

HUMAN RIGHTS, SOCIAL JUSTICE AND SOCIAL DEVELOPMENT IN  
KENYA

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## Starting with the Maasai Land Question

The British acquired land from the Maasai through the 1904 and 1911 land agreements and by way of legislation devoted to seeing that control over land was achieved. It did not matter how this would be done, the necessary legal effect to ensure British occupation would nevertheless be given.<sup>2</sup> It did not matter that the Maasai as natives of vast portions of the alienated land had original title by virtue of occupation since the memory of man.

Almost a century since the initial acquisitions, the inadequacy and injustice of Kenya's present approach to native rights and claims persists. There is an urgent need for recognition of such rights and equitable solution of such claims.

The Maasai linguistically comprise all the people who speak the Nilo-Hamitic language known as Maa. Little is known by historians and anthropologists alike on the origin and history of the Maasai<sup>3</sup>. By the arrival of British colonial occupation towards the end of the 19<sup>th</sup> century, the Maasai occupied a stretch of country measuring approximately five hundred miles from north to south and its widest point about two hundred miles from east to west<sup>4</sup>. The extent of Maasai occupation was such that their land extended from the arid plains of Baringo, following the contours of the Rift Valley all the way to Central Tanganyika. Though difficult to strictly define the extent of the country the Maasai considered their property, it is factual that in 1902, they still roamed over a vast stretch of country which included land north and south of the new railway line<sup>5</sup>.

In a letter by Sir Charles Elliot, Governor of the Kenya Colony to the Foreign Secretary responding to landowners who had argued for the protection of Maasai rights in the Rift Valley, he wrote:

*"I have no desire to protect Maasaidom. It is a beastly bloody system founded on raiding and immorality, disastrous to both the Maasai and their neighbours. The sooner it disappears and is unknown except in books of anthropology, the better"*<sup>6</sup>

In a nutshell, the customary jurisprudence of Maasai land tenure led to the undue encroachment of their ancestral land. Colonial and neo-colonial policies have since, unfortunately been twisted resulting to dispossession of most of the ancestral lands of the Maasai. The tone was set by Sir Charles Elliot, Governor of Kenya colony, who argued that as a matter of expediency, it was best to set aside reserves for the Maasai while in principle stating that wandering tribes had no right to keep other and 'superior' races out of larger tracts of land merely because they had acquired a habit of ranging over far more land than they could utilize

The politics of the conquest of the Maasai was brought to an end with the Maasai moves of 1904 and 1911 which fenced pastoralism out of the best grazing lands in the Rift Valley

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<sup>2</sup> Abuor O.C *White Highlands No More, a modern political history of Kenya* Volume 1 (Pan African Research)

<sup>3</sup> The Maasai tradition itself is of little aid in this connection. However, historical evidence does point to a Negroid sub-race of tall people called Nilotes living in present Sudan in the sixth century who subsisted by hunting and gathering. Later they turned their efforts to the less arduous pursuit of stock-raising and having turned pastoral and consequently nomadic, started a territorial expansion southwards. By the 17<sup>th</sup> century, the Maasai had trekked southwards conquering, dispersing and absorbing other tribes along the way finally arriving in the Laikipia and Uasin Gishu country that would later comprise the 'white highlands'

<sup>4</sup> Keriako Tobiko "Land (Group Representatives) Act; group ranches, a study of the Kaputiae Group ranches in Kajiado District" (LLB Dissertation, University of Nairobi, 1989).

<sup>5</sup> For a more comprehensive reading, see Marsh Z. *East Africa; Through Contemporary Records* (Cambridge University Press 1961)

<sup>6</sup> Quoted from the book by Abuor C. Ojwando *White Highlands No More* (Pan African Research Press) Vol 1 1982 at page 72

while fencing capitalist ranching in. Before the beginning of this process of deprivation, three quarters of the white highlands had been Maasai land. A 1904 Maasai agreement was given a halo of legitimacy by then Governor of the protectorate Sir Donald Steward who called it a treaty.

The Maasai chiefs under the leadership of Lenana Ole Mbatian were asked to put their finger marks on a pre-typed agreement stating that the Maasai were acting in their own interest in removing their people, flocks and herds into definite reservations away from the railway line and away from any land that happened to be thrown open to European settlement. It is noteworthy that this agreement had a clause stating that the Maasai were satisfied with this arrangement and thus bound their successors to abide by the agreement. Is it plausible that one would forsake an ancestral birthright of such immemorial origin so casually? It is no wonder that this agreement has been the genesis of everlasting controversy as to its legality and binding nature

There was a total mistake at the start of colonialism as to where the corner institution of Maasai leadership lay. Leadership for the Maasai was egalitarian lacking an all-powerful leader in the political set up. Decisions were made in democratic meetings chaired by none and the decisions were binding even on those who opposed them<sup>7</sup>

The Laibon therefore lacked authority to enter into such an agreement ceding away the giant's share of Maasai territory without the consent and approval of the whole tribe. No Laibon had the power to plunge the community into such a far-reaching decision. Notwithstanding that the 1904 agreement provided that it would endure so long as the Maasai existed as a race and that no Europeans or other settlers would be allowed to take up land in the area reserved for the Maasai, this agreement was abrogated by another in 1911, in which Sir Percy Girrouard the then Governor of East Africa Protectorate convened a meeting at Ngong where the 12 year old son of Lenana (Seki) signed a new pre-typed agreement. In this agreement, the Maasai agreed to vacate the north Maasai reserve and thus the Maasai were moved from the Laikipia area to the arid zone south of the railway line

This move incensed the Maasai who felt the Government had reneged on its promise of 1904 and they reacted surprisingly with a law suit famously known as the *Ole Njogu Case*<sup>8</sup>. The case in spite of its merit was summarily dismissed based on a mendacious argument that it could not be arbitrated by a court of law as the 1904 agreement was a treaty and not a contract. In the final analysis, the Court's finding was circular; to the question- '*could the Maasai make a treaty?*' the answer was '*Yes because they retained an element of sovereignty*'. And to the question '*what element of sovereignty did they retain?*' The answer appeared to be '*the treaty making element*' which was an unsatisfactory explanation<sup>9</sup>

The alienation of Maasai land, the confiscation of their herds and white domination has thus been the crux of the long struggle for a return of their birthright. Colonialism saw the Maasai and other African land owners lose their best ancestral lands. The Maasai land question was further complicated by other factors and more so the pre and post independence migration of Kikuyu squatters into the Rift Valley<sup>10</sup>. Kikuyu infiltration

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<sup>7</sup> Jacobs A.H. "The Pastoral Maasia of Kenya, An Anthropological field study" (unpublished). Paper submitted to Overseas Development Ministry London 1963

<sup>8</sup> *Ole Njogu and others v The Attorney General and others* (1913-14 Volume 1. Kenya Law Reports page 70.

