LIVING AND VOTING
WITH DIGNITY AND
JUSTICE
A HUMAN RIGHTS MANIFESTO

November 2012

Kenya National Commission on Human Rights
Living and Voting with Dignity and Justice

A Human Rights Manifesto

Nov 2012
# TABLE OF CONTENTS

## ACKNOWLEDGEMENTS

## CHAPTER ONE: INTRODUCTION
- Background v
- Summary of Recommendations v

## CHAPTER TWO: LIVELIHOODS
- Introduction 1
- Education 2
- Work 4
- Housing 6
- Right to be free from hunger 8
- Health 10
- Social protection 12
- Recommendations 13

## CHAPTER THREE: JUSTICE
- Introduction 16
- Reorganisation and Restructuring of the Judiciary and Judicial Process 16
- Cleaning up the judiciary through the vetting as an aspect of Justice 21
- Justice for victims of the post election violence 23
- Internally displaced persons 25
- Recommendations 25

## CHAPTER FOUR: DIGNITY
- Introduction 27
- Capital Punishment 27
- Torture and ill-treatment 29
- Balancing security with liberties 30
- Recommendations 32
- Short-term measures 32
- Medium-term measures 33

## CHAPTER FIVE: POLITICAL PARTICIPATION AND ACCOUNTABILITY
- Introduction 35
- The framework for political engagement 36
- Reform of electoral institutions: cosmetic or credible? 39
- Enabling political expression 43
- Strengthened accountability framework 45
- Recommendations 47
ACKNOWLEDGEMENTS

We wish to acknowledge all the people who made this publication possible. Special thanks go to the following colleagues who researched and wrote chapters for this report:

- Rose Kimotho, Senior Human Rights Officer and Maurice Anyal, Intern Research and Compliance Department, Chapter Two;
- Antonina Okuta, Senior Human Rights Officer and Edith Muluhya, Intern Research and Compliance Department, Chapter Three;
- Lawrence Mute, Commissioner and Maurice Anyal, Intern Research and Compliance Department, Chapter Four;
- Lucy Minayo, Senior Human Rights Officer, Chapter Five.

We also acknowledge the critical comments made by Victor Lando and Dr. Bernard Mogesa. Finally thanks to the United Nations Office of the High Commissioner for Human Rights-Kenya, United Nations Development Fund-Kenya, and the embassies of Finland and Sweden for their generous support towards the publication of this report.

KNCHR, November 2012
CHAPTER ONE: INTRODUCTION

Background

1. On 27 August 2010, Kenyans celebrated the promulgation of their new Constitution to replace the Independence Constitution following at least two decades’ activism, negotiations and attempts at introducing a new constitutional order.

2. The Constitution of Kenya 2010 recrafted or elaborated a detailed patchwork of governance institutions, including multiple Constitutional Commissions and Independent Offices, executive President, bicameral Parliament, restructured Judiciary, and devolved (county) governments. At the same time, the Constitution established elaborate mechanisms and institutions to ensure that its provisions would without fail be implemented. Key among such mechanisms and institutions which now play critical roles to guard and guide constitutional implementation are: the Constitution Implementation Commission (CIC), the Judiciary, and the three Commissions established to succeed the Kenya National Human Rights and Equality Commission (KNHREC) – the Kenya National Commission on Human Rights (KNCHR), National Gender and Equality Commission and Commission on Administrative Justice.

3. This report is prepared by the KNCHR established by the Kenya National Commission on Human Rights Act (No. 14 of 2011). The report’s aims are twofold. It offers snapshots of the extent to which Kenya’s Bill of Rights has impacted the lived realities of Kenyans during the first two years of its implementation (27 August 2010-26 August 2012). The report though makes the conscious choice not to undertake a blow by blow assessment of each Chapter Four right. Rather, it identifies key events in the lives of Kenyans during the last two years and provides a rights context to those events. The themes under which these events and rights are discussed are: livelihoods; justice; dignity; and participation and accountability.

4. The report also proposes short-term and medium-term Interventions which both state and non-state actors should take account of to ensure better implementation of the Bill of Rights. The periodicities of these recommendations are linked, in the short-term to actions that may be implemented in the next few months before the country undertakes the 2013 general elections; and in the medium-term to actions which state and non-state agencies should take account of in the period 2013—2017 during the life of the newly elected central and county governments. These medium-term interventions may also dovetail into the remaining life of the Kenya 2030 Vision. In other words, the Short-term measures set out in this report are addressed to the Grand Coalition Government, current
State agencies and non-State actors. The medium term recommendations are addressed to the political parties desirous of forming the next governments, at the national or local levels; and political parties are invited to include those recommendations in their manifestoes.

5. The four themes under which this report is framed are essential blocks for ensuring implementation of the Constitution. Individuals’ livelihoods as represented by freedom from hunger, quality education and indeed high a standard of health are essential to enhancing implementation of the Constitution; as does a society where justice prevails. The individual also needs to be secure from indignities and aggravations such as torture and ill-treatment. Finally, the individual’s self-worth cannot be realised if they are not able to participate fully in making the decisions that matter in their lives.

6. In preparing this report, KNCHR is conscious of the CIC’s overarching responsibilities in facilitating implementation of the Constitution. KNCHR’s roles though are as significant in the constitutional matrix for ensuring effective and expeditious implementation of the Constitution; and the Commission draws its basis for this report in particular from functions assigned to KNHREC in Article 59 of the Constitution and allotted to KNCHR by Section 8 of Act No. 14. In particular, the report responds to Section 8 of the KNCHR Act’s requirements that the National Commission should: promote respect for human rights; promote the protection and observance of human rights; and monitor, investigate and report on the observance of human rights in the country.

7. State agencies, political parties and Kenyans generally should take actions so that the following short-term or medium-term measures are effected to ensure steady implementation of the Bill of Rights.
CHAPTER TWO: LIVELIHOODS

“Africa is a continent surging with impatient nationalist movements striving to win freedom and independence. Apart from this struggle, there is the struggle against disease, poverty, and ignorance. Unless these three evils are defeated, political freedom would become hollow and meaningless….the motive behind various nationalist movements should always be geared towards the security of all our people, higher standards of living and social advancement.”

Introduction

1. The Constitution of Kenya 2010 changed the country’s governance structure and enhanced the fundamental rights and freedoms of Kenyans through the inclusion of economic and social rights as well as the rights for specific groups of persons: children; persons with disabilities; older persons; minorities and marginalized groups; and the youth. Article 43 provides for economic and social rights. These are subject to progressive realization as stipulated in articles 20(5) and 21(2) of the Constitution. Economic and social rights are also found in other constitutional provisions-articles 53, 54, 55, 56 and 57- and it has been argued that these articles have to be read singularly to determine if they apply fully immediately and if they differ from those in Article 43. What is not in doubt is that the state needs to put in place legislative, policy and other measures including the setting of standards as part of the implementation of these rights.

2. Under the theme of livelihoods, this Chapter refers to some major events during the last two years relating to the areas of education, work, housing, food, health, and social security to assess whether progress is being made towards the realization of these rights.

3. For purposes of this report, the term livelihoods includes not just the ‘means of securing the necessities of life’ but also on what those necessities are. The chapter will thus focus on the key interventions that have been made and that affect livelihoods and include interventions relating to the rights to housing, food, work, education, health and social protection.

---

2. Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations, KNHCR, 2011 at pg. 48
3. Merriam Webster Dictionary
Education

4. Education is both a human right and an indispensable means to realizing other human rights. It is an important empowerment tool as it is the primary vehicle by which individuals including the economically and socially marginalized can lift themselves out of poverty and increase their participation in their communities. Education plays a vital role in enabling people to secure work and hence a means of income that in turn contributes towards their food and housing needs. Moreover, education enables people to make better decisions relating to their health thus promoting the right to health. Education is a tool that equalizes opportunity and safeguards against marginalization; it promotes socio-economic and political participation.

5. Article 43(1) (f) of the Constitution provides for the right to education. In addition, the right to free and compulsory basic education for children is recognized in Article 53(1)(b), as is access to education institutions and facilities for persons with disabilities in Article 54(1)(b) and for the youth, the right to access relevant education and training-Article 55(a). However, even before August 2010, Kenya had already made positive steps towards the realization of the right to education. The Children’s Act of 2001(Section 7) included the right to education and in 2003, the government introduced Free Primary Education (FPE) and subsequently Free Day Secondary Education in 2008 via tuition fee subsidies.

6. In Kenya, it is more or less settled that the minimum core content of the right to education is non-discriminatory compulsory free basic (primary) education: no future government will conceivably move back on this minimum standard which for the first time was enforced by the National Rainbow Coalition government in 2003. for the right to education to be truly achieved, FPE needs to be accessible, affordable, adaptable and available to all learners including those with special needs. For instance while the FPE is credited with the increase in net enrolment rates, one of the major challenges that persists is improving access to learners with special needs. Monitoring by KNCHR of the rights of persons with disabilities has revealed that the benefits of FPE are not shared by learners with special needs for whom access to education remains a pipedream.
7. Corruption and mismanagement with regard to FPE funds continues to undermine the right to education. In 2010 it was widely reported that the FPE scheme was riddled with corruption characterized by widespread mismanagement and non-accountability. Subsequently, donors threatened to withdraw funding from the sector, and civil society organisations called for the resignation and prosecution of the involved senior government officials. About KES 4.2 billion was lost in the scandal.

8. Schools do not observe the fees guidelines set by the Ministry of Education; they continue to charge for unregulated components such as interviews, test papers, teacher motivation, monitoring and evaluation and remedial classes, in effect cancelling out the free aspect of education.

9. Challenges remain in relation to retention-completion of primary level and transition-continuation to secondary or technical levels of schooling. In 2010 about 746,000 pupils completed primary school but 260,000 did not get a place in secondary schools; in 2011 over 775,000 pupils completed primary schools and 205,000 missed secondary placements. The impact of this capacity gap is that every year the primary education sector alone is adding almost 200,000 unskilled workers into the labour force. A close analysis of who make up these numbers will reveal that it is often the poor who attend public primary schools and not the economically able who are more likely to attend a private primary school: these fix their own fees, are more costly and thus a reserve for those with better incomes. Whereas the Free Day Secondary Education is one strategy towards arresting transition, it does not respond adequately to the lack of adequate and quality places in secondary schools. At the same time, the secondary education sector has similar problems; the number of form four graduates has been rising while there has not been a corresponding rise in the number of spaces available in public universities: 64,000 such students missed admission to public universities in 2012 not because they had not met the required cut-off points but because there was no space.

---

10. The total sum of this is that the gaps in the education system are contributing towards widening the social economic inequalities among Kenyans and increasing stress on an already saturated non-expanding labour market. Addressing inequity brought about by the current system including through the adoption of temporary special measures must be a priority of the government. In deed the value of affirmative action in education was recognised by the court in John Kabui Mwai and 3 others v. Kenya National Examination Council and 2 others (2011) eKLR where the court held that: “…the adoption of temporary special measures intended to bring about a de facto equality for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as the measures do not lead to the maintenance of unequal or separate standards for different groups and provided they are not continued after the objectives for which they were taken have been achieved.”

