

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

//
THE ROLE OF INTERNATIONAL NON-GOVERNMENTAL
ORGANISATIONS IN THE PROMOTION OF THE RULE OF
LAW IN KENYA //

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DECLARATION

I declare that this project is my original work and that it has never been presented in any other university.



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Date: 1/11/2012

This project was presented for evaluation with my approval as University supervisor.



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DEDICATION

I dedicate this work to God, who gave me the strength to accomplish this great academic journey, Professor Christian Rochmman, for his technical advice, and to my children, (Hobbes Shagary-Kimangou, Fayette Kimangou- Biguet, Hellothas Kimangou-Biguet), the gift that God gave me.

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ABSTRACT

The study examines the contributions made by International Non-Governmental Organizations (INGOs) in the promotion of the rule of law in Kenya and it focuses on four organizations namely, Amnesty International, International Commission of Justice, Konrad Adenauer Stiftung and the National Democratic Institute. A descriptive research design was used and stratified random sampling was used using the proportionate allocation method. The researcher has reviewed the relevant literature on the subject of the four International Non-Governmental Organizations their role on the promotion of the rule of law and the strategies they have used. The researcher will critique the past studies on the rule of law and identified gaps in the literature for possible future research. Structured questionnaires were used to collect information, and the data collected was interpreted and critically analyzed.

The study draws its theoretical framework from the concept of transnational theory proposed by Nye and Keohane as a guide to its analysis. Relations between states, international organizations and non-governmental organizations have changed and this has put into question the usual theories in International Relations. A transnational relation is the interaction between a state and at least one actor who is not an agent of the state. In this study, the nature of interaction is transnational for it involves a state, Kenya, and non-state actors like the ICJ, Amnesty International, KAS and NDI

The study has established that contributions have been made under the following thematic areas: Legal reforms (judicial reforms, electoral reforms, police reforms); human rights, access to justice, transparency and accountability, increasing citizen empowerment, democracy and good governance, fight against impunity and devolution. All these thematic areas are interlinked for they are dependent on each other and are all covered in the constitution.

The study recommends that the government collaborates more with the INGOs by putting in place measures that ensure that the environment is conducive for the INGOs to carry out their mandates in the country and to speedily implement the propositions made by task forces on the various reforms in the country.

ABBREVIATIONS

ACT	Action Change Transform
AI	Amnesty International
CIC	Commission for the Implementation of the Constitution
CDU	Christian Democratic Union of Germany
CJPC	Catholic Justice and Peace Commission
GIZ	Gesellschaft Für Internationale Zusammenarbeit
ICJ-K	International Commission of Jurists -Kenya
KAS	Konrad Adenauer Stiftung
NDI	National Democratic Institute
UNDP	United Nations Development Program
USAID	United States Aid
UKAID	United Kingdom Aid

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CHAPTER ONE:

INTRODUCTION OF THE STUDY

1.0 Introduction

This study examines the contributions of International Non-Governmental Organizations (INGOs) in the promotion of the rule of law in Kenya with a special focus on four organizations; International Commission of Jurists (ICJ), Amnesty International (AI), Konrad Adenauer Stiftung (KAS) and the National Democratic Institute (NDI). The study will mention the interventions of these international non-governmental organizations since their establishment in the country and will focus on their interventions between 2002 and 2010. 2002 marks the beginning of the democratic era in Kenya, attracting the attention and aid of international organizations that accompanied and supported it until it held a referendum and subsequently adopted a new constitution.

The study holds that various International Non-Governmental Organizations have been instrumental in advancing and supporting the rule of law. According to Tamanaha. B. (2004) there appears to be a widespread agreement traversing all fault lines, on one point: that the rule of law is good for everyone.¹ He also adds that among western states this belief is orthodoxy. It has been listed in the 'Declaration of Democratic Values' issued by the seven heads of state of the major industrial democracies who say that they believe in a rule of law which respects and protects without fear or favour the rights and liberties of every citizen and provides a setting in which the human spirit can develop in freedom and diversity. There is a need to separate the executive, legislature and the judiciary in other words the powers of the institutions of the republic for the rule of law to be achieved. Most importantly is that the judiciary should be

¹ Tamanaha, B. (2004) On The Rule Of Law. Cambridge. Cambridge University Press P.1

independent with no external interference. The rule of law advocates for the primacy of law and equality before the law so as to guarantee fundamental freedoms in the access to all levels of power without discrimination. In spite of all these requirements for the existence of a rule of law, there has been quite a number of confusing range of conflicts, some nationalistic, some political and some ethnic in nature. International Non-Governmental Organizations step in during such cases and their presence is necessary in this period when the world is globalized. Most INGOs are fully committed to the protection of human rights and human dignity, the promotion of good governance, democratization, and decentralization, and therefore by extension, to the advancement of the rule of law. In addition, INGOs aid in peace building and promotion of justice.

This study shall primarily focus on four INGOs, Amnesty International, International Commission of Jurists (ICJ), Konrad Adenauer Stiftung (KAS) and The National Democratic Institute (NDI), and their role in promoting the rule of law in Kenya. Amnesty International works for the release of people who have been arrested for their convictions, due to the colour of their skin, their ethnic origin or their faith and this is so long as they did not use force or exhort others to resort to violence. The ICJ, a non-governmental, non-partisan, non-profit making, member organization registered in Kenya, is dedicated to the legal protection of human rights and has been in the country since 1959, the year of its establishment. The KAS Foundation was founded in 1955 but it was not until 1974 that it began its operations. In 2008, it became active in the execution of its objectives such as the protection of human rights, supporting the development of stable and democratic political parties in the country, decentralization and delegation of power to lower levels and dialogue and capacity building for young leaders for the development of the country. The National Democratic Institute is a non-profit, non-partisan

organization working to support and strengthen democratic institutions worldwide through citizen participation, openness and accountability in government.

1.1 Statement of the Research Problem

The late 1990s and the beginning of the 21st century, have been characterized by democratization in the entire world, especially in Africa and particularly in Kenya where there were concessional reforms. The wind of democratization swept through African countries, and brought constitutional, judicial and electoral reforms. It also brought with it the campaigning for the freedom of expression, gender equality and the respect for human rights. Following all these developments, INGOs got concerned and stepped in to support these developing countries to realize their reforms objectives and good governance.

Since independence in 1963, during Kenyatta's regime, Kenya witnessed cases of gross human rights abuses and corruption that saw the collapse of a once promising economy. After Kenyatta's death in 1978, Moi took over and his regime was not any different for it saw the enforcement of repressive laws, detention without trial and ethnicity. In 1991, due to pressure from within and without, Moi repealed Section 2A of the constitution that saw the re-introduction of multi-partism and subsequently the agitation for reforms. Moi left power in 2002 at the end of his two terms and Kibaki was elected Kenya's third president under the NARC coalition. Disputes erupted during the drafting of the constitution that was later defeated when it was put to a public referendum. In 2007, Kibaki was re-elected but there was a post election crisis that led to the death and the displacement of many people. A new constitution was approved on August 4th 2010 following a focus on constitutional, electoral, land and institutional reforms. It is in this light that this study examines the role of these four INGOS are playing in promoting the rule of law in Kenya and how they have impacted on the country.

1.2 Objectives of the Study

The objectives of this study are to:

- i. Trace the successfulness of INGOs in their efforts to promote the rule of law in Kenya
- ii. Identify Kenya's response to the work of the four selected INGOs to promote the rule of law.
- iii. Examine the different strategies employed by INGOs in their effort to promote the rule of law.

1.3 Literature Review

The study reviews literature to establish emerging themes in the general promotion of the rule of law by INGOs. This section, will examine what has already been written about the role of INGOs and their efforts in the promotion of the rule of law. Culture is increasingly global and so there is a general feeling that the rule of law is a universal good for it can be said to be the highest law of mankind. It has variously been described as the highest intellectual achievement of mankind since it allows man, the most dangerous predator on earth, to live comfortably in peace and enables him to cooperate with others in matters of mutual interest and progress. Analysis of the contemporary events in political circles brings back to life the words of Plato when he asserted that "...if law is the master of the government and the government its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state."²

States, especially non-democracies, are fond of using political violence in their pursuit for absolute power leading to what Haynes (2009), terms as a creation of the necessary conditions for 'homicide,' that is, "the murder of any person or people by a government, including

² Hall R. (2004). Plato. London: Routledge. P.101

genocide, and mass murder.”³ Hence, it is the function of the rule of law to replace or at least control the powers of the rulers associated with arbitrary rule and the conflict that emerges as a result of the competition for power. A lot of work has been done on the disregard of the rule of law in Africa and the role of INGOs in promoting the rule of law.

1.3.1 Disregard of the Rule of Law in Africa

Disregard for the rule of law in Africa has seemingly become more of a norm than an exception. Scholars have, since time immemorial, debated upon the position of law in the society. While others have argued that the law ought to be *King*, others have insisted that the *King* cannot be bound by law. It seems that, in practice, the African way of governance has been characterized by the latter. Thomas Hobbes, the English philosopher, asserted that it was illogical to suggest that a sovereign body can be bound by law. According to him, law is the command of the sovereign. He argues that the creator of law cannot be limited by the law for the plain reason that the law may be altered at the lawmaker’s will. Jean Hampton as cited by Tamanaha. B. (2004) beautifully conveys how Hobbes argues against the rule of law:

“A rule of law is inherently powerless; it only takes on life if it is interpreted, applied, and enforced by individuals. That set of human beings that has final say over what the rules are, how they should be applied, and how they should be enforced has ultimate control over what these rules actually are. So human beings control the rules and not vice versa.”⁴

Concerning this state of affairs, examples can be drawn from all over Africa. The Heads of African states have always been known to have the ultimate say on almost all issues concerning their states. Their word is law and they have always manipulated the law to satisfy their own desires. They have variously, as in the case of Kenya’s immediate former president, referred to them as being ‘above the law.’ The executive has also been known to command more power over the other two arms of government. The Democratic Republic of Congo’s (DRC) new

³ Haynes, J. (2005). *Comparative Politics in a Globalizing World*. Cambridge: Polity Press. P. 225

⁴ Tamanaha, B. (2004) *On The Rule Of Law*. Cambridge. Cambridge University Press P.1

constitution, for example, asserts the principle of separation of powers and the independence of the courts. This principle, is however, complicated by a legacy of governmental interference. The concept of separation of powers is in fact a rather novel one in the DRC. While in the early years of Mobutu's regime, judicial independence was formally recognized, the growing power of the executive resulted in the de facto subordination of the judiciary, as political and military factors continued to interfere. As one judge noted, 'I render justice, but I render it in conformity with the party.' Siriam, C. (2011) sums this up when he notes that political actor's control nominating, promoting, imposing sanctions against, and dismissing of judges and prosecutors without consulting the appropriate judicial authorities.⁵

While giving other examples from Africa, Siriam (2011 p.334) notes that in Zimbabwe, the situation is no different and that in spite of the guarantee of a separation of powers by the constitution, an analysis of the executive actions over the past 20 years will show that such separation exists in name only⁶. Zimbabwe is an incredibly different dictatorship in so far as the government actually goes through the motions of passing laws (although flawed) and relying on a compromised judiciary to interpret these laws in its favour. So, at first glance, one can believe that there is adherence to the rule of law if one only considers the fact that the government goes through the motions of trying to legalize and legitimize the unlawful and illegitimate. In other words, the rule of the law is non-existent in Zimbabwe and it is a case of human beings controlling the law and not the law controlling the people. On the other hand are scholars who believe in the supremacy of the law and who reaffirm that, the state ought to be governed by the rule of law and not the rule of men. "Aristotle embraced the rule of law because the law represents 'reason free from all passion.' Similarly, John Locke believed that freedom could not

⁵ Siriam, C. (2011). *Peace Building and Rule of Law in Africa: Just Peace?* New York: Routledge. P. 117

⁶ Siriam, C. (2011). *Peace Building and Rule of Law in Africa: Just Peace?* New York: Routledge. P. 334

exist without written law and that a good government should follow certain precepts.”⁷

Magsadt.T. (2009).

In their book on the challenges of globalization, security and governance in Africa, Makinda & Wafula (2008), quote Francis Nyalali, a former Chief justice of Tanzania, who asserted that there was no doubt that the principle of the rule of law is part of the African dream, resulting from the liberation struggle against colonial and racial oppression.⁸ He went on to indicate that it is inherent to the statehood which came into being when the African states became independent. Therefore, despite all these challenges and shortcomings, African states seek to respect the rule of law. While giving the case of Senegal, Makinda & Wafula (2008) write that the rule of law exists but has still to be consolidated in practice. Generally, the judicial system in the country operates correctly though it still has to achieve full effectiveness⁹. The Senegalese constitution of 7 January 2001 recognizes and affirms respect for individual rights, for fundamental freedoms and for the rights of the citizens, as the basis of the society. The main factors which militate against putting the rule of law into practice in Senegal are illiteracy and poverty. A stronger and better structured civil society could contribute more to the establishment of the rule of law. The same applies to the private press, if it could free itself from some constraints. The political authorities could also fight more strongly against corruption and impunity.

Recent events in Kenya indicate that the country is more committed to execution of the rule of law. The government is committed to a wide ranging governance reform programme over the five year plan period that will take into consideration all the lessons learnt from the 2007

⁷ Magsadt, T. (2009). *Understanding Politics*. Belmont: Wadsworth Cengage Learning. P.77

⁸ Makinda, S and Wafula, F. (2008). *The African Union: Challenges of Globalization, Security and Governance*. New York: Routledge. P.63

⁹ Makinda, S and Wafula, F. (2008). *The African Union: Challenges of Globalization, Security and Governance*. New York: Routledge. P.63

post-election crisis. With the launch of Vision 2030, the government seeks to focus on reforms already in the sector. This will entail not only initiating new programmes, but also ensuring respect of the rights of citizens in law enforcement. It will also deal with any emerging governance and security issues during the plan period. The formulation of these strategies, projects and programmes will be guided by the Political Pillar of Vision 2030, which envisions 'a democratic political system that is issue-based, people-centered, result-oriented and accountable to the public. Kenya has learnt a lot from the 2007 post-election crisis. Events that followed the 2007 election and the path that Kenya had pursued in returning to normalcy have demonstrated that, despite the remarkable progress made in governance and the rule of law, a lot still remains to be done. To this effect, the strategy for governance and the rule of law will focus on rebuilding confidence among Kenyans that their access to justice is guaranteed. According to a recent report on poverty reduction strategy, electoral disputes and other types of disputes will need to be resolved through legally-provided channels. Moreover, structures need to be put in place to ensure that Kenyan citizens can in future participate in free, fair, credible and decisive elections.

1.3.2 Role of INGOs in Promoting Rule of Law

A Non-Governmental Organization (NGO) is said to be a non-profit, voluntary citizens' group which seeks to perform a variety of service and humanitarian functions and encourage political participation, monitor and advocate government policies in a country. It is important to note that NGOs serve as early warning mechanisms and help monitor and implement international agreements. They are organized around specific issues such as human rights, democracy, education, environment or health: "the World Bank's definition of NGOs is that they are private organizations that pursue activities to relieve suffering, promote the interests of the

poor, protect the environment, provide basic social service or undertake community development”¹⁰. Devetak, R., Burke, A and J. George (2012) note that the UN’s Economic and Social Council (ECOSOC) defines an INGO as any international organization that is not established by treaty¹¹. Their definition of the term NGO is very broad and encompasses a wide variety of organizations. Divergence is typical for the ways in which NGOs are organized and for the scope and objectives of NGOs. NGOs range from large, long-established organizations such as Red Cross, Oxfam, Amnesty International and Greenpeace to, for instance, small community-based self-help groups in the South and small networks maintaining websites for the support of other NGOs or individuals.

Internationally operating NGOs are increasingly involved in international politics and policy-making. They have become powerful players in the international arena. INGOs have played a central role in developing international law and thus in the promotion of the rule of law. They remain highly influential. Since the latter half of the nineteenth century, the scientific community and environmental groups have mobilized the force of public opinion, and have sought to contribute to the progressive development of international law. According to Sands, P. (2003), at the international level, non-state actors play a formal role in several ways: they identify issues requiring international legal action; they participate as observers in international organizations and in treaty negotiations; and they participate, formally and informally, in the national and international implementation of principles and rules adopted at the regional and global levels¹². Lewis, D and Nazneen, K. (2009) agree that INGOs are best known for

¹⁰ Vedder, A. *NGO Involvement in International Governance and Policy: Sources of Legitimacy*. Netherlands: Martinus Nijhoff Publishers, 2007)

¹¹ Devetak, R. Burke, A and J. George. *An Introduction To International Relations*. (Cambridge: Cambridge University Press, 2012).

¹² Sands, P. *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003).

undertaking one or other of these two main forms of activity: the delivery of basic services to the people in need, and organizing policy advocacy and public campaigns for change¹³.

Lewis, D. (2001) summarizes the different numerous roles played by INGOs into the following broad categories: service delivery, catalysis and partnership¹⁴. The roles are distinct but also closely related to each other. INGOs now feature prominently in efforts to secure social and economic change in favour of marginalized populations by the agencies which make up the international 'aid industry,' in the growing number of public interest group seeking alternative approaches to poverty reduction through better service delivery and through advocacy and campaigning work, and in the self-help efforts of organized local communities to improve their conditions of life. Other scholars have however noted that INGOs are largely not effective in executing their mandate due to some inhibitions. According to Fowler (2000) the contribution by INGOs to social change has proved less durable than is popularly imagined¹⁵. One serious problem is the issue of government funding for INGOs. INGOs resource dependency on a limited set of funds increases the possibility of external influence on their performance. According to Bell, D. (2006) many INGOs accept government funds and the main advantage, is that they can carry out their projects without wasting time and money on fundraising efforts¹⁶. This raises a question regarding their independence. Once they have accepted such funds, they will be obliged, in one way or another, to give in to the demands of their donors. Since he who pays the piper plays the tune. Hence the INGOs may be forced to play to the tune of their donors. In essence, this implies that the well-intentioned original agenda of the INGO may be lost

¹³ Lewis, D & Nazneen, K. *Non-Governmental Organization and Development* (New York: Routledge, 2009)

¹⁴ Lewis, D. *The Management of Non-Governmental Development Organizations* (New York: Routledge, 2001).

