

Democratisation and the Rule of Law in Kenya

ICJ Mission Report



International Commission of Jurists

April 1997

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INTRODUCTION

1991 will remain as important a year in the constitutional history of Kenya as 1963, the year of independence. For towards the end of that year, in December to be precise, President Daniel Arap Moi dramatically changed his opposition to pluralist constitutional democracy. The one-party system legalised in 1982 was abolished.¹ The KANU government conceded multiparty politics, released officially gazetted political detainees, promised fresh elections (both parliamentary and presidential) and started the process of loosening its iron grip over the country, a grip which had progressively, since independence, turned Kenya from a country of hope for the African to a land of despair.

This is not the place to provide a detailed chronicle of the constitutional history of Kenya since it was declared a protectorate in 1895 and attained independent nationhood in 1963.² However, a brief historical overview in summary form will help to bring out the unfolding drama in which this momentous decision was made. It will also explain the reasons behind the continuing difficulties which Kenya politics and constitution have been engulfed in since the return to multiparty democracy.

- 1 Kenya which steadily became a *de facto* one party state was by the Constitution of Kenya (Amendment) Act. No. 7 of 1982 dated 9 June 1982 made into a *de jure* one. This 1982 amendment was repealed by the Constitution of Kenya (Amendment) No. 2 Act of 1991 dated 10 December 1991.
- 2 See *World Almanac and Book of Facts* (1993); C. Mulei - *The State of Human Rights in Kenya* (Unpublished Paper); *A Long Road to Uhuru: Human Rights and Political Participation in Kenya* (Report of a fact-finding study conducted by David Gillies and Makau wa Mutua for the International Centre for Human Rights and Democratic Development, Montréal, Canada and the Westminster Foundation for Democracy, London, U.K.; Ojwang, J.B.: *Constitutional Development in Kenya*, Nairobi, 1990; Gathii, J.T.: *A Socio-Contract analysis of Kenya's constitutional experience -Towards a citizen-centred constitutional ethic*, paper prepared for ICJ-Kenya Seminar on Sectoral Studies on Kenya's future policy reforms, 12-15 May 1993; Africa South of the Sahara (1991 Edition).

The dramatic reversal of policy by President Moi permitted new political parties to be formed to challenge the hegemony which the Kenya African National Union (KANU) had enjoyed since independence. The reversal and the restoration of multiparty democracy resulted from domestic and international pressure.³

HISTORICAL AND DEMOGRAPHIC OVERVIEW

Although it came into being in 1895, the Career of the East African Protectorate, later to be called Kenya, may be said to have had its real beginnings in April 1902, when its boundaries were advanced at the expense of Uganda from the Rift Valley to Mt. Elgon and the eastern shores of Lake Victoria. In 1920, the territory acquired the name "Kenya" and was officially made a British colony.

Kenya today occupies an area of 582,646 sq. km. and has a population of 25.3 million people. It lies on the equator in east-central Africa on the coast of the Indian Ocean. Its neighbours are Uganda on the west, Somalia on the east, Tanzania on the south, and Ethiopia and Sudan on the north.

Always a meeting place of different racial and ethnic groups, the population is made up of Kikuyu (21%), Luo (13%), Luhya (14%), Kalenjin (11%), Kamba (11%) and others including Asians, Arabs and Europeans. Most of the African populations, live in high density cultivated areas, while the majority of the non-Africans live in cities or towns. Persian and Arab influence is evident on the coast especially around the port city of Mombasa.

Administratively it consists of 8 provinces namely:

- Central
- Rift Valley
- 3 Gilles & Makau wa Mutua, op. cit. 2 supra.

- Nyanza
- Western
- Eastern
- North Eastern
- Coast
- Nairobi

English is the administrative language. Kiswahili is the national language. The religions practised include Christian-Protestant (38%), Roman Catholic (28%), traditional (26%), Islam (6%). The Bahai faith and others account for the rest.

The country's economy centres around agriculture which employs about 78% of the estimated 9 million labour force. In the north the land is arid; the south-western corner is in the fertile Lake Victoria Basin. The eastern depression of the Great Rift Valley separates Western Highlands from those that rise from the lowland coastal strip. With its large game reserves, Kenya is a popular tourist place. Apart from tourism, the major sources of its economic strength are coffee, sisal, tea, pineapples, livestock, textiles, processed foods, consumer goods and refined oil. Small quantities of gold, limestone, minerals and wildlife constitute its natural resources.

As indicated earlier, Kenya began its modern life as a British colony in 1920. The first and second world wars saw a consolidation of settlers hold on both the government and the highlands. When nationalist agitation began therefore the central issue was access to arable land for the native Africans. This agitation led to the formation of a nationalist organisation called the Kenya African Union (KAU) to demand African access to the "White Highlands".

The agitation took a more militant form when the Mau Mau, a predominantly Kikuyu secret society began armed struggle against settlers in 1952. The colonial government gave itself all the powers it thought necessary to deal with the situation. The legislation which resulted from the exercise of these powers was essentially of a repressive character.

To understand fully contemporary Kenyan politics, it is important to keep in mind **four** elements from the early political struggles. These are (a) the repressive orientation of governmental reaction to genuine demands for participation in the political process and the shaping of the destiny of the emerging country, (b) the use and role of ethnicity in the nationalist movement especially by the active political elements of the larger ethnic groups, (c) the role of the Kikuyu-Luo politicians in spearheading the organisation of the first political movements and (d) the tendency for political groups to splinter and amalgamate driven essentially by the egos and personal ambitions for power of key individual members. Perhaps, it might not be considered unfair or far off the mark to suggest that Kenyan politics today are still dominated by reflections of the realities or echoes of this colonial past. **KANU favoured radical land distribution and nationalism, principles which were strongly supported by Kenya's major tribes, including the Kikuyu, the Luo, the Kamba, the Meru, Embu, Taita and the Kisii.**

As the armed struggle brought the colony closer to independence, more traditional political parties began to emerge. Elected African members of the Legislative Council and the more radical elements of the nationalist movement formed the Kenya African National Union (KANU) in 1960. KANU favoured radical land distribution and nationalism, principles which were strongly supported by the Kikuyu, the Luo, the Teita and other related tribes.

The leadership and platform of KANU created fears in others. There were fears that KANU's radical land distribution policy

would favour the allocation of the "White Highlands" to the disadvantage of minority tribes. This triggered the formation of a multi-tribal coalition which included the Kalenjin Political Alliance, the Maasai United Front, and the Coast African Peoples Union. This Coalition was called the Kenya African Democratic Union (KADU). Significantly, KADU which received its support from minority tribes called for a federalist constitution to protect their interests.

On 12 December 1963, Kenya obtained independence from the United Kingdom with a negotiated constitution that provided for multiparty democracy with a bicameral legislature under a KANU government, under the leadership of Jomo Kenyatta.

By 1964, that is a year after independence, Kenya was declared a republican State. By this time too, KADU had ceased to exist because of defection by most of its key members to KANU. Kenya thus became a *de facto* one-party State with opposition to mainstream politics coming from within KANU itself. In particular two divisions emerged in KANU: a radical wing led by Oginga Odinga (a Luo) and a conservative wing with Tom Mboya (a Luo) as its exponent.

This division spawned a splinter group, the Kenya Peoples Union (KPU) in 1966 led by Oginga. KPU accused the government of promoting vigorously the development of a small privileged class of Africans. Legislation was immediately enacted requiring the 30 KANU members of the legislature, who had left to form the KPU, to present themselves for re-election. In addition, ominously, the **Preservation of Public Security Act** empowering the government to impose censorship and hold suspects in detention without trial was passed. In the by-elections that took place, only Odinga and eight of the KPU members were re-elected.

KPU was subsequently banned in 1969, and its leaders, including Jaramogi Oginga Odinga, detained without trial under the Public Security Act.

President Jomo Kenyatta died at the age of 82 years on 22 August 1978. Vice-President Daniel Arap Moi, from the Kalenjin ethnic group, assumed the presidency with a little help from a leading Kikuyu politician, the then Attorney-General, Charles Njonjo. Three years after this, Kenya became constitutionally a one-party State when the Constitution was amended to make KANU the only legal political party.

This relatively "smooth" constitutional development in Kenya was rudely shaken by an attempted coup d'Etat by a section of the Kenya Air Force in August 1982. The insurrection was quickly quelled by loyal forces. Because of the high involvement of the Luo in this unsuccessful coup, Odinga was placed under house arrest.

The coup had one beneficial effect on Kenyan politics. At least for a while. It seemed to have made President Moi more receptive to the opposition and dialogue. Unprecedented meetings, for example, took place between the President and student leaders following the call for dialogue by the Minister for Education. In public speeches, the President emphasised the need to reduce unemployment and inflation and to increase Kenya's reserves of foreign currency and agricultural production. But the coup also seemed to have had another effect on President Moi. Though obviously shaken by the event, it also hardened him in his general distrust of democracy. He and his government became increasingly intolerant and worked towards total control of society. By 1985, Moi had established and consolidated his preeminent position in Kenyan politics and the opening to his political opponents was closed.

In 1986, the KANU party conference approved the new open "queue-voting" system to replace the secret ballot in the candidate selection stage for the general election scheduled for 1988. The new system was opposed by the National Council of Churches of Kenya, severely criticised by the international community and denounced by NGOs, both local and international.

The National Assembly, in December 1986, amended the Constitution to increase the power of the President over the civil service further by doing away with the constitutionally protected security of tenure of some key civil servants such as the Chairman of the Public Services Commission. The independence of the judiciary was also reduced by giving the President the power to dismiss the Attorney-General and the Auditor-General without recourse to a legal tribunal.

The independence of the judiciary was seriously undermined by the constitutional amendments two years later empowering the President to dismiss judges at will. At this time also, the maximum time which a suspect charged with a capital offence could be held in custody by police before appearance in court was increased from 24 hours to 14 days.

President Moi's government came under intense criticism from all quarters including religious leaders and civil society and grassroots organisations so that, by early 1987, the political atmosphere in Kenya had the flavour of the months immediately preceding the unsuccessful coup in 1982. A general election held in 1988 did not lessen the increasing criticism of the government largely because, among others, prominent opponents of the regime were not allowed to contest the elections. By this time also a coalition of church leaders, civil society groups, lawyers, trade unions was beginning to crystallise into an active opposition that was not deterred, by the repressive responses of the government, from being vocal in its disapproval of government policies and corruption. Two of the leading members of this group, Kenneth Matiba and Charles Rubia, both ex-Cabinet Ministers in the Moi government were even detained for daring to clamour for democratic changes.

Out of the coalition was formed a pressure group called the Forum for the Restoration of Democracy (FORD) under the leadership of Oginga Odinga, the veteran politician. FORD called for the restoration of multiparty democracy and the legalisation

of opposition parties. The government's reaction to these developments was to arrest several of FORD's leaders. Far from stemming the pressure, these reactionary measures rather emboldened the opposition leadership further.

As pressure from within and without mounted on the Moi government to introduce multipartyism and observe respect for human rights, Moi became more and more adamant in his resistance. He called the leaders of the opposition tribalists working for foreign powers against the interests of Kenya. He maintained that, in the circumstances of Kenya, multipartyism was a recipe for tribal chaos.

Tribal clashes did ensue. The first were reported in parts of Kericho and Nandi districts. These rapidly spread to other areas in the Western, Nyanza and Rift Valley provinces. Given the open brazenness of the fomenters of these clashes and inaction from the government, there were many observers who saw government hand in these clashes or at least its tacit consent and encouragement to them.

Anyway the pressure for legal and constitutional reform continued relentlessly and inexorably. Oginga Odinga, Masinde Muliro, Martin Shikuku and three others founded the FORUM for the Restoration of Democracy (FORD) in the middle of 1991 to lobby for the return of multiparty democracy. In November 1991, FORD, though denied a licence, proceeded with a planned rally at Kamukunji Grounds, Nairobi. Police attempted to break up the rally, but thousands showed up. In the wake of this attempted rally, several of the leaders of FORD were arrested and detained.

Ten days later, the pressure for constitutional reform received an important external input. The Paris Consultative Group Meeting, the umbrella which brings together Kenya's external donors and the multilateral lending institutions, decided at their Paris meeting to withhold new aid to Kenya, for at least six months until major economic and political reforms

were undertaken. The six month period passed without any movement from the donors front. In plain language, aid was being predicated on good governance.

It was against this background that President Moi announced on 2 December 1991 that the constitutional provision enshrining the one-party State would be repealed (Section 2A). The legal changes necessary to effect this change of policy were completed in December and by the end of 1991, FORD became the first registered opposition party. The charges preferred against the FORD leaders arrested for their part in the unsuccessful rally a month earlier were dropped.

Several interpretations have been placed on the political history outlined above. But, from the point of view of the ICJ Mission, it is sufficient to point out that the record is replete with dictatorship by government (colonial and independent), repressive laws and violations of basic human rights — a political environment that was generally inhospitable to the free exercise of body and mind by its peoples.

With the repeal of Section 2A⁴, the way was paved for political party activity. Initially two major political parties emerged - FORD and the Democratic Party. Later, for various reasons mainly dealing with generational differences and personal ambitions as well as blatant exploitation of ethnicity, FORD split into two distinct parties - FORD-Kenya and FORD-Asili. Other parties were also registered. These included the Social Democratic Party (SDP), the Kenya National Democratic Alliance (KENDA), the Labour Party Democracy (LPD), the Party of the Independent Candidates of Kenya (PICK), the Kenya Social Congress (KSC) and the Kenya National Congress (KNC). The Islamic Party of Kenya (IPK) was

4 Section 2A of the Constitution provided that "there shall be in Kenya only one political party, the Kenya African National Union."

denied registration on the grounds, claimed by government, that it was religion-based.

The proliferation of political parties, once the flood-gates had been opened by the repeal of Section 2A is noteworthy because it reflected a replay of the political scene on the continent of Africa at the dawn of independence. Then, the pro-independence movement, united in the fight against colonial domination began to fragment as colonialism crumbled. So in Kenya, the pro-democracy movement was united in forcing the government to dismantle the one-party political apparatus. But once the prospect of throwing Moi out of power appeared to be real, the front of the pro-democracy movement began to break up, fuelled mainly, it appeared, by individual ambitions. Thus, with the return to multiparty politics, the promise of constitutional democracy which it gave to the mass of Kenyans began to play second fiddle to individual dreams of replacing Moi in the State House as President. Constitutional democracy was therefore flawed at the re-birth in Kenya.

1992 ELECTIONS

Multiparty elections were held in December, 1992. These elections were considered the most complex ever held in Kenya.⁵ They involved simultaneous polls for the presidency, parliamentary and local government seats.

