

News and Events

Moving On

Rita Njau

One of the constant things in life is Change. In the first quarter of 2010, Jesuit Hakimani Centre has undergone changes at both programme and personnel level. With the guidance of an Administrative Team appointed by Fr. A.E. Orobator, SJ, the Provincial of Eastern Africa Province of the Society of Jesus, Hakimani has undergone a restructuring process to review its apostolic identity and re-align to its original vision. At the programme level, three programmes have been identified for continuity:

- **Research Agenda Setting and influencing (RASI)** under which falls the Economic Justice and Action for Better Governance Projects. The overriding strategic change objective remains to influence practice and policy through objective, evidence based and independent research. We intend to continue influencing practice through actioned knowledge and shadow policy briefs as well as set the agenda on economic justice through knowledge banking and think tanking. As a result, our traditional annual Nairobi Basic Needs Basket survey will continue among other program activities.
- **Social Transformation Strategies (STS)** a traditional Hakimani program that avails training on peace issues laced with Catholic Social Teachings. Particular projects include the Ambassadors of Peace and the Building Structures for Sustainable Peace in Kenya's Urban Slums. The strategic objective change holds as to build an egalitarian society that safeguards the dignity and sanctity of life. Hakimani intends to continue building structures that are responsive, equalising and enabling and to empower actors (on both the demand and supply side of transformation) to be responsible and proactive.
- **Media Community and Voice (MCV)** program will persist to collectivise voice on the public agenda through community making by

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promoting ownership of the public agenda through issue-focused communities and by building proactive ‘communities of interests’ that will serve as the conscience of the public space. Continued publications will include the monthly on line e-newsletter and Journal for Social Justice in Eastern Africa amongst others.

In view of the program audit as detailed above, Hakimani has had to release a sizeable number of staff. Those who will be leaving Hakimani at the close of April 2010 include: Catherine Karoki, Bernard Musongo, Dennis Oricho, Hassan Marube, Purity Murugi, Wangechi Gitahi, Naomi Ihugo, Zacharia Chiliswa and Zacharia Khadudu. We thank them sincerely for their contribution to the realisation of Hakimani’s vision and wish them well in their new endeavours. On going Hakimani staff members include: Harriet Were who will serve as the Administration

and Finance Officer, Patricia Sakali who will serve as the Social Transformation Programme Officer, Paul Odhiambo who will serve as the Media Community and Voice Programme Officer and Editor, Phares Mugo who will serve as the Acting Deputy Director, and Rita Njau who is serving as the Acting Director until the close of April 2010 when Phares Mugo takes over the position. It is important to note that Hakimani is operational and that programme activities are on going contrary to word that has reached the Hakimani Secretariat. Hakimani is still moving on for social justice issues still abound. We look forward to continued partnerships with our benefactors and collaborators.

The Place of Women in Kenya's Constitution Making Process

Joseph Thomas Mboya S.J., Student at Arrupe College, Jesuit School of Philosophy, Harare, Zimbabwe.

As the constitution making process in Kenya hopefully approaches its final stages, many questions come to the fore. The biggest debate at the moment has to do with abortion. The churches and other groups insist that the ambiguity created by Article 26(4) which states that: "Abortion is not permitted unless, in the opinion of a trained health professional, there is need for an emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law," provides a loophole for abortion. As I read the daily papers, it is interesting to note that most of the people who are airing their views on the abortion debate are men. It will either be the President, the Prime minister, Church leaders (mainly men), and parliamentarians, who again are male dominated. This clause will affect mostly women, prodding me to wonder why their voice in this issue has been drowned out and this issue turned more into a political power play. Will women once again be asked to rubber stamp decisions imposed on them by a male dominated process?