Work

11. Each year, the Kenyan labour force grows by over 300,000 as students drop out of school or complete their studies. Whereas unemployment is high in all levels of the population, high youth unemployment was identified as a threat to Kenya’s social and political stability and since 2008, the government has been trying to put in place initiatives to stem this problem. Data collected in 2008 indicated that 14% of Kenya’s workforce was in formal employment, 36% in informal employment, 50% in agricultural self-employment and 10% were unemployed. An even more serious problem is that a majority of Kenyans in the workforce are employed—in most cases working more than 40 hours per week—and still living at or near the official poverty line. This is despite the fact that the government has been increasing the minimum wage with a view to cushion the lowest paid workers against rising cost of living: 10% in 2010, 12.5% in 2011 and 13.1% in 2012.

12. The Constitution does not provide for the right to work, but it does provide for the rights at work otherwise known as labour rights (Article 41). These constitutional provisions which also include the rights of employers aim at protecting labour through an approach that promotes both workers and employers’ rights. At the same time, Article 55(c) provides that the State shall take adequate measures including affirmative action to ensure that the youth have access to employment.

Indeed job creation has been prioritized under Kenya Vision 2030: under the Medium Term Plan of 2008 to 2012 the government aims to facilitate the creation of about 500,000 jobs per year⁷. In fact, in 2008 alone the government created 467,300 jobs: but the challenge was that these jobs were in the informal sector, which is characterized by temporary jobs that are low paid, temporary, and with no social protection ⁸.

13. Another class of persons in regard of whom the law has established special considerations in regard to employment is persons with disabilities. Section 13 of the Persons with Disabilities Act provides that the National Council for Persons With Disabilities shall endeavour to secure the reservation of 5% of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. This provision though has not been implemented in the private let alone the public sector and there is need to interrogate why this is so and institute remedial measures.

14. Kenya's laws underwent comprehensive review in 2007 with a view to improve working conditions, workers' protection and employee-employer relations and bring them in line with the state's obligations under international laws. However, these measures have not been enough to improve the lot of the Kenyan worker. The enforcement of the labour laws including the provisions relating to minimum wages is very weak. The Ministry of Labour admits it is not adequately staffed to enforce and monitor the laws⁹. That violation of labour rights is common place is corroborated by evidence from the KNCHR: labour rights related complaints comprise the bulk of the cases of human rights violations received by the KNCHR¹⁰.

15. In the last two years, there have been increased demands by Kenyan workers for better terms covering implementing collective agreements, salary increments and terms and conditions of work. Consequently, strikes have been witnessed in both private and public sectors. Within the public sector, the most significant strike actions were the September 2011 strike by teachers, December 2011 strike by doctors and a March 2012 strike by public health workers including nurses and lab technicians. While salary increments remain a key basis of strikes, terms and conditions of work and the right to form, join and participate in activities and programmes of trade unions have been as likely to lead to strikes.

---

⁷. xxxx
⁸. xxxx
⁹. See Labour Commissioners Annual Report for the period 1st January 2011 to 31st December 2011, Pg.5-6, available at http://www.labour.go.ke/
¹⁰. Out of 1024 complaints received at KNCHR Headquarters, 387 were labour related. Source, Kenya National Commission on Human Rights, 2010/2011 Annual Report
16. While the law recognizes the right to strike, the handling of industrial action by employers especially government remains wanting. Threats of being fired have been overly used by employers against striking workers as was in the case of the public health workers strike where the striking workers were ‘fired’ by the Minister for Medical Services and the Government Spokesman. Employers have seemed not to respect the fact that workers have a right to strike and to demand fair labour practices. In this regard, the reform and reconstitution of the Industrial Court should go a long way to aid in the interpretation of the constitutional provisions relating to labour matters.

17. While legal provisions will no doubt help in achieving dignified work for Kenyans, the biggest challenge remains to expand what is considered work by Kenyans to include informal employment and not just formal employment. For this to happen, the government, educational institutions and the private sector must come together and identify opportunities, provide the requisite training and investment with a view to making informal employment attractive and sustainable.

**Housing**

18. The right to housing does not mean that it is the obligation of State to build houses for the entire population. Rather the right to housing obliges the State to take all measures necessary to prevent homelessness, prohibit forced evictions, eliminate discrimination in access to housing, address the rights of the marginalized and other vulnerable groups, ensure security of tenure for all and ensure every individual enjoys reasonable housing.

19. The State has focused on providing housing for its employees through affordable mortgages and development of housing schemes for civil servants. The National Housing Corporation, a state owned corporation whose mandate is to provide adequate and affordable housing, has been involved in the development of housing units in various towns. Recently this effort was marred by a scandal in the allocation of houses where senior government officials, politicians and National House Corporation staff were allocated multiple houses thereby denying other deserving Kenyans of the opportunity to access housing.
20. Two years after the promulgation of the Constitution, quality housing remains a pipe dream for low income urban dwellers\textsuperscript{11} many of who result to living in informal settlements in sub-standard housing and on land that has no security of tenure. Congestion is common place and this, coupled with the lack of proper water and sanitation facilities, makes for poor living conditions that leave residents prone to diseases. Kenya needs about 112,000 housing units per year yet only 20,000 to 30,000 are developed each year\textsuperscript{12}. That the main players in the housing sector are from the private sector and are thus profit driven amplifies the challenge which is further exacerbated by the corruption in the land administration system at the Ministry of Lands and at the local government levels.

21. Forced evictions are still common in Kenya, undermining further the right to housing. The majority of the victims of forced evictions are the low income people living in informal settlements. Evictions have also been carried out in areas gazetted as forests and government land. For instance, in 2010, the government evicted communities that had settled in the Mau Forest and in November 2011 tens of Syokimau residents had their homes demolished after they were said to have encroached on government land. Most of the evictions are carried out by the provincial administration, local authority askaris and private developers also use hired gangs.

22. In 2011 alone, a number of cases challenging evictions that threatened to render the petitioners homeless were brought before the High Court. The case of Satarose Ayuma and others vs. The Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme and Two Others [2011] eKLR\textsuperscript{13} residents of Muthurwa Estate challenged the eviction order of the respondent, who was also the landlord. The court considered the competing rights between the tenants and the owners of the estate. The court observed that Kenya lacked appropriate legal guidelines on eviction and displacement of people from informal settlements and even formal ones, particularly in instances where low income earners have to be displaced from public or private land. The court held that it could not overlook the fundamental rights of the tenants and that when tenants had to be moved that ought to be done in a humane manner.

\textsuperscript{11} Assessment of the realization of the right to housing in Kenya, 2009-2010, Haki Jamii
\textsuperscript{12} http://www.nhckenya.co.ke/download/PUMWANI_HOUSING_PROJECT.pdf
\textsuperscript{13} HCCC Petition No. 65 of 2010, available at http://www.kenyalaw.org/newsletter/20111230.html
23. Similarly in the case of Susan Waithera & 4 Others v the Town Clerk, Nairobi City Council and 2 others [2011] eKLR the court 24 hours’ notice was unreasonable and indeed unconstitutional. It further observed that eviction should not result in individuals being rendered homeless or vulnerable to the violation of other human rights and that where those affected are unable to provide for themselves, the State party had to take all reasonable measures to the maximum of its available resources to ensure that adequate alternative housing, resettlement or access to productive land as the case may be was available.

24. Other than evictions, internal displacements have also been a cause of loss of housing. In the aftermath of the 2007/2008 post election violence, about 600,000 people were rendered homeless. While many of these have returned to their homes or have been resettled, there remain pockets of internally displaced persons that are yet to find a durable solution. Moreover, intermittent interethnic conflict in various parts of the country and frequent natural and man-made disasters are also causes of homelessness. The problem is further exacerbated by the lack of a legal and policy framework to address the concerns of internally displaced persons.

**Right to be free from hunger**

25. Kenya is a food deficit country even in times of bumper harvests. Almost each year, significant sections of the population are food insecure. The last two years have not been any different. In 2010 drought crippled many farming activities leading to severe food shortages that lasted for most of 2011 and affected about 3.7 million people. Within the same period, the strategic national grain reserves were depleted exposing the country to further risk. The spiralling cost of living specifically the price of essential goods such as maize flour, sugar and high fuel costs contributed to sharp increases in food and transport costs. In April 2011 Kenyans took to the streets to protest the high food prices. But the paradox of the situation is that during this period there was surplus food in some regions that went to waste as it could not get to markets or be processed and stored for future use. Furthermore, a small but politically connected group of large scale maize farmers were hoarding their produce in the hope of better prices.

26. Demands by Kenyans saw the government attempt albeit temporarily to control the price of maize flour by making it more available at lower than market prices. Other temporary measures included the creation of a duty free window period to encourage importation of grains, a measure taken to allow millers to bring in the commodity at low prices in order to pass on this benefit to the consumer and relief food distribution particularly in the semi-arid and arid zones.

27. In the same period, several legislative interventions were made to cushion Kenyans against the soaring food prices. Of note is the Price Control (Essential Goods) Act of 2011 which provides for the regulation of prices of essential commodities in order to secure their availability at reasonable prices. The Act gives the Finance Minister the powers to gazette essential commodities and fix price ceilings in consultation with the industry. The Act has not been implemented yet and therefore its intended benefits are yet to be realized. A second intervention is the proposed Consumer Protection Bill 2011. This is a much broader bill that seeks to prohibit unfair trade practices in consumer transactions, to promote a fair, accessible and sustainable marketplace for consumer products and services and thus its impact if enacted into law would be beyond the regulation of prices in the food sector to standards, safety and quality and covers other sectors such as banking, energy, telecommunications, transport and health.

28. In 2009, the Bio Safety Act was passed. The enactment of this law elicited debate on food security as Kenyans interpreted the passage of the law as allowing for the introduction of genetically modified organisms (GMO). The Act establishes a National Bio safety Authority, one of whose functions is to carry out research and advice on the level of protection for safe transfer, handling and use of GMO products including food stuffs. During the food crisis of 2011, amidst reports that the government was considering importing GMO maize, a section of Kenyans argued that these foods have the potential to cause ill-health and that adequate due diligence ought to have been done before importation. Another question that arose and is related to food security is the potential impact of GMO seeds on the food chain and particularly on the local seed varieties.

29. To increase food production and reduce dependency on rain-fed agriculture, the government has been encouraging a move to irrigation. This was one of the priorities of the National Economic Stimulus Programme, initiated in 2009/2010 that saw the revival of irrigation in among other schemes, Bura, Hola, West Kano and Bunyala. Whereas the schemes were a success in producing the much required food, delays in buying of the harvest by the National Cereals and Produce Board resulted in some wastage.

Health

30. The right to access the highest standard of health including reproductive services and emergency treatment now is entrenched in the bill of rights. In the last two years, the State has sought to ensure this right in practice for Kenyans; and indeed the ministries of health have set out a blue print on how to interpret this right vis-à-vis their services to Kenyans.

31. Since 2009, the State through the National Hospital Insurance Fund (NHIF) has been encouraging the approximately 11 million people (this number includes their dependants) in the informal sector who have no medical cover to join the Fund. While the Fund is open to all Kenyans who have attained 18 years of age, its membership in the past was drawn mainly from persons in formal employment for whom membership is mandatory.