The new rules introduced for the election of the President raised eyebrows. Under the new rules, to be elected President a candidate had to satisfy three conditions: (a) win his own parliamentary seat; (b) win a plurality of the votes; and (c) obtain 25% of the votes from five of Kenya's eight provinces. On the face

5 Gilles & Makau wa Mutua, *op. cit.* 2 *supra*.

of it this triadic scheme may appear an important safeguard against instability. In practice, it favoured and was seen to favour the incumbent, since his party, KANU was the only party with a national reach. Besides, the ethnic divisions then resurfacing and an apparent official stoking of ethnicity meant that the major opposition candidates could not campaign in some areas of the country.

The Electoral Commission put in place to run the elections was considered as one of the obstacles to free and fair elections. For a number of reasons. First, it did not seem to have sufficient independence from the government. It was suspected that its members were appointed more because of their loyalty to the KANU party and President Moi rather than any special skills in the management of a complex process such as an election. Secondly, the Commission appeared inaccessible to the opposition largely because of its Chairman's refusal or unwillingness to meet other parties or to reach out to the public at large. Thirdly, electoral laws were amended without adequate consultation or public debate. For example, new nomination rules were introduced giving opposition parties only eight days to nominate their candidates. They were withdrawn only when, upon opposition challenge, the High Court struck them down.

Then there was the question of the violence and insecurity which attended the electioneering campaigns. Opposition politicians bore the brunt of the violence. They were reportedly frequently attacked or harassed with impunity while campaigning in some parts of the country. Ethnic clashes in the Rift Valley and Western provinces led to colonies of internally displaced persons. Even some people lost their lives in those clashes.

In short, confidence in the fairness of the electoral process was seriously undermined by these combinations of factors.

Nevertheless, the elections which took place on 29 December 1996 were adjudged to have passed off relatively well. They may

not have been free or fair, but they were peaceful. As the Commonwealth Observer Mission stated these elections constituted the “first step on the path to multiparty democracy.”⁶

Indeed while important, elections constitute only one plank in the complex societal construction known as constitutional democracy. As David Gilles and Makau wa Mutua put it,

“Durable democracies are built on respect for human rights, popular participation, equality and accountability. Democracy is at once a set of institutions and process, an approach to politics and a system of government to promote long-term change.”⁷

Measured against the above yardstick, democracy in post-1992 Kenya left much to be desired. Essential constitutional reform had yet to take place. The Rule of Law, that vital ingredient of a constitutional democracy appeared at risk. Though the security of tenure of the judges had been restored, judicial independence remained a distant dream. State laws retained their one-party State quality of prohibiting rather than nurturing political participation either by professional politicians, ordinary citizens or civil society organisations. Parliament was now made up of representatives of the governing and opposition parties; but, through the Speaker and Standing Orders dating from the one-party days, the government ensured that it would not function as a truly democratic platform. At greatest risk were the freedoms of association, assembly and expression. If we add to this list the fact that Kenyan politicians continued to place their own ambitions and dreams of personal power above the general good and the welfare of Kenya, then it would be clear that the return to multiparty politics would change nothing.

6 Report of the Commonwealth Observer Group, 1993 p. xi.

7 See note 3 *supra*.

To understand fully, the recommendations we make in this Report, we provide in the next paragraphs a more detailed summary of the situation prevailing in Kenya immediately before the Mission was undertaken.

The persistence of the unlimited executive after multiparty elections

Calculated unwillingness has characterized the official attitude towards constitutional reform. There has been no move towards dismantling the legal infrastructure that propped up the one-party system. The Executive is still an overacting and predatory institution shadowing and preying upon the other two constitutionally co-equal branches of government - the Legislature and the Judiciary.

First, there have been no changes made to election laws in order to rectify the inequitable winner-takes-all electoral system Kenya inherited from Britain. The current president won on a plurality, not on a majority, of the votes cast. Given the substantial difference between his total votes and the votes cast for other candidates there is need to rethink the simple majority vote system in Kenya. These inequities have been further aggravated by gerrymandering and the presidential power to nominate an additional 12 members to parliament. With such provisions in place the whole electoral law effectively frustrates the wishes of the majority. Moreover the statistics from the last election show the seriousness of the problem. The so called marginal districts enjoyed a major electoral advantage over the more populous ones.

The three districts of Turkana, Samburu and West Pokot, all in Moi's home Province, the Rift Valley have eight electoral constituencies yet they have a voting population of only 170,000. Mathare constituency in Nairobi Province has a voting population of over 150,000. Mathare constituency gets one member of parliament whilst the three districts with roughly equal

population get 8 members of parliament. This clearly is hardly a case of one person one vote.

Second, the President has not been shorn of any of the powers that he had under one-party government. We agree that he has the right to appoint the people he is comfortable with and considers able to assist him to govern. However, experience has shown that the Rule of Law will be strengthened by ensuring that a transparent and accountable system is devised which ensures that people with merit are appointed to these ministerial positions. On the other hand, the power of dismissal has always been used punitively against vocal or popular ministers. No changes have been effected to regulate this arbitrary use of power. One way of balancing the situation would be to make the appointments subject to parliamentary approval. This would be reasonable since, under Section 16(1) of the Constitution, it is Parliament which has the power to create ministries.

Third, there has been no change to presidential powers to hire and fire the members of Public Service Commission. Section 106 (1) and (2) vest in the President the power to appoint a tribunal to investigate such a commissioner and make recommendations on the measures that ought to be taken against him. Neither of these two powers, that of appointing commissioners nor that of appointing the tribunal to investigate an errant commissioner, is subject to parliamentary or any other institutional controls. Additionally, no attempt has been made to rationalize the decision in *Mwangi Stephen Muriithi v. The Attorney-General* with section 107 of the Constitution.⁸

8 The Muriithi case held that on a proper reading of section 25 of the Constitution the President had power to dismiss at will any person in the public service in Kenya. On the other hand, section 109 of the Constitution gives some security to certain officers in the public service while section 107 provides that the power to hire and fire people working in the civil service is vested in an independent Public Service Commission.

Fourth, the power to constitute the Judicial Service Commission remains in the President. Admittedly, the Constitution expressly provides that the Chief Justice, the Attorney General and the Chairman of the Public Service Commission are automatically members of the Judicial Service Commission. But given the fact that all these constitutional officers are themselves presidential appointees there is little hope that the Judicial Service Commission can be truly independent. In any event the additional two members who help make up the five-man Judicial Service Commission are direct presidential appointees.

In much the same way as is the case of the Public Service Commission, the President has the power to appoint a tribunal to investigate errant or incapacitated members of the Judicial Service Commission. This plus the formal power to appoint judges given to the President under the Constitution which gave the impression that the President influenced judicial decisions.

Fifth, it is a particularly serious omission that there are no changes to the President's power to declare an emergency or to bring into operation Part 3 of the Preservation of Public Security Act. When it is operational, as it has been since 1968, this part allows for detention without trial and other emergency measures. Given the current blatant disregard of this section in the case of the ethnic clashes in Molo, Londiani and Burnt Forest, it is clear that the point is not merely academic. Critically, given Kenya's express obligations under the *International Covenant on Civil and Political Rights*, legal changes should have been effected to harmonize local law with international law. Given article 4 of the *Covenant* which lays down when, how and to what extent emergency powers may be exercised, there is need to revisit the President's emergency powers in the light of the insecurity now prevailing in other parts of the country. Imprudent and uncontrolled use of emergency powers could effectively subvert the democratic initiative in Kenya. The calls made by people to

have these powers repealed or qualified in important respects reflect a growing apprehension that these laws serve only pertinently political purposes.

The Legal Structure of the Multiparty Parliament

In Parliament, the changes needed to give effect to a multiparty system have also not been made. The right to participate in the political process and to contest in parliamentary and civic elections remains tied to the party system. One cannot contest elections without being sponsored by a registered party. There is yet no provision for independent candidates.

Second, the privileges and immunities of members within the precincts of the House are still open to whimsical violation. Recently, it was reported that an opposition member of Parliament would have been arrested within the precincts of Parliament had his lawyer not intervened.

Third, the Standing Orders have not yet been squared with the Constitution. For example, the Constitution recognizes the existence of the opposition, protects the freedom of association and does not prohibit coalition-building between political parties. As drafted, the Standing Orders prohibit coalitions and leave to the discretion of the Speaker the determination of the issue of the form the official opposition takes. The Speaker does not consider any parliamentary arrangements that the parties may make for the purpose of pursuing a joint agenda in the House. As experience from the break-up of the Congress Party in India showed, the opposition in Parliament need not be equivalent to the opposition outside it.

Fourth, the Standing Orders give enormous discretion to the Speaker with regard to virtually every matter in the House. Particularly, the Speaker has the power to vet members' questions and notions before submitting them to the Session Committee for

inclusion in the Order Paper. Some members have complained that the Speaker administratively saps their effectiveness by hoarding their questions and motions and refusing to hand them over to the Session Committee. Given the fact the Standing Orders were made by a one-party parliament they should have been reviewed when parliament became plural. There is a perception amongst the opposition that the Speaker is not impartial. Having regard to the persistence of this charge, the Standing Orders should have been reviewed with a view to limiting the Speaker's discretion.

The Character of the Judiciary in the Era of Pluralism

In the Judiciary, reform is still awaited. The High Court remains the only court that can entertain applications under section 84 of the Constitution that is the provisions relating to human rights. This means that all questions relating to the enforcement of fundamental rights are initiated and finalized in the High Court. Since the unsatisfactory decision in *Anarita Karimi Njeru v. The Republic*, the Court of Appeal has held that it does not have jurisdiction to hear an appeal from the High Court on questions of fundamental rights. The result is that the highest court in the land cannot guarantee the observance of the most important part of the Constitution: the bill of Rights.

Besides, one hardly sees any significant change on the part of the courts and the judges. Judicial attitude to enforcement of the bill of rights remains hostile as recent sedition and press cases have shown. Like Parliament, the Judiciary is itself structurally maladapted to being an effective monitor of constitutionalism, human rights or to check government excesses. The last officially produced law reports appeared 15 years ago. In the absence of organized law reports, there is no coherent development of legal doctrine. Precedents for practitioners are inaccessible and court decisions are often contradictory. This introduces great

arbitrariness into case-law and judicial attitudes tend to differ from court to court and town to town. Certainty and predictability which should ideally be the hallmarks of legality are thus placed at great risk in Kenya. Hopefully , the issue of law reporting is being addressed. The Attorney General piloted through parliament the National Council for Law Reporting Act. On the Council, the judiciary, the Attorney General's office , the Law Society of Kenya and the Faculty of Laws of Public Universities are represented. The Council has begun meeting and its first priority is to publish law reports of "lost " years. This is a positive development since the Mission's visit to Kenya.

Additionally, judges have no research support. They work in a structural void in which there exists neither the human resources nor the legal mechanisms that ensure efficiency and speed in the disposition of cases. For instance, judges and magistrates are their own stenographers, their own researchers and also have to be active participants in routine administrative matters such as allocation of cases and other pre-trial procedures which could easily be done by paralegals. The result is that decision making in the courts tends to be tedious backbreaking work and the pending case load is large. This has created illicit opportunities for court functionaries such as clerks to manipulate the system for corrupt gains.

Institutional Failures and the Absence of Capacity

The collapse of Parliament and the Judiciary as checks on the Executive

At the broadest level, a democratic transformation involves the transfer of sovereignty from State agencies to citizens. In practice this means that citizens are able to set and control the agenda followed by their government. Notwithstanding the formal transition to pluralism, this has not happened in Kenya. This is an

important indicator of the fragile nature of the democratic initiative in this country. In concrete terms we see the following institutional and structural failures.

(a) The ineffectiveness of public opinion

The citizen is virtually powerless in the face of official wrongdoing even though the clamour for justice by the people is very evident. Thus, for example, governmental reaction to the revelations relating to the Goldenberg scandal has been lethargic. The opposition's attempt to raise the matter in Parliament floundered when the Speaker abruptly stopped two members' attempts to introduce debate on the issue. The office of the Attorney General has not taken visible action until recently, when apparently under IMF and local pressure, prosecutions were commenced against some of the people. The Director of the Criminal Investigations Department has refused to tell the press what his investigations have turned up.

(b) The ineffectiveness of Parliament

When one turns to Parliament it becomes clear that it is institutionally dysfunctional with regard to the working of true multipartism. For one, it is too beholden to the party system to be a truly national policy-making institution. There is little or no attempt to build inter-party consensus even on important national issues. The various whips have interpreted their role in the House as one of maintaining partisan purity whenever a division is called. The result is that important national issues are subsumed under the need to keep party ranks closed. Thus the recent crucial debate on detention law was stymied by the ruling party merely because it was introduced by the opposition. Paradoxically, the government has now set up a committee to look into - and if desirable to recommend - the repeal of the detention law. This is a

roundabout and expensive way of doing what could have easily been done under the auspices of the National Assembly. As it is, whatever recommendations the current committee comes up with must eventually come before Parliament before any amendments to the law can be made. According to the Attorney General, a resolution calling for review and repeal of various legislation has been passed since the Mission visited Kenya. This is a positive step .

One of the more pernicious consequences of this partisan closet-mindedness has been the destruction of the ability of the Legislature to effectively control the Executive. Since the government of the day is invariably assured of the support of backbenchers from the party in power, it has no motivation to improve its conduct. The matter is particularly depressing when one sees parliamentary helplessness in the face of the scandalous revelations in the Controller and Auditor General's Reports year after year.

Moreover, the institutional effectiveness of Parliament is greatly undermined by the absence of mechanisms that support and facilitate the members' work. The parliamentary library is a collection of abstruse official reports and outdated books. Members have no research support and useful information from the library is not readily available. There are no links between the parliamentary library and other national libraries such as the Jomo Kenyatta Memorial Library and the High Court Library. The mission acknowledges that in the present state of the economy this may be considered a luxury, but believes that with a bit of commitment on the part of those responsible, this problem should not be insurmountable.

Members of Parliament do not have office space and secretarial services. This forced most parliamentarians to run their legislative affairs alongside their private businesses.

A bird's eye view of the civil service and the police force in light of democratic changes

Other institutions of State have not shown a substantial shift in attitude since the elections. The civil service has not become markedly faithful to the constitutional principle that it be politically neutral. District Officers and District Commissioners still routinely deny or cancel permits for public meetings called by members of the opposition on the basis of what they think would please the ruling party.

On its part, the police force is still complicitously involved in KANU's partisan battles with the opposition. A recent charge that the force has avoided its legal duty to enforce law and order in situations where lawlessness serves the interests of powerful public officials seem to have some merit in them. This happened when armed Maasai warriors attacked opposition parliamentarians, and in Mombasa, during the clash between followers of United Muslims of Africa and the Islamic Party of Kenya. Armed Maasai morans barricaded the courts and marched armed in the city and raided homes in certain parts of the country without action from the police. Moreover, working in concert with the police and KANU Youth Wing, armed Maasai attacked members of the unregistered Safina party in Nakuru.