¹⁵ Fowler, A. *Civil Society, NGDOs and Social Development: Changing the Rules of the Game*. Occasional Paper No. 1, (UNRISD, Geneva, 2000).

¹⁶ Bell, D. *Beyond Liberal Democracy*. (New Jersey: Princeton University Press, 2006). P. 108

somewhere on the way. It is therefore not a wonder that INGOs have at times been viewed suspiciously as means by which the west can exercise patrimony over African states.

Another hindrance to the INGOs execution of their mandate is corruption. This is because some suspect that civil society organizations are used as instruments by national or local politicians in order to lay their hands on external resources, which usually arrive, by these routes. Disregarding this, how have the four organizations selected for this study promoted the rule of law in Kenya. The NDI for example has projects that target democratic reform while the KAS Foundation is guided by the understanding that democracy and good governance should not only be viewed from a national level, but also the participation of people in political decisions political progress from the grassroots level. Indeed, the foundation is guided by the conviction that human beings are the starting point in the effort to bring about social justice and democratic freedom while promoting sustainable economic activity. It seeks to develop active networks in the political and economic spheres, good governance as well as in society itself by bringing together people who embrace their responsibilities in society. In Kenya, the utmost priority of KAS is the promotion and stabilization of democracy and justice.

1.3.3 The Gap in the literature

First, the study acknowledges that the rule of law is a must-have for peace to reign in the society. It is a basic requirement for justice, freedom, development and good governance to exist in any society. It helps restrain the lawmakers from exalting themselves above the citizens by coming up with rules and regulations that aggrandize them. The relationship between the rule of law and African response to it is still a virgin area fertile for research. Looking into this issue, this study has found out that though the concept of the rule of law is enshrined in most of

African's constitutions, the political leaders and other powerful groups, INGOs included, should put in more effort towards promoting it.

Secondly, an analysis of the literature reveals that not so much has been done on the relationship between the rule of law and INGOs in Kenya. This area can thus be termed as virgin with regard to the need for further exploration. This study shall highlight the different strategies employed by INGOs in their quest to promote and protect the rule of law. Their success or failure shall be evaluated and recommendations given on the best way to go about promoting and protecting the rule of law. Emphasis and focus shall be on the four INGOs and specifically on their work in Kenya.

1.4- Justification of the study

The study seeks to examine how the target INGOs, ICJ, Amnesty International, KAS and NDI participate in setting the pace for peace, social and economic welfare and democratic development in Kenya. It purposes to show what International Non-Governmental Organizations have done in the promotion of the rule of law in the Kenyan society. Their contribution to the development and advancement of the principles of justice, democracy and freedom cannot be taken for granted. The study shall also assess the success and failure of the INGOs in their bid to promote the rule of law in Kenya. In this way, it will act as an eye opener to the policy makers; the INGOs and government of Kenya on the best ways by which they can help improve the efficiency and effectiveness of INGOs in advancing the rule of law in the country. Needless to say, this will be a stepping stone towards improvement of the Kenyan society as a whole since it will facilitate achievement of peace, justice and good governance in the country.

According to Saunders, C. and Le Roy, K. (2004) peace, justice and good governance will be achieved since at the heart of the Rule of Law lies three core principles: First, the policy

must be governed by general rules that are laid down in advance. Secondly, these rules (and no other rules) must be applied and enforced¹⁷. Thirdly, disputes about the rules must be resolved effectively and fairly. Mathews, A. (1986) concur that in addition, adherence to the rule of law will ensure that officials who violate the legal rights of the individual are amenable to criminal prosecution and in appropriate cases, to a civil action for damages¹⁸. In a nutshell, the implementation of the recommendation provided at the end of this study will go a long way in making Kenya a better place to be.

From the literature review, it is evident that scholars have reviewed the definitions and application of the rule of law in different democratic settings. This has shown the local agents who strongly develop and implement the rule of law. However, there is a gap in examining the role of international agents in promoting the rule of law in Kenya. This study seeks to fill this gap by evaluating the contribution of INGOs in promoting the rule of law in Kenya. In addition, the study will contribute towards the debate on the involvement of international actors in 'domestic' issues, emphasizing the need for policy research on the limits of international actors in state matters.

1.5 Theoretical Framework

This study draws its theoretical framework from the concept of transnational theory proposed by Nye and Keohane as a guide to its analysis¹⁹. Relations between states, international organizations and non-governmental have changed and this has put into question the usual theories in International Relations. According to Keohane and Nye, this change has

¹⁷ Saunders, C. and Le Roy, K. *The Rule of Law*. (Sydney: The Federation Press, 2004).

¹⁸ Mathews, A. *Law, Order and Liberty in South Africa* (London: University of California Press. 1972). pp. 45

¹⁹ Joseph S. Nye, Jr. and Robert O. Keohane, "Transnational Relations and World Politics: An Introduction," *International Organization*, Vol. 25, Issue 3, 1971). pp. 329

been brought by increased interaction between countries by people who do not represent the state. According to Nye and Keohane (1971) among others (Risse-Kappen, 1995), a transnational relation is the interaction between a state and at least one actor who is not agent of the state²⁰. They term it transnational as opposed to international relations, which is the interaction between two state actors. In this study, the nature of interaction is transnational for it involves a state, Kenya, and non-state actors, ICJ, Amnesty International, KAS and NDI. In transnational relations, it is not states but rather individuals or groups of individuals that have an impact on national or international policy.

Nye and Keohane (1971) stress that the environment of interstate politics, however, does not include only these powerful and well-known forces²¹. They also contend that in essence the complexity of world politics involves many actors beyond states. However, they draw attention to the fact that while proponents of state-centric order are very well aware of the rise of transnational politics, they are inclined to disregard the relevance of global complexity created by transnational actors on the grounds that their direct political importance is small and that their indirect effects enter, along with domestic factors, into the formation of national foreign policies. Della Porta and Tarrow (2004) note that states currently face constraints from within and without as non-state actors have become increasingly sensitive to the events and decisions in other parts of the world²². As much as there is a general agreement by many authors (Young, Walker, Tarrow and Keohane and Nye) that non-state actors can create and operate regimes to impact on policy making, these same authors agree that the state itself remains important and central in national policy. This study examines the impact that the four INGOs has on Kenya while at the

²⁰ *ibid*

²¹ *ibid*

²² Della Porta, Donatello and Tarrow, S « Transnational Processes and Social Activism: An Introduction » Della Porta and Tarrow (eds.) *Transnational Protest and Global Activism*. (Lanham: Rowman and Littlefield, 2004). pp.1-17

same time retaining the central role of Kenya, its reaction whether positive or negative to the strategies put in place by the INGOs.

1.6- Hypotheses

- i. INGOs are instrumental in the promotion of the rule of law in Kenya.
- ii. Kenya's response to the work of the four INGOs contributed to the promotion of the rule of law.
- iii. The success of INGOs in the promotion of the rule of law in Kenya has been greatly influenced by the strategies they employ to achieve this end.

1.7 Research Methodology

1.7.1 Introduction

In this section the researcher presents the tools to be used to collect information and the procedures for collecting, analyzing and presenting the research information. The section covers the research design, the population of study, sampling frame, the sampling and sampling techniques, data collection instruments, data collection methods and procedure as well as the data processing and analysis methods.

1.7.2 Research Design

The research design will be of a descriptive nature, which according to Cooper and Schindler (2008) is a study conducted to find out who, what, where, when or how much. The researcher will attempt to describe such things as possible behaviour, attitudes, values (Mugenda & Mugenda, 1999) and characteristics of a particular individual or of a group (Kothari, 2004). The research attempts to describe the International Non-Governmental Organisations and their mandate in Kenya.

1.7.3 The Population of Study

The population of study will be from four selected International Non-Governmental Organisations namely; Amnesty International, which is located in Nairobi's Westlands area, International Commission of Justice, located in Nairobi's Kileleshwa area, Konrad Adenauer Stiftung (KAS), located in Nairobi's Ngong Road area and National Democratic Institute located in Gigiri; the senior government officials from the Ministry of Justice and Constitution and the Kenya citizens. This will enable the researcher to gather information regarding the consumer satisfaction with the work of INGO.

1.7.4 Sampling Frame

According to Mugenda and Mugenda (1999), to select a representative sample, a researcher must have a sampling frame²³. The following is a listing of the International Non-Governmental organization, the Kenya government ministry and the Kenya citizens from which a representative sample will be selected.

Table 1.7.1 Sampling Frame

ORGANISATION	Population
INGO	4
Ministry of Justice & Constitution	3
Kenya Citizens – Nairobi	
Professionals	500
Occupations	500
Total	1007

²³ Mugenda O.M. & Mugenda A.G. *Research Methods. Quantitative & Qualitative Approaches.* (Nairobi. Acts Press, 1999).

1.7.5 Sampling and Sampling Technique

The researcher will concentrate on the four International Non-Governmental Organizations in Kenya dealing with the rule of law together with Ministry of Justice and Constitution where 100% of the population will be sampled. The researcher will, however, use stratified random sampling design to gather information from the Kenya citizens. This is because the population is stratified into groups of professionals and occupations. For each stratum 30% of the individuals in the group will be selected randomly, which is more than the appropriate size of the accessible population for descriptive studies according to Mugenda and Mugenda (1999)²⁴. This will enable the researcher to achieve the desired representation from the various subgroups of the population and gather sufficient details.

Table 1.7.2 Sampling and Sampling Technique

ORGANISATION	Population	Percentage	Sample
INGO	4	100%	4
Ministry of Justice & Constitution	3	100%	3
Kenya Citizens – Nairobi			
Professionals	500	15%	150
Occupations	500	15%	150
Total	1007		307

The researcher will distribute the questionnaire to the selected organizations and staff personally. This is to save on time and costs.

²⁴ Mugenda O.M. & Mugenda A.G. *Research Methods. Quantitative & Qualitative Approaches*. (Nairobi. Acts Press, 1999).

1.7.6 Data Collection Instruments

The researcher will carry out the study by collecting data from International Non-Governmental Organisations, the Ministry Justice and Constitution and the Kenya Citizens. The research is of a descriptive nature, whose data according to Mugenda and Mugenda (1999), are typically collected through a questionnaire, survey and interview or by observation²⁵.

1.7.6.1 Primary Data

The researcher will concentrate on primary data to be collected by the use of questionnaires. The questionnaires will contain open and close-ended questions to permit a greater depth of response and for economical use in terms of time and money (Mugenda & Mugenda, 1999)²⁶. The open-ended questions are also simpler to formulate and the researcher will structure the questions for easy comprehension. The questionnaires will allow large samples to be used and thus the results can be made more dependable and reliable (Kothari, 2004). The respondents will also have adequate time to give well thought out answers, free from the bias of the interviewer as the answers will be in the respondents' own words.²⁷

1.7.6.2 Secondary Data

The researcher will collect the secondary data in relation to the various organizations by perusing the organizations' published reports and books.

1.7.7 Data Collection Procedure

The self-administered questionnaires will be distributed to the respondents by the researcher. The respondents will be asked to complete the questionnaires themselves as pointed

²⁵ Mugenda O.M. & Mugenda A.G. *Research Methods. Quantitative & Qualitative Approaches*. (Nairobi. Acts Press, 1999).

²⁶ *ibid*

²⁷ Kothari C.R. *Research Methodology. Methods & Techniques*. Revised 2nd Edition. (New Delhi. New Age International (P) Limited Publishers, 2004).

out by Mugenda and Mugenda, (1999). The researcher will collect the completed questionnaires to save time and avoid loss of questionnaires in the post.²⁸

1.7.8 Data Processing and Analysis

All the data collected from the specified sample will be edited and classified using frequency distribution tables. The researcher will then interpret the data and critically analyze in continuous prose.

1.8 Chapter Outline

The study is structured around five chapters.

Chapter One is the proposal which looks into the view of the study, highlights the problem statement, reviews literature on the contentious issues in the subject, provides a justification for the study and presents a theoretical framework which guides the analysis of the study.

Chapter Two presents a discussion on the rule of law in Kenya. First, it will present the definition of the term of the rule of law, its major elements and the constitutional components of the rule of law. We shall also look at the existence of the constitution, the institutions and structures of the government namely the Executive, the Legislature and the Judiciary. To analyze the implementation of the regulation existing in the rule of law, we will look at the state as an entity, and discuss the differences between state and country. We will also look at the three regimes from Kenyatta's (1963-1978), Moi's (1978 – 2002) and Kibaki's regime (2002 – 2010) in the context of the four elements of the rule of law.

²⁸ Mugenda O.M. & Mugenda A.G. *Research Methods. Quantitative & Qualitative Approches.* (Nairobi. Acts Press, 1999).

Chapter Three examines the presence of the four selected international non-governmental organizations and their mandates in Kenya in relation to their projects and participation in the promotion of the rule of law. The chapter will also present the milestones, evaluate the challenges faced by the four INGOs and determines the responses of the INGOs to local resistance against its efforts to promote the rule of law. The chapter highlights the core issues and the extent of the rule of law in Kenya. The researcher will carry out the study by collecting data from International Non-Governmental Organisations, the Ministry Justice and Constitution and the Kenya Citizens. The chapter will also look at the various efforts by the Kenyan government to strengthen the works of institutions of 'good faith' such as INGOs that endeavour to promote the rule of law.

Chapter Four critically analyses the contribution of the four selected INGOs in Kenya and the strategies that they use to promote the rule of law in Kenya.

CHAPTER TWO

THE RULE OF LAW IN KENYA

2.0 Introduction

This chapter presents a discussion on the rule of law in Kenya. First, it will present the definition of the term of the rule of law and its major elements and the constitutional components of the rule of law. We shall also look at the existence of the constitution, the institutions and structures of the government namely the Executive, the Legislature and the Judiciary. To analyze the implementation of the regulation existing in the rule of law, we will look at the state as an entity, and discuss the differences between state and country. We will also look at the three regimes from Kenyatta's (1963-1978), Moi's (1978 – 2002) and Kibaki's regime (2002 – 2010) in the context of the four elements of the rule of law.

2.1 Definition of the Rule of Law

The meaning of the term Rule of law can vary between different nations and legal traditions. It varies from one language to another. Most definitions give the components of the rule of law in the attempt of defining it. The idea that nations ought to be governed by impartial, binding laws is not new. "Aristotle argued that the rule of law is almost always superior to the rule of unrestrained individuals. He based this argument on the concept of fairness, contending that whereas individuals are subject to appetites and passions for physical materials and psychic satisfaction, the rule of law represents 'reasons free from all passion.'²⁹ Therefore a government of laws is superior to one of individuals, even though the laws must be interpreted and enforced by individuals. Magtadt, T. (2009) cites Plato, who on the other hand, asserts that in anything

²⁹ Magtadt, T. *Understanding Politics: Ideas, Institutions and Issue* (Belmont: Cengage Learning, 2009). pp. 108

other than the ideal state, strict adherence to the rule of general law is the best course³⁰. In this two statements, both Aristotle and Plato agree that the rule of law is the principle that no one is exempted from the law, even those who are in a position of power. The rule of law can serve as a safeguard against dictatorship, since fair laws ensure that rulers do not become corrupt.

Thomas Hobbes in his book the *Leviathan* (1651) held the view that power must be representative, based on the consent of the people³¹. He argued that even in the limited senses of government being founded on a rule or set of precepts was logically impossible. For Hobbes, a sovereign must subject himself to a greater power. Montesquieu's *L'esprit des lois*, which was anonymously published in 1748, advocated constitutionalism, the separation of powers, and basic civil liberties³². He argued that the best way to secure liberty and prevent a government from becoming corrupted was to divide the powers of the government among different actors who would check each other.

Jean Jacques Rousseau's *Social Contract* (1762) equally affirms the supremacy of law but in the form of legislation as the expression of the popular will and therefore not subject to any form of limitation. He argued against the idea that monarchs were divinely empowered to legislate. He asserted that it is only the people who have that all-powerful right. In chapter 1 of this book: *Government in General*, Rousseau writes that "the legislative power belongs to the people and can belong to it alone."

The English philosopher, John Locke, whose writings had an influence on Rousseau among others, defended the rule of law on the basis of its close relationship to individual freedom. Locke believed that freedom could not exist without written law and that a good

³⁰ Magtadt, T. *Understanding Politics: Ideas, Institutions and Issue* (Belmont: Cengage Learning, 2009). pp. 108

³¹ Hobbes, T. (Dent 1914) (1651), *Leviathan* ch 29, para. 9.

³² Montesquieu, Baron de, Charles Louis de Secondat (1798) *Spirit of the Laws*, translated by Thomas Nugent Kitchener (Ontario: BatocheBooks, 2001).

government must follow certain precepts. From Locke's concept of higher law, the idea of constitutionalism evolved. Indeed he noted, 'Wherever Law ends, Tyranny begins.' Pangle, T. (1973) writes that Montesquieu seemed to concur with Rousseau when he said that 'Life under law is the only life which is secure and therefore free.'³³ Montesquieu added that 'if men living together in society were all independent or free to do as they wished the result would be a state of war. All men are naturally in competition for the same material goods necessary to live and live comfortably; men free to do as they wish will steal, will kill or dominate one another in order to get goods for themselves and to prevent others from depriving them of these goods.'³⁴ That is why he insists that the only free men are those who are secure and free from those threats; this security is achieved through the creation of a 'state' which regulates the behaviour of men so as to put an end to war and acts that bring war.

