



International Center for Policy and Conflict

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Kenya National Dialogue and Reconciliation (KNDR) –Agreed Reforms -Taking Stock (2009)

About International Center for Policy and Conflict (ICPC)

The International Center for Policy and Conflict (ICPC) is a non-profit and non-partisan organisation founded in 2005 to create a platform to foster democratic, peaceful, secure and just societies in Africa and globally. The Great Lakes and Horn of Africa region which have experienced widespread political instability for decades is the ICPC major focus. The Center is registered in Kenya under the Trustees (Perpetual Succession) Act Chapter 164.

Institutional Objective

The International Center for Policy and Conflict proactively reflects and engages in public policy and legal dialogues, research and analysis as well as advocacy and capacity building on the broad realms of transitional justice, human security, conflict resolution and gender justice. Furthermore, this is done to prevent conflict recurrence; promote accountability and equality; and deepen culture of justice and respect for human rights and democracy. The Center is designed to establish, promote and build sustainable human development; and democratic human rights adhering states.

Governance

The International Center for Policy and Conflict comprises a Board of Trustee, Management Committee and a full-time programmatic and administrative staff. In addition, it utilizes a network of associates and experts and works in cooperation with other local, regional, and international organizations. In addition, the Center also offers internships.

The Board Members are responsible for the strategic and policy direction of the Center. Furthermore, the management committee guarantees a sound internal management structure and policies that contribute to the optimal functioning of the organisation. Lastly, the Executive Director is the head of the secretariat, responsible for its management, coordination of programmes and ensuring accountability in utilization of its resources.

Background /Political Context

Under the auspices of African Union, Kenya was saved from eminent collapse courtesy of mediation talks spearheaded by the former UN Secretary General, His Excellency Koffi Annan. The mediation panel alias Kenya National Dialogue and Reconciliation (KNDR) agreed on four sets of agenda: ceasefire of violence; humanitarian crisis; political settlement; Addressing long term issues, including constitutional, legal and institutional reforms; land reforms; tackling youth unemployment, tackling poverty, inequity and regional development imbalances, consolidating national unity and cohesion, and addressing impunity, transparency and accountability. The latter is crucial for the stability of this country and it is upon this gauge that the achievement of Coalition Government can be judged.

Kenya is back to theatre of political absurdity. The Reforms agenda has been given a back seat while ethnic based politics and parochial political interests have been elevated to high pedestal ahead of the 2012 general elections. The Coalition Government is facing serious internal cohesion deficit and ‘political parties’ are quickly starting to disintegrate posing single biggest political challenge to the realization of crucial reforms¹. . The doctrine of separation of powers has been thrown out of the window and replaced with conflict of interest anarchy. There is no longer difference between civil service, security and justice system and parliament. They are all muddled either in misguided denial without cause or mobilizing certain constituencies of the society to discredit one political grouping against the other and misinform the Kenyan public.

The situation has resulted to despondency, despair and apathy among the populace. Concrete reforms have a very limited chance of successful implementation. The ethnicisation of the politics in the country is deepening polarization and diminishing any hope of the much needed meaningful and purposeful genuine national reconciliation.

Reforms Implementation Checklists

Since last year several institutions and commissions have been formed with mandate to address fundamental causes of the Post-election violence (PEV) 2007/2008. However, their work is still at very infancy stage (just done groundwork) without substantive, concrete and tangible results some of the set reform areas and commissions are:

- ❖ Independent Review Commission (Kriegler Commission);
- ❖ Commission of inquiry into Post-Election Violence (Waki Commission);
- ❖ Police Reforms Taskforce;
- ❖ Judicial Reforms Taskforce;
- ❖ Interim Independent Electoral Commission;
- ❖ Special Tribunal for Kenya Bill 2009(defeated);
- ❖ Interim Independent Boundaries Review Commission;
- ❖ National Cohesion and Integration Commission;
- ❖ Committee of Experts on Constitutional Review;
- ❖ Truth Justice and Reconciliation Commission;
- ❖ National land policy;

¹ See Imenti Central M.P. Gitobu Imanyara interview by standard newspaper dated 22nd December, 2009.