In addition, official neglect of the police on the ground in many rural areas has greatly sapped law enforcement efforts in the "invisible" parts of Kenya. Resources are not reaching many areas and the Mission was informed that police vehicles are out of action for want of repairs. A new form of corruption has been spawned by this rural neglect. Time was when *chai* ("tea" in Swahili) euphemistically described bribes. Now "petrol" is quickly assuming that same meaning. When people in the rural areas turn up at a police station to report an incident, they are, more often than not, likely to be asked for "petrol", the police alleging that their vehicles have no fuel. Elsewhere in the more insecure areas such as North Eastern Province, regular police

patrols have been suspended. In the face of increased banditry this absence of an official presence has fuelled an already volatile situation.

The failure to effect the legal changes necessary to complete the transition to genuine democratic pluralism coupled with an undesirable persistence of modes of governance peculiar to the one-party system has frustrated the democratic initiative in Kenya. Unfortunately, even where the institutions may have democratized without government support, they suffer from a serious deficiency of capacity. There is therefore a need to broaden the agenda so as to focus not just on legal changes but also on ways of invigorating the present democratic institutions.

ECONOMIC AND SOCIAL RIGHTS

The legal framework of agrarian poverty and oppression

The predominant feature of the one-party State in rural Kenya has been its hierarchical and authoritarian structure which subjugates small scale farmers and paternalistically constrains their capacity to make personal economic decisions. This political control is maintained via coercive laws inherited and preserved from the colonial days.

This coercive legal and political structure deprives the small-holder farmer of their basic democratic rights and a meaningful say in the production and the sale of agricultural products. This dampens their political and economic potential and is the primary cause of stagnation and decay of the physical and social infrastructure in rural Kenya.

From a statistical standpoint this structure of control is scary. Consider that over 70% of the population of the country directly derive their livelihood from some connection with land. This fact

has special urgency when the salient features of the patterns of land use and access in Kenya are considered.

First, Kenya is a land scarce country. Only about 40% of the total land area is arable. Of this, only 50% is medium or high potential, Juxtaposed against a rising population (the annual growth rate now hovers somewhere around 3.4%) this statistic assumes portentous significance. This is manifest in the increasing pressure on land and the rising craving for access to land.

Over the last decade the amount of land available per household has dramatically declined. This has had a deleterious impact on agricultural growth and yields. The mean size of the household holding has declined from 2.0 hectares in 1982 to 1.6 hectares in 1992. Average yield per hectare has hovered around 2 tons throughout the eighties and in the nineties.

The consequences of this on the nutritional status of vulnerable groups and on food security in the country have been enormous. In 1982, 35% of the population were food poor. This means that they were unable to consume 2250 calories of food per day. This figure has not varied significantly over time. It climbed marginally to 37% in 1992.

Secondly, about 45% of the arable land available is still under the large farm holding sector and is held by about 800-1000 large scale farmers. The efficiency of most of these huge farms is low. Wheat farms and large scale grazing operations are particularly inefficient. Ironically, these inefficient farms are highly protected by the government through easy credit and import tax breaks.

For instance, in the 1993-1994 period alone, more than Kshs 460 million was loaned by the Agricultural Finance Credit Company, AFC, a government parastatal, to large and medium scale farms. The real value of this sum, when interest subsidies are factored in is about 800 million shillings. Against this, consider the fact that about 50% of the AFC loan portfolio is running in arrears.

The contrasts between the large farm sector and the small scale farm sector are even more stark when we look at the tax breaks available to both. Small-holder tools such as spades and manual ploughs attract nearly 60% import duty and a Value Added Tax (VAT) of 18% whereas tractors and combine harvesters are exempt from both.

The purpose of this statistical recital is to give some context to the analysis of the laws that follows. Without some picture of the activity sought to be regulated the regulatory framework may seem reasonable. Moreover, without tenure and general agrarian reforms being undertaken the statistical horror story above is likely to get worse.

An overview of the agrarian legal regime

Structure of political control

Lord Delamere once observed that before the Russian Revolution, the British colonial system as exemplified in East Africa, probably represented the most advanced form of State ownership and control in the world.

'The State was supreme and its servants, like the Communist party, were absolutely dictators of the country's economic life.'

Laws and regulations command the farmer, and tendrils of bureaucracy grope for him even the remotest of areas. At every point in his daily life, he came up against government policy and its execution. The prefectural provincial administration saw to it that the farmer complied.

The post-colonial State in Kenya has continued to intervene and determine the mode of agricultural production in Kenya through law and politics. At the political level, the small scale farmers are still regarded as backward and ignorant people who

are incapable of running their own affairs. *The Land Control Act* (Cap. 301) makes nonsense of the concepts of ownership and of a free market, as no farmer can sell, transfer, lease, divide, mortgage, exchange, partition, consent to or otherwise deal with his land without consent of the Land Control Board, a government appointed body.

Over and above the vast network of laws and regulations which limit and restrict the democratic freedoms of Kenyans, such as the *Societies Act* (Cap. 57), *Public Order Act* (Cap. 56) and the various provisions of the *Penal Code* (Cap. 63), the rural farmers live under the absolute dictatorship of chiefs. The chief's powers are 'legalized' by the *Chiefs' Authority Act* (Cap. 128). The Act confers upon chiefs powers which are used for political control at the village level. The chiefs are only accountable to the 'higher authorities' and have broad powers to intervene in political, social and economic affairs in the village. Apart from maintaining the *status quo* (law and order, and the emphasis is always on the order), section 10 of the Act gives chiefs broad discretionary powers to control consumption or possession of intoxicating native liquors, excessive dancing, collection or receipt of money, directing and planting of food crops, regulating grazing, use of water, cutting of trees, suppressing animal, insect and plant pests, soil conservation, distributing famine relief, raising compulsory labour, requiring proper burial of persons, and promptly carrying out unspecified orders from the top. In a recent case, a chief ordered directors of a newly incorporated private company not to meet as the meeting was 'illegal'. Further, chiefs have been reported in the press as having set suspects ablaze, imposed unconscionable fines on culprits, etc.

The chiefs have 'captured' the rural organs of democratic governance. They frequently pretend to act on behalf of the people and call meetings at which rural Kenyans are told to change old ways, take children to school, plant cash crops, and to pledge their loyalty to the President. Local opposition party leaders are not

usually permitted to address such meetings, and if they are, it is usually 'to put them in their place.'

The *Harambee* (through which self-help projects are used as pretexts for rural politicking) is tightly controlled by the provincial administration through the *Public Collections Act*. The Act prohibits collection of money and property from the public without a license from the District Commissioner. The DC has an absolute discretion to grant or refuse the permit. In practice, the Act is administered so as to deny rural opposition groups access to public financial support, and 'political space' at *harambee* meetings. On the other hand, KANU officials have used *harambee* as fora for lampooning the opposition and threatening their supporters with denial of development funds. Rural institutions of political participation, such as the county councils, the District Development Committees, Divisional Development Committees and Locational Development Committees, are illusory and ineffective, as they are cash-starved and controlled by their chief officers, who are local civil servants. The numerous women's and youth groups in the rural areas are aid-addicted, and rely on political patronage for their existence and survival. By and large, they are opportunistic, lack broad political awareness, and are inadequate instruments of grassroots political participation.

Structure of extraction and distribution

The predominant feature of the agrarian regime is its control of production distribution and exchange of agricultural commodities. The ubiquitous strategy is a statute establishing a 'Crop Authority' which controls and regulates the entire production, collection, processing, fixing of prices, and sale of agricultural produce.

The authority imposes various fees and levies on producers, processors and marketing agents, which are used to cover

administrative costs and to open windows for corruption. Through monopoly purchase and compulsory marketing strategies, the authorities purchase agricultural commodities from producers and resell them to local and export markets at certain price mark-ups. They milk the producers of large part of their surplus by pocketing the difference between what they pay to producers and the price at which the commodity is sold.

Appendix A details out the relevant pieces of legislation in force and the way in which they operate. The relevant point to keep in mind is that through the power which these laws allows it, the ruling party is able to control politics at the grassroots level in the rural Kenya. **Government sources have indicated that all the pieces of legislation by which the farmers are kept under tight control and exploited by public functionaries are slated to be substantially amended or repealed altogether by the end of 1997.**

ICJ MISSION

In July 1993, the International Commission of Jurists (ICJ) sent a Mission to Kenya. The Mission was composed as follows:

1. Mr. Justice Enoch Dumbutshena, a former Chief Justice of Zimbabwe and the Vice-President of the ICJ;
2. Prof. Kofi Kumado of the Faculty of Law, University of Ghana, Legon (Ghana) who is a member of the Executive Committee of the ICJ and Chairman of HURIDOCs (Human Rights Information and Documentation System International, Geneva.
3. Mr. Adama Dieng, Secretary-General of the ICJ.
4. Professor Daniel Marchand, Professor of Law in Paris and a member of the ICJ.

The aims and objectives of the Mission were:

- (a) To inquire into the recent developments as they affect the Rule of Law, respect for human and peoples rights and the independence of the Judiciary and the Legal Profession in Kenya;
- (b) To study and report on the constitutional and legal changes necessary for the transition to a multiparty democracy;
- (c) To recommend practical measures aimed at encouraging the emergence of a civil society which can serve as agents and protectors of democratic culture in Kenya;
- (d) To recommend ways and means through which the International Community can assist the people and Government of Kenya to strengthen the institutions of democracy, such as the Electoral Commission, Parliament, the courts, the media and non-governmental organisations.

For five days, the Mission held consultations with the President, Ministers of State, the Chief Justice, the Attorney-General, the leadership of the Law Society of Kenya, the Speaker, Deputy Speaker and some members of Parliament, some representatives of the Donor Community, representatives of political parties, religious leaders, the Commissioner of Police; the Commissioner of Prisons, NGOs as well as a good number of ordinary Kenyans.⁹ In addition, the Mission received a large amount of documentation relevant to its terms of reference.

The Mission was also fortunate that it was able, thanks to the excellent assistance of the Attorney-General, to visit the port city of Mombasa. There the Mission met with local leaders. Two

9 A full list of the Schedule of Meetings is attached as an appendix to this Report as Appendix B.

aspects of the visit to Mombasa are worth singling out. First, the Mission was able to visit the Shimo La Tewa Prison to see the conditions of the prisoners in the light of well publicised reports of the harshness of prison conditions in Kenya. Even though the prison seemed to have been well prepared for the visit, the Mission was able to observe enough to suggest that some of the accounts which have appeared in reports to the international community may not have been too far from the truth.

The second highlight of the visit to Mombasa was the meeting with the leader of the IPK, Sheik Balala now living in exile. The difficulties encountered in arranging the meeting with him, the tension surrounding the discussion at the airport where the meeting took place and the general environment surrounding his appearance at the airport conveyed to the Mission some sense of the consequence in the Kenyan context of non-registration of political groupings even where the grounds for withholding registration appear defensible.

Preliminary Findings

A press conference was held on the last day at which the Secretary General outlined the preliminary findings and recommendations of the Mission.¹⁰ At this stage the Mission made ten main findings:

1. The Constitution and Laws of Kenya, in spite of the return to multiparty democracy, retained their one-party framework and the principal policy-makers were still beholden to a one-party culture and cast of mind.

¹⁰ A copy of the full text of the Press Conference is attached as an appendix to this Report as Appendix C.

2. The political climate remained inhospitable to the fullest realisation and enjoyment of human rights, both as contained in the domestic Constitution and in international human rights treaties to which Kenya was a party. No attempts were made to harmonise domestic law with Kenya's obligations under the international human rights instruments.
3. An attitude of mind had developed, unwittingly perhaps strengthened by an incautious remark of the Attorney-General in Parliament, which gave the impression that the President was above the law. Thus, for example, while matters were being considered by the Courts, the President often freely made prejudicial remarks about them or the parties involved or both.
4. Despite assurances to the people by the President and the investigations and measures on which the Attorney-General had commendably initiated action, there were continuing threats to life and property in some parts of the country. As the brunt of these threats appear to be borne by persons assumed to be in opposition to the government, one was left with the impression that the attacks and harassment were somehow orchestrated by government or at least had its tacit approval.
5. The criminal process appeared to be used as an active tool for muzzling opposition by such practices as selective prosecutions, denial of bail, bonding, the preferment of charges against people in jurisdiction far away from their places of residence or the places where the alleged criminal acts were carried out.
6. Though the security of tenure of the judges was restored by the Constitution of Kenya (Amendment) Act, No. 17 of 1990, the confidence of the judges had already been shaken. The practice of contract judges also meant that some of the judges must have been in a state of perpetual mental

insecurity. Thus in human rights disputes, the judges were most likely than not to rule in favour of government and against the individual.

7. The physical facilities, the remuneration and retirement benefits of the judges were inadequate and may have been a drag on the fair administration of justice. In particular, it was unfortunate that the judges had no opportunity to interact with their colleagues in other common law jurisdictions.
8. The legal condition of labour was unacceptable. There was no right to form or join a trade union freely. The right to organise a non-political strike was denied (e.g. Joseph Mugalla, Doctors Case and Case of University teachers). In spite of assurances by the Kenyan government, a number of key recommendations by the ILO Committee of Experts remained unimplemented.
9. Though the media were freer than in most African countries, yet the use of the law to intimidate them by acts such as seizure of their equipment appeared pervasive.
10. The use of torture on detainees could not be discounted.

Rapidly Changing Situation

The process of analysing the results of the interviews conducted by the Mission as well as the documentation and other data made available to the Mission took some time. In the meantime, the situation on the ground was changing rapidly, in some cases for the worse. For example, a frequent complaint heard by the Mission while in Kenya was the selective use of the law, especially the criminal law, as an instrument of repression against opponents of the government. Amnesty International reported in its 1994 Report that opposition supporters were required to obtain licences to hold meetings, but were routinely

denied such licences and arrested if meetings were held without them.¹¹

Amnesty also reported that the government continued to be particularly sensitive to allegations that it was involved in the rural violence in the Rift Valley Province and denied access to journalists or human rights monitors to the affected areas. According to Amnesty, the charges against Koigi wa Wamwere, a former Member of Parliament and prominent critic of the government appeared to have been motivated by his activities in founding an NGO, the National Democratic and Human Rights Organisation in 1993 and in monitoring violence in the Rift Valley. An observer attending the trial on behalf of the International Bar Association, according to Human Rights Watch/Africa Report in July 1994, concluded that "procedural anomalies would result in miscarriage of justice to the accused persons." On October 2, 1995, Koigi wa Wamwere and two others were sentenced to four years in jail and to six strokes of the cane. The sentence to caning tells a significant story about the poor state of the human rights situation since Kenya is a party to the International Covenant on Civil and Political Rights which prohibits corporal punishment.

- 11 The General Rapporteur of this Mission Report witnessed at first hand the practical operation of the repression relating to the licensing of meetings on Saturday, 17 July 1993. On that day, he in the company of some Kenyan friends, went to the Kikuyu Country Club on the outskirts of Nairobi to watch Ngugi's play *I'll Marry When I Want*. Five minutes into the play, the premises of the Club were surrounded by armed and steel-helmeted policemen led by local political functionaries and an officer. They ordered the play which was being staged in a private club to be stopped on the grounds that a licence was required under the Public Order Act. The incident was widely reported in the Sunday newspapers the next day. In subsequent discussion with the Attorney General, he pointed out that the action of the police was illegal and unauthorised because a licence was not required for the event, contrary to police claims. However, no action is ever taken against the functionaries involved. Mere acknowledgment of the illegality of official action without actually censuring is not enough.

