



Kenya's new constitution and conflict transformation

ABSTRACT

The infamous 2007/8 post-election violent conflict that engulfed Kenya and attracted global attention was by no means unprecedented. Indeed, the country's history includes episodes of violent conflict, some of the causes of which are still unresolved. A repeated failure to address the root causes of these violent conflicts has occasioned their reoccurrence and further entrenched their underlying factors, such as impunity, weak accountability in governance, corruption, politicised ethnicity, inequitable resource distribution, poverty and marginalisation. The Kenya National Dialogue and Reconciliation process, which ended the 2007–2008 post-election violence (PEV), considered in its fourth agenda item long-term issues and solutions to address the root causes of conflict that have led to episodic violence in Kenya, and made proposals for extensive reforms. Constitutional reform is the foundation supporting other legal and institutional reforms to tackle effectively long-standing issues impeding sustainable peace.

Within the conceptual framework of conflict transformation, this paper analyses the ways in which sections of Kenya's new constitution, adopted on 27 August 2010, address the root causes of conflict. This paper identifies Kenya's root causes of conflict and examines how the new constitution provides for reforms on governance, democracy, human rights, ethnicity and resource sharing. However, a lack of clarity in how some of these provisions will be achieved is cause for concern, as is how certain implementation challenges will be surmounted. Recognising that the potency of the new constitution depends on its faithful implementation, the paper recommends sustained, extensive civic education,

technical and financial support for the implementing institutions and the continued engagement of all Kenyans in ensuring the spirit of the constitution is preserved in its implementation.

INTRODUCTION

The violent conflict that followed the 2007 elections took Kenya by storm. Pockets of violent conflict spread rapidly across the country. Perpetrators included state and non-state actors alike. What began as a reaction to a contested election quickly degenerated into a violent conflict whose root causes predate the election crisis. This was not the first instance of violent conflict in Kenya since its independence. Violent conflict has previously manifested itself as political violence; resource-based conflict, such as land conflicts and cattle rustling; and identity-based conflict linked closely to politics and economics. Many of these violent conflicts were triggered by political processes such as general elections. In certain parts of the country, Kenya's first two multiparty elections – in 1992 and 1997 – were marred by incidents of violent conflict that caused forced displacement, death and destruction of property. The link between electoral processes and violent conflict is in part testament to the high-stakes nature of Kenyan politics, whereby the winner gains all in terms of power, control and resources. This nexus between political power and economic control in Kenya was made possible by the former constitution, which enshrined centralised and executive powers and which enabled successive regimes to utilise politics to access national resources to benefit a select few. Nevertheless, the magnitude of the violent conflict that followed the 2007 elections was unanticipated.

Although Kenya has weathered previous storms of violent conflict, the escalating nature of the 2007–2008 PEV brought Kenya to a near standstill. The political deadlock was finally broken by means of the Kenya National Dialogue and Reconciliation process.¹ Cognisant of the nation's history of recurrent violent conflict with underlying, unresolved root causes, this process included an agenda item popularly referred to as Agenda Four. The other three agenda items were included to guide deliberations on immediate action to stop violence and restore fundamental rights and liberties; provide measures to address the humanitarian crisis and promote reconciliation and healing; and provide means to overcome the political crisis. The focus of Agenda Four is long-term challenges and solutions that recognise that '[p]overty, the inequitable distribution of resources, and perceptions of historical injustices and exclusion on the part of segments of the Kenyan society constitute the underlying causes of the prevailing social tensions, instability and cycle of violence'.² Under Agenda Four, the following measures are proposed: constitutional, legal and institutional reforms; tackling youth unemployment, poverty, inequality and regional development imbalances; consolidating national unity and cohesion; and addressing impunity and the need for transparency and accountability. Constitutional reform is particularly significant as the basis for guiding all the other proposed reforms and strategies of Agenda Four.

Following nearly two decades of constitutional review, the Agenda Four proposal for constitutional reform provided a renewed incentive for a new constitution. This proposal, included within the agenda item dealing with long-term causes of and solutions to violent conflict, communicates the notion that a new constitution has the potential to deter future cycles of violence. On 27 August 2010, Kenya celebrated the promulgation of a new constitution following a peaceful referendum that favoured the adoption of the proposed new constitution. This emotive event was greeted with euphoria and heralded a new beginning for the republic. The document was ratified by over 67 per cent of voters. The threshold of 25 per cent of votes cast in each province was surpassed in all eight of the country's provinces, demonstrating widespread support by the electorate. Although a new constitution is not in itself a cure-all to alleviate the root causes of conflict, its effective implementation will create frameworks and institutions to support the restoration of justice and sustainable peace. In seeking to alter or introduce structures that administer justice and governance more effectively, the reforms in the new constitution are in line with the ethos of conflict transformation. Introduced by Lederach, conflict transformation is a conceptual framework that looks beyond the immediate conflict situation to the root causes of the conflict to

comprehensively address issues of content, context and structures.³

This paper recognises that Kenya has had intermittent violent conflicts in the past, and that resolution efforts, when undertaken, have tended to be aimed at resolving the immediate crisis. A repeated failure to comprehensively deal with violent conflict by addressing the root causes resulted in residual tensions that precipitated subsequent cycles of violence. Agenda Four recognises the crucial role to be played by a new constitution in addressing root causes of conflict through the provision of structures and frameworks to achieve peace and justice. This paper analyses how the new constitution captures the long-term issues and solutions envisioned by Agenda Four in dealing with root causes of conflict to prevent further violent conflict in Kenya. The paper provides a brief background to violent conflict in Kenya; looks at the decades-long national history of constitutional review; discusses conflict transformation and the provisions and gaps in the new constitution that deal with root causes of violent conflict; examines the challenges, prospects and indicators of constitutional implementation; and concludes with recommendations. Although the constitution may contain worthy provisions, only through their effective implementation will Kenya achieve much-needed conflict transformation, sustainable peace and development.

BACKGROUND TO CONFLICT IN KENYA

The term *conflict*, as used in this paper, refers to both literal violence that causes physical harm and non-physical violence of a structural nature that causes harm through the denial of rights and justice. Galtung distinguishes between personal and structural violence: personal violence is direct and refers to physical harm, whereas structural violence is indirect and relates to repressive structures that perpetrate social injustice.⁴ Galtung defines violence as the '... cause of the difference between the potential and the actual, between what could have been and what is. Violence is that which increases the distance between the potential and the actual, and that which impedes the decrease of this distance.'⁵ Put another way, if the difference between the actual and potential is avoidable, then there is violence. For example, if the laws that govern a state declare the equality of all citizens, regardless of ethnic heritage (potential), but in reality there is systemic discrimination on ethnic grounds (actual), then this differentiation constitutes violence. Shirch defines structural violence as '[t]he disabilities, disparities and even deaths that result from systems, institutions or policies that foster economic, social, political, educational and other disparities between groups'.⁶ Shirch discusses the cycle of

violence, illustrating how the reaction and responses to structural violence engender secondary violence at three levels, namely self-destruction, community destruction, and intra- and interstate destruction. These theories of violence are important for understanding and addressing the root causes of conflict, as they provide necessary linkages between direct and indirect, and primary and secondary violence.

Within this theoretical framework, it can be seen that violent conflict in Kenya has roots that reach as far back as colonial times, when harmful policies, such as those of land alienation, were enacted. British colonialism was responsible for substantial land-alienation policies at the expense of the locals and to the benefit of settler agriculture, giving rise to Kenya's so-called White Highlands.⁷ At the dawn of the new republic, the government sought to maintain this precedent of land alienation, making land one of the first resources to be distributed inequitably.⁸ History illustrates how land has been significant as a political tool to garner power and support, as an economic tool to demonstrate wealth, and as a social factor – with claims to ancestral land being grounds for forced displacement. Today the repeated failed attempts to comprehensively address this particular cause of conflict and the lack of substantive reform in this sector make land a sticking point on the road to sustainable peace.⁹ A brief look at key causes of conflict in Kenya reveals threats within the political, economic and social spheres, with crosscutting implications.