<sup>9</sup> See Njoroge A. K., "Native Rights in Kenya; The Maasai Claim to Rift Valley Province" (LLB Dissertation, University of Nairobi, 1997) pg 35.

<sup>10</sup> The Kikuyu Expansionist Dynamic is of special significance and was negatively used as an excuse to stoke politically instigated clashes in 1992 and 1997. The widespread fear of Kikuyu encroachment on other tribes-Embu, Meru, Kisii, Kamba, Maasai etc is a matter that has historically raised lots of suspicion and dislike among their hosts. The extensiveness of Kikuyu cultivation coupled with the growth of their population in areas outside their home in Central Province had even before independence precipitated appeals to the Colonial Government to control Kikuyu infiltration. A 1946-

happened very easily among the pastoralist Maasai and was an appealing option for those Kikuyus displaced from Central province and the white highlands.

Other factors for the Maasai plight include a flawed process of decolonization, continuation of the agrarian reforms of the 1950s, the post independence resettlement policy and the public appropriation of Maasai land. It is often said that we cannot give back the country to the Maasai-just as with native Indians in the Americas-but it is at least our obligation to understand the legal and historical processes that were involved in depriving native people of their homelands and to comprehend the legal and moral claims which the Maasai still retain and justly put forth.

### The Struggle for Independence.

The Independence struggle in Kenya was multi-dimensional and complex. While the clamour for black majority rule could not be put down even by brute force; as independence came knocking, fears were already widespread that a new era of land alienation would begin afresh especially in Maasailand. Kikuyu squatters were firmly entrenched in many areas of the Rift Valley where they considered themselves the rightful owners. That is why the history of the Mau Mau movement is closely associated with Olenguruone in the Rift Valley since the eviction of the Kikuyu squatters in Olenguruone has been considered as one of the factors that fomented the Mau Mau rebellion. Two seminal books published in 2005 on the Mau Mau struggle for independence by Prof Caroline Elkins and David Anderson have reignited debate about the period of colonial occupation in Kenya<sup>11</sup>.

The independence struggle was further complicated by other social dynamics. The original owners of land in the Rift Valley like the Maasai felt that independence meant that Kikuyu squatters would go back to Central Province hence their support for the Majimbo constitution which they thought would entrench the land rights of indigenous communities.

By 1952<sup>12</sup> when the state of emergency was declared, crimes against humanity had come to be accepted as such acts committed as part of a widespread or systematic attack directed against any civilian population<sup>13</sup>. Persecution- the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of a group or collectively- especially against the Kikuyu, Meru and Embu communities ensued on a scale then as now universally recognized as impermissible under international law. Enforced disappearance of persons-the arrest, detention and abduction of persons by British forces followed by refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons removed from the protection of the law for prolonged periods of time was a common feature of the emergency.

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47 report on Native affairs had stated, “ *Kikuyu immigrants having gained a foothold in other tribes’ domain by ingratiating subtlety and specious promises too often reassert their tribal character as soon as they feel they have numerical strength*” (Kenya Native Affairs Department Report 1947-51 “Kikuyu Infiltration and Inter-penetration in Maasailand” pg 23

<sup>11</sup> Prof Caroline Elkins Pulitzer winning “*Britain’s Gulag; Imperial reckoning and the end of empire in Kenya*” also forms the basis of the documentary “White Terror” and David Anderson’s “*Histories of the Hanged*”

<sup>12</sup> The Fourth Convention of the Hague on the laws and customs of war on land had been negotiated in 1907 while the Four Geneva Conventions enriched this body of law in 1949 (Convention I-for the protection of the condition of the wounded and sick in armed forces in the field, Convention II- dealing with wounded and shipwrecked members of armed forces at sea, Convention III- for the protection of prisoners of war and Convention IV- for the protection of civilian populations)

<sup>13</sup> Murder, extermination (including the intentional infliction of conditions of life like deprivation of access to food and medicine calculated to bring about the destruction of part of a population), enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced sterilization and other forms of sexual violence were a common feature of the methods employed by British forces to put down the Mau Mau

Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health have been documented. Grave breaches of the Geneva Conventions of 12 August 1949 also occurred. Yet, British forces were under an obligation not to engage in acts constituting grave violations of the Geneva Conventions

Mau Mau War Veterans have consequently filed a suit in the United Kingdom against the British Government for actions of torture perpetrated in concentration camps such as Hola, Mwea and Manyani and for losses suffered after the Queen signed a confiscation order for properties belonging to Mau Mau sympathizers.

The British argue that the Mau Mau was not a war-but a situation of internal terrorist disturbances and sporadic acts of violence - and that therefore the Geneva Conventions were not applicable. But the fact that the British constituted a Mau Mau War Council<sup>14</sup> comprised of among others the Governor Sir Everlyne Baring and General Erskine as the Commander of the British Forces in Kenya shows that they were fighting a war in Kenya-in much the same way as they had done during World War II.

Though it is a contentious issue how to characterize the Mau Mau uprising- whether international or non-international in character- all the four Conventions of Geneva usually recall a standard clause- the Martens Clause, according to which in cases not covered by the rule of law,

*“The inhabitants and belligerents remain under the protection and the authority of the principles of the law of nations derived from the established custom, from the principles of humanity and from the dictates of public conscience”*

The Martens Clause thus constitutes a legal safety net covering the loop holes of positive law. In short, this clause would imply that the British Forces operating in Kenya during the emergency never enjoyed full freedom as to how to put down the Mau Mau rebellion and that it therefore behoved them to find a solution consistent with humanitarian values in all the circumstances of that conflict.