In 1995, it was reported that a Political Parties Bill had been published by the government. On examination the Bill seems to be another example of the obsession of the Kenyan government with punishment and control. The immediate reason for this Bill seemed to be the efforts of Dr. Richard Leakey, the former Director of the Kenya Wildlife Services and a number of prominent opposition figures to form a political party to be known as SAFINA (kiswahili for boat, vessel or Noah's Ark). According to information available to the ICJ, for almost two months after the announcement of the formation of this party, the President made the proposed party and its interim officials the subject of a crude vilification campaign.¹²

The travails of SAFINA and the opposition generally and the publication of the Political Parties Bill seemed to confirm a feeling that the government remained resistant to the existence of divergent political views. It appears prepared to tolerate the existence of political opposition in words, but not in practice.

The Bill itself makes interesting, if troubling, study. At least 22 of its 33 provisions appear to be dedicated to obstructing, punishing and interfering with the operations of political parties. 12 of the 33 provisions are prohibitory, that is to say, these provisions concentrate on stipulating what parties may not do. There are 5 provisions which create new offences. Taken together with the definition clause, it has been suggested that, on a conservative estimate, the Bill will create 15 new offences! Excessively intrusive disclosure obligations are placed on a political party without a clear indication of the objects to be attained thereby. One is therefore left with the impression that they are designed to enable the government to spy upon opposition parties, their programmes and strategies. The Bill will affect the civil society organisations' ability to lobby in an

12 See the *Daily Nation* newspaper edition of May 9, 1995; also the *People*, September 8 - 14 1995 edition.

interesting way - section 11 requires every association or organisation supporting candidates for election to register as a political party! Power is given to the registrar to refuse to register a political party or to cancel its registration without the right to a judicial challenge. Given the acknowledged constitutional function of political parties in our contemporary world, there is no doubt that this bill, if enacted into law, would violate the Rule of Law.

Given this rapidly changing situation and the continuing troubling reports of the deteriorating state of human rights in Kenya and the threats to the Rule of Law there, it became necessary for the ICJ to do a follow-up Mission if its Report was to be meaningful. This follow-up Mission took place on 9-13 September, 1996. It was composed of the Secretary-General of the ICJ and Prof. Kofi Kumado, two of the members of the 1993 team.

The objectives and focus of the follow-up visit were the same as the original Mission. Therefore, during the second visit, the team did not attempt to meet all the people or organisations the Mission originally interviewed in 1993. Nevertheless, every effort was made to meet as much of a cross-section of Kenyan society as would enable verification of the findings and observations made during the earlier visit and to ascertain the current state of affairs in relation to the Terms of Reference of the Mission. In retrospect, the ICJ is satisfied that this updating exercise proved to be necessary and rewarding.

In consolidating observations made during the two visits and having regard to earlier discussion in this Report, three important conclusions need to be made. Firstly, political pluralism seems an irreversible process in Kenya, even if the march towards its full realisation appears jerky and flawed. There is abundant evidence for this conclusion. For one thing there is open debate. For another, the President's public utterances are publicly opposed without any visible reprisals. For example this happened during the second visit when there appeared to have been a stage-

managed *confession* by two persons claiming to have been trained, presumably by opposition elements, to destabilise the nation. The interesting thing about these self-confessed guerrillas was that they were already standing trial for an earlier alleged subversive activity. Without further ado, at least so it would appear to the disinterested observer, the President declared at the rally at which the *confessions* were made that he had pardoned them. The President was severely criticised and challenged publicly for what appeared to be a rather casual approach to the use of the presidential prerogative of mercy. As far as the ICJ is aware, none of the people who openly attacked the President on this issue has been harassed for it.

Secondly, the print media is lively and reasonably balanced. The newspapers contain lucid and well researched articles. To be fair, the Kenya Union of Journalists have a catalogue of genuine complaints about structural and non-structural impediments in the way of free media practice in Kenya. There is also the continuing matter of the apparent unwillingness of the government to free the airwaves. We may also note the ripples caused by the publication by the Attorney-General of a press bill which he has had to withdraw because of the severe bashing it received in the media and in informed circles in Kenya. If we may say so, the fundamental flaw in this bill is that it is based on the philosophy of State control of the media. Thus conceived the bill aims a dagger at one of the most important arteries of democracy and the Rule of Law namely independent media. So there is much to be unhappy about with regard to the current state of the media in Kenya. Nevertheless, it is fair to observe that, self censorship apart, the media, at least the print media, are able to publish what they like.

Thirdly, it seems very clear that, even though the donor community remains unhappy about some of the impediments in the way of the democratisation process in Kenya, it is unlikely that the freeze of 1991 will be repeated. Credit may dry up. But the

direct and public linkage of fresh credit with improvements in the political process and governance structures will not be insisted upon this time round. In discussions with members of the diplomatic community on the subject, it was not difficult to get at the reasons for current donor attitudes towards the situation in Kenya. First, as has been demonstrated recently by the efforts to address the problems of Rwandan refugees and the rebellion in Eastern Zaire, Kenya is in a position to play a stabilising role in a region of real and potential trouble. Thus, even though, with the end of the cold war its geopolitical importance is not the same today as it used to be, the international community prefers quiet diplomacy as a strategy for achieving the changes it considers desirable in the governing process in Kenya to the loudness of conditionality. For sure, now and again, diplomats accredited to Kenya will voice publicly their views about the state of democracy or some important elements thereof; however, one should not expect anything more dramatic than that.¹³

Besides, there is also the reality, as perceived by the diplomatic community in Kenya, that there does not appear to be a viable alternative to the Moi government, given the disunity within the ranks of the opposition and the fragmented state of the opposition parties. Top on the donor agenda for Kenya therefore are peace, stability and the consolidation of gains of earlier times, even if unsatisfactory.

Pluralism may be irreversible; however, the gains made for it since the opening up in 1992 are being whittled away daily because the government is getting more confident and oppressive. Indeed a cynic might say that, though the political atmosphere is now more relaxed, not much has changed in substance.

13 See *Sunday Nation*, No. 2199 of 15 September 1996 for an example of the kind of public criticism by diplomats referred to and the reaction of the Kenyan governmental authorities.

Debate about Constitutional and Electoral Reform

Two broadly-related issues engaged Kenyan society at the time of the follow-up Mission. In view of their importance to the Terms of Reference of the Mission, we shall now proceed to discuss them.

Constitutional Reform

In its Preliminary Findings (see Appendix C), the Mission indicated that the Constitution and some critical laws in force in Kenya retained their one-party framework. It follows that the search for true democracy would continue to elude Kenya unless the Constitution was reformed significantly. This much seemed to have been appreciated by President Moi. For in his New Year Message to the nation in 1995, the President promised constitutional reform. Somehow and for some inexplicable reason, the President has since changed his mind and has become an implacable foe of constitutional reform, at least before the next general election. The government's tune on this subject now is that constitutional reform would have to be comprehensive to be meaningful and that this would require time and, in any event, could not be done before the next general elections. From the government's point of view, constitutional reform can proceed only upon national consensus through enquiry and public debate on fundamental issues like the nature of the constitution (federal or unitary), the role of and structure of government etc. Indeed some of the key members of the Moi government, to show how complex such a debate might be, are resurrecting *majimboism*, a sort of federalism to take account of the ethnic mix in Kenya and to avoid domination of minorities by the major ethnic groups. It is significant, in this regard to remember that KADU, the party for which Moi was one of the leaders before joining KANU, also advocated *majimboism* as a safeguard for minority tribes.

While the government thus seems set against constitutional reform, the opposition forces, the Churches, civil society groups - the same coalition whose pressure resulted in the return to multiparty politics in Kenya - seem equally determined to achieve it. Indeed the sense of the Mission was that this coalition would be prepared for the postponement of the next general elections in the interest of a comprehensive reform of the constitution. The coalition was preparing to hold a constitution reform convention to address reforming the constitution with or without the participation of the government at the time of the follow-up visit.

The government's arguments against constitutional reform are only partially correct, superficially attractive though they might sound. This is because it did not take any major feat to launch Kenya's second attempt at true democracy. All it needed in real terms was the repeal of Section 2A of the Constitution. Therefore, since the key elements in any reform of the Kenyan Constitution have been debated for some time now, there are no real obstacles to implementing these initially. We take it for granted that the fact that the President has taken note of the campaign for constitutional reform and is publicly speaking against it suggests that the government knows the message for reform is reaching the ordinary Kenyan and striking a sympathetic chord.

In any event, the campaigners for constitutional reform seem strategically tuned for a two-stage approach to the issue - as a fall back position to full and comprehensive reform, they are also arguing for a minimum basket of reforms which must be introduced at any rate before the next general election. Apart from the formula for electing the President introduced in 1992, the most important elements in the minimum basket are the repeal of a number of repressive laws which impinge unacceptably on the democratic process and access to the electronic media.

This fall back position seems eminently sensible to the ICJ and one which it would commend to all Kenyans. The truth is that, on

close examination, the 1963 Constitution, in theory provides a reasonable framework for the flourishing of democracy in Kenya. The problem has been with constitutional amendments introduced since. These amendments converted public servants whose political neutrality was absolutely essential to the sustenance of democracy into civil servants, thus subordinating them to the whims and caprices of the political pendulum. Further, the subsequent amendments which took away the checks and balances, both institutional and substantive, on government resulted in power being concentrated in the hands of the Executive. As already noted, the repeal of Section 2A left the authoritarianism introduced by these amendments intact.¹⁴

Besides, the reform process, to be peaceful and meaningful requires not only longer time but also the active participation of the ruling party. Today more than ever in the evolution of Kenya society, the country needs, on both sides of its political divide, women and men of vision and long term perspectives for what is good for Kenya. It is obvious and hardly requires argument that an election without any reform of the present Kenya Constitution would be pregnant with long term trouble, since it may suggest that a political solution to Kenya's problems is not possible. The minimum reform agenda must therefore be seen by all as a pragmatic way of maintaining the unity of the Kenyan State and avoiding another Somalia. It must also be treated as the first phase to long term reform.

The minimum reform package must be coupled with the repeal or reform of a number of oppressive laws dating from colonial times. These are (1) Sections 40-68 of the Penal Code (2)

14 Apart from what is noted, the need for constitutional reform may be justified by the need to clarify the internal conflict such as in Sections 25, 107, 109 and the Muriithi case; directions as to the formation of coalitions either in government or parliament.

The Chiefs Authority Act (3) The Public Order Act (4) the Preservation of Public Security Act (5) the Books and Newspapers Act (6) the Official Secrets Act (7) the Trade Licensing Act (8) The Public Collections Act (9) the Societies Act. These are reproduced in full as appendices to this Report to give the reader the full feeling of the suffocating effect which they have on democracy.

The arguments for the repeal or drastic reform of the first four of these laws seem for us unanswerable. For example, the definition of sedition in the Kenya penal code is a disincentive to vigorous debate. It is a credit to the resilience of the Kenyan politicians that people dare at all to criticise the government on any issue. Secondly the Chief's Authority Act makes a mockery of democracy. By its operation, a Member of Parliament can be prevented from interacting with his or her constituents by a Chief or a district officer who is but a lowly wheel in the provincial administration sector of the governmental machinery. Such a lowly appointee of central government with no security of tenure is even empowered to prohibit *excessive dancing*, a concept which is not defined in the Act! The repeal or reform of this legislation has to go hand in hand with re-training of local government officials to sensitise them to be responsive to the law rather than political leaders whose will they think they are carrying out.

The Public Order Act is without doubt the legislation which most inhibits political activity of non-governmental actors, especially the political opposition in Kenya. Under this law, a licence must be procured from the police to hold a meeting or a procession. While the strict language of the legislation would seem to exclude certain meetings from its purview, the application of this law over time has created some absurdities. Thus to hold or celebrate your child's birthday you need a formal licence for example. In spite of the exclusion of social, cultural or recreational activities from the types of meetings for which a licence is required

under the Act, the police apply the law in an indiscriminate manner.¹⁵

An interesting example of the crazy nature and application of the Public Order Act relates to an incident which occurred in Limuru. Opposition MP, George Nyanja (Ford-Asili) had arranged for doctors from the Nairobi-based Visa Oshwal to assemble at a clinic to give free-check up to his constituents at Ndeiya location, Limuru. They were dispersed by a contingent of anti-riot and administration policemen on the grounds that they had not obtained a licence for the meeting!! The real reason seemed to be the fact that the check-up had been organised by an opposition politician.¹⁶

Armed with the authority of this legislation and the Chiefs Authority Act, the police and local government officials routinely interfere with civic education programmes of non-governmental organisations in the country at will on the grounds that these are subversive activities. On close examination the conception of civic education as subversive activity seems to be based more on the identity of the educator rather than the contents of the education.

The basic objective of the Preservation of Public Security Act, namely the preservation of public security would seem to be defensible. Key provisions of the Act however, create the opportunity for games to be played with the liberty of the individual. The Act permits the President by notice to bring the legislation into force in any part of Kenya. In 1966, a declaration was made bringing the Act into operation throughout Kenya. Regulations made under the Act provide for detention of persons without trial, authorise the search of persons and premises, permit censorship, control or prohibition of information, processions,

15 See footnote 10.

16 Reported in Kibwana *et al.* (eds.), *Constitutional Reform in East Africa* (Nairobi: Clairpress Ltd., 1996) p. 232.

property, assembly, meeting, association or society. The only brake on these wide powers is the good sense of the President. There is no provision for judicial or parliamentary review of the decisions made by the President under this Act, perhaps with the exception of the operation of the writ of *habeas corpus*, a process whose effectiveness, we understand, has been emasculated in Kenya. We would advocate that this law be repealed altogether. No authority should have power, under any circumstances to order the incarceration of a person without the prior interposition of a judicial determination.

Indeed, we would offer it as an article of our faith in the Rule of Law that the principle of prior judicial determination should underpin any future legislation by which an authority may be vested with power to curtail the liberties of the individual in Kenya.

We were made to understand that the Government of Kenya is contemplating reform of some if not all the laws listed above. This project is being undertaken not necessarily as part of a process of opening up for politics but as routine law reform. The Attorney-General has set up some task forces to this end. The work of the task forces is however being hampered by the absence of a qualified draftsman. Besides, in our discussions with the Attorney-General, we formed the impression that the most critical pieces of legislation were not being addressed.