In the political sphere, the key identified root causes of violent conflict include the 'politicisation of ethnicity; non-adherence to the rule of law; reliance on centralised and highly personalised forms of governance; inequitable development; corruption and abuse of power; a winner-takes-all form of political victory; and a perception that certain groups are not receiving a fair share of resources'.¹⁰ Furthermore, '[p]rogressively over the 45 years of the country's independence, an increasingly powerful presidency has rendered the quest for political power a zero-sum game'.¹¹ Once elected, the president is able to assume total control over state resources in the absence of effective accountability structures. This control has been at the expense of other political players and has yielded incremental political powers to the president. The previous constitution allowed for an excessively powerful presidency with ineffective accountability structures, and allowed past presidents to sanction marginalisation and impunity.¹² This mode of imperial presidency has allowed presidents to manipulate political processes to their own ends. Two ways in which this has played out in Kenya include the use of the state as an instrument of material acquisition and ensuring political exclusion through ethnic marginalisation.¹³ The aspect of wealth acquisition has led to the high-stakes

nature of Kenyan politics: political power has emerged as one of the primary means to access and amass wealth in a political environment that is above censure.

Closely related to this is the politicisation of ethnicity as a means of both political and economic marginalisation. During colonial times, the divide-and-rule system emphasised and encouraged differences as a way of creating disunity and preserving colonial rule. These politicised ethnic differences persist and form the fault lines for exclusionary politics and conflict. Successive governments have used ethnicity as grounds for mobilisation and resource distribution, as evidenced by the ethnic make-up of political parties and public appointments of previous governments.¹⁴ It is justifiable to argue that in terms of political exclusion in Kenya, ethnicity and class are two sides of the same coin. Given the historical ethnic exclusivity of Kenyan politics, the ethnic group represented in power has often had an advantage over other groups in terms of accessing education and wealth. This has resulted in a class structure that is heavily skewed along ethnic lines. According to Ajulu, '[e]thnicity has thus become the medium through which class politics is conducted'.¹⁵ This was highly visible in the incidents of PEV following Kenya's contested 2007 election – the violence occurred in the less affluent areas, where residents were mobilised to fight each other on ethnic grounds. The consistent insidious manipulation of ethnicity by successive governments has undermined nationalism and artificially fragmented the country into regional ethnic blocs.

Successive governments have used ethnicity as grounds for mobilisation and resource distribution

The politicisation of ethnicity has been managed under the cover of impunity. Despite various commissions of inquiry, disclosures on graft and investigative efforts, suspects with political standing continually evade justice. Using the PEV in Kenya as an example, the transitional justice processes have been derailed by political interest. The Commission of Inquiry into Post-Election Violence (CIPEV, popularly known as the Waki Commission, after Justice Philip Waki, who chaired the commission) was established to investigate the violence. A key recommendation it made for transitional justice was the establishment of a Special Tribunal by the government to prosecute key suspects. The tribunal was to be established within a specified time frame, failing which the names of chief perpetrators of violence would be

submitted to the International Criminal Court (ICC). The failure to establish the Special Tribunal would be interpreted as Kenya's incapacity or unwillingness to prosecute the perpetrators. Parliament voted against forming the tribunal, and subsequently a list of suspects was submitted to the ICC. The ICC was initially meant to complement the judicial process of the Special Tribunal, which as a local entity may have provided a more accessible transitional justice process and the capacity to try more cases more quickly.¹⁶ In December 2010, Parliament once again moved to derail the justice process by passing a motion to have Kenya withdraw from the ICC, a move that followed the naming of six suspected masterminds of the PEV. However, the move was highly criticised, primarily by civil society organisations, and the cases against the six commenced at The Hague.¹⁷ Despite the progress made towards democracy over the past years, the determination to evade due judicial process is not only galling, but also a possible indicator that the political goodwill by parliamentarians to build Kenya on foundations of justice and peace is compromised. As well put by Murithi, the repeated failure of justice for victims may indeed lay the foundation for further violence and instability in Kenya.¹⁸

The economic roots of conflict are intertwined with the political and social causes. Through political marginalisation, improper use of the state's economic resources has created uneven levels of development around the country. Some regions enjoy economic wealth; others are poor. The impact of climate change, in the form of frequent droughts, failed rains and natural disasters, has aggravated this disparity, and the less developed regions, which are often geographically vulnerable areas, face chronic human-security challenges over food, health, livelihood sustenance and harsh environmental conditions. This has resulted in chronic poverty in certain areas and a rapidly growing divide between the rich and the poor. 'The distribution of resources among the privileged and those in power according to ethnically-based patronage systems has created, and continues to reinforce, patterns of horizontal inequality by ethnic grouping and geographical location.'¹⁹ This uneven distribution of resources has meant that a large proportion of the population is economically and politically disenfranchised. In particular, the youth,²⁰ who constitute the largest segment of the population, bear the brunt of this disenfranchisement, and experience high levels of unemployment. An emerging issue linked to this is the growing phenomenon of criminal groups. These groups mainly comprise young people and are found in specific geographic locations – and in some cases, are formed on ethnic lines.²¹ The main activities of these groups are extortion through illegal levies and participation in violent crime and conflict.

According to Githongo, the traditional development accomplishments of the Kibaki government have been tangible. However, it appears that these policies have not improved the lot of the lower-income population, as commodity prices steadily rise in Nairobi.²² Traditional achievements in recent years have included substantial economic growth and improved service delivery. In a report for a UN Habitat meeting in March 2010, however, the Kenyan ministries of housing and local government observed that urban inequality was growing at a faster pace than efforts to curtail it were being put in place, and this has had a direct impact on the provision of essential services like water, electricity, sewerage systems and good roads in residential areas.²³ This inequality is evidenced by the mushrooming of informal settlements, often created by those who are employed in more affluent neighbourhoods. The inequalities of class and ethnicity were apparent during the PEV in 2007–2008, with most of the violence concentrated in lower-income areas and along ethnic lines. Linked closely to this is endemic corruption, which has been at the heart of the mismanagement of public funds. Inconsistent attempts to tackle high-profile corruption plague the integrity of different governments: the political elite's evasion of justice further entrenches the inequalities that propagate division and conflict.

Social causes of conflict have emerged from a culture that has experienced generational political and economic disenfranchisement. Taking the example of criminal groups, it is evident that the traditional culture of respect for elders has given way to a 'might is right' culture. Such groups, usually young and armed, take control and intimidate residents, regardless of age, and show no traditional respect for seniority. This was the case during the PEV, with the criminal groups controlling sections of the country to protect their own interests. In the context of the PEV, the argument that there is a normalisation of violence carries some weight. It proposes that there is a need to analyse why 'ordinary' Kenyans violently turned against each other and why there is a prevalence of violence in society in general.²⁴ The impunity surrounding violence over the past decades indicates a growing tolerance for violence as a means of expression – and as a response by state institutions. Given that economic prospects for the youth have not necessarily been enhanced by economic growth, the role of youth gangs in the PEV indicate that power was devolved to them suddenly, unintentionally and organically.²⁵ As political and economic events have destroyed cultural values, morality has adapted to situations of ethnic manipulation, impunity, violence and corruption.

Efforts to address these root causes of violent conflict were frustrated by the absence of a legal framework that could fundamentally transform these structures of injustice

that have been discussed. The PEV, tragic as it was, provided an opportunity to critically examine these structures and the root causes of conflict with the goal of transforming systems in order to establish justice and achieve sustainable peace. At the crux of this was constitutional reform. Given the impact of a new constitution on the root causes of conflict that are perpetuated by systemic injustice, this paper argues that these constitutional reforms essentially fall within the conceptual framework of conflict transformation.

