

THE KENYA NATIONAL DIALOGUE AND
RECONCILIATION

BUILDING A PROGRESSIVE KENYA

OUR COMMON VISION
VIEWS OF STAKEHOLDERS

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FOREWORD

Dialogue with diverse stakeholder groups was a hallmark of the mediation process and was used by the AU Panel of Eminent African Personalities to ensure that a wide cross-section of views and perspectives was represented in the negotiations that led to the signing of the National Accord and agreement on Agenda Item 4.

As a result, the whole process of the Kenya National Dialogue and Reconciliation (KNDR) was owned, not only by the signatories, but also by the people of Kenya as a whole.

By bringing people together around one table, the Panel made sure that the diverse interests and approaches of disparate organizations coalesced around the implementation of the objectives and goals of the KNDR process. A chorus of different voices soon became a united front, advocating a common message of peace and unity.

The Panel has maintained its collaborative partnership with stakeholder groups since the end of the mediation and, once again, has invited them to participate in the “Kenya National Dialogue and Reconciliation: Building a Progressive Kenya” conference, to take place in Nairobi on 5 – 6 December, 2011.

I am greatly encouraged that many of those participating in the conference have submitted contributions to this volume on their respective visions of building a progressive Kenya. I know that their ideas will shape the discussions we have and will be referenced long after the conference has concluded.

The engagement and participation of all Kenyans in determining the future of their country will go a long way to building a stable, secure and prosperous country.

Kofi A. Annan

CHAPTER ONE

THE KENYA NATIONAL DIALOGUE AND RECONCILIATION

BUILDING A PROGRESSIVE KENYA

*Office of the Deputy Prime Minister and Ministry of Local
Government and The Ministry of Justice, National Cohesion and
Constitutional Affairs*

CONSTITUTIONAL, INSTITUTIONAL AND LEGAL REFORM

The Constitutional reform symbolised by the promulgation of the Constitution of Kenya in August, 2010 is a milestone towards fulfilling the conditions and instruments of the National Accord of February 2008. The reform process under the Kenya National Dialogue and Reconciliation (KNDR) has been Kenya's journey towards taking necessary measures to address the long standing issues of poor governance with the goal of fostering democratic governance. The Constitution of Kenya was enacted after over twenty years of agitation and resistance, and against the backdrop of the unfortunate events of the 2008 post-election violence (PEV).

This dark moment in our country's history was the prompter for fundamental reforms. In itself, the new Constitution epitomises renewed optimism and confidence in the people of Kenya, as they embark on restructuring their governance structures. This optimism is reflected in the commitment of the institutions charged with the implementation of the Constitution who have taken no hostages in ensuring that even what appears as punitive deadlines have been met. At issue are, however, the quality and therefore the efficacy of some legislation pushed through under immense pressure of constitutional deadlines.

FUNDAMENTAL PILLARS OF CONSTITUTIONAL IMPLEMENTATION

National Values

The national values and principles of governance represent the standard upon which enactment, interpretation and implementation of laws and public policy decisions is measured. The basic norms are set out under Article 10 of the Constitution and all persons have an obligation under the Constitution to respect and promote national values and principles.

Devolved System of Government

A key principle that all implementation must factor in is the system of devolution, without which the intended transformative aspirations will be faulted. The Constitution provides for two levels of government with assigned functions and resources at which the people will exercise their sovereign power. The dimensions and forms in the devolved systems and structures of government are founded on the concept of decentralization and devolution of power. Consequently, Article 10(2) (a) of the Constitution identifies devolution and sharing of power as values and principles that guide our governance system. The objects of devolution spelt out at Article 174 buttress this by invoking the promotion of democratic and accountable exercise of power; fostering national unity by promoting diversity; and

giving powers of self-governance to the people. There are clear provisions on citizen participation, and resource sharing and management. The levels of government are coordinative, but not subordinate to each other. The levels are hence distinct in their constitutional functions, institutions, resources and legal frameworks. None is a mere agent of the other and neither can be abolished by the other. Distinctness in this sense rules out the concept of hierarchy as a relational principle.

Devolution, is therefore, the fulcrum upon which the use and distribution of state power is based and provides a future power map for the progressive construction of the society and the running of the affairs of State. Ensuring setting out of clear rules for allocation of resources are, therefore, prerequisites that will ensure discharge of functions. It is important that the operational principle of resources must follow responsibility remains in focus throughout implementation.

Bill of Rights

The Bill of Rights is a key element of the normative foundation which underpins Kenya's constitutional framework. The Constitution provides that "the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies." The Bill of Rights further applies to all law and binds all state organs and all persons. The Bill of Rights in the Constitution of Kenya is celebrated as highly comprehensive and among the most progressive.

Legal and Institutional Reform: Status of Constitutional Implementation

Judicial Reforms

A key plank in the reform process has been the need to restore integrity and faith in the Judiciary. The Constitution safeguards the independence and integrity of the Judiciary. It declares principles upon which judicial power shall be exercised, establishes a strong Judicial Service Commission (JSC) and provides for a transparent manner for appointment of judges. The Constitution also established the Supreme Court to hear and determine disputes relating to the election of the President; and to hear and to determine appeals.

A number of legislations have been enacted to bolster judicial reforms and implement the constitutional provisions on the Judiciary. These are: The Supreme Court Act, 2011; the Judicial Service Act, 2011 and the Vetting of Judges and Magistrates Act, 2011, the Act, 2011; Industrial Court Act, 2011; Land and Environment Court Act, 2011.

The members of the Judicial Service Commission were appointed to spearhead judicial reforms. Similarly, the recruitment process of the Chief Justice, the Deputy

Chief Justice and other judges of the Supreme Court were conducted through a competitive, transparent and public process that guaranteed compliance with the provisions of Chapter 6 of the Constitution on leadership and integrity. In addition, the existing vacancies of the judges of the High Court were filled through an open and competitive process. This demonstrates the concrete gains reaped from the effective implementation of the Constitution and it contributes to strengthening of the Judiciary to ensure that it is credible, independent and effective in administering justice.

Devolution

Devolution is one of the single most transformative elements of the new Kenyan Constitution. It provides for structural division of governmental power to the national and county governments within a framework of interdependence and cooperation. It targets self-governance at the local level. Under Art 6(2) of the Constitution, “the governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultations and cooperation.” Chapter Eleven establishes the devolved structures and the Fourth Schedule outlines the respective competence of the national and county governments. Operationalisation of the devolved system requires clarity in terms of policy, sound legal framework and capacity in the counties.

The Office of the Deputy Prime Minister and Ministry for Local Government established a multi-sectoral and multi-disciplinary Task Force on Devolved Government (TFDG) to consider and advise on policy, legislative and institutional reforms required to operationalise the devolved system in October 2010. The Task Force published its final report in September 2011. The report outlines measures to operationalise the devolved system as envisaged under the new Constitution, and a Draft Sessional Paper to guide implementation of the Constitution. Remarkably, the Task Force also drafted six bills; the Devolved (County) Governments Bill, 2011; the Financial Management Bill, 2011; the Intergovernmental Fiscal Relations Bill, 2011; the Intergovernmental Relations Bill, 2011; the Transition to Devolved Government Bill, 2011 and the Urban Areas and Cities Bill, 2011. Parliament has enacted the Urban Areas and Cities Act, 2011 and the Contingency Fund and County Emergencies Act, 2011. The (Devolved) County Government Bill, 2011 and the Transition to Devolved Government Bill, 2011 have been processed by the Commission on the Implementation of the Constitution (CIC) and await presentation to Parliament for enactment.

Electoral Reforms

The Constitution consolidates incremental reforms initiated by the recommendations of the Independent Review Commission (IREC) and introduces

further fundamental reforms. The tenure of the Interim Independent Boundaries Commission (IIBRC) and the Interim Independent Electoral Commission (IIEC) lapsed on 27th November, 2010 and 14th November, 2011, respectively. Prior to the lapse of its tenure, the IIBRC had submitted its report to Parliament, which forms part of reference materials for the Independent Electoral and Boundaries Commission. The Independent Electoral and Boundaries Commission Act, 2011 which facilitates the establishment of the Independent Electoral and Boundaries Commission (IEBC) has been enacted. Members to this Commission have taken their oath of office and have commenced their functions. In accordance with Article 88 of the Constitution, the IEBC shall succeed the Interim Independent Electoral Commission and shall undertake the consolidated electoral and boundaries functions. The Political Parties Act, 2011 which provides for the registration, regulation, and funding of political parties and the Election Act, 2011 which provide for the conduct and procedure of elections to the office of the President, the National Assembly, the Senate, Governor and County Assemblies among others have already been enacted.

Enactment of the Campaign Financing Bill will be central to the election process as it will regulate the funding of election campaigns and provide for the control and management of funds used during the campaign period. The Bill has been developed and it is expected that it will be enacted by 26th December, 2011.

Bill of Rights

The government has enacted the Kenya National Human Rights Commission Act, 2011; the Gender and Equality Commission Act, 2011; and the Commission on Administrative Justice Act, 2011. The legislations provide the framework for the protection of human rights under the Constitution. Both the Kenya National Human Rights Commission and the Commission on Administrative Justice have been established and are operational. Furthermore, the Courts have an express obligation under the Constitution to promote and protect the Bill of Rights.

Security Sector Reforms

The Constitution provides a framework for major security sector reforms that reflect the recommendations of the Commission of Inquiry into the Post-Election Violence (CIPEV) and the Task Force on Police Reforms. The Ministry of State for Internal Security constituted the Police Reform Implementation Oversight Committee to oversee implementation of police reforms. Parliament has enacted the National Police Service Commission Act, 2011; the Police Oversight Authority Act, 2011 and the National Police Service Act, 2011. Ministry of State for Provincial Administration and Internal Security has also developed the Private Security Companies Bill, the National Intelligence Service Draft Bill and the National Coroners Bill which are being considered by stakeholders. These legislative measures are complemented

by institutional and administrative reforms regarding recruitment, training and vetting; terms of service and accountability mechanisms within the service.

Public Finance

The Constitution recasts the framework of public financial management based on principles of prudence, decentralisation and equity, maintenance of national fiscal stability and accountability. The Constitution reinforces Parliamentary authority in approval of the national budget and subjects the Executive to institutional checks through the empowered offices of the Controller of Budget and Auditor General. These offices have been filled competitively.

The Treasury and the Ministry of Local Government are facilitating the development of a harmonised Public Finance Management Bill, 2011 which makes provisions for financial management, control, reporting and accountability. The Independent Offices Act has been enacted to provide for the procedure for identification and recommendation for appointment of holders of independent offices. The Commission on Revenue Allocation Act, 2011 which makes provision for the functions and powers of the Commission on Revenue Allocation was enacted. The Commission which has been operationalized will facilitate the principles of equity and devolution in revenue allocation.

Land Reforms

The Kenya National Dialogue and Reconciliation process identified land as one of the factors responsible for recurrent conflict in Kenya. The Constitution entrenches and builds on significant aspects of the Land Policy. According to the Land Policy “the land question has manifested itself in many ways including fragmentation, breakdown in administration, disparities in land ownership and poverty. This has resulted in environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict.” The land and environment chapter is, therefore, of fundamental significance in the realisation of the objectives of the Constitution. The Chapter fundamentally reforms the land management system, enhances accountability through shared competence between national and devolved government, establishes the National Land Commission and forms a basis for further legislative reforms.

The Ministry of Lands has facilitated the development of the National Land Commission Bill, the Land Bill and the Land Registration Bill. These Bills are being processed by the Attorney General, the Commission for the Implementation of the Constitution and the Kenya Law Reform Commission. The legislations will

help facilitate effective development mechanisms on land use, administration and management.

The Legislature

Parliament (Senate and National Assembly) and County Assemblies are among the organs of state established under Article 1(3). The Constitution establishes a bicameral Parliament. The Senate and National Assembly shall perform their respective function in accordance with the Constitution. The National Assembly has the primary legislative and oversight functions; while Senate serves primarily to deliberate amendments to the Constitution, resource allocation and to protect the interests of counties and their governments. The Senate also has oversight functions of state officers by considering and determining any resolution to remove the President or Deputy President and County Governor. The Taskforce on Devolution proposed various mechanisms for regulating the two levels of government through a legislative framework where the Senate takes a primary role.

Executive

The executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution. This executive authority shall be exercised at both the national and county levels of government since such power resides in the people as sovereign. The national executive comprises the President, the Deputy President and the rest of the Cabinet. The Cabinet is expected to be leaner and accountable. The executive is modelled on the presidential system. The Cabinet members are accountable individually and collectively to the President. However, the Constitution supplements the accountability to the President by requiring every Cabinet Secretary to submit reports to Parliament concerning matters under their control.

The same structure is replicated at the County Government level where the Governor exercises executive authority together with the County Executive Committee with checks and balances exercised by the County Assembly of elected representatives.

The provisions regarding the organisation of executive and the legislature shall largely be implemented after the 2012 General Elections.

Leadership and Integrity

The Constitution fundamentally transforms the nature of public service and provides a framework for accountability mechanisms. Leadership authority reposed on state and public officials is based on public trust and may only be exercised in a manner that respects the Constitution, respect of the people, brings honour to the nation and dignity to the office, and promotes public confidence in the integrity of

the office. These objectives are reinforced through the principles of leadership and integrity. The Ethics and Anti-Corruption Commission Act has been enacted and the Commission is in the process of being established.

Public Sector

The public service under the Constitution shall be governed by values and principles that shall transform it into an efficient, effective, and responsive vehicle of service delivery. The Constitution establishes the Public Service Commission that shall promote the values and principles of Article 10 and 232 and undertake the human resource function of the national government. The commission shall hear appeals with respect to the county public service. The Public Service Commission and the Ministry of State for Public Service have developed the draft Public Service Commission Bill. The Office of the Prime Minister and the Ministry of State for Public Service are leading the efforts of public service transformation.

Consolidation of National Cohesion and Unity

The National Cohesion and Integration Commission (NCIC) was established as a dedicated institution that seeks to address issues of national cohesion and integration by eliminating ethnic discrimination and hate speech and promoting harmonious relations between ethnic communities. The Commission works with various communities and stakeholders and it has made considerable success in preventing hate speech by identifying hate mongers and recommending their prosecution during campaigns.

Further, the department of national cohesion in the Ministry of Justice, National Cohesion and Constitutional Affairs has developed a training manual for national cohesion and integration to facilitate training and sensitization forums and to help coordinate the work of stakeholders involved in national cohesion. The department and the NCIC are in the process of finalising the policy of National Cohesion and Integration.

The Minister for Justice, National Cohesion and Constitutional Affairs on 15th March, 2011 appointed the Steering Committee and Task Force on National Values Policy and Legislation. The Task Force submitted the draft policy on national values, the draft legislation on national values and a report of their activities. The Ministry is taking necessary measures to commence the enactment of the legislation.

To address historical injustices and to promote healing and reconciliation, the Truth, Justice and Reconciliation Commission Act, 2008 was established to create a commission that would establish an accurate, complete and historical record of violations and abuses of human rights and economic rights on persons by non state actors, the state, public institutions and holders of public office both serving and

retired between 12th December 1963 and 28th February 2008.

The TJRC is also mandated with the responsibility of investigating the causes and circumstances, under which violations and abuses occurred, identify the victims of the violations, investigate economic crimes, educate and engage the public and give sufficient publicity to its work. The TJRC's term has been extended for one year to facilitate the Commission to complete its work.

KEY SUCCESS DRIVERS FOR CONSTITUTIONAL CHANGE

Coordination: The Constitution establishes a framework of coordination between the Committee on the Implementation of the Constitution (CIC), Attorney General and KLRC in development of legislation for tabling in Parliament. The CIC in consultation with Constitutional Implementation Oversight Committee (CIOC), the office of the Cabinet Secretary, Kenya Law Reform Commission, and the Attorney General, published a matrix outlining the timeframes for undertaking key tasks to facilitate development and timely enactment of priority legislation.

The Constitution establishes the CIOC as the focal oversight committee in parliament. CIC makes quarterly reports on the progress and impediments of implementation to the CIOC to ensure that implementation remains on track. These coordination frameworks should be structured, sustained and enhanced.

Policy, legislative and Institutional coherence: Successful implementation will impinge on necessary policy, legislative and institutional intervention. Several policies, legislations and institutions are provided under the constitution and measures which further the objectives and the principles of the Constitution in legislative development are encouraged. The quality of the strong and accountable institutions should not be compromised by merely formally meeting implementation requirements.

Civic Education and Public Participation: The Constitution's normative foundation safeguards the sovereignty of the people and provides for national values including democracy and participation of the people. The constitution also provides for referendum in respect to amendments to specified provisions. The constitution therefore requires genuine informed and active public participation.

Timely legislative enactment: Parliament is critical to implementation. As a framework law, the Constitution requires to be operationalised through statutory enactments. The Kenyan Parliament has immense capacity, through progressive standing orders reviewed in 2008-09, effective committee system and technical capacity in the secretariat. However, implementation demands more. For Parliament to effectively discharge its historical mandate, it is important to seize the opportunity to transform Kenya. In 2008 and 2011, Parliament showed great

determination when it provided legitimacy for the Grand Coalition Government, insulated the constitutional reform process and enacted necessary legislation required to implement the Constitution within one year. Such leadership and momentum will be required in the continued implementation process.

Appreciation of “political risk”: The implementation of the Constitution should be insulated from political interest particularly as we approach the 2012 General Elections.

Acceptance of Change: The Constitution is revolutionary. Individual or institutional resistance to the change whether based on lack of understanding or schemes to circumvent, undermine or sabotage reform should not be allowed to compromise implementation process.

CHAPTER TWO

BUILDING A PROGRESSIVE KENYA THE JUDICIARY TRANSFORMATION AGENDA WITHIN THE CONTEXT OF THE NEW CONSTITUTION

Hon. Dr. Willy Mutunga, SC

Chief Justice/President of Supreme Court

Republic of Kenya

The Judiciary is a critical pillar in the transformation of societies. There are no known functional democracies that have dysfunctional judicial systems. The rule of law is eminently cardinal to the realization of a just society, stable politics, and productive economy. Indeed, the historical failures of Kenya's transition to democracy have also been as a result of an enfeebled, inefficient and corrupt judiciary. The Judiciary has operated in extremely difficult circumstances, even though it has also not made its conditions any better by the choices it has sometimes made in the past. The confidence and credibility deficit of the Judiciary played a big part in the unfortunate events of 2007/08. This is why the new Constitution and the new leadership offer a new opportunity for the country. We are conscious of the expectations that Kenyans rightly have of the Judiciary, but it is important to mention that, absent counterpart initiative on the part of the Kenyan citizenry, the transformation agenda of the Judiciary will 'come a cropper.' I released a progress report to mark our 120 days in office, and below are part of the reflections I shared with the Kenyan public.

The Judiciary was set up in a manner that suggests that it was designed to fail. The institutional structure was such that the Office of the Chief Justice operated as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralised. Accountability mechanisms were weak and reporting requirements absent. The promulgation of the new constitution has radically altered this ugly structure. We now have a decentralised Judiciary with the Supreme Court and the Court of Appeal having their own Presidents and the High Court having a Principal Judge at their respective helms.

This was the state of affairs in the judiciary prior to the promulgation of the new Constitution. The Judiciary was an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.

As a country, we now stand on a constitutional frontier from which we expect to put tyranny, oppression and exploitation, opacity and impunity on the back-foot, while making strides towards freedom, opportunity, transparency and liberty.

We must not take this dispersal of power for granted, for the intoxicating nature of power can be true of the Judiciary as it is of the Executive. The existence of courts alone provides no guarantee of justice. Rather, it is the values and quality of the citizens who lead it; the aspirations and design of the Constitution that create it; and the vigilance and civic consciousness of the citizens who continuously demand better. In sad moments in our history, courts have failed to uphold the rule of law and to defend the rights of the citizens.

The new team at the helm of the Judiciary brings with it the necessary political will to implement reforms that many had long identified. Some of these include

excessive bureaucracy and silo mentality among organisational units and the court system; backlog of cases; endemic corruption; inefficient and ineffective case flow management; poor terms and conditions of service for judicial and administrative staff; poor infrastructure; absence of a clear transfer policy; understaffing; artificial workloads occasioned by unfilled approved vacant positions; remuneration imbalances due to haphazard salary grading and compensation structures where, for example, magistrates are poorly remunerated relative to other court officers; weak institutional and staff performance management systems; blatant disregard for performance and financial audits; fragmented reform interventions; and inadequate implementation capacity of recommended institutional reforms by the various task forces.

This is why Kenyans fought for a new Constitution. It is the reason we are reforming the Judiciary. It is the reason we must succeed in creating an institution of justice that can secure our democracy and fulfil its rich promise.

The vision of the revamped Judiciary, as we move forward, is to transform the Judiciary to ensure equitable access to, and efficient and effective delivery of justice. In leading this transformation agenda, the Judiciary will be guided by the constitutional principle that the citizens are the source of judicial authority. Those of us to whom this authority is delegated must exercise it only in their interest and for their benefit.

In order to strengthen this collective and accountable use of the power envisaged in our constitutional architecture, the Judiciary has taken additional administrative decisions to give effect to the intentions of the Constitution. We have set up a Leadership Committee which will act as a management team for the entire Judiciary. Its composition from the Chief Justice as Chair, Deputy Chief Justice, President of Court of Appeal, Principal Judge of the High Court, as well as representatives from the magistracy and the paralegal fraternity permits all the voices of the Judiciary to be heard in the management of this important institution. The operationalisation of this committee will take effect once the vetting process is completed, new judges are on board, and elections held for each level of representation.