In our discussions with members of the diplomatic community, all were agreed that the operation of these and other laws has stifled the democratisation process. They also would like to see some corrective measures though issues of constitutional reform, in their view, should be left to Kenyans to sort out themselves. However, there was a small number that did not consider the real issue as relating to constitutional or legal reform. From their perspective, the real problem is attitudinal. Without changing the constitution or repealing the laws, they seem to feel that if only the President or the Attorney-General would publicly

exhort public officials, local and national, not to apply the laws with a pro-government bias or implement them in such a way as to impede the activities of opposition parties and parliamentarians things would change dramatically in Kenya.

Partly because of the importance of the countries represented by these diplomats, we have given some thought to this viewpoint. We are unable to share it for two reasons. Firstly, as we have stressed time and again in this Report, reforming these laws will to a large extent create a level playing field for politics in Kenya. It is important if the change to democracy is to endure that everyone partake of this feeling of a new dawn. Secondly, and, perhaps, more importantly from our point of view, we have discovered that the Kenyan legal psyche is dominated by the black letter of the law and by the literal approach to interpretation. Sometimes this approach even leads to a deadlock. A striking example of this approach and its consequences in Kenya relates to the opposition in Parliament. Standing Order No. 2 provides that the official opposition party must have not less than 30 MPs in the House. Both Ford-Asili and Ford-Kenya have 31 seats¹⁷. The issue of the *true* opposition leader in the House has been left in doubt because of this tie and the *silence* of the Standing Orders on what is to be done in the event of such a tie and also because, it is argued, the constitution does not allow the formation of coalitions.

17 This was the position at the time of the 1993 Mission. According to information currently available to the ICJ, Ford-Kenya is now the official opposition with 31 seats while Ford-Asili and the Democratic have 22 each. KANU remains way ahead with 107.

Electoral Reform

The second issue that was being hotly debated during the follow-up visit was the electoral process. Some of the flaws in the existing system have been noted in earlier paragraphs of this report. At the time of the visit one of the key issues was the so-called *Second Generation ID Cards* registration exercise. This process involved the registration of people who had reached the voting age, normally a routine exercise in many other parts of the world.

In Kenya, this exercise assumed an unimaginable political dimension, in part, because, without these ID cards, you cannot obtain a voter's card and participate in an election. So we looked into the reasons for the agitation. First is the data which must be supplied. The applicant must provide, among others, his or her district of birth, place of residence and constituency. Without adequate official explanation, many have been at a loss as to the motive behind the collection by officialdom of these data. Secondly, the administrative arrangements for the issuance of the ID cards seem difficult to understand. What was stressed by everyone we spoke to on the subject was that the process was proceeding in a painfully slow manner leading to long queues in some places. If all parts of Kenya were subjected to the same level of slowness perhaps one could simply put the blame on administrative inefficiency. However, it was impressed on us that the frustrations were being experienced in non-KANU zones only. For example, we were informed that the exercise was proceeding with alacrity in the Rift Valley but extremely slowly in the Nyanza and Central Provinces. The impression therefore created was that the exercise was designed to disenfranchise voters in opposition strongholds as well as tribes thought to be against the government and to support opposition parties. When we met with officials of the Kenya Union of Journalists we were informed that public anxiety was heightening because even in a place like Nairobi very few had obtained these cards.

Matters seemed not to have been helped by the public feud between the President and the Chairman of the Electoral Commission. While the latter tried to allay public fears of disenfranchisement by stating that old and new ID cards could be used in the next general elections, the former is reported to have stated categorically that only the new cards would be used. In a country where the President's word is law or soon thereafter becomes law, few believe that the Electoral Commission will stand its ground. Indeed, we were informed that the Chairman of the Electoral Commission has been back-peddalling since the President spoke and has been careful not to contradict him.

The right to vote and be voted for is an indispensable part of the foundation of the democratic fabric and the Rule of Law. In the view of the ICJ, therefore, nothing should be done which denies any eligible Kenyan of the right to vote. Without doubt citizen identification is important. But not even the importance of this process can justify the denial of the right to vote. In any case, any such denial would constitute a breach of Kenya's obligation under the International Covenant on Civil and Political Rights as well as under the African Charter on Human and Peoples Rights. Besides, this need not be a complicated matter. If the election should take place before the registration exercise is completed their identity through appropriate means e.g. old ID cards, driving licence, birth certificates etc., should be enough.

Perhaps, it is not out of place here to draw the attention of the President and his advisers to a tendency which we noticed has contributed in no small way to undermine public confidence in public institutions and officials. This relates to the President's penchant for commenting publicly on matters being dealt with either by the courts or other public decision-making bodies. May be the President's background as a teacher urges him on to make these interventions. Some, we are sure, might even argue that he is merely exercising his civic right of expression. Be that as it may,

there is no doubt that, by so commenting he gives the impression that the Presidency, rather than the officials or institutions concerned, is the one calling the shots. This undermines the public perception of the independence of these bodies. The political temperature will be helped a great deal positively if the President were advised to resist the temptation to make these public interventions.

Attention may be drawn to three other areas where critical electoral reform is needed. The first relates to the membership of the Electoral Commission itself. At the moment, the members are appointed by the President. It would have been helpful to the political process if, in appointing them, the President would hold consultations with a broad spectrum of the political class in Kenya. This process of consultations hopefully should produce members with a broad acceptance to all Kenyans or a majority of Kenyans. At the time of the follow-up visit the process of appointing new members was about to start. It was impressed upon us by a very high ranking diplomat with more than reasonable access to the Presidency that the President was looking for people of integrity to appoint. Though we were not able independently to verify this information, we had no reason to doubt its veracity¹⁸.

But this is beside the point. The issue for us is not only that good people should be appointed. Ultimately, this is important. But of greater importance is the need to involve all the stakeholders in the process through which the people are selected. In a politically polarised society like Kenya, appointment through consultations must rank as of the highest order in the selection of members of the Electoral Commission. The law should then provide the Commission with independence and budgetary autonomy from the government.

18 Information received since shows that Justice Chesoni and many of his Commissioners were re-appointed for another five year term.

The second issue which must be addressed by electoral reform relates to registration of political parties. We found it totally bewildering but certainly unacceptable that a decision had not been made on the application for registration by SAFINA more than 14 months after it had been lodged with the Registrar of parties.¹⁹ At the time of the follow-up visit, we were informed that the applications of 13 other parties were also pending. In the case of the application by SAFINA, from the information available to us, it appears that the main thing holding up a decision is one of the sponsors, Dr. Leakey who seems to have incurred the ire of the President simply because of his origins and skin colour. But this consideration is contrary to the International Bill of Human Rights. It bears repeating that the right to form or belong to a political party as an incident of freedom of association is a non-negotiable element of the democratic ideal. The current situation of pending applications by bodies seeking to register as political parties in Kenya, to put it mildly, is scandalous.

The present machinery for registering political parties in Kenya is clearly dysfunctional to the political process and the development of true democracy in that country. We urge reform. In particular, we would recommend that the responsibility be shifted to the Electoral Commission once the security and independence of the Commission have been assured.

The third element in the reform of the electoral process in Kenya is the financing political of parties. In its Delhi Declaration in 1959, the ICJ reiterated its conviction that the Rule of Law in our contemporary world embraces those institutions which the experience of the human race has shown over time to be essential for securing life and liberty. Without doubt, political parties have come to be accepted as typical of the institutions in question.

19 According to our information, the application was lodged in June 1995.

Political parties are vehicles for the attainment of public power. They therefore belong to the basket of rights by which we seek to participate in or influence the formulation of policy for the governance of our public affairs. Their viability therefore must concern all in a given society. Especially in countries in transition, their financial health cannot be assured without state support. In Africa, the evidence abounds that incumbent political parties exploit their access to public resources to perpetuate their rule. There can therefore be no meaningful hope of having fair elections unless attempts are made to balance the resource base of all the participating parties.

This argues for public financing of political parties at least in a country like Kenya which is in transition from one-party rule to a democratic society. No particular model of public financing is offered here. There is a menu of models in operation elsewhere for Kenya to select from.

Other Reform Issues

There are other issues which the minimum reform agenda ought to tackle such as the media especially electronic, the formula for electing the President, the sizes of constituencies,²⁰ and the nominated members of Parliament. Of these, one of the most important is the formula for electing the President. As noted elsewhere in this Report, the formula has three elements namely (a) a plurality of the votes cast (b) success in winning a parliamentary seat and (c) obtaining at least 25% of the votes in 5 of the 8 provinces into which Kenya is administratively divided.

20 At the time of the second visit, the Electoral Commission was touring the country to address the issue of the sizes of constituencies. Reports since then say that these consultations have resulted in the creation of 12 additional constituencies by the Commission.

The primary objective for this formula is to ensure that the elected President would be a person who commands broad national appeal. In Africa, the importance of such an objective cannot be under-estimated. The need for pursuing it is even greater in Kenya, given its demographic profile.

Nevertheless, we agree with those who argue that this formula must be changed - for the simple reason that Kenyans of all walks of life seem convinced that the exigencies of ensuring the re-election of the incumbent rather than concern for the nation's long term welfare dictated the choice of the formula. The point is not whether this belief is justified. We simply take cognisance of its existence across the broad spectrum of informed Kenyan society. For two principal reasons therefore we would recommend the abandonment of the formula and its replacement with a simple scheme.

Our first reason is that we did not get the impression that people felt, in a significant way, that the Moi government represents all the tribes in Kenya, the 25% minimum threshold for electing a President notwithstanding. Secondly, since the provinces are of unequal population size, the 25% threshold is, in any case, ineffectual in practice in achieving its objective. In any event, it is not clear why the 25% threshold is limited to 5 and not applied to all the 8 provinces. Besides, there is a strong perception that only President Moi could have achieved the 25% element in the formula since the operation of the Chiefs Authority Act and the Public Order Act and their interplay with ethnic politics meant that opposition candidates cannot campaign at all or effectively in some of the provinces.

Ultimately, of course, we would concede that the process of taking the ethnic factor into account in the design of the electoral process to produce a nationally-oriented leader as President is a matter for Kenyans to debate publicly. A consensus formula can then be designed. However, we hazard the opinion that the search for a nationally acceptable formula may be unattainable, given

what is at stake. At any rate, we are of the considered opinion that, given the demographic profile and the history of ethnicity in Kenyan politics, one way of addressing the perceived problem of ethnicity is to provide effective and adequate protection for minorities. The measures for achieving this protection must be openly agreed upon by Kenyans themselves.

Once such protective measures are in place and guaranteed against encroachment by the Constitution, it should be possible to elect a President by a simple 51% plurality of the votes cast, with the possibility for a run-off among the top two if no one achieves that percentage in the first instance. The greatest reservation or fear we have heard expressed against this suggestion is that the major tribes may conspire against the minorities if such a rule is instituted. However, we have been persuaded by the view expressed by many to us that the practicalities of Kenyan politics, as amply evidenced for example by the havoc which personal ambition is causing among opposition politicians, means that the 51% rule would not lead to a combination of the politically-active among the major tribal blocks at the expense of the minority tribes.

Our proposal above, of course, means that we do not see any value in the requirement that the President must also win a parliamentary seat. This seems to have been just a mindless carry over from the days when the Kenyan constitution was parliamentary.

The reform of the formula for electing the President must go hand in hand with the removal of impediments which currently make it impossible for political leaders, especially the opposition, to campaign in some provinces. Everything must be done by the government to ensure access to all parts of the country for all politicians to present themselves, their messages and their programmes to the people. The Kenyan authorities must spare no effort in creating the conditions which make it possible for every Kenyan, whatever his origin or station in life, to feel that, all other

things being equal, he can without fear or favour, present himself for consideration for election to all the people of Kenya to the highest offices in the land.

The Judiciary

The most important institution for the attainment and sustenance of the Rule of Law is an independent judiciary. A ruler who subdues his judiciary strips his society of the most effective tool for the maintenance of the Rule of Law, democracy and human rights. This much is traditional orthodoxy which has been accepted throughout our contemporary world. Thus Article 10 of the Universal Declaration of Human Rights states:

"Everyone is entitled in full equality to a fair and public hearing by an *independent* and *impartial* tribunal, in the determination of his rights and obligations and of any criminal charge against him."

This provision is substantially amplified by Article 14(1) of the International Covenant on Civil and Political Rights which is binding on Kenya.

The independence of the judiciary and the requirement of a fair trial make any interference or attempt, overt or covert, to exert pressure by authorities or persons not involved in the case unacceptable. The reference here is to the independence of the judge in particular cases both from his or her colleagues and superiors. Thus the Basic Principles on the Independence of the Judiciary unanimously adopted by the General Assembly state, *inter alia*,

"There shall not be any inappropriate or unwarranted interference with the judicial process. ..."

Interference by unlawful pressures such as media pressure, demonstrations in court premises and unguarded utterances by the public authorities all go to undermine the actual independence of the judiciary and the public's perception of it. This, in turn, undermines the people's confidence in the ability of the courts to dispense justice impartially or at all.

It is for the above reasons that the Mission was dismayed to learn during the follow-up visit of the existence of a circular on bail issued and dated 14 March 1996 by the current Chief Justice of Kenya, Justice A.M. Cockar. The threat which this circular poses to the independence of the judiciary is so great that we have taken the liberty of reproducing the full text below. It reads,

"Commission of Offence by Accused on Bail Pending Criminal Trial

It has been observed that some notorious offender (which fact is normally not made known to the Court) when released on bail after being charged with an offence, generally repeats the same offence and is brought before the Court charged with the same offence but on different particulars. The fact that such an offender is already on bail pending another trial for a similar earlier offence is not revealed to the Court with the result that he is again released on bail. Invariably he commits another offence and he is again released on bail and the process keeps on repeating. A very common offence which is committed repeatedly by perpetrators of such offences is that of obtaining money by fraud where the accused either cons innocent wananchi of their money or defrauds banks and other financial institutions of huge sums of money by means of sophisticated frauds.

It is absolutely not permissible to inform the Court of an accused person's previous convictions prior to his

conviction in that trial. But if a person has committed an offence while on bail in respect of a pending charge for an offence of a similar nature, then it is in order and in fact quite proper for the Court to be informed of this fact. It is the Court prosecutor's duty to do so. However, once this fact is brought to the notice of the Court *then please ensure that such an accused person is not released on bail until the conclusion of his criminal trials.* (emphasis ours). By a copy of this circular the Hon. The Attorney-General is also being requested to take appropriate steps to impress on the Court Prosecutors that in such a case the Court must be informed of the fact that the person being accused and charged before the Court is already on bail pending trial in respect of an earlier similar offence."

This circular was addressed to all magistrates in Kenya.

The Mission found the terms of this circular extraordinarily disturbing. For in line with the legal systems of all the countries following the Anglo-American common law tradition, the Kenyan constitution provides that the basic consideration in deciding on bail applications is whether the accused would attend at his trial. Without doubt, over time, other factors have come into play but the basic principle has remained constant. The determination must be made by the judge trying the case or before whom the application for bail has been made. The directive by the Chief Justice that bail should be denied automatically and mindlessly in certain cases is therefore contrary to a basic principle accepted by all civilised judiciaries.