INTRODUCING CONFLICT TRANSFORMATION

According to Lederach, conflict transformation is a conceptual framework that connects an occurrence of violent conflict to underlying patterns and contexts.²⁶ Recognising conflict as normal²⁷ and a potential motor of change, Lederach posits that the term *conflict transformation* more aptly relates to constructive efforts at change that go beyond the resolution of specific problems. In essence, conflict transformation, in adopting a broader contextual analysis of conflict, interrogates the existing structures that allow the manifestation of injustice and violent conflict, and proposes the transformation of these structures accordingly. The rationale is that, although a conflict crisis may be resolved, without adequately addressing the context of violent conflict, there is a strong likelihood that violent conflict will reoccur. Conflict transformation requires long-term analysis of violent conflict situations, their contexts and ways in which these situations can be transformed to reduce the risk of future violent conflict.

In the case of Kenya, episodic violent conflict that appears to have common root causes is indicative of a failure to address contextual issues surrounding the episodes of conflict, thereby leading to consequent episodes of violent conflict arising from the same or similar issues. For example, conflict over land ownership use and access has been a dominant conflict typology in Kenya. This form of conflict has often been handled on a case-by-case basis, with no effort made to transform systems of land tenure to address the broader context of land ownership, use and access, and how they affect Kenyans. In Kenya, the privileged few own large portions of the land, while many Kenyans are landless. However, the new constitution aspires to transform this issue – a chapter is devoted to land and the environment – and seeks to reform land systems and address historical land injustices.

HISTORY OF CONSTITUTION-MAKING IN KENYA

Constitutions usually capture a nation's past experiences and aspirations. It is through constitutions that nations

seek to repair the ills of the past and put in place the beacons to guide them towards an improved future. This is no different for Kenya, whose constitution-making and reviewing process is both a reflection of its history and an indication of its ambitions. This section briefly discusses Kenya's history of constitution-making, tracing it from colonial days up to the new constitution published in 2010. It discusses how Kenya's recent and past history of violent conflict is central to the state's constitution-making and reviewing processes. Issues that were inadequately addressed in Kenya's previous constitutions were allowed to fester, making the nation vulnerable to violent conflict at different stages, as described above.

Constitution-making during the colonial period

Kenya's first constitutions, if they may be termed as such, were adopted during colonial times. The first to note is the Lyttelton Constitution, named after the British colonial secretary Oliver Lyttelton, which was adopted in 1954. It was meant to respond to the rising expressions of discontent by Kenyans, notably the Mau Mau rebellion. Africans were agitating against the colonialists' policies of land alienation and inadequate representation in state affairs. This and other socio-economic issues, such as unemployment and poverty, heightened tensions in the colony and eventually led to a violent response in the form of the Mau Mau rebellion. As one of Kenya's liberation heroes and its first vice president, Jaramogi Oginga Odinga, put it:

[I]n the years between the war and the Emergency, the government was not aware that trouble was brewing. Unrest had been deeply aggravated in the overcrowded reserves, and had spread to the African squatters on white farms and to Nairobi, where unemployment was brewing.²⁸

The Lyttelton Constitution was a placebo intended not to repair these issues, but to respond to and hopefully quell the violent Mau Mau rebellion. As Nyanchoga et al. observe: 'Seemingly the Lyttelton Constitution was introduced as an emergency measure to prosecute the Mau Mau fighters and maintain the authoritarian nature of the colonial rule.'²⁹ Indeed, this constitution did not deal in any significant way with the issues of land and under-representation that were ailing the majority, who were Africans. The roots of using constitution-making as veiled inaction towards problems facing Kenyans can be traced to the Lyttelton Constitution.

As a result, the agitation continued with the realisation that the Lyttelton dispensation was not going to improve the plight of Africans. In 1958 the Lennox-Boyd

Constitution (again named after the then colonial secretary) was published. This constitution attempted in some ways to address some of the issues concerning Africans, albeit in a superficial way. For instance, it increased the number of Africans in the Legislative Council to 14, equal to the number of Europeans. However, it did not address the core issues affecting Africans, such as land. The constitution was used once again as a carpet under which those issues could be swept.

The call to resolve once and for all the independence-related issues facing Africans continued as a result of the inept way that the Lyttelton and Lennox-Boyd constitutions had dealt with them. Pressure from freedom fighters on both the political and Mau Mau fronts eventually led to the three Lancaster House constitutional conferences between 1960 and 1963. These conferences and the resultant constitutions cumulatively led to the independence constitution of September 1963, which ushered in Kenya's independence on 12 December 1963. Although the independence constitution led to Kenya's independence, it still did not address the key issues exhaustively or satisfactorily. According to Nyanchoga et al., 'the Lancaster House Constitution Conference generally failed to iron out some of the fundamental issues that affected [the] majority [of] Africans.'³⁰

Land was the core issue, hence the Mau Mau slogan 'freedom and land'. It was not addressed, however, in a manner consistent with the expectations of Africans, who had hoped that the conferences would come up with a solution that would return to them the land that had been forcefully and fraudulently taken away from them. It was not to be. The independence constitution retained controversial provisions, such as the 999-year lease for white people holding agricultural land, which was introduced in 1915. The Bill of Rights also contained clauses protecting ownership of property, irrespective of how it was acquired. This meant that white ownership of land acquired by colonialists from Africans through force or trickery was laundered through the constitution. After independence, the Kenyan government would, therefore, have to compensate owners by buying back land from those who had taken it away wrongfully. Odinga laments this scenario:

[T]he country's Bill of Rights, negotiated as part of the Constitution, contains the key clause on property rights which obligates us to pay compensation for settler farms.³¹

Beyond ushering in what has been termed as 'flag independence', the independence constitution was unfortunately a document that glossed over the real issues affecting Africans. Nyanchoga concludes: '[T]he independence constitution did not reconcile the realities of

oppression and subordination, especially as expressed in poverty, inept land policies, corruption and weak institutions of governance.' Instead, it created 'more conflicts and the rise of multiple social movements'.³² This analysis supports the notion that the current manifestations of violent conflict in Kenya have their seeds in constitution-making and the constitutions churned out during the colonial days.

Constitution-making after independence

Kenya's post-independence constitution-making process can be described as a continuation of the call to resolve the issues not addressed by the independence constitution. The process also served as a counterbalance to the administration's quests to amend the constitution in such a way that power shifted from systems of checks and balances to the presidency. Kenya's first president, Jomo Kenyatta, set the pace. In 1964 the constitution was amended to create the Republic of Kenya when the institution of the presidency was created. The president became the head of state and of government, positions that had been held by the Queen of England as represented by the governor general and the prime minister, respectively. Kenyatta was Kenya's first prime minister and became its first president in 1964. Additionally, regionalism, or majimboism, which brought in devolution by establishing seven regions plus the capital, Nairobi, as semi-federated entities, was expunged from the constitution. Governance was henceforth exercised centrally. The land issue remained unresolved, with the political 'class' of the day allocating to themselves huge areas of fertile land instead of resettling landless Kenyans.

These and other issues, such as the banning of opposition parties in 1969, which made Kenya a de facto one-party state, catalysed opposition to Kenyatta's government, with calls to review the constitution and revert to the principles and values embodied in the independence struggle and constitution. Opposition first came in the form of Jaramogi Oginga Odinga and allies, who, in April 1966, driven by 'frustration and disillusionment [with] the Kenyatta administration',³³ formed the Kenya People's Union (KPU). Kenyatta's regime had failed to put in place programmes that would comprehensively deal with the issue of the landless, among others. Odinga described policies formulated by the government to deal with the issue of land as 'hobbled from the start'.³⁴ In June 1964, Bildad Kaggia, one of Kenya's liberation heroes and a junior minister in Kenyatta's government, had had enough and resigned because of the indifference with which the government was handling problems afflicting ordinary Kenyans, and his 'devotion to the needs of the landless in whose interests, after all, our independence constitution was fought'.³⁵ He joined Odinga's KPU in the first offensive

against the constitutional order that Kenyatta and his allies were engineering.