32. Another ambitious and laudable step that has been undertaken by the State is the roll out of a medical cover for civil servants. Hitherto, only a small fraction of Kenyans mainly comprising persons in private employment and an even smaller number of those that are self-employed had medical insurance cover. Starting 1st January 2012, the State introduced a comprehensive medical insurance cover for its employees and their eligible dependants. The program offers out-patient and in-patient services to teachers, civil servants and members of disciplined forces in a cover worth KES. 4.5B annually, administered by NHIF.

33. But like many good intentions in this country, the roll out of this plan is now subject to a mismanagement scandal involving the Ministry of Medical Services under whose mandate the management of NHIF falls, NHIF and some private medical providers over the alleged disbursement of funds to non existing medical facilities. The scandals elicited public outrage and investigations leading to the cancellation of contracts with some health providers, and the suspension and eventual firing of the NHIF board. At the same time, NHIF was seeking to increase members’ contributions; a move that drew fierce opposition from the workers union and Kenyans in general who were concerned about putting more money in an institution whose capacity to manage public funds is in doubt. Despite a court order in the Funds favour, the new rates have not been implemented and the stand-off remains. While these dramas continue, a majority of Kenyans remain without medical cover and many poor Kenyans continually succumb to preventable, curable communicable and non communicable diseases.

34. Access to affordable and essential drugs and medication is a prerequisite for the realization of the right to health and licensing the use of generic drugs is one way to ensure affordability. On the other hand there is no doubt that ridding the market of counterfeit drugs also contributes towards this goal. But the two terms need to be clearly distinguished so as to protect the benefits to the realization of the right to health that a country stands to gain by licensing the use of generic drugs. In April 2012, the High Court declared the Anti-Counterfeit Act of 2008 a violation of the right to the highest attainable standard of health in as far as it limited the access to generic medicines and drugs-PAO & 2 others v. Attorney General [2012 eKLR]. The three petitioners in the matter were adults living with HIV/AIDS and at the time of the petition had been taking medication since generic ARVs became widely available. The petitioners averred that Section 2 of the Anti Counterfeit Act did not differentiate between counterfeits and generic drugs and thus they were afraid in its enforcement, the very drugs on which their lives depended would be criminalized and thus liable to seizure; and Further that the cost of their treatment was likely to increase considerably as they would have to rely on branded drugs that are more expensive.
The Court asked the state to reconsider the provisions of Section 2 of the Act alongside its constitutional obligation to ensure that citizens have the highest attainable standards of health and make the appropriate amendments to the Act. The decision comes at a time when the donor-driven financing for the provision of HIV/AIDS related medical services especially life-saving drugs is decreasing; hence its importance. Moreover, for a country with a high disease burden the availability of cheaper drugs and medicine should be a priority if the right to health is to be realized.

Social protection

35. The right to social security is now recognized in the Constitution under articles 43 (1) (e) and 43 (3) that provide every person has the right to social security and that the state shall provide appropriate social security to persons who are unable to support themselves and their dependants respectively. The term social security comprises both contributory and non-contributory schemes that provide benefits to everyone who experiences a particular risk or contingency. Kenya has both contributory and non-contributory schemes but benefits are not universally available to all Kenyans.

36. Contributory schemes include the National Social Security Fund, the NHIF and other private pension schemes that are regulated by the Retirements Benefits Authority whose benefits are limited to persons or dependants of persons in formal employment that contribute to these schemes. Contributory schemes have existed since the 1960s but the idea of non-contributory schemes (a targeted social assistance program whose benefits are received by those in need) that was initiated in 2009 through the Draft Social Protection Policy has been approved by Cabinet and is awaiting debate at the National Assembly. Furthermore, a Social Assistance Bill has been prepared and is already before Parliament. The Bill seeks to establish the National Social Assistance Authority who, other than identifying those in need, shall have the power to make grants to any organisation or group of citizens for the purpose of providing assistance to persons in need or likely to become in need. The bill proposes that those to qualify for assistance to include Orphans and vulnerable children, poor and elderly persons, unemployed persons, persons disabled by acute chronic illnesses, and persons with disabilities. However, the unemployed persons to benefit from the programme will have to be youths and show proof that lack of income is not due to negligence or lack of industry.
37. The question of sustainability of Kenya’s social protection programs stems from the fact that the number of people being taxed relative to the number of people in need of social protection is small. The lack of mechanisms to tax or enrol into contributory social protection schemes earners in the informal sector is depriving government of valuable revenue that could be channelled to cushion the most vulnerable members of society or paid out to members when contingencies arise.

Recommendations

38. Short-term measures regarding education are:
   
a. The government should employ more teachers to close the 80,000 teacher-shortage gap. The recent move to employ 10,000 teachers is welcome but more still need to be recruited.

   b. The State must ensure continued funding for FPE; institute proper management and accountability mechanisms to ensure that funds are utilized properly; and eliminate unregulated levies. On a priority basis, prosecution of those who misappropriated the FPE funds must be instituted and completed.

39. In the medium term:
   
a. More investment must be put in ensuring that learners with special needs access education on the same terms as their able bodied counterparts. The report of the Taskforce on education is instructive as it includes a breakdown of the costs of learning for learners with different learning needs, an excellent demonstration that education for these children is achievable\textsuperscript{23}. Such a breakdown is also important in as far as it takes into consideration the individual needs of each child as opposed to generalized funding for learning with special needs as it has been in the past.

   b. Financial support should be made to all students that require such support at all levels through bursary or loan schemes.

   c. Moreover, because education is a progressive right, the Government must continue to make concrete steps towards achieving free secondary education and eventually, higher education. Specifically, free secondary education (for day students) must in time, extend to boarding students while taking into account available resources.

\textsuperscript{23} Page 143 Taskforce Report
40. Regarding work, in the short term:
   a. The Government should establish career advice centres in all post-
      primary educational institutions to offer career guidance to students.
   b. The Ministry of Labour should embark on an awareness campaign
      on the labour laws targeting both workers and employers because
      whereas there are some groups of workers that know their rights,
      others do not and employers are exploiting this ignorance.

41. In the medium term:
   a. The Government should continue setting aside empowerment funds
      for youth, women and persons with disabilities and institute proper
      management and accountability mechanisms to ensure that funds are
      utilized properly.
   b. The government must deliberately increase the capacity of the Ministry
      of Labour to enable it carry out its monitoring and supervisory
      functions.
   c. The Government should professionalize through certification blue
      collar skills with a view of making them attractive alternatives to
      white collar jobs.

42. Regarding housing, in the short term:
   a. The Ministry of Lands must prepare and issue guidelines on evictions.
   b. The NHC house-allocation scandal must be investigated and action
      taken against those that will be found culpable.

43. In the medium term:
   a. The Government including the NHC should invest in low cost housing
      as opposed to middle-income and high-income housing as they have
      been doing in the past.
   b. Both the national and county governments need to deliberately set
      aside money for housing public officers deployed to or employed in
      the counties.

44. Regarding food, in the short-term:
   a. The Government should set aside adequate money to buy and store
      maize from farmers.
   b. It should establish an effective food pipeline and strategically place
      stocks in areas that are prone to drought and famine.
45. In the medium term:
   a. There is need to step up investments and training in food processing and preservation.
   b. There should be continuous improvements of infrastructure to better the distribution of food produce throughout the country.

46. Regarding health, in the short term:
   a. The Government should investigate to the full the NHIF scandal.

47. It should finalize and enact the proposed laws operationalizing article 43(1) (a) and 43(2) of the Constitution.

48. Regarding social security, in the short term:
   a. The Government should finalize and enact the Social Protection policy and bill.

49. In the medium term:
   a. The Government should expand the NSSF coverage to include the informal sector.
   b. It should increase the amount of money to beneficiaries under Urban Food Subsidy Cash Transfer Program and to make the beneficiary selection process transparent.
CHAPTER THREE: JUSTICE

“Governments must create institutions that bring justice to the past, while at the same time demonstrate a commitment that justice will form bedrock of governance in the present and future” (Franke, 2006)

Introduction

1. Justice is an abstract concept, its definition affected by a wide range of moral, legal and societal factors. It may be defined in terms of equality, equity, process or outcome. However, there is a general consensus that justice is imperative in any democratic society which claims to espouse rule of law and respect for human rights. For purposes of this chapter, emphasis will be placed on the steps that have been taken, in the past two years, towards the enjoyment of justice by all. Judicial reforms, the role of the International Criminal Court, the Truth, Justice and Reconciliation Commission and the status of internally displaced persons will be examined. What comes out is that justice must be done as well as seen to be done.

Reorganisation and Restructuring of the Judiciary and Judicial Process

2. Following the promulgation of the Constitution, the Judiciary embarked on effecting a massive reorganisation and restructuring programme in efforts to rebrand its image and restore public confidence. Article 159 of the Constitution was instrumental in triggering this much needed transformation: by stipulating that judicial authority is derived from the people and laying out principles which must guide courts in the exercise of their judicial authority. These principles require, among other things, that justice be done to all irrespective of status, that justice be administered without undue regard to technicalities; and that the purposes and principles of the constitution be upheld in judicial decision making. This has resulted in measures to simplify administrative and judicial processes; improve the delivery of services so as to enable transparency and accountability; and to equip the judiciary with financial, human and physical resources in order to ensure the delivery of progressive well reasoned judgments.
3. Simplification of judicial and administrative processes ensures justice is dispensed without unnecessary delay and without undue emphasis on technicalities. Amendments to the Civil Procedure Act, Cap. 21, sought to introduce the ‘overriding objective’ principle which simply put requires that resolution of disputes must be done justly, expeditiously, proportionately and affordably (Sections 1 A and 1 B of the Act). Courts must look at the substance rather than the form and must not strike out a case, as was historically the practice, on the basis of a mere technicality. Similarly, a number of notable provisions were introduced under the Civil Procedure Rules. Order 3 introduced a tracking system which requires that a plaintiff establish whether the suit falls within the ‘small claims,’ ‘fast track,’ or ‘multi track’ Additionally, full disclosure is required at the pleadings stage as all documents that are required to be relied on must be produced. This ensures litigants are able to efficiently prepare for their cases thus preventing losses flowing from the consequential backlash of litigation costs. Order 11 which deals with Pre-trial Directions and Conferences governs the conduct of all preliminary issues well in advance of the commencement of trial. The objective behind this order is two-fold: on one hand to facilitate expeditious disposal of cases and on the other to ensure the suit is ready for trial in a cost efficient and prompt manner. The Judiciary has embraced information technology in efforts to arrive at efficient and expeditious delivery of justice. The High court, in an application for review, reversed the decision of a Magistrate’s Court declining the admissibility of video evidence. In arriving at this decision, the Learned Judge observed that the absence of laws on admissibility of video evidence did not prevent the court from exercising its inherent jurisdiction to develop law. Further, he stressed a court must be able to disregard technicalities in order to live up to its mandate to deliver substantive justice. Likewise, the Court of Appeal has admitted a number of procedural applications argued by lawyers appearing by video link.