For Popper K. (2000) the rule of law is an absolute priority such that if the percentage of the people breaking the general agreement rises above a certain limit, the law itself becomes at risk and may even collapse³⁵. Kuhn T. (1962) says that in the political realm, if one side plays a principled contest and simply assumes that the other will do likewise, this is a recipe for disaster³⁶. Kuhn, who championed the term paradigm shift, argues that dominant paradigm get into increasing trouble when they cannot handle anomalies. He adds that a government ought to be limited including its power to tax and impose tariffs. The concept of rule of law is therefore not a new phenomenon as it has been deliberated upon extensively by scholars since time immemorial. Costa P. and D. Zolo. (2007) notes that this concept has been revived as a political

³³ Pangle, T. *Montesquieu Philosophy of Liberalism: A commentary on the Spirit of the Laws*. (London: The University of Chicago, 1973). pp. 110

³⁴ Montesquieu, Baron de, Charles Louis de Secondat (1798) *Spirit of the Laws*, translated by Thomas Nugent Kitchener(Ontario: BatocheBooks, 2001).

³⁵ Popper, K. *Lesson of the century: With Two Talks on Freedom and the Democratic State*, (New York: Routledge 2000).

³⁶ Kuhn T. *The structure of the scientific revolution* Chicago. University of Chicago Press (1962)

and legal theory that gives pre-eminence to the protection of human rights; moreover, the rights which have been defined by a great number of 19th and 20th century constitutions and international conventions³⁷. These, in particular, are the rights to life, personal security, freedom, private property and contractual autonomy as well as political rights. Mathews, A. (1972) notes that an independent judiciary has been cited as one of the most important institutional requirements of the rule of law³⁸. Almost all studies agree that the requirement of independent courts, if not implicit in the notion of the rule of law, is a necessary practical consequence. Obonyo and Nyamboga (2011) writes that the rule of law establishes a transparent process accessible and equal to all while at the same time ensuring the adherence to principles that both liberate and protect.³⁹

There is a widespread agreement traversing all fault lines, on one point: that the rule of law is good for everyone. Among western states this belief is orthodox. It has been listed in the 'Declaration of Democratic Values' issued by the seven heads of state of the major industrial democracies: 'We believe in a rule of law which respects and protects without fear or favor the rights and liberties of every citizen and provides a setting in which the human spirit can develop in freedom and diversity'⁴⁰. Moreover, the rule of law demands for the separation of powers of the institutions of the republic, judicial independence, equality before the law (which guarantees fundamental freedom to all citizens in the access to all level of power without discrimination), and most certainly, the primacy of law.

In spite of all these developments, there have been many conflicts in the recent past ranging from ethnic clashes to genocides in the recent past; some worse than what was witnessed

³⁷ Costa, P. and D. Zolo, *The Rule of Law* (Alabama: Springer, P, 2007).

³⁸ Mathews, A. *Law, Order and Liberty in South Africa* (London: University of California Press, 1972). pp. 45

³⁹ Obonyo L. and Nyamboga E. (2011). *The Journalist and the Rule of Law*. ISBN No. 9966-958-11-8

⁴⁰ Tamanaha, B. *On The Rule of Law* (Cambridge: Cambridge University Press, 2004). pp. 1

in the Cold War". It is for this reason that International Non-Governmental Organizations are indispensable in this global village period. Most INGOs are fully committed to protection of human rights and human dignity, promotion of good governance, democratization, and decentralization, and therefore by extension, to the advancement of the rule of law. In addition, INGOs aid in peace building and promotion of justice.

American legal scholar Lon Fuller (1977) identified eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law. Fuller stated the following: laws must exist and those laws should be obeyed by all, including government officials; laws must be published; laws must be prospective in nature so that the effect of the law may only take place after the law has been passed⁴¹. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed); laws should be written with reasonable clarity to avoid unfair enforcement; law must avoid contradictions; law must not command the impossible; law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed and official action should be consistent with the declared rule⁴². Standing alone, these eight elements may seem clear and understandable. But they are difficult to implement in the real world because governments are often compelled to prioritize one goal over another to resolve conflicts in a way that reflects society's political choices. For example, making too many laws that are too detailed and specific may make the legal system too rigid. Inflexibility could cause the courts of a country (judiciary) to neglect the human element of each particular case. Additionally, instead of only applying prospectively, some laws are meant to apply retroactively, or to past conduct, because they were

⁴¹ Fuller, L. *The Morality of the Law*, rev. ed. (1977).

⁴² Yu, H. and Guernsey, A. (2003). What is the Rule of Law?

passed with the specific intent of correcting the conduct in question. Fuller recognized these conflicts and suggested that societies should prepare to balance the different objectives listed above.

Multilateral institutions such as the World Bank and many policymakers throughout the world believe the rule of law promotes economic development. Modern economic development often comes with the introduction of a market economy, or an economy based on private enterprise that does not rely on government-planned production. Max Weber, a famous sociologist and economist, has commented that the capitalistic order on which a market economy is based is organized on a rational, law-bound state. The market economy brings buyers and sellers to the market for complex transactions and the international sale of goods. In the age of globalization, players in the market economy can come from many different parts of the world. According to the World Bank, law is important to the market economy because it is the common basis on which parties can make agreements; it provides parties with confidence that disputes can be resolved efficiently and fairly. For this reason, the predictability and order that the rule of law promotes in substantive laws is viewed as the stabilizing force behind much economic development. The rule of law helps set the “rules of the game” in critical areas such as investments, property, and contracts.

It further adds that the rule of law also serves as an important assurance of social rights and government accountability. Governmental restraint is especially critical for many transitioning economies where a previously planned economy is to be transformed into one that is market-based. When the government is no longer the sole owner of land, capital, and labor, the rule of law guarantees that the crucial elements of the economy will be free from arbitrary governmental actions. The rule of law thus assures market participants that the government will

adopt a hands-off approach to investments and production, allowing those participants to fully exercise their rights in relation to land, labor and capital.

2.2 The State as an entity - The difference between state and country

Having given the different definitions of the rule of law, it is necessary to give the difference between a state and a country for there is reference to the use of a constitution and the value of this body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed. Finer (1979) defines the constitution as “codes of rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and officers of government, and define the relationships between them and the public”⁴³. The notions of rule of law focused on the nature of the State, particularly on the role of constitutionalism. Constitutionalism is often associated with the political theories of John Locke that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations. State in this sense is used to refer to a self-governing political entity. In the definitions of the rule of law, reference is made to the State. The

JN’s definition is

“For the UN, the Secretary-General defines the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”⁴⁴

Finer, S E. *Five Constitutions*. (Penguin Books, 1979).

Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies” (2004)

The terms state and country are often used interchangeably but the distinguishing factor is that a country can lack sovereignty (lack independence and autonomy) while in the term State sovereignty must be there a state is independent and self-governing. Kenya is a state for it has its constitution which clearly spells out the notion of sovereignty in Article 4 of the Constitution of Kenya 2010.⁴⁵ Sihanya notes that the neo-liberal definition of the state has been dominant since the collapse of the Berlin Wall in 1989⁴⁶. It is largely captured by the 1933 Montevideo Convention on the Rights and Duties of States, which defines the state in terms of having the following four parameters: a permanent or stable population; defined territory boundaries that can be established or ascertained; an effective government; and capacity to engage in international exchange and relations with other states, for example, to transact trade, incur debts, recognize other countries' passports, protect foreigners within its boundaries.

2.3 The Constitution as a Component of the Rule of Law

The Kenyan constitution which is the supreme law of the republic, binds all state organs at all levels of government and all persons. The constitution, spells out the rights of the citizen in Chapter V, the power of the executive in Chapter II, the composition and duties of parliament in Chapter III and the powers of the judiciary in Chapter IV. Concerning democracy, the constitution states that "the people may exercise their sovereign power either directly or through their democratically elected representatives"⁴⁷ It is this sovereignty that qualifies Kenya as a state. Kenya's definition as a republic in Chapter II, further expounds that it is a republic founded on national values and principles of good governance which include multiparty democracy, participatory governance, transparency and accountability, separation and devolution

⁴⁵ Article 4 of the Constitution of Kenya, 2010

⁴⁶ Sihanya B. (2011). The Presidency and Public Authority in Kenya's new Constitution Order (SID constitutional paper No. 2)

⁴⁷ Art. 1 of The Constitution of Kenya, 2010

of powers, respect for human rights and fundamental freedoms and the rule of law. Of particular interest to this study is Kenya's role in supporting the role of civil society in governance and facilitation of its role in ensuring the accountability of government.⁴⁸

Good governance and accountability play an important role in promoting the rule of law in a country. The four INGOs selected for this study do work in partnership with civil societies in promoting the rule of law and putting the government at check.

2.4 The Existence of the Constitution

The three branches of government - the executive, the legislature and judiciary - each have corresponding functions and should be confined to the exercise of their specific functions and not allowed to encroach upon the functions of other branches. This division of the government into three branches is essential for the establishment and maintenance of political government therefore persons who compose these three branches of government should be kept separate and distinct. Vile (1998) notes that in this way each branch will be a check on the others and no single group will be able to control the machinery of the state.

2.4.1 The Executive

The role of the executive is to implement all the laws made by parliament. The executive consists of the president, the vice-president, prime minister and two deputy prime ministers, ministers and the assistant ministers, who are all members of the national assembly (parliament). The position of prime minister was created in 2008 in a power sharing deal following the post-election crisis but the adopted August 2010 constitution eliminates this role after the next presidential election in 2013. The executive authority is vested in the president who is both the head of state and government, and also a member of parliament. The prime minister is tasked

⁴⁸ Art. 10 of The Constitution of Kenya, 2010

with the responsibility of coordination of the executive functions of government. At the same time, the whole government can, by law, be dismissed from office by a vote of no confidence in parliament⁴⁹. The ministers are appointed by the president and are charged with responsibility over a ministry, over which they are to exercise general direction and control. The president has power to dissolve and pro-long parliament, but he has to summon it into session not later than 12 months from the end of the preceding session, if parliament has been pro-longed, or three months from the end of that session if parliament is dissolved.

2.4.2 The Legislature

The role of the legislature is to make laws. It also decides on national objectives, strategies, functions and services. The legislature consists of the president and the national assembly. The national assembly is currently composed of 224 members, 222 being members of parliament and 2 ex-officio members, the attorney general, and the speaker of the national assembly.⁵⁰ The speaker presides over the meetings of the national assembly. Laws are first introduced to parliament as bills and it is after they have been published and debated upon that it can then transform from a bill to a law. It requires the president's assent for it to become an act of parliament. The date of commencement of the Act is either the date it received the presidential assent, or a date shortly afterwards, or it can be brought into operation by order made by the appropriate minister.

Concerning finances, parliament has control over revenue and expenditure is secured by the establishment of the consolidated fund, into which all revenue of the government must be paid. On its role of putting the other arms of government at check, parliament also acts as a control and critic of the government in the sense that it can pass a vote of no confidence, which

Art.4 of The Constitution of Kenya, 2010
The Constitution of Kenya, 2010 – Chapter 8 – The Legislature

can lead, depending on the decision of the president, either to the dissolution of parliament or the resignation of the government.

2.4.3 The Judiciary

The Judiciary's role is to determine disputes that arise between individuals and those between individuals and the state. Among Kenya's sources of laws are the constitution and the acts of parliament.

2.5 The Rule of Law in Kenya

The constitution of Kenya details the "evolution of the office of the presidency in Kenya since 1963"⁵¹. This includes the Jomo Kenyatta regime (1963–1978) and the politics of power, resource distribution, and the rise of the imperial and populist presidency. The Daniel arap Moi presidency (1978–2002), sought to consolidate the imperial and popular tradition of the Kenyatta era. Mwai Kibaki's presidency in the pre-coalition phase (2002–2007) was largely a continuum of the Kenyatta–Moi administrations⁵². The arrival of colonization in Africa necessitated the presence of legal systems that would help in maintaining order. The colonialists set up systems that were foreign to Africans borrowing from their own European countries disregarding what Joireman (2001) calls the pre-existing mechanisms of conflict resolution as primitive or appropriate for 'natives' only⁵³. Without exception in Africa, colonies adopted the legal system of the European countries at independence. This occurred for two reasons. First, throughout the entire colonial experience, indigenous peoples were forced to live with a particular system, either

⁵¹ Sihanya B. (2011) The Presidency and Public Authority in Kenya's new Constitutional Order (SID constitutional paper No. 2)

⁵² Sihanya B. (2011) The Presidency and Public Authority in Kenya's new Constitutional Order (SID Constitutional Paper No. 2)

⁵³ Sandra Fullerton Joireman: Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy; *The Journal of Modern African Studies*, Vol. 39, No. 4 (Cambridge: Cambridge University Press, Dec., 2001). pp. 571-596

the continental civil codes or British common law. At independence, such experience of a national legal system as existed was of that designed by the continental European powers or the British. Therefore, just as newly independent colonies chose to keep the languages of the colonialists for the carrying out of governmental activities, and hence retaining the legal and other political institutions left behind. The situation was not any different in Kenya.

2.6 The Regimes

2.6.1 Jomo Kenyatta Regime (1963 – 1978)

When Kenya gained independence from British colonial rule in 1963, it introduced its independence constitution in the same year. It resulted from difficult negotiations between the British Colonial Office and Kenyan political leaders between 1960 and 1963 in the Lancaster conferences. The outcome was a constitution with a bill of rights, a multi-party system and a Westminster-style parliamentary government, led by a prime minister whilst the Queen remained formally the head of state. In order to overcome potential conflicts between different ethnic groups within the new state a system of regionalism was chosen. Thus a structure distributing power between the center and regions was implemented. Additionally, a bicameral federal legislature was created: besides a house of representatives there was the Senate as a second chamber in which the regions were represented. Therefore it produced a system of separation of powers on the vertical and on the horizontal level.

However, in the years following independence, Kenya failed to establish democracy and the rule of law based on this Constitution. The system of checks and balances provided for by the Independence Constitution was undermined through numerous reforms. The powers of the president were enormous and the president could amend the constitution at will to suit his interests. For example, Kenyatta labeled various members of the opposition as 'destructive

elements', and had them arrested and imprisoned for alleged subversion. He also banned independents from seeking election to the national assembly in 1968 by amending section 40(d) of the Constitution, which required every candidate to be nominated in a "manner prescribed by or under an Act of Parliament by a political party".

The Kenyan state had progressively decayed since independence in 1964. Vices inherited from the colonial masters were continued as neocolonialism emerged characterized by cases of unpleasant human rights abuses, and the greediness of leaders that heavily contributed to the disintegration of a once promising economy. The Kenyatta government had a dubious record in regards to human rights. The police were notorious for their brutality, and prison conditions were almost intolerable as notes Martin (1977). He further noted that, the regime compromised the prosecution and the judiciary. Although bail law was essentially English (only denied for good reason, and usually granted), the actual practice was very different in Kenya. Magistrates rarely granted bail and people were remanded in custody for extremely long periods - three to six months was not unusual - in violation of Article 49 of the Kenyan Constitution which stated that an accused needs to be brought to trial in a reasonable time or else released. In addition, the right to appeal on denial of bail was always crushed because the appellate judges sided with government. Basically, if the prosecution strongly opposed bail the court knew where the order had come from. This clearly showed a case of the judiciary being interfered with by the government.

Through the first constitutional amendment in 1964, the office of the president was created making him become both head of state and head of government, while the function of the prime minister was abolished. In the following years, the president gradually became more and more powerful. Secondly, from the first government on, there was never serious political will to

implement the system of regional power. Thus constitutional reform was used to dismantle the regional features of the system of government. Soon, the exclusive legislative competences of the regions were taken over by the central parliament. Later, in order to strengthen central power, the Senate, which represented the regions, was merged with the second parliamentary chamber into one legislature, the national assembly.

The KANU state entrenched autocracy and used its hegemony to usurp control over national resources. Mutua M. (2009) writes that this regime zealously enforced repressive laws, fanned traditional rivalries among different ethnic communities, and undermined constitutional guarantees of the citizenry with impunity⁵⁴. The rule of law in Kenya has thus not been upheld for a long time. It has always been a case of the *king* being the law and not the law being the *king*. For years, the English law, inherited from the colonial master, was applied without consideration of its suitability to the Kenyan conditions. Arthur (1989) argues that this is not because these systems were necessarily better than traditional African legal systems, but rather because there was a lock-in that occurred, a particular path that prevailed because of the earlier experience with a specific set of institutions⁵⁵. During the colonial era, Africans had few civil liberties. The most notorious denial of basic rights occurred during the Mau Mau uprising, when many Kenyans were imprisoned, including the future President, Jomo Kenyatta, under the Emergency Powers Act (predecessor to the Preservation of Public Security Act). This was used to confound political opposition because under its provisions the government could detain anyone for long periods without a trial. In drafting their constitution for an independent state, leading Kenyans professed to want the British government to provide civil liberties for all

⁵⁴ Mutua, M. *Human Rights NGOs in East Africa: Political and Normative Tensions*. (Philadelphia: University of Pennsylvania Press, 2009). pp. 220

⁵⁵ Arthur, W. B. 'Competing technologies, increasing returns and lock-in by historical events', *The Economic Journal* 9, 9: 1 (1989) pp. 16-31.

Kenyan. Help was sought from several foreign legal experts, including Thurgood Marshall, who later became a member of the United States supreme court. It is therefore somewhat ironic that Section 85 of the Repeal Constitution recognizes the Preservation of Public Security Act, and that both Kenyatta and his successor, Daniel arap Moi, retained and used this remnant of colonial rule. Therefore, the rule of law in Kenya during the colonial period was meant to put the Britons in power and ensure the Africans submit and serve them.