Failure to address the land question, de facto one-partyism and the emasculating of democracy were the hallmarks of Kenyatta's constitutional amendments. With these amendments, Kenyatta scoffed at the very issues – land and freedom – that had prompted Kenya's most prominent pre-independence violent conflict, the Mau Mau rebellion. The causes of Kenya's recent violent conflict can be traced back to Kenyatta's government through its constitutional amendments and autocratic exercise of power. His regime exploited ethnic-based politics, aggravated the land problem and failed to deal adequately with poverty, thereby breeding voices of dissent and change.

Daniel arap Moi succeeded Kenyatta in 1978. Political leaders, religious leaders and academics opposed to Moi's regime rallied against his administration's philosophy, dubbed 'nyayoism',³⁶ namely that Kenyatta's status quo would be maintained in the new regime. Moi was vice president when Kenyatta died; he intended to run the country along the same lines as Kenyatta. Moi also oversaw several constitutional amendments, key of which was the 1982 amendment through a new Section 2A, which confirmed Kenya as a *de jure* one-party state. Moi's nyayoism, the new Section 2A of the constitution and other factors – such as entrenched economic corruption, poverty, impunity among the political elite and the disappearance and detention without trial of Moi's opposers – strengthened the resolve of Kenyans to usher in greater democracy by means of a new constitution. The fight for the repeal of Section 2A in order to allow for political parties other than the Kenya African National Union (KANU) reached fever pitch in the late 1980s and early 1990s.

The repeal of Section 2A in 1991 of the former constitution catalysed demand for a new constitution and marked the beginning of the second main period of constitutional review. However, following the 1992 general elections, when Moi and KANU retained power, Kenyans realised that the repeal was no panacea for the myriad of problems that ailed the country. And they eventually realised that piecemeal amendments to the constitution would not change the prevailing situation resulting from the numerous previous amendments to the constitution. '[I]n deed, the many political, social, and economic problems facing the country were attributed to deficiencies in the Constitution.'³⁷ It became evident that only a comprehensive review of the constitution would usher in real change in Kenya.

In 1997 the Inter-Party Parliamentary Group (IPPG), a team of MPs representing political parties in Parliament, cobbled together an agreement whose aim was to navigate

the country through the general elections that year. The agreement, which addressed only political and electoral reforms, was inadequate, a gentlemen's agreement, and, therefore, likely to be dishonoured because it was not legally binding. In 2010 the Committee of Experts for Constitutional Review (CoE) succinctly noted that '[t]he IPPG package focused on political and electoral reform concerns, but beyond those dealt with the problems inadequately. Important agreements, such as the appointment procedures for the members of the Electoral Commission of Kenya, for example, were not enacted, let alone constitutionalised.'³⁸

The period between 1998 and 2005 witnessed what could be described as the institutionalised quest for a new constitution. The process, now established in law,³⁹ was led by an independent institution, the Constitution of Kenya Review Commission. In November 2005, Kenyans rejected the Proposed Constitution of Kenya 2005 in a referendum. Unfortunately, after the referendum there were no clear beacons leading to a new constitution. This void was filled by politicians who exploited Kenyans' undying hope for a new constitution. Through party manifestos and public rally pronouncements, they promised to deliver a new constitution if given the reins of government in the 2007 general elections. The commitment and ability to bring about a new dispensation were crucial qualities for political parties and presidential aspirants during the elections that year.

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The 2008–2010 process

The 2007 presidential elections were tightly contested, and, as earlier stated, led to violence in various parts of the country, necessitating the formation of the Kenya National Dialogue and Reconciliation team, whose primary aim was to manage the cessation of violence. Kofi Annan led the discussions under the banner of the Panel of Eminent African Personalities,⁴⁰ established by the African Union (AU). The Kenya National Dialogue and Reconciliation drew up an agenda with four items, as follows:

- Immediate action to stop violence and restore fundamental rights and liberties
- Immediate measures to address the humanitarian crisis and promote reconciliation and healing

- How to overcome the political crisis
- Addressing long-term issues, including constitutional, legal and institutional reforms; tackling youth unemployment; tackling poverty, inequality and imbalances in regional development; consolidating national unity and cohesion; and addressing impunity, transparency and accountability

Through the fourth agenda item (known as Agenda Four), Kenya got an opportunity to conclude the constitutional review process. To some extent, and regrettably, the PEV arguably provided the impetus to resume the process of constitutional review. This was underlined by Kenya's prime minister, Raila Odinga, who, when delivering his speech during the promulgation ceremony, stated: '[N]o one could have thought that out of the bitter harvest of the disputed election and the violence that pitted our people against each other just two years ago, we would be witnessing today the birth of a national unity that has eluded us for more than forty years.'⁴¹

Parliament enacted the Constitution of Kenya Review Act 2008 (CKRA). Its preamble declared that it was drawn to facilitate the *completion* (authors' emphasis) of the review of the constitution of Kenya. The CKRA set out the procedure, process and timeline for the completion of the review process. It also outlined the organs of review,⁴² namely:

- the CoE
- the Parliamentary Select Committee (PSC)
- the National Assembly (NA)
- the referendum

The CoE provided leadership, technical guidance and stewardship of the process. Among its other duties, it was supposed to examine draft constitutions⁴³ that had been churned out over the years, identify contentious issues⁴⁴ and come up with a harmonised draft constitution. The CoE was also charged with conducting civic education on the process and content of the proposed constitution before the referendum.

The PSC, which comprised 27 MPs representing the parties in Parliament, was primarily mandated to provide political leadership and forge consensus on issues that the CoE had identified as contentious, according to the Act. To its credit, the PSC did find consensus on all contentious issues presented to it, but unfortunately overstepped its mandate by reviewing the entire draft. As observed by the CoE, 'the PSC's proposals made substantial changes not only in the contentious chapters, but also – controversially – to provisions in agreed areas'.⁴⁵ These changes did not go down well with Kenyans because some of them included the adulteration of clauses in the Bill of Rights that

were close to Kenyans' hearts and were aimed at the enhancement of their well-being, such as provisions on social and economic rights, and specific provisions for women, children, young people and the disabled.

Civil society organisations voiced their concerns and urged the CoE, who had the final responsibility for determining the content, to reinstate the axed provisions. Eventually, and as per the CKRA, the CoE prepared the final draft and took into account the consensus arrived at by the PSC. However, it made changes to other parts that had been controversially altered by the PSC 'for reasons of coherence and in order to adhere to the guiding principles of the process of constitutional review'.⁴⁶

On 23 February 2010, the CoE presented the draft constitution to the third organ of review, the NA, for consideration and debate. The NA had 30 days to complete this task and could only amend proposals made by the CoE through a two-thirds majority. Despite the numerous amendments that MPs proposed, none met the required threshold, and on 23 March 2010, Parliament unanimously endorsed the draft constitution, as presented by the CoE.

This set the stage for the referendum, which was held on 4 August 2010. During the run-up, vibrant debate emerged on various issues in the Proposed Constitution of Kenya, as published on 6 May 2010 by the Attorney General. The vibrancy of the debate was marred, however, mainly by politicians and other leaders who misrepresented the contents of the proposed constitution. 'Even before the official campaign period, the politicians had hit the ground misrepresenting and distorting the contents of the proposed constitution on such issues as the Kadhis' courts, abortion, land, etc.'⁴⁷ A large majority of Kenyans ignored the distortions and, as noted above, endorsed the proposed constitution as Kenya's new constitution.

These events show that the quest for a new constitution in Kenya was a long and arduous journey. Indeed, Kenya's constitution-making process is reputed to be one of 'the most protracted in the world'.⁴⁸ It was met with many hurdles, primarily centred on Kenya's political culture, which to a great extent was what the new constitution sought to repair. Those who benefited from the status quo industriously sought to ensure that little success, if any, was achieved. However, the Kenyan people's resolve to get a new dispensation was indefatigable. Despite the numerous challenges encountered during the process, Kenyans pressurised leadership to ensure that their goal of a new constitution was achieved. They understood that the many social, political and economic problems they faced were born of the old constitutional order and that a new constitution with relevant pronouncements would provide the perfect platform for them to improve their well-being and prevent violent conflict.