24. Livingstone Maina Ngare v Republic, High Court of Kenya at Nairobi, Criminal Revision No. 88 of 2011
4. Despite these notable steps towards ensuring access to justice by simplification of court procedures, a point of concern remains the issue of costs. In the Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, “fees” are defined as all those expenses related to the commencement of the suit and at any other time as the Registrar may require whereas “costs” encompass lawyers’ fees and other disbursements of the parties. Provision has been made for fees to be scrapped at the commencement of the suit for those that cannot afford but there is no mention of how fees required during the suit would be waived or how costs at the end of the suit would be dealt with in the event that the petitioner’s case is not successful. This evidently presents a hurdle to basic access to the courts especially with regard to matters concerning enforcement of the Bill of Rights.

5. As far as service delivery is concerned, steps have been taken to ensure that information is easily accessible and available. Litigants can now make inquiries to the Office of the Chief Registrar of the Judiciary on the status of pending matters both electronically and through post. Interestingly, judicial attire and address have been simplified in order to ensure that courts appear less formal and that judges appear to be more in touch with society. In issuing the circular, the Chief Justice proscribed the wearing of wigs and limited judicial address to “Your Honour” only. As far as robes are concerned, there will be two robes for each court, a functional one and ceremonial one; whereas magistrates are to decide whether or not they would like to wear robes.

6. In efforts to enhance the capacity of the judiciary to dispense justice, the Judicial Service Commission, as part of its constitutional mandate to improve the overall efficiency of administration of justice under Part 4 of Chapter 10 of the Constitution of Kenya, has been involved in the recruitment and appointment of judges, magistrates and legal researchers. For the first time in the country’s history, a commission which is fully independent of the Executive is responsible for judicial appointments. Also a first was the country-wide broadcasting of the recruitment process for the offices of Chief Justice, Deputy Chief Justice and Supreme Court Judges. Enabling public participation in the appointment of judicial officers enhances transparency and goes a long way in building confidence in the judiciary.

---

25. Circular on Judicial Dress Code and Address, Circular No. CJ 90
Moreover, the rigorous recruitment process will most likely result in the selection of robust individuals who will then be able to deliver progressive and sound jurisprudence and as a result rebuild confidence and legitimacy. The Judicial Service Commission has since its constitution recruited 11 new judges to the Labour and Employment division of the High Court; 28 judges to the High Court; 109 Magistrates and 11 Court of Appeal Judges.

7. These efforts at transforming the judiciary coupled with Articles 2(5) and 2(6) of the Constitution have arguably resulted in progressive and robust jurisprudence strongly grounded in international human rights standards.

8. In *P.A.O. & 2 Others v Attorney General*\(^\text{26}\) the Learned Judge undertook a thorough analysis of the meaning and implication of the right to health looking at Article 43 of the Constitution of Kenya; Article 12 of the International Covenant on Economic, Social and Cultural Rights and General Comment No. 14 on the Right to health; amongst other international human rights and constitutional jurisprudence. Significantly, the Court determined that the right to health includes not only the positive duty on the state to provide health care and medication but also implies a negative duty on the state not to do anything that would undermine access to health and medication. Therefore the Court held, by enacting provisions in the Anti-Counterfeit Act that would have the effect of outlawing generic drugs, the state violated the petitioners’ rights to health, dignity and life.

9. In the *Republic v Independent Electoral and Boundaries Commission (IEBC) and The Attorney General*\(^\text{27}\) the specially constituted High Court thoroughly analysed Article 38 on political rights vis a vis Article 89 on delimitation requirements and produced a well reasoned three hundred page judgment. The first issue was that the IEBC, in carrying out its delimitation mandate, undermined the one-person, one-vote principle of equality of the vote and thus acted in breach of articles 89(5) and 38(2) of the Constitution. The Court determined that there are instances which justify a move from equality of voting to fair representation after having conducted an in-depth study of jurisprudence in countries which have federal systems such as the United States, Canada, and Australia. Additionally, the court looked at considerations under article 89(5) which affect boundary delimitation: population, geographical features and communities of interest.

---

26. Supra note 24  
27. Misc. App. 94 of 2012
With regard to population, the court determined that equal composition of population quota can only be achieved progressively. In looking at communities of interest, the court first arrived at a definition of what these encompass by applying what it called the valid, objective, proportionate and appropriate test. It then proceeded to state that clan identities and clan based political systems are important in representation of a collection of personal views and beliefs but that care must be taken in order to ensure human rights are not undermined by these groups. Turning to the issue that delimitation would result in the creation of minorities and marginalised groups and that those that are already minorities deserve wards of their own, the Court determined that a strict interpretation of equality would result in unfairness. In its view, protection of these groups as provided for in the Constitution promotes an equality-amongst-equals approach. Thus, treating majority groups in the same way as minorities and marginalised groups in the delimitation process is discriminatory and against the requirements of social justice. Furthermore, the Court reiterated the state’s obligation to make interventions and ensure legal and policy mechanisms are in place to ensure that rights of minorities and marginalised groups are protected.

10. In Centre for Rights Education and Awareness and 7 Others v The Attorney General\(^{28}\), the constitutionality of the Presidential appointment of 47 county commissioners was challenged. Issues were raised on the grounds that the appointment failed to adhere to the national values and principles set out in Article 10 of the Constitution; the principle of gender equality under Article 27 of the Constitution; the principle of consultation under the National Accord and Reconciliation Act and the exercise of presidential powers under Article 132 of the Constitution. In making its determination, the Court made significant pronouncements on a number of issues. First, it held that gender equality and equity, as provided for in the Constitution, are not subject to progressive realisation which only applies to those circumstances where an allocation of resources, which are limited, is required. It further held that progressive realisation only applies to Article 43 rights as well as the rights of persons with disabilities in Article 54. Second, the court found that the President had no powers under Article 132 to make the County Commissioner appointments in the first place and even if he did have those powers, he would have been required to consult with the Prime Minister on the same.

\(^{28}\) Petition No. 208 of 2012
11. The Judiciary has also significantly increased its physical resources in the form of expansion and establishment of court houses in order to ensure that courts are available and accessible to all. For example, in Mombasa, 10 courts have been set up including one at the Shimo la Tewa Prison. And in Lugari, plans are underway to set up mobile courts as there have been concerns that litigants have to travel long distances to either Kakamega or Eldoret Courts to have their cases heard.

12. The judiciary is taking a zero tolerance towards corruption. Corruption claims can be channelled to the Judiciary Ombudsman. On 1 August 2011, the Chief Justice established the office of the Judiciary Ombudsman. With powers to consider complaints from anyone with grievances against the judiciary, this will go a long way in eliminating the god like status that members of the Bench once enjoyed. Now, aggrieved members of the public as well as employees have a channel within which their judiciary related grievances can be addressed.

13. Article 173 of the Constitution created the Judiciary Fund to cater for administration expenses and other purposes necessary for the discharge of the functions of the judiciary. The significance of this is that whereas previously funds were received through Treasury, Parliament is now charged with the powers and duties of releasing funds to the Judiciary. This is a significant step towards financial independence of the Judiciary, the realisation of separation of powers and granting of autonomy to each of the government arms.

Cleaning up the judiciary through the vetting as an aspect of Justice

14. In-built into the constitution was the requirement of vetting for all judicial officers in office at the time of promulgation of the constitution, as an aspect of fulfilling the right of access to justice by ridding the judiciary of inept, inefficient and incompetent judges and magistrates. The Vetting of Judges and Magistrates Act was passed in 2011 and a Board constituted to conduct the vetting. A major challenge with cleaning up the judiciary has been the time frame for the vetting exercise. As a transition mechanism, the completion of the vetting process was envisaged within one year (November 2011 to November 2012). It immediately became clear however that it would not be possible to vet over 400 Judicial Officers within the prescribed time frame. This was further exacerbated by the Board’s decision to sit as a full board rather than panels of 3 in the initial vetting exercise of the Court of Appeal Judges.
As a result, only 9 Judges had been vetted by March 2012. With only six months to vet the remaining Judicial Officers (44 High Court Judges and 350 Magistrates), the Board requested an amendment to the law to remove the time frames. Parliament however amended Section 23 of the Vetting of Magistrates and Judges Act to extend the Board’s mandate only to 28th February 2013. The amendment also provided that the Board shall sit as panels of three and transferred the vetting of magistrates to the Judicial Service Commission. While concerns on the pace of the vetting Board is shared by many, the move of transferring the vetting process to the Judicial Service Commission is problematic for several reasons. First, the independence of the Vetting Board was a key concern and the vetting law provided for incorporation of three foreigners into the Board to ensure impartiality. The Judicial Service Commission is composed of some members of the Judiciary who are the subject of vetting and who are yet to be vetted; they cannot therefore vet their colleagues. Further, the Commission’s Commissioners serve on a part time basis and some of the members like the Chief Justice hold constitutional offices, and they would not be able to set aside all their duties to vet 350 magistrates within the required time. Further, the vetting process envisaged in the constitution was a distinct transitory process; the Judicial Service Commission would have to familiarize itself with this process, develop the requisite rules and regulations as well as the vetting tools, and put in place a criteria for receiving complaints before embarking on the exercise. All these would cause considerable delay in the process. The move by Parliament was inexplicable and imprudent and the law must be re-amended to correct this and ensure the Board vets the Magistrates as envisaged in the constitution. The amendment that the Board should sit in panels of three is however understandable as it would ensure the Board works faster and the process does not take over two years to conclude, defeating its purpose.

15. So far, some Judges have been found unsuitable for various reasons, ranging from impropriety in handling cases to the manner in which some judgments were decided. The entire question of removal of a Judge or Magistrate based on the judicial decisions they made, without evidence of impropriety or corruption could be challenged as interfering with lawful discretion of judicial decisions. It would seem that after senior Judges were sent home based on some judicial decisions they made Judges and Magistrates in the High Court and Subordinate Courts hesitated in delivering judgements and decisions, perhaps on the apprehension that these could be used as a basis for their removal.
A perusal of the daily cause list released by the Judiciary shows that judgements and rulings in recent months were rarely delivered and notices were posted in many courtrooms always deferring judgements to dates later than they were scheduled, despite the measures put in place for Judges and Magistrates to declare pending rulings and judgements. Of course it could also be that the Judiciary is still struggling to meet the standards set for realization of access to justice, and, used to doing things at their own pace, the Judges and Magistrates are struggling to catch up and deliver on schedule in the new dispensation. One of the biggest challenges, perhaps foreseen but not addressed earlier, is addressing the gap left behind by the Judges and Magistrates in the cases they were handling, particularly where judgements and rulings are pending. Take for instance the case of a Judge who was sent home for having accumulated over 200 rulings and judgements: do the litigants start all over again, further delaying their cases?

16. It is important to keep in mind that the conduits of corruption in many cases are often the judicial clerks, and administrative measures should be put in place by the Judiciary to ensure all judicial clerks are also vetted to weed out those who have in the past stood in the way of access to justice.

