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One Year Since Promulgation: Assessing the Reform Process in the new Constitutional Dispensation

Introduction

The Kenya Transitional Justice Brief, a quarterly bulletin by the International Center for Transitional Justice, seeks to highlight current developments in the field of transitional justice

in Kenya. ICTJ's goal in publishing the Brief is to provide a central and reliable source of transitional justice information for critical stakeholders, including development partners, policy makers, and civil society actors.

Each issue of the Brief will focus on one or more critical areas for transitional justice in Kenya, including truth-seeking, criminal prosecutions, institutional reforms under the new constitution, and reparations and other victims' considerations. This Brief focuses on the process of implementing the 2010 constitution and the political context in which this takes place. Below is a concise summary of recent relevant events, accompanied by an analysis of the status and challenges to the various reforms.

Background to the Reform Process

- Agenda Item No. 4 of the February 1, 2008 agreement between the Parties to the Kenya National Dialogue and Reconciliation (the Parties) expresses commitment to constitutional, legal, institutional, land, and other reforms.
- On March 4, 2008, the Parties agree on the principles for a constitutional review process.
- In December 2008, the Constitution of Kenya Review Act 2008 enters into force.
- Following a peaceful campaign and referendum, on August 27, 2010, a new constitution is promulgated, laying the foundation for fundamental reforms of the electoral and political system, the judiciary, land ownership and distribution, and a number of other reforms.
- On October 5, 2010, parliament establishes the Constitutional Implementation Oversight Committee (CIOC), which is mandated to oversee the entire implementation process.

Summary of Events Taking Place between 1 January and 1 August 2011

- Following the passing of the Commission for the Implementation of the Constitution (CIC) Act 2010, on January 4, the commissioners are sworn into office and commence their work, which includes preparing the reform bills in cooperation with the Attorney General (AG) and the Kenya Law Reform Commission.

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- On January 31, President Mwai Kibaki submits to parliament a contested list of nominees for AG, Chief Justice (CJ), Director of Public Prosecutions (DPP), and Controller of Budget.
- Following intense pressure from the ODM political party, the Speaker of Parliament, the CIC, and other actors, on February 22 President Kibaki withdraws his nominees for the judicial positions, thereby avoiding a major constitutional crisis.
- On March 22, President Kibaki addresses parliament, urging it to quickly adopt the needed reform bills.
- Having conducted public interviews with the various candidates, on May 13, the Judicial Service Commission (JSC) nominates Willy Mutunga as CJ and Nancy Baraza as Deputy CJ.
- On May 16, Kibaki and Raila accept the nomination of Mutunga as CJ, Baraza as Deputy CJ, and Keriako Tobiko as DPP.
- On May 25, The Panel of Eminent African Personalities, headed by Kofi Annan, urges the two principals to build consensus on main issues related to the implementation of the new constitution.
- In early June, following lengthy and intense debate, parliament adopts amended versions of the Salaries and Remuneration Commission (SRC) Bill and the Independent Electoral and Boundaries Commission (IEBC) Bill.
- In early June, vetting of senior police officers starts.
- On June 7, following controversies concerning the composition of the parliamentary committee to vet the nominees for CJ, Deputy CJ, and DPP, CIOC finalizes the questioning of the candidates and recommends they all be approved, even if the commission was split in the middle on Tobiko's appointment.
- On June 15, JSC nominates 5 judges for the Supreme Court.
- On June 15, with few MPs opposing, parliament approves Mutunga, Baraza, and Tobiko for their posts in the judiciary.
- On June 17, a High Court judge orders that the swearing in of the 5 Supreme Court judges must be stopped until it is clarified whether the constitution's requirements of gender balance are satisfied.
- On June 20, Mutunga, Baraza, and Tobiko are sworn into office.
- On June 22, President Kibaki assents to the Supreme Court Bill.
- In early July, CIC complains that the AG is deliberately delaying the formation of the IEBC.

Analysis

General assessment of the reform agenda and its connection to other transitional justice mechanisms

The adoption of a new constitution in August 2010 presents a significant step towards reforming Kenya's state institutions, many of which have been characterized by lack of independence, inefficiency, and corruption. The new constitution also lays the ground for land reforms, reforms of the electoral and political system, and increased protection of human rights, all of which are important for creating a more just and peaceful society. The reforms envisaged in the new constitution thus present a crucial pillar of the ongoing efforts to achieve political and peaceful transformation in Kenya, and should be considered an element of transitional justice along with the accountability, truth-seeking, and various other measures adopted following the 2008 post-election violence.