CONSTITUTIONAL PROVISIONS ADDRESSING ROOT CAUSES OF CONFLICT

The new constitution has provided an excellent platform for addressing the root causes of conflict in Kenya. It is responsive to the root causes identified in Agenda Four and introduces new frameworks, while modifying existing structures. There are key provisions in the new constitution concerning socio-economic rights, governance, integrity in leadership, accessible judicial process, non-discriminatory representation, separation of powers, political accountability and protection of land and the environment. The sections that follow provide an analysis – albeit not an exhaustive one – of how these key provisions specifically address the threats to human security that have given rise to conflict in Kenya.

Governance and accountability

Weak governance and lack of accountability have been at the root of past conflicts. The new constitution seeks to modify the structure and style of leadership, thereby promoting the tenets of good governance and accountability. Some of the manifestations of bad governance in Kenya's history have been an excessively powerful and unaccountable presidency and Parliament, a compromised judiciary, high-level corruption and impunity. Specific efforts to address issues of governance and accountability are set out in Chapter 6 of the new constitution on leadership and integrity, Chapter 9 on the executive, Chapter 10 on the judiciary and Chapter 11 on devolved government.

New provisions that seek to include a system of checks and balances respond to the problems of unaccountability that came about as a result of the former structures of an imperial presidency and an unaccountable legislature. The past model of an imperial presidency has been blamed for marginalisation, inequitable power distribution and politicised ethnicity. To counter this presidency model, Article 145 in Chapter 9, which concerns itself with the executive, now allows any member of the NA, with the support of a third of the members, to call for a motion to impeach the president. This provision adds a much needed element of accountability by ensuring that the president is not above the law. Likewise, Article 104 addresses the right of recall, which now allows constituents to recall their MP before the end of term of Parliament. A major gap in the previous system had been the fact that once elected, MPs were free to engage or disengage with their constituencies as they liked. These layers of accountability – of the MPs to the people and of the president to the NA – bode well for democracy and good governance.

Chapter 6 seeks to introduce transparency into leadership through integrity in an effort to stem the

gnawing problem of corruption that has threatened the livelihoods of many Kenyans. It outlines the principles of leadership, which include transparency and accountability, and reminds state and public officers that public service is a public trust. This chapter details the expectations of leadership in public service, and in Article 75 notes that those who hold public office who are dismissed for contraventions of the chapter through corruption and abuse of office shall not be eligible to hold any other state office. This addresses the issue of impunity that used to prevail: previously there were cases of dismissed civil servants later being reappointed to different state offices in a clear violation of the spirit of justice and good governance.

New provisions that seek to include a system of checks and balances respond to the problems of unaccountability

Impunity has been the scourge of development and reconciliation. Kenyans have been victims of impunity both collectively and individually as a result of corruption and as casualties of violent conflict. Justice has been slow in coming, if at all. Although Chapter 6 addresses the requirements of transparency and accountability, the constitution goes further by reaffirming the independence of the judiciary. Article 160 of Chapter 10 expressly reiterates that the judiciary will not be under the control of any person or authority save for the constitution and the law. Agenda Four of the Kenya National Dialogue and Reconciliation process called for judicial reform to deal with systemic issues that have compromised the independence and autonomy of the judiciary. The independence of the judiciary will be greatly enhanced by the provisions for a judiciary fund in Article 173, which secures financial independence for the work of the judiciary. An independent judiciary will restore Kenyans' eroded trust in the legal system and thereby boost their desire to engage with the legal system as a means to access justice. One should remember that the PEV in Kenya was triggered by the Orange Democratic Movement presidential candidate, Raila Odinga, refusing to challenge the results of the presidential election through an election petition because he felt that the courts would not have been impartial. Instead he opted for mass action as a path to justice.

Good governance will also be achieved through a more equitable distribution of power to ensure better service delivery. The new constitution provides for a devolved

government in Chapter 11, the objectives of which⁴⁹ are fundamental to conflict transformation. These include promoting the democratic and accountable exercise of power; giving powers of self-governance to the people; enhancing the participation of the people in the exercise of the powers of the state and in making decisions affecting them; promoting social and economic development; and the provision of local, easily accessible services throughout Kenya. Devolved governments will now be protected in Parliament by the newly created senate.⁵⁰ The devolved system of government will enable a more sustainable model for resource sharing and improve the ability of local governments to provide basic services and infrastructure. The constitution creates the framework for making resources available to the county governments in order to realise these objectives. Article 203 in Chapter 12 on public finance ensures that there is an equitable share of national revenue between national and county governments. It guarantees that at least 15 per cent of national revenue raised annually shall be provided to county governments, ensuring that counties have the financial means to provide services and enhance the well-being of their residents. In addition, Article 204 establishes the equalisation fund, which the national government will use to provide basic services, including water, roads, healthcare facilities and electricity, to marginalised areas in order to bring them up to par with other areas of the country.

This new legislative structure, as outlined in Chapter 11, is one of the biggest contributions of the new constitution in introducing a devolved government through the establishment of new county governments. Corruption and marginalisation thrived under the previous system, which gave a small number of people absolute control over the nation's resources, resulting in gross underdevelopment in some regions. Underdevelopment has served to exacerbate the cycle of migration, population density and competition over scarce resources, leading to conflict. The aspect of separation of powers inherent in the new system, together with increased degrees of representation, will ensure a more equitable distribution of resources and an improved system of checks and balances, which are central to democracy. Caution must be exercised, however, as there is the danger of simply devolving the structural causes of conflict, such as corruption, negative ethnicity and impunity, to the new county authorities.

Participatory democracy and citizen empowerment

From the very beginning of the new constitution, the preamble lays a firm foundation for human security with its people-centred approach. It affirms that it is the *wananchi*⁵¹ of Kenya who wrote and granted themselves

the new constitution: 'We, the people of Kenya ... adopt, enact and give this constitution to ourselves and to our future generations.'

Following the preamble, the substantive pronouncements on the design of statehood bestow sovereign authority in the people of Kenya (Article 1). These pronouncements confirm that the new dispensation is 'people-centric' by ensuring that, through the constitution, the people sanction all that is exercised. Key to participatory nation building is the empowerment of the people. The new constitution seeks to recognise the power vested in the people to determine governance, and recognises that the constitution is by them and for them; it is both inherent in and instrumental to their well-being. Although this may be characteristic of other constitutions, it is particularly significant in the case of Kenya, where the power of the people has been consistently usurped by excessively powerful, unaccountable politicians and governance structures. The preamble is supported by subsequent articles that illustrate how the people's right to governance is upheld by this new constitutional dispensation.

In facilitating better representation of the people, Chapter 7 guarantees free and fair elections by outlining the principles of the electoral system.⁵² The Independent Electoral and Boundaries Commission is established in Article 88. The commission is charged with conducting elections and referenda, registering voters and delimiting constituencies and wards. It must be emphasised that the institutional and functional integrity of the Electoral and Boundaries Commission is paramount in guaranteeing peaceful elections in Kenya, given that among the main catalysts of the PEV were the controversial actions of the now defunct Electoral Commission of Kenya. The system of governance also adheres to the democratic tenet of the separation of powers, with cabinet secretaries not being MPs.⁵³

An example of another provision that delivers power back to the people is Article 22 of Chapter 4, on the enforcement of the Bill of Rights, which allows every person to institute court proceedings for themselves or on behalf of others in the event of a violation of rights. This will be particularly useful because now one can lodge a petition on behalf of somebody else who may be incapacitated, or on the grounds of public interest, making justice more accessible to those who may not have the resources or capacity for such actions. Article 119 of Chapter 8, concerning the legislature, also gives citizens the right to petition Parliament to enact, amend or repeal any legislation. In addition, Article 257 of Chapter 16, on the amendment of the constitution, allows an amendment to be proposed by popular initiative if signed by at least 1 million registered voters. The right to petition Parliament

and amend the constitution also opens the way for the public to directly engage in legislation if they believe their best interests are not represented. Previous Parliaments have been known to pass unpopular legislation, often to the benefit of politicians, without regard for public opinion. These articles seek to engage the citizenry in determining their own governance, which is key to establishing democracy.

