

KatibaNews

Towards a new constitutional dispensation in Kenya

DECEMBER 2008

Issue NO. 12.08



The Fourth Estate under fire

- Big brother is watching
- Katiba briefs
- Leaders of tomorrow today
- Review process at a cross roads

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ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

The Media Development Association (MDA) is an alumnus of graduates of University of Nairobi's School of Journalism. It was formed in 1994 to provide journalists with a forum for exchanging ideas on how best to safeguard the integrity of their profession and to facilitate the training of media practitioners who play an increasingly crucial role in shaping the destiny of the country.

The MDA is dedicated to helping communicators come to terms with the issues that affect their profession and to respond to them as a group. The members believe in their ability to positively influence the conduct and thinking of their colleagues.

The MDA aims at:

- Bringing together journalists to entrench friendship and increase professional cohesion; Providing a forum through which journalists can discuss the problems they face in their world and find ways of solving them;
- Organising exhibitions in journalism-related areas such as photography;
- Organising seminars, workshops, lectures and other activities to discuss development

issues and their link to journalism;

- Carrying out research on issues relevant to journalism;
- Organizing tours and excursions in and outside Kenya to widen journalists' knowledge of their operating environment;
- Publishing magazines for journalists, and any other publications that are relevant to the promotion of quality journalism;
- Encouraging and assist members to join journalists' associations locally and internationally;
- Creating a forum through which visiting journalists from other countries can interact with their Kenyan counterparts;
- Helping to promote journalism in rural areas particularly through the training of rural-based correspondents;
- Advancing the training of journalists in specialised areas of communication;
- Create a resource centre for use by journalists;

- Reinforcing the values of peace, democracy and freedom in society through the press;

- Upholding the ideals of a free press.

Activities of MDA include:

- Advocacy and lobbying;
- Promoting journalism exchange programmes;
- Hosting dinner talks;
- Lobbying for support of journalism training institutions;
- Initiating the setting up of a Media Centre which will host research and recreation facilities;
- Working for the development of a news network;
- Providing incentives in terms of awards to outstanding journalists and journalism students;
- Inviting renowned journalists and other speakers to Kenya;
- Networking and linking up with other journalists' organisations locally and abroad.

This newsletter is meant to:

- 1 Give critical analysis of democracy and governance issues in Kenya.
- 2 Inform and educate readers on the ongoing Constitution Review Process.

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The Fourth Estate under fire

There is no love lost between the government and the media in Kenya. In fact, this is usually the case in many countries all over the world. On one side, the media claims that its mainstay and relevance in society can only be guaranteed through freedom of expression. On the other side the government feels that there is need to protect national security from 'media anarchy'. In an unprecedented move, President Mwai Kibaki recently signed the Kenya Communications Amendment Bill 2008 in to law. Aside from the drawing of daggers from both sides, we look at the bigger picture of the role of the media in governance.

By Joel Olandi



Journalists covering an event.

resulting in the resignation, firing, or prosecution of public officials.

There exist situations where the media can affect public opinion in ways that are contrary to the spirit of separation of powers. One of the most compelling of these situations is when the state controls the content and distribution of the information disseminated by the media. However, even if the media is immune to censorship and compulsion from the government, the controlling entity of a media association or media outlet must almost always edit, and may editorialise, providing opportunities to affect public opinion in ways that may contradict public interest.

Freedom of the media

Freedom of the media is essential for the perpetuation of democratic governments. Many governments financially support public broadcasting while preserving editorial latitudes of public broadcasters. An independent media acts as a powerful check by providing information about governmental activities to the public.

The media is an important tool of public education and awareness on the constitutions, rule of law and the functions and roles of three arms of government. An educated citizenry is able to keep the Government in check and participate in elections in an informed manner. Free media creates a market place of ideas where the public access different view points on social, economic and political matters.

Information enables the public to hold their leaders to account. In its efforts to disseminate information, the media should collaborate with the civil society. The media also carries out investigative journalism thereby acting as a watchdog over government and demanding accountability.

