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On August 27th 2010, President Mwai Kibaki promulgated Kenya’s new constitution, following a referendum in which 66.9% of voters voted for its adoption.

The new Constitution heralds great expectations regarding better life prospects for all. Many of its provisions aim at curing past ills, including excessive executive power, ineffective/ineffective involvement of the public in public affairs, inequitable distribution of public resources, runaway corruption, under-representation of women and minority groups and an ineffective judiciary. Should the strong rights framework that underlies this Constitution be made to work, there is no doubt that that we, the people of Kenya, shall have given ourselves and our future generations an enduring legacy.

However great institutional arrangements alone cannot engender the change Kenyans desire. Important as they are in structuring our relations with each other and the state, a lot more in terms of behavior change with respect to the extent to which Kenyans and its leadership decide to obey the rules and laws inspired by the Constitution is what will give value and fulfillment to the constitutional promise. As one of America’s founding fathers James Madison wrote in the Federalist Paper No 51:

“If men (and I dare add women) were angels, no government would be necessary. If angels were to govern men neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficult lies in this: you must first enable government to control the governed; and in the next place oblige it to control itself.”

We need to build a nation that draws a balance between these twin difficulties of managing the governed and obliging government to control itself. This calls for ensuring that the checks and balances system – between the Executive, Legislature and Judiciary on one hand, and national and devolved government on the other - work effectively, that the public participates vigorously and with diligence, and that state institutions and its officers as well as members of the public bear their requisite responsibilities and accountabilities.

It is against this background that in our 10th Issue of Nguzo za Haki, we provide a selection of key issues we think would help our country at these initial stages of transformation. Included are articles tracing the history of our constitution-making efforts, followed by what we have identified as the key building blocks of “the Second Republic”. If we get it right in operationalizing our Bill of Rights, ensure that the national values and the integrity of our leadership at all levels meet the prescribed constitutional threshold, that pursuit of equality and non-discrimination and justice remain the shield and defender and that all citizens and business take their responsibility, then truly the strong foundation we desire for Kenya will have been set.

Our lead article on constitutionalism combines all these blocks and makes a case for a culture that respects the rule of law and where both leadership and citizens take responsibility seriously. It underlines what really would turn Kenyans aspirations of a constitutional democracy to reality. It is a must read.

As we start the New Year, the message the KNCHR would like to relay to Kenyans is this: to make our new Constitution a reality, we must make vigilance our new collective duty.

Over to you.

Wambui Kimathi
Background:

Commonly referred to as the supreme law, a constitution is an expression of the general will of a nation; the sum total of its history, fears, concerns, aspirations, vision, and indeed, the soul of that nation.” Indeed, the preamble to the Constitution of Kenya recognises “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy social justice and the rule of law”. As the supreme law expressing the will of the people a constitution must therefore be seen as a contract between the governed and the governors. Those who are governed i.e. the people are considered as sovereign, while those who govern only do so on behalf of the people and it is for this reason that constitutions seek to limit and check the powers of those entrusted with the responsibilities of governing.

Unfortunately, constitutions in Africa have instead been seen as instruments that legitimize authoritarian rule, and establish the supremacy of the state over society. For instance, Kenya had at independence a fairly liberal constitution with a bill of rights that guaranteed and sought to protect fundamental rights, a pluralist political system that was geared towards enhancing democracy, and a parliamentary system that operated to check on the executive. However, successive amendments by the post-independence governments increasingly concentrated power in the presidency. The cumulative effect of these amendments undermined democracy, eroded the idea of limited government, and removed from the independence constitution the checks and balances, which are the hallmark of constitutionalism. Furthermore, the introduction of Section 2A to the constitution in 1982 transformed Kenya into a de jure one-party state. These developments not only damaged the country’s constitutional development, but also transformed the constitution into a document that no longer reflected the values and principles on which it was founded.

Close to three decades later, Kenyans, in a bold and unequivocal gesture, voted overwhelmingly for the new constitution on August 4, 2010. The birth of the new constitutional order has given Kenyans the opportunity to break away from the past; a past that has benefited a few to the exclusion of millions of Kenyans. It offers Kenya a clean slate to begin anew and boldly face the challenges that a new global order brings.

This article explores the concept of constitutionalism very broadly and does not purport to be an academic piece. There is no doubt that modern democracy as we know it today and the development of constitutions arose out of the dissatisfaction with governance structures that elevated those who governed to a godlike position with immense and unaccountable powers. Such systems did not take into account the contribution of ordinary citizens towards a stable government hence their labour was exploited, while their loyalty to the rulers was taken for granted and enforced and disloyalty or questioning the powers of those governed was dealt with ruthlessly.

Constitutionalism: Why does it matter?

Constitutionalism is an idea often associated with the political theories of jurists and political philosophers such as John Locke and Montesquieu, who maintained that a government should be limited in its powers by a fundamental law, beyond the reach of an individual government to amend them; and that a government’s authority depends on its observance of these limitations. These constitutional structures are considered conducive for human freedom, liberty and pursuit of happiness.

Put another way, constitutionalism means that political authority is to be exercised according to the law; that state and civic institutions, executive and legislative powers have their source in a constitution which is to be obeyed and not blatantly violated at the whim of the government of the day;

In this regard, Montesquieu, stipulated that:

Political liberty is to be found … only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go… To prevent this abuse, it is necessary from the nature of things that one power should be a check on another… When the legislative and executive powers are united in the same person or body—there can be no liberty… Again, there is no liberty if the judicial power is not separated from the legislative and the executive… There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all the three powers.

In the same vein, John Locke observed that:

It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their private advantage.

Undoubtedly this means that constitutionalism is a form of political thought and action that seeks to prevent abuse of power or tyranny by guaranteeing the rights and freedoms of individuals; in this regard it is expected that political conduct, behaviour and action will be in compliance with the constitution. This concept is largely based on the English and American political history; and whereas, Britain does not have a written constitution it’s constitutional basis can be attributed to an assemblage of laws, institutions, and customs derived...
from certain fixed principles of reason, directed to certain fixed objects of public good, which has created a general system to which the citizens have agreed to be governed. America on the hand has a written constitution, the principles are the same, in that the desire was to ensure that citizens are governed by consent and were assured that those exercising power on their behalf would be limited through various safeguards.

Traditionally therefore, the constitution of a state distributes powers to at least three organs: the Executive, the Legislature, and the Judiciary, thus instituting what has come to be known as the system of checks and balances and the doctrine of separation of powers.

As noted above, the essence of constitutionalism is the limitation of the exercise of state power by law. This law (the Constitution) distributes power to the arms of government, but also requires them to hold each other to account for the exercise of this power. It also denotes a practice where human rights and fundamental freedoms are respected and protected by the state. Recent developments in constitutional practice have also seen the doctrine of constitutionalism expanded to include the establishment of autonomous oversight bodies such as National Human Rights Institutions, Anti-Corruption bodies and Independent Electoral Commissions.

The question that then follows is; how do we translate the language of academics, jurists and philosophers into a concept that is well understood and accepted by a majority, if not all Kenyans? To hazard an attempt, I would say that in simple terms, Constitutionalism means that no one is/should be above the law. The Constitution being the supreme law of the land, binds every person. Accordingly, all actions of state and non-state actors must be in conformity with the Constitution. In this regard therefore we cannot be simply satisfied with a well written constitution; if indeed the constitution recognizes the sovereignty of the people over all the institutions created by it; then the role of the citizens cannot be overemphasized. It means that it is the duty of every citizen whether individually or collectively with others to bring the constitution to life. This must be done by bringing to the attention of the institutions and individuals to whom responsibility is donated any non-compliance with the constitution. On the hand, citizens as individuals, collectively as civic bodies, and business enterprises must also commit to complying with constitutional requirements. Clearly in the early development of democracy more concern was on the state’s exercise of power, however, with most states including Kenya divesting the provision of essential services from the public to private sector they must be equally held responsible for ensuring that the social and economic rights of citizens are realized through compliance with not only laws but also practices that are people centered. Since the notion of constitutionalism essentially affirms that citizens as a polity have agreed to and ascribed to basic standards which will improve the quality of their lives politically, socially, economically and culturally, it is also in the interest to the private sector to concern itself with holding the state accountable to providing a legal, policy, institutional and infrastructural environment that facilitates business and other civic activities.

As for the institutions and individuals entrusted with responsibilities under the constitution it is their duty to safeguard the letter and spirit of the constitution. In doing so we will nurture a culture of constitutionalism, we will be able to define our actions in compliance with the constitution; this will lead to values and practices that secure rather than scuttle the constitution. Such a culture will be demonstrated through actions such as better services, more accountable public bodies, respect of the rights of citizens in all forms including the right to participate in decisions that affect them, better resource allocation, the willingness by individuals and public institutions to take responsibility for their actions and a mature political culture that is devoid of ethnic loyalty but rather devoted to identifiably issues and strategies that

See B de Montesquieu The Spirit of Laws (1949), p xi.
It is this ideal that we must all jealously guard and strive to achieve. Thus, as Kenyans, we must be prepared to reexamine ourselves and deal with the difficult questions that we have over the years ignored or simply swept under the carpet and wished away: the runaway corruption that has now become normal and is oftentimes glorified; impunity and lack of accountability for the abuse of fundamental rights; political violence; interference by the executive in the affairs of other arms of government; a ‘rogue’ parliament that increases its perks every so often, and the cancer of negative ethnicity.

**Kenya’s Constitution Making Process**

Kenya has had a long torturous flirtation with Constitution making marked with many fits and starts. From being the preserve of a few leaders during pre colonial and early post independence, the constitution making process has significantly evolved to include the participation of all Kenyans through the Bomas process and the 2005 referendum all through to the 2010 pre referendum debates and the referendum vote of 4 August 2010. Indeed, President Mwai Kibaki, in his speech delivered during the promulgation ceremony on 27 August 2010, observed that..."we, the people of Kenya, on the basis of our own free will, overwhelmingly voted to renew our nation and usher in the Second Republic.”

Heralded as one of the most progressive constitutions on the continent, the Constitution of Kenya makes a distinct departure from the previous constitutional order by investing in institutions and structures that set the stage for constitutionalism.

Kenyans can now boast of a comprehensive bill of rights that obliges state and non-state actors to respect, promote, protect and fulfil not only civil and political rights, but also economic, social and cultural rights. It outlines a mechanism for any individual or group to claim these rights and does away with the infamous ‘claw back’ clauses that fettered the enjoyment of fundamental rights under the previous constitution are done away with in the Bill of Rights.

Government is brought closer to the people through a comprehensive devolution system that enhances the participation of the people in the exercise of the powers of the State and in making decisions affecting them.

Moreover the constitution outlines a mechanism of ensuring that the youth, women and other previously marginalised segments of the Kenyan society are adequately represented at the County Assemblies and in Parliament.

Affirmative action mechanisms that seek to empower the youth, women and persons with disabilities have also been put in place. For instance, the requirement that not more that two thirds of appointments to public offices shall be from one gender, ensures that women are given greater access to key decision making posts in public service.

An Equalisation Fund is established to provide in marginalised areas, basic services such as water, roads, health facilities and electricity to bring the quality of services in these areas to the level generally enjoyed by the rest of the country. It is hoped that areas such as the Northern part of the Country will see significant improvement in infrastructure and enhanced access to basic services thus improving the quality of life for the inhabitants of such areas.

Powers of a hitherto imperial presidency have been subjected to the oversight role of the National Assembly. These include the powers to appoint Cabinet Secretaries; the Attorney General as well as High Commissioners and Ambassadors. Similarly, the president’s power of appointment of judges is subject to a recommendation by a newly empowered Judicial Service Commission.