The European Convention on Human Rights also placed all British colonial subjects under the Convention's protection. Upon the declaration of emergency in 1952, Britain invoked Article 15 of the Convention in order to deal with the Mau Mau<sup>15</sup>. Even with derogation in place, the Convention nevertheless prohibited torture and other cruel, inhumane and degrading treatment. Prof Elkin's *“Britain's Gulag”* provides detailed information on this period and how the British continued to maintain a state of emergency when the circumstances no longer required derogation from the Convention. The Convention required a Party availing itself of the right of derogation to keep the Secretary-General of the Council of Europe fully informed of the measures which it had taken and the reasons therefor. Britain therefore had an obligation to inform the Secretary-General of the Council of Europe when such measures ceased to operate and the provisions of the Convention were again being fully applicable to protect the Kenyan population under Her Majesty's jurisdiction.

The Reparations Suit by the Mau Mau exposes to the world the myth that British colonial administration was more responsible than that of the French in Algeria, the Belgians in the Congo or the ruinous Portuguese in Angola and Mozambique. In particular, the confiscation of property and legal discrimination, as well as Nazi style concentration camps for the purpose of incarcerating and liquidating all political opposition were real life issues that

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<sup>14</sup> See Anthony Clayton's , *“The Killing Fields of Kenya 1952-1960”* (Trans Africa Press 2006) pg 34

<sup>15</sup> Article 15 provides that in time of war or other public emergency threatening the life of the nation a Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

African residents of the "British Crown Colony" of Kenya experienced. These were the same crimes the United Kingdom set out to punish in the Nuremberg Trials- confiscation of property, destruction of villages, extra-judicial detention, murder, inhumane treatment and enslavement (forced labor) by the Nazis.

Official estimates of the number of Africans killed during the Mau Mau war reach as high as 90,000 while the number of those detained has been put as high as 160,000 which makes the search for the official truth very important. Further, international law obliges the wrong doing State to compensate the victim for material and moral damage. This kind of guarantee was first included in the Fourth Hague Convention of 1907 according to which a belligerent party violating its provisions would be liable to pay compensation and be responsible for all acts committed by persons forming part of its armed forces.

The issue of Reparations, especially in an economy as impoverished as ours is doubly attractive. But reparations form only part of the whole picture. The reparations suit provides an avenue to address serious human rights violations committed during the colonial era. It also constitutes an innovative way of seeking formal accountability for British actions in Kenya.

Whether or not the Reparations suit succeeds, the solemn duty to vindicate the War veterans remains. This suit should therefore not be seen just to be a gesture or intended as a symbolic acknowledgement from the British government of the truth. Even if the suit fails to achieve monetary compensation, the point has been made that a group of Africans have brought a suit to a foreign country in pursuit of their dignity.

Kenyans would like to see the affirmation at Nuremberg mandating the Allies to judge high-ranking Nazis for the crimes they had ordered and organized in the name of the Third Reich affirmed on behalf of these veterans, to wit:

*"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".*

### The legacy of inequitable resource allocation.

After independence in 1963, and with Jomo Kenyatta as Prime Minister, a boundary dispute with Somalia resulted in sporadic fighting-and ultimately the Shifta War. The legacy of this war<sup>16</sup> is that the region formally known as the Northern Frontier District (NFD) still has no links with the rest of country in terms of infrastructure and thus residents rightly perceive this neglect as official indifference from Nairobi.

Little has been done to progressively realize the economic and social rights of the people of northern Kenya and it is arguable that some of the reasons for the indiscriminate violence and lawlessness that characterize the northern region can be found in the lack of

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<sup>16</sup> The region formally known as the Northern Frontier District (NFD) still has no links with the rest of country in terms of infrastructure and thus residents rightly perceive this neglect as official indifference from Nairobi. Little has been done to progressively realize the economic and social rights of the people of northern Kenya and it is arguable that some of the reasons for the indiscriminate violence and lawlessness that characterize the northern region can be found in the lack of development associated with this region. Since independence, the country's authorities have almost completely neglected the region. There are few telephone lines, no electricity and the roads, where they exist, are in a state of utter disrepair. District hospitals are managed by solitary doctors who serve hundreds of thousands of people. As a result, the people here feel disconnected from the rest of the country in a gulf that separates them from the world to the south making the people in this region feel they are exiles in their own country. Bitterness persists that the Government does not care at all about the inhabitants of the region.

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### Unexplained Political Assassinations

The initial years of independence were characterized by disputes especially between the Kikuyu and the Luo. On 5<sup>th</sup> July 1969 **Thomas Joseph Mboya** the Minister for Economic Planning and Development-a renowned trade unionist, politician, statesman and independence hero-was gunned down in Nairobi at the tender age of 39.

Kenya's independence struggle owes a lot to this young, eloquent, articulate and astute agitator and negotiator. The Labour movement that he led became a vehicle through which indigenous Kenyans articulated their burning aspiration for self-determination and independence. There were many Kenyans who were afraid of being free and for whom there was security in being oppressed by colonialism. Yet Mboya was a true nationalist who reviled ethnic politics and sectarianism.

It is widely believed that his high profile and illustrious career as a brilliant and charismatic leader led to his assassination. His intelligence and charm had won him worldwide recognition and respect and his performance at both national and continental level was such that at the 1958 All Africa Peoples' Conference convened in Accra by President Kwame Nkrumah of Ghana, Mboya was elected conference Chairman at the age of only 28<sup>17</sup>

**Pio Gama Pinto** is another hero who was actively involved in the local politics aimed at overthrowing colonialism. In 1954, he was rounded up in the notorious Operation Anvil at the height of the Emergency and spent the next four years in detention on Manda Island. After his release in 1960, he founded the newspaper Sauti Ya KANU.

Pinto was one of the key architects for KANU's victory in the independence elections and was elected a Member of the Central Legislative Assembly. On February 25, 1965, Pinto was shot down at very close range on his driveway. Kenyans widely believe that he was killed by the Kiambu mafia, a group of power hungry cronies very close to President Kenyatta.

Another unresolved murder is that of the charismatic **Josiah Mwangi Kariuki** popularly known as 'JM'. JM had joined the Mau Mau uprising after completing his secondary school education in Uganda. After taking the Mau Mau oath, he worked as Mau Mau liaison officer helping in soliciting money, boots and housing for Mau Mau which led to his arrest and detention in various camps from 1953 until his release, seven years later in 1960.