The media is a useful in lobbying for legal, policy and institutional reform. The

The system of checks and balances between different arms of government, namely the Judiciary, the Executive and the legislature is a fundamental principle of constitutionalism. Under the principle, each of the three arms provides checks on others in the exercise of their distinct constitutional mandates.

The legislature makes the laws, the judiciary interprets the law and the executive implements the law. No country has totally separate and distinct arms of Government. In many countries, Kenya included, the president and cabinet ministers are members of the legislature while the judiciary depends on the Executive and Legislature for provision of funds.

The separation of powers facilitates the observance of the rule of law as the judiciary is able to undertake its interpretative duties independently and impartially thereby ensuring the functions of the Executive and the legislature are undertaken in accordance with the Constitution and the law. The system permits one branch of government to

limit the powers of another. The media has been described as a "fourth power" because of its considerable influence over public opinion which affects the outcome of elections and its indirect influence in the branches of government by, for example, its support or criticism of pending legislation or policy changes.

Role of the media

Information is the backbone of citizens' ability to participate in making decisions and shaping their lives. The role of the media is simply to check the government, report the truth and advance arguments in public good. In Kenya, the constitutional protection of the media is derived from the right to freedom of expression which is secured under section 79 of the Constitution.

The First Amendment of the United States Constitution explicitly guarantees freedom of the Press against interference by the federal government. Later, the right was extended through interpretation by the Supreme Court to cover state and local governments. The media is the "voice of the people", which keeps the government in check. Many scandals have been investigated and reported by the media

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media, for example, has partnered with the civil society to lobby for the Freedom of Information Bill that will guarantee public access to information held by government. The civil society has also partnered with the media in lobbying for the Media Act. These Acts are important cornerstones for expanded freedom of the media in Kenya.

Freedom of speech and democratic participation

A leading English jurist, William Blackstone, stated in the Commentaries on the Laws of England, 1796 that:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication; and not in the freedom of censure for criminal matter when published. Every freedom has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press...But if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity."

Freedom and diversity of the media are part of the foundation for democratic participation, control and shaping of public opinion in modern societies. Transparency and accountability are crucial elements for the realisation, participation and understanding of good governance principles. The media and Parliament are key institutions in keeping watch over the governance process.

There is a strong link between supporting press freedom and alleviating poverty. The new development paradigm designed by state actors and international development agencies has structured development around local participation, on recognition that without consultation, empowerment and understanding of local actors. In efforts to eradicate poverty, a free and independent media is a central priority.

Free and independent media serves as an information conduit to facilitate good governance, creating and developing the relations between an informed, critical and participatory population and responsive elected officials. Free and independent media nurtures benefits such as recognition and strengthening basic human rights, a vibrant civil society, political transparency, and sustainable economic development.

'A skilled and viable independent media

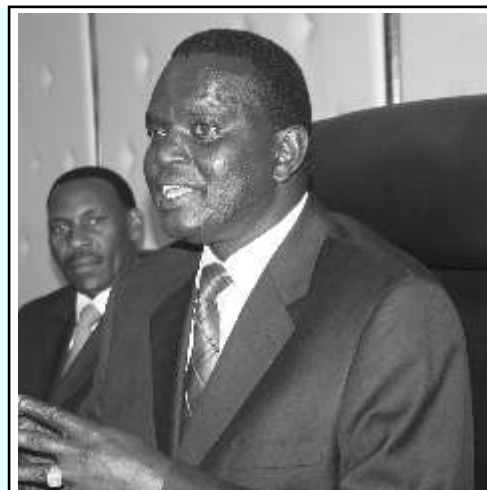
sector is a community's most promising tool for providing citizens the information they need to bring about and sustain government reform and poverty reduction'.