The constitution also provides a framework of national values and principles of governance.⁵⁴ These include patriotism, the rule of law, inclusiveness, human dignity, equity, social justice, human rights and sustainable development. These values are more than mere words – they are justiciable,⁵⁵ as they are binding to the government and all Kenyans, and form the basis of the application, interpretation and implementation of the constitution.

Protecting human rights

The link between conflict prevention and human rights cannot be denied. Protecting human rights is integral to preventing violent conflict because it assures the life, dignity and safety of all individuals, thus allowing them to actively participate in their own progressive development. The Bill of Rights in Chapter 4 outlines a more progressive and ambitious human rights framework. Article 19 states that the recognition and protection of human rights and fundamental liberties are aimed at preserving ‘the dignity of individuals and communities’ and promoting ‘social justice and the realisation of the potential of all human beings’.

The Bill of Rights categorically recognises and protects social and economic rights. This is through Article 43, which guarantees people’s rights to the highest attainable standards of health; accessible and adequate housing; reasonable standards of sanitation; freedom from hunger; clean and safe drinking water; social security; and education. The historical injustices of inequitable resource distribution, corruption and marginalisation have created chronic and generational poverty in Kenya, situations that have sometimes provided fertile ground for violent conflict. The state is now obliged to ensure these socio-economic rights, and, in doing so, will address chronic poverty around the country, thus eliminating poverty as a factor in violent conflict in Kenya.

The Bill of Rights also provides for rights that enable or facilitate a democratic and free society founded on good governance. These rights include equality and freedom from discrimination (Article 27); respect for human dignity (Article 28); freedom of expression, while respecting the rights and reputations of others (Article 33); access to information (Article 35); freedom of association (Article 36); freedom of movement and residence (Article 39);

protection of a right to property (Article 40); a clean and healthy environment (Article 42); and conducive labour relations (Article 41). In addition, the rights of vulnerable groups are protected ‘to ensure greater certainty as to the application’⁵⁶ of their rights and fundamental freedoms. The rights of children (Article 53), people with disabilities (Article 54), the youth (Article 55), minorities and marginalised groups (Article 56), and older members of society (Article 57) are guaranteed.

Protecting human rights is integral to preventing violent conflict

Ethnicity

Negative and politicised ethnicity has been a plague to the nation, with large-scale violent conflict mainly occurring in the form of what has been described as ethnic clashes. On a political level, the devolved government will ensure greater representation within this new layer of leadership. As stipulated in Article 90 of Chapter 7, on representation of the people, political parties will have to demonstrate regional and ethnic diversity in their composition. The ethnic make-up of political parties and ethnocentric politics in the recent past have been cause for concern, as these have been used to manipulate and exacerbate ethnic tensions. This provision seeks to remedy the situation by dictating visible ethnic representation in all spheres of government and public service appointments. Citizens are also protected against ethnic discrimination in Chapter 4 of the Bill of Rights – Article 27 stipulates that all are equal and have rights to equal benefit of the law, and the state or any person shall not discriminate against anyone, directly or indirectly. This gives communities an opportunity to seek redress for past discrimination, and all citizens to begin to enjoy full benefits and rights, regardless of their ethnicity.

Competition for resources

One of the most commonly occurring types of conflict in Kenya has links to land access, use and ownership. Chapter 5 is dedicated to land and the environment. In terms of land, the provisions seek to remove what one of Kenya’s land and property law experts, the late Professor Okoth Ogendo, described as ‘distortions of modalities of access and control of land’⁵⁷ in Kenya. This is achieved through the principles set out in Article 60, which include equitable access, security of land rights, sustainable and productive management, and elimination of gender discrimination. To further protect public land, which over

the years has been the ‘currency’ for corruption through land grabbing, mainly by politicians, Article 62 (4) states that public land shall only be disposed of and used through an Act of Parliament that will qualify its use or disposal. Land that was acquired through illegal means shall no longer be protected, according to Article 40 (6) under the Bill of Rights. The environment is protected under the provisions of Article 69, whereby the state and all Kenyans are obligated to protect and conserve the environment. Article 71 ensures that any transactions involving natural resources must be authorised by parliamentary legislation.

Establishing an independent National Land Commission, as set out in Article 67, will be instrumental in resolving historical land injustices and land theft, which have been central to recent violent conflicts. The constitution seeks to protect land access and acquisition to discourage inequitable and illegal land distribution. Conservation of the environment is also outlined in Chapter 5; this will directly impact on land availability and arability. Unsustainable land practices have caused environmental degradation, rendering tracts of land unproductive for agriculture and pasture, further increasing land pressure. The impact of climate change has also compromised environmental sustainability and increased migration patterns, which challenge the state’s already stretched capacity to cope with land and environmental issues. Dealing with land issues directly will be instrumental in securing long-awaited justice, and put in place a more sustainable system of land use, access and ownership.

GAPS IN THE NEW CONSTITUTION

The new constitution is commendable in terms of addressing root causes of conflict, and its provisions appear comprehensive. The gaps lie, therefore, not in the absence of provisions, but in the lack of clarity on how the objectives will be realistically achieved.

Managing ethnicity

Negative ethnicity has harmed the fabric of Kenyan society and undermined sentiments of nationhood. Diversity is celebrated and protected in provisions such as that of Article 90 of Chapter 7, which requires political parties to demonstrate regional and ethnic diversity, as discussed above. Article 27 in Chapter 4 of the Bill of Rights also addresses equality and freedom from discrimination. Although the constitution refers to affirmative action programmes on the basis of gender, age and minority groups, there is no specific articulation of what proportional representation reflects regional and ethnic diversity. Given the historical dominance of particular ethnic groups, which also happen to be numerically larger, how will the new

constitution, in the absence of explicit stipulations (such as the two-thirds rule on gender parity), ensure proportional representation of the numerous ethnic groups at the highest levels of government? The ethnic playing field is not level in Kenya. Certain communities enjoy advantages when it comes to accessing education and other social resources. Creating specific affirmative-action programmes, as proposed in Article 27 (6) of Chapter 4, will contribute to levelling the playing field.

The creation of county governments may also reinforce ethnic enclaves because the population tends to be distributed geographically along ethnic lines. Although devolved governance structures are likely to have a positive impact on national development by ensuring greater uniformity in progress, the delineation of county boundaries may provide yet another source of conflict on ethnic grounds if not well managed. It may inadvertently promote ethnic identity over national identity.

Rebuilding nationhood

At the core of Kenya’s violent conflicts is the destruction of the social fabric that unites a diverse group in the spirit of nationhood. Since the divide-and-rule policies of colonial times, the various ethnic groups in Kenya have upheld the divisions that have been frequently used to disempower them. Although the preamble boldly declares that the constitution belongs to the people of Kenya, the question remains as to what the majority of Kenyans regard as their primary identity – their ethnic or national identity. There seems to be a gap in the political construction of nationhood in Kenya, which by extension has caused a reversion to more immediate identities like ethnicity. This is well illustrated by the issue of land, whereby community land can be classified as such on the basis of ethnicity, among other factors. The new constitution states in Articles 39 and 40 of Chapter 5 that every citizen has the right to enter, reside in or own property anywhere in Kenya. Nevertheless, as a result of historical land injustices, ancestral land claims and the consequent politicisation of the land issue, this right evokes an unpopular sentiment. For example, attempts by the government to resettle internally displaced persons following the PEV have been met with hostility by host communities, who rejected the ‘outsiders’, resulting in a stalemate.⁵⁸ As a result of historical land injustices and ancestral ownership of land, the resounding sentiment is that certain land belongs or belonged to certain ethnic communities and this has been the cause of mass evictions and displacement. The complexities surrounding identity and historical injustices will make rebuilding nationhood an uphill task. Nevertheless, it must remain a priority, as Kenya belongs to all Kenyans, regardless of their ethnic groups.