- ❖ Parliament Standing Orders and other reforms;
- ❖ Civil service reforms;

Progress and Status

1. The Kriegler Commission - recommended overhaul of the electoral system and election, enact legal framework to govern election and electioneering and establish independent professional electoral management bodies. New voters' register and registration were to be implemented afresh.

Consequently, two commissions have been formed i.e. Interim Independent Electoral Commission and Interim Independent Boundaries Review Commission. Both Commissions have a mandate of 24 Months, to a great extent there is no logical sequence and connectivity of activities. Constitutional review outcome has huge implication on their work and is a key determinant of the success of these commissions which has not been mitigated.

Interim Independent Electoral Commission (IIEC)

September 1, 2009 the IIEC successfully completed Parliamentary By-Elections for Bomachoge and Shinyalu Constituencies. The voter education programs carried out by IIEC and Voter Education Providers, VEPs, in Bomachoge and Shinyalu constituencies, contributed significantly to the success. Voter turn out was over 60% for both constituencies, a figure considered high for by-elections that are normally characterized by low voter turn out. It was also peaceful and cases of election malpractices were minimal.

On October 16, 2009 a workshop to review electoral laws, brought together members of Interim Independent Electoral Commission, MPs sitting on the parliamentary committee on legal affairs, Judges of the High Court, ICJ, Kenya Law Reform Commission (KLRC), Institute for Education in Democracy (IED) and other stakeholders in election reforms in Mombasa. The two day meeting discussed the Electoral Bill 2009 and Electoral Commission Bill 2009 with a view of building a consensus on the way forward in relation to the two draft bills.

On November 25, 2009 the Interim Independent Electoral Commission successfully completed the testing of various technologies on electronic voter registration. The exercise, which entailed demonstrations from three companies, Ventix of Kenya, Code Incorporated of Canada and Electronic Corporation of India saw a large number of students "register" as voters. The students gave their comments on their experiences with the machines.

It is imperative that though the Commission has been formed to replace the defunct Electoral Commission of Kenya, not much has changed in terms of legislation governing the electoral processes. It is only prudent that the enactment of its reform Bills is fast tracked otherwise the (IIEC) will remain hollow as its predecessor.

Interim Independent Boundaries Review Commission

The commissioners were appointed on 12th May, 2009² pursuant to section 41B of the Constitution, and sworn on 4th June, 2009³, with mandate to review all administrative and electoral boundaries.

The team is expected to review constituency boundaries to reflect geographical size and voter representation. The team will also evaluate a proposal to convert all constituencies into districts.

Between 6th and 9th July, 2009 there was a joint retreat with Commissioners of Interim Independent Electoral Commission based on the complementarity of their mandate and roles. A national conference on setting Electoral Reform Agenda for Kenya was held between 29th and 31st July, 2009 with both local and international experts' presentations.

During the month of October 2009, the Commission had provincial visits which were meant to sensitize the public on the mandate of the Commission, unfortunately it was perceived to be collecting views from the public which they were hesitant to get but finally agreed to take them. The Commission has managed to visit all the provinces, political intricacies has been seen to play based on the Nyeri incident where there was a clash between the political elite amongst Hon. Martha Karua, Prof. Wangari Maathai and a group alleging to represent the people of Central province.

The Commission had prepared a concept paper⁴ which set out the work plan for the Commission which has not been achieved as expected. The Commission has embarked on drafting a new work plan to be launched in January 2010. The Commission is also set to commence a national civic education programme to sensitize the public on the mode and format of presenting their views to the Commission electoral and administrative boundaries.

2. Committee of Experts on the Constitutional Review

Charged with duty to prepare a draft Constitution that would be subjected to a referendum for ratification, the Committee has prepared a harmonized draft Constitution that has been under public scrutiny and debate. High court of Kenya has granted a religious group leave to challenge the constitutionality of Constitution Review Act, 2008.⁵ There is consensus amongst the Kenyans that it is the constitutional moment for Kenya, the civil society under the umbrella of Constitution and Reform Education Consortium(CRECO) have publicized the harmonized draft and aided the public to understand it courtesy of “*Katiba Sasa*” campaign, with numerous articles published in both print and electronic media on the content of the harmonized draft.