Justice for victims of the post election violence

17. Justice continues to remain elusive for hundreds of thousands of victims of human rights violations who have been waiting for many years for some form of redress. In this category are victims of various ethnic clashes, particularly occurring during elections in 1992 and 1997, thousands of internally displaced persons as well as victims of the 2007 post-election violence. These victims still cry out for reparations. The Truth, Justice and Reconciliation Commission (TJRC) was expected to bridge this gap and recommend appropriate reparations for these victims. The TJRC has however had several challenges and has continued to seek one extension after the other instead of delivering its report. Victims of human rights violations continue to wait for a semblance of justice.

18. The other element which has hampered justice for victims is lack of prosecution of perpetrators of various crimes and human rights violations. Crimes committed within the context of the 2007 post-election violence remain largely unpunished; and it is to be noted that similar crimes were committed in 1992, 1997 and 2002 and very little was done to bring the perpetrators to justice. The message firmly sent by the government has been that people will always get away with criminal acts.
This has just served to widen the impunity gap and hamper any efforts of reconciliation at the grassroots level. A task force constituted by the Director of Public Prosecutions to look into some 6,000 cases emanating from the Post-election violence recently reported that the bulk of cases under investigation were unprosecutable for lack of evidence.

19. The only measure of justice for victims of the post election violence is being pursued by the International Criminal Court (ICC). The government’s actions in this regard though have involved various attempts at ensuring the cases do not proceed at the ICC. First, in March 2011, the government filed an application challenging admissibility of the cases at the ICC, arguing it was taking investigatory and prosecutorial steps at the local level. The Court found that no such steps were being undertaken and dismissed the application. Once charges against four suspects were confirmed, the President announced, on 24th April 2012, that local mechanisms would be put in place to try the post-election violence. The government appointed a panel of experts to advise it on the way forward, it would seem, on what to do in the face of the confirmations particularly for the suspects. Efforts were also initiated at the East African Legislative Assembly (EALA) which endorsed a motion urging the ICC to transfer the trials of the four Kenyan suspects to the East African Court of Justice (EACJ), an institution that does not yet have jurisdiction over international crimes.

20. All these efforts, instead of complementing the ICC, were geared towards closing the little justice space that existed for the victims. Instead of investigating and prosecuting thousands of middle and lower level perpetrators, the government sent a strong message that it was not willing to prosecute anyone. Neither was it willing to put in place appropriate reparations mechanisms for the victims.

21. There has been unjustifiable delay in seeking accountability for post election violence victims through prosecution of the perpetrators. The government should act in the national interest and once and for all close this impunity gap or at least provide a way forward on the post-election violence cases. Prosecution of the four suspects at the international level, it must be remembered, is on the basis of their individual culpability and not on the basis of anyone’s ethnicity.
Internally displaced persons

22. The situation of internally displaced persons (IDPs) who were victims of the 2007/8 post election violence has also remained an unresolved matter, years after the displacements took place. The resettlement process began without a clear policy and legal framework, leading to multi-faceted challenges as it progressed. There was poor profiling of IDPs leading to a lack of credible and disaggregated data on IDP population. The ex-gratia payment of KShs.10,000/= payable to all IDPs and Kshs 25,000 payable to those whose houses were burnt was hardly enough to sustain families for one month, yet they were expected to reconstruct their lives with this amount. The Government’s approach to durable solutions for the IDPs has not been flexible. The initial approach to entice all IDPs to return to their original homes led to some IDPs remaining in camp like settings as they did not have anywhere to go. Some IDPs, having waited in vain for the government’s assistance in vain, teamed up as self-help groups, reconstructed their lives and integrated into communities. When the government finally identified land and began resettling IDPs in self help groups, there was no clear mapping and identification of the IDPs, and some of the self-help groups were left out. Further, some communities were hostile to the IDPs in areas in which they were resettled. Still, other IDPs were left languishing in camps. There has been inadequate focus and assistance to integrated IDPs, urban IDPs, IDPs who were not land owners, and IDPs who had been traders and businesspersons whose livelihoods were destroyed during the post election violence. Most of these problems could have been addressed through a clear legal and policy framework. The draft IDP policy was developed in 2009 but it has still not been approved by the Government. An IDP Bill has now been developed but is yet to be passed into law. Without these legal and policy framework, we are likely to run into similar problems should there be displacement during the next general elections.

Recommendations

23. As far as the reorganisation and restructuring of the Judiciary is concerned, it is imperative that the following are done:

a. The Government of Kenya, as a matter of priority, should pass legislation regulating how the Judiciary Fund is managed. This would ensure that funds to the judiciary are effectively managed and thus promote greater transparency and accountability.
b. The Chief Justice must ensure that provision is made in the Rules for the Protection of Rights and Fundamental Freedoms and Enforcement to ensure that waiver of fees is available at commencement, during trial and at the end of trial in instances where the petitioner is unable to pay.

24. With regard to vetting:
   a. The Vetting of Judges and Magistrates Board should be allowed to vet the Magistrates as constitutionally provided but with the caveat that the vetting process must be completed in a timely manner. Political Parties should in their manifestoes make it clear that they will not interfere with the vetting process but will let the Board carry out its mandate to vet the Magistrates and judges.
   b. As the vetting gets underway, the Chief Justice should issue specific guidelines to litigants on what happens to pending cases when a Judge/Magistrate is sent home.
   c. The Chief Registrar should put in place administrative measures to vet the Judicial clerks and other subordinate staff to weed out those who have in the past stood in the way of access to justice.

25. On IDPs, the government should immediately resettle the remaining IDPs and ensure the IDP Bill is speedily passed.

26. As far as the Post Election Violence is concerned:
   a. The Taskforce constituted by the Director of Public Prosecution should speedily conclude its work and give a final report. Moreover, the AG and the DPP should give direction on how to deal with the middle and low level perpetrators.

27. Political parties should let the public know what measures they will take to ensure that the violence witnessed in 2007 post-election shall never happen again. They should tell Kenyans how they will deal with the pending issue of low and mid level perpetrators of the violence and they should affirm commitment to accountability and punishing egregious crimes wherever they happen.
CHAPTER FOUR: DIGNITY

Introduction

1. The idea of human dignity refers to the fundamental value of the existence of the human being. It draws from the notion that the human being is intrinsically valuable and is worthy of esteem and respect on the mere account of being human and thereby is deserving of the most favourable conditions in life.

2. The Constitution of Kenya 2010 establishes human dignity as fundamental to the country’s constitutional arrangements and dispensation. Article 10 of the Constitution identifies human dignity as one of the core values and principles which should inform the exercise of power by state as well as non-state agencies. Article 28 of the Constitution provides that: “Every person has inherent dignity and the right to have that dignity respected and protected.” This right seeks to ensure that each individual has self-respect and self-worth. It is enhanced by policies and laws responsive to each individual’s needs; and where all individuals are included in society in a fair way.

3. This chapter focuses on three particular themes at the core of human dignity: capital punishment; torture and ill-treatment; and the relationship between ensuring national security on one hand and individual liberties on the other. The death penalty, torture and the consequences of combating terrorism have undermined the inviolability of the person; and this assessment and the subsequent recommendations may enable Kenyans to take the next essential steps towards ensuring their human dignity.

Capital Punishment

4. Two years following promulgation of the Constitution, capital punishment remains part of Kenya’s statutes. Article 26 of the Constitution does not expressly abolish capital punishment; instead, it affirms that every person has the right to life; but that the Constitution or legislation may authorise the taking away of life. The Penal Code (Cap. 63) legislates capital punishment for convictions against murder - Section 204, treason - Section 40 (3), robbery with violence - Section 296 (2)and attempted robbery with violence - Section 297 (2).

31. See Mette Lebech, “What is Human Dignity?” Faculty of Philosophy, National University of Ireland, 2004
33. At the conceptual level we recognize that human dignity in fact encapsulate all the four themes which constitute this report; and that one cannot really live in dignity until their livelihoods are secured, they live in justice, and they can participate in democratic choices.
5. Kenya’s reality though is that despite these capital criminal sanctions, the State has for nearly three decades now not executed prisoners on death-row.

6. The Executive’s response towards capital punishment has typified this reluctance. In 2009, President Mwai Kibaki commuted the sentences of over 4,000 prisoners on death-row to life imprisonment. When the United Nations Human Rights Council sought assurances from Kenya regarding capital punishment in September 2010 as the country was being reviewed by the Council under the Universal Periodic Review mechanism, the Government argued that it could not abolish the death penalty since a majority of Kenyans supported the death sentence. The paradox which continues to confront the Government therefore is its implicit acceptance that the death penalty is abhorrent and unacceptable yet it cannot repeal it from the statute books.

7. Legislative and judicial responses to capital punishment in recent times have also been instructive of a conflicted State. Notably, whereas the rhetoric by parliamentarians establishes the firm impression they support the death penalty, no new laws with the option for capital punishment have been legislated for decades.\textsuperscript{34}

8. Perhaps the most reassuring response against the death penalty has come from the courts; with the Judiciary bearing the torch of change against the death penalty. In July 2010, the Court of Appeal, in \textit{Godfrey Ngotho Mutiso and Republic (EKLR) 2010}, determined that Section 204 of the Penal Code was unconstitutional to the extent that it provided for mandatory death sentence for a murder convict. This view was upheld by a number of Court of Appeal and High Court judgements between 2010 and 2012, including the Court of Appeal decision of March 2011 in \textit{David Njoroge Macharia and Republic (EKLR) 2011}; and the 2011 Court of Appeal case of \textit{Boniface Juma Khisa and Republic (2011) EKLR}. At the same time though, the High Court has on occasion deviated from this position to apply the death penalty. In \textit{Republic and Dickson Mwangi Munene and Another (2010) EKLR}, the High Court termed the 2009 presidential commutation of death sentences as utter disregard of his constitutional responsibilities and upheld mandatory death sentence as law.

\textsuperscript{34} For example, if Kenya’s legislators were really persuaded by the value of capital punishment, they would have legislated the death sentence for some of the sexual crimes established under the Sexual Offenses Act and the egregious crimes set out in the International Crimes Act.
9. The last two years have witnessed continued advocacy by the KNCHR and other human rights organisations against the death penalty; on the basis that effective exercise of the right to life by Kenyans will stay unrealised while capital punishment remains a lawful option within Kenya’s justice system. The National Commission has consistently advised the State to legislate for de jure abolition.

10. The critical nature of the ongoing judicial reforms attests to the fact that miscarriages of justice have been the norm in the country. This has meant that many inmates on death-row may actually be innocent of the crimes they were convicted for. Further, the internationally accepted norm is that where it must be applied, capital punishment should be used in relation to the most serious crimes. In Kenya today many inmates on death-row were convicted for the crime of robbery with violence when the facts constituting that crime involved no dangerous weapon at all.

11. The right to life of Kenyans remains under threat even despite the new Constitution. Extra judicial killings continued even after promulgation of the Constitution. Instances where civilians apparently arrested by security forces were found dead continued to be reported. In one particular period at the beginning of 2011, two such instances were reported. Most recently, concerns have been raised that the killing of Abud Rogo, a Sheikh who at the time was being prosecuted on terrorism charges, was undertaken by the police; a charge that the police have denied.