IMPLEMENTATION OF THE NEW CONSTITUTION

The 35th US President, John F. Kennedy, said, 'Things do not just happen, they have to be made to happen.'⁵⁹ This is the thinking that should guide the implementation of the new constitution. The prospects for Kenyans, which have been vitally encapsulated in the new constitution, must see the light of day, otherwise they will remain mere words on paper. Life must be breathed into them. As evident below, those who framed the constitution intended this by creating institutions and processes to facilitate its implementation.

Prospects

The constitution places an obligation on all 'to respect, uphold and defend' it.⁶⁰ Kenyans are alive to this and committed to change for the current and future generations. Their commitment was exemplified by the large numbers who turned out to register as voters and participate in the referendum. This point needs to be underlined because this happened hardly two years after Kenyans had witnessed the worst atrocities in the nation's recent history in the form of the PEV and the failed referendum in 2005. As observed by the CoE when noting some of the challenges of the constitution-making process:

The political inability to establish a new constitutional framework, including the unsuccessful 2005 referendum and the discontent it caused, are acknowledged as contributing factors to the conflict between December 2007 and February 2008. The new challenges created by the failed 2005 constitutional referendum process deepened suspicion, cynicism and apathy.⁶¹

It is, therefore, evident through the strong support for the new constitution that Kenyans are ready and willing to see through the changes envisaged by the constitution. In this regard, Kenyans have shown leadership and it now remains for the country's leaders, political, religious or from civil society, to follow suit and exploit this ripe prospect.

As stated earlier, the constitution creates institutions whose primary responsibility is its implementation. To provide for political leadership in the implementation process, the Parliamentary Constitution Oversight Committee has been created.⁶² This committee will receive and deliberate on reports from the technical and independent commission charged with the mandate to 'monitor, facilitate and oversee the development of legislation and administrative procedures'.⁶³ This commission will be known as the Commission for the Implementation of the Constitution (CIC). It will provide an important channel for lobbying for legislation and structures that will advance the quest for enhanced human security.

Another body that offers great opportunity is the Kenya National Human Rights and Equality Commission.⁶⁴ This institution will primarily promote human rights and gender equity and equality. In addition to its role of watching over how government delivers on its human rights obligations, this commission will also play an advisory role to government, especially concerning its obligations under international human rights instruments. It will also be able to institute investigations *suo moto* or based on complaints or reports received from the public on alleged human rights abuses. With this width and depth in mandate coupled with constitutional independence, the new human rights commission is well placed to advance the course of human security in Kenya.

The prospects for Kenyans ... must see the light of day, otherwise they will remain mere words on paper

Parliament and county assemblies also offer opportunities for implementation. Together, these institutions will enact national and county legislation, respectively. These items of legislation must be in line with the constitution or else they will be deemed unconstitutional.⁶⁵ Kenyans, especially through organised groups, have an opportunity to influence the content of legislation to be enacted. The constitution actually provides the opportunity for *wananchi* to petition Parliament for the enactment, amendment or repeal of any piece of legislation.⁶⁶

The courts also present a significant opportunity for the implementation of provisions aimed at enhancing human security. Primarily, Article 159 (2) (d) in principle guides courts and tribunals to ensure that 'justice shall be administered without undue regard to procedural technicalities', which emancipates due justice from the trappings of procedure, especially where there is substantive cogency in claims, as has been the case. This approach is further emphasised in the chapter on human rights, in which Article 22 (3) (d) guides courts, 'while observing rules of natural justice', not to be 'unreasonably restricted by procedural technicalities'. In the same article, courts are also allowed to 'entertain proceedings on the basis of informal documentation',⁶⁷ whereas the requirements for standing have been widened to allow for class actions and public-interest litigation.⁶⁸ The onus is upon Kenyans to take advantage of these provisions, particularly those that relate to socio-economic rights, and take advantage of the fact that 'despite the pessimism,

contradictions, reluctance and challenges that greet the enforcement of socio-economic rights, successful realisation of these rights remains principally the responsibility of courts of law'.⁶⁹

Challenges

Kiswahili folk wisdom counsels *kumzaa mwana si kazi, kazi ni kumlea*, which means giving birth to a child is not the hard work, the hard work is raising the child. Through the referendum, Kenyans endorsed a nascent dispensation whose implementation faces many challenges. The following sections examine some of the main challenges.

Finance

The first major challenge is the cost of implementing the new constitution. As discussed above, the new constitution requires new institutions to implement different aspects. These institutions require funding for their set-up and operation. This, unfortunately, requires taxpayers to dig deeper into their pockets. On 24 August 2010, the Kenyan minister for justice and constitutional affairs announced that the initial phase of implementing the new constitution would cost 6.8 billion Kenyan shillings (\$75 million).⁷⁰ The government will be hard-pressed to find this money, and it will be a burden on the already overcharged taxpayer's bill. In addition, the new devolved governance system will require greater government spending on employees. If, however, the devolved structures maximise economic productivity, then some of these challenges will be mitigated.

Competing political interests

Partisan and 2012 succession politics also pose a big obstacle to the implementation of the new constitution. There were delays in setting up the CIC and the Commission for Revenue Allocation. These commissions were supposed to be in place by 28 November 2010, or within 90 days of the new constitution coming into effect. This deadline was not met, as parliamentarians were embroiled instead in debate around the gazetting of new constituencies, as recommended by the Independent Interim Boundaries Review Commission. The constitution also stipulates that Kenya should have had a new Chief Justice by 28 February 2011. The Chief Justice and the deputy were appointed on 17 June 2011, more than three months after the stipulated period. This sets a pernicious and worrying precedent, and is indicative of the impunity from which the country is endeavouring to disengage itself. If these circumstances continue, they are likely to affect the timed implementation of the constitution, consequently delaying the reforms and subsequent justice that Kenyans sought through a new social contract.

Furthermore, politicians are looking ahead to the next general elections in 2012 and are busy building alliances ahead of them. Parliament was also late in setting up the Parliamentary Oversight Committee for the implementation of the constitution amid wrangles of who its chairperson should be. This politicking threatened the enactment of vital pieces of legislation that should have been in place before 2012. Objective debate around legislation might not be forthcoming as politicians try to come up with legislation to suit partisan interests come the 2012 elections and beyond. The political challenge is best summed up in a journal article commenting on Kenya:

[W]hat worries some observers is that Parliament will be crucial in implementing the new constitution. Already divided along ethnic and party lines, Parliament's involvement will depend on the skills of the two principals, Kibaki and Odinga, in balancing partisan interests. With this comes the question of who succeeds Kibaki in 2012. From the start of the [referendum] campaign in May, it was clear that the battle over the terms of the new constitutional order would shape the political landscape ahead of the 2012 elections.⁷¹

There has been a political culture of self-reward in Kenya that has united politicians across the parliamentary floor. On issues of increasing their allowances and remuneration, there has often been unanimity. The new constitution abolishes exemption from tax, previously enjoyed by MPs and other servants of the state. MPs remained, and still remain, unanimous in their quest to maintain the status quo. The culture of self-reward will continue to pose a challenge, with the political elite living far beyond the means of their constituents and unwittingly propagating political patronage systems as their constituents lean on them for favours.

Similarly, the question of political will cannot be overlooked. The implementation of the constitution will be a real test of the political will of the government and parliamentarians to adopt a new framework that effectively reduces their previous excessive power and control, now making them accountable to the people they serve. Already, as discussed above, there have been delays in implementing seminal milestones. These early-warning indicators raise the question of the level of enthusiasm and political will present in implementing the new constitution for the benefit of Kenyans.

