

## ABSTRACT

The passing of the Constitution of Kenya of 2010 and its promulgation on August 27, 2010, heralds

the deep desire of Kenyans, as individuals and communities, to live in a society that respects and protects their liberties and livelihoods without discrimination.<sup>1</sup> With respect to transitional justice,

it seeks to heal society, facilitate exit from authoritarianism, and establish a just society based on the rule of law.

The new Constitution establishes rules, values, and principles that if implemented will facilitate the

realization of equality and inclusive citizenship. It promises to end the political manipulation of perceptions

of marginalization and exclusion that has contributed to interethnic strife in Kenya. In this respect, the new Constitution seeks to address the root causes of interethnic conflicts, by:

- establishing national values and principles of governance that seek to diffuse ethnic tensions often fueled by perceptions of marginalization and exclusion;

- reforming the electoral system, which has been used as an instrument of inclusion and exclusion

in sharing of national resources, with a view to ensuring that the voices of all segments of society are represented equitably in government and making elections less fractious;

- creating devolution mechanisms that seek to enhance fairness in the sharing national resources; and

- establishing mechanisms to ensure fairness in land administration and to address historical land injustices that have often reinforced perceptions of marginalization and exclusion and triggered ethnic conflicts, especially during elections.

Further, the new Constitution seeks to facilitate government accountability, by seeking to circumscribe

the exercise of power in the three branches of government in general, and the security agencies in particular. In doing so, the new Constitution promises to prevent future violation of human rights

and the commission of economic crimes.

Critically, however, the new Constitution fails to establish the principles that would provide much needed

direction in terms of how the country should address past human rights violations, including the post-election violence of 2007-'08 and provide redress for the victims of such violations.

Since

Kenya does not have a coherent policy on addressing the past, the new Constitution should have established timelines to ensure that prosecutions for post-election crimes take place within the shortest

time possible to preclude the possibilities that the evidence required would be destroyed or lost.

In this regard, the new Constitution should have mandated the government to establish the Special

Tribunal envisaged by the Commission of Inquiry into Post-Election Violence (CIPEV). In addition,

the new Constitution should have established principles for giving redress to victims of past human rights violations and economic crimes.

1 The 2010 Constitution replaces the first Constitution of Kenya, which came into force in 1963. The draft constitution was subjected to a referendum on August 4, 2010. It was promulgated at a ceremony in Nairobi on August 27, 2010

8 [www.ictj.org](http://www.ictj.org)

International Center Institutional Reform in the New Constitution of Kenya for Transitional Justice

The new Constitution faces several challenges that are likely to confront its implementation. For example, some of the individuals suspected of perpetrating past human rights violations and economic

crime continue to hold powerful positions in government. In addition, the Constitution will be implemented in a fairly polarized political environment, in which the positions of the antagonists

will be defined by a desire to either capture or retain power in the new constitutional order. It can therefore be expected that proponents of the status quo will constitute a formidable obstacle to the

implementation of the new Constitution. In this endeavor, they are likely to be aided by the statutory

order, which invariably gives the president, ministers, and public officers wide-ranging powers and

discretion in execution. And since much of the government's power resides in the statutory order,

it can be expected that the proponents of the status quo will want to retain the bulk of such power.

Therefore Kenya's human rights organizations should participate in and monitor the processes of interpreting and implementing the new Constitution to ensure that not only existing and proposed statutory laws, but also the regulations, codes of conduct, and practices of governmental institutions

adhere to the values and principles of this new Constitution.