The media facilitates participatory and rights based human development by:

1. Empowering disadvantaged and marginalised groups.
2. Contributing to sustainable economic development through improved communication and information flow between stakeholders and different levels of society.
3. Increasing transparency, accountability and good governance by exposing acts of corruption in the public sector. By playing the watch dog role, the media obligates the Government to behave better as it is under watch. A free, independent and vibrant media sector is a prerequisite for economic success.
4. Collecting, analysing, interpreting and refining information for consumption by the public. The media, therefore, plays an educational role and serves as a market place for ideas.

Poverty is not lack of material resources but lack of empowerment, opportunities, choice and security. Democracy and poverty reduction can never be guaranteed by politicians alone. The people must have an opportunity to influence their situation, claim their rights and voice their concerns. To exercise these rights presupposes that citizens have access to information that has not been filtered, censored or distorted. The quality of the information an individual is able to access will, by necessity, greatly influence his or her ability to participate in the political process. The media has a responsibility to provide correct and analytical information.

Lively and independent media are essential components of the complex system of checks and balances that characterizes democratic societies. No person should be exempt of scrutiny. Corruption is a cause and an effect of weak governance. Corruption breeds inefficiency and undermines confidence in the institutions of a society. An Englishman, Lord Acton, once made the now famous statement that "power corrupts and absolute power corrupts



Information minister Hon. Samuel Poghiso

absolutely". The quality of decisions will inevitably suffer if a free debate is disallowed. A free media provides decision makers with invaluable information, thereby ensuring enhanced quality of legislation.

Freedom of expression includes the right to seek, receive, express and disseminate opinions, ideas and information without interference, and to do so either orally or in writing through any media. Freedom of expression is a precondition for media pluralism and the foundation for strong and functional media which facilitates a broad spectrum of information, ideas and opinions in society.

A fundamental cornerstone of freedom of expression and the media is the principle of public access to official documents. This principle is important for journalists when carrying out reporting and investigative work, especially in the scrutiny of the exercise of power by the Government and other public agencies. Freedom of information is a cornerstone of an open society and an effective tool for monitoring and preventing corruption.

Key highlights and critiques of the Kenya Communications Bill, 2008

Section 5A of the Kenya Information and Communications Act, 2008 provides that the Minister may issue to the Communications Commission of Kenya policy guidelines of general nature relating to the provisions of the Act. Section 5B does not confer independence to the CCK. There is no requirement for stakeholder consultations in constituting the board and no requirement for approval of members by Parliament. The Board of the CCK is composed of a chairperson appointed by the President, a

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Director General appointed by the Minister, the permanent secretaries for information and communications, finance and internal security, and seven appointees of the Minister.

Section 46A provides that the CCK shall be responsible for promoting and facilitating development in keeping with public interest, of a diverse range of broadcasting services in Kenya, facilitate and encourage development of Kenyan programmes, promote observance of the public interest obligations in all broadcast categories, promote plurality and diversity of views for a competitive market place of ideas, ensure provision by broadcasters of appropriate internal mechanisms for disposing of complaints in relation to broadcasting services, and protect the right to privacy of all persons.

Under Sections 46C and 46H of the Act, the CCK has unilateral powers to prescribe to broadcasters and without any consultations, the time, type and manner of programmes to air. The Programme Code developed jointly by the CCK and the media to ensure editorial independence. The enforcement of the Code should be the remit of the Media Council of Kenya which has an oversight mandate over the media in Kenya as a self regulatory mechanism. Under section 46H (2) the CCK shall prescribe a programming code, review the code at least once every two years, prescribe a watershed period programming and ensure compliance with the programming code.

Under section 46I, licensed broadcasters shall ensure that the Kenyan identity is developed and maintained in their programmes, shall observe standards of good taste and decency, shall gather and present news and information accurately, shall make reasonable efforts to present alternative points of view where controversial or contentious issues are discussed, shall maintain a programming log for one year after the date of broadcasting and ensure that advertisements are not deceptive or repugnant to good taste and ensure that derogatory remarks based on ethnicity, race, creed, colour and sex are not broadcast.