2.6.2 Daniel Arap Moi's Regime, 1978-2002

After Kenyatta's death in 1978, Moi took over and tried to put in place policies that favoured Rift Valley's disadvantaged groups.⁵⁶ Initially these policies were well received but later led to the failed 1982 *coup d'état* that saw Moi's regime introduce repressive laws. In reaction to the attempted *coup d'état*, Moi clamped down on dissent and developed a distinct personality cult by establishing himself as the 'big man'. Sedition charges were brought for shouting abusive words about the president, and one Kenyan who removed his framed photograph from a wall was charged with 'breach of peace'. Moi's portrait was found in all offices and on the national currency, and schools, streets, and public buildings were named after him. Badges and portrait pins were worn by leading officials, schools sung his praise, and reports of his daily activities began and dominated the news broadcasts on radio and television. It is under the government of Kenya's second President Daniel Arap Moi in the 1980s, that the country was formally transformed into a single party state.

A constitutional provision was added which prohibited the establishment of new political parties. The rule of law was basically in the hands of the powerful president who could sack the vice president and any minister based on his own political interests. Moi amended the

⁵⁶ Sihanya B.(2011) The Presidency and Public Authority in Kenya's Constitutional Order(SID Constitutional Paper No. 2)

constitution in May 1982, after four years in office, when he reacted quickly to plans to create an opposition party by amending section 2A of the Constitution to make Kenya into a *de jure* one-party state. Since then, at least until late 1991, almost all political opposition was removed, including members of KANU who challenged the government. Opposition from within the ruling party became extremely difficult after 1987, when KANU changed its procedures in choosing members of Parliament by abolishing the secret ballot and introducing acclamation, voting by show of hands.⁵⁷

During this time, the Kenyan high court judge upheld the ruling party's actions on one occasion by saying that it did not agree that any statute, rule or regulation which ousts or tends to oust the jurisdiction of the high court is inconsistent with the constitution and void. The court had also decided that it had no jurisdiction to entertain human rights violations in the name of parliamentary sovereignty, despite the fact that section 84(2) of the Constitution creates additional jurisdiction over and above that conferred by section 60. The Court had failed to realize that there were limits to parliamentary sovereignty, and that enactments whose effect would be to destroy the democratic foundations of the state could not be applied by the courts as law. In the early 1990s, there were increasing demands for a return to a multi-party system⁵⁸. Thus, in 1991 the provision prohibiting the creation of political parties was abolished. For most African countries, this is the period that was characterized by the agitation for reforms for example, Benin in 1990 and Congo-Brazzaville in 1991 with the organization of national conferences as democratic forums which saw the birth of multi-partism. However, in Kenya, this period was characterized by a movement which announced the coming of democracy⁵⁹. Although the international community had been quiet concerning Moi's repressive leadership in

⁷ Mutua M. "Human rights and state despotism in Kenya: Institutional problems," (Africa Today 50, 1994) pp.41

⁸ Mutua M. "Human rights and state despotism in Kenya: Institutional problems," (Africa Today 50, 1994) pp.41

⁹ Researcher's opinion

the 1990s, it became critically concerned with the corruption and violation of human rights that reigned in the country. International donors suspended a \$ 250 million aid to Kenya in 1991 forcing president Moi in December 1991, at a KANU delegates meeting at Kasarani Stadium, to announce the repealing of Section 2A of the constitution, thereby making Kenya a multi-party state. The change enabled the introduction of term limits to the presidency. Under this pressure, Moi's regime initiated a formal constitutional review process.

In 2000, a Commission for Constitutional Reform of Kenya was set up by President Moi when Prof Yash Pal Ghai was installed as its chairman to spearhead Kenya's first major constitutional reform. The constitutional reform process that began in 2000 led to the adoption of several competing drafts, and a deadlock between government and opposition, until 2008.

Moi's regime saw the rule of law as the president's word. The constitution could be overrun by the president's speech; those close to the president could do whatever they want even if it involves violating human rights.

2.6.3 Mwai Kibaki's Regime 2002-2012

Kibaki took over power after an election in 2002 that was termed peaceful after Moi's two terms came to an end. Kibaki's coming to power in 2002, marked the beginning of the era of the real democracy with the development of many reforms for example, constitutional reforms which began with the Bomas draft. During this era of democracy, there was the freedom of press and the independent functioning of the judiciary. In 2004, the Bomas draft (named after the location of the constitutional reform conference that adopted it) - proposed transferring most of the powers of the office of the president elected by the people to the prime minister that would be elected by parliament. In addition, there would have been checks on executive appointments. The prime minister would nominate members of parliament to become cabinet ministers; the

president would then appoint them. All appointments would require up and down votes by a members of the senate⁶⁰. The 2005 Wako draft (named after the Attorney General) - put forward unilaterally by the government in place of the Bomas draft that it had rejected. A modified version of the 1969 constitution but got rid of 25% requirement in general elections that requires the winner in the presidential election to have 25% in at least five provinces. The winner would also have to get more than 50% of the vote, else an instant re-run would occur. A constitutional referendum held in 2005 defeated the proposed constitution supported by the government. Post-2005 minimal constitution reform option - proposed by Prof. Yash Pal Ghai after the failed referendum suggested that for political and practical reasons, the best way to achieve constitutional change would be to do it in small phases as opposed to immediate and complete overhaul of the current system⁶¹.

In 2007, parliamentary and presidential elections took place. The result of the elections was disputed and culminated in severe violence between the ethnic groups. To bring about peace the presidential candidate, Mr. Kibaki, and the then opposition leader, Mr. Odinga, concluded a power-sharing agreement in February 2008, the so called National Accord and Reconciliation Act. According to this peace accord, president Kibaki stayed in power. In return, the opposition leader, Mr. Odinga, became prime minister, a post newly created for the purpose of sharing power. Bearing in mind the recent dramatic events within the country, the topic of constitutional reform became part of the Accord, stipulating an obligation to begin drafting a fundamentally new document. In February 2008 an independent committee of experts started work on the draft constitution, which was finally put to a referendum on the 4th of August 2010. The pre-

⁶⁰ Prof. Michelo Hansungule. *Kenya's Unsteady March Towards the Lane of Constitution*. The Univeristy of Nairobi Law Journal. P.41

⁶¹ Prof. Michelo Hansungule. *Kenya's Unsteady March Towards the Lane of Constitution*. The Univeristy of Nairobi Law Journal. P.41

referendum period was accompanied by a huge public debate. Amongst others the question of land reform as part of the new constitution was particularly controversial. Finally 67 per cent of voters endorsed the new Constitution on a turnout of 72 per cent in a peaceful process⁶².

Subsequently, on the 27th of August, President Kibaki signed the document in a public ceremony attended by thousands of Kenyans and several African leaders. Amongst Kenyans, the promulgation of the constitution resulted in an atmosphere of great celebration. Kenyans are full of hope and optimism that the constitution is a starting point for a new era. Newspapers commented on the event with exclamations such as “a historic day for Kenya” or “a nation is reborn”. The country, however, still struggles from a huge variety of problems including an arbitrary judicial system, corruption, nepotism and ethnic rivalries which have led to unjust distribution of land and resources. Thus many Kenyans hope that the new Constitution will help to overcome these difficulties. Unlike the new constitution, the old constitution says little about the principles of government. Section 1A (which brought an end to one party rule) says that Kenya is a multi-party democracy. But it gives no indication of the implications of democracy for the purposes of the constitution: there is no mention of the separation of powers, checks and balances, the representation of the people or principles of free and fair elections, or the responsibilities and accountability of the state. The new constitution of 2010 has changed Kenya’s institutions and caused a scientific revolution in treaty practice that is concerning the shift from the old dualist practice to monism. It has given a significance face for Kenya’s internal and external legal relations. A treaty is an express agreement under international law entered into

⁶² Kenya Judicial Independence, Corruption and Reform (2005)

by actors of international law, namely sovereign states and international organizations. It is necessary that we study the new constitution and its historical development⁶³.

A constitution is a set of fundamental principles or established precedents according to which a state or other organization is governed. In other words it is the supreme law of the land. At independence, the *majimbo* constitution Kenya adopted provided for devolution of government to regional assemblies in the context of bicameral, Westminster-type parliament with a senate and assembly- the lower and the upper house respectively. The constitutional provisions were premised on the need to secure the rights of ethnic minorities grouped in the Kenya African Democratic Union (KADU) party, against the domination of the 'big tribes' grouped in the Kenya African National Union (KANU) party. On attaining independence, the new government under President Kenyatta proceeded to make amendments to the constitution. These amendments had effect on concentrating the power of the executive by dismantling the devolved system and strengthening the presidency. By 1975, the Kenyan constitution was fundamentally different from that which had come from Lancaster.

The history of the constitutional reform has been long and difficult. Many lives have been lost in the process, huge sums of money expended and a lot of people injured. While the actual review process has taken slightly longer than twenty years, the real genesis of the review process is much longer and can be traced to the events at the Lancaster House conference, when the colonial government invited representative of the incoming African government to a constitutional conference and hammered out a deal on a constitution for the country. The main difference between Kenya's new constitution and the old one is that the new one is people oriented, in that it was generated from the citizens themselves. Since the Kenyan citizens were

⁵³ Mwangiru, M. From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice. *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1. 2011).

greatly involved in its formulation, it leaves no doubt that the new constitution upholds the ideals held dear by the citizenry. Unlike the former one which largely sought to promote the interests of the ruling class. Its objective and design served the Kenyan people. This main difference has an overwhelming effect on Kenya's treaty practice. Prior to the adoption of the new constitution, Kenya's practice in treaty making and implementation was based on the doctrine of dualism. This doctrine is largely propounded by positivism which stresses the overwhelming importance of the state and tends to regard international law as founded upon the consent of states, and the existence of wide differences between the two functioning orders. According to Mwangi (2011), treaty practice specifies the relationship between the different branches of government, at least to the extent of the country's relationship with treaties⁶⁴. In Kenya, the three branches of government are the legislature, the judicature and the executive. Although in theory, the three branches are independent and equal in practice, the executive has always superseded the other two branches since time immemorial. Prior to the 2010 constitution, the executive often overstepped the mandate by sidelining the legislature and the judicature. This means that treaties often ended up being ratified before being tabled for amendment. Thanks to the new constitution, the other two branches have come up and shown that they are truly independent and 'sovereign' in their own respect. The rule of law underwent a revolution after the adoption of the new constitution. This scientific revolution offered by the new constitution, gives more freedom and opportunities to international organizations to participate and support Kenya in the implantation of the objectives of the new constitution and the achievement of the rule of law in Kenya.

⁶⁴ Mwangi, M. From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice. *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1. 2011).

2.7 Implementation of the Existing Regulation.

As much as democracy brings with it the hope of the realization and establishment of a rule of law, there exist certain anti-democratic practices which hold back the society. Dictators use dictatorial means to hold on to power while democratically elected leaders resort to electronic fraud. Free and fair elections are one of the pillars of the rule of law. In Kenya, the rule of law has encountered many challenges since the Kenyatta and Moi regimes. In spite of the presence of legal institutions, that is, the judiciary and the parliament, the implementation of the rule of law was not effective because of the autocratic leadership of those in power marked by corruption, violence⁶⁵. Another challenge in the implementation of the rule of law concerns the reviewing or violation of constitutions to suit leaders' interests and to meet their political needs. Kenyatta in 1968, during his regime did away with the section that allowed the formation of political parties hence preventing Odinga and his Kenya People's Union from challenging his party, KANU.

The amendments on the constitution carried out by the two regimes hampered the carrying out of the rule of law. Kenyatta, in spite of a constitutional amendment that provided for presidential elections, he never allowed elections to take place until his death in 1978. Moi on the other hand, amended the constitution and made the country a one-party state and banned all opposition parties. The trend continued and when elections were held in 1988, voters were denied the right to vote by secret ballot and were instead forced to vote queuing behind the candidate of their choice. Since 1991, the period that marked the beginning of the agitation for reforms, this period was characterized by a lot of violence and lack of freedom of expression under autocratic rules which didn't allow the good running of existing institution characterized

Patricia Kameri-Mbote and Migai Akech, Kenya: Justice Sector and the Rule of Law. A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011.

by corruption and impunity. Ignorance of the law by the citizens posed a problem in the sense that they were not aware of their rights and even then, the few who knew about their rights didn't have the opportunity to exercise their rights. Problems in the electoral and democratic system during Moi's regime persisted during Kibaki's regime saw similar cases of electronic fraud like the one witnessed in the 2007 elections which led to the post election violence resulting in the death and displacement of people in most parts of the country. "Electoral systems can be a source of good governance as they give voters the chance to hold leaders accountable from poll to poll"⁶⁶. In spite of the elections in 2002, which saw the arrival of the democratic era and the initiation of various reforms in the country, it ought to be noted that there are difficulties in the implementation of certain reforms because of the appearance of certain gaps in the violation of human rights and the excessive use of force by the authorities on the press in the eve of the 2007 elections. There are cases of Kenyan democratic leaders committing electoral fraud which are examples of attempts to hold back the Rule of Law by democratic elected leaders.

2.8 Conclusion

From this discussion of the three regimes and the challenges in the implementation of the rule of law show that, the establishment of a rule of law is not easy because while there are those struggling to attain this noble objective, there are those who seem to be working at frustrating such efforts. The rule of law in Kenya is on the right path in spite of some gaps in its implementation.

⁶⁶ Ogada, M. *Electoral Reform in Africa: Challenges and opportunities*. (The Kenya section of International Commission of Jurists. Nairobi 2009).

CHAPTER THREE

THE ROLE OF INGOS IN THE PROMOTION OF THE RULE OF LAW IN KENYA

3.0 Introduction

This chapter examines the presence of the four selected international non-governmental organizations and their mandates in Kenya in relation to their projects and participation in the promotion of the rule of law. The chapter will also present the milestones, evaluate the challenges faced by the four INGOs and determines the responses of the INGOs to local resistance against its efforts to promote the rule of law. The chapter highlights the core issues and the extent of the rule of law in Kenya. The chapter will also examine the various efforts by the Kenyan government to strengthen the works of institutions of 'good faith' such as INGOs that endeavour to promote the rule of law.

3.1 Core Issues in the Rule of Law in Kenya

The core issues in the rule of law in Kenya include the reforms, access to justice, transparency and accountability; democracy and good governance, citizen empowerment, human rights, and fighting impunity.

3.1.1 Reforms in the Rule of Law in Kenya

The call for reforms in Kenya had been there but "the 2007 – 2008 post election crisis in Kenya gave the law reform agenda a significant impetus."⁶⁷ Following the post election crisis, electoral reforms were needed. The inability of the existing rules to solve the crisis gave rise the need to transform the justice system so as to have a system independent of political interference.

⁶⁷ The Kenya Justice Sector and the Rule of Law. A review by AfriMAP and the Open Society Initiative for Eastern Africa March 2011

According to Norris⁶⁸, pressure for electoral reforms mounts when the citizens are dissatisfied with their government. Kenya's dissatisfaction with the electoral system and the disputed election results intensified agitation for electoral reforms. It gave rise to a commitment to complete the process of drafting a new constitution. Some of the key reforms included in Kenya's new constitution touch on the inclusion of the rule of law, equity, human rights, social justice, the reorganization of policing agencies, measures for greater independence of the judiciary including re-organization and a revamped judicial service commission.

The key players who play a role in the placing concerns on a states policy agenda about electoral reforms are the public, the political parties, the media and the NGOs. The International Non-Governmental Organizations monitor the actions of governments and pressure on governments to observe international human rights principles. Reforms in Kenya and those that touch on the topic of our study are in three main sectors: Constitutional reforms, judicial reforms and police reforms.

3.1.2 Police Reforms

The motivation to reform the police arose after the post-election crisis with the police accused of brutality, political partisanship and impunity. The Police Act of 1960 (revised in 2002) and the Police Standing Orders of 1962 (revised in 2001) adopted under the Act, are out of date and inadequate⁶⁹. The Commission of Inquiry into Post Election Violence argued that among the weaknesses of the police were: little guidance to work with partner agencies, an inadequate system for managing staff performance and discipline issues. In order to address these problems, the National Task Force on Police Reforms, appointed to look in to the issues of

⁶⁸ P Norris, "Public Disaffection and Electoral Reform: Pressure below." Paper presented at the Joint Sessions of Workshops of the European Consortium for Political Research, Lisbon, 14-19 April 2009 1.

⁶⁹ The Kenya Justice Sector and the Rule of Law. A review by AfriMAP and the Open Society Initiative for Eastern Africa March 2011

police, recommended that the government should carry out a comprehensive vetting of police staff.

3.1.3 Legal Reforms to Enhance Independence of the Judiciary

A major impediment to the rule of law in Kenya has been the lack of independence of the judiciary which led to many Kenyans not having confidence in the courts. Over the years, the judiciary was influenced by the executive and parliament and this lack of trust in the courts is directly contributed to the post election violence of 2007/2008. Although the old constitution required judges to be independent and impartial, there were no constitutional provisions for the immunity of judicial officers. In the new constitution, provides for the reestablishment of judicial service commission that has the mandate of “promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.”⁷⁰The other role of the JSC is to recommend judges for appointment to the president. A year after the implementation of the constitution, judges and magistrates were vetted so as to remove those not fit for office.