² <http://www.capitalfm.co.ke/news/Kenyanews/Kenya-boundaries-review-team-appointed-4376.html>

³ http://www.justice.go.ke/index.php?option=com_content&task=view&id=123&Itemid=43

⁴ See annex 1

⁵ See standard newspaper dated 23rd December, 2009.

The Committee would have benefited more from the recommendations of various institutions/commissions set by the coalition government; unfortunately, they were all set almost the same time with no room for proper consultations amongst them due to time constraints.

The constitutional review is marred by political intrigues particularly lack of cohesiveness by the coalition parties and the lack of party team approach to the review process. It also lacks a proper and structured mechanism for technical and impartial input; compromise-seeking; deadlock breaking, promoting inter-groups dialogues, building trust and negotiating the contentious issues which are detrimental for the success of the process.

3. Criminal Accountability:

The tragedy of post election and culture of impunity as articulated in Commission of Inquiry into Post-Election Violence (Waki Report) has been overlooked and disregarded. Though Waki Report recommended for the formation of Special Tribunal, the Coalition Government has been playing to the gallery.

A Bill to set a toothless Special Tribunal was defeated in National Assembly February 2009. Since then efforts to set up an effective Tribunal has been a mere rhetoric with cabinet rooting for the TJRC and ICC. Either by default or design, Kenyan Government has failed to appreciate the complementarity principles of Rome Statute. Attempts by Imenti Central M.P., Hon. Imanyara have been futile with outright sabotage, undermine and blockage of the Bill on the floor of the House with a conspicuous silence by both the President and Prime Minister. Members of Parliament have consistently ganged up to block the enactment of the credible and independent Special tribunal for Kenya fearing that it would cast its net wide in terms of crimes and suspects.

Special Tribunal for Kenya

The government through the Ministry of Justice, National Cohesion and Constitutional Affairs, published a Constitutional Amendment on 28th January, 2009, which had sought to entrench the Special Tribunal in the Constitution. On the same day, Special Tribunal for Kenya Bill was published. Both Bills were defeated in the floor of the House.

On 3rd July, 2009, a delegation of Kenyan Ministers⁶ signed an agreement with the Prosecutor of the International Criminal Court Moreno Ocampo to have the matter referred to ICC if by 30th Sept., 2009, there was no local mechanism set to try the perpetrators of 2007 post election violence..

On 30th July, 2009, the cabinet resolved to amend the Truth Justice and Reconciliation Act to vest the Truth Justice and Reconciliation Act, this caused great public outcry and division within the fragile coalition, the idea has since been shelved.

On 26th August, 2009, Hon. Gitabu Imanyara published a private Member's Bill (Constitutional Amendment No.3 of 2009) seeking to entrench Special Tribunal of Kenya in the Constitution. Efforts by the civil society have turned out to be futile due to the

⁶ Ministers Mutula Kilonzo, James Orengo, A-G Amos Wako and other government officials.

concerted efforts by the suspecting individuals to block course of justice and lack of commitment by the two principal to marshal their Members of Parliament to pass the legislation.

This demonstrates the unwillingness of the leadership of this country to address the upheavals of this country satisfactory. International coercion is required to fast track this process.

International Criminal Court

On July 3rd, 2009, a delegation of Kenyan Ministers signs a memorandum with the Prosecutor of International Criminal Court declaring that the Kenyan government would set up mechanisms to try post-election violence perpetrators by 30th September, 2009 and would brief the Prosecutor accordingly and in case of default there would be state referral to the International Criminal Court.