Furthermore, the constitution does away with appointments to the cabinet from Members of Parliament. It also requires the president to appoint a diverse cabinet on the basis of ethnicity, gender and qualifications.

Under the previous constitution, the president was vested with complete authority over the police force through the unfettered right to appoint and terminate the police commissioner. Neither parliament, nor any other body, played any role in appointing or removing the police commissioner. The overall effect of this is that one of the key coercive arms of the State was under the control and command of the president, making it open to abuse and political manipulation. Under the new constitution, Article 245 (2) (a) removes the president’s sole authority of appointing the new position of Inspector-General and gives the National Assembly veto powers over any of his appointments.

As part of ensuring the culture of respect of the constitution it will be critical that the executive appoints persons of high caliber and integrity to the various positions, in the first instance. This will only be evidenced by real departure from the previous practices which failed to take into account not only qualifications and competence, but in most cases ignored the principles diversity and plurality. The National Assembly on its part will be required to adhere to the same principles; therefore parliamentarians will have to exercise their power of approval without bias, and will not be expected to use these powers to their own advantage as has been seen in the past. In other words the separation of executive powers from parliament through the creation of a purely presidential system must enhance the values of mutual respect between the executive and the legislature. The current Kenyan Judiciary has been perceived as weak, inept and riddled with corruption. This precarious situation is all the more compounded by the judiciary’s complete dependency on the Executive for funds and the unchecked appointment of judges by a sitting president. Under the previous constitutional order, the judiciary was under the control of the executive and legislature with the allocation and management of funds to the judiciary controlled by the Treasury. Under the new constitutional order, the Judiciary will now get money, appropriated by parliament, directly from the Consolidated Fund. It is expected that a financially independent judiciary will thus be able to assert its independence without fear of a freeze in resources from the Executive. However, it is also very clear that the perceived or real lack of independence of the Kenyan judiciary is not only directly linked to interference or threats of the same by the executive.

As already indicated the judiciary has been accused of corruption, and hence an institution that is compromised by corruption cannot be independent; some have shied away from creative judicial activism thereby stagnating the growth of the law. Appointments particularly to the upper judiciary has not always been based on proven track records; to make matters the judiciary has suffered lack of resources leading to serious backlog and
an archaic case management system. All these factors have contributed to the lack of confidence in the judicial system. A culture of constitutionalism will depend largely on a well resourced judiciary that is manned by independent and objective legal minds with solid legal credentials but also that understand that their independence can only be guaranteed by the Kenyan people. It will behoove the judiciary to create transparent and accountable systems that are accessible and responsive to citizens as a basis for its constitutional role and mandate.

The Constitution also creates a number of oversight Institutions that act as a check on the exercise of state power. Article 249 thereof outlines the objects of these Commissions and Independent Offices as to protect the sovereignty of the people; secure the observance by all State organs of democratic values and principles and to ensure participation of citizens, it is never expected that it will address the constitution is really comprehensive, This is line with the fact even though there will be things that Kenyans will know for certain will not happen simply because the constitution has outlawed them.

This can only be done through ensuring its implementation in letter and spirit. As a country, we need to look back and reflect on why we struggled for decades to have this constitution, identify the key lessons we have learned and use these points of learning to inform our implementation process.

The most significant lesson Kenyans may draw is that constitutionalism is work in progress; there is no finishing line in holding states accountable for power that they wield. Just like there is no true democracy, no state can boast of having achieved true constitutionalism. This means that all the arms of government must keep each other in check. The erstwhile weak Judiciary will have to rise to the occasion and be the vanguard in protecting the rights of Kenyans as outlined in the highly acclaimed bill of rights. Oversight institutions such as pronouncements will have to breathe life into the provisions that are not self executing.

Most importantly, Kenyans from all walks of life-academia, business community, professional bodies, civil society and the religious fraternity- will need to internalise, promote and protect the national values espoused in the Constitution. Kenyans must be reminded that the promulgation of the new Constitution is only the beginning of a journey. Kenyans must never forget what led to the agitation for a new constitution in the first place. The partisan interests and the scramble to grab scarce public resources and the international power games that were at play at independence are still essentially the same. Indeed, some of the political players who abused their positions to derail the dreams of the nation are still active. The history of many African countries aptly demonstrates that having a good constitution is not good enough. Constitutional change would be a waste of time if we do not properly embrace constitutionalism, respect for human rights, good governance and the rule of law. Kenyans, therefore, must remain ever vigilant, ever watchful, and ever alert. Without this, history will repeat itself. We need vigilance in ensuring that the new Constitution is implemented in the way in which it was designed to be, which is in essence, building a culture of constitutionalism. The real test of how progressive we are will depend on how all the institutions that are created as check and balances will live up to their tasks without constant legal disputes; when there will be things that Kenyans will know for certain will not happen simply because the constitution has outlawed them.

"Government is brought closer to the people through a comprehensive devolution system that enhances the participation of the people in the exercise of the powers of the State and in making decisions affecting them."

Promote Constitutionalism

Reinforcing Democracy and the Rule of Law through implementation

Democracy is defined as a system of government in which the governed choose and replace the government through free and fair elections; where citizens actively participate in politics and civic life; where the human rights of all citizens are protected, and where there is respect for the rule of law in which the laws and procedures apply equally to all citizens. All these hallmarks of democracy are beautifully outlined and articulated in our constitution. However, for Kenyans to be able to enjoy the benefits of democracy and the gains in the new constitutional order, we need to breathe life into the words of our Constitution.

The National Assembly will need to churn out laws that are needed to ensure that the implementation of the Constitution does not lose momentum. In carrying out its implementation role parliament will need to ensure participation of citizens, it will need to ensure that laws and policies introduced by the executive comply with the constitutional requirements. This is line with the fact even though the constitution is really comprehensive, it is never expected that it will address all issues. The laws enacted and judicial

These include the Kenya National Human Rights and Equality Commission, the National Land Commission, the Independent Electoral and Boundaries Commission, the Judicial Service Commission, etc. See Article 248 of the Constitution. It also elevates a number of statutory bodies to constitutional status.
The constitution is the supreme law of Kenya and any other law that is contrary to it becomes null and void ab initio (from the beginning) to the extent of the inconsistency. In simple terms, the Constitution is a social contract between the governor (government) and the governed (people). A good constitution promotes democracy and addresses the rights of the marginalized and the most vulnerable within the community.

Pre-Colonial Period

Kenya’s constitution making process has a history dating back from 1890. Before independence, Kenya was a British colony and was headed by a ‘Governor’ who ruled through orders, decrees and ordinances received from White Hall in Westminster Abbey in Britain from Her Majesty.

The Governor worked with the administrative system consisting of Provincial Commissioners, District Commissioners, District Officers and African Colonial Chiefs. The administrative system of governance was considered oppressive to the people since they had no say on how they wanted to be governed.

By 1944, there was some level of consciousness among Kenyans and some of them were elected to the Legislative Council (LegCo). In 1962, the Governor, together with specially elected members of the LegCo who included Martin Shikuku, Tom Mboya, Oginga Odinga, Mbiyu Koinange, Julius Gikonyo, left for London to attend the Lancaster House Constitutional talks. This was the first time the parties agreed on a constitutional framework before Kenya finally attained independence in 1963.

Post-Colonial Era

The former constitution or the ‘Lancaster Constitution’ came into force in December 1964. Numerous amendments that wreaked havoc to institutionalism and constitutionalism were hurriedly done to the extent that by 1969, ten amendments had been made. All the amendments were made in favour of the then political bigwigs to protect and advance their selfish ends.

The most notable amendment came after the 1982 attempted coup de tat where the military made unsuccessful attempted topple President Moi’s government. Subsequently President Moi pushed legislation through, making Kenya a de jure (by right) one-party state, although it had been a de facto (actual) one-party state since 1969.

The parliamentary elections of 1983 and 1988 saw the one-party system reinforced. It is notable that the various amendments of the former constitution fell short of providing the country with institutional and governance structures to serve Kenyans well.

Kenyans Demand a New Constitution

Kenyans yearned for a new constitutional dispensation that would promote democracy and good governance and respect of human rights of all people. The demand for the new constitution was driven by political leaders, Civil Society Organizations and religious groups. The call was for an all inclusive process. Initially when the process commenced in the 1990s, the call was to improve on the constitution and not a total overhaul. However as time went on, it was found necessary to write a new law.

The key concerns that Kenyans clamoured to be addressed in the new constitution included the abolition of the one-party state and the re-introduction multi-party politics; the removal of detention without trial; addressing abuse of rule of law and removal of elements of bad governance; the removal of security of tenure for judges, the Attorney General, the Auditor General; and addressing the weakened separation of powers.

Pressure and lobbying continued until August 1997 when government bowed to the pressure. The Inter-Parties Parliamentary Group (IPPG) was formed. The IPPG agreed on a number of reforms to be undertaken before the 1997 general elections. The aim of the process was to maintain peace and stability to avoid
election violence that was experienced during the 1992 general elections. The interim proposed reforms included:

- Independence of the Electoral Commission
- Repeal of a number of laws restricting enjoyment of civil and political rights.
- Abolition of the offence of sedition
- Facilitation of political meetings
- Fair access of all political parties to the state-owned media.

Unfortunately, before parliament could address all the identified issues, it was dissolved and elections called.

After the IPPG

Kenyans yearned for a new constitutional dispensation that would promote democracy and good governance and respect of human rights of all people.

The Constitution of Kenya Review Act was introduced and passed in 1997 to provide a legislative framework for the review process after the 1997 general election. Subsequently lobbying and negotiation followed that led to the amendment of the CKRC Act in 1998. But the process was delayed because the major political parties failed to nominate membership as was required to constitute the CKRC composition. After intense consultations, this finally bore fruit leading to further amendment to the CKRC Act 2001. The agreement was to have a team of 29 Commissioners from the Parliamentary Select Committee (PSC) and the Ufungamano process known as People’s Commission of Kenya (PCK) who formed the Constitution of Kenya Review Commission (CKRC). The CKRC Act, apart from creating the Commission, also gave the roadmap to the review process. The team was required to have Constituency Constitution forums, hold a National Constitutional Conference, and present the draft through a referendum, followed by adoption by the National Assembly.

The Bomas and Wako Drafts

The CKRC process subjected its views to the national constitutional conference in Bomas. Many opposing views were evident during the discussions. The team was led by a constitutional lawyer, Prof. Yash P. Ghai. Thereafter Ms Abida Aroni Ali led the team after Ghai resigned alleging, among other reasons, the interference with his work by political forces.

Prof. Ghai presented a draft constitution to the national conference for deliberations popularly referred to as the “Ghai Draft”.

Lengthy deliberations led to the Bomas Draft that was submitted to the Attorney General who retreated to Kilifi and came out with the infamous “Wako Draft” that was soundly rejected by Kenyans in the 2005 referendum. The Wako Draft had various contentious issues.

The Committee of Eminent Persons

After the failed referendum, the desire for a new Constitution was rekindled by the appointment of a 15 member team by President Kibaki through a gazette notice No. 1406 of 2006. The team was headed by Amb. Bethuel Kiplagat. Their specific terms of reference was to receive views from Kenyans as to what they thought about the constitution review process citing the weaknesses, strengths, success and failures among others.

They were to identify any obstacles that stood in the way of successful conclusion of the constitution review process. They were to receive views through consultations and memoranda from local and international experts. The team presented their report to the President in May 2006.