What is new is that we have the collective will of the Kenyan people, and the leadership in the judiciary to implement these reforms. The voice of the Kenyan people is unceasing and unequivocal in its invocation to the Judiciary to clean up. This call is driven by the recognition that the transformation of the Judiciary constitutes the next most important stage in our democratic transition -- a recognition that a Judiciary that upholds the rule of law, dispenses justice fairly and efficiently, validates and protects rights is not just good for our stability but also our economy.

One of the key organs in the Judiciary tasked with revamping its organs and

structures is the Judicial Service Commission (JSC). The JSC is a realistic organ of recruitment, discipline, and oversight over the Judiciary as mandated by the Constitution and the relevant statute. Through its committees, it will make sure that the administrative arm of the Judiciary serves the judicial one while creating governance structures that modernize, democratize and decentralize the Judiciary. The JSC will make sure that the new structure of the Judiciary is harmonized and synthesized through proper management by decentralized leadership.

The JSC has the will to implement all reforms that the Judiciary has recommended in the past. It will also protect the Judiciary, agitate for better terms for the Judiciary, and ensure the security of every judicial officer and paralegal. The JSC will play its pivotal role in ensuring the decisional and institutional independence of the Judiciary is guaranteed and it will conduct a consistent and continuous dialogue with judicial officers and paralegals.

Another key office in reforming the Judiciary is the Office of the Chief Justice (OCJ). This office has embarked on a number of measures to align the Judiciary with the development of a progressive Kenya. In order to address the issue of corruption, the OCJ has undertaken two key measures: one, it has appointed an Ombudsperson to receive and respond to complaints by staff and the public. The public should make use of this office which will be strengthened so that it can effectively serve the public.

Two, in collaboration with the JSC, the OCJ has released a Code of Ethics and Conduct for Judicial Officers, and established a standing committee to handle enforcement and discipline.

Three, in realization of the fact that corruption in the Judiciary will not be eliminated if we do not change the environment that incentivises it, the JSC has reviewed the terms and conditions of judicial officers and its proposals are awaiting the approval of the Salaries and Remuneration Commission.

Four, the JSC has approved the creation of additional posts in the magistracy and Kadhis establishment and now has before it a recommendation from the OCJ to immediately promote 278 magistrates and 12 Kadhis. We have assented to the formation of an association to represent the interests of paralegal staff, and hope to have structured engagement with them. The Judiciary must be a place where the dignity of workers is respected and upheld. It is a place that must care for the welfare of its staff to take away any excuse to convert public goods and services into private gain.

Five, the Judiciary has embarked and completed the digitizing of cases to redress the huge backlogs. Quite a number of measures have also been operationalised to ensure that this backlog is cleared within the next six months: Chief Magistrates

have been redeployed to clear backlog of cases in civil, criminal and commercial appeals courts; a major recruitment drive is underway to hire more staff, more specifically, judges of the High Court and Court of Appeal. The Judiciary intends to reduce the waiting period for appeal cases from the current average of six years to less than a year.

Six, the OCJ and the ICT department are in the process of creating an electronic-based system for monitoring and tracking overdue judgments and rulings with a view to taking remedial action. It is the policy of the Judiciary that once proceedings begin, cases will be heard back-to-back on a first filed, first heard basis. We are also embarking on a major computerisation of the Judiciary that will ensure that proceedings are recorded electronically. As part of this programme, the Supreme Court will be established as a paperless Court. It is our intention to establish a modern e-library that can serve the interest of justice. Judges of the High Court and the Court of Appeal shall, henceforth, be empanelled automatically using computer software that removes the human hand from the choice of those who hear cases. In future, case lists will not contain the name of the judge, to shield judges from undue influence or being hunted down by litigants.

Seven, the OCJ is instituting performance contracting in the Judiciary. Performance based management will be applied to both judicial and administrative staff. A fully fledged directorate of performance management is to be established and an advertisement has already gone out for the recruitment of its head.

Eight, the OCJ intends to strictly enforce deadlines on writing of judgments and the hearing of cases. In the days to come, we intend to review the rules on deadlines with a view to further shortening this period as more staff joins the Judiciary. The hiring of 129 researchers, whose positions have only recently been advertised, will ensure that each and every judge has a research assistant. We shall spare no effort or resource to ensure that judicial officers deliver quality justice in an efficient and timely manner.

Nine, in order to promote sound management practices, we have also established the Judiciary Transformation Steering Committee chaired by the Deputy Chief Justice and where all stakeholders in the judicial system are represented. The Steering Committee, under the strong and able leadership of the Deputy Chief Justice has developed an Integrated Comprehensive and Institutional Transformation Framework. They have already developed the Judicial Transformation Comprehensive Strategic Plan.

Further measures are already being implemented to strengthen the OCJ. Under the new Constitution, the canvas of responsibility for the OCJ has expanded considerably judicially, administratively and in terms of policy making. The Chief

Justice is a judge of the Supreme Court, and is expected to sit in court, hear cases and write judgements. He is also the president of that Court, which bestows managerial responsibilities. He is the head of the entire Judiciary, which has enormous administrative implications. He is the Chair of the JSC and the National Council for Administration of Justice. He also plays ceremonial duties and functions such as swearing in of Constitutional office holders and advocates. To deliver on this broad mandate the office needs executive competence. In line with the new responsibilities, the OCJ has appointed a Chief of Staff to oversee the establishment of the Executive Office of the Chief Justice. Both the President of the Court of Appeal and the Principal Judge will also have to establish nimble but efficient executive offices to be able to perform their functions. We must modernise our Judiciary informed by known models and practices of 21st century management science.

The reform of the administrative limb of the Judiciary is one that rarely receives sufficient public attention. The work that judicial officers do is determined to a large extent by the quality and efficiency of the support system that they have. However, this part of our human resource needs immediate attention. We have launched an accelerated professionalization programme of the administrative staff of the Judiciary. We have advertised for six positions of Directors for Finance, ICT, Procurement, Administration and Chief Accounts Controller and five Registrars, each to serve the Supreme Court, the Court of Appeal, the High Court, the subordinate courts and the Judicial Service Commission.

As part of efforts to reorganise the Judiciary and to optimise efficiency, the Supreme Court is now operational following the establishment of its registry and publication of its interim rules of procedure. It has held its first sittings and made its first full Bench ruling. Its courtroom is being restructured to make it modern with a view to launching it before the end of January. The Court of Appeal is to be decentralised to Garissa, Nyeri, Eldoret, Kisumu and Mombasa. The construction of some of these Courts is at an advanced stage.

The OCJ has reorganised and reconstituted the divisions of the High Court in an attempt to honour and respect the spirit of the Constitution and the popular aspirations of our people as expressed through their sovereign will in the referendum. There are now divisions for Land and Environment, Judicial Review, Commercial and Admiralty, and Constitution and Human Rights. The Commercial and Admiralty division will accelerate the adjudication of commercial disputes and reduce the transaction costs of justice for the private sector.

The Constitution and Human Rights division will be the court of first instance in constitutional cases; and will play a leading role in addressing the many issues around the interpretation and enforcement of our expanded Bill of Rights. The Land and Environment division will deal with the critical issues of sustainable

development and equitable distribution of resources. We intend to reinforce these divisions as the Judiciary recruits more staff.

The main thrust of the new Constitution is to build a progressive new Kenya. Article 165 of the Constitution gives the High Court a critical jurisdiction that makes it the most important court in the country in the implementation of the new constitution. It is envisaged that we will have a High Court in every country and that will make the role of the Principal Judge very pivotal in leading a team of over 100 judges who will hold him/her accountable on many issues. In pursuing this important objective of bringing justice closer to the people, we are establishing fourteen new courts in places where the Judiciary has never before had a footprint. Additionally, eight mobile courts have been set up and thirty-eight new vehicles released to serve court stations in historically marginalised areas.

The Judiciary wholeheartedly embraces the culture of continuous learning, vigorous debate and peer review. Until now, there has been no organised training for judicial officers. A curriculum is under development for the Judicial Training Institute and a full time Director has been appointed. In Justice Paul Kariuki, the Judicial Training Institute has a well respected and innovative Director. The Judicial Training Institute will provide the intellectual anchor in making our courts the home and hearth of a robust jurisprudence. It is pivotal to a successful Judiciary. It was never facilitated to meet the training needs of the courts. Going forward, the Institute will have its own conference and residential facilities and staff as it moves towards awarding degrees. The Judicial Training Institute must become our judicial think tank, an institute of excellence, the nerve centre of robust and rich intellectual exchange, where the interface between the Judiciary and contemporary developments in society occurs. We foresee the institute hosting conferences on critical issues, attended by judges, magistrates, and paralegals where our collective intelligence can be harnessed for the benefit of the country.

An important component of the reform of the Judiciary is the vetting of judges and magistrates as called for in the Constitution, and further provided for in the Vetting of Judges and Magistrates Act. Given the enormity of public interest in this matter, and its direct bearing on the confidence of judicial officers, the Office of the Chief Justice has directed that the constitutional case filed on this matter be fast-tracked and a quick and fair determination made on it. A ruling on this matter is expected in November. When it does take place, the position of the Chief Justice and the JSC is that it should not be on the basis of a witch hunt but must be fair and transparent and concluded in the most reasonable time possible. Should this process not be concluded within a reasonable time, the case backlog will become a Sisyphean boulder we keep pushing uphill only for it to roll back. We also urge the Executive to expedite the process of appointment of foreign members to the Vetting Board and do so in a consultative manner.

In conclusion, it should be pointed out that the Judiciary will not change until those who serve in it and the public change their attitude and behaviour. When we say that judicial authority is derived from the people the implication is that the people should be law abiding make use of other for a of justice such as family, churches and mosques and other alternative dispute resolution mechanisms because court actions are, in their very nature, adversarial. Kenyans must see themselves as the change they wish to see in the Judiciary.

For this country to prosper, and for its democracy to flourish and, individuals and institutions must embrace and uphold the rule of law. The Judiciary will play its part and shall not use its independence to transgress the constitutional domain of the other branches of government. We shall uphold and respect the legislative power to enact just laws, and acknowledge the executive arm's power of governance, subject only to the legal structures. But we shall retain our power of review of those actions and decisions while defending our independence and the Constitution. Failure to observe and respect the constitutional design of separation of powers will not only imperil our nascent democracy but also be an unforgivable assault on the sacrifices and aspirations of the people of Kenya.

This is the judicial transformation journey that Judiciary has embark embarked on. It is the hope of the Office of the Chief Justice that through this we have brought a future to the present. Please walk with us.

CHAPTER THREE

BUILDING A PROGRESSIVE KENYA BY THE SPEAKER OF THE KENYA NATIONAL ASSEMBLY

*Hon. Kenneth Marende, EGH, ACI Arb, MP, Speaker of the Kenya
National Assembly*

INTRODUCTION: BUILDING A PROGRESSIVE KENYA

*“Our children may learn about the heroes of the past.
Our task is to make ourselves the architects of the future”*

Jomo Kenyatta, first president of Kenya, from an address given on Kenyatta Day, as quoted in Anita King’s Quotations in Black, Greenwood Press 1981.

The above quotation aptly captures my conviction about the role of all the people of Kenya, more so, those in positions of leadership who are anticipated to offer strategic leadership and shape policy that would result to a progressive Nation.

To build a progressive Kenya, focus ought to be placed in the evolving social, political and economic system, based on the principle of self-determination. Kenya has determined its vision and goals and documented those in her blue print document referred to as “**Vision 2030**”. To achieve this, the majority of the population must be brought on board to understand the objectives and participate in the journey; everyone must be given due regard so as to ensure that they have a sense of their own worth and be contented with their role. Kenya has done this in the constitution making process that included a countrywide referendum. As such, within each nation, the individual citizen must be given the right to self actualization and among nations; there must be equal concern for the welfare of all Countries. Ultimately, a combination of new ideologies, multi-party democracy, use of new technology, a new value system, practices, theories and beliefs are desirable and accords with the principles of democracy and foundations of a strong Nation.

We live in a dynamic world and Kenya is a case in point of a country beholden with change, and yet the desire for inertia and the maintenance of the status quo, is no less real. The achievement of justice, respect for the rule of law, harmony, prosperity and peace depends on many factors. I realize the enormity of the task before us, but I see no other alternative than the one we should opt for have as a starting point our love for Kenya and concern for the welfare of the mutual and long-term interest of the Kenya citizens.

By the design of God, whoever we perceive him to be, the destiny of the People of Kenya is found within its boundaries. Following the promulgation of the Constitution of Kenya 2010 on 27th August 2010, a daunting task that has spanned upwards 20 years, a time has come when Kenya must redeem her pledge as contained in the Kenya National Anthem at the first Stanza , that

“...may we dwell in Unity Peace and Liberty, Plenty be found within our borders”...

Indeed with the new constitution, Kenya has awoken to opportunities for freedom and prosperity. We are presented with a time to end the old undesirable course

of a Nation and chart new territories, new ground; now, the Soul of Kenya, long suppressed, has found expression.

The only question we have to determine is whether we are courageous enough to grasp this opportunity to create a prosperous country?

The Kenyan legislature, made up of legitimate representatives of the People, ought to be at the forefront of bringing freedom and economy to Kenyans. Indeed the 10th Parliament has burnt the midnight oil to midwife a new constitution and sift, screen, revise, refine and rewrite implementing bills despite many inherent partisan challenges. The August House has publicly vetted state officers for appointment to office in collaboration with the other arms of government to lay a foundation for a new governance system. The principles of good governance do not in themselves translate into positive acts, thus we have the responsibility to identify and elect leaders whose morals, commitment, performance and leadership skills and abilities will enable us as a Nation to stand out as a beacon of hope and development. This power of election is with all of the people of Kenya, to be exercised cautiously and judiciously; failure to which we risk turning our country into a sore thumb of missed opportunities and despair.

For a while I have pondered over the evolution of Kenya to a participatory, transparent, and accountable self- Government, but last week as I spoke to youth in my village at a development forum and, being inspired by their energy and hope for a better life in Kenya, I see pillars of nation building for Kenya as below;

PILLARS OF NATION BUILDING

Human resources

The people of Kenya will determine its destiny and the Government ought to invest in them. Kenya is reputed to have a deep pool of educated and skilled manpower, one of the greatest in Africa. Because education is essential we need to develop an education system that provides every citizen with educational opportunities appropriate to their individual needs, aspirations and abilities. This will promote and enhance productivity to the whole society through continuous learning and publicity campaigns.

To industrialize, emphasis must be placed in science and technology subjects, similarly, sports and other extra-curricular activities are to be encouraged at all levels of education. This way youth may have more opportunities for self-sufficiency and thereby reducing incidences of petty crime and organized criminal gangs such as has been witnessed in the country.

The land of Kenya and its other natural resources

Land is the ground upon which our Nationhood is founded. The land of Kenya is one upon which its people have deep spiritual and historical connections. Its natural resources are for the effective utilization and control for economic self-sufficiency and development.

The Cabinet and Parliament in Kenya approved the new land policy, which recognizes land not just as a commodity for trade, but also as a principal source of livelihood. The policy has far reaching implications, all of which go towards enhancing land use, promoting equity, and ensuring sustainable use and management of resources.

Kenya has many resources, including wild life, fresh water lakes and indigenous forests and minerals which we ought to jealously guard and grow. This way we will increase income and the problem of brain drain, concerns of mistreatment of Kenyans seeking employment abroad and strike actions by key service providers will be a thing of the past.

Good Governance and the Rule of Law

The rule of Law is secured in Kenya under the new constitution which provides for its supremacy and subjects all to its provisions. Codification and respect for law provides the political framework that expresses the vision of Kenya and unifies her people, define relationships among citizenry and with the land. Good governance must be made an instrument for the promotion and realization of development, equity, unity and peace. Respect for law and good governance must permeate the entire society and its institutions, so that it is demonstrated in modalities of social organization, coordination and interaction for development. Good governance must be cultivated by promoting the culture of accountability and transparency and by ensuring that laws actually work. This can considerably reduce corruption and ensure growth in economy for the benefit of the greater population and towards the attainment of self-governance.

Tied to this pillar is the principle of separation of powers between the three arms of Government i.e. the executive legislature and judiciary, to ensure that they all perform their roles without fear or favour. With the process of employment of the new Chief Justice and Attorney general of Kenya, one can begin to appreciate the benefits of injection of professionalism in Government institutions, particularly in its top leadership and in ensuring that key Government institutions have public legitimacy and operate independently.

Sound macro-economic management

The quality of livelihood will be enhanced by increasing the level of productivity in

all sectors. A re-orientation of the government's competence in providing leadership through public policy deserves the highest priority. The main objective will be to ensure stability, continuity and predictability of the environment in which economic decisions are made. There is need to put in place a sound and stable macroeconomic environment recognizing the prime importance of attaining high levels of domestic savings and investment, promoting price stability and the management of macroeconomic balances to ensure that the Kenyan society does not live beyond its means and that a prime environment for investment is created.

Due to the occasional food shortages and over reliance on donor aid, the economy can be transformed into a strong, resilient and competitive one, reinforced by science and technology. We must seek ways to change our economy from a predominantly agricultural one with low productivity to a diversified and industrialized economy with a modern rural sector and high productivity in agricultural production.

Infrastructural development

Investment in infrastructure ought to be a priority for our Government. The private sector is called upon to work with communities and the Government to realize this goal. In particular, the development of the road and rail networks is crucial for opening up rural areas and to ensure that they have access to essential facilities and develop. Further, the investment in energy, water and telecommunications is central to the stimulation of local and foreign investment and for creating wealth and employment-opportunities. Advanced micro-electronic information and communication technologies (ICTs) are central to competitive social and economic transformation. ICT costs are continuing to fall while their capabilities and resultant profitability enhancements are increasing. This should be harnessed in all sectors of the economy including in the elections process.

Grounded and Visionary Leadership

The experience of post-Independence Africa, with five or so exceptions, is that of apathy in terms of free and fair elections and one that is marred by non-patriotic and poor leaders. Kenya's experience in 2007 and 2008 has proven to us that we are not excluded. Chinua Achebe in his book, *The Trouble with Nigeria* (1983) speaks to many African countries and his assessment of failure of leadership cannot be gainsaid. Our nation will move forward once we have a dedicated group of like-minded leaders, with a clear vision for the country, who put the welfare of the Nation before their own and who in their conviction, apply themselves to national growth. The time is nigh, to move away from that legacy and secure a stable future for our children?

Women Empowerment

“Throughout Africa, women are the primary caretakers, holding significant responsibility for tilling the land and feeding their families. As a result, they are often the first to become aware of environmental damage as resources become scarce and incapable of sustaining their families.”

Hon. Wangari Maathai, (1 April 1940 – 25 September 2011) was a Kenyan environmental and political activist

The future of Kenya is bound to be more solid, stable and profound with the empowerment of a greater number of women. The new Kenyan constitution has been hailed as a first step in the right direction by many rights conscious Kenyans due to the gains that it delivers to Kenyans. It is seen as a stepping stone to women’s and societal empowerment. Among them are the citizenship rights (Article 14), the Bill of Rights which is in line with the 1948 Universal Declaration of Human Rights, Article 27 (8) by which the state is required to ensure that measures are put in place to ensure that not more than two thirds of members of elective or appointive bodies shall be of the same gender, property ownership and acquisition rights, and (Article 53) the rights of children.

THE ROLE OF THE KENYA PARLIAMENT IN NATIONAL RECONCILIATION.

As the Speaker of the Kenya National Assembly, I wish to briefly highlight the emerging role of Parliament, particularly in the area of peace and cohesion, which are, themselves, ingredients of national development.

The traditional role of the Parliament in any country is tri-partite, to legislate, represent and oversight. In our Kenyan experience, we have seen first hand how the function of Parliament has evolved and taken leadership in the reconciliation process. Firstly, in Parliament, different views, interests and concerns can find expression and be steered towards solutions for the common good under the cover of immunity. To this end under Articles 94 and 95 the Constitution of Kenya, Parliament at the national level (read the National Assembly) is conferred with powers to deliberate on and resolves issues of concern to the people and to be a promoter and custodian of democratic principles.

As a national platform for a free and open exchange of views, Parliament becomes an important venue for national reconciliation.

Secondly, Parliament is a manifestation of the diversity of the nation and is recognized as such (Constitution’s Article 94(2)). Its membership is reflective of society, the parliamentary debate and its outcome will stand the best chance of being endorsed

by the people. This means that all sections of society, women, men, the disabled and youth will have an equal say in the management of the country's affairs.

Apart from this, the Kenya National Assembly has group caucuses and associations dedicated in peace building, reconciliation and ensuring that focus is placed on the national agenda, over and above partisan interests, these are the AMANI forum, Prayer Breakfast Association and the Parliamentarians Caucus on Reforms.

RESPONSIBLE AND COLLABORATIVE LEADERSHIP

Finally, leaders must work together to the interests in building Kenya.

Actions by a section of political leaders seem to suggest that the old habits die hard and individual interests have threatened the process of implementing the constitution, particularly in the face of fast approaching General elections in 2012. These challenges run deep and must be confronted and addressed to ensure that the larger polity benefits from their resources to give meaning to democracy as per Mahatma Gandhi, thus:

“Democracy must in essence...is the art and science of mobilizing the entire physical, economic, and spiritual resources of all the various sections of the people in the service of the common good of all”

Collaborative leadership could improve the quality of governance in Kenya. The progress made so far in implementing the constitution of Kenya is remarkable, but this is only the beginning. To achieve the required expectations, there is a fundamental need for political goodwill and commitment against a background of a population seeming to slump into despair and apathy, a majority of whom see poor leadership as the panacea to the problems that have bedevilled Kenya in her 47 years of existence as an independent state.