After independence, JM worked as Kenyatta's private secretary up to 1969. His relationship with Kenyatta became increasingly strained once JM became vocal of some of Kenyatta's policies. Their disagreements were over Government corruption, the widening gap between rich and poor, deteriorating relations among East African Community members and unfair distribution of land after independence<sup>18</sup>.

In 1974, JM was elected as Member of Parliament for Nyandarua constituency and became an assistant minister in the Kenyatta government between 1974 and 1975, despite Kenyatta

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<sup>17</sup> See Kenya National Commission on Human Rights (KNCHR) publication "An Evening with Tom Mboya-Speeches, Lectures and Remarks from Prominent Personalities" pg 7

<sup>18</sup> The United Kingdom government had given Kenyatta's government funds to buy back land from the white settlers and redistribute it back to the natives. However, the land was never redistributed as envisaged, and most of it ended in the hands of Kenyatta's close friends.

having pulled all strings at his disposal to avoid his re-election since JM's popularity threatened to overshadow that of his government. JM was last seen alive at the Hilton Hotel, accompanied by Kenyatta's bodyguard on March 2, 1975. Several days later, his remains were found by a Maasai herdsman in a thicket in the Ngong Hills.

At the time of his death Kariuki was a millionaire though it is not clear how he amassed his fortune so quickly without somehow engaging in the same vice he was very critical of. JM is remembered by Kenyans as a hero as he came to represent the force against the evils that have hemmed the country to this day. A Parliamentary Select Committee was immediately established to investigate the circumstances surrounding his murder. The Committee's report implicated a senior police officer, Joginder Singh Sokhi, senior administrative officers and politicians, but no one was ever punished. It is most likely that the committee was the means used by Kenyatta's government to mitigate a potential revolt. When the report was finally released, the anger had subsided and the likelihood of revolt much lower.

Another unresolved murder is that of **Kungu Karumba**, a humble quiet man with acute business acumen who had spent seven years in detention with Jomo Kenyatta for leading the Mau Mau movement. His trade and transport business hence collapsed during his absence. After Uhuru in 1963, with his comrade Kenyatta as President, Karumba had a reputation for doing clean business.

It has been claimed without verification that Karumba was shot dead by Lt-Col Maliyamungu—a dreaded security chief of Uganda's President Idi Amin's State Research Bureau over a huge business debt he owed him and did not want to repay. Existing official records indicate Lt-Col Maliyamungu shot dead Kungu Karumba for security reasons at Bugembe in Jinja<sup>19</sup>.

Daniel Arap Moi took over from Kenyatta in 1978 when Kenya's economic performance was already on the wane. After 15 years of politics dominated by the charismatic Jomo Kenyatta, Moi was popular, with widespread support all over the country. He toured the country and came into contact with the people everywhere, which was in great contrast to Kenyatta's imperial style of governing behind closed gates.

Moi has always liked to point out that under his leadership, Kenya - as opposed to most of the neighboring countries - remained peaceful; yet few can forget that under his watch, Kenya's once-flourishing economy ground to a virtual standstill. Moi's regime stands accused of the murder of the late foreign Minister **John Robert Ouko** on 12 February 1990. His murder remains unsolved and it has been alleged that his death was connected to his exposure of grand corruption in the highest echelons of the KANU government. His investigations suggested that he had been compiling a report on corruption in government and how it had affected his attempts to reopen the molasses plant in his Kisumu constituency. The report was not found after Ouko's disappearance and it was suspected that his murder was an attempt to suppress these findings.

Ouko had disappeared from his farm near Kisumu after a trip to the United States and on 16 February 1990 the government announced that his body had been found on a nearby hill. The body had been mutilated and burnt. News of the crime set off riots in Nairobi. Initial police reports suggested that Ouko had committed suicide but it soon became apparent that Ouko had been tortured and shot before his body was burnt. Public pressure led Moi to ask Scotland Yard to investigate the death and in October 1990, Moi appointed a public inquiry into the case chaired by Justice Evans Gicheru.

The inquiry was terminated by Moi in November 1991 and did not produce a final report but its proceedings had brought many of the facts of the case to public attention. Several government officials, including then energy minister Nicholas Biwott and head of internal security Hezekiah Oyugi, were detained for questioning in relation to the murder but

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<sup>19</sup> Joseph Karimi "Uganda Business Trip was Uhuru hero's last" *Sunday Nation*, April 9 2000

released after two weeks for lack of evidence. A former District Commissioner was tried for Ouko's murder in 1992 and acquitted. To date, the crime remains unsolved.

Another unresolved murder during Moi's tenure was that of **Bishop Alexander Kipsang Muge**-a harsh critic of the excesses of President Moi's rule. The Anglican Bishop died in a road accident along the Eldoret-Webuye highway on August 14, 1990, on his way from Busia after a politician had warned him that he was unlikely to return alive from this trip which led many Kenyans to believe that his death was not an ordinary one. Nobody knows who killed Muge and why.

In August of 2000, **Father John Anthony Kaiser** was shot in the back of the head with a shotgun and his body found the next day on the Nakuru-Naivasha road. He was carrying documents he intended to present to the Akiwumi Commission and was also shortly to testify against the Moi government before the International Court of Justice in The Hague.

This catholic priest had spent 20 years in remote missions administering to many people living in grinding poverty. In 1993, he was in charge of the Maela refugee camp in the Ngong Diocese. Internally Displaced Persons had fled to the camp as a result of tribal violence with armed gangs driving them from their homes, and then torching their dwellings.

Kaiser and others thought the government was fomenting the violence as part of a land grab. Amid international attention, on Christmas Eve in 1994, the camp was closed and the refugees were forcibly resettled. Kaiser protested the closing, but he was arrested, beaten, and released into the dangerous bush.