Process after the 2007/2008 Post-Election Violence

After the disputed Presidential elections of 2007, Kenya witnessed its worst moment in history when there was widespread violence in the country. Negotiations mediated by the African Panel of Eminent Persons which comprised former United Nations Secretary-General H.E Kofi Annan, H.E Benjamin Mkapa of Tanzania, and H.E Graca Machel, helped achieve a consensus that led to the signing of the National Accord. In order to achieve lasting peace and prosperity, the accord under Agenda Four required a new Constitution for Kenya to be enacted.

This gave rise to the Constitution of Kenya (Amendment) Act 2008 and the Constitution of Kenya Review Act 2008 as the legal frameworks which gave a time frame of 12 months (one year). The new body established under the Act was the Committee of Experts (CoE). Their mandate was to re-look at the contentious issues in Bomas and Wako drafts and redraft the constitution harmonizing the issues. The CoE was headed by Senior Counsel Nzamba Kitonga. It comprised of nine experts drawn from Kenya and Commonwealth countries and two ex-officio members.

The Committee went through the process as guided and identified three contentious issues below:

i. The system of governance
ii. Devolution of power
iii. Transitional Process

Key milestones in the delivery of the new Constitution by the CoE

• Received views from Kenyans and published the draft constitution for consideration by Kenyans within 30 days after publication. Experts were given 21 days to give their input.

• The CoE presented the amended version to Parliamentary Select Committee (PSC) for deliberations and consensus building.

• The PSC debated the draft and

Dr. Abdirizak Arale Nunow; “Constitution making and Legal Reform Process in Kenya” (unpublished)

Dr. PLO –Lumumba, Kenya’s quest for A constitution; The Postponed Promise at p1 Ken

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entered various compromises that altered the draft by CoE. After the 21 days of discussion, the PSC resubmitted the draft to the CoE.

- Within seven days, the CoE submitted the draft to Speaker of the National Assembly for deliberations.

- Deliberations were delayed with MPs attempting horse-trading that never yielded results. No amendments were made to the proposed draft constitution when debates were open on the floor of the House.

- The proposed Constitution was adopted and submitted to the referendum process on the 4th August 2010. By a margin of 67% against 31%, Kenyans overwhelmingly voted in the new constitution.

- On 27th August 2010, the proposed constitution was promulgated into the new Kenya Constitution, giving way to the implementation process.

Conclusion

The Kenya constitution making process was indeed a very long bumpy road that took over 20 years – and many lives – to bring it to completion. However, it is a milestone achieved. Kenyans deserve kudos for the bold step they took to overhaul the Lancaster Constitution. They also take kudos for the momentum they sustained to keep the reforms debate alive. Indeed, without the sustained advocacy, the constitution making process would most probably have taken a different turn. Following in Kenya’s footsteps, other countries in the continent are following suit.

While Zambia is at an advanced stage of its constitution making process, Zimbabwe has also made progress. Ghana, among other African countries, is getting ready for the process. The lessons learnt in Kenya on making reforms a participatory and transparent process will be useful for the rest of Africa.

Winfred Lichuma
Commissioner KNCHR

The Constitution (Art. 73(2)) sets out the guiding principles of leadership and integrity to include inter alia that selection shall be on the basis of personal integrity, competence and suitability; or election in free and fair elections; objectivity and impartiality in decision making; and ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices; selfless service based solely on the public interest, demonstrated by honesty in the execution of public duties; and the declaration of any personal interest that may conflict with public duties; accountability to the public for decisions and actions and discipline and commitment in service to

The ‘detergent’ chapter

Leadership and integrity is a core component of the Constitution, and has been accorded an entire chapter setting out specific provisions to guide public officers in exercising State authority conferred upon them by the Constitution and other legislation. Chapter Six aims at cleansing the exercise of State authority by the country’s leadership. This chapter is what would be referred to as the “detergent chapter” of the Constitution. Previously existing legislation on leadership and integrity was only the Public Officers Ethics Act which has been more observed in breach than compliance. Such a state of affairs therefore militated for the enactment of a comprehensive chapter on leadership and integrity in the new constitution.

The provisions in Chapter Six are informed by Kenya’s history and previous experiences witnessed in the exercise of leadership. Impunity and disregard of the law has been legendary in Kenya. In the past, leaders pushed selfish interests in the name of official duty, persons of questionable integrity occupied leadership positions, while others plundered national resources uninhibited.

Often, public servants who looted from public coffers would be rewarded through appointments to other state offices where they would continue with their plunder in other departments. Public service had become an avenue for self-aggrandizement and enrichment bereft of service to the people. It is against this background that the enactment of the Constitution sought to address the leadership malaise that was bedeviling the country.

President Mwai Kibaki takes oath of office during the promulgation of the Constitution at Uhuru Park, Nairobi, on August 27, 2010. Looking on (left) is Chief Justice Evan Gicheru.


Ibid
the people.

State offices as defined at Article 260 include that of cabinet secretary, Member of Parliament, judges and magistrates, or member of a commission. Article 76 sets out financial probity of such State officers. It prohibits state officers from using their offices for personal gain. It is, therefore, unlawful for State officers to receive and keep gifts given to them by virtue of their office.

State officers are also specifically barred from maintaining bank accounts outside the country except in accordance with an Act of Parliament. This provision is to be understood in light of the revelations in the Kroll Report. This report traces the fleecing of national resources by senior State officers which were wired to foreign jurisdictions perceived as financial “safe havens”. The funds held in foreign accounts, as the reports disclosed, were astronomical or incongruent with the known incomes of the public officers concerned.

Article 77 bars retired state officers receiving pension from public funds from holding two concurrent remunerative positions as chairperson, director, or employee of a company owned or controlled by the State or a state organ. This provision aims to stem multiple positions at board level in state corporations, while other deserving persons are left out. The contribution of such officers to national development will have been felt and it is only fair that they do not hog all available appointive public positions.

The question begs: how many serving public servants meet the leadership principles as set out in Chapter Six of the Constitution?

A common practice that has existed in Kenya was for looters of public resources to contest elective positions ostensibly on which it is written. They utilized their campaigns, thus ensuring their victory in the contests. Hardworking and honest contestants who had only their commitment to service to the people as a campaign platform could not match the financial might of the Mr. Moneybags who corrupted the electoral process through bribery of voters and other unlawful means to win the elections.

Thus public officers with questionable integrity or those with corruption-related court cases took advantage of the lack of provisions on political party and individual spending on campaigns and electioneering to secure ill-gotten wealth to secure elective positions and the political power that comes with it.

**Enforcement of Chapter Six**

So how is the enforcement of this chapter likely to turn out in actual practice? It is not enough to have legal provisions on an issue without an inbuilt mechanism through which those provisions will be actualized. As beautiful as Chapter Six may appear, the devil lies in its implementation for governance. Without the right implementation, then the law in itself will not be worth the piece of paper on which it is written.

It is on this premise that Article 79 directs that Parliament shall enact legislation to establish an independent Ethics and Anti-corruption Commission which is accorded the status of a constitutional commission as captured in Chapter 15, and has the obligation to, inter alia, ensure compliance with, and enforcement of the provisions on leadership and integrity.

Appreciating the background of our legal

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Institute of Education in Democracy Report on the 3 by elections in Kenya held on the 20th September 2010, released on the 11th November 2010

Standard Newspaper of the 27th October 2010
system and governance, the Constitution has made a deliberate effort to achieve the realization of Chapter Six. The Ethics and Anti-Corruption commission once reconstituted, has been accorded the task of ensuring full compliance with the chapter.

A major coup in this regard is the application of the chapter to elected leaders. This is to be viewed in light of recent developments in the country. The election of Hon. Gideon Mbuvi as the Member of Parliament for Makadara constituency would be interrogated in this respect. There have been allegations of existence of a warrant of arrest against the MP. If such allegations are proven, then the election of Hon. Mbuvi to the Assembly would be in contravention of the provisions on leadership and integrity.

**Articles 73 and 75 of the constitution**

Thus Chapter Six opens an avenue through which Members of Parliament can lose their seats in the Assembly should they be found to have fallen short of the provisions on integrity and leadership. This has added a new ground upon which a Member of Parliament can lose his/her seat. Previous grounds were a successful petition challenging a Member’s election to the Assembly, missing eight parliamentary sittings without the Speaker’s permission, being declared bankrupt, and being sentenced to imprisonment for at least six months.

It is instrumental to juxtapose this against recent developments in the political arena regarding the handling of corruption allegations leveled against serving State officers. The application of this chapter provided the basis for the “stepping aside” by former Foreign Affairs minister Moses Wetangula, former Higher Education minister William Ruto, and the mayor of Nairobi, Mr. Geoffrey Majiwa, over corruption allegations.

The realization of good governance is a matter of practice rather than legislation.

The Constitution, recognizing that people’s conduct in matters relating to the management of institutions of governance has consistently failed to live up to expectations of a civil society, now legislates the good manners expected of leaders. With Chapter Six, abuse of office by public officers is no longer business as usual but the subject of condemnation by the very basic law of the land. This “detergent chapter” will help cleanse the governance instruments of characters who fail the integrity and leadership test. Further, it stops such characters from using ill-gotten wealth to ascend to the corridors of legislative and political power.

**Willis Evans Otieno**

*Advocate, Commission of Jurists, Kenya Section*

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**Yes, Kenya needs strong institutions**

**Africa doesn’t need strongmen, it needs strong institutions.**

In a speech on his first state visit to Ghana, the first to any country in sub-Saharan Africa, President Barrack Obama said, ‘In the 21st century, capable, reliable and transparent institutions are the key to success — strong parliaments and honest police forces; independent judges and journalists; a vibrant private sector and civil society. Those are the things that give life to democracy, because that is what matters in peoples’ lives.’ Though delivered in Ghana, President Obama’s message was targeted to Africa as a whole.

As Kenyans we can identify with it, for we are in dire need of strong honest and people-centric institutions.

**The need for reform**

For generations Kenya’s public institutions have been characterised by mismanagement and plunder of public resources, unaccountability and exclusion of the citizenry from public affairs. Indeed many of these bodies were an embodiment of the persons in power who often exuded an aura of being law unto themselves. As a result, public institutions of Kenya’s yesteryears were highly inefficient which in turn spurred corruption at all levels. Furthermore, the lack of accountability and corruption resulted in human rights violations injustices and inequalities many of which fester to date for lack of proper mechanisms to deal with them. It was these challenges and the desire for a new dispensation that kept Kenyans motivated in their search for a new constitution.

The Constitution of Kenya 2010 establishes the framework for the restoration of constitutional democracy by embedding within the Constitution a number of new independent commissions and offices and fundamentally restructuring existing ones. In total, there are established ten commissions and two independent offices whose objects are to ‘protect the sovereignty of the people; secure the observance by all State organs of democratic values and principles; and promote constitutionalism.’ Towards this end, and to further the ‘independence’ element, the Constitution provides that these institutions are subject only to the Constitution and the law, are not under the direction or control of any person or authority, shall be allocated adequate funds and the budget for each commission shall be subject to a separate vote. Furthermore, the Constitution spells-out the procedure of appointment, conditions of service and the procedure for removal from office of persons serving in these bodies. By giving these offices a constitutional mandate and the attendant protections, Kenyans were prescribing cures to the malaise of exclusion from decision making and governance, lack of separation of powers between the various arms of government, insecurity, poor access to justice, centralised and inequitable resource allocation, nepotism in government appointments among other ills. But are these enough to give the country the strong institutions it so desires?