It is for this reason that the role of the international community is very critical. I take this opportunity to thank Kenya's international friends for having patiently walked and worked with us in this transformative journey. I urge you to stay with us. We wish to ask for your continued assistance in investigating, arresting and freezing proceeds of crime and money laundering in your respective foreign jurisdictions, in fighting crimes that threaten global human peace and security, and in ensuring that Governments are kept vigilant, constantly, to deliver good governance for the benefit of its citizenry.

Finally, I wish to emphasize the importance of peace and unity and urge Kenyans to love and nurture this beautiful mosaic that we were positioned in. Our collective destiny is in Kenya. If focus is on general investment and growth of our resources, the results will be a big plate for all of us to share, thereby reducing incidences of

insecurity and increasing our quality of life. Kenya must be our pillar, selfishness, negative ethnicity and individualism ought to give way to nationalism. We are reminded that our leadership is a reflection of the society and any change we seek in them must first be sought within us, and together we will send positive ripples of change across the country.

The future is beckoning, and there would be, I think, no greater legacy for posterity

God Bless Kenya

CHAPTER FOUR

BUILDING A PROGRESSIVE KENYA ONE PEOPLE. ONE NATION. ONE DESTINY.

National Cohesion and Integration Commission

It is now two years since the National Cohesion and Integration Commission (NCIC) was set up. During this period, the Commission has made significant strides amidst challenges to enhance cohesion and integration in the country. The NCIC is a statutory body established under the National Cohesion and Integration Act (Act No.12 of 2008). The Commission draws its existence from the National Dialogue and Reconciliation Agreements that sought to provide a peaceful solution to the political impasse and violence that engulfed the country after the 2007 general elections. The idea to set up the Commission was borne out of the realization that long lasting peace, sustainable development and harmonious co-existence among Kenyans require a deliberate normative, institutional and attitudinal process of constructing nationhood. The NCIC envisions “A Peaceful, United, Harmonious and Integrated Kenyan Society”.

The NCIC constituting Act mandates the Commission to facilitate equality of opportunity, good relations, harmony and peaceful co-existence between persons of different ethnic and racial communities in Kenya and to advise the Government on all aspects thereof. The Commission’s Strategic Plan 2010-2012 guides the implementation of its work. The plan was designed in the context of the Post-Election Violence (PEV) and is alive to the possibilities of violence erupting again. The period leading up to the General Elections, thus, has to be managed properly to prevent violence, as the country is vulnerable to another political shock. In view of its mandate, the NCIC, in partnership with stakeholders, is putting in place the necessary structures and programmes aimed at delivering free, fair and safe elections in 2012. Beyond the elections, the NCIC has identified four additional triggers of violence, namely: the Truth Justice and Reconciliation Process; the International Criminal Court (ICC) Process; Devolution of the Government to the counties; and the crisis of the Internally Displaced Persons (IDPs).

TRIGGERS OF VIOLENCE 2012 AND BEYOND

To begin with, the ongoing Truth, Justice and Reconciliation process is complex and delicate. An outbreak of ethnic conflict between communities is possible with the opening of the old wounds as the TJRC process is raising expectations of Kenyans even though the Commission has limited capacity and unclear plans on how reconciliation and healing would be undertaken. The gains over the years through healing could be eroded as individuals and communities reveal gross atrocities that implicate individuals and communities in public hearings. The TJRC’s reconciliation mechanism is not clearly set out. The TJRC process could provoke and fuel clan, ethnic or racial animosity which in turn would trigger violence as was witnessed in North Eastern Province and Isiolo in Upper Eastern.

Secondly, another key factor contributing further to the uncertainty weighing on the political environment is the pre-trial of six high-level Kenyan officials – including

the current Deputy Prime Minister and Minister for Finance– by the International Criminal Court (ICC) for alleged crimes against humanity connected to the 2007/2008 post-election violence. There are valid fears of fresh ethnic tensions as the process goes on, as politicians may use the ICC process to manipulate the youth into violence and polarize communities along ethnic lines through hate speech and inflammatory statements. It is therefore, imperative that the Commission continues to monitor and handle complaints on hate speech. The Commission must continue to make deliberate attempts to reach the grassroots with a message to encourage communities to maintain peace.

Thirdly, ahead of the elections, heightened insecurity is a real possibility and there is a risk of outbreaks of violence between the local communities and the Internally Displaced Persons (IDPs). Tension is rising between local communities and IDPs in Rongai, Molo, Nakuru, Mau, Narok, Trans Nzoia, and Taita Taveta. The local communities have raised concerns that the government treats IDPs preferentially and with privilege, adequately providing basic services such as water, education and health in the IDP camps while neglecting the surrounding community at large. They are also concerned that the government has not involved them in deliberations to resettle IDPs on their land.

Lastly, the Commission has flagged the devolved system of government to the counties as one of the emerging triggers of conflict in the country. The concept of devolved government comes with new challenges that were either ignored, or not anticipated. The new Constitution provides for inclusion of minority communities in the allocation of county seats. However, in our engagements with people during the Commission's visits on the ground, we have learnt that the people's understanding of the devolved government is that it is a niche for a particular ethnic community to take up leadership hence encouraging ethnic balkanization and exclusion of minorities. Counties such as Migori, Nakuru, Uasin Gishu, Laikipia, Bungoma and Baringo are already emerging as hotspots.

Furthermore, in order for Kenyans to enjoy the benefits of devolution, there is need for the government to put in place effective policy, structural and legislative frameworks to facilitate the implementation of the devolved government structure as provided for in the new Constitution. The Ministry of Local Government, the Ministry of Finance and the Task Force on Devolved Government are key institutions in facilitating the operationalization of the devolved government structures. These institutions have produced parallel bills on devolution and public finance and have publicly disagreed prompting panic across the nation. Kenyans voted overwhelmingly for the new Constitution in order to participate in decision making and equitably access national resources concentrated at the centre. Tensions around devolution are potentially volatile especially with the public perception that some of the proposed bills would not deliver the promise of devolution. If misinterpreted,

devolution could easily create new minorities at various levels, for example, clan or legitimize the exclusion of minorities in the sharing of the county seats thereby creating new conflicts and possibly, violence.

It is against this backdrop that we are walking towards the next general elections. Whatever happens in the next general elections will determine the future of Kenya for years to come. The 2007/2008 post-election violence cost the Kenyan economy up to US\$1 billion in terms of loss of production. This estimate did not factor in destruction of property by looters who went on the rampage during the violence. Economic growth fell to a meager 1.6 per cent from 7.1 per cent in 2007. Tourism was one of the hardest hit sectors: earnings fell by 19.4 per cent, after the best year in its history in 2007. Kenya's shilling had strengthened by 9 per cent against the dollar in 2007 as foreign investors poured into the country's stocks and bonds, but these gains were largely erased during the violence as Kenya's currency fell by 7 per cent, trading at 68 shillings per US dollar from 63.50 by 24 December 2007.

The macroeconomic performance of the Kenyan economy improved significantly in 2010 compared to 2009. While the economy grew by 2.6 per cent in 2009, it is estimated that the growth rate of the Gross Domestic Product (GDP) almost doubled to reach 5.0 per cent in 2010. The outlook for 2011 is promising and a combination of trends could contribute to ensure positive prospects in the short-to-medium-term. However, this positive outlook is under threat should violence break out. The period leading up to the general election has, thus, to be managed properly to prevent violence. During the 2007 violence, there was no government institution charged with the responsibility of mitigating violence and peace building. Today, the NCIC has that mandate; and our reading of the landscape is that the threat of violence is a reality. The process of preventing and mitigating violence has to be properly coordinated and funded for the NCIC to put in place measures to forestall violence.

TOWARDS A PROGRESSIVE KENYA: THE ROLE OF NCIC 2012 AND BEYOND

Ahead of the 2012 General Elections, the NCIC is putting in place the necessary infrastructure for violence prevention, conflict management and transformation.

First, the NCIC is developing a multi-stakeholder strategy for an Early Warning and Early Response in regard to ethnic incitement. This strategy is based on the lessons learnt from the Uwiano Platform, a partnership that promoted peace and monitored violence during the referendum campaigns in 2010. Together with partners, the Commission is in the process of setting up a web-based platform for independent real-time conflict monitoring and reporting. This platform seeks to empower Kenyans and partners to cooperate, not only to receive and act on information on

early warnings on conflict and crime but also to promote effective partnerships for national cohesion at various levels.

Second, the Commission has placed huge investments in the enforcement of NCI Act Sections 13 and 62 that criminalizes hate speech. As part of its legal mandate, the NCIC endeavours to monitor and expeditiously handle hate speech complaints in the country. Since its establishment in 2009, the Commission has gained a reputation for taking a strong stand against individuals and institutions whose actions violate the law. A number of cases have been investigated and filed. A tripartite task force bringing together three institutions: NCIC, Office of the Director of Public Prosecutions (DPP) and the Kenya Police has been operationalized to guide in the enforcement of the legal provisions relating to hate speech.

Hate speech is one of the catalysts of the ethnic violence that Kenya has witnessed since the first intense tribal clashes in 1992 during the advent of multi-party politics; and which is said to have fuelled the 2007/2008 post-elections violence. Hate speech is propagated, especially prior to and during the electioneering period, mainly through the media and in political rallies. The role of the media in propagating hate speech is clearly articulated by the Waki report on post-election violence.¹ The witnesses who appeared before the Waki Commission stated that the vernacular radio stations played a negative and inflammatory role in the period before, during and after the 2007 General Elections. Controlled hate speech as a prerequisite for attainment of national cohesion and integration, particularly during the electioneering period, cannot be gainsaid. Hate speech polarizes communities along ethnic lines leading to ethnic tensions and violence. The effect of ethnic violence resulting from hate speech has been devastating to the socio-economic stability of the country.² Controlled hate speech in the run up to, during and after the 2012 General Election has critical implications, not only on national cohesion and integration, but also on development.

Control of hate speech also involves monitoring of the political rallies and media. To achieve this, NCIC has entered into a partnership with the Media Council of Kenya and the Communications Commission of Kenya (CCK). The partnership with the two institutions will enhance investigations into the hate speech matters. Additionally, the Commission has rolled-out a national training programme on hate speech for law enforcement officers across the country. Targeting the Kenya Police, Office of Director of Public Prosecutions (DPP), judicial officers, and experts, the

1 The Commission of Inquiry into the Post Election Violence (CIPEV) – The Waki Report 2008.

2 The Kiliku report which investigated ethnic clashes in 1992 documented seven hundred and seventy nine deaths and six hundred and sixty four injuries. Between 27th December 2007 and 29th February 2008 a total of 1,133 deaths were recorded. This was in addition to massive destruction of property.

training seeks to expand and enhance the investigations of hate speech under the NCI Act.

Third, to facilitate cohesion and integration work in hot spot areas ahead of the 2012 elections, the NCIC is setting up a structure dubbed the 'Cohesion Committees' in counties considered to be hotspots. Already being piloted in Mt. Elgon and Cheptais Districts of Bungoma County, the Cohesion Committees will go beyond peace education to promote the cohesion and integration mandate in its entirety. The Cohesion Committee members are essentially cohesion ambassadors in their communities. The Cohesion Committees will not replicate the work of the District Peace Committees; rather, they will complement the work since they embrace a wider mandate on cohesion and integration, and are not limited to peace initiatives only.

The NCIC has also partnered with the Kenya Forgiveness Project to encourage and empower Kenyans to explore the nature of forgiveness, and investigate alternatives to conflict and revenge within their own lives, and those around them. By so doing, the Commission hopes to promote peace, reconciliation, restorative justice and the building of bridges between individuals and communities at a local, national and international level. Additionally, the NCIC and the Truth, Justice and Reconciliation Commission (TJRC) have established a joint Taskforce on Healing and Reconciliation in Kenya. The mandate of the taskforce is to develop procedures and modes of working between the two commissions as well as the smooth continuation of healing and reconciliation work after the winding up of the TJRC.

Fourth, the Commission has taken a deliberate effort to create a pool of women and youth trained in conflict transformation and management. By so doing, the Commission hopes to enhance roles of women and youth in political and electoral conflict prevention and management, and peace building with a view to deepen their knowledge and enhance practical skills. The Commission is thus conducting sensitization and training on conflict management and transformation for women and youth in seven hot spots counties.

The key perpetrators and victims of the post-election violence, the youth, represent a critical mass that, if properly mobilized, can generate sustainable democratic governance, promote tolerance and peaceful coexistence among Kenyan communities. Women, on the other hand, are often victims of violence yet they are excluded from participation in conflict prevention and resolution hence the need for their active involvement in line with United National Security Council resolution 1325 (2000).

Fifth, following the 2007/08 post-election violence, there were calls for the inclusion of peace in education, with a strong component on conflict resolution, in the school

curriculum. Instructively, to infuse the principles of cohesion and integration in schools and promote national goals, values and identity, the NCIC has partnered with the Ministry of Education and other stakeholders to review the school curriculum; establish peace clubs in schools; and train drama and music teachers on cohesion and integration concerns in order to influence national drama and music festivals ahead of the elections. The Commission is also using schools debates, creative theatre, songs, essays, and storytelling as platforms for mentoring youth into being responsible citizens--empowering them to learn to accept diversity, prevent violence, and resolve conflicts with their peers and in their communities.

The Commission appreciates the role of traditional systems of communication such as poetry, music, and storytelling as instrumental mediums in the mobilization of people at the grassroots levels for peace building, cohesion and integration. Music and creative performances transcend language and cultural barriers and have the potential to reach wider audiences. It is for this reason that the Commission invested heavily in national seminars for drama, music and poetry teachers with a view to influence the outcomes of drama and music festivals next year. The Commission also undertook an exposure trip to Rwanda where drama has through time been used in the society to harness peace and promote reconciliation. The lessons learnt from this trip will inform the Commission's initiatives in the drama and music festivals endeavors.

Through these efforts, NCIC seeks to create a platform for the people to hold effective discussions and work out strategies for dealing with the socio-economic and political conditions that are affecting them. It is hoped that this will bring the community together, build community cohesiveness, and stimulate group action. In this way, the Commission will utilize the abundant ethno-cultural materials in terms of song, storytelling, dance and music to meet the challenges in ethnic struggles.

Lastly, the NCIC is taking leadership in framing the cohesion and integration discourse in the country.

The Commission is conducting an ethnic audit of the universities, parastatals, and municipal councils to establish the extent to which these institutions reflect the face of Kenya in the composition of their staff. The NCI Act mandates the Commission to eliminate discrimination on the basis of ethnicity and to promote tolerance among Kenyans. Following the findings of the ethnic audits, the Commission seeks to establish measures to prevent discrimination on the basis of ethnicity, race, religion and social origin in employment by developing guidelines on fair employment practices which will enable the employers in Kenya to follow through this commitment and go above and beyond the relevant employment legislation.

To establish the effect of the devolved government on national cohesion and

integration in Kenyan societies, the Commission will map the ethnic composition in the counties in Kenya with a view to identify the unique circumstances of ethnic minorities in each county and establish the conceptions of minorities at national and county level to inform policies intended to defuse tensions among the ethnic communities for peaceful coexistence. The Commission will also examine formal and informal ethnic conflict resolution mechanisms in Kenya with a view to identifying and assessing the effectiveness of the policy and institutions used to manage ethnic conflicts in the country and provide comparative judicial and alternative mechanisms for managing conflicts.

The NCIC is mandated to identify and analyze factors inhibiting the attainment of harmonious relations between ethnic communities. In line with this, the Commission is facilitating intellectual community diversity conversations on ethnicity, race and religion in every region in the country. Through regional conversations dubbed diversity conversations, community grievances against the state and other communities are brought to the fore and discussed analytically. The conversations provide a platform for actors to share ideas on what policies, measures and plans can be put in place in order to enrich socio-economic development, unity and peace and entrench interethnic tolerance. The knowledge gathered from the regional dialogues is instrumental in the development of sustainable relationships between communities based on respect and trust, and in establishing a resource of choice on cohesion and integration issues in the country.

Other initiatives being undertaken by the NCIC ahead of the elections are: the creation of a pool of good-will ambassadors drawn from the academia, business, arts, politicians, youth, and women, to promote tolerance and peaceful coexistence amongst diverse ethnic communities; and the hosting of an Awards ceremony by NCIC on an annual basis to recognize and reward individuals, institutions and groups that have made remarkable contributions in promoting the cohesion agenda in the country. Dubbed NCIC *Utu* Awards, the ceremony will be held on 28 February 2012, to coincide with the signing of the National Accord and Reconciliation Agreement. The Awards aims to motivate and inspire others to positively contribute to the promotion of cohesion and integration practices.

It is every Kenyan's civic duty to combat intolerance, negative stereotyping and stigmatization, discrimination, incitement to violence and violence against persons or groups ahead of the general elections. We must move from '*Haki Yetu to Jukumu Langu*'. As a country, we must go beyond mere rhetoric and reaffirm our commitment to fundamental freedoms. NCIC is working in partnership with relevant state and non-state actors to take measures, as set forth in the NCI Act and the Constitution, consistent with our obligations under international human rights law, to address and combat intolerance, discrimination, and violence based on ethnicity, race, religion, and/or political ideology.

CHAPTER FIVE

BUILDING A PROGRESSIVE KENYA SOME REFLECTIONS ON ACHIEVING AND SUSTAINING THE VISION OF A UNITED KENYA THROUGH RECONCILIATION

Truth, Justice and Reconciliation Commission

INTRODUCTION

Since the advent of the concept of transitional justice in the 1980s, truth commissions have played key roles in fostering reconciliation in societies emerging from violent conflict or decades of political repression. Thus far, experience has shown that amongst the activities undertaken by truth commissions, reconciliation is perhaps the most difficult. Not surprisingly, commentary on this complex yet necessary enterprise has featured prominently in transitional justice discourse. The debates cover issues ranging from the philosophical and moral foundations of reconciliation to its interplay with other equally important transitional justice pursuits such as justice for victims. In relation to the latter aspect, it is often argued that reconciliation forecloses issues of justice and accountability. Therefore, in order to promote reconciliation while at the same time providing justice for victims, truth commissions established in the recent past have been mandated to pursue both justice and reconciliation.

It is against such background, that the Kenya Truth, Justice and Reconciliation Commission (TJRC) was established to ‘promote peace, justice, national unity, healing, and reconciliation among the people of Kenya’. Established in 2009, the TJRC has so far engaged in two major activities: statement taking and individual hearings. Statements from victims, their families and witnesses are the primary source of information for the Commission. As at the end of October 2011, the Commission had received more than 30,000 individual statements representing the largest number of statements ever collected by a Truth Commission. Public hearings provide victims, witnesses and the general public with a platform for non-retributive truth-telling. As at the end of October 2011, the Commission had held public hearings in North Eastern, Upper Eastern, Western, Nyanza and Rift Valley.

The twin processes of statement taking and hearings have offered the Commission with the unique opportunity of capturing the voices of Kenyans on a myriad of issues including on the theme of reconciliation. Drawing from this opportunity, this section offers some reflections on how to achieve and sustain the vision of a united Kenya through reconciliation.

THE SOCIAL CLEAVAGES: WHERE ARE THE CRACKS?

Although the average Kenyan is a peaceful individual who lives in harmony with her neighbor, history is replete with accounts of social tensions that have occasionally erupted into violent conflicts. The 2007/2008 post-election violence brought to the fore these social tensions that had been simmering for decades in Kenya. These tensions exist at three broad levels: inter-group, inter-personal, and intra-personal.

INTER-GROUP TENSIONS

Inter-group tensions are experienced along cultural, racial, socio-economic and ethnic divisions. Of these, ethnic tensions are the most pronounced in Kenya and account for most of the violent conflicts that have been witnessed in the country especially following the re-introduction of multi-party politics in the early 1990s. As a result, addressing ethnic tensions has dominated the country’s reconciliation agenda. But do ethnic groups have inherent hatred for each other?

A perception study conducted by the Institute of Economic Affairs in 2009 found that respondents had more positive than negative opinions of ethnic groups other than their own. The study also found that many of the negative comments by the respondents on their opinion of other ethnic groups were based on traditional stereotypes about the particular ethnic groups. The study also revealed that 79.1% of the respondents would marry a person from another ethnic group while 86% of them would be a business partner to person of another ethnicity. In essence, the study revealed that members of different ethnic groups do not necessarily have inherent hatred for each other. Rather, they are willing to and often co-exist together.

	Ethnic group	Perception/comments of members of other ethnic groups	
		Positive comments	Negative comments
1	Luo	54.7%	18.5%
2	Kikuyu	37.2%	34.5%
3	Luhya	40.4%	8.1%
4	Kamba	32.6%	20.3%
5	Maasai	53%	6.9%
6	Mijikenda / Taita / Coastal ethnic groups	22.1%	15%
7	Kalenjin	23.7%	22.9%
8	Kisii	25.6%	13.5%
9	Somalis	13.1%	24.8%

Source : IEA perception study (2009)

	Question	Responses to the question	
		Yes	No
1	Would you marry a person from another ethnic group?	79.1%	20.9%
2	Would you be a business partner to a person of another ethnic group	86%	13.3%
3	Would you be best friends to a person of another ethnicity?	89.7%	9.2%
4	Would you share a house with a person of another ethnicity?	75.6%	23.1%

Source: IEA perception study (2009)

If ethnic groups do not have inherent hatred for each other as shown by the IEC study, what then accounts for the ethnic tensions experienced in the country? The answer lies in the complex relationship that has developed between historical land injustices, ‘politicization’ of ethnicity and its use to access political power, and the inequalities experienced in the sharing of and access to public resources. The resultant ‘unholy alliance’ between these factors has created a fertile ground for the breeding of bitterness especially amongst communities that feel neglected, marginalized and left out of the national political and socio-economic spaces. That particular ethnic groups dominate specific geographical regions have meant that marginalization is viewed in ethno-geographic terms (Waki Report, p. 32).