However, the reform process in Kenya faces a number of serious challenges, including indications that some of the reform bills will not be passed on time. Such delays may complicate the task of conducting fair elections in August next year, and may ultimately pose a threat to peace and security in the country.

In part, these challenges are the result of the politicization of the reform process. Some forces seem to resist the implementation of fundamental reforms to serve narrow personal interests, for example by using the reform agenda as part of a broader political campaign aimed at discrediting political opponents. Another challenge facing the reform process is that it has become intimately linked to ongoing International Criminal Court (ICC) investigations

into the 2008 post-election violence. Tensions in the political leadership have escalated since ICC prosecutor Moreno-Ocampo named the suspects in December 2010, something which has had a negative impact on attention to the reform process. As noted by the Kenya National Dialogue and Reconciliation Monitoring Project, the ICC process has brought with it "a tone for divisive ethno-political mobilization reminiscent of the eve of 2007 general election", which has "jettisoned the debate on real reforms that the country should urgently pursue before the next general elections." On the other hand, the fact that the government perceived a connection between the implementation of judicial reforms and the success of the admissibility challenge filed before the ICC seems to have promoted certain parts of the reform agenda, including judicial reforms. Despite the fact that it now seems highly unlikely that the admissibility challenge will be acted positively on, in a sense the ICC process has thus contributed to the political leadership paying increased attention to the reform process.

Though the challenges to the reform process should indeed be taken seriously, a far-reaching reform process such as that in Kenya, which involves numerous legislative acts and takes place in the run-up to presidential and parliamentary elections, cannot reasonably be expected to unfold without any complications. Furthermore, notable progress has in fact been made in some areas, such as judicial reforms. Important actors, including segments of the political leadership, civil society groups working in Kenya, and international donors, strongly support the implementation of far-reaching reforms, and the constitutional reform process has its own dynamics. This has made it more difficult for those who are opposed to reforms to seize the agenda. However, succession politics increasingly dominate the political landscape, and the closer we move to the 2012 elections, the harder it will be to implement the various reforms.

Status and challenges to reforms in the judiciary

The new constitution provides a sound framework for establishing a stronger and more independent judiciary, something which is important for curbing executive powers, strengthening the rule of law, and, ultimately, preventing the recurrence of political violence. Unlike its predecessor, the 2010 constitution explicitly guarantees the independence of the judiciary (art. 160). It also entails a number of provisions that will help promote such independence in practice. First, though the president still maintains the power to appoint judges, the nominations must be based on the recommendations made by the Judicial Service Commission (JSC), on which the president no longer has any direct influence (art. 166(1) and 171-72). Second, even though the Chief Justice (CJ), who is also the president of the Supreme Court and the chairperson of the JSC, is still appointed by the president, his appointment is based on recommendations made by the JSC and requires parliamentary approval (art. 166(1)). Third, the president is no longer substantially involved in the process of removing judges from their office (art. 168). Finally, the new constitution grants the judiciary financial autonomy (art. 173).

Article 261(1) of the new constitution lays down a timetable for adopting the necessary legislation to implement these constitutional provisions, stating that legislation concerning the system of courts, removal from office, and vetting of judges and magistrates must be implemented within one year from the constitution taking effect, whereas the Judiciary Fund must be established within two years to give effect to the provisions concerning financial independence. The constitution also includes transitional provisions relevant for the judicial reforms (article 262). For example, it requires that the JSC be appointed within 60 days after the constitution took effect; that the CJ vacates office within six months after the effective date and a new one be appointed by the president after consultation with the prime minister and with parliament's approval; and that parliament shall adopt legislation for the vetting of judges and magistrates within one year after the constitution took effect.