The International Criminal Court Prosecutor Moreno Ocampo visited Kenya on 4th November, 2009 and held a closed door meeting with President Mwai Kibaki and Prime Minister Raila Odinga on 5th November, 2009, where they held a joint press conference at Harambee House and reiterated that the Kenyan government would cooperate with the ICC in all aspects in prosecuting the perpetrators of post-election violence. On the same day ICC prosecutor notified the ICC President, Song, seeking leave to investigate the Kenyan matter.⁷ Pre-trial Chamber II was assigned the matter on 6th November, 2009.⁸

On November 26th 2009, the ICC Prosecutor filed a formal request with the pre-trial chamber II.⁹ These news were received with mixed reactions with some quarters terming a mockery of the sovereignty of the state while others supported it calling to an end to the culture of impunity.

Victims of post-election violence had 30 days to submit their views to the International Criminal Court on Kenya's case (lapsed on 23rd December, 2009).

The outcome of the ICC process is expected to demarcate political landscape in this country.

Issues of concern

- ❖ Threats to human rights defenders and victims and witnesses;
- ❖ Politicization and ethnicisation of criminal accountability
- ❖ Failure to set up an effective tribunal and its implication on the culture of impunity in Kenya.

4. National Reconciliation and Healing:

Two Commissions have been set up to address and spearhead the national healing and reconciliation i.e. **The Truth Justice and Reconciliation Commission; and National Cohesion and Integration Commission.**

Pursuant to Section 10 of the Truth, Justice and Reconciliation Act and the First Schedule thereof applications are invited from suitably qualified candidates, organizations or group of persons proposing the nomination of any person who is a citizen of Kenya for

⁷ <http://www.ejiltalk.org/icc-prosecutor-seeks-permission-to-investigate-kenyan-crimes-against-humanity/>

⁸ <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr473>

⁹ <http://www.nation.co.ke/News/-/1056/812742/-/vngk8i-/index.html>

nomination as Commissioners under Section 3 (1) of the aforesaid Act. The functions and powers of the Commission are provided for under Part 111 of the same Act.

On July 22nd, 2009, President Mwai Kibaki appointed commissioners of the Truth, Justice and Reconciliation Commission. In a gazette notice, the President in exercise of powers conferred upon him and pursuant to section 10 of the Truth, Justice and Reconciliation Commission Act no 6 of 2008. The Commissioners will serve for a period of two years.

The appointment of Bethuel Kiplagat as the chairman was met with great opposition¹⁰ and there are several cases pending in court questioning the legitimacy Commission's Chairman.¹¹ It is alleged that the chairperson is privy to the disappearance and murder of then Foreign Affairs Minister, Robert Ouko and thus cannot be expected to be a partial arbiter in unearthing this mystery.

The TJRC Act provides for three months grace period for the Commission to set up and the secretariat and roll out their programme, the time is running out and not even the Commission's secretary has been named.

The Commission is yet to roll out its programme to the public and it alleged that the government is not keen on facilitating the process with some commissioners threatening to quit. There has not much of activities to set pace for the commission to take off instead the political class has been castigating the commission.

There are no deliberate political efforts to the foundation of the national healing and reconciliation as well as very limited mutual recognition that the Commissions are part of a package of measures, of an intertwined set of obligations composed of truth, justice, reparation and guarantees of non-repetition essential in addressing and dealing with impunity and human rights violations.

The concept of truth, justice and reconciliation has been mis-conceptualized with very limited understanding of the actual purpose of a Truth Commission. The ill advised timing, sequencing, composition and limited victims' consultations has seen the legitimacy and credibility of TJRC featuring prominently. The government made a grave mistake of selling the Commission as one to handle with mandate to try post-election violence, and consequently, this clogs the whole process and denies its sentimental value.¹²

The national healing and reconciliation is hardly non-existent, disarray, and disjointed. Failure to implement the WAKI Commission Report further diminished the support of the Truth Commission. Further the Truth Justice and Reconciliation and National Cohesion and Integration Commission are simply discordant couples.