In North Eastern, for instance, the Commission heard time and again of how the region has remained on the periphery of the country’s economic development and growth. As a result, the residents of this region describe themselves, at best, as ‘second class citizens’. In Nyanza, links were drawn between the economic and socio-political marginalization of the region and the 2007/2008 post-election violence. According to a witness who testified before the Commission, ‘the post-election violence has relevance in so far as it resulted from decades of economic marginalization and the manipulation and abuse of the political process’. The cumulative effect of this state of affairs is that communities retreat to their ethnic enclaves at the expense of associating with the Kenyan identity.

INTER-PERSONAL TENSIONS

Inter-personal tensions relate to the delicate relationship between victims and perpetrators of gross human rights violations. The TJRC is mandated to provide victims, perpetrators and the general public with a platform for non-retributive truth telling. The Commission is also empowered to recommend amnesty for perpetrators although the amnesty is not available for perpetrators of gross human rights violations.

In execution of this mandate, and as earlier mentioned, the Commission has held public hearings. For most of the victims and witnesses, the oral testimonies they gave before the Commission marked the first time they had spoken publicly about their pain and suffering. Although, many of the victims of past atrocities, have insisted that the perpetrators must be held accountable for their actions, they are those who have expressed their readiness to forgive and forge ahead. Victims have also called for official acknowledgment that the atrocities they witnessed and suffered did in fact occur, followed by official apology. According to a resident of North Eastern, 'the President and the Prime Minister should admit that atrocities like genocide, wanton killings, rape, looting and everything have happened and then say we apologize to the people of North Eastern'. The willingness of victims and witnesses to testify before the Commission has however not been matched by adversely mentioned persons. As a result, reconciliation between victims and perpetrators has been minimal.

INTRA-PERSONAL TENSIONS

Machira Appollos (2008) describes a reconciled being as one who is at peace with his supreme being, with himself, neighbor, society and nature. In the above cases, reconciliation can only be achieved when one is in no conflict with another person, or a group experiencing tensions with another group. The wholesome effect of reconciling one in the above groups is to have citizens who are not easily incited or volatile at the slightest provocation. It has been stated severally, that many jobless youth were very quick in taking up arms during the 2007 post-election violence. A number of them claimed that they were harboring bitterness of past injustices.

SUSTAINING THE VISION OF A UNITED KENYA: SOME FLAG-POSTS AND ACTIONS

Reconciliation is a process and not an event. Therefore, although the TJRC has taken several initiatives (some in conjunction with the NCIC) to foster reconciliation in

terms of its mandate, it should be understood that the Commission's role is that of laying the foundation of the reconciliation process. Below I outline some possible actions that may be taken in order to sustain the vision of a united Kenya.

CONTINUOUS COMMUNITY DIALOGUES

In order to ensure sustained tolerance between communities, and that tensions are regularly monitored and addressed promptly, it is proposed that continuous community dialogues should be held across the country. Community dialogues are essentially discussions designed to foster reconciliation by creating platforms for communities to have conversations about tensions and historical injustices both within and across communities. They bring together individuals of different ethnic groups who live in proximity to each other but who may have different historical experiences. The Commission is in the process of initiating such dialogues but it will be of utmost importance that the dialogues are continuously held even after the mandate of the Commission expires.

MAINSTREAMING RECONCILIATION AGENDA IN ALL RECONSTRUCTION PROCESSES

Since the signing of the National Accord in 2008, numerous legislative and institutional reforms have been undertaken, all in a bid to put Kenya on the path of sustainable peace. However, there has not been a positive mainstreaming of the reconciliation agenda in the numerous reconstruction processes that have been undertaken thus far or that are currently ongoing. The effect is that there is the possibility that the implementation of such reconstruction processes may in themselves perpetuate social tensions. Two particular issues of relevance in this regard have been highlighted during the Commission's hearings: the ongoing resettlement of internally displaced persons (IDPs) and the intended review of boundaries across the country. The Commission's public hearings have revealed that in certain instances the resettlement of IDPs has been conducted without sufficient consultation of both the IDPs and the residents of the areas where the resettlement schemes have been established. It is imperative to conduct such consultations to ensure that, in future, resettlement schemes do not become the scene of violent conflicts.

In its hearings, the Commission has also listened to testimonies of boundary disputes between ethnic communities that have occasionally resulted in violent conflicts. Such areas remain volatile and are prone to erupt with the slightest provocation.

For this reason, it is important that the newly established Independent Electoral and Boundaries Commission will ensure that in its demarcation of boundaries, consultation with the concerned communities are conducted and that the views of such communities are taken into consideration in the demarcation process.

CONSISTENT POLITICAL SUPPORT FOR THE RECONCILIATION AGENDA

Although the TJRC (and NCIC) has rolled out activities that seek to promote reconciliation, it is imperative that these activities are backed by consistent and unwavering political support from the country's political leadership. By virtue of their position and stature in society, political leaders have a special role to play in the promotion of reconciliation and national healing. In particular, they are well placed to direct the mind and mood of the nation towards peace, healing and reconciliation.

CONCLUSION

With the ongoing legislative and institutional reforms, coupled with the work of the TJRC and NCIC amongst other stakeholders, there is room to believe that it is possible to achieve a united Kenya. This will, however, require conscious and concerted efforts of all stakeholders and the participation of all citizens. Although reaching the goal of a united Kenya may take long, it is nevertheless not beyond reach.

CHAPTER SIX

BUILDING A PROGRESSIVE KENYA IMPLEMENTING THE CONSTITUTION TO BUILD A PROGRESSIVE KENYA

Commission for the Implementation of the Constitution

INTRODUCTION

The Constitution of Kenya 2010 is arguably one of the greatest dedicated contributions by various men and women, to the creation of unity and prosperity in the Republic of Kenya. In adopting the Constitution at the 4th August 2010 referendum, the people of Kenya committed themselves to nurture and protect the well-being of the individual, the family, communities and the nation. The people of Kenya also recognized 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; and exercised their sovereign and inalienable right to determine the form of governance of the nation. Most importantly, the people of Kenya gave the Constitution of Kenya 2010, to themselves and to future generations.

It cannot be gainsaid that the adoption by the people of Kenya, of the Constitution of Kenya 2010, was a defining moment in the history of the country. The Constitution is a transformative document in which the people seek to define the nation that is Kenya, provide a framework for their governance and set out the rights and obligations of individuals and the state. Indeed, Kenyans were prompted to adopt a new law by the many difficult years of misrule, wastage and conflict that culminated in the post-election crisis of the 2007/08 period. Fortunately, this ended upon entry into a negotiated settlement in the form of the National Accord. The Accord had, among its various pillars, the enactment of a new Constitution under its famous Agenda 4 framework.

The most fundamental component of constitutional reform is the effective implementation of its provisions and requirements. To guarantee the implementation of the Constitution, the framers of the constitution, in their wisdom, established the Commission for the Implementation of the Constitution (CIC), a special and independent body mandated to oversee the implementation process. The CIC is convinced that a holistic protection of the constitution is imperative.

GAINS IN THE CONSTITUTION

The Constitution contains many provisions which are a gain for the people of Kenya. Admittedly, the first Article of the Constitution which proclaims the sovereignty of the people of Kenya stands out as the provision that defines the basis for the gains of the people in this Constitution. Article 1 calls upon all the people of Kenya to guard their sovereignty. The sovereignty must be guarded jealously since its exercise by state organs such as the executive and legislature is by delegation. The people are therefore in charge of the overall discharge of sovereign power. Article 10 of the Constitution sets out national values and principles, it is these principles, such as *'patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people'* that must guide the decisions of the

people of Kenya and especially those in positions of leadership towards achieving the dreams and aspirations of the Kenyan people. CIC ascribes to national values and principles of governance and advocates for the same.

Chapter four of the Constitution sets out an enhanced Bill of Rights which guarantees, among other things, the progressive realisation of socio-economic rights. Further, the Bill of Rights enhances the non-discrimination provisions by prohibiting the discrimination of marginalized groups.

The Constitution now has a whole chapter dedicated to land and the environment. That land is a sensitive matter cannot be overstated. The Constitution clearly states that land in Kenya is to be managed in a manner that is equitable, efficient, productive and sustainable. The Land Commission Bill and other legislation on land, once enacted, should and will set the stage for some sanity and order in management of the land resource in Kenya.

It is also notable that with a whole chapter dedicated to Public Service and another Chapter on Leadership and Integrity, the Constitution has indeed put in place the foundations of an accountable and transparent public service. It is only when the public service is working in the interests of the people that a nation can prosper. Indeed, the efficient and efficacious delivery of public service is a key indicator of a country's levels of development and integrity.

It should also be remembered that the integrity of our electoral system and processes was put to test and found lacking in 2007. It was, therefore, in order that the Constitution provides for a clear, elaborate and transparent manner of representation of the People in elective posts. The Constitution provides for independent, competitive and transparent selection of members to constitutional commissions. Thanks to the Constitution, Kenya now has an independent Judiciary with the Chief Justice and Judges appointed in a transparent and competitive manner. The imminent vetting of judges and magistrates will further ensure that the Judiciary, like Caesar's wife, is beyond reproach. Sweeping changes made in the National Security organs such as the envisaged appointment of the Inspector General and members of the National Police Service Commission under the Police Acts will ensure that the service is answerable to the people. Gone are the days when police officers were a law unto themselves.

Perhaps one other remarkable feature of the Constitution is the provisions for Devolved Government under Chapter 11. The 47 counties enumerated in the First Schedule will provide the people with greater access to development. The objects of devolution include: equitable sharing of national and local resources; promotion of social and economic development; the provision of proximate as well as easily accessible services throughout Kenya. During the next general elections, parts of

the country which had hitherto been marginalised will start to benefit from the Equalisation Fund. CIC went around the counties to collect the views of people at the grassroots, and therefore, the bills on Devolution of Government that are currently under review will represent the views of the people.

PROGRESS IN THE IMPLEMENTATION OF THE CONSTITUTION

The Commission is established in Section 5 of the Sixth Schedule of the Constitution. Its mandate is to co-ordinate, monitor, facilitate and oversee the process of implementation, with particular reference to the development of legislation and administrative procedures required to implement the constitution.

The Commission reports regularly to Parliament (through the Constitutional Implementation Oversight Committee), the President, and the Prime Minister, as well as to the people of Kenya. The Commission is also required to work with each constitutional commission to ensure that the letter and spirit of the Constitution is respected.

Under section 15 of the sixth schedule, CIC is also required to specifically monitor the implementation of the system of devolved government effectively. As an independent constitutional commission under Chapter 15 of the Constitution, and specifically, under article 249, alongside other constitutional commissions, CIC also has the objectives of:

- (a) Protecting the sovereignty of the people;
- (b) Securing the observance by all state organs of democratic values and principles; and
- (c) Promoting constitutionalism.

Article 249 also declares that, the commissions are:-

- (i) subject only to the Constitution and the law; and
- (ii) independent and not subject to direction or control by any person or authority.

CIC is established, therefore, with an independent mandate to ensure faithful implementation of the Constitution, the ultimate aim of which is to deliver to the people of Kenya, the transformative gains that the constitution promises them.

In discharging its mandate, CIC approached its functions by identifying key result areas; which are Legislation, Policy and Administrative measures, with specific outputs to be delivered within the period of its mandate. CIC places great emphasis

on public participation in all result areas. Eleven months after the establishment of the Commission, notable achievements have been made in the legislative arena and administrative arena. Chief among them are the successful enactment of laws, the monitoring of administrative processes such as taxation of MPs, police recruitment and appointment of Chief Justice, DPP, and Attorney General.

The following laws have been enacted to date:

- i. Judicial Service Act, 2011
- ii. Vetting of Judges and Magistrates Act, 2011
- iii. Supreme Court Act, 2011
- iv. Independent Electoral and Boundaries Commission Act, 2011
- v. Independent Offices (Appointment) Act, 2011
- vi. Salaries and Remuneration Commission Act
- vii. The Kenya National Human Rights Commission Act, 2011
- viii. The Commission on Administrative Justice Act, 2011
- ix. The National Gender and Equality Commission Act, 2011
- x. The Political Parties Act, 2011
- xi. The Independent Ethics and Anti-Corruption Commission Act, 2011
- xii. The Power of Mercy Act, 2011
- xiii. The Commission on Revenue Allocation Act, 2011
- xiv. Police Service Act, 2011
- xv. Police Service Commission Act, 2011
- xvi. Independent Policing Oversight Authority Act, 2011
- xvii. Employment and Labour Relations Court Act, 2011
- xviii. Elections Act, 2011
- xix. The Kenya Citizenship and Immigration Act, 2011
- xx. The Kenya Citizens and Foreign Nationals Management Service Act, 2011

- xxi. Land and Environmental Court Act, 2011
- xxii. National Loan Guarantees Act, 2011*
- xxiii. Contingencies Fund and County Emergency Funds Act, 2011*

The Commission also engaged with the executive to ensure that all ministries and parastatals put in place a plan of action for the implementation of the Constitution. The Circular called for, among others, preparation of plans for the implementation of the Constitution; sensitization of staff on the constitution, review and development of laws; policies and administrative guideline to conform to the Constitution; and the adoption of change management strategies by all implementing agencies for seamless transition.

The work of CIC and key implementers is reported regularly and the report submitted to the Parliamentary Committee on Implementation of the Constitution(CIOC). So far, three quarterly reports have been prepared and submitted to CIOC. The reports are also publicized for the information of the general public and serve as an important tool for informing the people on key milestones in the Constitution implementation agenda and also as an effective tool for monitoring and evaluation through which any delays and lapses in the implementation process are assessed.

Key challenges in the legislative process ranged from the late submission of bills to the total disregard of Article 261 of the Constitution in submitting some bills to Parliament.

CIC also made a number of interventions to the executive decisions with regard to administrative process which were found not to be in conformity to the Constitution. This includes:

- a) Advisory to the principals and parliament on Nomination of Chief Justice, Attorney General and Director of Public Prosecutions
- b) Advisory and monitoring of police recruitment
- c) Advisory on premature attempts at Construction of County headquarters
- d) Advisory on constitutional procedures relating to the budget process
- e) Advisory on the selection/ appointment of supreme court judges
- f) Advisory to KRA on taxation
- g) Advisory on undue delay in processing of Bills by other constitutionally mandated actors

The Commission for the Implementation of the Constitution also established linkages and partnerships with the people of Kenya, non-state actors and development partnership. The partnerships were instrumental in ensuring progress in the implementation of the Constitution.

Despite the achievements, CIC encountered a number of challenges in the course of discharging its mandate to facilitate the implementation of the Constitution. Some of the challenges are: reluctance to embrace devolution; lack of capacity of implementing agencies especially for legislative review; disagreements among stakeholders; political interests overriding national interests; and policy dissention among various stakeholders.

The biggest challenge is manifested in the attempt to amend the Constitution, the controversy surrounding the election date must, in the interests of the nation, be resolved in good time due to its sensitivity and potential effect on the country's stability, but, above all, the sanctity of the Constitution should not be sacrificed at the altar of political and administrative expediency.

To ensure that we live by our Constitution, the following must be observed and addressed.

- a) The people of Kenya must at all times defend the Constitution and uphold their sovereignty.
- b) The public must maintain vigilance of the Constitution implementation process. Any signs of fatigue by the public leads the implementation process possible manipulation by executive and legislature.
- c) All persons to maintain the implementation momentum and keep the Constitution implementation agenda as a matter of national priority.
- d) The urgent establishment of constitutional bodies such as the National Police Service to spearhead reforms in the different areas.
- e) Managing Political risk: - there is need for a strategy that ensures that politics of the day does not impede the implementation process (e.g. No parliamentary committee on legal and judicial affairs to date).
- f) A systematic and integrated approach towards implementation of the Constitution by state agencies.
- g) Institutionalising of public participation: CIC is working on legislation to ensure that the public participation principle is institutionalised.
- h) Political leadership and stewardship from political leaders to keep the

constitution implementation process on course.

- i) Adherence to agreed timelines and eliminating unnecessary delays and foot dragging in implementation.
- j) Need for civic education to enable the people to exercise their sovereign power effectively.
- k) Enhanced collaboration between the executive and CIC.
- l) Full appreciation of international treaties which now form part of the laws of Kenya.
- m) Ensure free and fair elections: This is important because the conduct of the next General Elections is the litmus test of a new constitutional order.
- n) Monitoring of the devolution process and devolved government structures.
- o) Sustaining institutional changes for posterity
- p) Flagging out of violations as and when they occur without fear or favour

CONCLUSION

The effect of constitutionalism to the growth of a nation cannot be overemphasized. As was stated by Prof J. Ihonvbere in the 4th Occasional Paper of the Centre for Democracy and Development “a constitution is more than just a document to be shelved and occasionally referred to by lawyers and politicians. It is supposed to be the soul and spirit of a nation reflecting its past, present and aspirations for the future.”

The many gains and dreams of the people of Kenya as enshrined in the Constitution shall be of no value until the Constitution is fully and faithfully implemented. It is for this reason that CIC holds fast to the view that the collective will of the people that is the Constitution of Kenya 2010 should only be amended by the people, or if by those exercising delegated authority, manifestly for the benefit of the people. The exercise of sovereign power by the people should be enhanced through greater public participation and the inculcation of constitutionalism amongst Kenyans. All individuals should protect the Constitution by ensuring implementation, both in letter and spirit.

CIC has, and always will, defend and uphold the Constitution and facilitate its implementation to ensure that we build a progressive nation in line with the aspirations of the people of Kenya.

CHAPTER SEVEN

BUILDING A PROGRESSIVE KENYA A CIVIL SOCIETY PERSPECTIVE

Kenyans for Peace with Truth and Justice

Remarkable progress has been achieved in returning the country to the path of sustainable peace and stability after the 2007/2008 post-election violence, but a lot still remains to be done. The socio-political conditions that gave rise to the violence are yet to be fully addressed, human rights and fundamental freedoms are continuously under threat, the IDP humanitarian crisis is not completely resolved, healing and reconciliation has not occurred as comprehensively as anticipated, and the two parties to the Kenya National Dialogue and Reconciliation (KNDR) process have evolved into entirely new entities with different interests. The shifting political ground has had a great impact on decisions to deal with the outcomes of the post-election crisis, among them assuring justice for the victims and perpetrators of human rights violations during the post-election violence.

Today, Kenya's political scene and economy is characterized by stark contradictions. Only a year after the promulgation of a new national constitution, there is a marked regression to tribalised political mobilisation, perhaps more marked than in the run-up to the Post-Election Violence (PEV). This is a deeply worrying trend and that portends trouble for the future. The divisive politics of adversarial tribal mobilisation that privileged and selfish individual and group interests propagate over the national good has echoes in 2007; neither the players nor the rhetoric has changed five years later.

The Economy and Corruption: on the economic front, while Kenya seems once again to be on a growth trajectory, inequalities are deepening, partly as a result of rises in the prices of oil and food that hurt the poor majority most. In the month of October 2011, the inflation rate was 18.91 per cent³ and with the steady rise in the cost of living being experienced, inflation is expected to increase to 20 plus per cent by end of the year.⁴ This will mean that more Kenyans will slide below the absolute poverty line. The monetary policy tightening underway will make an already bad situation much worse as there is a limit to which people will take such stress before social tensions escalate. Increased economic pressures will impact significantly on youth, risking their increased radicalisation and their availability for destabilising activities and negative political recruitment.

The steady depreciation of the shilling in 2011 may negatively impact implementation of reforms and may slow growth not only in agriculture but in other important sectors of the economy as well. Indeed, slow economic growth, combined with rising unemployment and generally huge income inequalities constitute a combustible mix that can explode.

There are enough good ideas on how to stimulate the economy, cut inflation, create employment and wealth; although, this would only work if everyone was at the

3 Kenya National Bureau of Statistics- Consumer Price Indices (CPI) and rates of inflation for October 2011.

4 Betty Maina, Chief Executive Officer Kenya Association of Manufacturers (KAM).

negotiating table. Discussions about the Public Finance Management Bill⁵ are a case in point. The new economic model around devolution needs to come into force, even with the challenges it poses.

The poor regulatory environment and fragmented policies have led to the rise in corruption cartels, misappropriation of public funds and economic banditry by those in power. If we are to move towards a progressive Kenya, Kenyans must push for a fair and just taxation regime, a transparent public debt register and public participation in budgeting. This would then ensure that managing the economy is not a messianic duty of the Treasury.