The reforms of the judiciary are now well underway with the recent adoption of some crucial laws, including the Judicial Service Act. The Judicial Service Act establishes the mandate and membership of the JSC, creates a Judiciary Fund, and regulates appointment and removal of judges, among other things. Additionally, the Vetting of Judges and Magistrates Act has been enacted, which requires that judges and magistrates be vetted to establish their suitability to

continue serving in the judiciary on the basis of their academic qualifications, professional competence, integrity, and other criteria. Most recently, parliament approved the Supreme Court Act without amendment, and the president soon after signed it into law. With the adoption of these laws, the institutional framework for a reformed judiciary is largely in place.

Besides these institutional changes, another important aspect of the judicial reforms concerns appointments for key posts in the new judiciary. The judicial appointments have been a lengthy and controversial affair. However, by mid June parliament approved the nomination of two well-known reformers, Mutunga and Baraza, for CJ and Deputy CJ respectively, and they were soon after sworn into office. Their appointment, which should be lauded for being highly transparent, reflects a shift indicating that it is becoming increasingly difficult for "anti-reformers" to halt the reform agenda. Though influential powers, including clergymen and some prominent politicians, were strongly opposed to the appointment of Baraza and especially Mutunga on alleged 'moral' grounds, in the end these powers did not gain sufficient support to stop the appointments. In part, this shift is a result of pressure from civil society groups and others who wish to achieve substantial change. But it also reflects that the institutional framework set up with the new constitution has its own dynamics, making it more difficult to follow old practices characterized by patronage and corruption.

Notwithstanding these positive signs, the nomination process also points to a continued politicization of the reform agenda. Following the nominations by the JSC and the two principals having endorsed the nominees, parliament for weeks debated which committee should be charged with the responsibility of vetting the candidates. This dispute – in which various factions of the leadership attempted to ensure control over crucial committees – ultimately derives from a clash between pro-reformers and those who wish to maintain *status quo*.

Furthermore, judicial reforms may to some extent be undermined by political compromises. For example, whereas the CJ and the Deputy CJ are both expected to promote fundamental change in the legal system, it is less clear whether Keriako Tobiko – the new Director for Public Prosecution (DPP) who since 2005 served as deputy public prosecutor and faces allegations of misuse of office – has the will to undertake fundamental reforms of the prosecutor's office. Yet, even if the new DPP might not be sincerely committed to the reform agenda, the institutional framework put in place with the new constitution, including enhanced possibilities for NGOs and others to challenge government decisions in court, may push him to promote the reform agenda.

A first test for Kenya's reformed judiciary will be whether it is able to follow up on the political leadership's promises of accountability for those who sponsored and perpetrated the 2008 electoral violence.

For such change to happen, it is not sufficient that institutions are reformed on paper, but there must also be a transition in the political culture. A truly independent judiciary which promotes human rights and the rule of law – even when powerful individuals are involved – can only exist if the other branches of government respect the separation of powers. Finally, to ensure that judges have the ability and will to apply the law fairly and equally, it is crucial that the vetting process be carried out in a legitimate manner.

Status and challenges to reforms of the electoral system

The new constitution provides the foundation for fundamental change in Kenya's electoral system. Such reforms, including reforms of the electoral commission, are crucial for conducting fair and peaceful elections in the country and re-building public confidence in the electoral process.

The 2010 constitution stipulates that a new electoral commission (the Independent Electoral and Boundaries Commission (IEBC)) be established (art. 88). Unlike its predecessor, the new constitution requires that the president's appointment of members for this commission be approved by parliament (art. 250(2)). The new constitution also lays the foundation for other reforms of the electoral system. For example, it requires that new legislation be adopted on electoral units, nomination of candidates, registration of voters, efficient supervision of elections (art. 82(1)), and political parties (art. 91-92). The current status of the electoral reforms must not only be assessed against the timetable spelled out in the constitution, which requires parliament to adopt legislation on elections, electoral disputes, the IEBC, and political parties within one year after the constitution came into effect (article 261(1)), but also in light of the deadlines established by the CIC and the considerable workload ahead preparing the country for the 2012 elections.

After significant controversy, in early June, parliament passed the IEBC Act. The Act, which makes up a crucial pillar of the framework for conducting fair and peaceful elections, was adopted with a large number of amendments. It is laudable that the Act entails a stringent code of conduct for the members of the commission and that there is a clear personal and institutional separation between the commission and the executive as well as other powers that may have interest in influencing the work of the commission. However, the Act also includes some controversial provisions. For example, it is questionable whether the standards set for the qualifications of the chairperson are sufficiently high. Some have also argued that parliament is compromising the independence of the commission by overly directing it in connection to delimitation of boundaries of constituencies.