All these measures were made possible through the partnership between the Ministry of Justice and Constitutional affairs and the development partners including INGOS like the AI, ICJ, KAS, and NDI. ICJ is one of the main organizations that lobbied for major changes and improvements to the judicial system. It regularly organizes conferences in partnership with the Ministry of Justice and Constitutional affairs to take stock of the reforms in the country. KAS contributes by funding these forums that bring together stakeholders in the justice sector. KAS funds the publications of ICJ-K that does a lot of work on legal research and analysis⁷¹. ICJ-K assisted in the formulation of parameters of engagement for the advisory panel of experts from

⁷⁰ The Constitution of Kenya, 2010

⁷¹ Konrad Adenauer Stiftung Country Report (March 2010).

the commonwealth that had been asked to study the proposals on the judiciary in the draft constitution and to provide proposals.

3.1.4 Access to Justice

Access to justice is one of the fundamental freedoms of the individual and foremost functions of the state. Article 48 of the 2010 Constitution of Kenya obliges the state to ensure access to justice for all persons and to ensure that any fee charged should not be an impediment to accessing justice for those who cannot afford. For many Kenyans this is a great relief since one of the greatest hurdles in accessing justice was the cost of the legal aid. The same constitution in article 159 on Judicial authority stipulates that Justice shall be done to all irrespective of the status (Article 159, 2a) and that justice shall not be delayed (Article 159, 2b).

Access to justice is standard to the realization of the rule of law and unfortunately very few Kenyans are aware of their basic rights⁷².

The high cost of legal aid is another factor that impedes access to justice for many people who find the cost unaffordable and hence end up not seeking it. The courts are not structured to facilitate equal access to justice either. Currently, the government provides legal aid to those charged with murder in the high court therefore leaving many out many Kenyans. The Civil Procedure Act⁷³ makes a provision for pauper briefs where people are allowed to sue as paupers and the hic here is that such applications are dependent on the availability of lawyers. Case backlog which is a challenge in the judiciary is another factor that affects the right to access to justice and the slow pace in determining criminal cases and appeals has contributed to the congestion in prisons.

⁷² Konrad Adenauer Stiftung Country Report (March 2010).

⁷³ *ibid*

ICJ-K in its mandates aims at increasing the access to justice for Kenyans through participation in Task Forces (bringing together other stakeholders) established by the government to examine and advice on the most effective and efficient ways of transforming the judiciary.⁷⁴

3.1.5 Reforms in Transparency and Accountability

Accountability is a term that initially belonged to the domain of public finance but has overtime expanded to include the proper exercising of power of improving the efficiency and reducing waste in carrying out public program. Chapter Six of the Constitution of Kenya on leadership and integrity spells out the responsibilities of a leader. A state officer should demonstrate respect to the people and promote public confidence in the integrity of the office. State officers are supposed to be accountable to the public for decisions and actions and be disciplined and committed in the service of the people. Accountability and transparency is not only required of state officers but also of commissions of inquiry. The Commissions of Inquiry Bill of 2009 sought to give the legislature an oversight role in the conduct of the activities and commissions. Commissions in the past rarely released the findings of their inquiries. On accountability and transparency concerning the fight against corruption, KAS partners with the Residents' Associations to monitor the use of public funds in their respective regions. NDI works partners with political parties to sensitize aspirants on the roles of leaders and what is expected of them.⁷⁵

3.1.6 Democracy and Good Governance

The struggle for democracy and good governance in Kenya has always been closely linked with the struggle for a comprehensive Constitution. "Democracy denotes a government that is periodically and regularly elected in free and fair electoral process by the eligible process

⁷⁴ Final Report of the Task Force on Judicial reforms 2011

⁷⁵ *ibid*

by eligible voters in order to represent and address the needs and the interests of voters”.⁷⁶ Democracy could be interpreted to refer to a form of government, where a constitution guarantees rights both personal and political after fair and free elections. The struggle for a new constitution is equated to a struggle for democracy. The reasons behind the need for a new constitution include among others a need to protect the people’s rights and free and fair elections. KAS contribution is on the monitoring of the implementation of the new constitution by cooperating with three political parties that have their origin in the Democratic Party. KAS offers political parties an opportunity to discuss proposed bills.

Democracy and good governance cannot be separated from human rights education. Organizations like ICJ and AI that have programs that touch on human rights contribute to the promotion of democracy in the country. NDI contributes to the promotion of governance by organizing forums that aim at equipping those aspiring to be leaders with knowledge on the constitution so as to ensure free and fair elections. NDI’s governance programs seek to promote effective public sector institutions and processes that operate in a manner consistent with democratic values of transparency, representation, pluralism and accountability. In order to achieve this, the Institute delivers technical and institutional support to these public institutions.

3.1.7 Increasing Citizen Empowerment and Participation

In order for democracy to work, the citizens ought to be informed on their rights so as to understand and actively voice their interests, act collectively and hold public officials accountable. Article 35 of the new constitution guarantees the right to access of information held by the government or by an individual required for the exercise or protection of a right or

⁷⁶ Koki Muli, ‘The Struggle for Democracy in Kenya through the Electoral Process’, a paper presented at the regional stakeholders round-table on elections and democracy organized by Zimbabwe election support network(ZESN), on 15th – 16th March 2007

fundamental freedom.⁷⁷ This right could also be linked to 254(1), which stipulates that all commissions created by this constitution should submit reports every year to both the government and the constitution. The Official Secrets Act of 1968 had denied the citizens the right to access of information held by the government for so many years under the pretext of “classified” information. Over the years, the Act had been used to cover up violations, abuses, abuse of office and grand corruption. Arming the citizens with information is the best way of empowering them so that they participate in the promotion of the rule of law. KAS in partnership with *Daraja* has promoted the importance of civic education in schools which has resulted into its incorporation in the regular curriculum. Subsequently teaching materials were developed and teachers of primary and secondary schools were provided with specific training on civic education. At the same time activities were conducted in cooperation with Universities and teacher colleges to discuss the integration of civic education into the regular teachers’ training program.⁷⁸

After the promulgation of the new constitution teaching materials have to be updated accordingly. Civic education in schools is crucial for the participation of the younger generation in the political landscape of Kenya. ICJ has a democratization program touching on the freedom of information. It carries out a lot of Legal Research and Analysis on the rule of law in Kenya. The dissemination of its research findings goes a long way in contributing to the empowerment of the people and their subsequent participation in the protection of their own rights.

⁷⁷The Constitution of Kenya, 2010

⁷⁸ Konrad Adenauer Stiftung Country Report (March 2010).

3.1.8 Human Rights

According to article 19 of the Universal Declaration of Human Rights, “everyone has the right to freedom of opinion and expression; this includes freedom to hold opinions without interference and to seek receive and impart information and ideas through any media regardless of frontiers. Articles in international and regional human rights instruments that correspond to the ones in the bill of rights are analysed in order to bring out the aspect of domestication of various international human rights instruments through the new constitution. There is an established link between the rule of law, effective human rights protection and economic progress.⁷⁹ These human rights need to be protected and this is where the constitution comes in. Chapter four of the constitution on the bill of rights is considered one of the most progressive provisions. It guarantees the freedom of expression, the freedom of conscience and belief, the right to equal opportunities for men and women, freedom of the media, the rights of arrested persons, and the right of an accused person to get a fair trial. The citizens play a role in the protection of their rights by demanding them but they can only do this once they informed. INGOs like AI, ICJ, KAS and NDI do civic education whereby they do sensitize citizens on their rights. This sensitization is done either through seminars and workshops or publications like *Katiba News* and *the Link*⁸⁰.

Good governance cannot be separated from human rights education. A population empowered to realize fundamental rights, has a bigger capacity to protect the same rights. It is only when armed with the knowledge of their rights can the people demand for them. AI carries out campaigns aimed at ending global poverty and protects the rights of people living in slums. It also facilitates workshops for local activists and puts pressure on the government to promote

⁷⁹ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers

⁸⁰ Konrad Adenauer Stiftung Country Report March 2011

human rights. ICJ which aims at serving its beneficiaries by improving human rights protection does also contribute to governance.

3.1.9 Fight against Impunity

Impunity as defined by Amnesty International is “the failure to bring to justice those responsible for human rights violations. It feeds the cycle of violence, encourages further abuses and denies the victim justice.” A victim refers to a natural person who has suffered harm, including physical and mental injury, economic loss, caused by a serious human rights violation. This term includes the immediate family members or dependents of the direct victim as well as those who have suffered harm in intervening to assist victims in distress or to prevent victimization.⁸¹ In the Kenyan Constitution, human rights are detailed under *Protection of Fundamental Rights and Freedoms of the Individual*. There is need to safeguard the rights of the citizens and at the same time ensure that perpetrators of human rights violations are held accountable for their actions. There should be established “mechanisms for furnishing remedies, reparations for victims/survivors of human rights abuses”⁸² According to the Kenya Human Rights Commission, research impunity exists amongst a wide range of human rights abuses such as ethnic cleansing, arbitrary and extrajudicial killings, police brutality, torture, domestic violence, mob violence, corruption and land grabbing.

In regard to the four INGOs that are the focus of this study, the human rights that have caught their attention are those that touch on political and economic crimes. Political in the sense that they are committed in the context of politics for example tribal clashes and ethnic cleansing that are linked to the 2007 post election violence, police brutality during street demonstrations and arbitrary and extrajudicial killings referring to the deaths of members of certain groups like

¹ REDRESS: Ending torture, Seeking Justice for Survivors, Impunity Guidelines. September 2010

² Law Society of Kenya: Constitution making and democracy in Kenya: *Building constitutionalism*

Mungiki and the deaths of human rights activists. Economic crimes are those touching on corruption and lack of transparency and accountability by leaders concerning use of public money. The Goldenberg International Company scandal is an example of an economic crime perpetrated in the past which saw the misappropriation of Kshs 68 billion of taxpayers' money. These crimes are well documented by the Public Accounts Committee (PAC) and the Public Investment Committees (PIC). In the past, there have been a series of political crimes committed including the violations after the 1982 coup and the ethnic clashes of 1992 and 1997. The perpetrators range from party officials, politicians, civil servants and members of law enforcement agencies.

The demand by an INGO like Amnesty International that the government brings to justice the people responsible for the 2008 post election violence is an example of the contribution towards fighting impunity. Such an organization does not just base its demands on hearsay but does so after carrying out its investigations. Kenya signed the Rome Statute in 2005 making it possible for the ICC to investigate in crimes against humanity in cases where the government takes no action. INGOs like AI which has tackling impunity is one of the mandates of AI in Kenya, ICJ-K, and KAS lent their voice to the demand for action on the prosecution of those suspected to have been behind the 2008 post election violence.

3.2 Promotion of the Rule of Law by the INGOs

The following four INGOs have played and continue to play a major role in the promotion of the rule of law in Kenya and assisting in the implementation of the constitution through reforms. The rule of law prevents the exercise of arbitrary power by the government and restrains it by promoting certain liberties, creating order and predictably regarding how a country functions.

3.2.1 Amnesty International

Founded in 1961 by Peter Benenson, a British lawyer, the aim of the organization was originally to launch an appeal in Britain with the intention of obtaining amnesty for prisoners of conscience all over the world. Its expansion to the rest of the world was a result of a realization that a detailed documentation of this category of prisoners would be needed. Gradually they realized that the work would have to be carried out on a more permanent basis; the number of prisoners of conscience was enormous and they were to be found in every part of the world. It is independent of all governments and is neutral in its relation to political groups, ideologies and religious dividing lines. The movement works for the release of women and men who have been arrested for their convictions, the colour of their skin, their ethnic origin or their faith - provided that they have not themselves used force or exhorted others to resort to violence. It is this category of prisoners that Amnesty International calls "prisoners of conscience".⁸³ Anne Marie Clark (2001)

Amnesty International was a British organization, but in 1963 an international secretariat was established and awarded the Nobel peace prize at a time when Amnesty International was rapidly expanding. In addition to its work for the prisoners of conscience - "the forgotten prisoners"(ibid) - Amnesty International has also carried on campaigns against torture and ill-treatment as well as - in recent years - against capital punishment. In the statutes adopted by the organization in 1974 these three tasks are named as the most important ones for Amnesty International.

⁸³ Anne Marie Clark (2001). Amnesty International Report 2012.

3.2.1.1 Presence of Amnesty International in Kenya

Referred to as Amnesty International (AI), the organization has since the 1990s been actively working on human rights campaigns targeting Kenya, especially by supporting the then prisoners of conscience through international solidarity actions calling for their immediate release. In 2002, AI established its physical presence in Kenya and was vital in the drafting and campaigns for successful passing of the Sexual Offences ACT 2006⁸⁴. Since 2009, AI associated itself with addressing human rights violations that “drive and deepen poverty”⁸⁵. This shift expanded AI’s mandate to link human rights with issues of poverty and especially within the context of adequate housing rights of people living in the slums and informal settlements

.3.2.1.2 Amnesty International’s Mandates in Kenya

Amnesty International has six specific campaigns that it carries out in Kenya and they all contribute to the promotion of the rule of law. The first one involves ending forced evictions that shatter the lives of people living in the slums hence driving them into deeper poverty. Families are often evicted from their homes by the authorities without human rights safeguards. The second is on the protection of women’s rights since women are the most disadvantaged. Most women and girls are still fighting for the most basic right of control over their bodies and their own lives and face discrimination and violence. In Kenya’s slums, the lack of toilets combined with the lack of policing has left women risking rape when going out to the toilet.⁸⁶ The third aims at controlling the arms trade that has been blamed for fuelling conflicts, poverty and human rights abuses in the country. The campaign is aimed at getting the arms out of the wrong hands and getting them under control.

⁸⁴ Sexual Offences Act No 3 of 2006

⁸⁵ Amnesty International Public Statement 12 September 2011 AI Index: AFR 32/005/2011

⁸⁶ Oral statement by Amnesty International to the CEDAW Committee (AFR 32/001/2011)

The fourth campaign is on the creation of an effective system of international justice such as tackling widespread impunity for possible crimes against humanity during the Kenyan 2007 post-election violence. The fifth campaign touches on the protection of refugees and asylum seekers so as to assist refugees to rebuild their lives after fleeing their countries to escape persecution and conflict. The sixth campaign is on the abolition of the death penalty which is the ultimate denial of human rights; the right to life. AI believes that the death penalty is abhorrent in all circumstances no matter what the crime. All these campaigns are linked to the protection of human rights and which is in line with its vision that is in line with the Universal Declaration of Human Rights and the other international human rights standards.

3.2.1.3 Contribution to the Promotion of the Rule of Law

In order to carry out its mandates, AI, which is an independent organization, finds out facts through impartial research before exposing the truth and demanding change. It mobilizes pressure on governments, armed groups, and companies to protect and promote human rights. In order to successfully carry out their mandate of protecting human rights, AI works also with other non-governmental organizations, governments and intergovernmental organizations. Networking is its main strategy whereby it creates networks with human rights defenders so as to establish patterns of abuse, find solutions to shared problems and to strengthen advocacy and build capacity. This networking also provides protection for human rights defenders at risk of being arrested and imprisoned for their activism. Another strategy is the use of new technology that provides opportunities for human rights defenders to communicate and reach a wider audience hence making local human rights issues international concerns within a very short time. The partnership with international organizations is another strategy that helps in AI's work in the sense that these international organizations do carry political weight which can lobby to ensure

that governments understand the important role of human right defenders. These international organizations can pressurize key officials when it would be too risky for human rights defenders to do so.

The inclusion of human rights related issues in all stages of project development, implementation and assessment is another strategy that AI uses. It involves getting donor agencies to include human rights related issues in their projects. Training provided by international organizations on the protection of human rights defenders and their work is a strategy often used to raise awareness about the content of the Declaration on Human Rights Defenders. Amnesty International facilitates workshops for local activists to develop strategies on how to work with other human rights organizations so as to strengthen effective activism. The period between 2002 and 2010 bore some fruits while at the same time saw AI encountering many challenges in their quest for democracy and social justice. In order to achieve its objectives on the promotion of the rule of law, Amnesty International negotiates with the Executive (Government) through Country Director and other officials of the organization. Since AI has been working closely with the Kenyan government, Kenya has put efforts in the quest for Judicial, parliamentary and constitutional reforms. As the AI Country Director, Justus Nyang'aya, put in an interview, the organization is happy with the progress that Kenya has made in the implementation of the constitution in respecting the freedom of justice, parliamentary and electoral reforms.⁸⁷

In 2008, during the post election violence in Kenya, many human rights violations including the rape of women, murder and forcible transfer of population were committed. Amnesty International urged the Kenyan authorities to ensure that government officials suspected of being implicated in post-election violence in 2008 comply with the International

⁸⁷ Interview held on 27 September 2012

Criminal Court (ICC). The Amnesty International's Africa Director is quoted to have said that all those allegedly responsible for human rights violations should not continue to dodge justice. The constitution of Kenya 2010, recognizes that every person has the right to "accessible and adequate housing, and to reasonable standards of sanitation"⁸⁸ Following this new development in the constitution, AI embarked on a project that focused on proposing to the government to help poor people especially those living in the slums and to raise the morale of the poor people. In June 2009, it organized Demand Dignity Campaign that aims to end global poverty by working to strengthen recognition and protection of the rights of the poor. The campaign demands the leadership, accountability and transparency that are essential to end the human rights violations that keep people poor.

On 30 July 2010 the Court of Appeal of Kenya, ruled that Section 204 of the Penal Code⁸⁹, providing for a mandatory death sentence in murder cases, was "antithetical to the constitutional provisions on the protection against inhuman or degrading punishment or treatment and fair trial", as it did not grant individuals concerned with an opportunity to mitigate their death sentences. In its judgment, the court expressly stated that the reasoning behind its rejection of the mandatory death penalty for murder might also apply to other capital crimes contemplated in the penal code, such as treason, robbery with violence and attempted robbery with violence. As much as the new constitution, which was adopted by referendum on 4 August 2010, guarantees the right to life but fails to prohibit the use of the death penalty in Article 26. Following this provision in the constitution, AI worked towards strengthening the capacity of the population on the human mobility issues and the civil political rights of the population to release the prisoners.