Virginia Held asserts that "It is generally argued that reproductive rights are a precondition for most other rights for women, yet they are continually threatened."¹ Should decisions concerning reproductive health care be left to a democratic process that favors a majority of men? Women have for a long time historically been viewed as the weaker sex. In traditional African society and indeed even today, the role of women is relegated to household duties and taking care of children. In the employment sector, women are discriminated upon because of their sexuality. Male sexuality is often developed such that it encourages domination of women. Sexuality therefore ends up becoming the

linchpin to gender inequality because gender roles institutionalize male sexual dominance and female sexual submission. Women end up degraded and viewed as sex objects, where males often associate sexuality of women with violence, hence many forms of abuse of women. The constitution must ensure that women are protected from such types of abuses, especially of young girls. Sex offenders should be handed stiffer penalties to end this vice.

The proposed draft constitution has attempted to empower women by ensuring that they are well represented in parliament and government positions by setting aside a number of seats for women in the house. It is clearly stated in the draft that no single gender should consist of more than two thirds of the house's representation. How this formula will be worked out is still not clear and will be addressed when the time comes. The constitution also aims at addressing historical and cultural injustices to women through their subordination in a male dominated arena. Is entrenching such modes for empowerment and affirmative action enough to ensure participation of women in politics and the constitution making process? Is it possible to change women's attitude towards politics as a 'dirty game.' Women should be sensitized and encouraged to take part in politics so that they can have the chance to influence policies from within the political arena. If more women contest for seats and win, there will be no more need to secure seats for them. They will instead rightfully be holders of those seats and even surpass the one third minimum numbers of seats that the constitution offers them.

If the proposed constitution is passed, the role of women in politics and governance will be

enhanced. But will many women take advantage of this or see their roles as secondary to those of their male counterparts? For this to happen, then the constitution has to go beyond writings in a document. The main problem of many African countries has not been the constitutions but rather the good will in implementing the constitutions. Women will have to be empowered at all levels in the state. The proposed constitution makes a provision of this by stating that “Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social activities.”²² The rights of women will have to be respected and women given equal opportunities in terms of education, jobs and decision making. In reality the state should ensure that women have equal rights and that there is gender equity.

A big percentage of women do household chores, work in their farms and spend most of their lives looking after their children. Perhaps it is high time that the role women play in society is appreciated more. By doing these essential jobs in the society, women contribute to nation building by being the first educators of children and play a great role in promoting harmony in society. Unfortunately, their work goes unnoticed and is not pensionable, thus when they grow older they lack economic empowerment to enable them to meet even the least basics needed for their survival. Universal primary and secondary education has been achieved. Could a universal pension for our women who work at home be a tenable idea? The civic societies, religious institutions and women’s groups should also have a voice and non-political agenda in order to sensitize women on their rights and role in the society.

Women are more than men in Kenya. They therefore have the power in the numbers to influence decisions that will ensure their protection and wellbeing. The draft constitution, which may eventually be enacted into law, should protect women from oppression and

discrimination. It does not go well to include women under the category of marginalized groups. Women should be empowered economically, socially and politically through education, sensitization and changing the ideology of women as inferior to men. It is my hope that it is not too late for women to have a stronger voice in the constitution making process, otherwise they will have let go a historic moment in Kenya’s history and the shaping of a future for women’s rights and equality.

1. Virginia Held, (2002). “Feminism and Political Theory”. In *The Blackwell Guide to Social and Political Philosophy*. Ed. Robert L. Simon. Oxford: Blackwell Publishers Ltd. Pg.163 – Virginia Held is a Distinguished Professor of Philosophy at the University of New York, Graduate School and Hunter.
2. Harmonised Draft of the Constitutions of Kenya. Published on 17th November, 2009 by the Committee of Experts on Constitutional Review pursuant to section 32(1)(a)(i) of the Constitution of Kenya Review Act, 2008.

20 years is a long time! Kenyans need to look ahead of the referendum

Phares Mugo

As the constitution of Kenya review process unfolds, areas that have raised considerable concern and debates across the nation are that of: land, devolution kadhi's courts, and abortion. Both the NO and YES proponents of the Draft Constitution have been on the campaign trail ever since the draft constitution was handed over to the Attorney General Mr Amos Wako.