In 1998, at great personal risk, Fr. Kaiser testified before the Akiwumi Commission, investigating the causes of the violence and the closing of the Maela camp. In public, sworn testimony, Kaiser fingered prominent cabinet ministers in the KANU government, as well as Moi himself which led to his testimony being quashed. His assassination is the matter of an ongoing inquest

#### **The Wagalla Massacre.**

In February 1984 Wajir residents were confronted by a massacre attributed to feuds between the rival Degodia and Ajuran clans that inhabit northern Kenya. The Kenya Army with the assistance of the internal security apparatus rounded up men from the Degodia clan - which was blamed for an earlier attack - and herded all of them at the Wagalla airstrip. The men were held there, behind a chain-link fence, for days and many died of thirst or hunger in the semi-desert conditions. Others were clubbed, shot or burnt to death, according to sources in the town. After five days, those who had survived attempted to escape but the security forces opened fire, killing dozens. The dead and near- dead were ferried in army lorries and dumped in the bush where they were left for hyenas to devour.

It was a month later that the incident went public when an MP raised it in Parliament. The government eventually admitted that "57 people" were killed in a security operation to disarm the Degodia, but the toll was widely disputed, with residents insisting hundreds had died. Indeed, today, it is said some 1,000 people are not accounted for<sup>20</sup>.

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<sup>20</sup> A yet to be published book by Salah Abdi Sheikh of an advocacy group called the Truth Be Told (TBT) Network "Blood on the Runway; The Wagalla Massacre 1984" has a detailed story of what transpired.

The Crime of Genocide<sup>21</sup> was committed by the Moi Government at Wagalla Airstrip in 1984. The definition of the crime of Genocide has remained unchanged since its first formulation in the Convention for the Prevention and the Punishment of Genocide signed on November 9<sup>th</sup> 1948. Amazingly Kenya is among the 50 nations that have not signed this Convention. Such a long standing definition suggests continuity of the law which can be explained in light of the historical developments that have characterized international criminal law in the last 50 years.

As we saw earlier, the principle of individual responsibility for international crimes was affirmed for the first time at Nuremberg. The Nuremberg principles in individual criminal responsibility are explicit that criminal responsibility can be born not only by those who directly commit the crime but also by those who order it, including constitutional rulers, public officials and private individuals.

The Crime of Genocide is held to be of such gravity that both the International Criminal Tribunals for former Yugoslavia and Rwanda have felt compelled to describe it as the crime of crimes<sup>22</sup>. The basic rationale of the law on Genocide lies in the protection of those groups which may become the target of policies and acts of Genocide.

The Wagalla Massacre is characterized as Genocide by the fact that the victims were targeted because they were members of a specific clan and atrocities were committed against members of this group precisely because they belonged to that group. In a nutshell, the actions of all those involved in the Wagalla Massacre from President Moi as Commander in Chief of the Armed Forces to his Field Commanders and their subordinates, classically satisfies the legal requirements for the crime of Genocide in offending the freedom of the Degodia (as a group) to exist.

We acknowledge that Genocide is an extremely difficult crime to prove due to the requirement of proving a specific intention of bringing about the total or partial destruction of a protected group as such. This element of specific intent constitutes the borderline between Genocide and other Crimes against Humanity. While the total physical destruction of the Degodia did not occur, it is more than clear that the intention to destroy this group was manifest in all the actions of President Moi's regime in 1984.

From the foregoing, Article IV of the Genocide Convention-providing that persons committing genocide or any of the other acts enumerated constituting the elements of the crime shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals-needs to be invoked to bring to account those who bear responsibility for what happened at Wagalla.

### **Kenya under one-man rule and a one party state**

Moi came to power when Kenya was in the throes of Grand Corruption and other scandals such as the Chepkube coffee smuggling scams and when Kenya had thus become a truly African state. Moi's presidency was a contradiction of sorts, while on one hand he craved

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<sup>21</sup> Article II of the Genocide Convention, defines genocide to mean any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

<sup>22</sup> See *Prosecutor v Jean Kambanda* IT-97-23-S, 4 Sept 1998.

the awe which Jomo Kenyatta had received from the public; on the other hand, he wanted to be different from Kenyatta, by being more in touch with the average man in the village.

Though on ascending to power he had released political detainees of the Kenyatta era, a coup attempt in 1982 saw Moi assume an authoritarian streak to consolidate his rule. Moi's critics have pointed out that many of the changes he attempted were expensive experiments culminating in failure.

While during Kenyatta's presidency, the civil service, security forces and state corporations came to be dominated by the Kikuyu<sup>23</sup>, Moi set about creating ethnic balance in government organs by appointing more people from other communities. Eventually though, members of his Kalenjin tribe came to dominate the civil service and this evoked tribal feelings among Kenyans. Unlike Kenyatta's appointees who were mostly qualified for the positions, Moi's tribesmen had little experience and training for their new jobs making incompetence a hallmark of his era. Moi tended to pick individuals from lowly positions, transform them into overnight power brokers and later dump them when they became too "big-headed" for their own usefulness.

Moi vehemently opposed the return of multi-party politics claiming that political parties would stoke ethnic nationalism. At the height of his intolerance to political competition, Nyayo House-an edifice within Nairobi's Central Business District- became the epicenter for the infliction of severe physical and mental pain to suppress a dissident group known as Mwakenya.

Torture was officially sanctioned as an instrument of governance by the Moi regime where it became legitimate for the President to confuse his personal interests with those of the State. His regime thereby constructed at taxpayers' expense, elaborate official torture chambers to torment those who expressed views different from his own. The prohibition against torture, then as now, was absolute and there can be no exception to this prohibition. Moi may not have reached the brazen heights reached by some of his ludicrous peers in Africa; but torture is nevertheless an international crime that is prohibited even in war time<sup>24</sup>.

Yet in spite of his resistance and anathema for democracy, Moi allowed plural politics which was achieved at great social cost when pro-democracy activists poured out in the streets to force his hand. The 1991 Saba Saba riots agitating for multi-partysim were violently crushed by Moi and for the first time, the international press described him as a typical African dictator. All the same, Moi was undefeatable in subsequent elections because his opponents would underestimate his intelligence by virtue of his humble origins.

### **Grand Corruption and the Goldenberg Scandal**

Following the re-introduction of multipartyism right until the close of his presidency in 2003, Moi dropped all pretenses at being development conscious. Because of legalized competition for his own job, Moi devoted his time and energies exclusively to politics. Political intrigues did not end; they actually intensified as politicians sought his patronage - and the cash that went with it. Financial scandals became routine in Moi's government

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<sup>23</sup> Not necessarily as a deliberate policy on Kenyatta's part but as a product of historical circumstances that put the Kikuyu at an advantage in terms of education levels and work skills.