⁸⁸ Article 43(b), the Constitution of Kenya, 2010

⁸⁹ Cap 63. Laws of Kenya

During this period between 2002 and 2010, Kenyans enjoyed freedom of press, freedom of association. People could work freely unlike in the past thanks to the organization's support of the Government's efforts in the implementation of the rule of law. Amnesty International also works with the civil society to assert the rights of human rights defenders ensuring that they are not arrested and imprisoned like in the past. Amnesty International encourages the government to partner and work with other organizations so as to arrive at solutions to the problems related to human rights and the respect of the rule of law. It means that the government at different levels should trust the partnership and bilateral work that they are engaged in.

3.2.1.4 Challenges faced by Amnesty International

According to the Amnesty International Country Director, the organization's main frustration is that the government doesn't do the right things regarding the respect of the rule of law for example the use of excessive force on the population. In 2009, two years after the post-elections crisis, many organizations among them AI, had carried out intensive lobbying to get the coalition partners to agree through a consensus to address past human rights abuses and injustice. Ms Khan, the then AI Secretary-General during a press conference on June 14 2009 criticized the successive governments for being good at establishing commissions and taskforces but poor at implementing their recommendations.

3.2.2 International Commission of Jurists (ICJ)

The International Commission of Jurists (ICJ Kenya) is a non-governmental, non-partisan, not for profit making established in 1959. With a membership drawn from the bar and as the bench, it is a national section of the International Commission of Jurists whose headquarters is in Geneva. It is however autonomous from the ICJ Geneva which means that ICJ-K is only in Kenya. The organisation whose mission is to protect human rights, and promote

the rule of law and democracy in Kenya and across Africa through the application of legal expertise and international best practices has the following objectives: ICJ-K aims at serving its beneficiaries by improving human rights protection, improving access to justice, increasing citizen empowerment, and improving Justice Systems and institutions across Africa. It also aims to be a premier organization that excels in the following areas: advocacy, legal research and analysis, capacity building, and impact litigation. Another aim is to invest in future development by networking with key stakeholders, creating a solid system of monitoring, evaluating and reporting on our activities, maintaining a highly motivated and high performing staff, and establishing best practices in international human rights in the African context. ICJ-K also aims to develop and use resources in order to develop a strong brand profile, with measurable impact and results.

The organisation runs three programmes on access to justice focusing on the vetting of judges and reforms in the judiciary, human rights program targeting police reforms and torture case and democratization program (freedom of information). In order to successfully carry out its mandate, the ICJ-K partners with the European Union, USAID, UKaid, Amkeni Kenya, Westminster foundation for democracy, Kenya Law Review and Uraia, AI, KAS, UNDP and ACT(action change transform). ICJ regularly organizes conferences to take stock of the ongoing institutional and legislative reforms in Kenya, and to question whether they are adequate to chart Kenya's democratic and good governance goals and realize the implementation of the Constitution particularly in the wake of the infamous 2007 disputed elections.

3.2.2.1 Contribution to the Rule of Law

The organization's milestones shall be discussed under the three programmes that it runs: access to justice focusing on the vetting of judges and reforms in the judiciary, human rights program targeting police reforms and torture case and democratization program (freedom of information). The constitution of Kenya promulgated in 2010 has an expanded bill of rights that has provisions that protect fundamental freedoms such as human dignity, security of persons, access to justice, rights of arrested persons, right to a free hearing and rights of persons detained in custody. After the promulgation of the new constitution, the bill of rights became a chapter that went into immediate effect and enforceable. In the previous constitution, certain rights were recognized but they required permission from the chief justice in order to be enforced. Article 24(4) of the constitution provides that the absence of rules by the chief justice "does not limit the right of any person to commence court proceedings...and to have the matter heard and determined by a court."⁹⁰

3.2.2.2 Access to Justice and Judicial Reforms

ICJ-K is one of the main organizations lobbying for major changes and improvements to the judicial system. It collaborates with the government through the Ministry of Justice and supports the government's programs in promoting access to justice. ICJ K and the government have a bilateral cooperation on the implementation of judicial reforms. Under the new constitution, three steps had been proposed to ensure proper judicial reforms; the vetting of judges, the appointment of a new chief justice by the president⁹¹ and the reconstruction of the Judicial Service commission. These three steps have been achieved so far in the sense that Mwai Kibaki, the president, appointed Justice Willy Mutunga as the chief Justice. A commission to vet

⁹⁰ The Constitution of Kenya, 2010

⁹¹ Chapter 10, part 2 (166)

judges was set up and as a result a number of judges lost their jobs either for incompetence or improper conduct. The need to vet judges was as the result of a concern about the state of the Judiciary following an internal investigative process in 1999. The Kwach Committee that had been appointed to carry out the investigations had found that “corruption, incompetence, neglect of duty, theft, drunkenness, lateness, sexual harassment, and racketeering”⁹² The committee recommended an amendment of the constitution to allow for the removal of incompetent judges. In 2002, an advisory panel comprising experts from the Commonwealth was asked to study the proposals on the judiciary in the draft Constitution and to provide proposals on how these could be structured.⁹³ At this point, ICJ-K assisted in the formulation of the parameters of engagement.⁹⁴

Later in 2003, after the Narc government had come to power, the then newly appointed chief justice Gicheru appointed a committee, the Ringera Committee, which called for the implementation of the Kwach committee. This resulted in the resignation en masse of most of the twenty-five judges and eighty-three magistrates who had been identified as implicated in corruption. To be exact, twenty-three judges and eighty-two magistrates were removed since some of them appealed against the accusations. In the meantime, the drafting of the constitution had progressed and in the final draft of the constitution, the Bomas draft, a provision had been made for a vetting mechanism against all judges and magistrates serving in the judiciary”.⁹⁵ Once the new constitution of 2010 came into full implementation, Judges were to be given an “opportunity to resign with appropriate benefits and those that remained in office were to be

⁹² Report of the Committee on the Administration of Justice (Nairobi, 1998),3.

⁹³ Report of the Advisory Panel of Eminent Commonwealth Judicial Experts (Nairobi: Constitution of Kenya Review Commission, 2002)

⁹⁴ ICJ Rule of Law Report 2010/2011: Transitional Justice in Kenya. Looking forward, reflecting on the past

⁹⁵ Ibid.

vetted by the Interim Judicial Service Commission”.⁹⁶ The JSC is regarded as a “cornerstone of good governance” for among other things, it played an important role in the appointment of the new Chief Justice following the retirement of Justice Evan Gicheru in February, 2011. The JSC invited applications for the post and after interviewing the ten candidates, it presented the candidate to the President who with concurrence with the Prime Minister, formally appointed Mutunga as Chief Justice.

3.2.2.3 Human Rights Program

Concerning torture, ICJ K has been involved in bringing justice to people who have been victims of torture by the state. The occurrence of torture and other forms of inhuman degrading treatment has been blamed on “the security paradigm adopted in the training of members of the security forces and also because the members of these forces lack knowledge relating to the human rights aspects of their work”.⁹⁷ Torture is often used as “a tactic for political intimidation and suppression of dissent”.⁹⁸ The Waki commission established to investigate the violence that followed the December 2007 elections concluded that the police were responsible for the deaths of demonstrators in Kisumu where police had used live ammunition to quell protests”.⁹⁹

3.2.2.4 Democratization programme (Freedom of information)

Concerning the freedom of information and democracy, ICJ-K actively participates in the dissemination of information to the citizens through publications and forums. Examples of publications include the Judiciary Watch series and the Electoral Reform in Africa: Challenges and opportunities (Ogada ed. 2009) that it publishes with the support of Konrad Adenauer

⁹⁶ The report on the Committee of Experts (CoE) on Constitutional Review(Nairobi 2009)

⁹⁷ Musila G (2011) Effective prevention of Torture: A Guideline for Security Forces. The Kenyan section of the International Commission of Jurists.

⁹⁸ Ibid.

⁹⁹ Report of the commission of inquiry into Post Election Violence of 2007-288(Waki Commission)

Stiftung (KAS).¹⁰⁰ According to ICJ-K publication like “The Rule of Law Report 2010/2011”¹⁰¹ reaffirms the organisations commitment to promoting the rule of law in Kenya. ICJ-K hopes that “the publication can serve as a guide for further work and development in establishing lasting peace through principles of transitional justice and institutional reform”¹⁰²

3.2.2.5 Challenges facing International Commission of Justice

Ngugi J. N in his article in the 2007 *Judiciary Watch report, Volume 5*, notes that the main problems with judiciary in Kenya is the lack of judicial independence, corruption and incompetence which also threaten constitutionalism in Kenya. During Moi’s era, there was total failure in fostering the culture of the rule of law and respect for human rights. Among the human rights violations are political assassinations, torture and detention without trial, police brutality massacres of communities, sexual abuse and violence against women and girls, politically instigated ethnic clashes, looting of public funds and land grabbing. This caused problems with donor funding which scared donors from giving aid to the country. Before the period billed as the “second liberation”, Kenya’s judiciary was characterized by “reluctance to check the powers of the executive, coupled with a politically-neutered parliament, the result of a one party state” Makau M. (1992)

Another major challenge had to do with the inadequacy of the human capital, a problem that still persists though there has been an effort to increase the number of judges and magistrates. The lack of capacity building and ignorance on the part of the citizens posed a challenge in the sense that people didn’t challenge court decisions hence denying themselves the access to justice. During the first two regimes, ICJ-Kenya was active in individual capacities

¹⁰⁰ Ogada, M. *Electoral Reform in Africa: Challenges and opportunities*. (The Kenya section of International Commission of Jurists. Nairobi 2009).

¹⁰¹ Rule of Law Report 2010/2011: Transitional Justice in Kenya. *Looking forward, reflecting on the past*

¹⁰² Ibid.

through civil activism of people like James Orengo and Otieno Amollo, lawyers, who through the mandate of the ICJ, actively participated in ensuring the rule of law, governance and democracy were achieved in Kenya. However, the lack of sufficient funding hampered the activities of the ICJ-K during these first two regimes hence posing a challenge in the carrying out of its mandate in promoting the rule of law.

In spite of the positive remarkable changes in the judiciary following the judicial reforms, the ICJ-K still faces some challenges in the carrying out of its mandate. The maximum number of judges and magistrates prescribed by law has not been attained hence hindering the work of the ICJ-K in ensuring access to justice for the people of Kenya. The ICJ-K continues to advocate for an increase in the number of judges and magistrates for the current number of 332 serving a population of 38 million people. The ICJ-K encounters resistance from the government in the implementation of its activities. Ignorance on the part of the citizens is another challenge that hampers the activities of the ICJ-K. The citizens are not sensitized on their rights. The high number of laws and regulations being enacted closer to the elections poses a challenge for it denies the IEBC, government agencies and the public in general time to understand and internalize the content and their implications.

Another challenge has to do with the conflicts that arise between ICJ and the other implementation bodies like the CIC and the registrar of political parties because of the fact that there has been no appointed registrar of political parties.

3.2.3 Konrad Adenauer Stiftung (KAS)

KAS' approach is multilateral, unlike the other three that have bilateral relations. KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU) and the core principles underlying its work are Freedom, justice and solidarity.

In its international cooperation efforts KAS works for people to be able to live self-determined lives in freedom and dignity and line with Germany's objective of meeting its growing responsibilities throughout the world. KAS which was established in Kenya in 1955 but it wasn't until 1974 that it began its operations. In 2008, it became active in the execution of its objectives such as the protection of human rights, supporting the development of stable and democratic political parties in the country, decentralization and delegation of power to lower levels and dialogue and capacity building for young leaders for the development of the country. It has more than 70 offices outside Germany and projects in over 120 countries with the aim of contributing to the promotion of democracy, the rule of law and a social market economy. It achieves peace and freedom through dialogue at the national and international levels as well as the exchange between cultures and religions.

In order to succeed in carrying out its mandate, KAS collaborates with governmental institutions, political parties, civil society organizations and handpicked elites with the aim of supporting countries to develop in freedom and under their own responsibility. KAS' main objective in Kenya is the promotion of rule of law and stabilization of Democracy. According to KAS, the implementation of the new constitution is crucial for the political development and the stabilization of democracy. KAS engaged itself in the process of constitutional reforms through partnership with the Catholic Justice and Peace Commission (CJPC) with whom it convened several seminars all over the country and the Media Development Association published *Katiba News Magazine*. The monthly magazine dwelled on topical constitutional issues and the reform agenda in general. Apart from the magazines, there are other publications like the African Law Study Library that it publishes twice every year and it covers judicial issues in Africa. KAS has a website where it disseminates information on the rule of law. It also supports the publications of

other partners working on the promotion of democracy and the rule of law for example the ICJ-K.

Over the past few years, KAS has been organizing forums to provide training to equip civil servants with the necessary information to facilitate their implementation of the new constitution. For example, in 2009, KAS, under the auspices of its Rule of Law Program for Sub-Saharan Africa in conjunction with the Kenya School of Law (KSL), organized a two day intensive training workshop for senior public servants on the theme Rule of Law and Governance in the New Constitutional Dispensation: Implications for the Kenya Public Service.. It is important that public servants who are also policy makers interpret laws and dispense their responsibilities in a way that conforms to the Constitution and hence ensure good governance, the rule of law, integrity, transparency and accountability which in turn encourage sustainable human development. The new constitution demands that the citizens of Kenya, the civil society and religious organizations, political parties and other stakeholders are all involved in the implementation process. It also demands for the legislation of 49 different bills by parliament. In this context it is inevitable that MPs, politicians and political parties must have a profound knowledge of the relevant background on the respective proposed laws and must engage the public more often and closely. With the adoption of the new constitution and the devolution of power, KAS has been facilitating discussions on the creation of county in collaboration with other partners particularly the aforementioned political parties, seeks to increase awareness among potential candidates at the county level on the specific tasks and duties of such leaders and the counties in general in accordance with the new constitution. This is in the hope of helping political parties to nominate suitable candidates for various positions.

Additionally joint workshops with CJPC are conducted to initiate a dialogue within the Catholic Church about the implementation process of the new constitution. The main objective of these dialogues is to identify similarities in the new constitution and the social doctrine of the church. As the Kenyan churches have a wide influence on the Kenyan people they can also influence the public opinion on various key issues of national interest. For many years, KAS in partnership with *Daraja* has promoted the importance of civic education in schools which has resulted into its incorporation in the regular curriculum. Subsequently teaching materials were developed and teachers of primary and secondary schools were provided with specific training on civic education. At the same time activities were conducted in cooperation with Universities and teacher colleges to discuss the integration of civic education into the regular teachers' training program. After the promulgation of the new constitution teaching materials have to be updated accordingly. Civic education in schools is crucial for the participation of the younger generation in the political landscape of Kenya. In relation to the fight against corruption, KAS partners with the Residents' Associations to monitor the use of public funds in their respective regions. From the beginning of 2011, KAS will merge the Residents' Associations with other CSOs to create networks at the county level in order to create more effective structures. The monthly magazine "The Link" supplements the work of these networks with regional news, information, support and the possibility to publish their own articles.

3.2.3.1 Contribution to the Rule of Law

KAS contributes to the rule of law in Kenya through facilitating the implementation of the constitution and by working closely with the government promotes transparency and accountability; democracy, fighting impunity, reforms, devolution, human rights and civic education.

3.2.3.1.1 Transparency and Accountability

Most leaders are nowadays accountable for their actions following demands for accountability and responsibility on the part of political leaders. The recent past has seen many people suspended from public office as well as prosecution of individuals on suspicion of corruption. Although Kenyans feel like more needs to be done to deal with the vice, this is remarkable progress.

3.2.3.1.2 Democracy

KAS is cooperating with three political parties which have their origin in the Democratic Party (DP) in the monitoring of the implementation of the new constitution. In this regard, KAS is offering these parties an opportunity to discuss the proposed bills and develop a party position on certain issues which may be published.

3.2.3.1.3 Fight against Impunity

It is a big step in the country's fight against impunity to see that those alleged to have been responsible for the 2007 post election violence are being prosecuted at The Hague. For KAS the way in which Kenya handles the ICC case is "not only decisive for the future relationship with her Western allies but also a very important test of her will to scatter impunity."¹⁰³ Kenya signed the Rome Statute in 2005 making it possible for the ICC to investigate in crimes against humanity in cases where the government takes no action.

¹⁰³ KAS Country Report March 2010

3.2.3.5 Reforms

Through partnership with the government and other organizations, particularly, ICJ-K, KAS has contributed greatly in the realization of reforms in Kenya.

The role of KAS has been to facilitate forums for stakeholders to exchange views and chart ways forward on various issues touching on the implementation of the new constitution. An example of such a forum is the 2010, ICJ-K's Annual Jurists Conference held in Mombasa.

On electoral reforms, the nullification of constituency results and subsequent loss of seats by incumbents is a sign of progress in the implementation of the new constitution. In past regimes such nullifications were almost inexistent. In 2010, the election results of Ikolomani constituency were nullified leading to a fresh election which saw Bonny Khalwale reclaim his seat. In South Mugirango constituency, Omingo Magara lost his seat after the nullification of results. Other members of parliament who lost their seats after the 2007 elections include Joel Onynacha (Bomachoge), Dick Wathika (Makaradara), George Thuo (Juja) and Abdirahman Hassan (Wajir South). Cabinet Minister Chirau Ali Makwere (Matuga) and Bishop Wanjiru (Starehe) had also lost their seats but retained them after successful petitions.