The issue of land was not identified as a contentious issue by the Committee of Experts (COE) although it remains an issue of concern in the country since independence. Land issues were in fact identified under agenda 4 of the National Accord as having contributed in the events leading to the post election violence in Kenya in 2008. In making its recommendations on this chapter, the COE took into account relevant articles relating to land covered else where in the Harmonised Draft Constitution. The comprehensive land policy recently passed by parliament, also apply in this section. In particular, the provisions of Article 47 of the chapter on the bill of Rights were cited. Due to the significance attached to the environment and the close linkage with land, the environment related issues were mainstreamed in the constitution under this chapter on land. In the draft constitution, the principles of land policy include:

Article 60 of Chapter five of the draft constitution states: land in Kenya shall be held, used and managed in a manner which is equitable, efficient, productive and sustainable in accordance with the following principles_

- Equitable access to land;

- Security of land rights;
- Sustainable and productive management of land resources;
- Transparent and cost effective administration of land;
- Sound conservation and protection of ecologically sensitive areas;
- Elimination of gender discrimination in laws, regulations, customs and practices related to land and property in land; and
- Encouragement of communities to settle land disputes through recognised local community initiatives consistent with the constitution.

Proponents of the No campaign against the constitution want legislation of the land clauses that prescribe minimum and the maximum land holding amended. They argue that these clauses as they are, set the stage for taking over land that belongs to the people. However, classification of land article 61 (1) states that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. (2) Land in Kenya is classified as public, community or private. The NO camp also wants clauses on the land commission be amended, arguing that the way it stands now gives the commission powers to grab land from people who don't have title deeds. Article 67 (1) States, that there is established the National Land Commission. (2) The functions of the National Lands Commission are to – manage public land on behalf of the national and county governments; perform such other functions

in relation to land as parliament may by legislation prescribe.

In line with the desire of the people for a devolved decision making and dispersal of power to the grassroots which was expressed in their views to the COE taking into account the operations of the Local and Central Governments, and the Constituency Development Fund (CDF) mechanism, the draft constitution proposes a two tier system of devolved government comprising of a senate at national level and a regional assembly based on 47 counties. Proponents of the NO campaign want amendments on the first schedule on counties which according to them, Kenya should have three levels of government, that is, national provincial/regional and counties. Politicians who advocate for majimbo believe that a well thought out devolution system will ensure that the marginalised communities will have better access to resources as opposed to a purely centralised system. The whole truth however, is that most politicians view devolution as a means of creating a power base in their respective regions so that they can perpetually use these bases in perceived power games with the Central Government.

The debate over the inclusion of kadhi's courts in the Kenyan constitution as well as other Eastern African countries has been strong and contentious. Various views have been offered in support of or against the presence of religious courts in the Kenyan constitution. The jurisdiction of Kadhi's courts is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce and inheritance in which all parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts. The NO proponents led by Christian religious leaders argue that inclusion of the Kadhi's courts amounts to the elevation of one religion over the rest. The clergy also argue that the Constitution should not be contradicted by elevating one religion above the rest and stressed on equality

and that Parliament should make use of the section that gives it the power to create special courts.

Chapter 4 on the bill of rights Part 2 on Rights and Fundamental Freedoms; Right to Life article 25 states that (1) Every person has the right to life. (2) The life of a person begins at conception (3) A person shall not be deprived of life intentionally except as may be authorized by the constitution or any other written law. (4) Abortion is not permitted unless in the opinion of a registered medical practitioner the life of the mother is in danger.

Mainstream churches are up in arms against this clause and affirm that respect for life is fundamental to the survival of the nation. The Catholic Church last week in a statement to the press emphasized that the deliberate murder of an innocent human being is against the law of God and human dignity itself. Human life is sacred – from the moment of conception to natural death. No person can claim the right to destroy another human being. However, the operational Penal code 240 states that abortion in Kenya is legal only when it is necessary to save a woman's life. It must take place in a hospital, with three medical practitioners certifying that the procedure is necessary.