Besides, the directive undermines the principle of justice in an important way. Both the Universal Declaration of Human Rights (Art. 11) and the Covenant on Civil and Political Rights provide everyone charged with a criminal offence the right to be presumed innocent until proved guilty according to law. As the Human Rights Committee established under the Covenant has

commented, this presumption of innocence places the burden of proof on the prosecution and gives the benefit of any doubts to the accused. This principle also means that the accused person must be treated at all stages of the trial *prior to conviction* as innocent of the particular charge he is facing. Nothing should be done which prejudices guilt. The fetter which the Chief Justice's circular seeks to place on the duty of the trial judge and his ability to be independent and impartial each time a person is brought before the court on a criminal trial is therefore offensive to the Rule of Law. We note in this connection that the presumption of innocence is guaranteed by Article 77(2)(a) of the Constitution of Kenya. The fact, as the Mission was informed, that the circular was issued shortly after the President had publicly castigated the behaviour of some judges in bail matters further dents the credibility of the Judiciary in general and the Office of the Chief Justice in particular before the judgment seat of public opinion. This further reinforces the feeling of *wananchi* that the Rule of Law does not exist in Kenya.

In discussions with the Chief Justice and two of his colleagues,²¹ the Mission expressed its disquiet about the circular. The Chief Justice suggested that he had authority under the Constitution, especially Section 70 thereof, to issue the circular in question. We also discussed the matter with the Attorney-General and the Council of the Law Society of Kenya. The ICJ is satisfied that this circular is offensive to the Rule of Law, is not warranted by the provisions of the Constitution of Kenya and is in breach of Kenya's international human rights obligations. If not already withdrawn, we would urge that thought be given to its withdrawal without further ado.

Most people the Mission talked to in Kenya have no confidence in the Judiciary, neither do they believe that the Judiciary is independent of the Executive. There seems to be a

21 Justices Ringera and Omolo.

general feeling that the Judiciary is not capable of checking abuse of power. The list of the principal causes of this generalised lack of confidence in the ability and capacity of the Kenyan Judiciary to act as midwives between the people and their government in the quest for democracy, human rights and the Rule of Law is a tall one. It includes the slowness of the judicial process which has led to a backlog of cases; the use of bail as punishment to satisfy the Executive; occasional threats by officialdom on judges as occurred for example in the protest to the Courts led by a Cabinet Minister Ntimama and which seemed to have the approval of the President; alleged political bias on the part of some of the judges; the lack of transparency in the judicial appointment process; the shortage of judges, the inadequacy of the resources available to the Judiciary; the absence of any system for reporting the decisions of the superior courts for the guidance of magistrates and the legal profession generally; and, above all, corruption on an immense scale among the Judiciary especially its lower levels.

The last mentioned factor, corruption, is a matter which concerns the diplomatic community in Kenya a lot. If not dealt with promptly and decisively its long term negative impact on investment flows in to Kenya would have a debilitating effect on the national economy. We would urge the Chief Justice and the Attorney-General to give this cancer in the judicial system the necessary attention it deserves.

It bears repeating that nothing will get on track in Kenya unless there is an independent judiciary. We note with approval the formal de-linking of the Judiciary from the Executive. But more has to be done than formal steps of this kind. Especially in the provision of adequate resources. The ICJ finds it unacceptable that appeals take a long time to be heard because of inadequate resources for the preparation of appeal records. The Mission was informed, for example, that the situation was so bad that, in the *Koigi Case*, the defence even offered to provide computers and secretaries to help speed up the preparation of the record of

appeal, an offer which was not taken up by the judiciary. These delays constitute a breach of the right to a prompt trial recognised by international human rights norms which are binding on Kenya.

The Office of the Attorney-General is so central to the flourishing of the Rule of Law and Justice in Kenya that we would like at this stage to make a special appeal to the Attorney-General on a general matter. Justice demands that judges should not be saddled with the implementation of oppressive, inconsistent and archaic laws. This means that the issue of law reform should be more vigorously tackled than seems to be the case at the moment. While it is not safe, in the nature of things human, to construct principles around the personality of any individual, we feel that the present incumbent of that Office owes a special legacy to human rights and the people of Kenya because of his considerable expertise and experience in this field. Posterity will judge him harshly if he fails his country. Given the importance of the Attorney-General to the Rule of Law in Kenya, we would like to suggest that early thought be given to de-politicising the Office. We consider this recommendation to be apposite because in all our discussions with the present incumbent we got the impression that his capacity to act as a servant of the law was constrained to a great extent by political considerations. This we find unfortunate.

Of the other causes of the public loss of confidence in the impartiality of the Judiciary, another one which we wish to single out for treatment is the perception of subservience to the government and its wishes. It is of fundamental importance that justice must not only be done but should be undoubtedly and manifestly be seen to be done. The ICJ is particularly troubled that the generality of the legal profession in Kenya is convinced that the judiciary is, by and large, pro-government in an unacceptable way. A particular example of this was offered to the Mission during the second visit.

According to our information, the law in Kenya is that there is no right of appeal from the High Court to the Court of Appeal in

cases arising from the Bill of Rights. Further, there is no right of appeal in election cases from the High Court to the Court of Appeal. Yet in November 1993, the Court of Appeal, in an appeal from the President, held that there was a right of appeal where a party was relying on a post-election event. The Court of Appeal held and allowed the appeal, the President having lost the case in the High Court. The Lawyer who argued the case for the President was appointed to the High Court and shortly thereafter promoted to the Court of Appeal.

Once again, we make no comment on whether there was a connection between representing the President and the lawyer's subsequent appointment to the Bench. We just note the fact that its occurrence, in the absence of a transparent appointment process and the non-representation of the Law Society on Judicial Service Commission, has sent a negative signal to the legal profession. Perhaps, in these cases, the judiciary is in a no-win situation. We would not have recounted the information in this Report if the decision had signalled a general relaxation of the law on appeals in these cases. Our information is that this has not occurred. The decision remains an exception to a general rule which is rigidly applied to ordinary citizens or anti-government elements in society. Only the Kenyan Judiciary can take steps to eradicate this perception from the minds of the Kenyan people. We urge the judges to do so.

Fortunately, we were informed that some judges have begun to publicly question this attitude of judicial leaning towards the government. Questions are being asked particularly among what appears to be a revitalised magistracy. We would call upon the legal profession in Kenya to support these *stirrings*. For respect for the Rule of Law cannot be fostered where the judiciary is cowed, the State security apparatus is unrelenting and the Executive is overbearing. In particular, we would urge that the practice of magistrates serving as members of local security committees should be discontinued.

THE GENERAL HUMAN RIGHTS SITUATION

During the first visit, the Mission heard and read a lot which suggested that the general human rights situation was unsatisfactory. Since then the annual reports of NGOs like Amnesty International and Human Rights Watch have narrated disquieting episodes. Regular communiqués issued by religious leaders have continued to decry ethnic violence, appalling prison conditions, police brutality and routine torture. These reports seem to have produced very little corrective action from the appropriate political authorities.

Although in the case of one of the leaders of SAFINA, Dr. Leakey, and an opposition Member of Parliament, the Hon. Paul Muite, who were beaten in Nakuru in August 1995, we were informed during the follow-up visit that four people were arraigned in court and were standing trial, but the pace of the prosecution is unconscionably slow.

Kenya, a country which used to be a fertile ground for NGO activity seems to have become inhospitable to civil society groups. One NGO, CLARION was de-registered for no apparent reason. It seems the authorities were irritated by its vigorous education programmes on the constitution as well as a devastating piece it did on corruption. Though the registration has now been restored the message has gone home to the NGO community that it is under the searchlight. Some of the threats against the civil society groups are subtle but no less real. But have they succeeded in breaking the spirit of the people? On the evidence available to us as well as what is discernible from the press, we would answer this question in the negative. Indeed we were impressed by the indomitable spirit of two organisations which have refused to apply for registration on the grounds (a) that it would be refused any way and (b) that as an organisation of Kenyan citizens they do not need the registration. The trouble with this kind of situation is that ultimately it is subversive of

the Rule of Law and the orderly development of a country if the implementation of the laws is so skewed that citizens who would otherwise obey the law feel they have no choice but to flout it.

Except for murder trials, there is no legal aid scheme. The Constitution provides in Article 84 that an indigent person who brings proceedings to protect his rights is entitled to a State-provided lawyer. This provision has, however, not been operationalised by Parliament.

As this Report graphically demonstrates, there is no economic emancipation for the ordinary people. The ICJ's Law of Lagos of 1961 as amplified by the Bangalore Principles and Plan of Action of 1995 stress that respect for economic, social and cultural rights of the people is an important corner pillar of the Rule of Law. It is unacceptable therefore that, in spite of the liberalisation measures under Kenya's structural adjustment programmes, all sectors of the economy, especially the agricultural, continue to be subjected to over-bearing state presence and control. In the circumstances we were not surprised to find from our conversations that the government had a credibility problem with ordinary people.

Nor do they have confidence in the opposition, given their present state of disunity. It is sad but true that ordinary people we spoke to in the streets of Nairobi and Mombasa perceive the opposition as desperate for power, wealth and influence rather than the long term democratic health of Kenya and the well-being of its people. The danger here is that the long term casualty in all of these would be belief in democracy, human rights and the Rule of Law.

It is in the light of the above observations and findings that we make the recommendations that follow hereafter.

RECOMMENDATIONS

1. Kenya has no choice but to take the issue of constitutional and legal reform before the next general elections seriously. All must participate in this process. As a short term measure, we would canvass for the minimum reform package strategy. We strongly recommend that the reform must see the repeal of the legislation listed elsewhere in this Report. Further, we suggest that in any such reform the law must clearly allow appeals from decisions of the High Court in human rights cases to the Court of Appeal. It is inconceivable how the highest court in a legal system, such as the Court of Appeal in Kenya, can have no jurisdiction to receive human rights cases. This is to deny the citizen the opportunity to have her/his case determined by at least two independent tribunals in the most important areas of the social contract - the protection of individual rights.
 2. Good governance is currently an important item in the external assistance programmes of bilateral and multilateral agencies. The weakest parts of the governance structures in Kenya are the institutions of the law namely the Judiciary, the police, prisons and the Office of the Attorney-General, but especially the Judiciary. We urge the Kenyan government to open up discussions with its bilateral and multilateral friends for the necessary funding to tackle the reform of these institutions on a large scale. We find it, for example, sad that the absence of a competent legal draftsman is a drag on the work of the Office of the Attorney-General. In this connection, the ICJ welcomes the recent on-going programme to train staff from the Attorney General's chambers in drafting.²² Furthermore, the ICJ assures the Kenyan authorities that it
- 22 At the time of going to press, over 25 staff were undergoing a training course sponsored by the Overseas Development Administration (ODA) at the Kenya School of Law. There is also a UNDP-funded governance programme that is in its initial stages, which incorporates an element for the strengthening of the judiciary.

would be prepared to enter into discussions aimed at developing the necessary strategies for and would also be prepared in specific activities to assist in the implementation of these strategies.

3. As we have said before, the ICJ urges the Kenyan government to take more genuine and vigorous steps to end the ethnic violence and to resettle people on lands from which they have been displaced. We reiterate our firm conviction that, in a game of politically-motivated ethnic violence, there can be no long term winners, only losers. The thesis that in Africa democracy is a recipe for ethnic violence was false yesterday, is false today and will have no relevance in the future. There is no point in trying to ginger it up artificially. In particular, we urge the Kenyan government to ensure that all politicians are able to campaign freely throughout the country.
4. For reasons stated in this Report, we call upon the Chief Justice to withdraw his circular on bail dated 14 March 1996.
5. We call upon the government to take steps to tackle the question of corruption in the judiciary and elsewhere in the public service. In this connection we request the Attorney-General to take more concrete and visible steps to prosecute all those against whom adverse findings have been made in the reports of the Controller and Auditor-General. Further, we call upon the Attorney-General to cause an end to be put to the misuse of the criminal process.
6. We call upon the Attorney-General to have all the pending applications of SAFINA and the other political parties determined without further delay. For a multi-racial society like Kenya, we find the racist undertones in the delay in determining the application of SAFINA totally unacceptable. If the determination should result in a denial of registration, we suggest that the applicants be given the opportunity to mount a judicial challenge to the refusal.

7. Noting the importance of economic emancipation, we urge the government to return sovereignty over their produce to agricultural sector workers so that they may derive maximum economic and financial benefits from their labours. Ultimately, the objective should be to achieve equity in the sharing of the national wealth.
8. A weak, battered and ineffectual trade union movement is a disservice to democracy. It is an abuse of human rights. Accordingly we appeal to the government to live up to its obligations under the ILO Conventions and put in place measures which will create an enabling environment for true, effective and efficient trade unionism to take root and flourish in Kenya.
9. The continued government control of the airwaves cannot be justified. The argument that consideration of pending applications for frequency to operate radio or television stations must await review of the relevant laws rings hollow, especially as persons or organisations sympathetic to government seem to have no difficulty getting their applications favourably determined. In the circumstances, we call upon the government to process the pending applications in good faith and to free the airwaves for competition. Competition in the airwaves would be good for the economy and good for democracy in Kenya. Further, we urge that real opportunity be created for the opposition to get its message and programmes across to the people through equitable access to the State-owned media.
10. The Office of the Attorney-General is so central to the maintenance of legality in Kenya that fidelity to the law should be the paramount interest of the holder of the Office. Accordingly, we recommend that the Office should be de-politicised. In this connection, we call upon the incumbent to initiate the necessary steps for this de-politicisation.

11. There is a great need for transparency in the appointment, promotion and dismissal of judges in Kenya. We therefore recommend the revamping of the machinery for the selection of judges. We recommend further that the Judicial Service Commission be expanded to include representatives of the different levels of the Judiciary appointed by the judges of those courts themselves and not the President, the Law Society of Kenya and at least two lay members of society, one of whom must be a woman.
12. In itself, contract judges may be necessary as a short term measure. All judges, whether expatriate or indigenous, holding contract or permanent positions are under an obligation to administer justice fearlessly and without favour. We are convinced that Kenya has produced enough advocates of the relevant competence, integrity and independence of mind and character to be appointed to the Bench. Accordingly, we recommend that the use of expatriate contract judges should be discontinued.
13. We reiterate our previous call that every opportunity should be afforded the judges in Kenya to interact with their colleagues in other jurisdictions. In this connection we commend to the Kenyan government for adoption the practice in other countries whereby superior court judges get the chance to spend time abroad once every five years to interact with professional colleagues and to generally acquaint themselves with judicial and legal developments in other parts of the world at first hand.
14. Finally, we urge all in Kenya to ensure that the next elections are not flawed. To this end, every effort should be made to create a level playing field for politics. For reasons stated elsewhere in this Report, we support the idea of postponing the next general elections until reasonable measures have been put in place to ensure that they would be fair and their outcome would be a true reflection of the expression of the will

of Kenyans. These measures must include the creation of an Electoral Commission which, by its membership and institutional arrangements, is secure and independent of the present government. In particular, the Commission must enjoy financial autonomy. We are satisfied that the minimum necessary measures need not take more than one year to put in place.