<sup>24</sup> Mr. Moi and his legal advisors should be well advised to read the Pinochet decision on his extradition to Spain from the United Kingdom for prosecution for the torture of Spanish citizens during his reign in Chile. Kenyan victims living abroad and tortured during Moi's watch only need to wait for the ex-president to make one of his many trips abroad before applying to a foreign court for his extradition for torture under universal jurisdiction laws that govern torture.

throughout the 1990s as his henchmen devised means of acquiring wealth in the shortest possible time.

Moi turned state functions into full time campaign rallies and these were held, not only on weekends, but at anytime during the weekday. Cabinet ministers and members of parliament eager to curry favor with the president took to tagging along with him wherever he went. The result: lack of commitment to their jobs and, possibly, one of the longest Presidential motorcades of an African president. A typical presidential motorcade accompanying Moi to the airport to "wish him a safe journey" would consist of at least 50 limousines ferrying cabinet ministers, heads of state corporations, security chiefs and several diplomats.

Moi was at the helm of the largest financial scandal in Kenya's history. Goldenberg was a monumental swindle of tax payers' money estimated to have directly and indirectly siphoned out through its networks as much as US\$ 1 billion. The spillover effects of Goldenberg continue to be felt a decade and a half since the actual transactions took place. Goldenberg was the climax of the Grand Corruption that Moi came to be associated with and which turned one of Africa's most promising economies into a state of desperation.

At the peak of the scandal in 1993, it is estimated that transactions associated with Goldenberg networks diverted up to 10% of the Gross Domestic Product (GDP) into private pockets through corruption. Though Moi knew the fraud Goldenberg was perpetrating on taxpayers, his regime remained not only reluctant to have the scam investigated but it also knowingly and consciously interfered with the machinery of justice to shield the economic saboteurs from being prosecuted and convicted. Moi ensured that the courts remained a circus whenever attempts were made to prosecute these saboteurs with an all too familiar result.

Goldenberg was ultimate proof that Moi never had good interests for the country when he deliberately presided over the depressing of Kenya's economic performance to its lowest level in history. In his last years in office, Moi had tried some positive steps on reform, including the 1999 establishment of the Kenya Anti-Corruption Authority, and measures to improve the transparency of government procurements and reducing the government payroll. The Anti-Corruption Authority that Moi set up was declared unconstitutional in December 2000, and other parts of the reform effort faltered in 2001. The IMF and World Bank hence suspended their programs and various efforts to restart the program through mid-2002 were unsuccessful.

### **Politically Instigated Ethnic Clashes of 1992 and 1997**

We saw earlier the fingering of Moi by the murdered Father Kaiser to the ethnic strife that rocked the country prior to elections. These clashes fomented by his regime in 1992 and 1997 remain an eternal hallmark of Moi's rule. The resultant plight of the homeless and Internally Displaced Persons continues to be a scar on the conscience of this nation. Thousands of families in Likoni, Molo, Enosupukia, Ol-Moran and Burnt Forest among many other places were left bereaved, hungry and homeless after being forced from their homes in one of the most blatant attempts at State sponsored ethnic cleansing and tribal balkanization in Kenya.

The severe humanitarian crisis caused by the clashes was unprecedented in Kenya's history. Armed raiders were allowed by security forces to rape women, beat and maim elderly citizens unable to flee, torch their homes and steal their valuables. For many, there was nowhere to go. Not only were thousands of livelihoods destroyed, to date, most of these families are living in tatty makeshift shelters or squatting with relatives, still clutching title deeds whose validity Moi's regime refused to recognize

What happened in 1992 and 1997 fits the legal description of "crimes against humanity"<sup>25</sup>. Even if Moi claims he kept Kenya out of war in a period when the horn of Africa and the great lakes region were on fire, these occurrences in parts of Rift Valley, Coast, Western and Nyanza provinces were nothing short of war for those who lived through them.

### The defeat of KANU and take over by NARC

President Kibaki inherited the reigns of power in an environment of weak commodity prices, endemic corruption, and low investment. Kenya was having its worst economic performance since independence. Growth in GDP was stagnated, and agricultural production was shrinking at an annual rate of 3.9%. Inflation was on the rise and the government's budget deficit was over 10% of GDP. Kenya's economic growth lagged at a measly 1.1% in 2002 because of erratic rains, low investor confidence, meager donor support, and political infighting up to the elections. Upon assuming office in 2003, substantive progress has been made in rooting out some forms of corruption and encouraging donor support while GDP grew more than 6% in 2006. Universal free primary education remains the single most prominent success story of his regime.

Under the leadership of President Kibaki, the Government began an economic reform program and resumed its cooperation with the World Bank and the IMF. It enacted the Anti-Corruption and Economic Crimes Act and the Public Officers Ethics Act in May 2003 aimed at fighting graft in public offices. Other reforms especially in the judiciary and public procurement led to the unlocking of donor aid and a renewed hope at economic revival. How has the NARC regime performed in the last four years?

#### *Re-emergence of Grand Corruption*

But despite the tough talk about graft, Kibaki's government has become mired in a major corruption scandal of its own making. Former and current ministers have been implicated in the Anglo Leasing scam involving shadowy deals and large sums of public money. The failure to take candid action on corruption, enact money laundering laws, rehabilitate and build infrastructure quickly enough and address serious structural reforms needed to reverse slow economic growth has left many people frustrated.

While the public is pleased that the economy is recovering, equally, the public is displeased with the Government's nonchalance to deal head on with corruption. Critics feel that the President has failed to demonstrate a clear and resolute will by weeding out and prosecuting corrupt or incompetent officials. How far the President is prepared to go to have his administration convict perpetrators of the Ndungu Land Grabbing Report, Anglo Leasing and Goldenberg scams remains ambivalent

#### *A rebound of Authoritarian Rule*

On the night of 2<sup>nd</sup> March 2006, the KTN and Standard groups were temporarily shut down in a bizarre attack subsequently defended by the Internal Security Minister, which attack

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<sup>25</sup> Crimes against Humanity are defined to mean any of the following acts when committed against any civilian population—murder, forcible transfer of populations, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, disappearance of persons and other inhumane acts of similar character intentionally causing great suffering or serious injury to body, mental or physical health—all.

destroyed key equipment, burnt newspapers, and witnessed the assault of staff members by the Police.

