerrymandering. KN

THE KONRAD ADENAUER FOUNDATION IN KENYA

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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

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- 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.

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