Even with the adoption of the IEBC Act, however, there is still a long way to go implementing the electoral reforms. Notably, the appointment of electoral commissioners, which might turn into a highly controversial affair, is yet to commence. Moreover, it is crucial that the Elections Bill – which among other things will guide how electoral data is collected and tallied, and requires sanctions against errant election officials as well as politicians who endorse violence or misuse their office – is soon adopted. But the bill has not yet been tabled in parliament, thus breaching the deadline agreed by CIC, parliament, and the AG. The Political Parties (Amendment) Bill, which will regulate the conduct of political parties, including registration, nominations of candidates, and raising of campaign money, has been drafted by the CIC, but is also yet to be adopted, thus breaching the June 23 deadline established by CIC.

There are concerns that the delays in adopting crucial bills for next year's elections will pose a threat to peace and security in the country. While the task of putting in place a credible and legitimate framework for the 2012 elections should be treated with urgency, it is at the same time problematic that some of the bills relating to the electoral reforms are being drafted without much public debate and participation. Part of the explanation for this seems to be that some aspects of the reform process, notably the judicial nominations, have overshadowed other more technical aspects of the reform agenda, such as electoral reforms.

Status and challenges to security sector reforms (SSR)

The police and other security agencies have often played an unfortunate role in political and other forms of violence in Kenya, something which is illustrated by the fact that the Commission of Inquiry into the Post-Election Violence found that around one third of the total casualties of the 2008 election violence were caused by police shootings. As such, the 2010 constitution encourages a fundamental change in the way security should be achieved. For example, the constitution stipulates that national security must be pursued in "utmost respect for the rule of law, democracy, human rights and fundamental freedoms" (art.

238(2(b)), and requires that the National Police Service "prevent corruption and promote and practice transparency and accountability" (art. 244).

On the more practical side, an important aspect of the security sector reforms (SSR) envisaged within the 2010 constitution is that the power to appoint the police chief (now called Inspector-General of the National Police Service) no longer rests solely with the president, but requires parliamentary approval (art. 245(2)). However, parliament is not involved in the appointment of the two Deputy Inspector-Generals who will head the Kenya Police Service and the Administration Police Service, and the constitution does not clarify how the chief of the Kenya Defense Forces and the director general of the National Intelligence Service are appointed. It is notable that the constitution creates a National Security Council (art. 240), whereby some amount of parliamentary oversight over security policies is established. The constitution also stipulates that the composition of national security agencies must reflect the regional and ethnic diversity of the people of Kenya (art. 238 (2)), a provision which might contribute to ending the partisan use of the police and other security agencies. Finally, though the 2010 constitution does not establish a civilian body tasked exclusively with hearing complaints over the police, the Kenya National Human Rights and Equality Commission is mandated to investigate and report on national security organs' human rights compliance (art. 59).

The status of SSR should be examined in light of the timetable laid down in the constitution (art. 261(1)), which requires that legislation on the national security organs and command of the National Police Service be adopted within two years after the constitution took effect. However, not least since the reforms of security agencies are important for ensuring peaceful elections in 2012, there is an urgent need to establish a more accountable and law abiding security sector.

Generally speaking, SSR has not yet received much attention. In late March, President Kibaki stated that the government was about to introduce important security related legislation, including a National Security Council Bill, a Police Service Commission Bill, a National Police Service Bill, an Independent Police Oversight Authority Bill, and a Private Security Providers Bill. However, none of these bills have yet been tabled in parliament. The government has established a Police Reform Implementation Committee, which by early June reported that it had finalized drafting these bills and forwarded them to CIOC. In early June, the government launched the Police Reforms Programme Document, in connection to which it was announced that 78 billion KSh has been allocated for the implementation of police reforms over the next three years (however with a financial gap of more than 16 billion, which the government hopes to raise from donors). Furthermore, on the basis of a 2009 report by the National Task Force on Police Reforms (the Ransley Report), a vetting process commenced in early June. Elements of the police force have expressed concern that this process will victimize officers. However, it should be of greater concern that the process lacks transparency and no clear criteria are established for determining suitability of the officers to continue serving in the police force or their fate if found to be unsuitable.