3.2.3.6 Devolution

Following the provision for devolution in Kenya's new constitution, KAS in collaboration with other partners particularly political parties sought to raise awareness on the tasks and duties of the different office bearers with the aim of helping the political parties to field the suitable candidates.

3.2.3.7 Human Rights Education

Good governance cannot be separated from human rights education. A population empowered to realize fundamental rights, has a bigger capacity to protect the same rights. It is only when armed with the knowledge of their rights can the people demand for them.

3.2.3.8 Challenges faced by Konrad Adenauer Stiftung (KAS)

Whereas the new constitution offers the ideal opportunity to address the country's numerous challenges, the main challenge lies in the full implementation of the same constitution and the challenge of beating deadlines. Widespread corruption poses a greater challenge that seems hard to root out. The looting of public coffers by politicians and highly placed leaders in government and the lack of transparency hampers the implementation of the rule of law.

3.2.4 The National Democratic Institute (NDI)

The National Democratic Institute is a non-profit, non-partisan organization working to support and strengthen democratic institutions worldwide through citizen participation, openness and accountability in government. NDI, an organization independent of the US government, was created in 1983 as one of the four core institutes of the National Endowment for Democracy, which was established by Congress in that year to act as a grant-making foundation, distributing funds to private organizations for the purpose of promoting democracy abroad. Also launched that year were the International Republican Institute (IRI), the American Center for International Labor Solidarity (the Solidarity Center), and the Center for International Private Enterprise (CIPE).

Since 1993, NDI has been supporting democratic reform in Kenya. Its activities initially focused on women's political participation and capacity strengthening of non-partisan civic groups to monitor elections. Since 2001, NDI has been working directly with political parties to strengthen their capacities. According to NDI, it is through governance that the benefits of democratic development most directly impact the lives of citizens. NDI's governance programs seek to promote effective public sector institutions and processes that operate in a manner

consistent with democratic values of transparency, representation, pluralism and accountability. In order to achieve this, the Institute delivers technical and institutional support to these public institutions. Leadership plays an important role in any society.¹⁰⁴ A good leader helps develop a vision for society, unite society and lead it to achieve greater heights of development and democratization.

3.2.4.1 Contribution to the Rule of Law

Kenya's constitution in Article 73 recognizes the premier role of leadership in "achieving the desire of a new Kenya".¹⁰⁵ In addition to reforming the structure of the legislative, judicial and executive arms of government, the constitution dedicates an entire chapter to the question of leadership. Those entrusted with leadership positions are expected to place public interest at the centre of all their decisions and to abide by the highest standards of integrity and to be accountable to the people for their actions. Aspiring political leaders ought to be aware of the provisions of Chapter Six of the Constitution, which deals with leadership and integrity so as to comply and play their part in taking the country forward. It is in this light that NDI's contribution comes in. In 2011, NDI organized various forums under the Leadership and Campaigns Academy, (LCA) so as to sensitize the aspirants drawn from different political parties and vying for different of the country for the various seats in the devolved government. The LCA training is also accredited as Continuous Legal Education (CLE) by the Law Society of Kenya.

Article 73¹⁰⁶ details what is expected of a leader. Chapter six of the constitution requires all aspiring candidates and leaders to desist from nepotism, corruption, conflict of interest and financial misconduct. Apart from sensitizing the aspirants on what is expected of leader, the forum also enlightens them on the different acts. For example, the Elections Act which details

¹⁰⁴ NDI's Leadership and Campaign Academy, Candidates' Manuel. November 2011

¹⁰⁵ ibid

¹⁰⁶ The Constitution of Kenya, 2010

election offences (offences and punishment levels), electoral code of conduct and election dispute resolution (petition timelines). This is aimed at ensuring the smooth running of elections and to avoid a recurrence of the 2007 post election crisis.

3.2.5 Kenyan Government Bilateral and Multilateral Support to INGOS

The Government does acknowledge that INGOs play an important role in the implementation of the new constitution. In a report prepared by the Task Force¹⁰⁷ on Judicial Reforms, the Government began by acknowledging the invaluable support and contributions made by among others Non-Governmental institutions. In 2009, The Government established a multi-stakeholder taskforce on judicial reforms chaired by Justice William Ouko to consider advice and recommend the necessary steps to be taken to address judicial reforms. Among the steps taken by the government towards the implementation of the constitution include the publication of the vetting of judges and Magistrates bill by the Ministry.

3.3 Conclusion

In concluding this chapter on the contribution of the various INGOs, it is worth noting that the organizations have made contributions towards the implementation of the new constitution in spite of challenges that exist. They have each taken an approach that differs from the others and in some cases they have partnered in achieving their mandates in Kenya.

¹⁰⁷ Final Report of the Task Force on Judicial Reforms , July 2010

CHAPTER FOUR

CONTRIBUTION BY INGOS IN THE PROMOTION OF THE RULE OF LAW IN KENYA

4.1 Introduction

This chapter presents analyses and interprets the data collected during the research at the four identified INGOs, the Kenya Citizens and the relevant government Ministry of Justice and Constitution. It critically analyses the contribution of the four selected INGOs in Kenya and the strategies that they use to promote the rule of law in Kenya. The data collected for the study has been obtained from the four selected INGOs involved in the promotion of the rule of law in Kenya. It has critically addressed the ways in which they have contributed to the rule of law. The study has also collected data from the government in order to establish its opinion on whether the INGOs are contributing to the promotion of the rule of law in Kenya and to ascertain whether there is a need to improve the bilateral cooperation between INGOs and the Government.

The study also aims to gain knowledge on the Citizens' opinion on whether there have been changes in the country on the promotion of the rule of law in areas like judiciary, Democracy, the Kenya police force, implementation of the constitution, civic education, accountability among leaders, fighting impunity and human rights. The study will also establish whether the Kenya Citizens are aware or unaware of the existence of the four selected INGOS and the role they have played in the promotion of the rule of law in Kenya.

4.2 QUESTIONNAIRE RESPONSE

A total of 307 questionnaires were distributed to the four INGOs identified for the research, the Kenya Citizens and the relevant government Ministry of Justice and Constitution. 87% of the questionnaires were returned for analysis by the respondents; however, 13% were either lost or misplaced by some of the respondents.

4.3 INGOs' ROLE IN THE PROMOTION OF THE RULE OF LAW IN KENYA

There are four INGOs dealing with the rule of law in Kenya and the researcher issued questionnaires to each of the INGOs with a view to provide the researcher with their current mandates and achievements. There was a 100% response on the questionnaires issued and each of the INGOs provided information on its activities and achievements since starting its operations in Kenya. The information gathered is recorded below separately for each INGO

4.3.1 Amnesty International

Amnesty International indicates that it started its operations in Kenya in 2002. It focuses on human rights and in abolition of the death penalty in Kenya. The INGO has made tremendous achievements in influencing the regulation of human rights issues, fighting impunity and brings in issues of accountability of the Kenya leaders. It has played a role in devolution of power, rights and freedom of the Kenya Citizens. It is actively involved in other activities which include prevention of human rights violation, prevention of past violent election, taking care of survivors of human rights abuses, setting the pace for peace, advancement of the principles of the rule of law. Amnesty International acknowledges that the government of Kenya has been supportive and offered good co-operation in carrying out its mandates, find solutions to shared problems

and to strengthen advocacy and build capacity. It mobilizes pressure on governments, armed groups, and companies to protect and promote human rights and use new technology to provide opportunities for human rights defenders to communicate and reach a wider audience hence making local human rights issues international concerns within a very short time. The Amnesty International Country Director, Justus Nyang'aya, in an interview, held on 27th September 2012, with the researcher said "The organization is happy with the progress that Kenya has made in the implementation of the constitution in respecting the freedom of justice, parliamentary and electoral reforms." However, they point out that they are facing challenges where the government does not do the right things regarding the respect of the rule of law and an example is where the Kenya Police use excessive force on the population.

4.3.2 International Commission of Justice (ICJ)

The International Commission of Justice states in the information gathered that it started its operations in Kenya in 1959. Its main focus is on the rule of law, democracy and human rights. When asked regarding the achievements they have made so far, the ICJ indicates that they have been influential in the reforms in Kenya, monitoring and regulating with vigor the governance, democracy and human rights. In the implementation of the new constitution the ICJ has contributed through the reforms in justice. They have also been involved in the training and devolution.

They acknowledge that the government has been supportive and have had good confrontation and confidence with the judiciary. The challenges faced include the logistic assistance and lack of capacity building.

4.3.3 Konrad Adenauer Stiftung (KAS)

KAS started its operations in Kenya in 1971 and its mandate is development co-operation especially with regard to the rule of law and democracy. It sites one of its achievements as providing assistance with the preparation and the implementation of the new constitution in 2010. It is also involved in other activities which include supporting political policies and civic education. KAS acknowledges the support provided by the government of Kenya in all its projects which have been carried out in close co-operation with the government or with political parties.

In citing the challenges experienced, KAS points out that these include logistical, the multifaceted-ness of the tasks, high number of tasks and the people.

4.3.4 National Democratic Institute (NDI)

The National Democratic Institute started its operations in Kenya in 1993 and their mandate is to support democratic development and to promote transparency and accountability. One of the achievements cited by NDI is the sensitization of the aspirant leader on electoral reforms. In the implementation of the new constitution the NDI has provided leadership integrity. Other achievements include supporting and empowering women. They acknowledge the support provided by the Kenya government in all activities where it has participated as well as the civil society. Their main challenge is logistical.

4.4 GOVERNMENT RESPONSE TO THE WORK OF THE FOUR INGOS

Three questionnaires were issued to the ministry of justice and constitution targeting the offices of the minister, the assistant ministers and the permanent secretary. There was 100% questionnaire response from the Ministry indicating a willingness of the government to

acknowledge and recognize the contribution of the INGOs in the promotion of the rule of law in Kenya. The officials indicate that the INGOs have provided financial support, training, creating awareness on what changes need to be implemented especially the judiciary reforms, human rights and more so sensitizing the people on their rights by representing them in the relevant forums. They have acted on behalf of people victimized by the law by highlighting their plight. On the need to improve the bilateral co-operation between the INGOs and the Kenya government, the ministry officials agree that it is necessary. They feel that most of the wrangles we see on the media could be avoided if the two institutions harmonized their relations. Improvement on the bilateral co-operation would also ensure that the government does not stall the reform process. After all it is all for the common man's good. INGOs need to consult with the government and the government needs to give the audience. Some of the officials, however, feel that most INGOs benefit a very small group of Kenyans such as their officials who have fat salaries and spend all their time in seminars.

4.4.1 Kenya Citizen Response to the INGOs' Work

The response from the citizens in other occupations was 54% a percentage slightly higher than those of the professionals which was at 46%. This indicates better knowledge and understanding of what is happening in the country regarding the presence and work of the four INGOs selected for the purpose of this research. Questionnaires were issued to the Kenya citizens and the respondents were required to indicate their age bracket. This was to gauge the attitudes and maturity in the responses, the awareness of the existence of the INGOs and their efforts to promote the rule of law.

The response from the age bracket 31 – 35 years and the age above 40 years showed a 31% and 27% response on the knowledge and the understanding of the rule of law. This indicates an age group that shows concern on what is happening today and is aware of its rights. The younger generation of the Kenya citizens who fall under the age bracket 18 – 24 and 25 – 30 with an equal percentage of 12% indicate little awareness and an attitude of not caring what is happening around them.

4.4.1.1 Kenya Citizen's Familiarity with INGOs

The researcher sought to know whether the respondents were familiar with the INGOs involved in the promotion of the rule of law in Kenya. 100% of the respondents indicated familiarity with Amnesty International; 92% were familiar with the International Commission of Justice; 46% were familiar with Konrad Adenauer Stiftung (KAS) and 50% were familiar with the National Democratic Institute. It is surprising to note, however, that 54% of the respondents indicated they were not familiar with Konrad Adenauer Stiftung (KAS) in spite of this INGO having started its operations in Kenya in 1971. 50% of the Kenya citizens were unfamiliar with the National Democratic Institute (NDI) and 8% were also unfamiliar with the International Commission of Justice (ICJ). The data collected and analyzed clearly shows that Amnesty International is familiar to all the respondents. This is because most of its lobbying is done in public and the issues it deals with affect the common man in his pursuit for social justice and defending his human rights.

4.4.1.2 Kenya Citizens' Opinion on Changes in the Last 10 Years

The researcher sought the opinion of the respondents on the changes being made with the help of the INGOs in co-operation with the government. The respondent displayed awareness of the changes taking place even though they felt that in some areas it was taking far too long. The judiciary seems to be ahead with the reforms than any of the other core issues of concern to the four INGOs. 100% of the respondents confirmed that indeed the judiciary had reformed. Ranking second is the implementation of the new constitution at 96%, followed by democracy at 92%, sensitization of the citizens on their rights and the human rights both at 88% and fighting impunity at 77%. Some of the respondents indicated that there was no change in certain sections of reforms. Accountability among the leadership in the country has not changed much and it shows only a 50% acknowledged improvement. There is notable change in the police force with an 85% score and in observing the human rights of the population at 88% score according to the Kenya Citizens.

4.4.1.3 Awareness of the Four INGOs' Activities in Kenya

In regard to the Kenya Citizen's awareness of the role of INGOs in promoting the rule of law in Kenya the information gathered shows that 73% of the respondents were aware of the activities of Amnesty International, 54% International Commission of Justice, 50% Konrad Adenauer Stiftung (KAS), and 62% National Democratic Institute (NDI). This is an indication that they have a basic idea in the advocacy of human right, social justice, and abolition of the death penalty, the judicial reforms, transparency and accountability. Some of the respondents also displayed knowledge of the INGOs' empowerment of women and their role as the country's watchdogs on the leadership. However, the ICJ and KAS need to sensitize people more on their activities. The ICJ reforms are beneficial to the common man especially in ensuring his rights

are not violated. The population needs to be more sensitized and good governance maintained in the country. The four INGOs' complement one another as they all deal with social justice and development.

4.5 THE INGO'S STRATEGY TO THEIR SUCCESS IN THE PROMOTION OF THE RULE OF LAW IN KENYA

Data was collected from secondary sources to analyze the influence of the INGOs strategy on their success in the promotion of the rule of law in Kenya in the following core areas.

4.5.1 Judicial Reforms

A major impediment to the rule of law in Kenya has been the lack of independence of the judiciary which led to many Kenyans not having confidence in the courts¹⁰⁸. A year after the implementation of the constitution, judges and magistrates were vetted so as to remove those not fit for office. All these measures were made possible through the partnership between the Ministry of Justice and Constitutional affairs and the development partners including INGOS like the AI, ICJ, KAS, and NDI. KAS does its contribution by funding these forums that bring together stakeholders in the justice sector. Through partnership with the government and other organizations, particularly, ICJ-K, KAS has contributed greatly in the realization of reforms in Kenya.

The role of KAS has been to facilitate forums for stakeholders to exchange views and chart ways forward on various issues touching on the implementation of the new constitution on electoral reforms, the nullification of constituency results and subsequent loss of seats by incumbents is a sign of progress in the implementation of the new constitution. In past regimes such nullifications were almost nonexistent.

¹⁰⁸ ICJ REPORT. Kenya: Judicial Independence, corruption and reform. April 2005

Some challenges had to do with the inadequacy of the human capital, a problem that still persists though there has been an effort to increase the number of judges and magistrates. The lack of capacity building and ignorance on the part of the citizens posed a challenge in the sense that people didn't challenge court decisions hence denying themselves their right to justice. The ICJ-K encounters resistance from the government in the implementation of its activities. Ignorance on the part of the citizens is another challenge that hampers the activities of the ICJ-K. According to the Amnesty International Country Director, the organization's main frustration is that the government doesn't do the right things regarding the respect of the rule of law for example the use of excessive force on the population.

4.5.2 Transparency and Accountability among Leaders

Transparency and accountability are necessary to restore credibility to the system and necessary for the achievement of the Millennium Development Goals since accountability implicates the effectiveness of aid. On accountability and transparency concerning the fight against corruption, KAS partners with the Residents' Associations to monitor the use of public funds in their respective regions. Although Kenyans feel like more needs to be done to deal with the vice, this is remarkable progress. NDI works in partnership with political parties to sensitize aspirants on the roles of leaders and what is expected of them.

4.5.3 Devolution

Following the provision for devolution in Kenya's new constitution, some INGOs like KAS and NDI in collaboration with other partners particularly political parties sought to raise awareness on the tasks and duties of the different office bearers with the aim of helping the political parties to field the suitable candidates.

4.5.4 Democracy and Good Governance

Good governance cannot be de-linked from the confines of human rights education. Fair or good governance however implies that mechanisms function in a way that allows the executive to respect the rights and interest of the stakeholders in a spirit of democracy.¹⁰⁹ KAS contributes on the monitoring of the implementation of the new constitution by cooperating with three political parties that have their origin in the Democratic Party in the monitoring of the new constitution. KAS offers political parties an opportunity to discuss proposed bills. Democracy and good governance cannot be separated from human rights education. Organizations like ICJ and AI that have programs that touch on human rights contribute to the promotion of democracy in the country. NDI contributes to the promotion of governance by organizing forums that aim at equipping those aspiring to be leaders with knowledge on the constitution so as to ensure free and fair elections. NDI's governance programs seek to promote effective public sector institutions and processes that operate in a manner consistent with democratic values of transparency, representation, pluralism and accountability¹¹⁰. In order to achieve this, the Institute delivers technical and institutional support to these public institutions.