The provision will protect the public from the broadcast of hate speech that has the potential of fanning ethnic violence. The Waki Report stated that the media was partly responsible for fanning post election violence. Section 46I imposes a responsibility and good taste on

broadcasters should ensure content is not immoral or vulgar. Section 46 C and D states that the Commission has power to issue or deny licences under such conditions as may be prescribed.

Part VIA of the Act provides for electronic transactions. The Commission shall facilitate electronic transactions by ensuring use of reliable electronic records, facilitate electronic commerce and reduce barriers to the trade, promote public confidence in the integrity and reliability of electronic records and electronic transactions, promote and facilitate delivery of public sector services by means of reliable electronic records and develop frameworks to minimise incidents of forged electronic records and fraud in electronic commerce.

The Act establishes the Universal Service Fund to support widespread access to and support capacity building and promote innovation in information and technology services. The Fund is funded from the universal service levy which shall be charged on all licences under the Act. Under section 84 W of the Act, licensees are prohibited from engaging in activities that have the effect of unfairly preventing, distorting or restricting competition. The commission may investigate any licensee who has committed any act or omission in breach of fair competition or equal access.

The Act has stipulated licensing requirements for aspects of information and communication that have been lacking in the past, for example of establishing the framework for electronic commerce. The Act safeguards the right to privacy and intellectual property rights. The Act has enhanced the fines imposable for breach of provisions under the Act.

It has been stated that the Act may precipitate a conflict between the role of the Media Council of Kenya and the Commission. This is because whereas the Media Council is legally mandated to deal with complaints raised against the media, the Commission has a mandate to regulate broadcast media. The Media Council of Kenya was set up in 2007 as a self regulatory mechanism by the media. The Council set up the complaints committee in 2008.

The Council is expected to ensure professional conduct among journalists by prescribing a Code of Conduct. However, due to inadequate resources, the impact of the Council has been diminished. The suitability of enforcing

standards by the Council in broadcasting stations has been doubted as some of the comments are generated randomly from the public and it would be difficult to enforce the Code against such persons. The Act attempts to facilitate media convergence by regulating different but related matters of communication regulated under one law.

The most contentious section that has emerged from the Act is section 88 which empowers the Minister for Internal Security on declaration of a public emergency or in the interest of public tranquillity to authorise temporary possession of telecommunication apparatus or any radio communication apparatus within Kenya. A certificate signed by the Minister shall be conclusive proof of the existence of a public emergency. Such equipment shall be returned at the end of the emergency and where it is not returned full compensation shall be paid. Whereas the said section 88 of the Act is draconian and may be subject to misuse and misinterpretation, the section was not subject to the Kenya Communications (Amendment) Bill, 2008 and has been part of the law since 1998.

The media has alleged that MPs are punishing media for its criticism on failure to accept taxation of their allowances. The Bill was first published in 2007 and was withdrawn to allow for further consultations. The media failed to effectively use the window of further negotiations and consultations with the Ministry of Information and Communications to ensure removal of the contentious clauses. The media has failed to set up effective mechanisms for self regulation. Indeed, the media sponsored Media Council of Kenya (MCK) which was a precursor to the statutory MCK had failed to self regulate the media. Political content takes up most of the editorial space in print and electronic media. The media has not taken initiative to effectively research and present information and news beyond the political bickering.

Some MPs have criticised the enactment of the Bill into law. The MPs have a duty to attend parliamentary proceedings at all times and especially when important Bills are slated for debate. Parliament as an institution is collectively liable for the enactment of the Bill regardless of party affiliation. All MPs receive the Order Paper which lists the business that is transacted in Parliament in each particular day. The Bill was a Government Bill and must have

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Big brother is watching

Calls for implementation of the so called Waki Report are mounting not just internally but also within the international community. Former UN secretary general and the United States government have called on Kenya's leadership to bite the bullet and do what needs to be done. Whether our leaders have the political goodwill and guts to walk the talk is a different issue altogether. We revisit this political dynamite and take a look at the prospects.