**Torture and ill-treatment**

12. Kenya’s colonial history as well as the bulk of its post-independence record is blotted by the extent to which the right against torture and other cruel, inhuman and degrading treatment or punishment was routinely violated by the State: the ongoing suit by Mau Mau veterans in London alleging torture against the British Government lays bare this past.

13. The Constitution of Kenya 2010 offers a solid affirmation against Kenyans ever again being tortured or treated cruelly. The Constitution not only prohibits torture; it also establishes that the right to freedom from torture cannot be derogated by the State under any circumstance.

---

14. The Executive and Legislature these last two years have passed a raft of legislation which directly or indirectly seek to protect against torture. Such laws include the National Police Service Commission Act (No. 30) of 2011; and the Independent Oversight Policing Act (No. 35) of 2011. Yet the Government has not demonstrated adequate political willingness to finalise establishing the institutions for enabling these laws: appointment of the Police Service Commission for example has remained mired in partisan political intrigue for nearly six months. A consequence of this has been the continuation of excesses by security forces.

15. Torture continues to be perpetrated by Kenya’s security forces, be they police officers, intelligence officers or officers from the military during security operations or what is euphemistically referred to as ‘security swoops’. Reports show how soldiers have responded to attacks by the Al-shabaab militia by committing atrocities against civilians.\footnote{See: http://www.hrw.org/news/2012/05/04/kenya-investigate-security-force-abuses-against-ethnic-somalis-o (accessed on 26 July 2012)}

16. Monitoring work undertaken by the National Commission since 2010 though indicates a marked decline in incidences of torture within prisons. This though is in relation to torture directly perpetrated by prison officers. A survey in prisons undertaken in 2012 by the National Commission shows the extent to which prisoners on death row are made to suffer psychological torture. Death row prisoners in Kamiti Maximum Prison said they sometimes were made to stay in an isolation cell from where they could hear the engine of the gallows being serviced. Death-row inmates of Kakamega Women’s Prison wore uniforms embroidered ‘condemned’.

17. A most positive note may be made here. The last two years have sent a remarkable message to both victims of torture and the State which perpetrates torture: that eventually regardless of how long it may take justice does come to pass. The courts concluded several cases of torture by providing compensation to victims who had successfully showed they had been tortured particularly during the Moi presidency.

**Balancing security with liberties**

18. Terrorism has become an ever present threat in the country. Since Kenya sent its troops into Somalia in 2011, acts of terror have taken place in Nairobi, Garissa, Wajir and other towns to which the terror group Al-Shabaab has claimed responsibility.
19. The need to ensure security for Kenyans has never been greater and the State’s responses have included revisiting the idea of passing anti-terrorism legislation. Past initiatives by the State to pass anti-terror legislation, beginning with the 2003 Suppression of Terrorism Bill, failed because proposed legislation included fundamental curtailments to the exercise of human rights in the country.

The present challenge therefore revolves around how on one hand to ensure security for Kenyans and her guests while at the same time not undermining individual liberties such as the rights to freedom of expression, movement and even against torture.

20. Within the last two years, Kenya’s missions against terrorism have continued to border on the illegal. For example, following the July 2010 Kampala bombing which killed over 76 people watching the Football World Cup finals match, the State in disregard of its own extradition laws transferred to Uganda a number of Kenyans who allegedly had participated in the bombing. Both the Attorney General and the Parliamentary Committee on Defence and Foreign Relations agreed that the Government had acted illegally; and so too did the National Commission in its advisory to the Government on that matter: the transfers were in disregard of extradition laws which would have involved judicial procedures in both countries.

21. It is therefore critical that any proposed legislation for preventing terrorism should abide by fundamental human rights norms. The key distinction between past and any future attempts to pass anti-terrorism legislation is that now the State will have to contend with a superior Bill of Rights extremely protective of individual liberties: for example, under the limitations clause to the Bill of Rights set out in Article 24 of the Constitution, it is stressed that any limitation on a fundamental right must be established in law and be justifiable in an open and democratic society based on human dignity, equality and freedom. Anti-terrorism legislation therefore may not detract on human dignity. Yet still securing Kenya from terrorist attacks too is critical.

22. While more Kenyans seem to agree about the need for anti-terror legislation, the country must not be so rash as to pass legislation that undermines the sanctity of the Constitution which Kenyans passed so recently. The need for wide consultation on any proposals therefore cannot be overemphasised. Furthermore, it should be affirmed that anti-terror legislation will never be used to profile individuals on the basis of their religion or ethnicity. At the same time, it should be realised that counter-terror measures will not succeed if the State fails to ensure that all Kenyans become its allies against terrorism. Using extra-legal means to kill alleged terrorists must be stopped and punished.

Recommendations

23. We call upon both State and non-State actors to take or facilitate the taking of short and medium term measures to guarantee human dignity for all Kenyans and Kenyan residents.

Short-term measures

24. Regarding capital punishment:
   
a. The Government of Kenya should with immediate effect issue appropriate administrative instructions to ensure that prisoners on death-row no longer have to wear prison uniforms with markings indicating they are on death-row. The wearing of such uniforms in our view constitutes torture. Similarly, prisoners on death-row should not be made to suffer indignities by being incarcerated where they can hear the gallows contraptions being tested. This should stop forthwith.

b. The Government should immediately seek amendment of Sections 204, 40 (3), 296 (2) and 297 (2) of the Penal Code to align them with the 2010 Court of Appeal decision which determined that the mandatory death sentence may not apply to every capital convict. These amendments will ensure certainty in the law particularly to curb the zeal of judges whose inclination is still to mete out the ultimate sentence every time they encounter a capital convict.

25. Regarding torture:
   
a. The Government should take its legislative and institutional responsibilities more seriously. It should apply its energies to ensure that all outstanding laws and institutions are established for ensuring protection against torture. IN particular, the Police Service Commission should be established. As well, the Coroner’s Bill and the Prevention of Torture Bill should be passed.
26. Regarding balancing between combating terrorism and individual liberties:

a. The Government should not rush to pass anti-terrorism legislation without taking time to ensure that such law complies with the Constitution. The Government should heed the firm warning from the courts that they will remain vigilant to ensure that no law undermines the rights of Kenyans. Any anti-terrorism law should be prepared in consultation with the political, religious and human rights communities.

**Medium-term measures**

27. We call upon all political parties contesting the 2013 general elections to include the following medium-term measures as part of the human rights agenda in their campaign manifestoes and post-elections programmes of action.

28. On capital punishment:

a. All political parties should affirm their commitment to enforcing the current de facto moratorium on capital punishment.

b. Political parties should commit that their governance agendas will involve partnerships with or deployment of appropriate State agencies and capacities to mobilise the public against capital punishment. One key agency in this regard is the KNCHR. This commitment should also be resourced accordingly.

c. Some political parties may opt to make the commitment that the death penalty may apply only for the most serious crimes. Our firm recommendation though is that political parties should make the commitment that they will de jure abolish the death penalty. This chapter has established that the State has for long realised that on account of philosophical and pragmatic reasons it can no longer enforce the death penalty. This de facto abolition should be legislated in law by repealing sections of the Penal Code which legislate for the death penalty.

d. At the same time, all persons charged with serious crimes should have the option of representation by legal counsel.
29. Regarding torture:
   a. Political parties should commit that they will seek passage of the Prevention of Torture Bill. This draft law was prepared following considered and concerted consultations between human rights organisations, the KNCHR and the Ministry of Justice, National Cohesion and Constitutional Affairs; and it forms Kenya’s most appropriate legislative blueprint for tackling crimes of torture.
   b. Members of the security forces who have tortured or been accessories to torture should be retired from their positions and further criminal steps taken against them. Political parties should commit that they will entrench a culture of consciousness which abhors torture or ill-treatment in all its forms, whether it manifests itself in the public or private realm.
   c. They will also ratify relevant optional protocol and designate and resource a national preventive mechanism.

30. On the balance between combating terrorism and individual liberties:
   a. Political parties should make the firm commitment that they will seek to attain the right balance between ensuring the security and safety of Kenyans on one hand while at the same time not undermining the individual liberties established in the Constitution. NO law will be framed or executed in a manner that profiles an individual on account of ethnicity, religion, gender or other discriminatory considerations.
CHAPTER FIVE: POLITICAL PARTICIPATION AND ACCOUNTABILITY

Introduction

1. Article 10 of the Constitution of Kenya identifies participation of the people and accountability as some of the national values and principles of governance that should bind all State organs, State officers and public officers when they apply or interpret it, enact, apply or interpret any law and make or implement public policy decisions. Understood in the wider sense, participation and accountability as envisioned in the Constitution relate to both matters of governance and democracy. However, the focus in this chapter is participation and accountability in so far as the terms relate to political participation and/or democracy. Political participation is defined as citizen acts to influence the selection of and/or the actions taken by political representatives. The concept of political participation is closely linked or related to that of accountability. There are different types of accountability – political accountability, administrative accountability and democratic accountability. This chapter’s focus is on democratic accountability.

2. Democratic accountability entails the existence of a direct relationship between the public administration and the society – a relationship in which the society is not only a passive object of the administrative action, but rather it adopts an active role, as much in relation to the adoption of administrative acts, as in relation to the request of accountability by the public administration. Public administration here is seen beyond the government to include the acts of the legislature and other public bodies. Democratic accountability is hinged on participation and is achieved when leaders take into account the needs and interests of the people when making decisions that concern them and when citizens play an active role in getting their interests on the table and demands fulfilled. This participation becomes a relationship of accountability where the citizens and social groups change into agents of control of administrative action and public administration is forced to give account and to justify its acts before them. Democratic accountability is not formal and/or much defined. There are no rules that govern how the public will interact with leaders and vice versa. However, the main general effect that is derived from the realization of democratic accountability is the legitimization of public administration.

42. Ibid
43. Ibid pp 45
3. The enablers of political participation and accountability are progressive civil and political rights and strong, vibrant and effective institutions supporting the realization of the former. Thus political rights, freedom of assembly, demonstration, picketing and petition, freedom of expression, the right of access to information, freedom of association and freedom of the media complement each other and facilitate the realization of effective political participation and accountability. Governance institutions including democratic political parties, electoral management bodies and national security organs are some of the agencies that regulate and manage citizens’ political participation.

4. Since the promulgation of the Constitution in August 2010, the State has put in place mechanisms and interventions aimed at ensuring citizens’ realization of political participation and accountability. These are discussed in the contexts of establishment of a framework for political engagement, reform of institutions involved in management of elections, and strengthening political expression and accountability. This section proceeds to consider these interventions in light of other occurrences that have been the hallmark of the period between 27 August 2010 and 31 July 2012.

The framework for political engagement

5. Significant events occurred in the period under review in terms of establishment of a framework for broadened political engagement. During the period under review, legislation aimed at regulating the affairs of political parties, the Political Parties Act, 2011 was passed. A key feature of this legislation is the requirement that political parties democratize, de-ethnicize and enhance transparency and accountability in their operations.

Upon the passage of this legislation, the Registrar of Political Parties commenced the process of registering political parties afresh. As at 15 June 2012, 51 parties had been duly registered\textsuperscript{44}. However, there are concerns regarding the features or character of the registered political parties. It is feared that parties are not democratic and are still ethnically leaning.