Legally stated *res ip loquitar*, there is no commitment by the Government and the political class to ensure that there is real healing and reconciliation. The former Secretary of National Cohesion (Dr. Kithure Kindiki) resigned merely after 100 days in office

¹⁰ <http://www.standardmedia.co.ke/InsidePage.php?id=1144021665&cid=289&>

¹¹ <http://www.kbc.co.ke/story.asp?ID=59514>

¹² Kenyan cabinet resolution aired live from State House, Nairobi by the Presidential Press Service to all media houses.

citing frustrations and lack of cooperation to the reconciliation process, since then there has not been a substantive holder of that office. This can explain partially the fate of internally displaced persons and other casualties of post-election violence.

Internally Displaced Persons

It is now almost two years since over 600,000 people were displaced and 1,133 died following the 2007 and 2008 post-election violence. Since then nothing convincing has been done to resettle them neither has the requisite law put in place to protect them. The national policy as recommended by the Waki report has been disregarded and thrown out of the window. Successful resettlement of the IDPs at their original homes is single crucial indicator of the commitment of genuine national and communities' reconciliation.

Of most worrying reports are that even the funds that had been earmarked for their resettlement has since alleged to have been misappropriated. The government has not put mechanism to deal with the real causes of displacement. That people are yet and or not willing to return to their original settlements defeats the very spirit of the Constitution that one has a right to own property in any part of the country. This negates the very oath that both the President and Prime Minister took to protect the Constitution of this country.

Committee of Elders

Justice Minister, Mutula Kilonzo appointed a Committee of council of elders with mandate to spearhead healing and reconciliation efforts. The Committee has been traversing the country meeting with various stakeholders setting pace for the National Elders Conference set to be held next year. No tangible results has been forthcoming as witnessed by some victims refusal to return back to their original homes and instead asking for resettlement.

5. Institutional Reforms (Security Sector Reforms)

The Coalition government has been promising security sector reforms. However, previous governments have made similar pledges over the decades and failed to deliver- including forming task forces to give reform proposals. There is clear lack of understanding that:

- ❖ Security is a crucial and immediate condition for peacebuilding and long-term development
- ❖ Security could not be guaranteed and maintained in a vacuum as it is vital to address the needs and perspectives of the State and the communities within it
- ❖ National ownership to security sector reform is crucial- it is an integral part in building sustainable peace
- ❖ Sustainable security goes beyond professional training and equipping individual police officers. Without effective and democratic security institutions, peace and political stability is short-lived
- ❖ Building sustainable security after violence requires engaging many stakeholders but all their efforts must be carefully coordinated.

Police Reforms

Vide Gazette Notice No. 4790 of 2009, President Mwai Kibaki appointed a National Task Force on Police Reforms with mandate to examine existing policy, institutional, legislative, administrative and operational structures and recommend comprehensive reforms within a span of 60 days. On 26th August, 2009 the Task Force handed in an interim report and sought for extension of their period to finalize on their report.

On 3rd November, 2009, the Police Reform Task Force handed over the final report to the President with over two hundred recommendations¹³ meant to address the effectiveness of the police service. The Task Force is currently disseminating its Report to the public through forums and meetings with the stakeholders.

On 8th September, 2009, President Kibaki appointed a new Police Commissioner, Mr. Mathews Itere, formerly General Service Unit Commandant and Major General Ali Hussein was deployed as the Postmaster General. On 5th December, 2009, Police Commissioner Itere, effects transfers within the police force.¹⁴ This has been marred by allegations of nepotism and favoritism amongst other grounds.¹⁵ Though there has been change of guard from a military Commissioner to a paramilitary and a rotation of top cops not much has been forthcoming in terms of delivery of services by the Kenya police. Kenya police remains at the top of list of shame in terms of corruption index.¹⁶ The Police Force stands accused of abetting killings with no decisive action by the government to stop the menace.¹⁷

Though Police Reforms Taskforce Report has given very radical recommendations on the security sector reforms, the public is held to another round of wait and see with likelihood of formation of another commission to oversee implementation. To government, reforms seem to be changing of guard from a military officer to a paramilitary or police transferring officers instead of enacting the prerequisite legal and institutional reforms that would transform security policy and security apparatus to the one that upholds human rights, rule of law and accountability. Government has adopted a political refrain “*we are committed to the implementation and police reform!*”

Judicial Reforms:

Kenyans have lost faith in the judicial system and nothing short of overhaul can reinstate it.