By Kieni Mb'ijiwe



The two principals: President Mwai Kibaki and Prime Minister Hon. Raila Odinga

The Commission of Post Election Violence (CIPEV) submitted its report to in October, 2008. The Commission, in its wisdom and to ensure the full implementation of its recommendations, issued a clear time table on how the recommendations were to be implemented. Among the key stages in implementing the report were the signing of an agreement to define the implementation framework, the entrenchment of the Special Tribunal for Kenya in the Constitution, the setting up of the Special Tribunal for Kenya through legislation, the enactment of the International Crimes Bill, now Act, and the Freedom of Information Bill and carrying out of Police reforms.

Prior to its December 2008 recess, Parliament enacted the International Crimes Act. The President and the Prime Minister signed the agreement on implementing the report in December, 2008. The process of implementing the report has therefore started in earnest. However, Kenyans must be eternally vigilant to ensure that the pace of reforms is maintained. This article

analyses the process of implementing the Report, popularly known as they Waki Report while identifying key steps that will define the reform effort.

Key stages and milestones in implementation

The Ministry of Justice, National Cohesion and Constitutional Affairs has developed an Implementation

Matrix of the Waki

Report for adoption by the Cabinet. The stages identified as key steps in implementing the Report are:

1. Enactment of the International Crimes Bill, now Act. The Bill defines genocide, war crimes and crimes against humanity and crimes against administration of justice. Such crimes include killing members of a group, causing serious bodily harm, murder, extermination, enslavement, deportation or forcible transfer of a group of people, torture, rape, and any other form of sexual violence, racial and ethnic persecution, or taking hostages. Crimes against administration of justice include bribery of officials, obstructing justice, perjury, intimidation and fabrication of evidence.

The International Crimes Act is will be used to define the crimes that the special tribunal will have jurisdiction to try suspects. These include genocide, crimes against humanity and war crimes. The agreement by the PM and the President states that the tribunal will try suspects for the crimes identified by the Waki Tribunal and more specifically crimes against humanity.

2. The President and the PM were obligated to prepare and sign the agreement to implement the report by December 17, 2008. The Government has 45 days from December 17, 2008 when the agreement was signed by

the President and the PM to enact all laws required to operationalise the tribunal including entrenching the tribunal in the constitution.

The Agreement contains the following provisions:

- a) The Ministers and public officers adversely named in the report will be suspended immediately they are charged. Such suspension has the potential of ending the political careers of persons who will be convicted by the Tribunal as they will be barred from holding public offices and contesting any electoral offices. However, it is a necessary step in ending the culture of impunity in Kenya.
- b) The Grand Coalition will carry out legislative reforms espoused in Agenda Four of the National Dialogue and Reconciliation Agreement. This includes taking necessary measures to operationalise the Witness Protection Act 2008, and the International Crimes Act, 2008. Other reforms relate to the Kenya Police Force and Administration Police, including a review of all tactics, weapons and use of force and establishment of an independent Police Service Commission to oversee the Kenya Police and the Administration Police and an Independent Police Conduct Authority. A modern Code of Conduct will be developed and measures instituted to guarantee achievement of ethnic and tribal balance in the force. The Conflict and Disaster Early Warning Systems will be articulated in the First Medium Term Plan and subsequently developed and implemented as a matter of priority.

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- c) The Special Tribunal for Kenya will be set up to try suspects having the greatest responsibility for the post election violence. The Statute for the Special Tribunal will be prepared by the Cabinet Committee on National Accord and Reconciliation which is chaired by the President, for enactment by Parliament. The tribunal's mandate is to try those bearing greatest responsibility for crimes against humanity relating to the 2007 General Election.
3. Parliament will review the Constitution to anchor the Tribunal by the 30th January, 2009. The amendment will entrench the Tribunal and oust the jurisdiction of the local courts in respect of the crimes in the report. The Procedures of the tribunal will be specified by the law that will create the tribunal. MPs will debate and enact the laws establishing the tribunal by January 30th, 2009. The law will stipulate the jurisdiction of the tribunal and set out its operational framework.