**Challenges of appointments**

The legacies from the Kenyatta and Moi eras that contributed to the weakening of public bodies was the appointment of political cronies to run public bodies. The impact of this was the capturing of public services and resources by the political elite and their favourites to the exclusion of majority of Kenyans. Moreover, the fact...
that politics in Kenya is largely organised around ethnic groups has meant that the ruling political class of the day and to some extent the ethnic groups it represents have so far been the ones largely in control of public bodies.

As a strategy to overcome exclusion, other ethnic groups through their leaders had to pledge support for the ruler in the hope that they too can share in the spoils of public appointments and national resources. At the helm of public bodies were persons appointed sometimes not for their competence but for their association with and allegiance to the political class. Furthermore, appointment, tenure of office and removal was based not on established rules and procedure but at the pleasure and will of the appointing authority that was vested in the person of the president. In the circumstances the only assurance of remaining in service was to ensure continued congenial relations with the president at the expense of all else including the law. In the process, individuals and groups had their rights violated and were disenfranchised in many ways, of which some are in the catalogue of what are commonly referred to as historical injustices.

Entrenching within the Constitution - Articles 250 and 251- the procedure of appointments, terms of office and removal from office, is an attempt to guard against the above problems. Article 250 spells out the appointment procedures and terms of office. It provides inter alia the minimum and maximum number of commissioners for each commission; a deliberate attempt to ensure lean and efficient public bodies. Another important requirement is that the appointments to public office should take into account the national values and principles which include equity, inclusiveness, transparency and accountability and as a whole should reflect the diversity of the people of Kenya.

However, the Constitutional provisions provide minimum criteria leaving the details to be spelt out in national legislation... In the case of the Commission for the Implementation of the Constitution, the criteria for appointment has been expanded to include issues of integrity drawn from Chapter Six of the Constitution on Leadership and Integrity. This has been achieved by embedding within the enabling legislation, the Commission for the Implementation of the Constitution Act, 2010 In addition, the CIC Act excludes from appointment persons who hold state offices which includes, sitting members of parliament and local authority officials among others, an attempt to keep commissions free of political agenda. However, sitting parliamentarians or members of the local councils or devolved governments are only the bastions of political agenda... If the intention is to have as politically neutral public bodies as possible, persons holding certain political offices for instance those that hold key positions within political parties and those that have held state offices within the last five years should be excluded for obvious reasons. While this may seem a harsh stance, let us not forget that by voting overwhelmingly for the new Constitution Kenyans were hoping for real change, which change was previously missed because the same political elite reincarnated as the new regime.

Additional protections

Article 249(3) of the Constitution provides that 'parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.' The import of this provision is to delink the funding of commissions from related government ministries intended to further strengthen their operational independence and to be directly accountable to Kenyans for the outcome.

Furthermore these institutions will be expected to prepare, publish and publicize annual and other reports giving the citizenry and opportunity to verify and even interrogate their activities.

Importantly too, the Constitution has put in place checks against abuse of power by persons appointed to these offices. Under Article 251, any individual may petition the National Assembly for the removal from office of any of the appointees by presenting facts that show a serious violation of the Constitution or any other law including provisions of Chapter Six, gross misconduct, physical or mental incapacity or incompetence. This provision gives back power to the public to check on the quality and calibre of individuals holding this office, should the appointment process fail to exclude those unfit to hold public office.

Whether or not the new Constitution enhances accountability by public bodies depends on the extent to which it succeeds in curbing the problem of arbitrary power. While the minimum principles and mechanisms have been established within the Constitution, Parliament must not undermine these bodies in enacting weak operationalization legislation, or in approving appointment of persons who do not espouse the national values and principles under Article 10. In this regard, Kenyans to whom all sovereign power belongs must be eternally vigilante for the rules and procedures without legitimate and verifiable outcomes are a mere experiment and it is bound to fail.

Rose Kimotho
Senior Human Rights Officer, KNCHR

Makau Mutua, Kenya's Quest for Democracy: Taming Leviathan, 2008, Page 23
Justice is an essential pillar in a democracy and plays a fundamental role in the preservation of the rule of law. Rather than being an end in itself, it is a continuum that encompasses the embodiment of the rights of all in the law; the provision of equal protection of the rights of all in the law; the equal access to all of judicial mechanisms; the respectful, fair, impartial and expeditious adjudication of claims; and the equal and humane treatment of those incarcerated for purposes of enforcement of the law. For justice to have any meaningful impact, it must be accessible as a matter of right.

The right of access to justice finds expression at Article 48 of the new Constitution. Couched in mandatory terms, the Article requires the state “to ensure access to justice for all persons and, if a fee is required, it shall be reasonable and not impede access to justice”. The concept of access to justice is broad. It requires that information on rights be available, that individuals should be able to access services of law enforcement agencies on the basis of equality, that costs associated with engagement with justice institutions should be reasonable, that procedural hurdles in the judicial system should be minimal, that infrastructure supporting access to justice should be accessible and available, that the environment within which justice is sought should be culturally responsive and facilitate justice, and finally, that processing cases and enforcement of decisions should not be occasioned by inordinate delay.

Various factors militate against the effective realization of the right of access to justice. These include high costs of the legal process, insufficient legal aid, disparities in granting bail therefore institutionalizing pre-trial detention, non-judicious unjust and unfair sentencing policy, inadequate entrenchment of human rights in the administration of justice, delays in administration of justice, incompetent investigation and prosecution of cases, gross incompetence in the management of cases by legal professionals, lack of information among the citizens on their rights and socio-cultural factors that entrench gender based discrimination. Therefore, the category of citizens highly at risk of failing to access justice due to the factors outlined includes the poor, marginalized and vulnerable (such as women and children).

Key challenges likely to have an impact on the ability of citizens to access justice arise from institutional deficiencies and weaknesses. These vanguards of justice are the Judiciary, the National Police Service and the Office of the Attorney General. Some of the deficiencies in these institutions arose from the constitutive provisions in the Constitution of Kenya (Repealed) Act and general institutionalized practice. The new Constitution contains provisions aimed at reforming these key institutions. This article examines the extent to which these institutional reforms are likely to affect the right of access to justice.

Substantive and Structural Opportunities

Before delving into the institutional aspect of the reforms set out in the new Constitution, there are substantive provisions that are likely to, alongside the changes in key agencies, facilitate access to justice. Under it, the state is obligated to ensure access to justice for citizens at a reasonable cost. Other facilitative provisions are with regard to issues related to public interest litigation. Specifically, the category of who can institute a public interest case has been broadened to include individuals and associations (Article 22). The Constitution requires that formalities in terms of proceedings filed in the interest of the public be kept to a minimum and that there be no fee charged (Article 22 (3) (b), (c)).

In addition, courts are not to be constrained by procedural technicalities when adjudicating over matters (Article 22 (3) (d)). The new Constitution


On this matter the Task Force on Judicial Reforms noted that though the objective of every justice system was to administer justice by protecting parties’ legal rights and the rights of citizens, some aspects of the system undermined human rights. Ibid., Pp 94

According to the report of the Task Force on Judicial Reforms as at 2009, some 910,013 cases were pending before the Court of Appeal, High Court and Magistrates Courts around the country due to various reasons including shortage of judicial personnel (334 against an establishment of 638), weak case management, among other systemic challenges.

The Law Society of Kenya’s Continuing Legal Education programme (CLE) was an attempt by the society to improve the implementation capacity of lawyers.

In 2005 in Darfur, a fact finding team from the Office of the High Commissioner for Human Rights established the insensitive and often intimidating treatment of victims of sexual violence as a major obstacle to establishing accountability for sexual offences.
further articulates the rights of arrested persons in broader terms (including the requirement that persons arrested be held separately from those serving a sentence, the requirement that bond terms be reasonable); makes provision for fair hearing, particularly with regard to intermediaries (Article 51 (7) and (8)), protection of witnesses and other vulnerable persons (Article 50 (8)) and welfare provisions for victims of offences (Article 50 (9)): and rights of persons detained, held in custody or imprisoned. The Constitution specifically provides that such persons retain all fundamental rights and liberties except those incompatible with the fact of incarceration (Article 51 (1)), availing the right of an order of habeas corpus (Article 51 (2)), and requiring Parliament to pass legislation on the humane treatment of persons detained, held in custody or imprisoned (Article 51 (3) (a)).

These provisions cannot be fully realized unless there are fundamental changes in legal sector institutions particularly the Judiciary, the National Police Service and the Attorney General.

The Judiciary
The judiciary is a key cog in the wheels of justice. However, the institution has come under attack over its ineffectiveness. This point was made clear when during the vote which rocked the country after the 2007 General Elections, one of the main political contenders declined to refer the political dispute to the institution. The perception of partiality stemmed in part from the manner of appointment of judicial officers. In the repealed Constitution, High Court judges were appointed by the President according to recommendations of the Judicial Service Commission (JSC) (Section 61 (2)). However, the composition of the JSC – the Chief Justice, the Attorney General, two representatives from the High Court and the Court of Appeal designated by the President and the Chair of the Public Service Commission (PSC) – put to doubt the independence of the institution. Under the new Constitution, membership of the JSC has been broadened and democratized. For the first time, ordinary citizens will sit on this important commission, as will representative of the Law Society and other professional associations. Under Section 23 of the Sixth Schedule, the JSC will facilitate the vetting of judges and magistrates.

Other challenges that previously faced the judiciary relate to limited redress options. Under the repealed Constitution, only the High Court and the Court of Appeal formed the Superior Courts. But now, the forums have been increased through the creation of the Supreme Court, as well as courts with the status of the High Court for employment and labour disputes, and environment and the use and occupation of, and title to land (Article 162 (2) (b)). Further, alternative forms of dispute resolution are recognized. The financial and operational independence of the judiciary is guaranteed under Article 171 which establishes the Judiciary Fund to be used for administrative expenses. The Article further provides that the expenditure of the judiciary shall be a charge of the consolidated fund and not a component of a ministry’s budget. Finally, the judiciary is required to ensure that when exercising judicial authority everyone is able to access justice irrespective of status, cases are dealt with expeditiously and justice is administered without undue regard to procedural technicalities (Article 159 (2)).

The National Police Service
An effective, human rights compliant and people-oriented police force is essential to the realization of justice. In the past, the police have been accused of using extra-legal means ostensibly to fight crime and realize 'justice'. Investigations in 2007 found credible information that points at likely official policy sanctioning killings in the quest to address the surge in crime. In Mount Elgon, the KNCHCR obtained information that the police and defence forces were responsible for torture in an operation against the SABAOT LAND DEFENCE FORCES (SLDF). These actions were undertaken despite express constitutional guarantees on the right to life, the right to personal liberty, protection from inhuman treatment, secure protection of the law, among other provisions.

The new Constitution addresses the challenges in the police force by establishing an independent National Police Service required to comply with constitutional standards of human rights and fundamental freedoms. In terms of functional independence, the Constitution vests in parliament the duty of approving the appointment of the Inspector General of the National Police Service, reducing arbitrariness and politicization of appointments. Secondly, a National Police Service Commission is established with mandate to recruit and disciplinary oversight over members of the service (Article 246 (1)).

The Attorney General and the Director of Public Prosecutions
The legal advisory and prosecutorial functions of the state were, under
the repealed Constitution fused into the office of the Attorney General. There were attempts to delink the two roles administratively through the establishment of and appointment of a Director of Public Prosecutions (DPP). However, the DPP was still an office under the control and supervision of the AG. Under the latter, there were seven other departments dealing with, inter alia, representation of government in civil cases, legislative drafting, treaties and international agreements and the Advocates Complaints Commission.