Status and challenges to other reform areas

The 2010 constitution stipulates a number of other reforms relevant to transitional justice concerns of guarantees of non-repetition, including decentralization and land reforms. The constitution also establishes a number of commissions, which it is hoped will promote accountability, transparency, and human rights protection in the country.

The new constitution decentralizes power by establishing counties with directly elected governors and assemblies with legislative powers (Chapter 11). Such restructuring of the state will limit the central government's role in resource allocation and may give a new voice to ethnic groups who have historically been marginalized. The timetable laid down in the constitution (art. 261(1)) requires that legislation concerning election of speakers of county assemblies and governance of urban areas and cities be adopted within one year after the

constitution came into effect, whereas legislation for support to county governments must be adopted within three years. At present, there has been little progress on devolution, and key concerns, such as whether or not the provincial administration, councilors, and mayors will continue to play a role under the new constitutional framework, remain disputed. In early June, the Local Government Ministry, which has been tasked with drafting the devolution bills, declared that it is attempting to simplify the devolution process (stating that the number of bills will be reduced from 13 to 4), but gave no indications of exactly when the bills might be tabled in parliament. However, the Independent Offices (Appointment) Bill, which makes operational the key offices of Controller of Budget and Auditor General who will oversee the implementation of the budgets of county governments, was recently tabled in parliament for debate.

The 2010 constitution also contains important provisions concerning land ownership and distribution. The constitution declares that "land in Kenya shall be held, used and managed in a manner that is equitable, efficient and sustainable", and applies principles such as "equitable access to land", "security of land rights", "transparent and cost effective administration of land", and "encouragement of communities to settle land disputes through recognized local community initiatives" (art. 60(1)). To ensure this, the constitution requires that an independent National Land Commission be established to formulate a new land policy (art. 60(2) and 67(b)). The National Land Commission – whose members will be appointed by the president but must be approved by parliament – is also authorized to make recommendations on how to address present and past land injustices (art. 67(e)). These provisions present a significant step forward addressing problems related to land ownership and distribution, which have been underlying causes of inter-community grievances and drivers of political violence in Kenya.

The constitution requires that new land legislation be passed within 18 months (art. 261(1)) and sets out a number of requirements for this legislation, including an obligation to prescribe an upper limit on land holdings (art. 68). During the first months of 2011, the Lands Ministry conducted workshops to obtain input for the drafting of the bill, which it is expected the Land Ministry will soon forward to the AG's office for further drafting. According to the CIC timetable, the bill should be enacted by early August 2011. It is important that the new land legislation is scrutinized by civil society groups and other stakeholders to ensure that the letter and the spirit of the new constitution are respected, and to mitigate reactions by powerful interests opposed to fundamental land reforms.

Other crucial bills related to the reform agenda, including the Kenya National Human Rights and Equality Commission Bill, the Ethics and Anti-Corruption Commission Bill, the National Gender Commission Bill, and the Family Protection Bill have not yet been put into effect.

Conclusion

The reforms envisaged within the 2010 constitution present an important tool for changing many of the factors that have allowed political violence to occur on a regular basis in Kenya. For example, the reform process holds the potential for promoting accountability principles and human rights protection in the country. It also provides a framework for holding more fair and peaceful elections as well as addressing land issues and other causes of division and violence. The reform process should thus be seen as an important element of transitional justice in Kenya, which is connected to other aspects of addressing the legacy of political violence including the attempt of holding accountable the perpetrators of the 2008 post-election violence. There has been notable progress in implementing some of the reforms, in particular judicial reforms. However, though both President Kibaki and Prime Minister Raila seem committed to the reform agenda and have urged parliament to fast-track the

implementation process, a number of crucial reform bills are yet to be adopted. The implementation process is increasingly hampered by tensions in the political leadership, a problem which is likely to become more pronounced in the coming months as the politics of succession will increasingly dominate the political debate. Finally, it must be kept in mind that the adoption of reform legislation is not sufficient on its own; to ensure fundamental change, various stakeholders, including politicians and civil servants, must fully respect the letter and the spirit of the new constitution. If not, the risk that next year's elections will again be surrounded by large-scale violence increases significantly.

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