The statute will define the crimes to be dealt with by the tribunal, the composition of the Trial and Appellate Chambers, the procedure, the rights of suspects, the accused and victims, the punishments to be meted, the appointment of prosecutors, the registrar and defence counsels, and the code

of work for the staff. The tribunal is expected to start functioning by March 1st, 2009. The Government will facilitate the operations of the Tribunal between March 1st and December, 2009.

Parliament may be recalled early by the President to enact the laws setting up the tribunal. The President and the PM will work hand in hand with the Panel of Eminent African Personalities in constituting the tribunal. The President and the PM have a free hand in appointment the chairpersons of the Trial Chamber and the Appellate Chamber. The other two judges for each chamber, the prosecutor, the registrar and chief defence counsel will be nominated by the Panel.

4. Parliament is expected to enact Freedom of Information Bill by April 30th, 2009. This law will facilitate access by the public to information held by the Government. Such a law facilitates greater dialogue and understanding between the Government and the citizenry.
5. On police reforms, the Government will establish a Police Service Commission by November, 2009 and Establish a Police Conduct Authority to investigate police conduct and provide civilian oversight by April 30th, 2009. The National Security Policy is expected to be finalised by December, 2009. Further reforms include the establishment and operationalisation of a Police Reform Group to lead police reforms by April, 30 2009, undertaking comprehensive reforms of the regular and administration police by December, 2010 and establishment of a joint operational preparedness strategy for state security agencies by June, 2009. The involvement of politicians should be minimised in police reforms process.

International experts will be included in the Police Reform Group. Then National Security Policy will assist in controlling proliferation of small arms and tackling organised criminal gangs.

Chief Mediator Kofi Annan has urged leaders to redouble their efforts to implement the CIPEV recommendations and respect the suggested time lines for implementation. He further stated that whereas the efforts at reform were commendable, the Grand Coalition Government should implement reform measures expeditiously.

Analysis of the Implementation Agreement signed on December 17th, 2008

The agreement is an indication of the commitment across the political divide of the resolve to implement the Waki Report. The agreement must be followed by demonstrable commitment by the President and the PM to lobby and advocate for necessary legislative measures to implement the report fully. The legislative function will be exercised by Parliament. This will include enacting a constitutional amendment that will anchor the Tribunal in the constitution and insulate it from legal challenge. Granted the protracted nature of constitutional amendments, MPs must be effectively lobbied to ensure the Bill is not rejected. Indeed, rejection of *continued page 7*

KAF publishes reports

The Konrad Adenauer Foundation and the Dialogue Africa Foundation have published simplified versions of both the Kriegler and Waki Reports. The 74-page booklet aims at abridging the final versions of the voluminous reports to enable a wide cross section of readers as possible access the findings of the reports. Copies of the booklet are being distributed by both organisations to various stakeholders and partners. The booklet will soon be uploaded on the organisations' websites in order to reach people who will not receive hard copies of the publication.

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the Bill will mean that the suspects will have to be tried at the International Criminal Court in The Hague.

Key components of the proposed implementing Law: The inclusions and exclusions

The Statute establishing the special tribunal for Kenya will include the following provisions, at the minimum:

a) Definition of crimes and category of persons to be tried by the Tribunal. The statute will define the crimes that fall within the jurisdiction of the Tribunal. Whereas the statute does not have to directly define the crimes, the definition will have to be done by inferring to the Rome Statute on the International Criminal Court and the International Crimes Act. The statute will further define the category of persons over whom it will exercise jurisdiction. In the Waki Report, it was recommended that the Tribunal tries those having the greatest responsibility for the crimes against humanity committed during the post election violence.

b) Appointment criteria for the judges, composition and mandate of the Trial Chamber and the Appeals Chamber prosecutor, chief defence counsel, and registrar. The statute will outline in detail the appointment criteria and qualifications for key staff at the Tribunal. The Report recommended that whereas the President and the PM would appoint the Chair of the Trial and Appellate Chambers, the Panel of Eminent African Personalities would select the two judges for each of the Chambers. This will reflect the international component of the tribunal and perhaps insulate it from local interference.