Various scholars contended that vesting in the office of the AG the additional function of chief prosecutor, with the attendant heavy workload was likely to result in a botched job. Further, the sitting AG had on various occasions arbitrarily used his powers in cases relating to corruption or politically sensitive matters.

Under the Constitution, the Offices of the AG and the DPP are delinked, not administratively as is currently the case but functionally – with clear and distinct roles. This is likely to enhance efficiency in the delivery of justice. The office of the AG is established as principal legal adviser to the government, and chief counsel of the national government in civil proceedings. In terms of promoting access to justice, the New Constitution allows the AG to appear as a friend of the court in civil proceedings to which the state is not a party. The AG is appointed by the President following approval by the National Assembly. The DPP is established to exercise state powers of prosecution.

The Constitution expressly disallows the DPP from discontinuing prosecutions at will and requires such discontinuance to be exercised only with the authority of the court.

**Opportunities for Improving Access to Justice**

The country is at the critical stage of implementation of the Constitution. However, there are various gaps that should be addressed comprehensively. These relate to the vetting of judges and magistrates, legal aid, delegation of prosecutorial powers, rules on public interest litigation, and aspects of accountability in the National Police Service Commission.

As indicated, the new Constitution requires judges and magistrates to be vetted within a year. Four months after the promulgation of the Constitution, the legislation that is expected to bring to life this aspect of the Constitution is yet to be passed. It is unlikely that vetting will be undertaken within the timeframe. Nevertheless, lack of personnel may still torpedo the intent. Associated with this is the need to vet other judicial officers, for which there is no provision in the Constitution. Section 23 of the Sixth Schedule, however, would indicate that this must accompany the vetting of magistrates and judges.

Although the new Constitution does not contain express provisions on legal aid as was contained in the Harmonized Draft Constitution, the intention can be read at Article 48. Further, the right to a fair hearing established under Article 50 includes the right of an accused to counsel assigned and paid for by the State. It therefore behooves the State to ensure that a holistic framework is established for the existing National Legal Education, Aid and Awareness Programme to strengthen its operations.

The Constitution mandates parliament to enact legislation conferring powers of prosecution on authorities other than the DPP. This provision appears to give lots of wiggle room on prosecution. Delegation of the power of prosecution to the police has been fraught with numerous challenges, including allegations of bias particularly where the poor are pitted against people of means. Excluding the police, the institutions which should enjoy this delegation are the Ethics and Anti-Corruption Commission, the Kenya National Human Rights and Equality Commission and the Independent Electoral Commission.

Under the Repealed Constitution, the CJ was required to publish rules to actualize

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In 2006 for instance the AG entered a nolle prosequi in the first Cholmondley shooting case without reference to the then DPP Mr. Murgor who learnt of the move in court while preparing to proceed with the case.

**Under the Constitution of Kenya (Repealed) Act, the DPP was subordinate to the AG**

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The Inspector General will exercise independent command over the National Police Service among other functions.
the provision under section 84 (6) on enforcement of protective measures of the Constitution. These rules were only promulgated in 1999 and amended in 2006. Though it is arguable the extent to which absence of rules letters one’s right to access justice, they are critical in establishing proper practice. The New Constitution requires the CJ to publish rules to enable the provision on enforcement of the Bill of Rights.

Finally, a key gap noted in the functions of the National Police Service Commission relates to accountability. This is critical to the realization of justice. Provisions requiring the police to comply with human rights and the Constitution are good but they are not sufficient. The oversight function of that Commission should be looked into. Alternatively, the Constitution should in the long term be revised to provide oversight in respect of National Police Services.

Conclusion and Recommendations

This article has brought to the fore the key weaknesses that plagued the institutions of justice under the former constitutional dispensation. The article has also pointed at the provisions and mechanisms put in place in the new Constitution that are likely to improve the functional capacities of the various institutions and therefore contribute to the realization of justice. Key challenges have been discussed which are likely to militate the ability of citizens to access justice. If they are addressed, it may be possible to achieve justice under the new constitutional dispensation. However, a major challenge that will have to be addressed relates to the functional capacities of those institutions. Therefore staffing levels will need to be addressed to meet the needs of the increased number of individuals interacting with the justice system; their capacities will need to be built through continuous training and sensitization; finally, citizens will need to be meaningfully engaged to be able to meaningfully engage with the justice system.

Lucy Minayo
Senior Human Rights Officer - KNCHR

This framework should include aspects of legal empowerment, engagement with paralegals, among others.

Overview

The new Constitution of Kenya creates a legal framework for a just society founded on the rule of law. Chapter Four, which contains the newly created Bill of Rights, could represent a real step change in the protection of the right to equality and non-discrimination in Kenya, but significant enforcement and legislative measures will need to be taken.

Structure of the Bill of Rights

Part I of the Bill of Rights deals with the purpose and framework of the Bill of Rights (article 19); its application to all laws, State organs and all persons (article 20(1)); the duty of the State to implement the Bill of Rights (article 21); the procedure for enforcing the Bill of Rights (article 22) and the limitation of rights and freedoms (article 24 & 25).

Part 2 outlines the rights and fundamental freedoms protected by the Bill of Rights (articles 26-51). Part 3 then specifies how those rights are to be applied to certain groups of persons who are identified as vulnerable (articles 52-57). Part 4 specifies when a state of emergency may be declared and how it must be done (article 58). Finally, the Bill of Rights concludes with Part 5, which provides for the creation of the Kenya National Human Rights and Equality Commission.

Novelty of the Bill of Rights

The former Constitution was influenced by an earlier era of global constitutionalism, which used a human rights discourse that was largely drawn from the constitutions of Western nations and international human rights instruments. Thus Kenya’s Bill of Rights, like those of other African nations, was written into the Constitution foremost as a limitation on governmental power rather than a minimum prescription for justice and good governance.

In contrast to the former Constitution, in which only 16 articles dealt with rights and freedoms, the new Bill of Rights contains 38 such articles. It expands the scope of the previously protected political and civil rights. Economic and Social Rights, which were not recognized or specifically protected under the previous constitution, are identified and granted constitutional protection in the new order (article 43). Some of the rights granted constitutional protection are the right to human dignity (article 28); the right to privacy (article 31); freedom of the media (article 34); the right to picket, petition or demonstrate (article 37); political rights (article 38); the right to a clean and healthy environment (article 42); the right to a family (article 45); consumer rights (article 46); the right to fair administrative action (article 47); the right to access justice (article 48); the rights of arrested persons and persons detained, held in custody or imprisoned (articles 49 and 51). These are rights that did not receive protection under the former Constitution. Additionally, the rights of vulnerable persons such as women, the elderly, persons with disabilities and the youth have been given recognition and emphasis (articles 52-57).

The rights enshrined apply to all laws in Kenya, binding all State organs and all persons, including private actors (article 20(1)). The extension of the Bill of Rights to private actors is unusual, as the responsibility for ensuring rights and freedoms conventionally lies solely with the State.

Controversial Aspects of the Bill of Rights

There are a number of contentious provisions within the Bill of Rights. For instance, the definition of the right to life contains the phrase “life begins at conception” and prohibits abortion in all but emergency medical cases (article 26). The provision assists the hundreds
of women who die every year as a result of complications of pregnancy but overlooks women who wish to terminate their pregnancy voluntarily and victims of sexual assault who are forced to raise a child born of violence.

Also, the list of grounds of discrimination does not include gender identity or sexual orientation (article 27(4)). Furthermore, homosexuality remains illegal in Kenya. Similarly, the right to marriage is only to a person of the opposite sex (article 45(2)). However, the list of grounds of discrimination is not exhaustive, such that it will be possible to petition the court for recognition of new grounds. Article 27 does not establish a test for the inclusion of new grounds, such as has been adopted in South African anti-discrimination legislation, and established as best practice in the Declaration of Principles on Equality. It will be up to the courts to establish such a test.

Finally, there is no specific provision for women beyond the provision stating that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres (article 27(3)). Part 3 elaborates on certain rights to ensure their application to certain groups of persons (article 52), namely children (article 53), persons with disabilities (article 54), youth (article 55), minorities and marginalized groups (article 56), and older members of society (article 57) but omits women.

That said, many provisions have greater applicability to women than to men, such as the right to reproductive health care (article 43(1)(a)), the assurance that every adult must freely consent to a marriage, and the right of parties to a marriage to equality at the time of marriage, during the marriage and at its dissolution (article 45). The Bill of Rights provides for equal responsibility for child care even outside of marriage (article 53), which may help to lessen the burden on women who are often left to care for children, particularly when a child is born to an unmarried mother.

The Entrenchment of the Bill of Rights in Policy, Law, and Administration

With the introduction of the Bill of Rights, Kenya has the opportunity to ensure that every citizen and individual feels equally protected by the Constitution, which is necessary to facilitate a meaningful movement towards peace and democracy. With the reintroduction of multiparty politics in 1991, every ethnic community has aimed its sights to capture the presidency, since politicians and the public alike feel strongly that this is the only way to ensure access to public goods and services. Elections are bitterly contested, as witnessed in the outbreak of violence that followed the 2007 general election, and “politicians have politicized perceptions of exclusion, which have become effective tools for mobilizing members of their ethnic communities.” Accordingly, the State, the newly created Kenya National Human Rights and Equality Commission, the courts and civil society must act to enhance perceptions of inclusion, equality and non-discrimination if the new Bill of Rights is to facilitate a real transition to democracy and peace.

The State

Under the Bill of Rights, the State is required to create programs to assist historically marginalized groups (article 27(6)). More specifically, State must create affirmative action programmes that allow marginalized groups to participate in governance and society, that focus on education and employment, develop minority cultures and languages, and ensure reasonable access to water,

UNICEF, State of the World’s Children 2010 (New York: UNICEF, 2010). The rate of maternal deaths in Kenya is 560 per 100,000 live births, placing Kenya at 128th in the world. Maternal death is defined as the death of a woman while pregnant or within 42 days after terminating a pregnancy, regardless of the length and site of the pregnancy, due to any cause related to or aggravated by the pregnancy itself or its care but not due to accidental or incidental causes.
Sections 162 to 165 of the Penal Code, cap. 63 criminalize homosexual behaviour and attempted homosexual behaviour between men.
health services and infrastructure (article 56). There was previous legislation, but the “extension of affirmative action to all grounds under article 27(6) represents a significant increase in scope.”

**KNHREC**

The Constitution creates the Kenya National Human Rights and Equality Commission (article 56), which merges the existing Kenya National Commission on Human Rights and the National Commission on Gender. The new Commission is an institutional mechanism to advance the interests of women and marginalized groups, and to ensure the number of people, or that the State failed to have consideration for the vulnerability of particular groups. No test is set out for determining an infringement of this article, so the courts will have to flesh out this provision.

**Kenyan Citizens and Civil Society**

Organisations in civil society have the responsibility to monitor both the State in its adherence to the new Constitution as well as the Commission on the Implementation of the Constitution to ensure that the principles and values of the new Constitution are upheld. Where errors are made or where the

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**Under the Bill of Rights, the State is required to create programs to assist historically marginalized groups (article 27(6)).**

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The Bill of Rights has the lofty goal of seeking to recognize and protect human rights and fundamental freedoms in order “to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings” (article 19(2)). Without additional steps to implement the Constitution, however, Kenya risks embracing a culture of “constitution without constitutionalism”, leaving the Bill of Rights an empty promise of human rights. Even at the time of writing the government of Kenya has started to fall behind in its timelines for action. It is now for Kenyans, particularly in civil society organizations, to assist in the implementation of the Constitution by acting as watchdogs and cheerleaders.