Civic education

The general public's inadequate knowledge of the content of the new constitution also poses a challenge. For Kenyans to be able to fully exploit the provisions of the

constitution, they need to know and understand them. Even though the CoE and many other organised groups conducted civic education during the run-up to the referendum, the time was short, and, as indicated above, information was adulterated and distorted by politicians and religious leaders. The strategic challenge is whether the government, which has the wherewithal to provide nationwide, sustained civic education on the new constitution, will be genuinely interested in doing this considering the imminent consequences, which include organised and protracted claims from the citizenry – especially for socio-economic rights.

Institutional preparedness

The institutional ability to implement the constitution relies heavily on the CIC because this body is the precursor to the formation of other important commissions, like the National Land Commission. Important legislation touching on vital aspects of setting up these commissions, such as specific qualifications and recruitment mechanisms, are to be contained in legislation that should originate from the CIC. Additionally, many government ministries and departments depend on pieces of legislation – many of which are outlined in the Fifth Schedule of the constitution – that need to be restructured in order to fit within the framework of the new constitution. As already noted, Parliament, in line with the new constitution, will be required to enact many items of legislation before 2012. Furthermore, Parliament's structure will change from being a unicameral to a bicameral house. In anticipation of these legislative requirements, Parliament was prompted to start preparing early considering that it was always ready for the status quo had the proposed constitution been rejected by Kenyans.⁷²

IMPLEMENTATION GAUGE

Implementing the new constitution will be a gradual process, but it is vital that Kenyans continually monitor the progress made on its implementation. The Fifth Schedule will be a key gauge of implementation, as it details the time limitations for enacting the legislation that will operationalise the new constitution, and Kenyans now have the capacity to push forward these processes. For instance, Parliament's failure to set up two commissions by the deadline of 28 November 2010 has occasioned two court cases filed with the Chief Justice, seeking to have Parliament penalised for missing the deadline.⁷³ This incident illustrates the need to monitor implementation and at the same time the potential to address situations of failure. Despite the shaky start, it is essential that the timelines of the Fifth Schedule are strictly adhered to. Under Article 261, the NA can only extend deadlines for a year – on a two-thirds majority vote and under exceptional

circumstances. In the first year, some of the legislation items to be enacted include Article 18 on citizenship, which now allows for dual citizenship; establishing commissions, such as the Kenya National Human Rights and Equality Commission (under Article 59), the Ethics and Anti-Corruption Commission (Article 79) and the Independent Electoral and Boundary Commission (Article 88); and legislation on political parties (Article 92). Within the first year, there will also be legislation on elections and electoral disputes, as in Articles 82 and 87, the establishment of the system of courts (Article 162) and the creation of a contingency fund under Article 208 of public finance.

The fifth schedule will be a key gauge of implementation

CONCLUSION

Kenyans have long been living with the burden of insecurity, poverty and lack of freedom, hence their unrelenting quest for a new dispensation. These deprivations have not come about by chance, but, disappointingly, by design. The constitutional journey that Kenya embarked on after its independence sought to amass power around the presidency and create a political culture of patronage, but remained blind to the primary needs of the country's citizens. The fifth UNDP Human Development Report on Kenya bore witness to this when it stated that, to a large extent, state policies since independence prioritised economic development at the expense of political and social development. It further states:

A closer review of the sessional paper⁷⁴ that steered development indicates that education, health, property rights, social security, freedom, political participation, equality and non-discrimination were envisioned from a purely economic perspective. The setbacks in these policies, which were seemingly progressive in terms of steering economic growth, were experienced in later years through regional inequalities, increased urban population, landlessness, political suppression, personal insecurity.⁷⁵

As has been shown, the new constitution of Kenya rectifies this misdirection and addresses other root causes of conflict in Kenya. If it is well implemented, it will provide the best platform that the country has had to improve the well-being of Kenyans, primarily through the

comprehensive Bill of Rights, provisions for good governance, integrity in leadership, due process, representation, separation of powers, accountability and protection of land and the environment. The new constitution addresses what were described by Amartya Sen as instrumental freedoms in his pivotal book, *Development as Freedom*. These are political freedoms, economic facilities, protective security, guarantees of transparency and social opportunities.

However, the challenge lies in the implementation of these provisions, or, as Professor Yash Pal Ghai, former chairperson of the Constitution of the Kenya Review Commission, said, in the ability to make the provisions, and more emphatically those on human rights, ‘jump out of the printed page and become effective’.⁷⁶ Effective implementation is, therefore, premised on equipping Kenyans with adequate knowledge and information so that they can take full advantage of the new provisions of the constitution.

As recommended by the CoE, the government should devise effective programmes to ensure that civic education on the new constitution continues to be provided.⁷⁷ Civil-society organisations should complement the government’s efforts and devise strategies and programmes to ensure that information about the new constitution reaches as many Kenyans as possible. These organisations should also be instrumental in providing greater accessibility to what is intended to be a more independent legal system for Kenyans in the new dispensation. This they should do by utilising new provisions to present to the courts matters that raise awareness on issues that are root causes of conflict.

For Kenya’s development partners, the provision of both technical and financial resources to both the government and organised groups to realise civic education and the timely enactment of relevant legislation is paramount. Technical and financial assistance to the commissions, primarily the CIC, will be invaluable. The provision of resources should also be linked to the government’s evident commitment to the implementation of the constitution, and should be accompanied by sustained pressure to implement it.

Related to the above, the Panel of Eminent African Personalities, which helped broker peace in 2008, should continue to monitor the implementation process and provide useful advice and guidance. Enacting a new constitution is in no way a panacea to the ills that bedevil Kenya. However, the new constitution provides a manual that may lead Kenya into the birth of what has been christened by many as the second republic.

Finally, Kenyans must remain enthusiastic about and proactively engaged in shaping the implementation of the

new constitution. This could be by creating benchmarks for the various pieces of legislation or developing drafts for the use of the CIC. Kenyans should strive to elect upright leaders and remind them that ensuring conflict transformation by effective constitution implementation should be the nation’s priority. In their capacity as stakeholders, Kenyans bear a great responsibility to see that the new dispensation comes to fruition, and they should be ‘vigilant in ensuring that the new constitution is implemented in the way in which it was designed to be. This responsibility – which is in essence the task of building a culture of constitutionalism – falls not only to the special bodies established in the constitution to guide its implementation and govern under it, but also to every Kenyan.’⁷⁸

From the architecture and principles that forge the state, to the provisions in the Bill of Rights, conflict transformation resonates throughout the new constitution. However, the provisions remain words on paper unless implemented. The onus remains on the government and the Kenyan people to breathe life into the words of Kenya’s national anthem, which declares: ‘Justice be our shield and defender, May we dwell in unity, peace and liberty, Plenty be found within our borders.’

NOTES

- 1 Kenya National Dialogue and Reconciliation was the process that brokered peace following the 2007/08 post-election violence. It was mediated by Kofi Annan and the African Union Panel of Eminent African Personalities.
- 2 Kenya National Dialogue and Reconciliation. Annotated agenda and timetable, February 2008.
- 3 John Paul Lederach, *Conflict transformation*. Intercourse, PA: Good Books, 2003, 11–12.
- 4 Johan Galtung, Violence, peace, and peace research, *Journal of Peace Research* (1969), 174.
- 5 Galtung, Violence, peace, and peace research, 168.
- 6 Lisa Shirch, *Strategic peacebuilding*, Intercourse, PA: Good Books, 2004, 24.
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ABOUT THIS PAPER

The 2007/8 post-election conflict that engulfed Kenya was not unprecedented. A failure to address the root causes of these violent conflicts has occasioned their reoccurrence and further entrenched their underlying causes. The Kenya National Dialogue and Reconciliation process considered long-term issues and solutions to address the root causes of the conflict and made proposals for extensive reforms. Within the conceptual framework of conflict transformation, this paper analyses the ways in which sections of Kenya's new constitution, adopted on 27 August 2010, address the root causes of the conflict. This paper also examines how the new constitution provides for reforms on governance, democracy, human rights, ethnicity and resource sharing.

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