Although organized crime and corruption are gradually undermining Kenya's foundations, the country has the people, the energy and creativity to reverse this process of self destruction. If corruption and organized crime are to be addressed effectively, it would require interventions that result in early wins that can generate quick and tangible results, and that contribute to the restoring of public confidence and legitimacy in government institutions while these institutions are being transformed. If corruption and organized crimes are confronted head on, without denying their extent, there will be widespread support nationally and internationally for effective countermeasures.⁶

To reduce the incidences of organized crime and corruption, the government would need to make a strong commitment to cushion the poor, adhere to the rule of law and demonstrate political resolve to stop impunity in all its forms and at all levels of the society. Further, citizens must lay emphasis on all stakeholders, particularly, the Principals and Parliament that it is critical to respect the constitutional requirement for the most responsible and frugal use of public funds and hold accountable those who seek to cover up blatant corruption.⁷

The Constitution:⁸ The Constitution enjoyed support of the majority of Kenyans because it rejected the style of politics that has dominated them since independence. It places at the centre of state and society, integrity, democracy, human rights and social justice. One of its main objectives is to ensure to all, a life in dignity, that is, meeting the basic needs of even the most deprived. It aims

5 In August 2011 the Treasury presented the Public Finance Management Bill to direct how the revenues will be shared between the National and County governments in the new devolved government structure. The bill sought to lock out the county governments from accessing the revenue from taxes generated from their counties. It was soon realized that this was a condition of an agreement with IMF in return for a multi-million-dollar loan to the government of Kenya. The draft Bill was contested by a key Task Force on Devolution in the Ministry of Local Government, which is insisting on its own draft and the Constitution Implementation Commission (CIC) who wrote to the Attorney General to be given an extra time to work on the bill.

6 Termites at Work: Transnational Organized Crime and State Erosion in Kenya. Peter Gastrow.

7 Gladwell Otieno Executive Director Africa Center for Open Governance (AfriCOG).

8 "Katiba Yetu" Campaign Statement drafted by John Githongo Executive Director Inuka Trust "Nisisi" and Prof Yash Pal Ghai Executive Director Katiba Institute.

at an inclusive and vibrant democracy, through wide participation of the people in public affairs, honest leadership, and full accountability for the conduct of the government. It seeks to transcend tribal politics and to unite us in our commitment to new constitutional values, including patriotism and embracing a broader Kenyan identity of which we can be proud of. The Constitution promises us much, and sets out the institutional framework for achieving the national values.

President Kibaki and Prime Minister Odinga described the Constitution in their speeches on promulgation day as “an embodiment of our best hopes, aspiration, ideals and values for a peaceful and more prosperous nation”. They predict that the Constitution “will fundamentally transform our nation politically, economically and socially” and lead to “productive and dignified lives”. They drew attention to “the new ways of conducting public affairs”, saying, “This Constitution’s leadership code and values makes it clear that people who will present themselves for public or state offices will have to be individuals of integrity, willing to be held accountable by the people and the institutions and laws of our country. In order to achieve the objectives of the Constitution, for ourselves and future generations, civil society should facilitate partnerships towards the pursuance of constitutional goals, promote co-operation across ethnic divides, use opportunities for public participation, decision making; engage with the rural and urban poor; encourage awareness among people of their constitutional rights and ensure continued vigilance over the Constitution implementation process. In the absence of effective and stable political parties, civil society has the potential to influence political policies and developments, for example one important aspect of the Constitution is that it is a “people’s” Constitution, heavy on public participation. Civil society should harness this opportunity and aid in the development of a concrete public participation policy within the constitutional framework that would act as insurance for shifting political interests.

Critical legal and institutional framework for implementing the Constitution has been put in place, but some of the new institutions lack the capacity to help

consolidate gains and achievements thus far. There is need to insist on government support for, and recognition of, the role of the Commission on the Implementation of the Constitution. And to begin building capacity of these institutions as well as developing clear and coherent policy frameworks to support their work.

The status of women in Kenya:⁹ The new Constitution has provided women in Kenya with a holistic framework that seeks to address most of the long-standing barriers to women’s rights in Kenya, ranging from discrimination to under representation in public life. The Constitution is a key guiding light for the Kenyan people. However, the practice and attitudes of Kenyans towards women and women’s rights remain the same. We have not seen the necessary shift in order to fully actualize women’s

9 Grace Maingi Kimani- Executive Director Federation of Women Lawyers (FIDA)-Kenya.

gains in the Constitution and, therefore, women rights violations still occur both in the private and public sphere. Women are becoming more aware of their rights; however, the patriarchal stereotypes and perceptions still largely guide relations with women and womens issues. One only needs to look at the debate around affirmative action currently on going with regard to our electoral system to see that Kenyans still have a long way to go in their acceptance of women as equal partners. Domestic violence and other forms of gender based violence against women continue to be meted on women solely on the basis only of their gender.

Securing what is guaranteed for women in the constitution must be done by winning over the public (and women themselves) to defend what is theirs. In order for us to build a progressive Kenya, there is a great need to ensure that women participate in public life and receive protection within their private lives. It is essential for Kenyans to fully embrace equality and non discrimination in all sectors of life. In essence, there should be a strategy on how to action the great provisions in the constitution and consider what is necessary steps towards making them a reality.

There is a need for targeted focus on attitudinal change alongside policy and legislative reform in line with equality principles and the new Constitution. Apart from actions to guide our future behavior, there is still need for a holistic approach to correcting the historical injustices meted against women by the State and appropriate reparations instituted.

The Judiciary:¹⁰ One of the most promising and popular advances arising from the new Constitution is the process of vetting of applicants for key public offices and of the existing judicial officers. It contains much potential for introducing accountability into the public sector and raising the bar for the integrity of public officials. The revamped Judicial Service Commission (JSC) and the Judges and Magistrates Vetting board are expected to radically reform the Judiciary and

there is renewed public confidence in the judiciary and its ability to implement credible institutional reforms. The Chief Justice has established a comprehensive transformative committee to implement/oversee the implementation of reforms. This committee comprises both members of the judiciary, civil society and public, and therefore, is poised to ensure not only public participation but also a proper monitoring of what is necessary for genuine reform.

Use of the Supreme Court for constitutional interpretation will lead to a progressive Kenya. As a final arbiter, the impact of the Supreme Court decisions will extend beyond the parties, in any case, and will shape the manner in which society embraces the new Constitution. Further, this court as the apex court will have the ability to check the excesses of all the other courts below it through the established appellate and referral processes.

10 Judy Gitau- International Commission of Jurists (ICJ) Kenya.

The recent appointment of an ombudsman to receive complaints against the judicial officers is a progressive step in the right direction. The ombudsman will facilitate a feed back to the judiciary on their levels of service delivery to the public. It is hoped that this office will radically change the manner in which judicial officers treat the persons who they engage with in the courts.

As the judiciary makes strides in reforming the way in which it carries out its work, it has become apparent that a good judiciary is not enough in terms of building a progressive justice system. That is why, despite having a new Chief Justice and a Supreme Court, Kenyans are still not happy. Prosecutions are dead, police reform moribund and prison reform has stalled. In order to achieve real progression, the whole assembly line has to be overhauled, i.e., police investigators, police prosecutions and the penal system.

Justice and reparations for victims of post-election violence: The ICC Chief Prosecutor has made progress in efforts to address the legacy of the post-election violence. However, there is no movement on holding the lower and middle level perpetrators accountable. Demand for domestic accountability for these crimes has been reducing in terms of attention. Failure to fight impunity, by establishing complementarity mechanisms for domestic accountability for international crimes, and lack of trust in government programs, suggests that the causes of the post-election violence have not been addressed. A progressive Kenya would see raised public action towards holding the government of the day accountable for any form of politically motivated violence.

Internally displaced persons (IDPs) have continued to be a sore reminder of the post-election violence, yet their existence in a state of homelessness evokes fundamental questions about the reasons they are unable to go back to places from which they were displaced. The presence of IDPs is also a reminder that reconciliation is taking a while to consolidate. A lot of efforts have been put into restoring peace and reconciliation in violence affected areas. However, it appears that such peace has not been deeply rooted, as fear of reprisal and mistrust pervade the society.

A recent study launched by the International Center for Justice (ICTJ) in Kenya on reparative demands of Kenyan victims of human rights violations¹¹ (most of whom were IDPs from the 2007/2008 post election violence) states that the demands and expectations of the victims they spoke to during the discussions and interviews for the study revolved predominantly around having the harms committed against them addressed through material reparations that can meet their most basic needs and that the state acknowledge the harm they suffered. So far, only a fraction of IDPs, have received compensation whereas there are still many “invisible” victims who suffered greater harm than displacement and are shouldering great burdens in

11 International Center for Transitional Justice (ICTJ) 2011 “To live as other Kenyans do”: A study of reparative demands of Kenyan victims of human rights violations. Simon Robins (Kenya 2011).

medical care, increased economic and psycho-social burdens, all of which, have not been addressed by the government.

The emphasis the victims placed on their basic needs and on the urgency of having their livelihoods restored raises questions about the extent to which transitional justice processes currently on going in Kenya are responding effectively to victims needs. The study demonstrates that, if the ongoing transition is to serve those who have suffered the most from Kenya's long history of violations, the issue of reparations must be firmly put on the agenda. An urgent reparation program that addresses the immediate needs of the most vulnerable victims is one of the most immediate steps that Kenya needs to take in order to see progress in this area.

The study raises a further issue hindering progression, that is, that no active steps have been taken towards stopping the cycle of violence and deliver security; this is articulated through demands for acknowledgement of violations, judicial processes to deter future offences and fundamental reform of many areas of the Kenyan security sector.

Satisfying reparative demands of victims requires a new set of norms and institutions to emerge in the country, as promised by the ongoing transition and the new Constitution. In this sense, a reparative process for victims is not only a product of the transition but it can also become a driver of it, linking victims' rights to reparations with the transformation of Kenyan institutions.

Electoral reform:¹² The next general election will move the country through a democratic transition if the poll is well and effectively managed. But failure to manage the electoral process or to prevent partisan political considerations from influencing decisions about the elections can fail the country yet again. On the whole, the electoral process should aim at moving the country to a democratic order. Kenyans should demand good laws, credible institutions and critical reforms. It is also critical to emphasize the importance of creating a strong legal framework for the electoral campaigns for the next and future elections.

Clear progression in the area of electoral reforms will be pegged on surmounting three challenges related to past elections: (i) establish a conducive context for a successful electoral process; (ii) manage the next general elections reliably, competently and in a manner that inspires public trust in the electoral process; and (iii) proactively manage pre-election violence triggers and settle election disputes effectively.

One can describe Kenyan political parties as being in shambles, or as a theatre of all the bad things; 'from suspected drug lords, high level corruption suspects and the Hague watch list, not forgetting the daily squabbling and threats of splitting.

12 Njeri Kabeberi, Executive Director Center for Multiparty Democracy (CMD) Kenya and Professor Karuti Kanyinga Executive Director South Consulting.

Meanwhile political parties are meant to be institutions with ideals and values on which leadership shall be based and not simply political vehicles created to ascend to power.

The Kenya Constitution 2010, the Political Parties Act 2011 and Elections Act 2011 all demand better governance and leadership and have given elaborate guidelines on how we shall run our political parties and political institutions in the future. These guidelines demand of inclusivity, participation and nationhood as key principles of our future politics.

If, however, the citizens neglect their duty and place unprincipled men (and women) in office, the government will be corrupted. Laws will be made, not for the public good but for selfish reasons. Corrupt or incompetent men and women will be appointed to execute the laws that have been enacted, public revenues will be squandered on unworthy men and women, and the rights of the citizen will be violated or disregarded.

According to Noah Webster, an American patriot and scholar, the citizen has a critical role in making sure that leaders of principle are elected into office. He connects delivery of good laws and good leadership to the role that an electorate plays in picking leaders (principled *or* unprincipled).

The change in our politics, and therefore, our political parties is in the hands of the citizens of Kenya. Kenyans must continue to defend the Constitution and laws by making right choices that will push us towards a new culture and higher heights of development.

Security Sector: Security sector reforms have progressed substantially in the policing sub-sector from a legislative perspective, that is, the development of legislation on public participation, police accountability and access to responsive police services across the country. Three pieces of legislation that have been recently signed into law are: The Independent Policing Oversight Authority Act, The National Police Service Act and The Police Service Commission Act. Of the three, it is only the Police Service Commission Act that has been published in the Kenya Gazette and is now in operation.

A new police training curriculum which focuses on policing science (criminology, forensic science, psychology, criminal justice, correctional administration and penology and human rights) has been prepared and is being used as a pilot curriculum, in the ongoing recruits training. New police officers will now have to sit an examination and those who fail will not get an opportunity to serve.

A new recruitment process was implemented in April 2011 and overseen by the Police Reforms Implementation Committee. It is hoped that lessons learned from the

April exercise will inform policy on recruitment that serves as a guide to upcoming recruitment drives.

A major challenge to reforms in the security sector is that recommended reforms are implemented without an overarching policy framework that not only spells out the security priorities for Kenya but it also sets out the responsibilities for lead actors in each stage of the reform process. At the moment, there is an intense policy divide at the drafting of legislation stage, an issue that would have been overcome by putting in place an overarching security sector policy. The question of the relationship between the Administration Police and the Kenya Police Services would have been dealt with at the policy preparation stage rather than at the legislation drafting stage. Regardless, as is the case with the Kenyan policy processes, the law is made ahead of policy and this is what applied to the security sector. This challenge will be stark when the country finally gets down to preparing the National Security Council legislation. The relationship between different organs and how they also operate at the national and county levels will remain a challenge.

It is important to note that currently, reforms in the security sector have only focused on the policing sub-sector with the assumption that it is the only sector requiring reforms. There is somewhat minimal attention on the Intelligence as well as the Defense Forces. Ideally, in order to have progressive security sector reforms, reforms should touch on all security sector sectors.

The country is still seized of the debate around enforcement and strong arm approach to dealing with contemporary crime and violence concerns in communities. The ongoing reform process has not quite prioritized the aspects of crime and violence and while the country has attempted to implement recommendations of Waki, Ransley and Alston reports, the reality is that the Kenyan public needs to be brought on board through a discourse that places more emphasis on the broader human security as opposed to state centric paradigm.

Politics and Ethnicity: Building a progressive Kenya will require a new political culture, a fundamental transformation in the hearts and minds of Kenyan voters. Politics in Kenya is still primarily organized around ethnic interests where politicians seek political office on the platform of “best defenders” of their ethnic communities’ interests.¹³

Ethnicity has taken centre stage as a tool for political mobilization and organization. Thus, elections are contested and largely won or lost by the propagation of ‘fear’ of the ‘other.’ Political tribalism has become a huge obstacle to Kenya moving forward with the reform agenda, as corruption and all forms of impunity take centre-stage today. One only needs to consider how easily and quickly calls for accountability on

13 Michael Orwa, Coordinator, Movement for Political Accountability (MOPA).

individual members of the political class are converted into cries of ‘our community is being targeted’, by affected individuals.¹⁴ A progressive Kenya will require the growth of a new culture of issue-based politics that de-emphasizes ethnicity and other negative aspects of identity politics.

One of the means to building a progressive Kenya is for a deliberate political investment in a Kenyan identity. An identity that embraces all the various tribal, religious, gender, age, class and other distinctions that Kenyans have. To achieve it will require an honest national, regional and local conversation on what it means to be Kenyan. The main catalyst to these discussions will be a new category of politicians and other sector leaders, able to see Kenya beyond their respective areas of influence.

Land reform:¹⁵ Land reform was identified as one of the long outstanding key elements under Agenda 4 that needed to be addressed during the Kenya National Dialogue and Reconciliation process. Indeed, land cuts across the rural-urban divide as a broader factor whose access, control and use rather than necessarily its ownership determines the country’s ability to build a progressive society that is efficient, sustainable and equitable for prosperity and posterity.

In order to build a progressive Kenya, each ministry dealing with reforms that touch on land must ensure that its dealings are from joint action and common platform effort. For instance, agriculture, natural resources and environment fall under land as defined in the Constitution of Kenya, 2010. The Ministry of Agriculture has been going through reform as part of the Strategy for Revitalizing Agriculture (SRA) (2004) and its successor the Agriculture Sector Development Strategy (ASDS) 2010-2020. Further, Vision 2030 seeks to increase agricultural production through irrigation. This has implications for the land sector and in order to ensure progress in the land sector, coordination between the Ministries of Water and Irrigation, Land and Agriculture should be key.

The Constitution provides the context and the momentum for the implementation of the National Land Policy (Sessional Paper No. 3 of 2009); and the twin blueprints on land reform make a strong foundation for building a progressive Kenya. It is also proposed under Article 162 of the Constitution that a court with the status equivalent to the High Court be established to deal with environment, land use and title to land. This progressive step in ensuring land disputes should be resolved in an expeditious manner.

14 Ngunjiri Wambugu, Executive Director, Change Associates.

15 Odenda Lumumba, National Co-coordinator, Kenya Land Alliance, and Head of Land Sector Non-State Actors Secretariat.

The Constitution has introduced devolution of government, providing that the sovereign power of the people be exercised at the national and county level. It then makes detailed provisions on the national and county government and in the fourth schedule details the distribution of functions between national and county government. These changes require that the reforms in the land sector align to the requirements of devolution. It is therefore imperative that the Ministry of Lands works closely with the devolution mechanisms established under the Ministry of Local Government.

In view of the foregoing, it is important to state that the existing institutional operation of the Ministry of Lands is not capable of coordinating the land reform implementation process in a manner that contributes to building a progressive Kenya. As a result, it is prudent to move with speed to enact the National Land Commission Bill into law to operationalise the National Land Commission to take charge of land reforms. To dither would be to roll-back the land reform agenda, and consequently, reduce its inevitable contribution to building a progressive Kenya.

Human Rights:¹⁶ One of the key and most celebrated gains of the new Constitution of Kenya (2010); is Chapter Four: The Bill of Rights. This chapter came to be known as the “*people’s chapter*” during the referendum campaigns as it proved to be the most popular with the people of Kenya. The Bill of Rights in the new Constitution has brought about a sea change in several ways. First, unlike the Bill of Rights in the old Constitution, the new Constitution’s Bill of Rights is actionable. The Constitution not only recognises rights, but also enables citizens to enforce them; the previous one required the Chief Justice to enact rules. Thus, several cases testing various aspects of the Bill of Rights have already been filed before the Courts; this heralds well in respect of strengthening a culture of constitutionalism in Kenya.

Second, the Bill of Rights broadens the recognised scope of actionable categories of rights by including economic and socio-cultural rights such as the rights to health, water, housing and education under article 43.¹⁷ It recognises and expressly prohibits various forms of discrimination that had entrenched inequality such as discrimination on the basis of disability and age (article 27). Third, the Bill of Rights contains several enabling mechanisms, for example, it allows a person to act on behalf of another who cannot act on their own (article 22 [2a]); and it provides for a constitutional human rights commission (article 59). The importance of a robust enforceable Bill of Rights in instituting a culture of constitutionalism cannot be overstated. These constitutional provisions have been further strengthened by the establishment of a High Court Division specifically dedicated to hearing human

16 Atsango Chesoni, Executive Director, Kenya Human Rights Commission.

17 Please note that the obligation on the State is to ensure progressive realization of these rights (article 21(2)) however, article 20(5(a)) places a responsibility on the State to illustrate “*that the resources are not available.*” The State cannot therefore spuriously claim lack of resources.

rights matters.

The theoretical framework for a strong progressive human rights culture in Kenya is in place. However, there are challenges. Kenya's weak culture of constitutionalism has meant that Kenya does not have strong human rights jurisprudence and enforcement practices. There is limited understanding of human rights norms such as substantive equality—many people do not understand that in respect of exclusion, for example, the State can be required to compensate victims of exclusion, that there are policies and practices that can be instituted that nurture a more inclusive society. There is also resistance to the new human rights mechanisms and the entrenchment of the new norms. This can be observed in several recent events. During the parliamentary debate about the appointment of the new chairperson of the National Gender and Equality Commission, for example, it became apparent that there is need to develop clear policies for ensuring inclusion and to do so in a manner that does not further exacerbate historical injustices.¹⁸

Several challenges to the right to property and housing are observable in the recent evictions. It is hoped that the ongoing parliamentary debates on this issue will yield a new policy approach. The consequence of years of corruption are coming to bear vis-à-vis the housing and land sectors in a manner that increases the burden on ordinary citizens in a time that they are already suffering an economic recession.

On the positive side, citizens are seizing the new opportunities that the Bill of Rights provides: several groups of IDPs have taken the government to court on the questions of violations of their rights to property, security and dignity. The question of the rights of persons with intellectual disabilities to various State funds is currently before the courts, amongst various issues. Also several former prisoners of conscience have successfully sued the State on questions of false imprisonment and torture. Despite the controversies, principles of inclusion and merit are now consistently being cited as guidelines in appointment to public office. It is hoped that increasingly human rights norms will come to guide policy and law making as well as practise in Kenya.

There is need to provide training in human rights based approaches to policymakers and lawmakers, members of the Bench and Bar as well as the various human rights bodies and constitutional commissions. This will enable a proper understanding as well as institutionalisation of human rights norms amongst duty bearers. There is

¹⁸ During the parliamentary debate on this appointment, parliamentarians objected to the fact that His Excellency the President and the Right Honourable Prime Minister, had chosen the fourth ranked candidate (in order to comply with diversity principles). All the candidates were female and in the case of the first ranked candidate, she was passed over on account of the fact that her mother was from the same ethnic community as two other commissioners; even though she does not identify herself in this particular manner. Women are particularly challenged as the fact that they may be married to a man that is not from the same ethnic community as them is brought to play. See, "Kenya: House Rejects Equality and Gender Chair," 9th November, 2011, at <http://allafrica.com/stories> accessed on 28th November, 2011.

also need to ensure a better understanding amongst the public of their rights as well as the historical context of human rights to ensure an environment that is responsive to the evolution of a human rights state in Kenya.