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**The Courts**

Courts have the authority to “develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom” (article 20(3)), which gives latitude for the evolution of the law and for the progressive realization of the freedoms enshrined in the Constitution. Where an economic or social right calls for action from the state (under article 43) that the State is unable to provide, the State may be required to show in court that the resources are not available (article 20(5)(a)). A petitioner must show that the State’s allocation of resources did not give priority to providing enjoyment of the right or freedom to the largest number of people, or that the State failed to have consideration for the vulnerability of particular groups. No test is set out for determining an infringement of this article, so the courts will have to flesh out this provision.

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**Conclusion**

International Center for Transitional Justice, supra note 1 at 17.

The Bill of Rights has the lofty goal of seeking to recognize and protect human rights and fundamental freedoms in order “to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings” (article 19(2)). Without additional steps to implement the Constitution, however, Kenya risks embracing a culture of “constitution without constitutionalism”, leaving the Bill of Rights an empty promise of human rights. Even at the time of writing the government of Kenya has started to fall behind in its timelines for action. It is now for Kenyans, particularly in civil society organizations, to assist in the implementation of the Constitution by acting as watchdogs and cheerleaders.

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**Paige Morrow**

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Kenyan women, as a historically marginalized group, hope to gain from the various provisions of the Constitution that provide for equality and non-discrimination, especially the Bill of Rights (which recognizes and protects human rights and fundamental freedoms), and Devolved Government, which enhances their participation in the exercise of the powers of the State and in making decisions affecting them. The twin principles of equality and non-discrimination inspire the whole human rights concept. They are not only stand-alone rights, but should be the basis of all policy, administrative and legal decisions.

Moreover, these principles-cum-rights have a special meaning for socially excluded groups; adhering to them has the potential of bringing the much-needed change not just in regard to civil and political rights but most importantly in the arena of economic, social and cultural rights. Article 260 of the Constitution interprets a “marginalized group” to be a group of people who are disadvantaged by discrimination on one or more of the grounds in Article 27 Clause (4). Furthermore the Constitution in Article 27 Clause (6) recognizes that affirmative action can be employed to correct inequalities brought about by marginalization. “Affirmative action” is interpreted as any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom.

Gender Equality

Gender equality is the key principle underlying the protection of women’s rights. Though the Constitution of Kenya refers to sex, rather than gender, as prohibited ground for discrimination (Article 27 Clause (4) and (5)), it is still a gain for women because the previous constitutional dispensation excluded “sex” as an objectionable ground for discrimination. The principle of gender equality encompasses the prohibition of discrimination and the adoption of special measures in favour of women. Discrimination takes different forms; it is direct when norms or practices explicitly differentiate treatment on the basis of sex/gender, and indirect when norms or practices include requirements that advantage persons of one sex. Discrimination is de jure when it is envisaged by law, de facto when although the law is gender-neutral, discrimination exists in practice. Non-discrimination alone cannot overcome the obstacles hindering achievement of equality of men and women; it is imperative that legal instruments contain an “affirmative action” clause requiring the State to adopt special measures conferring temporary advantages on women, with the long-term aims to achieve de facto gender equality.

Anti-Discrimination Instruments

Kenya has a strong record of ratifying international and regional human rights instruments, but, it has not yet ratified the Optional Protocol I to the International Covenant on Economic, Social and Cultural Rights (2008), has placed a reservation against Article 10 (2) of the International Covenant on Economic Social and Cultural Rights which requires state parties to make provision for paid maternity leave; neither has it ratified the Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999). Under the previous constitutional dispensation, Kenya had a dualist legal system; international treaties and obligations did not take immediate effect and required implementation through domestic legislation and debate and disagreement in the enactment of new laws and amendments to existing legislation delayed the full implementation of a number of treaties providing protection from discrimination. Nonetheless, the issues of equality and non-discrimination were addressed by Parliament through the enactment of the National Cohesion and Integration Act, the Persons with Disabilities Act, the HIV/AIDS and Prevention Act and the Employment Act and various other anti-discrimination laws. Under the new Constitution, the full implementation of international treaties providing protection from discrimination is now guaranteed by Article 2 Clauses (5) and (6), which provide that the general rules of international law as well as any treaty or convention ratified by Kenya shall form part of the law of Kenya.

Equality and Non-Discrimination in the Constitution

In the Preamble of the Constitution is the aspiration by Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law; Article 27 Clause (1) provides for the equality of all persons before, and their right to equal protection and equal benefit of the law, with Clause (2) providing for full and equal enjoyment of all rights and fundamental freedoms; Article 10 Clause (2) (b) gives the national values and principles of governance that bind all State organs, including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

Article 20 Clause (2) provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent, while Clause (4)
(a) emphasizes an open and democratic society based on human dignity, equality, equity and freedom values to be promoted by a court, tribunal or other authority in interpreting the Bill of Rights. Article 24 Clause (1) provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law; the limitation being reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; while Clause (4) provides that equality shall guide application of Muslim law before the Kadhi courts in matters relating to personal status, marriage, divorce and inheritance.

The Kenya National Human Rights and Equality Commission will serve to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development (Article 59 (2) (b)); with the Judicial Service Commission being guided by the promotion of gender equality in the performance of its functions (Article 172 Clause (2) (b)).

Gains for Women

Article 81 of the Constitution provides general principles of the electoral system, with Article 81 (b) stating that, “not more than two-thirds of the members of elective public bodies shall be of the same gender”. This provision specifically represents gains for women in the political arena and is expected to boost the number of women in active politics. Needless to say the gains are not restricted to elective bodies; Article 27 Clause (8) provides that “the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”. As per Article 21 Clause (1), it is a fundamental duty of the State/every State organ to observe, respect, protect, promote and fulfill the rights and fundamental in the Bill of Rights; Clause (3) provides that State organs and all public officers have the duty to address the needs of vulnerable groups within society, (including women).

Article 27 Clause (3) provides for the right to equal treatment of women and men, including the right to equal opportunity in political, economic, cultural and social spheres, Clause (4) and (5) give prohibited grounds of discrimination by the State and by persons (natural or artificial), respectively. Various provisions protect the rights of women in marriage, and ensure that women get support in raising and providing for children. The family unit shall enjoy the recognition and protection of the State (Article 45 Clause (1)); with parties to a marriage being entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage (Clause (3)); and all marriages shall be registered under an Act of Parliament (Clause (4) (a)). The reproductive role of women, especially their role as primary caregivers of children, is recognised and supported by Article 53 Clause (1) (e) of the Constitution, which provides that “every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not”.

The Constitution also has provisions for affirmative action programs (Article 56), and provisions on values and principles of public service, which include equal opportunities for appointment, training and advancement, at all levels of the public service, of men and women (Article 232 Clause (1) (j)). Provisions on procurement of public goods and services allow for Parliament to enact legislation to provide guidelines on categories of preference in the allocation of contracts, and for the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination (Article 227 Clause (2) (a), (b)). Such articles, including Article 60 Clause (1) (f) on elimination of gender discrimination in law, customs and practices related to land and property in land, and Article 68 (c) (iii) on legislation to regulate the recognition and protection of matrimonial property and, in particular, the matrimonial home during and on the termination of marriage, will enhance the ability of women to realize their economic (and social, cultural) rights.

Article 27 Clause (8); Article 81 (b); Article 175 (c) and Article 177 Clause (1) (b) allow for more women to represent the people in elective public bodies at the National and County Assemblies/Governments. Provisions on political parties enhance participation of minorities and marginalized groups, and make it imperative for the parties to respect and promote human rights and fundamental freedoms, and gender equality and equity (Article 91 (1) (e), (f)). The Constitution also provides that 47 women, each elected by the registered voters of the counties, (each county constituting a single member constituency) will be members of the National Assembly (Article 97 Clause (1) (a)). Sixteen women shall be nominated by political parties to be members of the Senate, one woman will represent the youth, and one will represent persons with disabilities (Article 98 Clause (1) (b), (c), (d)).

Though the full implementation of international treaties providing protection from discrimination is now guaranteed, and though every person is to enjoy the rights and fundamental freedoms in the Bill of Rights as enshrined in the Constitution, the social exclusion and under-utilization of competencies of women is due to gender stereotypes and entrenched prejudices. Therefore, changing the law will only result in de jure equality and nondiscrimination {policy, norms and standards established by law}, but will not change entrenched cultural values {implying the possibility that de facto discrimination may continue in some spheres}. Thus, there exists the need for adoption of policies and programs that will help bridge the gap between de jure and de facto gender equality, including such measures as sensitizing the public on gender equity and equality, and undertaking civic education on the legal provisions that provide for gender equality and the statutes which provide that affirmative action can be employed to correct inequalities brought about by marginalization.

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By Commissioner
Anne M.K. Ngugi

The provision gives a minimum of a third representation by women.
The corporate sector is well recognized for the positive contributions it makes as an important engine for economic growth, job creation, revenue through tax payments, and provision of invaluable goods and services. According to Professor Ruggie, ‘they constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights’. However, what is also getting increasingly recognized is that the sector can have significant negative impacts on human rights and society at large.

Currently there are limited avenues for holding businesses responsible for actions or omissions that negatively impact the human rights of Kenyans. Not because human rights abuses by businesses are non-existent, on the contrary allegations of abuse are rife; but accountability mechanisms have been lacking. In the past, the state has laid emphasis on tax obligations of businesses with little focus on the treatment by businesses of their employees. Allegations of human rights violations span all business sectors but the best documented examples being agricultural sector in relation to displacements and poor/lack of adequate compensation, working conditions in big commercial farms such as tea, coffee and flower farms and the manufacturing sector, especially in the Export Processing Zones. Further anecdotal evidence on the extent of the rights abuse by employers is provided by the Complaints and Redress Department of the Kenya National Commission on Human Rights who report that labor related complaints are the bulk of the cases received.

These kinds of issues have seen the sustenance of the debate on business and human rights both at the domestic and international levels. At the international level debates on whether and how the sector could be held accountable for its impacts on society have been growing steadily over the last 15 years. These efforts by civil society organizations, governments and sections of business have seen the proliferation of all manner of codes and standards, a lot of them voluntary, aimed at mitigating the negative impacts of the sector while ensuring the positive impacts are sustained.

One initiative that should be of particular interest to both Governments and business is the recent ‘Protect, Respect and Remedy’ framework developed under the auspices of the UN by the Special Representative of the Secretary General (SPSG) on the issue of human rights and transnational corporations and other business enterprises. Of note is that the framework has been adopted unanimously by the Human Rights Council which means that governments have agreed to pay attention to it. This framework clarifies the responsibilities that business have as far as human rights are concerned and distinguishes such responsibilities from the obligations that states have as primary duty bearers.

At the home front, Kenyan’s new constitution has elevated such responsibilities by business to constitutional obligations. In Art 20, the Constitution binds all State organs and all persons to the Bill of Rights, and defines person as including ‘a company, association or other body of persons whether incorporated or unincorporated’. For business in Kenya, this provision is bound to be a game-changer.

Further, Art 59 establishes the Kenya National Human Rights and Equality Commission and among other functions, requires it to ‘promote the protection, and observance of human rights in the public and private institutions’.

**What does this mean for business?**

To illustrate this, in this article we cite a few key provisions in the Constitution that are of note to any business as a way of interesting it to assume ‘a human rights aware’ approach and act in responsible ways.

While it is possible that conduct by some companies may in the past have arisen due the weak framework of governance and poorly enforced regulatory frameworks, it must also be said that there are some companies that exploit such weak governance environments to benefit from non-compliance even with the minimum legal requirements. What the new constitution is calling for is a new way of doing business.