A Task Force was appointed and submitted its report to the Minister of Justice With numerous recommendations to resuscitate the image of judiciary and improve its efficiency. The Minister submitted the Report to Parliament which was transmitted for consideration by the Parliamentary Select Committee on Justice and Legal Affairs, the

¹³ See National Task Force on Police Reforms, October, 2009, Government Printer, Nairobi.

¹⁴ <http://www.standardmedia.co.ke/InsidePage.php?id=1144029714&cid=418&>

¹⁵ See the Star Thursday December 17th, 2009 @page 3.

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¹⁷ See Nation Newspaper Thursday December 17th, 2009.

Parliamentary Select Committee has differed with the recommendations of the Task Force.¹⁸

Though Judicial Reforms Taskforce submitted its report several months back, there is stalemate between the Parliamentary Committee on Justice and Legal Affairs and the Taskforce on Judicial Reforms.

Parliamentary Reforms

There have been significant parliamentary reforms geared to boosting and strengthening of the institution of Parliament in its legislative and oversight role over the other arm of the Government.

The 3rd session of the 10th Parliament set the dawn of the current Standing Orders which have set up new Parliamentary Committees in grey areas the formation of Implementation Committee is key in follow-ups of recommendations of the Parliamentary Committees. In September 2009 Parliament sent Ringera packing after a controversial appointment by the President without due process of scrutiny and observance of the statutory provisions.¹⁹

The Standing Orders now do also provide for Private Member's Bills, it has seen a number of private Members Bills being tabled in the House including the Special Tribunal Bill by Honourable Imanyara. The Standing Orders have also facilitated live coverage of parliamentary Proceeding amongst other crucial developments.

There has been spirited efforts to curtail the culture of impunity, Agriculture Minister, William Ruto found himself in a strange land when a censure motion was brought against him for allegations of maize scandal save for the ethnic arithmetics. There have been allegations of horse-trading particularly during the adoption of Mau Report and Ringera re-appointment saga though one group outsmarted the other.

Land Reforms

The land reforms are an emotive issue both in colonial and post colonial Kenya, which needs to be addressed satisfactorily for a harmonious society. The Cabinet adopted draft national land policy which has been adopted by the National Assembly as Sessional Paper setting the stage for legislation This is not the end in itself but a stage towards it; in 2005 the Land Laws (Amendment) Bill lapsed in Parliament and no constructive efforts to enact the Bill have been put in motion since then. Already there is a powerful clique of people within government, parliament and outside strongly opposed to the Land Reforms Sessional Paper casting doubts on the legislative process.

The challenge lies in translating the policy into legislation and implementation, the government abandonment of Land amendment Bill of 2005 which was meant to legislate the recommendations of Ndung'u Commission on irregular land allocation is a reminder of the hard task ahead of comprehensive land reforms in Kenya.

¹⁸ <http://www.standardmedia.co.ke/InsidePage.php?id=1144027563&catid=591&a=1>

¹⁹ <http://www.marsgroupkenya.org/multimedia/?StoryID=266563&p=Maalim+Farah&page=2>

Conclusion

Implementation of the agreed reforms under the National Dialogue and Reconciliation are far from entering the concrete deliverables. Government has made promises and pledges just like the past governments which are still a mirage.

At the moment various commissions and task forces are either mid way and it is not very clear on whether their recommendations and reports would effectively be implemented drawing lessons from the Report on Post Election Violence dubbed as the Waki report. The dilemma is more glaring considering lack of cohesiveness in the coalition government and the imminent disintegration of the political parties that form the government. The successful implementation of various commissions' reports and their impact is dependant on the ability of the government to marshal sufficient political will for substantial reforms.

The challenge therefore is the ability of Kenyans to heighten civic vigilance to demand and agitate for comprehensive reforms. Otherwise there is no foreseeable political will to implement these crucial reforms. It patently clear that politicians minds and focus is already in a campaign mood for the 2012 general elections.