CONCLUSION

In this Report, we have put Kenya under the microscope of the Rule of Law. We have made a number of critical comments. These have not been just for the sake of painting Kenya in a bad light. Indeed, we agree with those who say that, given the turmoil in the region where Kenya is physically located, there are many things to be thankful for in Kenya. It is precisely because of the importance of Kenya to the East African region that we have spent time to study the state of affairs there since the return to formal democracy and the last general elections. Let all note, in particular the Government and People of Kenya, that in writing this Report we have been motivated solely by our conviction that a democratic, stable, prosperous and violence-free multi-racial Kenya in which the Rule of Law reigns supreme is good for Africa and the world. Above all, we believe that these goals are achievable. But the time to start the process towards these goals is now; that is, before the next general elections.

In conclusion, we wish to put on record our belief that a society cannot be considered democratic unless pluralism, tolerance and broadmindedness find effective expression in the society's governance system and unless this system is subject to the Rule of Law, makes basic provision for an effective control of executive action to be exercised by both the legislature and an independent judiciary and assures respect of the human person.

APPENDIX A

The Agriculture Act (Cap 318)

This gives the Minister of Agriculture wide and draconian powers over land management, production, processing, storage and marketing of agricultural produce and products.

Section 7 of the Act authorizes the Minister of Finance to fix prices for producer crops in February each year to be paid to producers for crops planted in that calendar year. Section 9 prohibits producers to sell produce except through agents appointed by the minister. The agents are required to purchase at the fixed price. Under section 184 he can order good management of farms, prohibiting cultivation of land or keeping stock, controlling pests, dispossess owners and occupiers who don't manage the land properly, and take over mismanaged farms. Under section 186 the minister can order that crops produced in a particular area be processed in a particular factory. Rule 2 of the *Agriculture (Sugar-cane Marketing)* Rules made under section 21 requires that all sugar cane growers named in the first column of this schedule, shall sell sugar cane grown in areas specified in the second column to the factories shown in the third column. Though, at a policy level some of these controls have been removed pursuant to structural adjustment it is not certain that there will not be reversals. As the schedule to this part shows there have been such frequent reversal even during structural adjustment that the possibility of these powers being invoked once again should not be discounted merely because there are policy declarations from government that there is no going back on reform.

The Tea Act (Cap. 343) and the Kenya Tea Development Authority Tea Cultivation) Order, made under section 191 of the *Agriculture Act (Cap. 318)* gives the Tea Board and the Kenya Tea Development Authority exclusive control over the entire production and marketing of tea, from establishment of nurseries, provision of seedlings,

fertilizers, methods of planting, harvesting, collection, processing, transportation, storage, sale to fixing of producer prices.

The Tea (Movement Control) Regulations prohibits any person to move or cause tea to be moved without a written permit from the Board. The permit specified the precise route along which tea shall be moved.

After tea is auctioned in foreign currency half of the proceed is retained by the Central Bank, and the other half is deposited in a retention account.

The Coffee Act (Cap. 333)

This establishes the Coffee Board of Kenya which controls the cultivation, picking, selection, processing and sale of coffee. Under section 21, it is a criminal offence punishable up to ten years imprisonment without corporal punishment, for a planter to roast coffee for sale, export or to sell coffee to any person other than the Board, or for any person, other than the Board to purchase coffee from any planter. A dispute is brewing between the coffee board and 1000 small scale farmers from Central and Eastern Province, Kenya's key growing areas, who want to bypass the board in the sale of their coffee.

The Coffee (Cultivation and Processing) Regulations give an inspector unrestricted access to any land, power to uproot and destroy coffee planted without authority, and to order farmers to mulch, manure, and treat coffee trees and to restore oil fertility or condition of the coffee trees.

The Coffee (Movement Control) Rules make it a criminal offence to move any coffee between 6.30 p.m. and 6.30 a.m. except by a train operated by Kenya Railways.

The Co-operative Societies Act (Cap. 490)

This statute regulates the formation and regulation of co-operative societies, through which most of the agricultural produce is marketed. The Commissioner of Co-operatives has broad dictatorial powers over the constitution, management and dissolution of these societies, without reference to the wishes of members. Section 30 empowers co-operative societies to legally bind their members to sell all their agricultural produce through the society, and to produce such quantities as the society specifies. Where a society produces 60 per cent of a particular produce, the minister can order non-member producers to sell the produce through that society. Section 303 empowers the society to pledge the produce delivered to it, as security for loans 'as if it were the owner of the produce.' It is a criminal offence to persuade or assist any person to sell or deliver agricultural produce to any person other than the society.

Many small-scale coffee farmers are abandoning coffee growing as the superstructure of extraction has made it a frustrating, non-profitable venture. After the coffee Board of Kenya sells coffee through auctions, it deducts a three per cent commission from the gross sales, plus auction fees and storage charges. The Kenya Planters Co-operative Union (KPCU) which mills and grades coffee, charges a three per cent commission on the gross sales, and milling and storage charges.

The District Co-operative Society (Union) charges a three per cent commission plus other charges for services provided to primary societies, e.g. audit fees, tendering services, commission, etc.

The primary society which weighs, grades, dries, stores, packs and transports coffee beans to KPCU deducts 20 per cent to cover its recurrent expenditure, plus the costs of any inputs such as fertilizers and pesticides and other advances made to the farmer. Apart from these 'production costs' the societies pay Value Added Tax (VAT) at 18 per cent a County Council assess at 1 per cent.

After all the deductions, the small-scale coffee growers earn less than 40 per cent of the prices at which their coffee is sold. With all these deductions, the argument that it would be dangerous to expose the strategic business of coffee marketing to private businessmen, does not hold water because they are even more exploited by the coffee bureaucracy.

The Crop Production and Livestock Act (Cap. 321)

Section 4, empowers the minister to make rules specifying a particular crops, tree or plant to be grown, limiting the area on which it may be grown, limiting the number, kind and sexes of the livestock to be kept in any area, and requiring castration of male livestock. *The Crop Production and Livestock (African Produce) Rules* rule 5 prohibits any movement of African producer (legumes, sorghum, millet, etc.) unless it is contained in sound well-sewn bags which bear a clear mark registered by the District Commissioner at least two inches in size, indicating the name and place of the businessman who first bought them from an African. NO produce can be purchased from an African between 6.00 p.m. and 6.00 a.m. This patently colonial piece of legislation remains in our statute book 32 years after independence.

The Canning Crops Act (Cap. 328)

This prohibits the cultivation of pineapples and passion fruits without an annual license which specifies the crop and the variety, quantity, and the canning factory authorized to buy the crop. The Canning Crops Board fixes the prices to be paid.

The Cotton Act (Cap. 335)

This establishes a Cotton Board which (Section 22) 'purchases all cotton lint produced and ginned in Kenya on terms fixed by the

Board and sells the lint to millers and exporters licensed by the Board, on terms fixed by the Board.

The Pyrethrum Act (Cap. 340)

This prohibits growing of pyrethrum without a license (section 12). A grower's levy is imposed on all growers. No pyrethrum grower is permitted to sell pyrethrum or pyrethrum products to any person other than the Board (section 16). All the pyrethrum delivered to the Board becomes the property of the Board.

The Dairy Industry Act (Cap. 336)

Although one of the objects of the Dairy Industry Act (Cap. 336) is to 'permit the greatest possible degree of private enterprise in the production, processing and sale of dairy produce! the hypocrisy of the act is revealed in section 19 which empowers the minister to fix prices, prescribe the manner of handling, transporting, and storing dairy produce, and prescribing areas where retailers may sell their dairy produce. Under section 23, the minister can empower the Dairy Board to acquire by compulsory purchase all or any form of dairy produce upon such terms as to the price and method of payment, as may be specified in the order.'

The National Cereals and Produce Board Act (Cap. 338)

This controls the marketing and processing of maize, wheat, millet, rice, sorghum and other 'scheduled agricultural produce.'

Section 15 of the Act empowers the minister to fix prices at which NCPB may purchase the agricultural produce from farmers. The Board sells the produce to licensed millers at a price fixed by the minister. The Act prohibits any other person to purchase or be in

possession of maize or scheduled agricultural produce except as authorized by the Act.

The cumulative effect of this panoply of paternalistic and coercive legal rules and regulations is to deprive the small-scale farmers of any real freedom or control over their land, the productive activities carried thereon, or any meaningful say in the disposal of the fruits of their labour. If he wants to buy a piece of land, he requires government permission. To cut a tree on it, he requires permission from the chief. If he wants to grow coffee - as a cash crop - he needs a license. If he wants to sell the coffee, he must sell through the society and the society through the Coffee Board. He has no idea what the price of coffee is going to be. If he wants to organize other farmers to discuss their situation, he needs a license to meet them from the District Commissioner. If he uproots the coffee, the chief will arrest him.

APPENDIX B

Schedule of the 1993 Mission

Monday, July 12, 1993

- | | |
|-------|--|
| 08.30 | Hon. Amos Wako, Attorney-General, AG's Chambers |
| 10.00 | Hon. Kalonzo Musyoka, Minister for Foreign Affairs and International Cooperation |
| 11.15 | Hon. Justice F.K. Apaloo, Chief Justice of Kenya |
| 15.00 | Mr. James Hamilton C.B.E. Law Reform Commission |
| 16.00 | Meeting with National Election Unit (NEMU) -FIDA (Ms. Grace Githu) |
| 17.00 | National Council of Christian Churches (NCCCK) - Rev. S. Kobia, Gen. Sec. NCCCK |
| 18.00 | Hon. Justice Chesoni, Chairman, Electoral Commission. |

Tuesday, July 13, 1993

- | | |
|-------|--|
| 09.30 | Hon. Johnstone Makau, Minister of Information & Broadcasting |
| 10.15 | Hon. Francis Ole Kaparo, Speaker of the National Assembly |
| 11.00 | Law Society of Kenya (LSK) |
| 12.00 | Mr. Shadrack Kiruki, Police Commissioner |
| 15.00 | Commissioner of Prisons |
| 16.15 | Dr. Oki Ooko Omboka, Public Law Institute |
| 17.30 | Departure for Mombasa |

Wednesday, July 14, 1993

Mombasa

Visits: The Courts

Prison

Provincial Administration

The Local Bar (Advocates)

18.00

Return to Nairobi

Thursday, July 15, 1993

09.30

Mr. Charles Nyachae, Chairman, ICJ (Kenya
Section)

11.00

Meeting with Leaders of Political Parties

FORD-Kenya

FORD- Asila

KANU

Democratic Party

14.30

Prison Visit

16.30

Donors' Community Representatives

Friday, July 16, 1993

09.00

Chief Justice

Hon. A.G.

11.00

Meeting of members of the Mission

17.00

Press Conference

Saturday, July 17, 1993

Departure

Schedule of the 1996 Mission

Monday, September 9, 1996

- | | |
|-------|---|
| 11.00 | Dr. Richard Leaky-Safina Offices, Nairobi |
| 14.00 | Prof K. Kibwana |

Tuesday, September 10, 1996

- | | |
|-------|--|
| 08.30 | Ambassador Engfeldt, Swedish Embassy |
| 10.00 | Justice M. Cocker, Chief Justice, Chief Justice's Chambers |
| 14.00 | Mutegi Njau |
| 16.00 | Inter Parties Committee (IPC), Democratic Party Offices |
| 17.00 | Githu Muigai |

Wednesday, September 11, 1996

- | | |
|-------|--|
| 08.30 | Kihu Irimu, Secretary-General, Kenya Union of Journalists |
| 10.00 | Christopher Mulei, Executive Director, Centre for Governance and Development |
| 11.00 | Professor Mutungi, Standing Committee on Human Rights |
| 15.00 | Mr. Hemans, British High Commissioner, British High Commission |

Thursday, September 12, 1996

- | | |
|-------|----------------------------------|
| 09.00 | Member of Parliament |
| 10.00 | Mr. Lee Muthoga |
| 11.00 | Kenya Section of the ICJ Offices |
| 14.15 | Law Society of Kenya |

Friday, September 13, 1996

09.00	Hon Amos Wako, Attorney General , AG's Chambers
14.30	Jean Kamau, Fida Offices

APPENDIX C

Preliminary Statement of the Members of the ICJ Mission

As you may know, the International Commission of Jurists sent a Mission to Kenya which arrived here and has been holding consultations since Monday 12th July. This Press Conference marks the end of the formal consultations of the Mission.

Aims and objectives of the Mission are:

1. To inquire into the recent developments as they affect the Rule of Law, the respect for human and peoples' rights and the independence of the Judiciary and the legal profession.
2. To study and report on the Constitutional and Legal changes necessary for the transition to a multiparty democracy.
3. To recommend practical measures aimed at encouraging the emergence of a civil society which can serve as agents and protectors of democratic culture in Kenya.
4. To recommend ways and means through which the International Community can assist the People and Government of Kenya to strengthen the institutions of democracy, such as the Electoral Commission, Parliament, the courts, the press and the non-governmental organisations.

The Mission is composed as follows:

1. Mr. Justice Enoch Dumbutshena, a former Chief Justice of Zimbabwe and currently one of the Vice-Presidents of ICJ;
2. Dr. Kofi Kumado, Professor at the Faculty of Law, University of Ghana, Member of the Executive Committee of the ICJ and the

- current Chairman of HURIDOCs (Human Rights Information and Documentation System, International);
3. Mr. Adama Dieng, Secretary-General of ICJ.
 4. Professor Daniel Marchand (teaches Law in Paris and nominated Commissioner of ICJ).

For the past four days, the Mission has held consultations with the President, Ministers of State, the Chief Justice, the Attorney-General, the legal community (Judges and Lawyers), the Speaker, Deputy Speaker and Parliamentarians, Local Government Officials, Religious Leaders, the Commissioner of Police, the Commissioner of Prisons, NGOs as well as a good number of ordinary Kenyans. The Mission has also received a large amount of documentation relevant to its terms of reference. We also visited the Shimo La Tewa Prison in Mombasa.

The International Commission of Jurists will in due course publish a report on the Mission which will contain more definitive conclusions and recommendations. This Report will be presented to the Kenyan government and distributed widely. We hope the Kenyan government will accept the Report, adopt and implement the recommendations it will contain.

The purpose of the press conference is, however, to draw attention to a few preliminary findings and recommendations we think require urgent action.

Findings

1. The Constitution and the Laws of Kenya retain their one-party framework and the principal policy-makers are still beholden to a one-party culture and cast of mind.
2. The Political climate remains inhospitable to the fullest realization and enjoyment of human rights, both as contained in the domestic

Constitution and International Human Rights treaties to which Kenya is a party.