Kenyans need to ask themselves what choices they have before they vote in the up coming referendum. If Kenyans vote NO in the referendum they go back to the current constitution. The current constitution may be amended with 65% of parliament's vote. In chapter 16 of the Draft constitution provides that the constitution may be amended in the following ways:

- Parliament can amend the constitution in matters related to issues like the supremacy of the constitution, territory of Kenya, sovereignty of the people, principles and values, bill of rights, terms of office for president, functions of parliament and

devolution with a 2/3rd majority of parliament plus a referendum by the people where a simple majority approves the amendment.

- An amendment for any other provision of the constitution can be amended in one of two ways: first, an amendment may be passed by 2/3rd of parliament. Second, an amendment may occur through a popular initiative supported by signatures of 1 million registered voters plus support by majority of the district assemblies. Parliament may then pass the amendment with 2/3rd of parliament. If parliament does not pass the proposed amendment, a simple majority of registered voters in a referendum can pass the amendment.

Kenya on the road to constitutional referendum

Odhiambo Paul

After the search for a new constitutional order for almost two decades, Kenyans might soon realize a dream of having a new constitution before the end of this year. While the constitutional review process has been torturous, the referendum is a major challenge remaining before the country ushers into a new constitutional order. Since Parliament endorsed the draft constitution early April this year, a heated debate has emerged in the country over some contentious issues. While some politicians and church leaders have called for a new round of consensus talks to iron out the contentious issues such Kadhis' courts (article 170), abortion (article 26), devolution (articles 174-191, 202-227) and land (articles 40, 60-68), proponents of the draft contend that the draft should be passed first in the referendum then be amended later on.

Despite a general mood in the country that time is ripe for a new constitution, opposition to the draft by some clergy due to the inclusion of the Kadhi's court and abortion clauses have raised concerns whether these threats could deny Kenyans a new constitution in the coming referendum. While the two principals: President Kibaki and Prime Minister Raila Odinga; their key political allies; several leaders across the political divide and considerable members of civil society organizations have supported the draft, there are also concerns that shifting of positions on the draft by some politicians might undermine the last phase of the constitution making process. It is not a surprise that some legislators are opposed to the draft as a number of them had unsuccessfully attempted to amend the draft in the parliament where they were unable to lobby for two-thirds (145 MPs) needed to effect the changes. Kenyans and the rest of the world

will be watching keenly whether the draft will sail through during the plebiscite or it will be rejected by voters.

In order to appreciate the struggle for constitutional reforms, it is imperative to briefly state some of the key events that led to the clamour for restoration of multiparty democracy and constitutional reforms in the country. Before Kenya got independence in 1963, Kenyan delegates and the British officials negotiated a constitution that became to be known as the Lancaster constitution. Some of the features of the independence constitution included bicameral parliament; semi-federal system of governance that gave the regions relative autonomy from the central government; and separation of powers between the three organs of the state among others. Jomo Kenyatta became the first African Prime Minister in June 1963 when Kenya attained internal self-rule that preceded full independence from Great Britain on 12 December 1963. On 12 December 1964, Kenya became a republic with Kenyatta as the president while Oginga Odinga became the Vice President.

Observers contend that the successive regimes in Kenya concentrated power in the presidency through amendments of the constitution especially during the first three decades of independence. The political power was also centralized in the executive by other statutes, administrative measures and by political conduct of the ruling elite. Political authority was monopolized in the presidency to the extent that the politics of neo-patrimonialism became the order of the day in the governance practices. Politics of patronage and sycophancy by the ruling elite led to state authoritarianism as those who displayed unwavering loyalty to the regime were rewarded generously. Though Kenya was a *de facto* one-

party state after Kenya's People Union of Jaramogi Oginga Odinga was banned in 1969, the country became a *de jure* one party state through amendment of the constitution in 1982.

