

## Kenya

Only two years after the election of the National Rainbow Coalition Party (NARC), after twenty-four years of autocratic rule by President Moi, the public euphoria that greeted its entry into power has begun to wane. The record of the Mwai Kibaki government has been a source of both hope and disappointment.

The current human rights situation in Kenya is one of few serious abuses. However, the potential is growing for serious problems in the future as much of the repressive state machinery from the Moi era remains intact. And while this government has made some commendable steps to address human rights concerns, it has demonstrated insufficient willingness to commit to any institutional changes that would fundamentally limit the extensive presidential and executive powers it inherited.

Change at the highest levels of power is not being institutionalized, and high-ranking Kibaki officials are not being held to account for abuses in the same way as former Moi government officials. The government's commitment to the rule of law is increasingly coming under question, amid a backdrop of internal power-brokering and unpunished corruption scandals within the ruling party. Since the election, the political divisions among NARC coalition members have deepened along ethnic lines. Increased political jockeying is rapidly emerging as factions seek to entrench power before the next election in 2007.

### **Signs of Hope**

Commendable and promising steps have been taken to address human rights issues. The government appointed to high office several well known rights activists. Officials enforced universal free primary education. A more independent government National Human Rights Commission staffed with qualified persons was sworn in.

A major reform program was initiated for the judiciary, police and prison services. Public pressure forced out former High Court Chief Justice Bernard Chunga, accused of complicity in torture and cruel, inhuman, and degrading treatment of suspected members of *Mwakenya*, a clandestine political movement in the 1980s. A massive shake-up of the judiciary followed an internal report that accused twenty-three judges of corruption. While the removal of corrupt and politically compliant judges was a welcome step, the process attracted criticism for the lack of due process. The process commenced with a committee of inquiry which did not always take affidavits from accusers, arrived at its findings without seeking a response from the accused judges, and its findings were widely publicized in the newspapers before consideration by the appointing authority. In some cases, there has been no fixed charge, but a process

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of new allegations introduced serially as the inquiry has proceeded so that the affected party does not know what new allegation he/she may face as the hearing progresses. The expulsion of judges considered—but not yet found—guilty of corruption, ineptitude or improper conduct amounts to a denial of due process. The new judges have been appointed as acting judges and are serving without tenure until they are formally appointed.

The freedom of the press and electronic media flourished and there has been a real expansion of FM radio. This resulted in an increase in public participation and critical commentary of government actions. However, the government's response to its own policy has not always been welcoming. It has threatened curbs and failed to dismantle some of the restrictive statutory amendments of the Moi years. Thus, an exorbitant security of one million shillings [U.S.\$12,500] for new publications still remains; Information Minister Raphael Tuju appointed an extra-legal committee of "inquiry" in a radio station's operations in displeasure at their commentaries; and the old Media Bill of the Moi regime passed in 2002 remains a threat to press freedom.

With strong calls for accountability for past abuses, President Kibaki mandated three transitional justice initiatives to address human rights abuses, economic crimes (corruption), and the widespread illegal expropriation of public lands. The government created a task force to examine whether a truth and reconciliation commission should be established, although it has since ignored the recommendation of the task force to create such a commission. In closely-followed public hearings, the Goldenberg Commission of Inquiry began to unearth evidence about the Goldenberg scandal, viewed as the single worst case of corruption during the Moi era, implicating President Moi and others. President Kibaki also set up a Land Commission to provide him with a report on "land grabbing" by former government officials. That report was handed to the president in June 2004 with detailed recommendations. It remains to be seen whether these initiatives will lead to any prosecutions or reparations.

### ***Disappointments and Concerns***

The broadening of human rights space in Kenya since the 2002 election is a most welcome development, but important human rights concerns remain. The repressive state machinery that permitted the misrule that characterized the Moi era remains in place. The fact that this institutional framework is being retained and can be used by the Kibaki government remains a continuing danger to sustainable human rights in Kenya.

Additionally, the government's reform efforts to address the ills of the past are not always being undertaken with care for due process and rights protections. In some cases, the approach and justification of the Kibaki government has been that good intentions can allow it to forego safeguards in the process of redressing past wrongs.

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## **Constitutional Reform**

The NARC government came to power on a campaign promise that it would make the new constitution a cornerstone of its rule. The draft constitution has become a symbol of the hopes and aspirations of Kenyans for a participatory democracy. It contains a strong non-derogable bill of rights, separation and devolution of powers, and a weaker presidency through the creation of a prime minister position. Although a product of consensus and political compromise, it is the most widely consultative rights document that Kenya has ever seen and contains better human rights guarantees than the current constitution. Its passage would be a good first step towards a devolution of executive power and the creation of an institutional framework for the protection of rights through an enlarged and enforceable Bill of Rights.

Twice the government has publicly announced deadlines by which the constitution would be passed; both times it has failed to deliver. On July 3, 2004, peaceful protests in support of the constitution in Nairobi were met with police using water cannons and tear gas, and during demonstrations in Kisumu on July 7, live ammunition was fired by police killing one person and injuring several demonstrators.

Political wrangling among ruling NARC members has scuttled the likelihood that this draft constitution will be passed in its current form, if at all. The split is between NARC's two predominant coalition partners: the National Alliance of Kenya (NAK) headed by President Kibaki, and the Liberal Democratic Party (LDP) headed by Raila Odinga. LDP members complain that they have been marginalized and are pushing for Odinga to be appointed prime minister following the passage of the draft constitution. Appearing unwilling to devolve power from the presidency—and particularly not to a member of the Luo tribe—the NAK faction are blocking passage of the constitution.

The thwarting of the constitutional review process signals an apparent unwillingness to allow an institutional framework that would devolve or share power, in particular with other ethnic groups in the country. This has had an immediate and adverse impact on the issue of the executive devolution of power and accountability, the rebuilding of independent state institutions, and the passage of a strong Bill of Rights.

Also, there is growing impunity for actions by those in the inner-circle of government. Since the new government came to power, there have been several instances of government ministers publicly expressing their intention to disregard court injunctions; property expropriated by executive order, and reluctance to prosecute violations by the president's supporters. As corruption scandals or other excesses by current government officials come to light, the government has been unwilling to dismiss, investigate or prosecute its members the same way that it is dealing with former government officials.

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## **Key International Actors**

One of the most significant developments came in late 2003 when numerous international donors officially resumed aid to Kenya. These renewed pledges indicated widespread support for the Kibaki government's economic and political reforms.

Donor aid to Kenya had previously been suspended because of rampant corruption, abuses, and economic mismanagement under President Moi. The International Monetary Fund (IMF) suspended lending in December 2000 and shortly thereafter the World Bank followed suit. In 2003, the European Union was the first to announce that it would resume aid, pledging 50 million euros in budget support and 225 million euros for development projects. Days later, the IMF announced that it would also resume dealings with Kenya, approving a U.S.\$252.8 million loan, of which roughly U.S. \$36 million will be available immediately. Then, in the last week of November, a group of donors—including the World Bank, the European Union, the African Development Bank, the United States and the United Kingdom—announced pledges totaling U.S. \$4.1 billion for 2004-2006, the greatest portion of which would be available in 2004. Unlike the majority of aid, to support infrastructure and development projects, the U.S. aid (approximately U.S. \$78 million) was earmarked for its “Draining the Swamps that Feed Terrorism” program, to focus specifically on good governance and security initiatives designed to curb corruption and terrorist threats.

Many donor pledges still have not been delivered in full due largely to their concerns about the stalling of constitutional reform, the political in-fighting in NARC, and corruption scandals in the new government.