Art 27 on Equality and freedom from discrimination is singularly important as a fundamental principle of human rights. It forbids any person from discriminating directly or indirectly against another on the prohibited grounds which include ‘race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, dress, language or birth.’ Any distinction, exclusion or preference made on the basis of such grounds which results in the impairing of equal opportunity will attract legal sanctions. Companies will have to ensure that their recruitment, promotion, job evaluation and disciplinary policies, for example, are designed and implemented in such as employment and enforcement of policies is extended to each employee without being blind for example to issues of disability, pregnancy or other special condition that may require special reasonable accommodation. Companies will need to pay particular attention to women who, the International Labour Organization notes, are still ‘by far the largest most discriminated group.’

Further, the Bill of Rights in Articles 41 and 46 on labour relations and the protection of consumer rights respectively apply directly to businesses as employers and as suppliers of goods and services to the public market place. In addition, the provisions relating to the environment, Articles 42, 69 and 70 recognize not only the right to a clean and healthy environment but also require positive action by all including businesses as users of the environment.

A lot of companies and other enterprises frown at being asked to pay attention to their responsibility to respect human rights, yet, in not doing so, they have created mistrust between themselves and individuals and communities that have suffered corporate-related human rights harm. Kenyans would remember, for example, the lingering case of Tiomin and Kwale residents (since 1997) and how the
frosty relationship between the various groups has delayed the mining of titanium, which is reportedly due to begin in 2011. While the disputes that accompanied the initial entry into Kwale by Tiomin will not suddenly disappear just because there is a new framework of governance, the fact that this and other companies can be held to account on matters relating to, for example, the fairness of the compensation they should receive to make way for investment. Under Art 40 in the Bill of Rights, should government sanction investment that may cause the re-location of any person, there is the explicit requirement that the government laws should be put in place requiring that such persons be given ‘prompt payment in full, or just compensation’ for their property.

Companies will therefore have to pay heed their responsibility to comply with such requirements that are in their realm of respecting rights. It should not be forgotten though that the primary duty to protect human rights lies with the state and it must provide the necessary infrastructure to ensure that companies respect rights. Moreover that the fulfillment of this duty requires the state to not only guard against its own human rights violations but also against any violation by third parties including businesses and to provide appropriate remedies when violations occur.

Even more important to this to work is the need for Kenyans themselves to understand both their rights and responsibilities and be ready to make the constitution a reality by being at the forefront in constructively claiming their rights.

Wambui Kimathi
Commissioner - KNCHR

Protect, respect and remedy: a framework for business and human rights, John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
Dated: 07 Apr 2008

WE THE PEOPLE OF KENYA’ AND THE CONSTITUTION

The Constitution only gives people the right to pursue happiness. You have to catch it yourself. – Benjamin Franklin

Introduction

On August 4th 2010, Kenyans turned up at polling stations around the country in great numbers to give their verdict on the then Proposed Constitution of Kenya. Through the referendum, Kenyans constituted the fourth and last organ of the constitutional review process as required by the now defunct Constitution of Kenya Review Act (CKRA) 2008. By a majority of over 67%, Kenyans ushered in a new Constitution and bid farewell to the old order. One of the benchmarks for the new Constitution as outlined in the CKRA was a dispensation that ensured that Kenyans were effective participants in all activities, including governance. The new order was supposed to create beacons that ensured that Kenyans were effective participants in all activities, including governance. The new order was supposed to create beacons that ensured that power was devolved and democracy deepened to allow ordinary Kenyans effectively participate in governance.

It is against this backdrop that the Preamble of Kenya’s new Constitution declares: “We the people of Kenya…adopt, enact and give this Constitution to ourselves and future generations.” Beyond this, the first article of the Constitution reposes all sovereign power to the people; authority of which is delegated to Parliament, the executive both at national and county levels, the Judiciary and independent tribunals. Sovereign power is to be exercised as premised by the Constitution, the supreme law of the land.

As can be seen from above, the new Constitution is mwananchi-centric, being a document that Kenyans not only bequeathed unto themselves and generations to come but also one in which they gallantly proclaimed that all sovereign power belongs to “the people of Kenya”. In the same vein, the Constitution obligates every person “to respect, uphold and defend the Constitution” (Art. 3 (1)) placing duty and responsibility for its ‘wellbeing’ on Kenyans. Kenyans are, therefore, not only claim-holders, but also duty-bearers in seeing to the success of the new dispensation.

Mwananchi’s role and responsibility in the Constitution

So how can Kenyans respect, uphold and defend the Constitution? Does the Constitution grant Kenyans avenues of affecting this?

As a side-step and prior to examining the provisions of the Constitution, it is important to interrogate whom the term ‘people’ refers to. The term refers to the general populace other than the government. It also refers to organised groups that fall under the broad banner of civil society organisations. This article explores what and how much room mwananchi has been provided in the new
Constitution. Further, it seeks to show what the citizen can do to give life to the new dispensation.

The new Constitution requires Kenyans to vote for an array of leaders. These include the President, Members of Parliament (both National Assembly and Senate) and their county leaders who include the Governor and members of the County Assembly. These are leaders whose terms of reference will include policy formulation and the administration of public funds both at the national and county levels. These leaders shall amongst other things be required to adhere to the letter and spirit of the new Constitution and more specifically, Chapter Six, which addresses leadership and integrity. It is, therefore, incumbent upon all Kenyans who qualify to register as voters and participate in elections.

Secondly, in undertaking this constitutional duty, Kenyans will be required to vote for men and women of integrity, who will uphold the Constitution. In the same vein, Kenyans are obligated to vote out leaders who do not adhere to the letter and spirit of the Constitution. Indeed, this was best articulated by Abraham Lincoln when speaking Americans said, “We the people are the rightful masters of both Congress and the courts, not to overthrow the Constitution but to overthrow the men who pervert the Constitution.”

Article 22 of the new Constitution provides avenues for the enforcement of the rights outlined in Chapter Four, the Bill of Rights. These rights guarantee social, economic, basic and cultural entrenchments which seek to enhance the well being of each and every Kenyan. The government and all Kenyans are bound by the Bill of Rights. Kenyans must, in the first instance, respect each other’s rights so as to provide an environment for the enjoyment of rights by all. The precondition here is the duty of all Kenyans to know and understand the rights enshrined in the chapter. This can be done through civic education conducted by the government and civil society organisations. As former UN Secretary General Boutros Boutros Ghali said, “It has long been recognized that an essential element in protecting human rights is widespread knowledge among the population of what their rights are and how they can be defended.”

Where the rights of a person or a group of persons have been denied, violated, infringed or threatened, that person or group of persons can go to court to have the rights enforced. The substantive issue is that Art. 22 now makes it much easier for people to do this. First, the Constitution does not require one to be the person directly harmed for one to go court. A person can go to court on behalf of another who cannot do this in their own name or as a member of a group or in the group’s interests or for public interest. Associations can also go to court on behalf of members.

The requirements for instituting a case have also been lessened and made easy. Cases can be entertained on the basis of informal documentation and no fee may be charged for starting a case. Courts are also not supposed to be strait-jacketed by procedural requirements. The avenues for enforcement of rights have thus been made easy. Courts shall now be more accessible for human rights issues. The onus is upon the people, including civil society organisations, to take advantage of these provisions to build jurisprudence on human rights. Over and above that, the onus is on the people to ensure that the rights of all Kenyans are fully promoted and protected.

To make Kenyans viable participants in the legislative process, the new Constitution opens opportunities through Article 119. This pronouncement gives Kenyans the right to petition Parliament to enact, amend or repeal any legislation. When the provision takes effect after the next general elections, Kenyans will not need to wait for Parliament to initiate action towards the creation or repair of legislation. They proactively will be able to move Parliament to do the same. To enable this, Article 118 obligates Parliament to facilitate public participation in the legislative and other business of Parliament including affairs of Parliamentary committees.

Giving life to national values

Beyond legislation, the new dispensation allows Kenyans to commence activity aimed at amending the Constitution. Again, the doors have been widely opened and the onus is upon wananchi to take full advantage of these provisions in order to influence future legislation.

Article 10 creates a value framework whereby national values and principles of governance outlined in the article bind the state and all Kenyans. The national values and principles of governance include patriotism, the rule of law, integrity, transparency and accountability. They form the foundation of our nation and are the cornerstone for interpreting the Constitution, legislative reforms and policy formulation. It is therefore incumbent upon all Kenyans to hold fort to and breathe life to these values and principles in the way they conduct themselves and relate with each other.

A West African proverb counsels, “If you do not dance when the gods play the tom tom for you, then others will.” In other words, Kenyans have to take advantage of the opportunities presented. As manifest from above, the new Constitution provides varied ways that if fully exploited, will turn Kenyans from passive bystanders in public affairs and governance into active stakeholders and duty-bearers in this journey towards a new Kenya.

Bobby Mkangi
Advocate

www.betterworld.net/quotes/humanrights-quotes.htm
Ibid

Nguzo za Haki - January 2011 • Page 24
The concept of human rights

Human rights are a set of claims and entitlements to human dignity, which the existing international regime assumes will be provided (or threatened) by the state. A more cosmopolitan and open international system should free individuals to pursue their rights...’ Human rights as a philosophical concept refers to the reasonable demand for personal security as basic well-being that all individuals can make on the rest of humanity by virtue of being members of the species of homo sapiens.

They are, therefore, inherent and should be accorded to all members of the human race. However, this is not always the case. The concept of a democratic society presupposes a situation in which members of the society can give their contribution in the governance of the society that they currently live in. One of the proponents of the definition of the term ‘democracy’ states that ‘democracy requires that citizens enjoy their human rights in totality...’.

The reality on the ground is that there are human rights violations perpetrated on a daily basis and the victims are unable to either demand for their rights or claim compensation where they have been subject to violations occur. To protect human rights is to ensure that people receive some degree of decent, humane treatment. To violate the most basic human rights, on the other hand, is to deny individuals their fundamental moral entitlements. It is, in a sense, to treat them as if they are less than human and undeserving of respect and dignity.

Background

It is imperative that human rights be protected and defended in society. Dozens of human rights treaties are now operative within organizations such as the United Nations, the Council of Europe, and the African Union. Apart from organizations mandated with various aspects of protection and defence, there are individual persons who have taken it upon themselves, to champion the rights of these victims, to create awareness and advocate for their protection and to ensure that human rights gain precedence in the running of a democratic country. This has not always been the case in Kenya. There emancipation and realization of these rights has been a battle that has seen many a casualty and irreplaceable collateral damage. Kenya can be said to have undergone various stages of realization leading up to what we can describe now as a ‘human rights

Stanford Encyclopaedia of Philosophy ‘Human Rights’, first published Fri Feb 7, 2003; substantive revision Tue Aug 24, 20
The different categories of the awards are aimed at recognizing and motivating individuals and institutions that have made positive contributions to human rights. The Annual Human Rights and Democracy Awards aim to recognize and motivate individuals and institutions that have made positive contributions to human rights. There are nine categories of the Annual Human Rights and Democracy Awards, namely:

• Milele (Lifetime Achievement) Award: presented to an individual who has consistently over at least two decades, been dedicated to the pursuit of ensuring, protecting or promoting human rights.
• Firimbi (Whistle Blower) Award: presented to an individual who has exposed a grave or egregious human rights violation at great risk to themselves.
• Umma (Public Body) Award: to a public institution or public servant that/who has excelled in delivering or facilitating delivery of services to the public.
• Utumishi (Police Station/Officer) Award: presented to a police station or law enforcement officer that/who has facilitated or excelled in respecting, protecting and promoting human rights.
• Urekebishaji (Prisons) Award: presented to a correctional officer or correctional facility, including borstal institutions and other detention facilities, that has best protected the rights and welfare of its inmates, employees and the public interest.
• Utetezi, (Civil Society) Award: presented to a Civil Society Organization or individual working with a civil society organization that has best facilitated the protection and promotion of the human rights of individuals or communities in Kenya.
• Mashinani (Community based organization) Award: presented to a group or Community Based Organization that has best enabled protection and promotion of human rights of its beneficiaries.
• Habari (Print/Electronic Media) Award: presented to a journalist or media institution of integrity that has best enabled the protection and promotion of human rights.
• Biashara (Business) Award: presented to a business enterprise, including small or medium enterprises, which has demonstrated compliance with human rights principles in its internal and external dealings with stakeholders, including employees, consumers and the community.