Due to arbitrary amendments of the constitution and consolidation of power at the centre in the first decades of independence, gross violation of human rights, corruption, nepotism, tribalism, impunity, marginalization, unequal development, widening of gap between the rich and the poor, electoral malpractices, detention without trial among others undermined democratic ideals and constitutional governance in the country. Bad governance and misuse of power became catalysts to progressive forces in the country who began agitating for social and political change.

While the restoration of political pluralism was seen as a major step in opening the political space in 1991, Kenyans realized that the advancement of democracy, good governance, equitable development and improving the welfare of all Kenyans would not be achieved if fundamental constitutional and institutional reforms were not undertaken. According to Professor Makau Mutua, there were two schools of thought that emerged with respect to the democratization process of the Kenyan state. The first group supported minimal legal and constitutional reforms to level the political play ground. On the other hand, second group that was mainly composed of civil society activists routed for a constitutional overhaul.

Between May and September 1997, the civil society activists under the umbrella National Convention Executive Council (NCEC) advocated for the implementation of minimum reforms before the December 1997 general elections. Their slogan of "no reforms, no elections" became popular with the masses as opposition leaders who initially had been reluctant to push for constitutional overhaul

joined the nationwide demonstrations to force the government into initiating constitutional review process. In order to cool down political temperatures, President Moi reached out to opposition parties leading to the formation of Inter-Party Parliamentary Group (IPPG) that was mandated to agree on a set of minimum reforms before the elections. Through the IPPG, Moi managed to take away the steam from the NCEC.

After the 1997 general elections, the constitutional review process took interesting twists and turns as civil society organizations and religious groups (Catholic Church, Protestant churches and Islam) put pressure on the government to take the law review process more seriously. In 1998 the Inter-Party Parliamentary Committee convened public meetings of stakeholders to deliberate on the norms, institutions and processes for constitutional reform. These forums became to be known as the "Safari Park talks". The meetings were held at Safari Park hotel in Nairobi. In December 1999, the Ufungamano-initiative (faith-led constitutional review process) was launched. The Ufungamano-initiative established the NGO People's Commission of Kenya (PCK) to counteract the KANU government-led constitutional review process. The PCK was mandated by the stakeholders under Ufungamano-initiative to conduct a people-driven constitutional review process by traversing the republic to gather the citizens' view on what should be included in the new constitution. On the same day that (December 15, 1999) that Ufungamano was launched, the Parliamentary Select Committee on Constitutional Review (PSC) was established by the government to collect views on Kenyans on the constitutional review.

In 2000, President Moi appointed Professor Yash Ghai as the chairman of the Constitution of Kenya Review Commission (CKRC). In order for the CKRC to attain some level of legitimacy, Ghai ensured

that the PCK was incorporated in the constitutional review process. Nevertheless, the struggle to control the constitutional review process continued to pit the reform activists against KANU loyalists who mainly paid lip service to the constitutional reforms. The quest to control the review escalated further after the 2002 general elections, further complicating the process during the National Rainbow Coalition (NARC) government. In 2003, the constitutional review process picked up the momentum again. The power struggle of main partners (Liberal Democratic Party and National Alliance of Kenya) in the NARC coalition spilled over into the review process especially during the national constitutional conference at the Bomas of Kenya. The cracks in the NARC coalition were further complicated as LDP formed an “alliance” with opposition party KANU to champion what they perceived as their common interest.

As the constitutional conference was in the final phase, the emerging camps became irreconcilable to the extent that Vice President Moody Awori and NAK leaning delegates walked out the Bomas in protest. Observers argue that the adoption of the draft constitution in March 2004 without the NAK leaning delegates did not augur well for a process that was meant to unite the country. However, the NAK and its allies in the government made matters worse when they proceeded to Kilifi where they allegedly mutilated the Bomas draft. The LDP-KANU group did not make it to the Kilifi talks. It was after Kilifi meeting that the Attorney General Amos Wako published what became to be known as the Wako draft. When Wako draft was subjected to the November 2005 referendum it was rejected by majority of the voters.