Our Vision of a Human Rights State:¹⁹ A progressive Kenya is where all the basic human rights and individual freedoms are respected, protected and promoted. Flowing from the provisions of the Constitution of Kenya, the Bill of Rights encompasses part of the progressive Kenya that we sought, since its very normative framework and content proposes a radical way in which Kenya should and must move forward. As a human rights organization, we firmly believe that if all State organs, offices, and officers (not to mention private organizations and individuals) respect all the principles and tenets of the Bill of Rights, and fulfil their responsibilities, Kenya is poised to be a progressive nation. A firm foundation has been built, but Kenyans still require to implement the structure and system of governance in its entirety – from the County to National Governments.

In conclusion, it is our firm conviction that a progressive Kenya is where democratic space, ideas and values stem from all persons without any sort of discrimination; whether arising from any ethnic background, from any race, from any sex or sexual orientation, from any age, from any political opinion, from any social status, from any religious background, and also from any of the other protected grounds, which the Constitution of Kenya provides. Therefore, if the State and society respect and fulfil equality for all, provide equity in opportunity, ensure public participation in governance, and also respect all other values and principles of governance as enshrined in our national charter, then a progressive Kenya will be gradually built. We will continuously play our role to ensure that this Kenya we all cherish is realizable, within the next generation, if not earlier. *Aluta continua!*

Conclusion²⁰

It is crucial for Kenyans to embrace courage and decisiveness in order to occupy their rightful place under the new constitutional dispensation so as to avoid erosion of the gains thereof. Kenya must be bold to discard unpatriotic cultures, ethos and beliefs that are an inhibition to growth of a progressive, equitable and democratic nation.

The ongoing reforms witnessed in the judiciary are commendable and set sound criteria on illegibility of holder's elective offices. It is a constitutional proviso that eligibility to contest for office of president, governor, senator, Member of Parliament and county representative must be pegged on merit, integrity and sound moral attributes.

19 Tom Kagwe, Senior Programs Officer, Kenya Human Rights Commission.

20 "Katiba Yetu" Campaign statement drafted by John Githongo Executive Director Inuka Trust "Nisisi" and Professor Yash Pal Ghai Executive Director Katiba Institute.

The politics of yesterday, where materialism, tribalism and manipulations were glorified at the expense of positive leadership qualities must be buried and forgotten. This can only be possible if the people of Kenya agree to change negative attitude and misguided notions in approach to politics and expectation of leadership. Those occupying public positions must be viewed as public servants with an obligation to pursue national growth.

Beyond their daily routine lifestyles, Kenyans need to passionately analyze the caliber of individuals seeking elective offices. The quality of political office holders significantly determines the nation's wellbeing and development and it is upon the citizens, particularly the enlightened individuals, to sieve the candidates seeking elective office with a view to realizing credible leadership

Citizens must effectively determine who their leaders become by participating in election as positive educators, elective office seekers and/or vigilant observers. In the past, political elites have courted tribalism, manipulation and corruption to further selfish political agenda. A progressive Kenya will be one that sees issue-based political competitions tethered on political parties' manifestos, which have been more than just a pipe dream; and subjective political considerations such as tribalism which have dominated political campaigns will be a thing of the past as will politicians who pursue tribal-based politics. What Kenyans need is leadership that can push a development agenda and achieve national stability and social justice. Kenyans must embrace leaders on the basis of their ability, effectiveness and development agenda. The citizens must seek knowledge to enable them to evaluate elective offices seekers.

Under constitutional provisions on the right to legal representation, coupled with a reformed judiciary, Kenyans must remain zealous and ensure that political demagogues are locked out, never to set foot in matters of public governance. Institutions such as the church, mosques and other religious bodies must preach values of sound leadership and integrity. Interest groups should focus to equip citizens with objective information on leadership. Finally, a curriculum on leadership and positive values should be introduced in institutions of learning so as to influence the future.

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CHAPTER EIGHT

BUILDING A PROGRESSIVE KENYA PRIVATE SECTOR PERSPECTIVE

Kenya Private Sector Alliance

INTRODUCTION

Kenya has a great potential to achieve high levels of economic, social and political development. The theme of Kenya Vision 2030 “a globally competitive and prosperous Kenya” provides a rallying call for building a progressive Kenya.

The general definition of the word ‘*Progressive*’ has a positive ring to it. Explanations like favoring or advocating progress, change, improvement, or reform, as opposed to wishing to maintain things as they are, especially in political matters forces one to start assessing from where he or she is and then wondering whether they cannot improve for the better. Further definitions include making progress toward better conditions; employing or advocating more enlightened or liberal ideas, new or experimental methods; characterized by such progress, or by continuous improvement; going forward or onward; passing successively from one member of a series to the next; proceeding step by step.

The key points to note are that progress means adapting a new mindset, a paradigm shift from the comfort zone and daring to venture into the unknown to do things differently. More importantly, progress has to be a conscious measurement and comparison between what has been, what is and envisioning what will be.

The opportune time for national transformation and progressive development in Kenya is now. The existence of a new constitutional dispensation, the implementation of the Kenya Vision 2030, an optimistic and hopeful Kenyan population coupled with renewed impetus to rebuild credibility of institutions of governance has laid an appropriate foundation for building a progressive Kenya.

This conference is timely as it offers the much needed opportunity and forum for dialogue, exchange of ideas and dreaming into the future of making Kenya better and prosperous. The private sector will be a key player in making the dream come true.

BACKGROUND

Following the political violence that engulfed Kenya after the disputed December 2007 General Election, the Kenya National Dialogue and Reconciliation (KNDR) forum was formed to facilitate mediation among the various parties. The overall goal of the KNDR process was to *achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights*.

The parties agreed to take several steps to end the crisis. They also identified long-standing issues that had caused the crisis and which posed a threat to Kenya as a unified country.

The Business community was a key player in the discussions that took place by virtue of its critical position as the engine behind the economic activities of this country. It is the catalyst for economic growth, wealth and job creation.

Four Agenda Areas towards National Dialogue and Reconciliation were outlined as follows: Agenda 1: Action to Stop the Violence and Restore Fundamental Rights and Liberties; Agenda 2: Immediate Measures to Address the Humanitarian Crisis and Promote National Healing and Reconciliation; Agenda 3: Resolution of the Political Crisis and the Power Sharing Agreement and Agenda 4: Long Term Issues and Solutions.

Agenda 1, 2 and 3 were fulfilled leading to the end of the violence. Agenda 4 provided for long term solutions that require progressive implementation. The Issues identified under Agenda four are outlined in the table below.

Issues under Agenda 4
1. Undertaking Constitutional Reforms
2. Legal and Institutional Reforms
3. Land Reforms
4. Tackling poverty and Inequality
5. Combating regional development imbalances
6. Tackling unemployment, particularly among the youth
7. Consolidating national cohesion and unity
8. Addressing transparency, accountability and impunity

So far there is notable progress in the realization of Agenda 4. For example the promulgation of the Constitution of Kenya, 2010 was a major milestone in constitutional reforms which now need to be followed by reforms in the constitutional institutions as well as its full implementation. The process of land reforms has started with the preparation of draft Land Bills. The provision of national values under Article 10 of the Constitution of Kenya as well as establishment of institutions such as National Cohesion and Integration Commission and Truth, Justice and Reconciliation Commission is a progressive step towards the realization of national cohesion and unity among others. The institutional reforms especially in police, judiciary, electoral body and other public sector institutions has also been notable. The implementation of Kenya Vision 2030 which guides government’s medium term planning, development and budgeting has provided for various measures for tackling poverty and inequalities.

LESSONS LEARNT TO MOVE FORWARD

Liberal democracies respect the rule of law, individual rights and initiative, and

transparent policymaking, all of which benefit the business community and society as a whole. A competitive, responsible private sector in an open economy provides an important counterweight to the state, injects dynamism into political discourse, and makes possible a vibrant civil society. Thus, successful democratization depends on economic reform on multiple fronts, including the creation of market institutions, the advancement of informed debate on economic policy, and the empowerment of the private sector.

A politically engaged private sector can improve policymaking, represent legitimate economic interests, and defend democratic rights and institutions.

In this regard, the third Kenya National Dialogue and Reconciliation conference is different from the two held previously whose discussions centred around history and the present, *where we have come from and where we are*. In that regard, the discussion in this paper is more futuristic, *where do we want to go and how do we get there*.

SUSTAINING THE GAINS TO BUILD A PROGRESSIVE KENYA

Kenya is now in its second year of implementing the new constitution. This is a great achievement considering that one of the key issues under Agenda 4 was to undertake constitutional reforms. Institutional reforms in the Judiciary, Public Office Appointments and setting up of various Constitutional Commissions, including the key Independent Electoral and Boundaries Commission, are taking shape.

However, as the political temperatures start rising in anticipation of next year's general elections, the window for reforms could close by early 2012 when campaigns pick up. It is, therefore, paramount to move things along quite fast. The remaining constitutional commissions have to be fast tracked, fully established and funded. The need for fundamental and comprehensive Civil Service, Land, Judicial and Police reforms cannot be over emphasized. Aligning Vision 2030 with the new Constitution, enacting legislation on Ethics and Anti-Corruption, establishing legislation for implementation of devolved government at County level is staring at all stakeholders in the face.

The country also has to realize that it will need at least 2 to 3 election cycles to fully embed the new Constitution and start to entrench the changes.

ROLE OF THE PRIVATE SECTOR IN BUILDING A PROGRESSIVE KENYA

Strengthening, Respecting and Supporting Institutional Reforms

The Private Sector will consolidate the gains made under the new constitution mainly

through strengthening, respecting and supporting the rule of law and effective functioning of the various institutions. For instance, reforms in the Judiciary are on course with the public appointment of the Chief Justice and his Deputy. It will support the Judiciary through advocating for the increased use of arbitration in business related disputes rather than the courts as a way of reducing the over load of cases in the courts and administration of costs of the same.

The Private Sector is a major player as a supplier in the corruption equation, and therefore, it behooves the members to believe in the rule of law. It must be seen to be practising honest and genuine business and not circumvent justice.

In its 2010 Corruption Perception Index (CPI) survey, Transparency International (TI) ranked Kenya as the third most corrupt country in East Africa after Burundi and Uganda, followed by Tanzania and Rwanda. Globally, the report ranked Kenya in position 145 out of 180 countries polled in the annual survey in which Kenya scored 2.1 out of a possible score of 10.

Although no concrete data exists on the incidence of corruption in Kenya, the now defunct Kenya Anti-corruption Commission (KACC) has recorded 30,000 cases over the last five years (an average of 6,000 cases per year), but estimates 1 million annual incidences premised on a population of approximately 40 million.

Most corruption cases involve compliance with import/export and cargo clearance procedures, facilitation of business licenses and other hook-up costs charged by public sector organisations such as Kenya Ports Authority (KPA), Kenya Revenue Authority (KRA), Traffic Police, Local Authorities / Counties, and key ministries involved in Public Procurement with respect to local sourcing of goods and services.

In this regard, KEPSA and Kenya Association of Manufacturers (KAM) are developing and implementing a Code of Ethics and related standards for the private sector that will offer technical capacity building training to companies in Ethics Management, and developing a Corruption Prevention Pact between Kenya's private and public sectors. There is also further need to establish clear rules and systems to discourage and detect such malpractice with stiff penalties imposed for culprits.

Building and Strengthening Democratic Governance

The Kenya Private Sector Alliance (KEPSA, as the umbrella body of the Private Sector in Kenya, has to sustain the current Public Private Dialogue (PPD) mechanism through the engagement structures that it has established including the Prime Minister Round Table (PMRT), Presidential Private Sector Working Forum (PPSWF), Ministerial Stakeholder Forums (MSFs) and the KEPSA Speaker Forum. The Private Sector can only provide government with a steady revenue stream if the political climate is stable. Open dialogue removes uncertainty that drives away both

key local and foreign investment.

Under the new constitutional dispensation, there are three main game changers that will make a big positive impact in enhancing an enabling business environment if they stay true to reforms and deliver on their mandates as per the constitutional provisions. These are the Judiciary, the Independent Electoral and Boundaries Commission and the County Structures.

Specifically the Private Sector must engage with the governors and define the role of a governor as the Chief Executive Officer of a county. The governor must be made aware that he or she will be competing for resources and investment opportunities by facilitating a conducive enabling business environment at the county level and like any other business entity, he or she must promote the unique selling point(s) in his or her area.

The County Structure will bring focus to regions that have hitherto played second fiddle to Nairobi, the capital city, and, therefore, the task for the private sector is to also be proactive by sensitizing the governors on the need to have proper land tenure laws, highly educated, skilled and productive workforce and developed infrastructure in order to deliver on the social and economic expectations. In the same breath, the communities will learn to manage common resources like water catchment areas, which in due course, will reduce the level of mistrust and tension.

The 2011 Legatum Prosperity Index shows that Kenya is placed at position 97 globally in terms of governance with most Kenyans deeply suspicious of their country's politics. The country is placed at number 62nd with respect to the overall quality of its democracy, and 85th for the effectiveness of its bureaucratic institutions. The public perceives corruption to be widespread in government and business, with the country among the bottom 10 nations on this variable. Only 34 per cent of the Kenyan population had confidence in their government when surveyed in 2010. The rule of law is very poorly enforced, with the country placing 100th on this variable. Less than a third of the population expresses trust in the judiciary and only 15 per cent of the population has faith in the honesty of the electoral process.

Kenya is at position 52 on the Index on the freedoms of expression, belief, association, and personal autonomy. Public satisfaction with the freedom to choose is much worse, placing the country 84th on this variable. Additionally, society is not highly tolerant of minority groups. Kenya is placed 86th, globally, with respect to citizens' perceived tolerance towards immigrants, and just 90th with respect to perceptions of tolerance towards ethnic and racial minorities.

Interventions by the Private Sector

In a report '*Helping Build Democracy that Delivers*' by the Center for International

Private Enterprise (CIPE), the question on why the business community is important to democratic development is answered. It states that “In a democracy, all parts of society must count, and business people too must be free to express themselves politically. Often a majority of legitimate business interests are not represented in the political process. This broader business community must become engaged in the reform process to ensure that fair competition prevails and business involvement in politics is open and clean. Fair economic competition strengthens business diversity and pluralism, which creates a strong context for healthy political competition and checks on government power. Democracy flourishes in countries with open economies; equal opportunity; and responsible, prosperous businesses”.

Some of the components that promote a market economy in tandem with its democratic political regime include:

- **Rule of Law** that protects rights and guarantees commitments
- **Competition** in a decentralized economy. In the Kenyan case, the county structures will permit and encourage open competition which will stimulate economic growth away from the central capital city of Nairobi
- **Participation** by Private Sector in policymaking, debate, and other political activities by representing business interests, sharing information with government and the private sector, educating the public on economic issues, and making policy recommendations. KEPSA is already involved with the government through the various engagement structures including the Prime Minister Round Table (PMRT), the Presidential Private Sector Working Forum (PPSWF), the Ministerial Stakeholder Forums (MSFs), the KEPSA Speaker Forum and the Parliamentary Committees. All these engagements are avenues to talk with the government on policy matters that affect the business climate. Some of them will undergo transition after the general elections next year and KEPSA is aware that it has to be flexible and innovative to keep the conversation going
- **Accountability** by both the government and the private sector will encourage democratic transition and consolidation. KEPSA must lead the way in making such demands and holding government accountable. It also has to look within its members and enforce responsible practices
- **Political freedom cannot be achieved without economic freedom.** All facets of freedom are good but freedom must always be accompanied by responsibility. The new constitution has set the ball rolling with pro-business reform laws and the business community has to seize this opportunity to encourage individual initiative and creativity. The government is enhancing an enabling business environment and KEPSA has to take advantage and urge its members to be innovative and create jobs and wealth for this country

- **Equality** before the law and equality of opportunity by all business players has to be reinforced. In Kenya, the Micro-Small-and Medium Enterprises sector provides the majority of opportunity both for entrepreneurs and in informal employment. Unfortunately, this sector has no regulations and many opportunities have been lost and revenue to the government through taxes lost. KEPSA is spearheading the SME Bill in Parliament as a Private Member's Bill so that this huge pool of entrepreneurial talent is not left out of the formal market economy. The integration of this sector into the formal system would expand opportunity for some of the poorest segments of the population and give them a stake in a democratic, market-oriented system
- **Responsiveness by Private Sector in Public Private Partnerships**

The Private Sector will continue to give funding alternatives to the government in areas that are capital intensive in cases where the government may lack sufficient funds. For example, KEPSA has been in discussions with the government to give opportunity to its members who may be interested in investing in the energy, infrastructure and ICT sectors so as to enhance efficiency which automatically reduces the cost of doing business

Supporting the establishment of effective and accountable institutions that include:

- The Judiciary, Police, Parliament, and Counties as explained elsewhere in this paper
- Ethics and Governance Institutions that will inculcate preventive rather than curative anti corruption mechanisms. KEPSA, on its part, is partnering with the new Ethics and Anti Corruption Commission that replaced the defunct Kenya Anti Corruption Commission (KACC) to develop a Corruption Management Protocol
- Business Regulations and Reforms Institutions that will create space for the private sector and limit the scope of the public sector which in turn will reduce burdensome regulations on doing business. This will encourage the uninhibited flow of accurate economic information for policymaking decisions as well as micro-level perspectives
- Political institutions of elections, governance, and representation are as important to the private sector as they are to citizens. By representing business interests and facilitating private sector participation in open policy debate, they engage the business community in democratic processes. In the ongoing implementation of the constitution, the government needs to operationalize the Political Parties Act that will allow the Private Sector to give financial support to political parties with limits set within the law. This will enhance

accountability and disclosure where political parties with pro-business and pro-growth manifestos will be open for public scrutiny

- Youth empowerment institutions and initiatives that will promote entrepreneurship, training and mentorship. This could be in form of incubation centres for youth with innovative ideas and providing them with venture capital to implement these ideas as part of job creation. The Private Sector should also partner with academic institutions to influence the curriculum content to be relevant to the job market needs. The ongoing development of Business and Industrial Parks in major towns is also a solution targeting the needs of the youth
- Pro-business initiatives like promoting the Business Outsourcing Processes (BPOs) is one avenue of absorbing large numbers of skilled work force in exploiting the technology advancements in the ICT sector
- Regional Integration Initiatives like the East African Community Protocol have given the Private Sector the opportunity to be at the fore front to advocate and support seamless investment and trade across borders through movement of capital, labour, goods and services. The caution is to maintain professional standards and be cognisant of the special needs of the micro, small and medium enterprises
- Advocate for efficient, affordable and accessible education systems, which will set-off a string of positive repercussions that include a more educated and healthy population with reduced child mortalities and increased life expectancy, as a result of better medical technology: better living standards because people hold better paying jobs; less crime because of the general well-being of society

CONCLUSION

A progressive Kenya has to be forward and outward-looking beyond physical borders of Kenya and ethnic parochial domination. It must be a conversation with unified voices from the various stakeholders not just talking among themselves but listening to the developed democracies so as to borrow best practices. Progress is a life long journey like a relay where the race goes on, only changing the participants at various points.

The Private Sector is here to stay and it is ready and willing to remain relevant in building a progressive Kenya.

CHAPTER NINE

BUILDING A PROGRESSIVE KENYA KENYA NATIONAL DIALOGUE AND RECONCILIATION

The Religious Community in Kenya

INTRODUCTION

The process of building a progressive Kenya lies on the shoulders of each and every Kenyan. The task will not be easy. However, it has to be done. Five main issues are fundamental in this process. One, dialogue must become an integral part of the social, economic and political processes in Kenya. Second, the rules of the game in politics should be changed in line with the new constitution of Kenya. Third, Kenya's nascent democracy must mature and adopt a principle that democracy depends as much on cooperation as on competition. Fourth, the government needs to address the rising cost of living and reduce poverty levels. Fifth, the rule of law must be respected by all, regardless of status in society.

THE KENYA NATIONAL DIALOGUE AND RECONCILIATION PROCESS

The Kenya National Dialogue and Reconciliation process can be described as a major turning point for Kenya. The eruption of violence following the disputed 2007 general elections kicked off a flurry of activities that necessitated the initiation of the national dialogue and reconciliation process. The process was started at a time when Kenya was on the brink of a civil war and the collapse of the social order.

Prior to the 2007 elections, Kenya was witnessing major changes in the social, political and economic areas. On the one hand, Kenya had registered a laudable economic growth rate, impressive infrastructure improvement, expansion of social programmes such as health, implementation of free primary and secondary education, increased democratic space, renewed war on corruption, implementation of remarkable public service, governance, law and order sector reforms processes. On the other hand, the gap between the rich and poor expanded, inequalities became more pronounced, the grand coalition government collapsed, political rhetoric escalated, ethnic animosity was taken to an all-time high, and the electoral process was severely discredited.

The 2005 referendum on the proposed new Constitution failed to deliver a new constitution due to the deep-rooted mistrust and intrigue among the political elite. The 2005 referendum left in its wake a deeply divided and wounded nation. There were seldom efforts to bridge the gap between the two major political camps, namely, those who supported and those who opposed the proposed new Constitution in that referendum. The signs of a bleak future for Kenya was on the wall.