\textsuperscript{44} Found at http://www.iebc.or.ke/index.php/political-parties/575-registered-political-parties-list-2012.html accessed on 31 August 2012
6. A key underpinning of the Act is de-ethnicization of political parties. However, it is feared that this principle might not have been achieved based on the characteristics of currently registered parties which continue to be ethnically driven as they draw most of their support or members from the ethnic bases of their founders or leaders. This is despite the requirement that party members must be drawn from at least half of all the 47 counties in the country. Unless there is significant culture changes with particular emphasis on how Kenyans engage politically, Kenya’s real political parties will remain their tribes.

7. The Act also reinforces the concept of internal party democracy by for instance requiring that marginalized and minority groups be represented in the leadership of political parties. However, this provision may have been undermined during registration as political party “owners” still play a key role in the composition of party leaders. Another aspect of democratization relates to nomination of candidates which appears not to have been prioritized. In most political parties as currently constituted, the various party leaders seem to be their de facto presidential candidates. In fact, this was an issue that led to a key figure in one of the political parties moving out of it and joining another party ostensibly to avoid being locked out of the presidential contest. There have nevertheless been some changes in some political parties which have amended their nomination rules thereby altering the position of automatic nomination for the party leader. It remains to be seen however whether these changes are cosmetic or are indeed aimed at promoting internal democracy. Further, there is little confidence in the ability of the Registrar of Political Parties to offer much intervention in the event of disputes from the nomination of party leaders/ presidential flag bearers.

8. In relation to recruitment of members, one of the requirements under the Act is that political parties present a certain number of paid up members in order to qualify for registration. In order to meet this requirement, political parties embarked on membership recruitment drives. However, complaints ensued over fraudulent registration of members contrary to the principle of voluntary participation of citizens in the affairs of political parties. Whereas complaints were lodged with the Registrar of Political Parties no action has been taken against any errant party. Section 21 of the Act allows the registrar to compel an errant political party to remedy a breach. In the alternative the Act allows the registrar to suspend and/or deregister such party.

45. Recently ODM presented the Registrar of Political Parties with notice of intention to amend their constitution to allow for democratic nomination of presidential candidates
9. Further, whereas the Political Parties Act is aimed at developing ideology driven politics which is a key principle in the political pillar in Kenya Vision 2030, that may not have been achieved as the manifestos of most registered parties are remarkably similar. There have not been any concerted efforts by the electorate generally to concern themselves with the agendas of various political parties. The focus still remains personalities and individuals.

10. Finally, while political parties were expected to enhance participation by minorities and marginalized groups it is not apparent what mechanisms they have put in place to enable these groups engage with them. More needs to be done to attract these largely disenfranchised groups to political parties in order to ensure their political engagement. However, there is a corresponding obligation on marginalized and minority groups to proactively engage with political parties in order to ensure their consideration in political processes.

11. Apart from passing the Political Parties Act, the framework for political engagement has been enhanced under the Constitution through the introduction in Article 85 of the concept of independent candidates. Therefore political actors who wish to vie for elections without necessarily undergoing the rigours of engaging with political parties can do so. However it is not clear how this will work out as no one so far has declared themselves to be independent candidates.

12. The State’s commitment to ensuring women’s participation in the electoral process by upholding the two thirds principle embedded in the Constitution has not turned into clear action. A bill proposing amendments to the Constitution to ensure women have at least one third representation in elective bodies has still not been legislated; and it has been argued the approach in the Bill simply of setting aside seats for women is not best suited to ensure long-term substantive representation of women. Furthermore, concerns have been raised that it is far too early to begin amending the Constitution, only two years since its promulgation, and that the IEBC and other actors should rather have encouraged and facilitated the participation and election of women in all elective positions.
13. Political participation and accountability is facilitated and managed by various institutions including electoral management bodies (EMB), national security organs and the judiciary. These institutions came under intense scrutiny during investigations into the electoral process in 2008. They bore the brunt of the flawed electoral process and various recommendations were made in the context of reforms for better performance in upcoming elections. Some of the institutions are undergoing reforms and it is anticipated that these will result in tangible changes that result in a better electoral process whose results gain wide acceptance.

14. In Kenya, the relevant EMB is the Independent Electoral and Boundaries Commission which was established vide the IEBC Act No. 14 of 2011. A selection panel was set up to interview commissioners who would serve as the board of the IEBC and manage the transition of what was previously the Interim Independent Electoral Commission (IIEC) and the Interim Independent Boundaries Review Commission (IIBRC). The panel’s work was threatened by interference from political actors who claimed it had treated former commissioners of the IIEC and IIBRC unfairly during the short-listing stage. The panel however surmounted that challenge and riding on the wave of public support carried out interviews, a process that resulted in the appointment of 9 commissioners three of whom were retained from the interim commissions.

15. Once appointed, the IEBC embarked on activities aimed at putting in place proper electoral management systems that would ensure its credibility. However, challenges between the secretariat and the Commissioners, exemplified most dramatically in the Commission’s failure to procure the biometric voter register system, threatened that very trustworthiness and authority. In addition, the IEBC did not satisfactorily finalize the boundaries review process – the final report resulted in more than 150 challenges filed in court. The court in its decision found inter alia that the IEBC had not consulted adequately with some constituents and that in some cases it had disregarded the wishes of the community. The long and short of the judgment is that there are 80 new constituencies and the IEBC can embark on the process of voter registration. Voter registration is through the Biometric Voter Registration (BVR) was almost marred by the row over the award of the tender and the contentious decision of the IEBC to revert to manual registration despite the challenges this process presented in the last general elections.
This challenge was nonetheless addressed by the Executive when it entered into an agreement with the government of Canada to lease its equipment for that process. Confidence in the IEBC will be sustained on the decisions and actions it takes vis à vis the challenges it continues to face during this electoral period.

16. Despite the challenges faced by the IEBC, its role vis à vis management of elections has been strengthened under the Elections Act. Under the Act, the Commission has been granted powers of investigation and prosecution of offences spelt out there under. These offences have been broadened and touch on acts and omissions committed in terms of the register of voters and voter’s cards, voting, as well as acts and commissions committed by members and staff of the Commission. Personation, treating, undue influence, bribery, use of force or violence during an election period and use of national resources are all criminalized under the Act. Illegal practices are also criminalized and in relation to this for instance employers are required to allow employees reasonable period for voting. While its accountability role has been strengthened, it remains to be seen whether the IEBC will have the capacity to utilize these powers effectively. Nonetheless, in preparation for deployment of those powers, the IEBC has been strengthening its legal department through recent recruitments.

17. At the moment, the most pressing challenge facing the IEBC relates to the election timetable. The election date is 4th March 2012. However, a number of critical steps are yet to be undertaken to meet the deadlines set out in the law. One such step relates to registration of voters. This process is meant to be undertaken at least 90 days before the date of the election. So far, the IEBC is yet to procure the materials to be used for registration – IEBC intends to deploy BVR. This process will require recruitment of adequate registration clerks to cover the entire country in order to meet its target of 18 million registered voters. Another critical step is that of voter and/or civic education. A voter education curriculum was developed but systematic voter and civic education carried out under the supervision of the IEBC is not being undertaken. Various civil society organizations have filled the gap but the challenge that begs a response regards ensuring that the information passed to voters is systematic, standardized, impartial and responsive to voter apathy.
18. Another concern facing the IEBC relates to the measures it has taken and the mechanisms it has put in place to ensure the full and unhindered participation of marginalized and minority groups including persons with disabilities in the elections. KNCHR monitored the IEBC mock elections held on 24 March 2012\(^{46}\) and noted that the IEBC had not taken into account the needs of persons with disabilities when designing materials for voter education and voting, identifying polling and tallying centres, ensuring that persons with disabilities were to the greatest extent possible facilitated to vote on their own, and designing polling stations for purposes of that exercise. The KNCHR recommended among other things that the IEBC puts in place mechanisms to ensure persons with disabilities’ ability to participate in the vote with minimal assistance without compromising the secrecy of the vote.

19. In addition to the IEBC the other institution that will play an important role in management of the elections is the Political Parties Dispute Tribunal established under the Political Parties Act. The tribunal was established in December 2010, but it is not clear whether or not the tribunal has arbitrated over any dispute involving political parties as most disagreements have been filed in court. However, it is poised to play a key role in determining political party disputes thus obviating the danger of political actors resorting to violence and other unconstitutional means to resolve political disagreements.

20. The Judiciary is preparing itself for the role it will play in the elections. Part of that preparation has been the establishment of a Judiciary Elections Committee whose remit will be to fast-track hearing of disputes related to elections. The Committee is expected to work together with the Judicial Training Institute to build the capacity of judicial officers in relation to adjudicating electoral related matters. In addition to establishment of the infrastructural framework for electoral dispute resolution, the Judiciary has made determinations in key issues that threatened to negatively affect the elections. Key among these are the cases on boundaries and the election date. With these determinations the judiciary has reinforced itself as an independent body that is capable of arbitrating potential electoral disputes impartially.

\(^{46}\) The KNCHR presented a memorandum containing its findings to the IEBC on 15th April 2012. The memorandum can be accessed on www.knchr.org
21. The institution that is likely to present challenges in the electoral management model is the police. While the Constitution anticipated speedy police reforms, there has been no progress on that front. In fact, the National Police Service Act which was passed in 2011 curiously commences in January 2013, perhaps in anticipation that elections would be held in December 2012. The IEBC reported recently that it required about 70,000 police officers to offer security in the more than 40,000 polling stations that would be set up during the electoral period. A moratorium had been declared on police recruitments. This moratorium was only lifted in 2010 when the police undertook the first recruitments following the passing of the Constitution. Since then, less than 15,000 police officers have been recruited bringing the staff complement in the police service to less than 80,000. It is therefore quite apparent that the police will not be able to adequately support the IEBC in its work.

In recognition of this shortcoming, the Commissioner of Police informed participants at a regional dialogue on women’s political leadership that he would appoint special officers from disciplined forces such as the Kenya Wildlife Services and the Kenya Prisons Service to complement the numbers in the police service. These appointments should be carefully handled and measures taken to build the competence of these officers to offer effective support to the IEBC. In addition to supporting the IEBC the police are expected to support the efforts of the National Cohesion and Integration Commission (NCIC) to curb hate speech. All police officers are scheduled to be trained on hate speech. It is also important to note that the police training curriculum that is currently being applied in the case of new recruits and in service promotions contains human rights content.