With consideration being given to the new constitutional dispensation, it became fitting to recognize the efforts that were expended to ensure the re-birth that Kenyans so desperately needed. A
number of advocates for change lost their lives in the struggle for constitutional reform, while others were arrested, detained without trial, maimed in the infamous Nyayo house torture chambers or exiled. A number of organizations and institutions also made significant contributions to the constitution reform process. In recognition of the importance of the new constitution in democratization and promotion and protection of human rights, the Awards Committee of the Annual Human Rights and Democracy Awards created a special category award, the Katiba Award, to be issued in 2010 to reward three deserving individuals or institutions that relentlessly championed constitutional reform.

The awards ceremony was held on 11th December, 2010, three days after the International Human Rights Day, and a day before Jamhuri Day that marks Kenya’s independence from colonial rule. The recipients of the awards were:

- Hon Martin Joseph Shikuku – Former Butere MP, also known as ‘The People’s Watchman’
- Prof Yash Pal Ghai – Legal scholar and former chair of the Constitution of Kenya Review Commission
- Hon Abdikadir Mohamed – Mandera Central MP and former chair of the parliamentary committee on constitution review
- The Committee of Experts on Constitution Review. The Committee led by lawyer Nzamba Kitonga

President Kibaki and Prime Minister Raila Odinga got honorary mention for their role in steering the referendum campaign that led to the overwhelming vote for the new Constitution on August 4. The PM was also recognised for his “consistent and exceptional role in fighting for constitutional reforms at great personal cost,” leading to the promulgation of the Constitution on August 27. Lands minister James Orengo, a hero in the fight for a new constitution and who was present at the awards ceremony, received the awards on behalf of the Prime Minister. The Permanent Secretary in the Ministry of Justice, Ms Amina Mohamed, who was the chief guest, received the award on behalf of the President, while Mr Cyprian Nyamwamu of the National Convention Executive Council received the award on behalf of the Mandera Central MP.

Commending the award recipients, the chief guest paid tribute to the Katiba heroes and urged them to continue living the values for which they had been recognized. The sentiments were echoed by KNCHR chair, Ms Florence Simbiri-Jaoko, who warned that unless Kenyans embraced constitutionalism, the country risked mutilating the new Constitution just like the Lancaster House Constitution inherited from the British at independence.

“We must never let history play a sad sequel on this country. We must remain ever vigilant, ever watchful, and ever alert. Constitutional change would be a waste of time if we do not properly embrace constitutionalism, respect for human rights, good governance and the rule of law,” said Jaoko.

Conclusion

The initiative of the human rights awards is one that has been adopted around the world. It ensures that the advancement that is being made towards the cause that is human rights is encouraged, cultivated and nurtured. Its growth in prominence in the years past is indicative of the importance and need for it in society. The 23010 nominees and eventual recipients deserve recognition and appreciation for all their hard work and sacrifice. Our thanks and gratitude to them all!

Reviewed by Kurt Schillinger

All species regulate the individual at least to some extent through social organisation. There is the pecking order, the mating order and the distribution of labour. These rules assure, as Darwin observed, the ‘survival of the fittest’, but they also ensure the survival of the greatest sustainable number. The basis of such organisation is a compact. Subservience to the Queen Bee, say, or the Alpha Male, perpetuates not just the first individual but also the hive or pack. Man, being fundamentally a social creature, also creates rules for social order, but the same guarantees do not always apply. Human organisation seeks to regulate the individual within the context of the whole, but the relationship between ruler and ruled is often more parasitic than mutualistic. Dictatorship is rarely benign. Loyalty between corporation and employee is seldom reciprocal. The allocation of power in human affairs through force or acquiescence does not automatically result from or rest upon a compact of collective beneficitation. Neither is fitness a necessary criterion of ascension. A key difference between man and all lower species, of course, is the will. The ability to think rationally and sequentially nurtures and necessitates a desire for learning, and the accumulation of knowledge results naturally in scepticism. The basic compact of organisation is therefore troubled. Authority can be questioned, and the consent to be governed withheld. Over many millennia man has sought solutions to this problem. The Church imposed moral codes, often through draconian measures, to prevent an erosion of clerical supremacy. Monarchs clothed themselves in divinity. Slavery, castes, and class imposed relational control. In the modern equivalent, genetics asserts a new determinism, resulting in an advancing regulation of thought, action and causation through pharmaceuticals. Human history, however, can also be read as a gradual progression toward self-government.

In religion, we can cite the great Protestant Reformation and, in matters of state, the steady evolution of constitutionalism. The development of a rights’ consciousness located within the state is incomplete, but it has deep roots dating back at least as far as the early English experiments with local administration, taxation and representative government in the 13th century. The critical question of constitutionalism boils down to the nature of the social compact between the governing and the governed: what structures and principles will bind the interests of the elite to those of the masses? Put perhaps differently, by what constraints on power shall the governing be governed?

In early January 2008, Kenya erupted in the worst electoral violence in African history, resulting in the deaths of more than 1,000 people and the dislocation of more than 300,000 others. The low-level civil war, nominally ethnic in nature, principally between the Kikuyus of incumbent President Mwai Kibaki and the Luos of rival Raila Odinga marked a seemingly dramatic departure from the country’s experience five years earlier when voters peacefully displaced the 40-year reign of Kenya’s post-independence ruling party at the ballot box. Observers grasped at explanations. One pre-eminent retired Kenyan general asked, after the bloodletting stopped, ‘Why Kenya?’ His plaintive cry had more than a tinge of sadness and exasperation. As one of the four recognised ‘hub’ countries of Africa, Kenya has been arguably remains a point of stability in a turbulent region.

The Zimbabwean academic Martin Rupiya rightly observed that Kenya’s post-election crisis exposed a critical gap in Africa’s analytical capacity, particularly within the new security architecture of the African Union. But it cannot be argued that what happened in Kenya was unforeseeable. Indeed, if it was not inevitable, it was nonetheless predictable.

Rarely does a book enter the public domain with better timing than Makau Mutua’s incisive study Kenya’s Quest for Democracy: Taming Leviathan timing not just in the sense of a good news peg but more importantly in the convergence of issue, author and zeitgeist. At a time when Africans are for the first time in their modern history asserting control of their own collective security and development agenda, analysis of the continent’s many complex challenges must be rooted in the African perspective.

Mutua hails from the right generation: born in the receding shadow of colonialism, witness in his formative years to the squandered hopes of independence. That he is an African is therefore no more incidental than that he is a distinguished scholar educated in some of the world’s finest institutions of higher learning, Mutua...
cut his teeth fighting for human rights in Mobutu Sese Seko’s Zaire and took his place as chair of the Kenya Human Rights Commission just in time to play a key role in his own country’s successful campaign against one-party rule in 2002. Thoroughly versed in the canon of international law, he remains an authoritative advocate and undaunted critic in Kenya’s faltering pursuit of reformation.

Set within the theoretical terrain of the post-colony, the book is a stinging indictment of the post-independence African state. Mutua laments the generation of African leaders who, in his words, failed ‘to imagine a larger destiny’ and instead brought their countries to economic ruin. But he is equally critical of the external factors, including religion that shaped and perpetuate Africa’s deformity: ‘The post-colonial African state is an albatross, a yoke that the West has spun around the neck of Africa.’ He worries about the potential for globalisation to distort how African states are perceived today and impair* perhaps permanently* their prospects for development. The African post-colonial state, Mutua observes, is a cog that deceptively holds a place in the international state system but has little to show for it....Small, weak states like Kenya, which are ruled by elites that lack basic morality, have become easy pickings for a free market system gone amok.

Mutua therefore concludes that ‘[t]here can be no doubt that the post-colonial African state does not stand a chance without the radical revision of its raison d’e`tre.’

From lesser minds these would be justifiably dismissed as dog-eared diagnoses. For Mutua they combine to form a critical point of departure: if the post-colonial African state is to be salvaged, he argues, the elite must be brought to heel under viable, unassailable constitutional frameworks. But herein lies the rub. As Mutua observes: Although many a society has failed with a visionary elite, not a single nation has ever prospered without one, since the beginning of recorded history. The spiritual, ideological, and political rebirth of the African elites is the condition sine qua non for the recovery of the state. But the persistent problem is that elites, even where political democracy has been implanted, remain beholden to political myopia and moral bankruptcy. It seems virtually impossible to prevail upon elites to imagine a larger national interest.

Noting that ‘[t]he most progressive political actors have been drawn from the ranks of civil society,’ Mutua arrives at the prescription upon which the entire book is based: civil society must be the catalyst for inculcating a culture of constitutionalism that unites the elites and the masses through a set of ‘incontestable features’ to which both subscribe. There is no other way, Mutua argues, to cohere the people to the state.

To develop this argument, Mutua digs deeply into Kenya’s experience to examine Africa’s postcolonial trauma, the obstacles to constitutional reform, and the manufacturing of a liberal democratic consensus. He maps the various turning points since independence in 1963 when different political decisions might have led Kenya down a much brighter path.

He dissects the political manipulation of ethnicity and the external manipulation of economy in the destruction of the African postcolonial state.

Mutua cuts no corners and rejects simplistic solutions. He might have drawn more expansively from historical experience to show how other societies have resolved his central riddle of adhering elites to constitutional norms and constraints. His feet find firmer ground in law than economics. But his critique of the African postcolonial state is comprehensive, balanced and deeply informed by both scholarship and observation. He is angry, but never gratuitous, and in the end cautiously hopeful. His examination of Kenya provides critical analytical tools that will certainly come in handy elsewhere* not just in Zimbabwe, where Mugabe’s endgame is prologue to an equally daunting challenge of state reconstruction, but, more ominously, in South Africa, where an unopposed ruling party shows increasing discomfort and disregard for the institutions designed to constrain it.

Constitutionalism* constituting the state* is the process by which the collective insulates itself from the abuses and excesses of the individual. It enshrines principles and institutionalises checks and balances on power. Without it, democratisation is impossible.

The African post-colony, with all its pathologies, is Mutua’s Leviathan, but the unfinished* and unending* project of self-government implies also a more generic and pernicious foe: the baser impulses of human nature.

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10. Kenyan section of the International Commission of Jurists (ICJ), Nairobi April 2004,
20. Willy Mutunga (1999), Constitution Making from the Middle, (Sareat, Nairobi.)
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To enhance the protection and promotion of human rights in Kenya through strategic programming and partnerships

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The Commission will endeavour to realize the following objectives within the four year planning period.
1. Promote greater adherence to the rule of law and access to justice
2. Advocate for increased compliance and adherence to human rights principles and standards
3. Enhance the protection of human rights through investigations and redress
4. Promote human rights through public education

The Commission will achieve these through:
• Constitutional and legal reforms
• Human rights education
• Adoption of human rights standards by state and non state actors
• Redress for human rights violations