In May 2006, the Government of Kenya in collaboration with the Africa Peer Review Mechanism (APRM) published the Country Review Report of the Republic of Kenya. The report noted that failure to enact a new constitution through the 2005 referendum could be blamed on “inertia of leadership” and suggested that to resolve

the contentious issues, simple technicalities or constitutional legalese could not help:

“Current prognosis suggests that a carefully managed mediatory and conciliatory intervention under the aegis of the African Union may prove crucial in facilitating the much needed political compromise and solution in resolving these issues and minimize loss of face by the different power centers and factions. The sustainability of proposed outcome will hinge on the ability to devise a win-win formula while simultaneously responding to the collective aspirations of a highly divided society.”²¹

As the violence raged on, the African Union intervened. The Kenya National Dialogue and Reconciliation process under the leadership of the Chair of the Panel of Eminent African Personality, H.E. Kofi Annan, brought the Party of National Unity (PNU) and Orange Democratic Movement (ODM) political parties to the negotiating table. A number of political agreements and a reform agenda was agreed upon and implemented by the Grand Coalition Government. The enactment of the new Constitution through the 2010 referendum was one of the main achievements of the Kenya National Dialogue and Reconciliation process. The new Constitution forms a critical foundation for building a progressive Kenya.

National Healing and Reconciliation

The deep divisions that emerged among our people as a result of the political campaigns for the 2007 General Elections have not yet healed. Many Kenyans are wounded. Trauma among the grass roots communities is evident four years later. The efforts of the Religious Community to use regular services and meetings to heal the communities have yielded tremendous results. However, a lot remains to be done. Time is of the essence. These efforts need to be scaled up in the next twelve months. The Religious Community will continue pursuing peace, fostering unity, healing and reconciling the people. Furthermore, there is need to support the Truth, Justice and Reconciliation Commission (TJRC) and the National Cohesion and Integration Commission (NCIC) in the execution of their mandates.

As the general elections approach, the preparatory work should begin in earnest. An initiative similar to the *Chagua Amani Zuia Noma* (Choose Peace Prevent Chaos) Campaign that was run by a multi-sectoral platform needs to be established. The multi-sectoral stakeholder’s forum should focus on advocating peace, promoting healing and reconciliation, as well as implementing early warning and early response strategies before, during, and after the 2012 General Elections.

The forum should include, among others, the civil society, trade unions, private sector, religious sector, media, and youth and women movements. The government

21 African Union, 2006, *African Peer Review Mechanism, Country Review Report of the Republic of Kenya*, 24 – 25.

agencies such as National Cohesion and Integration Commission, Kenya National Human Rights and Equality Commission, Independent Electoral and Boundaries Commission, Ethics and Anti-Corruption Commission, National Security Intelligence Service, and National Police Service should also be included. If there is one lasting lesson that Kenya learnt during the aftermath of the 2007 General Elections, it is that sustainable peace, security and progress will be attained when all Kenyans pull together. United we stand; Divided we fall

Kenyans have a deep desire for national cohesion and integration. This desire is voiced mainly as a need for “peace”, “co-existence” and “reconciliation”. Peace building is a clarion call for many leaders in Kenya – even those who are suspected of fanning tribal animosity. How Kenya can move towards national cohesion and integration is a question in the mind of every Kenyan. However, peace is not an event, it is a life long process with as many facets as the players.

In a culturally plural country such as Kenya, many citizens have a very uncertain sense of national identity and community. Some writers see this a major factor to conflict:

“The ethnic communities that comprise divided societies typically do not see each other as interdependent parts of a single national entity...To the contrary, in such divided societies, members of each ethnic or religious group often perceive members of the other communities as “outsiders”, or in the extreme, as dehumanized and threatening hostile adversaries. Thus, the fundamental challenge of democratization and peace-building lies not in the absence of democratic values, but rather, in the fact that members of many culturally plural states simply do not see themselves as part of the same national community.”²²

Research has shown that Kenya is “still a country struggling to come to consensus with itself”. Some communities are considering secession from Kenya while some see “nationality as competing with, rather than complementing, other forms of cultural identity in Kenya”. It behooves all Kenyans, state and non-state actors, to recognise that singing the need to deepen democracy in Kenya is just that – one good song. The second and different song which all actors must learn to sing in unison with others is that democracy alone will not move Kenya forward. It is paramount that people are guided to perceive each other across the main cleavages as *cooperators* rather than mere *competitors*. Ways must be found to manage “different facets of identity that Kenyans hold dear in such a way that affirms diversity while refraining from remaking differences in ways that penalise those who do not belong to certain communities”.²³ Efforts must be scaled up to encourage members of different tribes

22 Howard Wolpe and Steve McDonald, *Democracy and Peace Building: Rethinking the Conventional Wisdom*, The Rond Table Vol 97, No 394, 137-145, (2008).

23 Inter Religious Forum, *Root Causes and Implications of the Post Election Violence of 2007*, A Report of the Research Undertaken by the Kenya Thabiti Task Force, 2008, 98.

and religions to see themselves as part of the same national community with one common destiny.²⁴

THE PRACTICE OF DEMOCRACY

With regard to democracy, Kenya now needs to realise that the time for a zero-sum game, winner-take-all mentality is over. Though Kenya is composed of many tribes, religions and languages, they are mere parts of one body. Therefore:

“ [A] way must be found to transform the pervasive zero-sum, winner-take-all mentality that is both the cause and the product of conflict. The leaders of the belligerent parties must come to see collaboration – even with former foes – not as an abstract ideal or as an act of altruism, but rather as a matter of enlightened self-interest. They must see themselves as emerging stronger and more secure through collaboration with others”²⁵

The Kenya National Dialogue and Reconciliation process is one example how Kenyans who perceive each other as “enemies” can pursue their enlightened self-interest and obtain a secure win-win situation through negotiated agreements.

Poverty and rising cost of living

The cost of living has consistently risen over the last four years, pushing poverty levels in Kenya even higher. The prices of food, fuel and other basic commodities have continued on an upward trend and many Kenyans can barely survive. The depreciation of the Kenyan Shilling against other world currencies especially the US Dollar means that the cost of major imports will increase in the short and medium term. As the Kenya National Dialogue and Reconciliation Monitoring Project Review Report revealed, the cost of living remains the biggest worry for a majority of Kenyans.²⁶In fact, the report noted that:

“People dislike the Coalition Government because of the high cost of living: Across the regions, all the respondents named high food prices as the main failure of the coalition. It is important for the coalition to urgently address the concern of high food prices since, as it has been seen elsewhere, it is a source of

24 Inter Religious Forum 93. “The perception that cultural identity matters in access to opportunities has increased the investment in ethnicity as an alternative identity that often matters more than nationality”. For instance, appointments to key Public Service Commission tend to reward “ethnic” chiefs who can command the political allegiance of their communities and “deliver” it in the form of votes when it comes to the General Election.” Therefore, during electoral campaigns, politicians appeal to two audiences: the voters and political party. To the voter, politicians appeal, not in terms of policy or issues they stand for, but first in expressing their appreciation of their communal grievances. To the political party, they demonstrate their capacity to deliver the vote of a particular tribe or an alliance of tribes. Policy and issues politicians stand for are mere incidental to the electoral process.

25 Howard Wolpe 2008: 140.

26 The Kenya National Dialogue and Reconciliation Monitoring Project Review Report, June 2011, para

civil tension and instability.²⁷

Poverty and an idle youth are precipitable ingredients for violence as it happened in 2007. The measures taken by the Government to address poverty and rising cost of living have not yielded many results. Past events have proved that even when economic growth rate was at 7 percent per annum much of the benefits were not trickling down to the citizens. One of the solutions to poverty lies in economic empowerment of the grassroots communities in order to add value, manage the value chain and facilitate market access for their produce. The Religious Community in Kenya is working with small scale producers towards this end. In line with Vision 2030, adequate state resources should be directed towards such initiatives.

THE 2012 GENERAL ELECTIONS

The date for the next general elections remains a contentious issue. Several cases have been filed in the courts seeking to ascertain the date of the elections. As Kenyans await the determination of the matter by the newly created Supreme Court, one hopes that the Government will follow due process and respect the courts. Even if the Supreme Court will resolve the matter, some sticky issues with regard to 2012 general elections concern the Religious Community.

POLITICIANS ARE ONCE AGAIN MOBILIZING FOR SUPPORT ALONG TRIBAL LINES

The political process in Kenya appears to swing on the fulcrum of tribal blocks.²⁸ Reports in the mainstream media indicate that politicians have formed two main blocks that coalesce around the tribes of the main leaders. The ODM and the G7/PNU Alliance are overtly and covertly implementing a strategy whose core is mobilisation for political support based on tribe. Fear, myths and rumours are used to glue the targeted communities together. In particular, both political blocks are using the ongoing ICC process to mobilise for political support and weave a narrative and perceptions that favour them.

Notwithstanding the social, economic and political risks associated with the mobilisation strategy adopted by the main political blocks, it may take some time to reverse, eliminate and replace it in Kenya's evolving democracy. Meanwhile, efforts must be exerted by all actors to move the national debate and electoral campaigns from ethnic cleavages to issue based platforms.²⁹

Apart from making elections – particularly presidential elections – mere tribal marathons, political mobilisation along ethnic lines makes losing elections a

27 KNDR Monitoring Project Review Report 2011:para 103.

28 Inter Religious Forum 2008: 93.

29 Inter Religious Forum 2008: 182 – 184.

communal rather than a political party or individual affair.³⁰ The tribe or an alliance of tribes that consider they have “lost” the elections are disillusioned and sometimes use violence to express their communal grief. Their ethnic pride is wounded and sniffed out.

On the other hand, tribe or alliances of tribes that consider they have “won” the election pour into the streets in a celebratory mood sometimes gloating openly over their hard earned victory. Their leaders then express their desire to vanquish the “losers” literally. Since the electoral process in Kenya remains largely a winner-take-all system, care must be taken to ensure that the majority have their way with humility and the minority are heard and handled sensitively. The winner must reach out to the losers with grace, magnanimity and fortitude. The losers must swallow their pride – even ethnic pride – and concede defeat honourably and in a dignified manner.

The principle that democracy depends as much upon cooperation as upon competition is yet to take root within the political leadership

The erosion of human rights and fundamental freedoms by the Government of Kenya reached its zenith in the 1980s. As the new decade opened its first page, Kenyans led by the faith communities were up in arms clamoring for the opening up of the democratic space for expression of opinion and the freedom to associate. The clamor resulted in the uprooting of KANU as the only political party in Kenya from the text of the Constitution of Kenya. However, for various reasons, the new parties that were formed, though popular with the people, had deficient leadership. They are lacking cohesion and integration among their rank and file. On the other hand, multiplication of political parties caused major divisions among the people. It also marked the onset of tribal clashes in Kenya. This, however, did not happen without notice. Some church leaders had noted the side effects of the re-introduction of multi party politics in Kenya. Since democracy is the rule of the majority, the minority are subjugated and undignified leading to a deep sense of deprivation. As deprivation worsens, the national cohesion and integration is eroded leaving the people open to civil strife in an effort to re-claim their dignity and space.

On 5th June 1990, the late Rt. Rev. Alexander Kipsang Muge issued a statement that warned of serious consequences on national cohesion and integration if multi-party politics was re-introduced in Kenya.

“Let us be realistic and act as Kenyans. If political parties were to be registered today in Kenya, every tribe will register its own party in order to form a base of recognition. Thereafter, various tribes with something in common, for example, small tribes, large tribes, poor tribes, regional tribes, etc, would form alliances

30 Inter Religious Forum 2008: 97.

with the possibilities of winning general elections and forming the government. The campaign to win many tribes as possible in one alliance will go on to an extent the distribution of ministerial post would be agreed upon before the general elections takes place. The sad moment will then follow after the general elections. The tribes forming the government will no doubt be given all Civil Service positions in the entire government and parastatals. Removing such a tribal alliance from power will not be easy, and the only options for the losing tribes or alliance are to go to the jungle and start guerrilla warfare. Kikuyus living in Rift Valley will be targets of violence. The spirit of *Majimbo* (regionalism) would be revived.³¹

Most, if not all, of the consequences that Bishop Muge pointed out have already occurred in Kenya. Political parties were formed along tribal lines. Multi-party democracy led to the emergence of entering Memorandum of Understanding (MoU) between different political parties before elections. While these MoUs help one group attain power, no one envisaged that such politically sacred covenants could be reneged. The violation of the 2002 MoU between Liberal Democratic Party (LDP) and National Alliance Party of Kenya (NAK) contributed immensely to the fallout in the then ruling National Rainbow Alliance (NARC); discord in the government, disagreements over the Constitution of Kenya Review Process that ultimately led to the rejection of the draft constitution in the 2005 referendum; and ultimately the 2007 post-election violence.

In principle, a progressive Kenya will be built when the principle that democracy depends as much on cooperation as on competition takes root within the political leadership. Kenyans must recognise that enduring democratic societies require more than pluralism and open, free and fair political competition. Democracy depends on underlying sets of tacit and legal agreements and common vision that define the rules of the game on the manner in which leaders communicate and relate to one another. In its raw form (as currently practised in Kenya), political competition is not only threatening but destabilizing.³²

Will the new Constitution and Vision 2030 form the agreements and common vision that define the rules of the game? The watershed offered by the two frameworks provides a strategic opportunity. Kenyans should, however, bear in mind that it is widely recognised that constitutions and visions can be reduced to mere pieces of paper if not implemented in letter and spirit. Both the Constitution of Kenya and Vision 2030 have identified clear values and principles of governance to guide its implementation. It is important that the spirit of these values and vision are reflected in all efforts to fully implement the Constitution and Vision 2030.³³ All actors should

31 Nicholas Otieno, *Beyond the Silence of Death: The Theology and Life of Alexander Muge*, 31, (National Council of Churches of Kenya, 1993).

32 Howard Wolpe and Steve Mc Donald 2008: 137 – 145, 139.

33 Inter Religious Forum 2008: 183 – 184.

also recognise that implementation of these frameworks goes beyond government action. Indeed, the Government is a mere stakeholder not the ultimate “owner” of the implementation process. All Kenyans have a right and a duty to participate in the process. The Government is a creature of the Constitution. Kenyans are the owners, mothers and fathers of the Government of Kenya, the Constitution and the Vision 2030. It is this renewed and revamped spirit that should inspire the building of a progressive Kenya.

Building a progressive Kenya will not be based only on pleading with one tribe or an alliance of tribes to subordinate their communal self-interest to national interest. True national interest must be magnanimous enough to accommodate the self-interest of all Kenyans and all tribes in a way that none feels excluded. Howard Wolpe and Steve McDonald state that:

“Democratic nation-building is not simply a matter of persuading political leaders to subordinate their parochial interests to those of the nation. Real transformation requires not greater altruism from leaders and citizens, but rather a new recognition that their self-interest can be more effectively advanced through collaboration and inclusive political processes”.

As Kenya rises from the ashes of the post-election violence of 2007, all Kenyans must mature in their democratic culture to identify, recognise and embrace one another’s self-interests and advance them through collaborative and inclusive political processes.

The 2012 General Elections present the most complex exercise in Kenya’s history

In addition, the Independent Electoral and Boundaries Commission (IEBC) will execute perhaps the most complex exercise than any other in Kenya’s history. There are at least six seats rather than the previous three that will be balloted on in the same day. The logistical nightmare of bringing closure to the 2012 elections fairly, freely and efficiently has to be deliberately planned for meticulously. The capacity of the new electoral body is untested, and therefore, Kenyans hinge its efficiency and capacity on faith, hope and resilience.

The Religious Community shall continue to push for free and fair elections and legal means of solving any electoral disputes.

As the elections draw near, it would be appropriate for the international community to:

- (1) Support the Government of Kenya and the Independent Electoral and Boundaries Commission in their quest for conducting peaceful, secure, free

and fair elections;

- (2) Support the non-state actors such as the Religious Community to conduct voter education, civic education, peace dialogue processes and interventions that create an enabling environment for peaceful, secure, free and fair 2012 elections; and
- (3) Support domestic and international observation missions.

INTERNATIONAL CRIMINAL COURT PROCESS

The Religious Community is keenly following the process at the International Criminal Court (ICC). Holding all the suspects of the post-election violence to account is critical in bringing closure to the civil disturbances that Kenya went through and cracking on impunity. Both the Kenyans who support and those who oppose the ICC process express a strong desire to see fairness and impartiality in not only the process but also the outcome. ICC has no choice but to ensure that justice is not only done but seen to be done for all parties.

The Religious Community is helping the grass roots communities come to terms with the process and to prepare for the outcome of the confirmation hearings. A clear message is going out to the people. The elements of that message are worth noting:

- (1) That Kenyans should expect zero to six of the accused persons being confirmed by the Court as the outcome;
- (2) That violence (crimes against humanity) occurred in Kenya, hurt people of all tribes and can happen again if no one is held to account and we continue with business as usual; and
- (3) Notwithstanding the waning support for the ICC process, the perception that ICC “targeted” specific tribes for prosecution; and whatever the outcome of the confirmation hearings, when the ICC issues its decision on the confirmation hearings, Kenyans must remain calm, sober and peaceful and allow life to move on.

CONCLUSION

In conclusion, it suffices to reiterate that building a progressive Kenya will require certain fundamentals to be in place. It is the duty of every Kenyan to participate in putting in place these fundamentals in their areas of influence and building the progressive Kenya as well.

First, the feelings of the uncertain sense of national identity and community among

many Kenyans must give way to a common vision, destiny and identity.

Two, leaders of the competing parties must come to see collaboration – even with former foes – not as an abstract ideal or as an act of altruism, but rather as a matter of enlightened self-interest. They must see themselves as emerging stronger and more secure through collaboration with others.

Three, it is important for the coalition to urgently address the concern of high food prices and rising cost of living since, as it has been seen elsewhere, it can be a source of civil tension and instability.

Four, the current scenario where political processes in Kenya appear to swing on the fulcrum of tribal blocks requires urgent re-orientation. Efforts must be exerted by all actors to move the national debates and electoral campaigns from ethnic cleavages to issue based platforms. Current incentives that make investment in ethnic rather than national identity more lucrative must be identified, eliminated and replaced.

Five, the practice of democracy needs to mature. All political players must embrace the principle that democracy depends much upon cooperation as upon competition. One cannot overemphasise the need for Kenyans to acknowledge that democracy depends on underlying sets of tacit and legal agreements such as those entered by the two principal following the Kenyan National Dialogue and Reconciliation Process.

Six, efforts to make Vision 2030 and the new constitution become truly the common vision that defines the rules of the game on the manner in which leaders communicate and relate to one another remains a priority.

Seven, apart from persuading the political leadership to subordinate their parochial interests to those of the nation, a new approach must evolve. Actors must at the same time, facilitate an environment where political self-interest can be more effectively advanced through collaboration and inclusive political processes, which is more transformative.

Lastly, the ongoing ICC process would contribute to entrenching respect for the rule of law. Holding all the suspects of the post-election violence to account is critical in bringing closure to the civil disturbances that Kenya went through as well as cracking on impunity that is so endemic within the ruling elite. Apart from facilitating an enabling environment, addressing these issues would also contribute to building a progressive Kenya.

CHAPTER TEN

BUILDING A PROGRESSIVE KENYA THE ROLE OF THE MEDIA

Media Council of Kenya

As Kenya inches closer to the 2012 elections what role can the media play in contributing to the success of the elections and to national unity; and what does the Kenyan nation need to put in place to encourage the media to play these roles? The Constitution, in article 10 (2) spells out the values, principles and aspirations of the Kenyan nation. These include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people. The second set of these values include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Further, the values as set out in this important document conclude with good governance, integrity, transparency and accountability.

These are high principles and it will take the rallying together of all institutions in the nation to contribute to their achievement. Among these institutions include the executive, the legislative and the various levels of government, the judiciary and the media. The Constitution has provided for avenues of reforming the arms of government in order to give them the capacity to contribute to the high goals of our society. But left outside this reform bracket is the media even though it has an equally important role to play in the achievement of these goals. How can the fourth estate, given that it is not an arm of government, and therefore, not being reformed through provisions in the Constitution, contribute to the achievement of these high ideals?

The question is particularly pertinent given the perceived role that the media played in the last general elections where some media houses were considered to have been biased towards particular candidates, and overall, some vernacular stations were seen to have contributed to the violence. In spite of the mixed scorecard, on the whole, the mainstream media were measured to have been balanced in their coverage of the election with the usual leaning towards the incumbent in the electioneering period, a characteristic of media in other democracies. However, the same observations reflected that vernacular stations and other small but influential media outlets may have fanned or contributed to the violence that ensued. That the media suffered these accusations is the result of rotteness within the body fabric of the media. Several factors may have contributed to this rot: the skewed media ownership structure that concentrates ownership and management of media houses in the hands of a few individuals from nearly the same geographic area; unethical conduct on the part of some media; unprofessionalism; poor media regulatory mechanism; and the lax that attended this industry that allowed it to reflect within its system some of the worst of our national foibles such as tribalism and corruption.

Most of the reforms taking place in the country following the Serena talks have targeted the public sector. Kenyan media is mainly in private hands and not directly targeted by these agreements. Yet for there to be significant change, it will be critical to address some of the issues that characterized media structure and behavior during

the 2007/08 period. But it is not just the media that must change, our social structure too must provide an environment that allows media to play an active role in the transformation of our society. The changes currently taking place and particularly the constitutional and judicial reforms have far reaching implications for the media.

The media is playing an exceedingly critical watchdog and midwife role in overseeing these reforms. For example: they have reminded the public of the schedules of the reforms; highlighted the debates; questioned instances of larkishness; witnessed the execution of some of the developments and in the process drawn the public's attention to these events; and in the case of the interviews for constitutional commissions beamed live proceedings across the nation – an unprecedented development in this nation's history.

But going forward, what else can the media do? Reflecting back on our media history and development provides lessons from which to draw in examining some of the changes essential in media transformation.