The attack raised public outcry since even the previous KANU regime never had the temerity to invade media freedom through masked and heavily armed police officers. This Government has been unable to answer the resultant accusations from the public of heavy handed methods to assault media freedom. Clearly, the destruction of property, disabling of television transmission, and assault on journalists, hiding behind masks and "confiscation" of mobile phones and other personal effects can never be justified at all as relating to "State Security".

The period July 2005 to June 2006 marked the start of a significant negative claw back on democratic space in the country. Rampant misuse of state resources during the referendum and by election campaigns; efforts to de-register NGOs that were not supportive in the referendum; efforts and attacks on the autonomy of the Kenya National Commission on Human Rights and the Electoral Commission of Kenya were some of the hallmarks of an emerging authoritarian rebound. In the same period, Internally Displaced Persons (IDPs) entered their 14<sup>th</sup> year of destitution without resolution in sight which epitomizes the lack of commitment from this Government to resolve issues of the past.

#### *The Armenian Affair*

The fact that the Standard attack coincided with the presence of two individuals who we are told were Armenians did not go un-noticed. How a pair of dubious foreigners could be appointed to high public office as Assistant Commissioners of Police is baffling

#### *Drug Trafficking*

The seizure of some 1.1 tonnes of cocaine in Malindi- the largest-ever drug seizure in Africa-proved that Kenya has indeed become a favored transit point for narcotics. The fact that such a large haul could be found obviously means that other shipments have transited through Kenya with direct or indirect support from the security authorities. Happily, the drugs haul was incinerated in March 2006 after several days of verification by forensic experts, and a matatu driver convicted for trafficking in drugs, but the danger to Kenyans—as witnessed in many Latin American countries that have permitted transit of drugs through rise of crime, impunity, ineffectiveness of security forces and drug use--continues until the drug kingpins are held to account.

#### *Non-Commitment to International Obligations*

Kenya's commitment to obligations under International Law came under serious question during the 39<sup>th</sup> Session of the African Commission on Human Rights in Banjul, the Gambia in May 2006. It became apparent that Kenya has failed to surrender a suspected war criminal wanted by the ICTR to answer charges of Genocide. A petition against the Government of Kenya was lodged by the NGO Forum at the Session demanding the surrender of Felicien Kabuga. This continued alleged presence of a wanted war crimes fugitive in Kenya severely dents the country's image notwithstanding ratification of the International Crimes Bill in 2005.

#### *Insecurity and the breakdown of a value system*

Currently, Kenyans are seriously concerned with run away insecurity. The proliferation of guns; the rising spread of private militias; the mushrooming of urban criminal groups of thugs; suspicion of police complicity in the crime wave; the rising scores of killings by security officials in circumstances suggesting possible extrajudicial executions; all point to a break down of any code of ethics in the country and is an alarming trend for our young democracy.

### *Private Militias and the Mungiki Menace*

Mungiki and other private militias have been newsworthy for association with violence and anti-government resistance. In Nairobi, the militias operate most extensively in the city's second largest slum of Mathare, where poverty and crime are daily norms. The operations in the slums are those of organized criminal networks that contribute to, and feed off an environment plagued by a security crisis. Every residence in the slums pays a variable sum of money to these organizations, in exchange for protection against theft and property damage. In addition, the gangs "man" public toilets, and charges user fees for services rendered.

### **Inseparability of Democracy, Development and Human Rights**

The grand hopes that energized democracy's optimists in Kenya have not been realized. The apparent democratic transition at times turns out to be relatively shallow, with non democratic forces able to reassert themselves on account of the often fractious character of fledgling governing coalition. The resurgence of authoritarian forces has made citizens gullible to the argument that only a strong hand can set back daily life on track. Authoritarian leaders or parties that may have learnt to say a few of the right things about democracy in the early 1990s have now reverted fully to type

Further we are faced with the challenge of providing better lives for citizens who face higher prices for basic goods, an increased threat of unemployment coupled with stagnant incomes. Further, they are beset with heightened social problems, especially rising crime and a breakdown of the traditional social safety net. Since the return of multi party politics, many citizens do not feel that greater political freedom and choice have improved their lives at all.

Talk of the "China model" has become much more common in Kenya than say, ten years ago, both among ruling elites and average citizens. Magnifying this effect in Africa, are authoritarian or semi authoritarian countries that have been able to turn out high growth rates which trend fuels the belief that a strong hand is best for development. China's extraordinary economic success has therefore presented a serious problem for those arguing that democracy is necessary for development or that dictatorial regimes cannot produce sustained economic development. In the current context where many African citizens are dissatisfied with the socioeconomic performance of their new democratic regimes, China's continued very rapid growth and its increasing economic muscle on the world stage have made it an increasingly powerful example.

Among the problems democratic governance and human rights protection faces in Kenya are:

- i) *Subversion of Institutions by Corruption or moneyed interests:* Corruption, abuse of power and intimidation by criminal elements all weaken democratic accountability and the protection of human rights. Oversight and regulatory agencies have failed to act when they have become captured by political or special interests. Electoral processes are often subverted by fraud. Money in politics is especially serious because it can distort democratic institutions at every level. It can distort the election process and the extent to which elected leaders represent their constituents. It can distort parliamentary politics and the functioning of the judiciary and the executive. Electoral processes cannot operate without financing, but where money plays a decisive role in politics; it turns unequal economic power into unequal political advantage and undermines the principle of one man one vote. The problem is not new, but the soaring cost of elections has made the situation worse even in established democracies like the United States.
- ii) *Inadequate reach of democratic institutions and gaps in democratic practice:* Elections and other formal checks only enable citizens to end the tenure of politicians who abuse their mandate. Even when citizens join political parties

seeking to influence their agendas, voting in elections has rarely been enough beyond being at best only a blunt instrument of participation. The decentralization of power to lower levels of government has its problems as local officials are no more immune to elite capture than officials in central government- indeed, far from strengthening local democracy; decentralization can serve to reinforce the power and influence of local elites.