22. These are important milestones; but however it is disconcerting that all these efforts are being undertaken before police officers are vetted to weed out the inept and corrupt. Without proper reforms within the police service, it is likely that we will witness violations perpetrated by them and/or under their watch. This institution came under intense scrutiny during investigations into the 2007 electoral violence. It was found that the police were used by the incumbent in doctoring elections. Further, the police were complicit in a number of violations that were witnessed in the period immediately after the announcement of results. It is therefore critical that reforms – particularly in terms of appointment of the Inspector General and his two deputies and vetting of senior police officers – be undertaken to restore confidence in the institution of the police.
Enabling political expression

23. Significant events have occurred in the last two years in relation to facilitating citizens’ ability to express themselves politically. There have been positive gains seen for instance through the broadened space within which citizens can express their views. However in certain cases, that space has been abused by individuals who have used the opportunity to perpetrate hate speech. Most recently, three musicians were charged in court with incitement to violence and hate speech allegedly propagated through their songs. While this development is appreciated, concerns over the problematic nature of prosecuting hate speech cases remains. This concern is particularly disturbing in the case of political actors. During the period under review, cases of hate speech against 3 politicians – Joshu Kutuny, Wilfred Mbage and Fred Kapondi - were dismissed on account of poor investigations. Nevertheless, a recent High Court decision allowing the Director of Public Prosecutions to investigate and file similar charges against the Minister for Transport, Chirau Ali Mwakwere, which was perpetrated during the Matuga by-elections in 2010, might be a sign of things to come. As the NCIC grapples with the matter of successfully prosecuting hate speech, it is important that it balances interests in cases where hate speech is perpetrated within a political contest because the very nature of politics is that either side could be a perpetrator. There is thus the obligation on offices with constitutional or statutory mandates to exercise their remit independently or fairly to guard against the appearance or perception of bias.

24. The policy and legislative framework in relation to expression, information and media freedom remains weak despite immense pressure from stakeholders for review. A freedom of information bill has been drafted but there does not seem to be commitment to pass it. A media law anticipated under Article 34 (5) of the Constitution is yet to be passed. However, this has not prevented media houses from engaging in some form of self regulation and/ or regulation of stakeholders. In April 2012, the Nation Media Group published guidelines on political advertisements.

48. The High Court dismissed the minister’s claims that any investigations into the purported allegations of hate speech would violate his right to freedom of expression and noted that the DPP had the mandate to investigate the case and determine whether the utterances constituted hate speech. “The DPP, being satisfied that there is sufficient evidence to sustain charges recommended by the National Cohesion and Integration Commission against Mwakwere, has approved his prosecution”, found at http://www.nation.co.ke/News/Prosecutor+approves+hate+charges+against+Minister+Mwakwere/1056/1464476/ index.html accessed on 30 July 2012. See Republic of Kenya High Court of Kenya at Nairobi Petition No. 6 of 2012, Hon. Chirau Ali Mwakwere and Robert M. Mabera, Commissioner of Police, NCIC, AG and DPP.
49. DN2 Africa Review: Guidelines for Political Advertising (Daily Nation, Friday April 20, 2012 pp 3)
The guidelines prohibit advertisements that propagate hate speech on any of the prohibited grounds under Article 27 (4) of the Constitution. They also encourage transparency by requiring sponsors of such advertisements to reveal their identity. In June 2012, Safaricom, a mobile telephone company with the largest subscriber base in the country, developed and published guidelines for political mobile advertising which in part allow it to censor advertisements that do not comply with electoral laws and the Constitution 50. Such attempts at regulating media engagement must be lauded and demonstrate an appreciation by the media to regulate expression undertaken through that medium. However, it is imperative that the anticipated media regulation law be passed to provide an appropriate and uniform regulatory framework.

25. The State’s response to citizens’ political expression has been inconsistent. On the one hand, the ruling elite were quite supportive of meetings that articulated political views that were favorable or resonated with their views. In this regard therefore, in April 2012, groupings under Kalenjin, Maasai, Turkana and Samburu popularly known as KAMATUSA and Gikuyu, Embu, Meru Association otherwise known as GEMA were allowed to hold meetings where political opinions were expressed and political agreements reached. This support was withdrawn in the case of groups that sought to meet in order to express or articulate contrary or unfavourable opinions. This was the case in the meeting dubbed Limuru 2B which essentially aimed to reject the ideas propagated by the GEMA and KAMATUSA tribal groups 51. In doing this, the State drew its validity from the Public Order Act, Chapter 57 of the Laws of Kenya.

26. Other inconsistencies have been displayed in the State’s treatment of the Mombasa Republican Council (MRC) which until recently had been banned and listed amongst proscribed groups. In fact, the government likened the MRC to the Al-Shabaab, the differences notwithstanding. While the MRC is a movement agitating for secession and whose ideology is informed by historical injustices relating to land control, ownership and use at the Coast, the latter group is a terrorist organisation that inflicts harm on the general public. The problematic nature of this categorization of the MRC is that the State has in effect criminalized otherwise credible concerns of a section of Kenyans making it impossible for it to develop a comprehensive response that addresses their needs.

The High Court of Kenya sitting in Mombasa\textsuperscript{52} unbanned the MRC but the government’s response to that decision has been a swift appeal and issuance of threats to members of the group. Recently, the police declined to grant a license to a rally called by the MRC\textsuperscript{53}. While the government continues to pussyfoot around the concerns of the MRC, the movement’s popularity is growing and its members may succeed in their quest to discourage residents of the Coast from participating in the elections.

**Strengthened accountability framework**

27. The Constitution has undoubtedly set the bar very high in relation to matters of accountability. The sixth chapter of the Constitution outlines principles of leadership and integrity. Though there is as yet no legislation on leadership and integrity, some standards aimed at promoting accountability have been established. For instance, anyone seeking appointive or elective positions must secure clearance from the Higher Education Loans Board (HELB), the Credit Reference Bureau, and the Ethics and Anti-Corruption Commission and must obtain a certificate of good conduct from the Criminal Investigations Department. These standards have been useful at establishing some semblance of accountability with obvious beneficiaries being the HELB which has recovered millions through this process.

28. There are also various provisions throughout the Constitution which when implemented will promote a culture of accountability in political processes. For instance, under Article 104 of the Constitution, constituents are granted the right to recall their representatives under both houses before they conclude their terms. The Political Parties Act, which is informed by the Constitution, also contains provisions that will encourage a culture of accountability and transparency in political processes. A key provision in this regard is the requirement that political parties publish their accounts and disclose their sources of income annually. This radical change to the political infrastructure is likely to mitigate against cases of corruption and misuse of public funds and property. The provisions are also likely to redefine how political actors relate with the electorate as they provide a framework for continuous monitoring of leaders by the public. Additionally the Election Campaign Financing Bill if passed will entrench accountability in the affairs of political parties and actors. The bill establishes a mechanism for monitoring political party expenditure.

\textsuperscript{52} Miscellaneous Application No. 468 of 2012, Randu Nzai Ruva & 2 others vs Internal Security Minister and the A.G

\textsuperscript{53} Joylene Sing’oei, ‘Police cancel MRC rally, cordon venue’ 4 August 2012 19:49 found at http://www.standardmedia.co.ke/?articleId=200063334&story_title=Police-cancel-MRC-rally,-cordon-venue accessed on 31 August 2012
29. To operationalize Chapter 6, a Leadership and Integrity Bill was been drafted and reportedly approved by cabinet. The bill was passed in parliament and contains some useful provisions some of which require state officers to serve in the public interest and avoid enriching themselves. There are however some few challenges in the law such as the arrogation of the duty to hold leaders accountable to various commissions which is likely to create multiple reporting lines therefore watering down the intentions of the law. Further the law does not provide a mechanism for vetting political aspirants. This is quite controversial given that chapter 6 applies to elected and appointed state officers with the latter undergoing thorough vetting before their appointments are approved by parliament. In addition, the main institution that is supposed to monitor the implementation of the proposed law is not fully established. The appointment of Commissioners to the EACC is in suspense as a challenge on the appointments is being determined in court.

30. While the legislation on leadership and integrity is important, a key issue that will need to be resolved as the country prepares for its first general elections under the new constitutional dispensation is the matter of the political leaders facing charges at the ICC. A case challenging their eligibility to stand for elections in 2013 is pending in the High Court. That notwithstanding, the key principle on leadership and integrity requires state officers to hold office in the public interest. It is therefore imperative that their potential candidature is assessed against that principle. Will their candidacy be a threat to national healing and reconciliation? If so, it may be prudent for them to reconsider their political ambitions in favour of the public interest. This is a matter that demands purposive interpretation of the Constitution.

31. It is also important that corruption is addressed in order to ensure that candidates that participate in the elections are honest individuals without blemish. In the period under review, corruption cases were reported, the latest being that involving the NHIF. It is alleged that billions of shillings were misappropriated through dubious hospitals registered with the fund. The subsequent investigative report of the parliamentary committee on health was not well received in parliament because key political figures were implicated in its findings. Another scandal reported over the last two years relates to multiple allocations to public leaders including politicians of government houses built by the National Housing Corporation (NHC).

---

54. Saturday Nation, August 4, “Cabinet clears key Bills in deadline rush”, pp 3
55. Already supporters of the two have declared no elections without UHURUTO – a corruption of Uhuru and Ruto. This was observed by the KNCHR during a political party held in Eldoret immediately after the confirmation of charges hearing in April.
The other scandal concerns the De La Rue printing tender with allegations made against the then minister of finance over the renewal of a money printing contract. It needs to be appreciated that during electoral periods, financial scandals usually increase and this is usually attributed to enhanced fundraising efforts by political actors. While the State has not been able to prove corruption cases against political actors, there is need for measures to be put in place to investigate political actors that have participated in corrupt acts and bar individuals that have played a role in fleecing the exchequer from participating in the elections.

32. The requirement of accountability is nevertheless not only based on the conduct of political actors. The framework anticipates an active citizenry that engages with political processes through for instance participating in activities of political parties. Citizen engagement is also expected through monitoring the actions of political actors as well as making informed choices during the vote. This will be an important anchor in the implementation of the right to vote, the right of recall and the right to petition parliament.

**Recommendations**

33. The State, political parties and Kenyans generally should work to put in place the following short-term measures to ensure implementation of the Constitution. These measures should have particular resonance in the period preceding the next general elections in 2013:

a. Political parties should commit to respect and implement constitutional provisions relating to participation of women, minorities and marginalized groups in the upcoming general elections.

b. Political actors should commit they will submit any conflicts that may arise during the electoral process to the offices established for this purpose. These include the Political Parties Dispute Tribunal and the Judiciary. During the last general elections, politicians declined to refer the political dispute to the judiciary citing its lack of independence. The Judiciary’s independence now should not be doubted.

c. To institutionalize accountability in political processes, citizens must actively participate in democratic processes. They must participate in the activities of political parties, access information on participating in the electoral process, make appropriate decisions at the vote and continuously monitor their political representatives.
34. The following medium-term measures should be undertaken:
   
a. The framework for political expression should be overhauled. Critical in this regard is the urgent review of the Public Order Act which does not resonate with the standards established in the Constitution. In addition, it is imperative that guidelines seeking to operationalize freedom of assembly are developed in order to guide the National Police Service who are mandated to provide security and maintain order when citizens are exercising their right to assemble, picket or demonstrate.

b. External funding of political parties and the amounts involved is secretive and not easy to monitor. The IEBC, the Registrar of Political Parties and other State actors should put in place stringent measures to monitor receipt and use of external funds.

35. It is imperative that the office is the Registrar of Political Parties is strengthened to enable it play its part in putting in place a political process that encourages issue based politics, register properly democratic political parties.