While the media industry can be categorized variously broadly the players fall into two major categories: the mainstream media with national reach and the regional media mostly broadcasting in vernacular languages. The mainstream category includes both print and electronic media while mainly electronic media dominate the regional markets. Mainstream media seek to be professional, have a cadre of well-trained staff, subscribe to some code of ethics and try to operate within the rules of journalistic practice. The picture of the vernacular media front is somewhat mixed. On critical national issues they are likely to take a narrow regional perspective, and appeal emotionally to a passionate local base often with base instincts. Their audience are closely attached to them which gives the vernacular stations collectively greater influence across the nation than can be mastered by the mainstream media. This is not a new phenomenon, looking back over time the Kenyan media has exhibited characteristics of appealing to sectarian interests.

From the beginning of Kenya as a nation, the media has been part of every critical moment. Initially, that role was restricted to recording developments in the land as evidenced in the early Standard. That, of course, changed in the course of time as the paper changed hands from one owner to the other. With the emergence of the African press with African nationalists at the helm, the aspirations and needs of the Africans began to take center stage. Much of the content was generated not from an army of traditional journalists but rather a reproduction of the fiery speeches of freedom fighters and African opinion leaders. For instance, in Harry Thuku's Tangazo, probably the first of the nationalist press, the demand for land rights took center stage.

Over the years, and particularly prior to independence, media could assume several

configurations depending on where one stood. The White press, on the whole, stood for the status quo as epitomized by the position the Standard took prior to independence. The nationalist press, on the other hand, fitted into two categories: the cultural media keen in recording the African history and preserving the African culture; and the restive press that championed the rights, particularly the land rights, of the Africans. These media also campaigned for equality and for greater political space for Africans. This nationalist category suffered setbacks in 1952 when most of them were proscribed and some of the luminaries behind them detained.

There were two more types of press: those run by the church and those aligned to the Asian community. The former were the pioneers of media in Kenya with the establishment of church publications at the Coast as early as 1896. But their content were geared specifically towards nurturing new converts to the Christian faith although that was to change later as the nation neared independence, and even more radically so, after independence when the church press took an active role in aligning its editorial policy with social issues and debates across the country and in the continent. While today there is still an important religious press, run by the Catholic, Pentecostal and Islamic faiths, their influence does not match that of their predecessors in the decade leading to and after independence. This probably limits the moderating influence that religious media could play in today's Kenya.

The Asian press straddled the full spectrum of the political and social thought in the country. While some were fairly nationalist in their demand for independence, others were more committed to cultural purity and Asian nationalism, and others still were content with the status quo. Hardly any Asian aligned media survived into the independence period. While the Asian community still plays a high profile role in Kenya's economic life they hardly influence the media.

But, of course, Kenya today cannot be seen through the narrow prism of races, as was the case above. It is a geographical construct of nearly fifty tribes some with fiercely nationalistic instincts, the pursuit of which causes resentment among other communities. The history over the years, of course, has equally contributed to this. That the national cake has seldom been equally shared in the last half a century of the nation's independence is one of the issues that has reared its head to haunt the nation, but which is reflected in the media. It is an area that the media must navigate well going forward in order to remain alive to the aspirations of the Constitution.

During the first years of independence under President Jomo Kenyatta, the full range of the media rallied behind the new government with few exceptions. The exception being the church media that stood by principles of social justice rather than perceived national loyalty. For the media run by the Catholic and the protestant churches this brought no small grief to their editorial teams. But for the rest of the media it did not matter where they had stood in the previous years, even the Standard was unswerving

in its support for the new regime in Nairobi, and its then editor, John Bolton, said as much. In pursuit of national unity such support would come in useful. It was not until the mid-1970s that the media started reflecting somewhat critically on the affairs of the nation, beginning to ask searching questions with regard to the state of affairs of the nation and the direction the country was headed. Unfortunately, save for a few media outlets, the obsession of the Kenyan media, a practice that has not changed much, has been with issues political rather than infrastructural, national unity and economic development. Too often, the Kenyan media did not ask hard question of the political leadership and the mandarins in key state positions charged with driving the nation forward. Most of the questions tended to be limited to the jostling for power in the ranks of the ruling party and the ruling elite. In national reconstruction a much more engaging role would be essential.

It was this attitude of looking the other side while the nation began its slide down the slope that brought us to where we found ourselves. The question we have to ask ourselves is whether this can happen again. There is no guarantee that it cannot happen. This is where the media's watchdog role comes into play. The basic instinct of the politician is to have his or her way. Would the media, with the capacity to act as a watchdog, sit by and let those tasked with the responsibility of seeing the rebirth of this nation start once again on the path to destruction? Even more fundamentally, does the media have the capacity to play the watchdog role?

Greater trust bestowed upon the media raises a greater responsibility for the entire industry. How well trained are the media personnel? Kenya must have in place the capacity to train highly qualified and motivated media staff. How well are we doing on this score? The last two decades have seen the proliferation of universities both public and private. All the public universities and all the private universities, with only the exception of one, are either already offering programs in media studies leading to specialization in journalism or are in the process of doing so. There is also an explosion of mid-level colleges offering a variety of programs that lead to the award of at most two-year certificates. There is no known academic body that does accredit most of these mid-level training institutions. Given the size of the media industry in Kenya, the country has the capacity to generate sufficient manpower for the local industry and beyond. However, there is a challenge in the training institutions with regard to the quality of the personnel that are coming out and which will continue to come out of these institutions in the short term. Kenyan universities have gone through a major challenge over the years impacting on the quality of education and of the graduates that universities churn out. But journalism programs are particularly facing a major challenge. There has been a major rush by the universities to establish J-programs. In public universities, this development has not been accompanied by an appropriate external oversight. In too many of these institutions, J-programs are run by scholars whose specialty is in disciplines

other than media studies, raising the question as to whether the graduates of these programs will be sufficiently equipped for the industry.

There are other factors as well that are affecting these institutions. Besides faculty there are challenges relating to facilities, high enrolments occasioned by the module two programs, poorly stocked libraries and a lack of hands on practical training environment. The curriculum offered in many of these institutions may provide skills but without sufficient appreciation of the fields that the graduates will work in. Consequently, there is the danger of producing journalists of tomorrow who are incapable of engaging sufficiently with social issues and providing appropriate interpretation of these issues. The new Kenya requires journalists with analytical skills, the capacity to engage in social debate and who are able to critically serve as government watchdogs.

But we do well to acknowledge some of the efforts that media houses are making. In many of them, particularly the mainstream ones, it is now near impossible to join the staff without appropriate qualifications, the minimum of which is an undergraduate degree. It should be pointed out though that to play a critical watchdog role would require more than just a university degree but high moral character, courage and conviction.

The media that transitioned from pre independence to the new dispensation was essentially the state broadcaster, the independent commercial press, and church aligned publications. These media operated under some fairly difficult environment. It appears that the nation felt it owed a lot to the independence heroes and thus critical voices were rather muted in pointing searching lights at the political class. Much of what leaders did then went by without questions. The situation was made even more delicate by the fact that the new nation's leader was an old man. It may have been considered disrespectful to critique the government that he led as such criticism could have been construed to be directed at him personally. That does not mean that there were no isolated voices of descent, but such voices were dealt with swiftly through detentions and other forms of punishments. We still see some parallels of these particularly with regional vernacular press that come across as owing loyalty to regional heroes. These media broadcasting in local vernacular still consider it lack of patriotism to criticize local leaders. Their identity is constructed locally and in so doing lose sight of national agenda of national unity.

Further, the airwaves in the immediate post-independence were controlled by the state and there was only one broadcast house, Kenya Broadcasting Corporation with the monopoly over the airwaves. The station was a government mouthpiece and as some media scholars have put it, a megaphone in the hands of whoever occupied State House. To be fair to Kenya, this was rather an African phenomenon and not limited to Nairobi. The state sought to spread the monopoly they had over the

airwaves to all other media. Journalists in Kenya knew how far they could veer off the official path without attracting the wrath of the government. Consequently, many journalists were deported and some detained whenever they touched on matters that the state was uncomfortable with. This drove sufficient fear in the remaining ones. Such state of affairs can not obtain in the pursuit of the new dispensation. Thankfully, now there are better legal infrastructures to guard against such excesses and society must ensure that such infrastructure remain in place. For the media to contribute to national unity and holding the government accountable it will need to have the freedom to do so.

The Kenya media was hindered by other factors. Kenya has a comparatively high functional illiteracy levels. The impact of this is that majority of citizens could either not access the media or not access the media in a language that they could easily relate with. The second hindrance was economic. The cost of accessing media in Kenya is prohibitive. In terms of the print media this cost is determined by the raw inputs. This is true whether one focused on ink for printing, the printing machines, or the printing paper. The infrastructure had been yet another hindrance. There are more than enough parts of this country where it is impossible to deliver the newspaper within the same day, and where the broadcast signals are equally very weak. The media must be able to reach as many citizens as possible to enable them to follow the national debate. There is good progress made in this regard with electronic media. There are many regional and niche stations broadcasting either in vernacular or to a fairly defined audience. Today, the critical matter may not be the reach but rather the extent to which the content of the station is educative and illuminating. The score card in this regard is still a mixed one. Most of these stations are manned by teams whose journalistic credentials are suspect and whose appreciation of national issues is rather basic. In order to play a critical role in the national debate, the management of these stations must step up the quality of their staff both in terms of training, grasp of issues and maturity. We differentiate here the mainstream media from the local vernacular ones. While the mainstream media are making every effort to fill their ranks with professionals and are seeking to professionalise the field, the same cannot be said of the regional and niche media.

One of the biggest challenges over the years has been lack of freedom of expression and freedom of the press. In a culture without a strong tradition of robust debate and where questioning authority is sometimes considered insolent, it is difficult to engage in the kind of debate that would foster the development of ideas, national unity and, by extension, the development of the country. In the decades of the 1980s and 1990s, this would be manifested in open challenge to the media to contribute to national development via unswerving support for Harambee House, compounded by the numerous defamation charges brought against the press and by the huge penalties meted out against the press in court cases. These penalties instilled fear

in the media. These may have been the conditions that partially contributed to the environment that the media found itself in. Hopefully the reforms being put in place currently would not allow such conditions to emerge again. It is too early to say yet but the reform train at the Judiciary has left the station. The hope is that it arrives at its destination.

The promulgation of the constitution a year ago was a critical moment, not only in Kenya's history, but the history of the media as well. For one, the inclusion of Article 34, for the first time in the nation's history, guaranteed the freedom of the media. This section of the law stops the state from interfering with any person engaged in broadcasting and prohibits the state from penalizing anybody for broadcasting his or her content. The only qualification that the law provides relates to licensing procedures, which, in any case, are essential for the orderly running and management of the field. Even then this is limited to regulating the airwaves and other forms of signal distribution. The law does further provide for the establishment of a body that would facilitate the self-regulation of the media. The popular reading of the law then is that the state, with regard to regulating media, will limit such activity to the management of the airwaves but other than that, media would be allowed to operate freely. The independent media body to be set up by 2013, as provided for in Article 34 (5), will regulate the media. This body will be independent of state, political and commercial control or influence, will reflect the contours of Kenyan society, set standards for the media, and monitor that the media abide by those standards.

Besides the Constitution there are other pieces of legislation that once passed will contribute greatly to a free media, which in turn will contribute to the development of a robust democracy. Apart from the legislation envisaged in Article 34, there is the Freedom of Information Bill and Data Protection Bill, both of which are envisaged to enhance the environment under which the media operate by providing a greater leeway for the media to access information. Further, the Communications Act is yet to be aligned with the new Constitution, and given the expected popular debate and input by stakeholders, the resulting legislation should reflect the views and aspirations of citizens.

While the legislation is generally progressive and well meaning, there are signs that individuals bent on violating the Constitution are doing everything they can to just do that: violate the legislative provisions. The current laws do not allow politicians and partisan interest to own media. That broadly appears to hold in theory. But in reality it is an open secret that there are many stations dotting the breath of the nation that are owned, paid for or run on behalf of politicians. Their editorial is punctuated with reference to some politician to which they owe loyalty. The law is the law and it is important that all citizens obey it. This nation is struggling with the dragon of impunity and the media industry is no exception. The import of the law is to remove partisan influence from the media. It is this that brought the nation to its

knees in 2007/08 and should not be allowed to be repeated.

While these pieces of legislation are good, and are certainly a great improvement from the past, it is one thing to have great legislation, but it is equally critical that the media personnel be of sufficient sophistication to operate in this new environment. The recent past has drawn a mixed picture. As is the case with the larger Kenyan society, the media industry has itself been characterized by ethnic loyalty. Too many Kenyan newsmakers are comfortable breaking stories not to just any journalist but rather to journalists from their ethnic extraction. In the lead up to the 2007 bungled general elections, it was an open secret that several of the leading newsrooms were riddled with tribal loyalty and journalists aligned to one side of the political discourse found it uncomfortable socializing with those from the other divide. These alignments were informed, not by ideological, but ethnic considerations. They were a hindrance to constructive collective discourse. Today, Kenya is debating ethnicity rather openly. It may not be obvious where this debate will lead the nation, but one would hope that rather than entrench tribalism and the perception that ethnicity informs the allocation of national resources, that indeed a new society may emerge where old wrongs are redressed and a united nation forges ahead.

The challenge for media houses is to reflect this emerging face of the nation. The conscious ethnic balancing act is taking place in the public arena. In fact, the new legislation is applying to the public sector but not the private sector, the domain of much of the media. It behooves the media to equally reflect the face of the nation in its staffing. Such effort can not afford to be mere tokenism, but must be in substance, through having fair representation of all communities across the rank of the media. Today, there are still some media that are known to be bastions of certain communities; this must not be the case.

With regard to the question of representation in the media, historically, the media has remained the face of the male society. This is strongly so in the case of Kenya. Today, no female owns substantial media. Further, females are not sufficiently represented across the ranks of the media houses. The majority of those who join the industry are actually female but along the ladder they fizzle out and are hardly present at the top. One dare say too that those in the higher ranks have also been socialized into male thinking in terms of their information processing. It is an area that going forward media houses will require to reflect on in order to align themselves with the reality of Kenya today.

Reference has been made to the emergence of vernacular press. In one sense it is inordinately liberating for citizens to listen to broadcasts in their own mother tongue- a right that is provided for in our legislations. But the flipside of this is that vernacular is a great tool of seclusion, of identity, and a prodigious store house of ideology, philosophy and secrets. It is a huge challenge to promote vernacular and

unity in the same breath. Many social commentators have observed that it was not without the collusion of the vernacular stations that the nation was brought to grief in the last general elections. Going forward, it is the challenge of the media to balance between the right and obligation of broadcasting in vernacular. It should never be again that this nation should be brought to pain by the act of so few with so much influence and power. It is not clear whether there are any efforts to address this matter. But it is a matter that should and must be addressed.

The freedom of the airwaves that brought about the spread of vernacular press also brought with it the myriad radio stations broadcasting across the nation. Most of these broadcast music and engage in everyday trite conversation. Quite a few of them have been of little help in tackling social issues and too many in fact have degenerated into, broadly speaking, unethical broadcast. The Media Council of Kenya is in constant receipt of complaints of one sort or the other regarding the content of these media. Responsibility for these media can not be overemphasized. This leads to the big question of ethics within the journalistic trade. There is a clear code of ethics developed by journalists themselves and now domiciled in the Media Act. The code provides guidelines on how journalists are to go about their business. But over the last year alone there has been sometimes serious violation of these guidelines by both print and electronic media. Indeed, the Complaints Commission at the Media Council of Kenya, which is charged with regulating the industry, has been fairly busy adjudicating one case after the other. The media cannot afford to be less responsible given the challenges that lie ahead.

The worry, however, is that this code of conduct for journalists was in place in 2007. Today, most of the studies surveying the level of awareness of the code of ethics suggest that few in the media houses are applying it. To achieve our high national ideals, the journalists will not only need to know the code of conduct, but to practice it.

Fundamental to the freedom of the press is the freedom of journalists to unite and be able to present a common front. This is good for internal debate among journalists, for defending their turf, but also for collective bargaining. While the Constitution does provide for the right to unionize, unfortunately, journalists have been their worst enemies, and have not shown a great capacity to manage their affairs well. The Kenya Union of Journalists (KUJ), for a long time was embroiled in self-inflicted legal suits that distracted it from engaging in the more serious issues that affect journalists. The industry must find ways of ensuring that the Union can manage its affairs well and create a platform that allows journalists to boldly practice their profession.

The media is perceived as a glamorous profession – what with the increased recognition, both of name and face, which comes along with television and radio

anchoring. However, because of lack of a powerful trade union that would bargain on behalf of journalists, and the capitalist nature of the Kenyan market, there is a huge disparity in how journalists are remunerated. While there is a cadre of journalists that is rewarded handsomely, there is an entire army that is not on the full time payroll, are paid on a piece by piece basis, and while these cadre may do the bulk of the heavy weight lifting of collecting and processing news, there is a high turnover within their ranks, robbing the field of institutional memory. There is need for stability in the industry, for rationalization of the pay of journalists including a careful examination of their welfare package in order to increase the stability of the field. There is some progress being made in this front. For the first time in a while KIJ is not in court over any matter. The welfare of journalists needs to be improved to enable them play critical role in the national reconstruction and KIJ should bring its fair share of weightge penalties against journalists and against media houses pose a serious threat to the notion of a free market place of ideas. Given the critical role that journalism plays, and the speed with which it must process information, it is inevitable that the discipline will, from time to time, fall short of the public's expectations. But the demand for accuracy must be balanced with the overall good in society that a robust and bold media play. While the media are expected to uphold high standards of accuracy such expectation must be tempered with the overall good that would be hurt by heavy penalties being preferred against the press. There was a time in Kenya when it was almost standard that a defamation suit filed against the media by a few select people would invariable be determined in favor of these individuals and the awards would run into millions of shillings essentially threatening to bankrupt the media. The reformed Judiciary must find a common ground to balance the protection of individuals who may be hurt by media houses and the guaranteeing of an environment that is free of judicial fear. Such an environment should allow reporters and journalists on the whole to robustly seek information, report and debate it.

Kenya has come a long way in the last two decades – from one broadcast station to the plethora of stations that dot the landscape today. Yet this landscape is just about to change significantly with the changes in technology. The country is in the middle of migration from analogue to digital broadcast. The analogue system has been known for its wastefulness and poor quality, both which will be corrected by the digital platform. The immediate effect will be the increased broadcast outlets throughout the country. The urgent challenge is how to manage this migration in a fair, democratic and equitable manner. A successful management and migration will ensure increased outlets and greater competition. This will benefit the Kenyan public.

The rise of many outlets must be met with greater responsibility by media houses in terms of the quality and quantity of content they carry. Scholars in the media indus-

try warn that an increase in broadcast stations usually does not result in diversity of content but rather increased similarity of the content. Kenya must watch so that it does not suffer this problem. Currently, the biggest threat to media freedom in Kenya comes in four forms: organized religion, political thuggery, commercial interests and self-censorship. In spite of the international ratings of freedom of media in Kenya--ratings which are often constructed with an eye on the role of the state in suppressing the freedom of the press--the reality in our view is that sometimes these reservations of government intention are over rated. Over the last couple of years the biggest stick held over the head of journalists has been text messages and oblique warnings that cartoonists, reporters and editors receive from some religious movements. Too often, journalists and editors will be thinking about these threats when doing a story than a potential threat from the state. For the media to operate freely, mechanisms must be put in place to deal with these threats that come from organized societies. Most of these operate beneath the judicial radar so that their threat is not easy to be detected.

Political thuggery may be easier to deal with. These are driven either by the payout that the thugs get from their political masters, hooliganism, or overzealous and fanatical following of political leaders. Given that the security arm of the government can track these down, it is critical that such thuggery be stumped out to enable a robust press to flourish.

The other insidious threat to the press is the business community. The sword that the business community holds over the media is advertisement. It will be pretentious to think that this can be wished away or that there is an easy way of dealing with it. Established media markets are still beholden to the threat of media control from the business community and the network of business that incorporates the media owners who would control the direction that media content take. This hinders the vibrant debate that ought to characterize a democracy. We should do well to guard against this. Such measures must be extended to self-censorship that runs in many media houses. Media owners are probably too close to the media. Their influence often towers over their editors, who are their employees. It is not uncommon to detect the grammar and rhetoric of editors abandon the skepticism of journalism and the guardianship of the social good to aggressively don the gown of apologists for the capitalist position complete with the royal we of the media owners. The danger of this is that media owners, in many cases, hail from ethnic communities and too often reflect those ethnic loyalties.

The 2012 General Election will be like no other. Given that media was associated with the evil of the past elections, even if that association only applied to a section of the media, media must bury that ghost in the elections to come. Whether the media is ready for that is difficult to gauge but the ghosts of the past have not been completely interred. There are efforts in individual media houses not to be caught

napping but instead to aggressively prepare for any eventuality. Some of that preparation will pay off. But the field is too fluid now for a clearer prediction. There are mergers in the media industry, some media houses exhibit signs of instability, but some may have not severed their relationship with the past.

There is optimism in the air that the constitutional changes are going well in spite of the hiccups here and there. But one of the reasons that they appear to be largely on track is because those tasked with bringing them to fruition know that they are being watched by the civil society, but even more importantly, by the media. This industry cannot remain where it was in 2007 and hope to still play a critical watchdog role.

The big question to ponder with is: Is there evidence that the media is reforming? There is probably greater evidence that the social environment within which the media performs is transforming more dramatically, making it easier for media to perform, than that the media is itself reforming. Maybe this is driven by the fact that the media are used to watching others. But who is watching the media to ensure that it too reforms?