- iii) Dynastic politics:* Formal structures of accountability in democracy are only strong in theory. Often, they are undermined by self-perpetuating concentrations of power and influence. In some countries, the same leaders have alternated at the helm for decades and dynastic politics continue even in Kenya with the culture of political inheritance of parliamentary seats. Breaking such vicious cycles will require strengthening democratic institutions and state capacities. But that is only part of the solution- political pressure also has to come from outside formal structures through the emergence of a more vibrant civil society.

### Does this mean that Democracy and Human Rights are unsustainable in poor societies?

There is less optimism about democracy today than in the euphoric period just after the cold war. Even in many countries that hold themselves out to be democratic, there is limited political competition and continuing abuse of political and civil rights.

In our case in Kenya, the fight for democracy was fought and won in the hope of greater social justice and broader political participation. Rightly or wrongly, we expected democracy to bring more effective development yet more than a decade on; democracy has not produced dividends in the lives of our people. Poverty has continued to increase in a more democratic Kenya.

How best can we therefore achieve this linkage to make democracy work?

#### **i. Public Accountability of Democratic Institutions:**

We have to go beyond simply expressing our views and preferences, to checking the power of our rulers and thereby influencing decisions. Accountability is about power and about us having not just a say in official decisions but also the right to hold our rulers to account. Those who have power in public decision must be made answerable for their actions to Parliament and to the public. The central pillar to democratic governance is in ensuring that the holders of the public trust are acting effectively and fairly.

The problem however, is that democratic institutions especially in newer democracies are overburdened and lack the means to do their jobs. Political parties are disorganized and representatives are unable to keep in close contact with their constituents. Oversight and regulatory agencies lack well-trained staff while bureaucracies are underpaid, overworked or both. It is a truism that many of the African countries that held multi-party presidential elections for the first time in the 1990s, did so with political parties created just months before.

#### **ii. strengthening formal democratic institutions**

We have yet to fully shake off the legacies of our authoritarian past and democratic institutions and practices are yet to take root. We can start to restore public trust in representative structures and reduce the concentration of political power by:

- i) Developing Stronger Vehicles for Formal political participation and representation:* A well-functioning democracy depends on well-functioning

political parties which are responsive to the people. New democracies necessarily mean new parties, which are not yet able to fulfill their traditional functions of political education, mobilization and representation of diverse interests. In many African countries, opposition parties disappear between elections, while ruling parties behave like they used to under single party systems.

- ii) A dearth of public funding coupled with limitations on fundraising leave parties dependent on a few wealthy individuals to finance their activities and campaigns. With perks and patronage flowing from ruling parties, politicians are increasingly switching party affiliation to join the winning party. Too often, the organizational structure of parties is not participatory. Parties that are not open and transparent are unlikely to be democratic in their policy commitments. Without internal democracy, political parties become individual fiefdoms, a situation all too common in Africa. Party loyalty is driven more by charismatic leadership than anything else. It is therefore vital to create a culture of democracy in political parties. At the very least, this should involve open, competitive elections for party leadership. Such a requirement must be made mandatory in any agenda for political reform.
- iii) *Strengthening checks on arbitrary power by separating powers:* Many elected governments in Africa have turned authoritarian and increasingly resorted to behaving like their autocratic predecessors. The keys to preventing such abuses of power- and reversals where elected governments are overturned- lies in strengthening the separation of powers and the independence of the legislature and judiciary together with professionalizing the bureaucracy and the military.
- iv) Whether the judiciary can maintain its independence is often the litmus test for whether democratically elected rule can avoid turning autocratic. In many new democracies however, domination by the executive branch and excessive influence of the security forces, especially the military, remain stubborn legacies. Shifting to a more balanced system with an independent judiciary and legislature does not happen overnight.
- v) *Developing a Free and Independent Media:* The most significant reform to make democratic institutions work would involve reforming the media- by building diverse and pluralistic media that is free and independent, enjoys mass access and which presents accurate and unbiased information. Informed debate is the life blood of any democracy. Without it, citizens and decision makers are disempowered, lacking the basic tools for informed participation and representation. Few African countries have freedom of information laws and journalists often work under strict constraints. Even in Kenya where press freedom is constitutionally guaranteed, the government has invented new ways to rein the press despite Kenya's history of a vigorous and independent media. For instance, criminal libel laws have been used by this government to silence critics.
- vi) An alert citizenry is what makes democratic institutions and processes work. Political pressure from below has always been the most effective trigger for change- how else were major human developments achieved over the past two centuries?; the abolition of slavery, the recognition of equal rights for women and the advance of democracy itself.
- vii) It still could be possible to have accountability in the high places of the State, honest rulers and free elections, yet have profound injustice or irresponsibility in the deep politics of society. Popular demands for greater accountability no longer stop at the state or national level. Global economic integration has reinforced the power and influence of global actors-inter governmental organizations such the World Bank, the IMF, the WTO and global corporations- which govern important aspects of national economic policies and have enormous impact on peoples' lives in Africa. What is obvious is that these

bodies create global / national gaps in democratic participation and accountability.

### iii. Deepening Democracy for Human Development:

The gap between democratic aspiration and practice is wide in long standing democracies as well as new ones in Africa. The chronic under representation of women, the neglect of minority interests and the unaccountable and untransparent militaries and civil services are common issues.

Democratic deficits often mean hollow citizenship. Many African citizens do not have equal rights and entitlements because constitutions fail to guarantee them or because administrative institutions fail to enforce them. Democratic realists say this is to be expected of representative democracy which above all is a system of political competition, and not one intended exclusively to empower citizens or produce economic and social justice.

Certainly, democratization does not guarantee social justice any more than it guarantees economic growth, social peace, administrative efficiency, political harmony, free markets or the end of ideology. Nevertheless, institutions, practices and ideals of democracy have the capacity to challenge the concentration of political power and prevent the emergence of tyranny.

### Conclusion

As the political space has opened in this country, it is becoming clear that the ruling regimes are subject to greater threats to their power hence the temptation to resort to violence as we saw with the Standard "operation". Our challenge as Kenyans is to push for a corresponding incremental gain in human rights protection as the level of democracy increases until we reach a point where executive constraints-whether under NARC, KANU, ODM or any other regime-are greatest and where political parties will compete regularly in elections with a real possibility of peaceful change of power between the various parties. Put more starkly, human rights progress is only possible if there is a genuine democratization process.