As Kenyans prepare for the forthcoming referendum, it is important that civic education is done effectively so that voters understand the proposed law. Though the quest for a new constitution has been long, the

citizens must critically analyze the draft to find out whether it has the prospects of meeting their aspirations. A good constitution should advance the rule of law, separation of powers, participatory governance, equitable distribution of resources, respect and protection of human rights, accountability and transparency in management of public affairs, equal opportunities for all people and protection of minorities, underprivileged groups among others. Does the draft constitution meet these expectations? Is the draft implementable? Will it promote unity in diversity? Will it help Kenyans in addressing historical injustices that have contributed to conflicts? These are some of the questions voters should ask before they vote at the constitutional referendum later this year!

Call for papers

Hakimani Publications

Hakimani: *Jesuit Journal of Social Justice in Eastern Africa*

Call for papers

In the next issue of Hakimani journal we turn our focus to International Criminal Court (ICC)

The establishment of the ICC at the end of the 20th century was seen as remarkable step towards addressing international crimes: Crime of genocide, crimes against humanity, war crimes and the crime of aggression especially in countries facing civil strife, armed conflict or any other form of massive violation of human rights targeting civilian population. There has been optimism among comity of states that the ICC will be the right institution to deal with atrocities committed in various parts of the world. In the first decade of the 21st century, there have been various attempts of ICC intervention in Uganda, Sudan and Kenya. The three states are part of the Eastern Africa Province of the Society of Jesus.

In 2005, the government of Uganda invited the ICC to arrest the five top leaders of the Lord's Resistance Army namely Joseph Kony, Vincent Otti (R.I.P.) Raska Lukwiya (R.I.P.), Okot Odhiambo and Dominic Ong'wen. In Sudan, the ICC indicted President Omar El-Bashir and issued a warrant of arrest accusing him of having committed international crimes in the Darfur where an armed conflict have pitted the black African Darfurians against the Government since March 2003. El-Bashir regime is accused of having used the Janjaweed Arab militias to unleash terror on the black Africans leading to loss of tens of thousands lives, destruction of property, internal displacement of civilian population, flight of other thousands of people to foreign countries and massive violation of human rights in Darfur.

The announcement of results of the 2007 disputed presidential polls in Kenya between the main contenders Mwai Kibaki of Party of National Unity and Raila Odinga of Orange Democratic Movement led to widespread violence that claimed over 1,300 lives, displacement of over 500,000 people, destruction of property and serious violation of human rights. A commission appointed by the grand coalition government and headed by Justice Philip Waki to investigate the post election violence recommended that the perpetrators of the violence be dealt with through ICC and/or local tribunal. It is most likely that the ICC will begin its work in Kenya before the end of this year.

The intervention of the ICC in the three Eastern African countries has prompted a heated debate in various circles at regional, continental and international levels whether the pursuit for justice could be realized through the ICC, national courts, independent tribunals or Truth, Justice and Reconciliation Commission. The issue of respecting the principle of sovereignty and intervention in a conflict-ridden state to protect the victims of violence has also been a major concern in the debate. As our countries strive to establish institutions and democratic culture, norms and practices that should be the foundation of stability, peace and development, it is important that Jesuit Hakimani Centre participates in this imperative debate that touches on matters of justice, peace, social justice and reconciliation. This will inform the next issue of the Jesuit Journal of Social Justice in Eastern Africa in which writers tackle the issue from various perspectives.

- Interested in contributing a reflection on a social justice issue in your locale in Eastern Africa?
- Are you organising or have attended an event seeking to promote social justice in the region?
- Are you involved in a campaign for transformation of unjust social structures?

Email us: editor@jesuithakimani.org

Hakimani e-Newsletter is the electronic monthly supplement of Hakimani: Jesuit Journal of Social Justice in Eastern Africa.

It offers reflections on issues of concern to social justice in the region, as well as announcements of news and events.

Jesuit Hakimani Centre is the social justice, research and advocacy centre of the Eastern Africa Province of the Society of Jesus. The province comprises of Ethiopia, Kenya, Sudan, Uganda and Tanzania.

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