3. There are continuing threats to the security of people and their properties, despite assurances to the people by the President and the investigations and measures on which the Attorney-General has initiated action.
4. Since the restoration of the Security of Tenure for Judges, we understand that the Independence of the Judiciary has received a fresh lease of life. However, we noticed an absence of opportunity for Judges to interact with their colleagues, both within Kenya and other Commonwealth jurisdictions. The physical facilities such as libraries, duplicating machines, computers are desperately needed. Remuneration and retirement benefits are not adequate.

Recommendations

In order to build confidence in the displaced persons and thereby encourage them to return to their homes and farms, a clear reiteration by the President of his personal commitment and the resolve of the government to take stand measures to bring the ethnic clashes to an end is necessary. In this connection, the Mission recommends the immediate institution of a judicial inquiry into the clashes with power to offer appropriate protection to those who give evidence before it.

Even though we recognize that all Kenyans have an obligation to refrain from deeds or words that encourage ethnic tensions we are convinced that it is the primary responsibility of government to protect life and property and to maintain law and order for all persons at all times.

1. (a) Constitutional review process should be set in motion without any further delay. This in our view will allay

suspicion that the government intends to continue business as under the one-party system and will reduce the political tensions.

- (b) In the interim we recommend the immediate repeal of the following statutes because we consider them incompatible with multiparty democracy:

Preservation of Public Security Act

Public Order Act

Societies Act

Chiefs Authority Act

Sections 52 to 58 of the Penal Code

Books and Newspapers Act

Trade Licenses

Official Secrets Act.

- (c) Further, we consider unacceptable the use of criminal process as a tool for muzzling opposition by such practices as denial of bail, bonding, the preferment of charges against people in jurisdiction far away from other place of residence.
2. All obstacles that make it difficult for members of Parliament to discharge their duties efficiently and effectively must be removed. In particular we recommend that the law be immediately changed to make it impossible for a Member of Parliament to be arrested or interfered with for a civil or criminal matter in Parliament and within the precincts of Parliament and while she/he is on her/his way to or from Parliament.
3. The Attorney-General in our view has a major role to play if the People of Kenya have to address their revision and expeditiously and realistically take measures necessary for the

opening up of the Kenyan society. We accordingly call on the Attorney-General to take the lead in ensuring the revision of the Constitution and the laws as we have proposed.

4. Noting that one of the UN Basic principles relating to the Independence of the Judiciary is that judges should adequately be provided for, and while welcoming recent measures in this regard, nevertheless we recommend that urgent action be taken for further improving the conditions of service, in particular the retirement benefits of Judges.

APPENDIX D

Comments on some aspects of the draft report by Hon. Amos Wako, Attorney General of Kenya*

1. 1992 Election

You state that the elections may not have been free and fair. This is not strictly correct. The observers recognised that although there were shortcomings, the elections were on the whole fair and the results reflected the wishes of the People of Kenya.

2. The Persistence of the Unlimited Executive After Multi-Party Elections

(A) You say in a critical tone that the President enjoys the power to appoint and dismiss at will any cabinet minister or assistant ministers. This is not understood as any executive president or head of government anywhere in the world have similar powers.

(B) You state that appointments be subject to parliamentary approval. This is a matter that requires careful consideration. Even in the USA, President Clinton recently decried that the system was being politicised by the republican party. If this can happen in USA, what about Africa ? The President of the Constitutional Court in France stated that the system cannot work in France and has proved unworkable in Eastern Europe who had imported the system from America. What is required is that a more transparent and accountable system which ensures that people with merit are appointed to key

* some of these comments have been incorporated into the report where it has been considered appropriate to do so.

positions, be devised. However, as far as appointments to cabinet and other political offices are concerned, it must be borne in mind that in Kenya we have a parliamentary system of democracy and not a complete separation of powers like USA.

3. The Legal Structure of the Multi-Party Parliament

You state that the standing orders were made by a one-party parliament and should have been reviewed when Parliament became plural. Both statements are not true in fact. The standing orders were made when Kenya was a multi-party country. They were slightly changed when Kenya became a *de jure* one party State in 1982. In 1992 those provisions that had been removed when Kenya became a *de jure* one party State were re-inserted. That is why under the current standing orders we have provisions whereby important parliamentary committees as public accounts committee and public investments committee shall be chaired by the opposition. The powers of the speaker under the standing orders are not different from the powers of the speakers in other democratic Commonwealth countries. In fact the standing orders of the National Assembly in Kenya are basically the same as the standing orders of parliaments or national assemblies in Commonwealth countries and in some cases they give the opposition parties more power e.g. Kenya is one of the very few countries in which standing orders permit a majority of the members on the key parliamentary committees to be from opposition parties.

4. The Character of the Judiciary in the Era of Pluralism

You mention the important issue of law reporting. For balance, you should also state that the issue is being addressed. The Attorney General piloted through Parliament the National Council for Law Reporting Act. On the Council, the Judiciary, the Attorney General's office, the Law Society of Kenya and the faculty of Laws

of Public Universities are represented. The Council has now began meeting and its first priority is to publish Law reports of "lost" years.

5. The Ineffectiveness of Public Opinion

You have implied that the Attorney General took action against the people involved in the Goldenberg scandal because of IMF pressure. This is not true. The Attorney General made it clear to all and sundry that he will prosecute if he gets an investigation file with *prima facie* evidence. On 9 May 1994, the Council of the Law Society of Kenya met the Attorney General and promised to give the Attorney General such a file. This was reflected in the minutes of the Council and also it received wide coverage in the media. The Council never did so and instead, many months later, a few days before the Paris talks they filed an application for private prosecution. The Attorney general successfully opposed it on the basis of the understanding reached. In the meantime police finalised their investigations and the Attorney General was able to initiate prosecution against the persons. The Attorney General has said on many occasions that whether or not he decides to prosecute any case will not depend on any pressure but on the evidence before him.

6. The Ineffectiveness of Parliament

(A) You have stated that the repeal of the detention law can be done under the auspices of the National Assembly rather than government. This is to misunderstand how parliamentary democracy in which members of the Executive are also members of Parliament works. Nearly all, if not all bills which are debated in Parliament are initiated by government. Although there is room for private members bill, this is rarely used. That is why the recent opposition members motion which was passed by Parliament unanimously called

on the government to review and where necessary repeal or amend various legislations.

(B) You state that Parliament is helpless in the face of the scandalous revelations in the controller and auditor general's reports year after year. I attach hereto marked "A" a letter the Attorney General wrote to Hon. J.A.B. Orengo, Deputy Leader of opposition on this issue. The letter shows that the government in spite of some limitations has in recent times taken seriously the scandalous revelations in the reports of the controller and Auditor General and the recommendations of the Public Accounts Committee and Public Investments Committee.

(C) What you state about the Library at Parliament and lack of links with other national libraries is true but it is really an issue of poverty.

However, steps are being taken to acquire a substantial building next to Parliament buildings as a step in facilitating the work of members of Parliament.

7. The Legal Framework of Agrarian Poverty and Oppression and Overview of the Agrarian Legal Regime.

It is difficult to comment on this part of the report because it is so out of date. You have made contrasts between the large farm sector and the small farm sector by looking at the tax breaks. The import duty and value added tax on the spades and manual ploughs are to protect the local informal sector which makes these products. I may here add that the informal sector, popularly known as the "Jua kali Sector" has been hailed by institutions such as the World Bank as worth of emulation by other developing countries for not only creating employment but providing a base for industrial growth.

The new agricultural sector has within the last year been liberalised. The government is no longer involved in the marketing of agricultural products such as tea or coffee. The aim of the agricultural sector policy has been to accelerate agricultural growth, increase small-holder productivity and expand rural employment. The domestic markets for all agricultural commodities have been deregulated. All the pieces of legislation are due for repeal or substantial amendments by the end of this year. Already, the co-operatives societies Bill has been published to repeal the existing Act with the object of democratising and professionalising the management of co-operative societies by making them autonomous, member controlled and self-reliant. The private sector is already playing the key role in production, marketing and processing.

The Ministry of Agriculture, Livestock Development and Marketing is being restructured so as to effectively facilitate private sector initiatives. It must be put on record that all these laws which are being repealed served a useful purpose and were instrumental in making Kenya, a leading agricultural country in Africa. In fact as far as small scale farmers are concerned Kenya has been and continues to be a model country in Africa.

8. Preliminary Finding

You mention in preliminary finding no. 3 that the Attorney General made an incautious remark that the President is above law. What the Attorney General said in and out of Parliament was that no criminal or civil proceedings can be instituted against the President whilst he is in office. The Attorney General was merely reflecting S. 14 of the Constitution. It appears to be the same position in the USA where the court ruled that the President cannot be prosecuted or sued on allegations of sexual molestation whilst he is in office.

9. The Registration of Political Parties Bill

The Bill was not designed to enable the government to spy upon opposition parties as you allege. The Bill which took two years to draft by the task force drew heavily upon similar legislation in Ghana, Tanzania, Seychelles, South Africa etc., which had been legislated in the countries as they moved from a one party State to a multiparty State. One therefore wonders why it should have drawn an outcry in Kenya and not in those other countries which have been put forward as models of transition from one party to multiparty States.

The Bill had many positive features in it. It provided for a virtually automatic provisional registration on application. It prohibited political parties formed on ethnic, age, tribal, racial, sexual, regional, professional or religious basis. Africa has been bedevilled by politics based on tribal or ethnic basis and a way must be found of dealing with it.

With a few amendments to the Bill such as clearly providing for the right to a judicial challenge, the Bill is good and does not violate the Rule of Law. In fact had the Bill been enacted, it is likely that the problem of the registration of political parties which is mentioned in the draft would not have arisen.

10. Press Bills

It is mentioned at page 17 [of] the draft that the Attorney General published the press Bills. This is not true. The Attorney General did not publish the Bills. The said Bills had neither been considered by the Attorney General nor by cabinet. They were initial preliminary draft Bills which had still to undergo consultations with all relevant parties and subjected to consideration by the task force on press law before being considered by cabinet for publication. This clarification was made by the Attorney General at the media workshop attended by over 150 journalists both local and foreign on 6 February 1996.

Please find enclosed a copy of the speech marked "B". The task force is now considering the press. The task force appointed by the Attorney General is mainly composed of members of the media industry including editors-in-chief of the three dailies, the economic review magazine and the Secretary of the Kenya Union of Journalists.

11. Constitutional and Legal Reform

- (A) It has been decided that in view of the general election due to be held this year, a constitutional review exercise will be done after the general election. For a meaningful and proper constitutional review process to take place, the populace of Kenya must be involved in that exercise - they must fully and effectively participate in that exercise. It cannot be assumed that only leaders, be they political, Church or professional know what is best for Kenya.

A constitutional review exercise can itself be a divisive exercise and generate a lot of emotion even in the best of times. An atmosphere generated by general election campaign is not conducive for holding sober and rational discussions on the Constitution.

There are a number of specific suggestions you have made on constitutional reform or amendments which are contentious in Kenya and which are best left for Kenyans themselves to decide during the constitutional review exercise.

(B) Legal Reform

At page 20 of the draft, you state that in your discussions with the Attorney General, we formed the impression that the most critical pieces of legislation were not being addressed. This is clearly wrong. The task force on public order and security legislation is clearly mandated to: review the Public Order Act (Cap 56); the Preservation of Public Security Act (Cap 57) the Societies Act (CAP 108) and the Chiefs Authority Act. All these are critical legislation.

In launching the task force, the Attorney General made it clear that the detention laws have to be repealed.

The task force drafted the peaceful assemblies bill to replace the Public Order Act which is still under consideration by the cabinet in spite of what is stated in the press cutting marked "C" attached.

It should be put on record that the President has not exercised detention powers since 1990 even during the period when Kenya went through the worst crisis since independence e.g. Tribal clashes.

The task force on penal laws and procedures is mandated to make recommendations on the reform of the penal code and criminal procedure code.

12. Electoral Reform

- (A) You have touched at length on the issue of identity cards. The slow start of people applying for the new ID cards in some areas is attributable to the fact that when the exercise started, some opposition leaders called for the boycott. However, they thereafter changed their mind and urged people to register. Consequently apart from a few administrative problems, the exercise has gone on smoothly.

The Attorney General has clarified in Parliament that both the old and the new IDs can be used for the purpose of registering voters.

- (B) The political party structures in Kenya were never linked, as in some other countries with governmental structures.

13. The Judiciary

- (A) You have complained of the slowness of the judicial process.

This is a problem in nearly all the countries and Kenya is no exception. The task force on penal laws and procedures is considering how the criminal procedures can be expedited with due regard to the rights of the accused person. The Chief Justice has appointed a Committee on which the Attorney General's office and the Law Society of Kenya are represented to make recommendations on expeditious disposal of civil cases. It is also proposed to increase the number of High Court Judges by 20 and the Court of Appeal Judges by seven. When the Constitution is reviewed after general elections, the setting up of the Supreme Court will be considered. See also press cutting marked "D".

- (B) The issue of corruption is being seriously addressed and already a number of Magistrates have been charged with corruption before the Courts.
- (C) Discussions are under way with the donor community to computerise the judiciary and the Attorney General's office.
- (D) As a deliberate policy since 1992, Kenya has succeeded in not having contract judges or expatriate judges. Since 1991, 15 judges have been appointed of whom seven were from the private sector. This again has been as a matter of policy.
- (E) The principle of financial independence for the judiciary and the delinking of the judiciary from the civil service in respect of the terms and conditions of service has been achieved (See Gazette notice N. 3801 of 1995 attached).

14. The General Human Rights Situation

- (A) The case involving persons who were arraigned in court for assaulting Leakey is being heard. The prosecution has not been unconscionably slow. In fact the time it has taken to be heard compares favourably with other criminal cases.

- (B) The Attorney General has taken the initiative to have a seminar on how a legal aid scheme can be set up and implemented in Kenya. The co-sponsors of the workshop are: Kituo Cha Sheria (Legal Aid Centre); The Public Law Institute; International Commission of Jurists (Kenya Chapter) and the Law Society of Kenya. The seminar will be held before the end of the year.
- (C) On 31 May 1994, the Attorney General decided to terminate all sedition case[s] and other cases involving political leaders in the public interest and with a view of restoring balance in the administration of justice system. The Attorney General has also instructed the Commissioner of police that they should not charge any leader, be they political, church, professional etc., before his office has had the opportunity to peruse the investigation file.

(D) *Prison Conditions*

The government has been candid in its admission of the poor state of our prison conditions. The steps that have been taken to reduce the prison population include the recent termination by the Attorney General of over 5,000 petty cases which were taking a long time to be heard; the exercise by the President of his prerogative of mercy resulting in the release of thousands of prisoners at least once a year; increasing prison facilities; the setting up of the interim committee on community service orders by the Attorney General which will shortly be recommending a Bill to regulate community service orders as a regular method of penal punishment particularly misdemeanours. The government has taken a lead since 1992 to interest the donor community to assist it to improve the living conditions of prisons. The government has the intention but lacks the means and resources to expeditiously improve prison conditions.

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