4.5.5 Sensitizing the Citizen on their Rights

In order for democracy to work, the citizens ought to be informed on their rights so as to understand and actively voice their interests, act collectively and hold public officials accountable. As Patricia Kameri-Mbote and Migai Akech noted many Kenyans remain unaware of their basic rights.¹¹¹ This lack of knowledge of rights remains a major hindrance to accessing justice, especially among poor, vulnerable and uneducated people. KAS in partnership with

¹⁰⁹ Ottichilo E.A. Human Rights and Good governance: Case Study of Kenya. 2011

¹¹⁰ NDI's Leadership and Campaign Academy, Candidates' Manuel. November 2011

¹¹¹ Patricia Kameri-Mbote and Migai Akech, Kenya: Justice Sector and the Rule of Law. A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011

Daraja has promoted the importance of civic education in schools which has resulted into its incorporation in the regular curriculum. Subsequently teaching materials were developed and teachers of primary and secondary schools were provided with specific training on civic education. At the same time activities were conducted in cooperation with Universities and teacher colleges to discuss the integration of civic education into the regular teachers' training program. ICJ has a democratization program touching on the freedom of information. It carries out a lot of Legal Research and Analysis on the rule of law in Kenya. The dissemination of its research findings goes a long way in contributing to the empowerment of the people and their subsequent participation in the protection of their own rights.

4.5.6 Human Rights

The citizens also play a role in the protection of their rights by demanding¹¹² them but they can only do this once they are informed. INGOs like AI, ICJ, KAS and NDI provide civic education to the Citizens to sensitize them on their rights. This sensitization is done either through seminars and workshops or publications. AI carries out campaigns aimed at ending global poverty and protects the rights of people living in slums. It also facilitates workshops for local activists and puts pressure on the government to promote human rights. ICJ which aims at serving its beneficiaries by improving human rights protection also contributes to governance. Its action is to bring justice to people who have been victims of torture by the state. The occurrence of torture and other forms of inhuman degrading treatment has been blamed on "the security paradigm adopted in the training of members of the security forces and also because the members of these forces lack knowledge relating to the human rights aspects of their

¹¹² The underlying philosophy of the right of access of information as captured in the Declaration of Principles of in Africa, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.

work”.¹¹³ Torture is often used as “a tactic for political intimidation and suppression of dissent”¹¹⁴.

4.5.7 Fight against impunity

There is need to safeguard the rights of the citizens and at the same time ensure that perpetrators of human rights violations are held accountable for their actions. The demand by an INGO like Amnesty International¹¹⁵ that the government brings to justice the people responsible for the 2008 post election violence is an example of the contribution towards fighting impunity. The organization expressed its concern at the failure of the state party to account for those responsible for human rights abuses, and to provide justice and reparation to the victims as required under article 2 of the covenant¹¹⁶. Such an organization doesn't just base its demands on hearsay but does so after carrying out its investigations. Kenya signed the Rome Statute in 2005 making it possible for the ICC to investigate in crimes against humanity in cases where the government takes no action. INGOs like AI which deals with fighting impunity as one of its mandates in Kenya, ICJ-K, and KAS¹¹⁷ lent their voice to the demand for action on the prosecution of those suspected to have been behind the 2008 post-election violence.

¹¹³ Musila G (2011) Effective prevention of Torture: A Guideline for Security Forces. The Kenyan section of the International Commission of Jurists.

¹¹⁴ Ibid.

¹¹⁵ Kenya Submission to the United Nations Human rights committee. AFR 32/002/2012

¹¹⁶ The covenant commits parties to work toward granting of economic, social and cultural rights to individuals

¹¹⁷ KAS Country Report March 2010

4.6 Conclusion

From the data collected and presented in this chapter, the study has established that contributions have been made under the following thematic areas: Reforms (judicial reforms, Electoral reforms, Police reforms) ; Human Rights, Access to Justice, Transparency and Accountability, Increasing Citizen Empowerment, Democracy and Good governance, Fight against Impunity and Devolution. All these thematic areas are interlinked for they are dependent on each other and are all covered in the constitution.

CHAPTER FIVE

CONCLUSION

5.1 Conclusion

This chapter discusses the key findings of the study before stating whether the hypotheses were verified or not and also gives recommendations on better strategies to be used by the INGOs in promoting and protecting the rule of law. The chapter will conclude the study by proposing further studies on this topic.

The study has demonstrated that Kenya has come a long way regarding the promotion of the rule of law, that is, since independence through the years of single party system to the present democratic era. In looking at the role of INGOs in the promotion and protection of the rule of law in Kenya, this study has demonstrated that INGOs have played a key role in the implementation of the new constitution, reforms, promotion of human rights, access to justice, transparency and accountability, democracy and good governance, fighting impunity and increasing citizens' empowerment and participation.

As the data collected shows, as much as a lot has been done on the promotion of law, there remains work to be done to fully achieve the objective of fully implementing the rule of law. The literature review reveals the challenges the INGOs have faced in the three regimes in the implementation of the rule of law and this shows that the struggle and efforts to obtain this noble objective has been frustrated by past regimes. It is worth noting that the INGOs have made contributions towards the implementation of the new constitution in spite of these challenges. They have each taken an approach that differs from the others but in some cases have partnered in achieving the mandates in Kenya. On reforms, there is need for the government to improve in its collaboration with the INGOs by speedily implementing recommendations made by the task forces the government establishes to look into the various

issues and suggestions provided by the INGOs which poses a challenge in carrying out their mandates in the country. The citizens have a role to play in the promotion of the rule of law. Apart from the sensitization made by the INGOs, the citizens themselves need to change their mind-sets and be more informed on their rights so as to be able to demand for them. Ignorance of the law by citizens poses a challenge to the role of the INGOs. Citizens should not only be consumers but also a sovereign people that is active in the implementation of the rule of law.

On fighting impunity and corruption, the government needs to be firm on leaders who violate the law by removing them from public office and having them prosecuted for the crimes committed without interfering with the work of the judiciary. In so doing, the government will have increased the confidence of the citizens in the judiciary and subsequently in the government. The government needs to put more effort in implementing police reforms because in spite of the notable changes, police brutality still persists. The police force needs to be trained for they lack knowledge relating to the human rights aspect of their work.

At the beginning of the study, three hypotheses had been established in line with the objectives of the study with the aim of guiding the researcher in establishing the role played by INGOs in the promotion of the rule of law. The study which sought to trace the usefulness of INGOs in their effort to promote the rule of law verified the hypothesis that INGOs did contribute a lot in this matter. After examining the different strategies of the four selected INGOs, the study verified the hypothesis that INGOs have been successful to a large extent in the promotion of the rule of law in spite of challenges encountered notably in form of resistance from the government.

In Kenya government's response to the work of the INGOs, the study shows its acknowledgement of their contribution to the promotion of the rule of law through provision of

financial support, training, creating awareness on what changes need to be implemented and representing the people in relevant forums to sensitize them on their rights. In spite of the slow speed at which the government implemented certain suggestions, the strategies of the INGOs, for example, the collaboration with government ministries (for the case of ICJ-K on judicial reforms) or with political parties and the civil society (for the case of KAS and NDI) did contribute immensely in effectively achieving their mandates concerning the promotion of the rule of law. The study has established that contributions have been made under the following thematic areas: Reforms (judicial reforms, Electoral reforms, Police reforms) ; Human Rights, Access to Justice, Transparency and Accountability, Increasing Citizen Empowerment, Democracy and Good governance, Fight against Impunity and Devolution. All these thematic areas are interlinked for they are dependent on each other and are all covered in the constitution. Following the conclusion of this study, there is no doubt that INGOs do play a vital role in the promotion of the rule of law and the study recommends that the government collaborates more with the INGOs by putting in place measures that ensure that the environment is conducive for the INGOs to carry out their mandates in the country. Another recommendation concerns the speedy implementation of propositions (suggestions offered for consideration or acceptance) made by task forces on the various reforms in the country. The study found out that the INGOs are often faced with the challenge of slow implementation of their recommendations, for example, the recommendation that the number judges is increased so as to speed up court cases and to avoid backlogs.

Concerning Kenyan citizen participation and empowerment, the researcher is of the opinion that the government can enhance sensitization of citizens on the constitution and their rights by doing more on capacity building. This can be done by organizing open forums to

sensitize the citizens, training workshops for civil servants or integrating the necessary information in the school curriculum.

5.2 Further studies on this subject

While reviewing existing literature on this subject, the researcher found out that little research has been carried out in Kenya regarding the role of INGOs and their role in the promotion of the rule of law. The researcher therefore recommends that more studies be carried out to enrich this field so as to not only find ways of rendering more effective presence of the INGOs but to also provide other researchers with a reference point. Following the establishment of this study that Kenyans are not familiar or aware of the institutions that come to participate in development and the implementation of the rule of law, the researcher recommends that studies be carried on why the citizens are not informed of the existence of these institutions and subsequently how to increase citizen awareness. These INGOs invest a lot of money but remain unknown to the citizens.

BIBLIOGRAPHY

- Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussion in Contemporary China on Rule of Law*, 17 *Ucla Pac. Basin L.J.* 2000).
- Arthur, W. B. 'Competing technologies, increasing returns and lock-in by historical events', *The Economic Journal* 9, 9: 1 (1989)
- Bell, D. *Beyond Liberal Democracy*. (New Jersey: Princeton University Press, 2006).
- Cooper D.R. & Schindler P.S. *Business Research Methods*. International Edition, 10th Edition. (New York. McGraw-Hill/Irwin, 2008).
- Costa, P. and D. Zolo, *The Rule of Law* (Alabama: Springer. P, 2007).
- Death sentences and executions 2010, Amnesty International
- Della Porta, Donatello and Tarrow,S « Transnational Processes and Social Activism: An Introduction » Della Porta and Tarrow (eds.) *Transnational Protest and Global Activism*. (Lanham: Rowman and Littlefield, 2004).
- Devetak,R. Burke,A and J. George. *An Introduction To International Relations*. (Cambridge: Cambridge University Press, 2012).
- Evans, J.D. *A Plato Primer*. (New York: Cornell University Press. 2010).
- Final Report of the Task Force on Judicial reforms (2011)
- Final Report of the Task Force on Judicial Reforms , July 2010
- Finer, S E. *Five Constitutions*. (Penguin Books, 1979).
- Fowler, A. *Civil Society, NGOs and Social Development: Changing the Rules of the Game*. Occasional Paper No. 1, (UNRISD, Geneva, 2000).
- Fuller, L. *The Morality of the Law*, rev. ed. (1977).
- Fuller, L. *The Morality of the Law*, rev. ed. (New Haven: Yale University Press, 1969).
- Ghai, Y, P. and McAuslan, J.P.W.B., *Public Law and Political Change in Kenya* (Nairobi/London/New York: OUP, 1970).
- Hall, R. *Plato*. (London: Routledge, 2004).
- Hayne, J. *Democracy and Political Change in the Third World*. (London: Routledge,2001).
- Haynes, J. *Comparative Politics in a Globalizing World*. (Cambridge: Polity Press, 2005).
- Henry, N. 'U.S. Jurists Criticize Kenya on Rights. Concerns Expressed Over Limits on Speech, Judicial Independence', in *The Washington Post*, 20 July 1991).
- Hobbes, T. (Dent 1914) (1651), *Leviathan* ch 29.

- Hornsby, C. and D. Throup, *Multi-party Politics in Kenya*. (Nairobi: East African Educational Publishers, 1998).
- Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (2003).
- ICJ Rule of Law Report: *Transitional Justice in Kenya*. Looking forward, reflecting on the past(2010/2011).
- International Monetary Fund; *Staff Country Reports (Kenya: Poverty Reduction Strategy Paper*. 2010).
- Joseph S. Nye, Jr. and Robert O. Keohane, "Transnational Relations and World Politics: An Introduction," *International Organization*, Vol. 25, Issue 3, 1971).
- Jowell J. *The Rule of Law and its underlying Values*, in: Jeffrey Jowell/Dawn Oliver (eds.), *The Changing Constitution* 6th ed., 2002).
- Kappen, T. ed. *Bringing Transnational Relations Back in: Non-state Actors, Domestic Structures and International Institutions*. (Cambridge University Press, 1995).
- Koki Muli: 'The Struggle for Democracy in Kenya through the Electoral Process,' a paper presented at the regional stakeholders round-table on elections and democracy organized by Zimbabwe election support network (ZESN), on 15th – 16th March 2007).
- Konrad Adenauer Foundation (ed). *Rule of Law*. (Berlin: Bouvier, 2006).
- Konrad Adenauer Stiftung Country Report (March 2010).
- Kothari C.R. *Research Methodology; Methods & Techniques*. Revised 2nd Edition. (New Delhi. New Age International (P) Limited Publishers, 2004).
- Kuhn T. *The Structure of the Scientific Revolution* University of Chicago press (1962)
- Law Society of Kenya: Constitution making and democracy in Kenya: *Building constitutionalism*
- Law Society of Kenya: Constitution making and democracy in Kenya: *Building Constitutionalism*
- Lewis, D & Nazneen, K. *Non-Governmental Organization and Development* (New York: Routledge, 2009).
- Lewis, D. *The Management of Non-Governmental Development Organizations* (New York: Routledge, 2001).

- L.Obogno and Nyamboga E. (2011). *The Journalist and the Rule of Law*. ISBN No. 9966-958-11-8
- Locke, John *'The Second Treatise of Government', Two Treatises of Government*, New York:Routledge, 1965).
- Magtadt, T. *Understanding Politics: Ideas, Institutions and Issue* (Belmont: Cengage Learning, 2009).
- Mathews, A. *Law, Order and Liberty in South Africa* (London: University of California Press. 1972).
- Michelo Hansungule. *Kenya's Unsteady March Towards the Lane of Constitution*. The University of Nairobi Law Journal
- Minxin Pei, *Does Legal Reform Protect Economic Transactions? Commercial Disputes in China*, in *Assessing The Value of Law in Transition Economies*, Peter Murrell, Ed. (2001).
- Montesquieu, Baron de, Charles Louis de Secondat (1798) *Spirit of the Laws*, translated by Thomas Nugent Kitchener(Ontario: BatocheBooks, 2001).
- Mugenda O.M. & Mugenda A.G. *Research Methods. Quantitative & Qualitative Approaches*. (Nairobi. Acts Press, 1999).
- Musila, G. *Effective Prevention of Torture: A Guideline for Security Forces*. (The Kenyan section of the International Commission of Jurists 2011).
- Mutua M. "*Human Rights and State Despotism in Kenya: Institutional problems,*" *Africa Today* 50, 1994)
- Mutua, M. *Human Rights NGOs in East Africa: Political and Normative Tensions*. (Philadelphia: University of Pennsylvania Press, 2009).
- Mwagiru, M. From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice. *Journal of Language, Technology & Entrepreneurship in Africa Vol. 3 No. 1*. 2011).
- NDI's Leadership and Campaign Academy, Candidates' Manuel. November 2011
- Ngugi, N. "*Stalling juristocracy while deepening judicial independence in Kenya: Towards a Political Question Doctrine*" Judiciary Watch Report – Judicial Reform in Kenya, 2007).

- Ogada, M. *Electoral Reform in Africa: Challenges and Opportunities*. (The Kenya section of International Commission of Jurists. Nairobi 2009).
- OSSREA *Good Governance and Civil Society Participation in Africa*. (Addis Ababa. OSSREA., 2009).
- P Norris, "Public Disaffection and Electoral Reform: Pressure below." Paper presented at the Joint Sessions of Workshops of the European Consortium for Political Research (Lisbon, 14-19 April 2009)
- Paine, T. *Common Sense* (Boston: Forgotten Books, 1776).
- Pangle, T. *Montesquieu's Philosophy of Liberalism: A Commentary on the Spirit of the Laws*. (London: The University of Chicago, 1973).
- Popper, K. *Lesson of the Century: With Two Talks on Freedom and the Democratic State*, (New York: Routledge 2000).
- Rakiya Omaar, 'Ten Years of President arap Moi in Kenya', in Human Rights Watch (New York, 4, October-November 1988).
- REDRESS: Ending torture, Seeking Justice for Survivors, Impunity Guidelines. September 2010 Report of the Advisory Panel of Eminent Commonwealth Judicial Experts (Nairobi: Constitution of Kenya Review Commission, 2002).
- Report of the commission of inquiry into Post Election Violence of 2007-288(Waki Commission)
- Report of the Committee on the Administration of Justice (Nairobi, 1998).
- Risse-Kappen, T. « *Bringing Transnational Relations Back in: Introduction* » and « Structure of Governance and Transnational relations: What Have We Learned? » in Risse-
- Sandra Fullerton Joireman: Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy; *The Journal of Modern African Studies*, Vol. 39, No. 4 (Cambridge: Cambridge University Press, Dec., 2001).
- Rule of Law Report: Transitional Justice in Kenya. *Looking forward, reflecting on the past* (2010/2011).
- Sands, P. *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003).

- Sandra Fullerton Joireman: Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy; *The Journal of Modern African Studies*, Vol. 39, No. 4 (Cambridge: Cambridge University Press, Dec., 2001).
- Saunders, C. and Le Roy, K. *The Rule of Law*. (Sydney: The Federation Press, 2004).
- Siriam, C. *Peace building and Rule of Law in Africa: Just Peace?* (New York: Routledge, 2011).
- Tamanaha, B. *On The Rule of Law* (Cambridge: Cambridge University Press, 2004).
- The Kenya Justice Sector and the Rule of Law. A review by AfriMAP and the Open Society Initiative for Eastern Africa March 2011
- The Constitution of Kenya, 2010
- The report on the Committee of Experts (CoE) on Constitutional Review (Nairobi 2009).
- The World Bank, *Judicial Systems in Transition Economics: Assessing the Past, Looking to the Future* (2005).
- Vedder, A. *NGO Involvement in International Governance and Policy: Sources of Legitimacy*. Netherlands: Martinus Nijhoff Publishers, 2007).
- Yu,H and Guersvy,A (2003) what is the rule of law