c) The Statute will be expected to define the source of funding and approval of budgets for the Tribunal. This will be an important component as the Government may frustrate the operations of the Tribunal by failing to provide an adequate budget.

d) Time limits on its operations. It may be important to stipulate the proposed period when the when will

the Tribunal be expected complete its investigations, try suspects and hand in its verdict. This will ensure that the Tribunal is efficient in carrying out its work.

e) The jurisdiction of the Tribunal. The statute will define the interrelationship between the International Crimes Act, the Rome Statute Establishing the International Criminal Court, the Constitution and the Statute for the Special Tribunal for Kenya. It will also delimit its role vis-à-vis the judiciary and protect suspects tried by the Tribunal from being subjected to trial in the courts. The Tribunal must espouse procedural fairness and ensure their rights of the suspects are protected. The tribunal must be insulated from possible political interference.

f) Rules and Procedures of the Tribunal. The statute will outline the rules and procedures of the Tribunal including the rights of the accused, the specific mandates of the Trial and Appellate Chambers, amnesty, pardon, the roles of the prosecutor and the registry and preparation and presentation of an Annual Report. The procedure will be further elaborated in details rules that the Tribunal will promulgate to regulate its procedure.

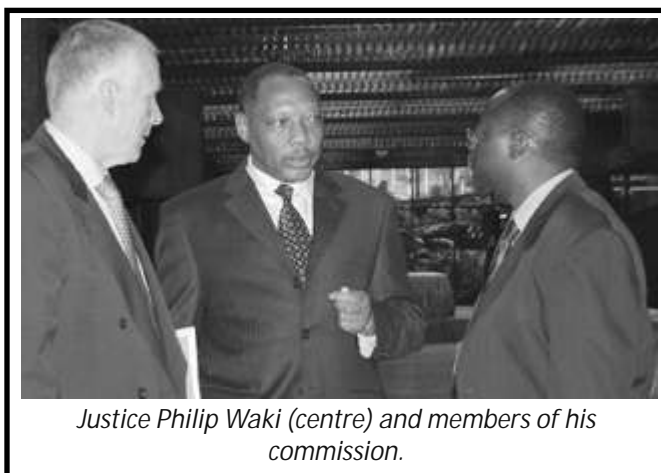
Challenges in implementing the report

Some challenges are anticipated in the implementation of the report, which include:

i) There may be lack of or minimal political will to push for speedy implementation of the Report. The President and the PM signed the agreement one day to the close of the deadline set in the Waki Report. Further commitment to implementation is obviously required, including among MPs.

ii) The process may be affected by polarization of Parliament due to political differences. Already, the main political parties have been taking different viewpoints on how the report should be implemented. These views must be harmonised and it befalls the President and the Prime Minister to offer leadership and convince their political parties and affiliates to support implementation of the Report.

iii) Another challenge is ethnicisation of the report, which will be carried out by the main suspects who are likely to appear before the Tribunal and their supporters. If such ethnicisation is not handled carefully, the fragile peace in Kenya



Justice Philip Waki (centre) and members of his commission.

may be undermined.

Role of the international community

The main role for the international community will be to offer oversight on the implementation process. This will ensure that the Government is monitored to ensure implementation of the Report. Already, the Panel of Eminent African Personalities has kept a keen eye on the reform process with the Chief Mediator, Kofi Annan, constantly holding consultations with the President and the PM. Recently, Kofi Annan released a statement enumerating the achievements of the reform process in Kenya.

The listed achievements included the signing of the power sharing agreement between PNU and ODM, the signing of agreements of ending violence, restoring fundamental rights and liberties, addressing humanitarian crisis, promoting reconciliation and healing, resolving political crises and tackling long term issues facing the country; the formation of the Grand Coalition Government; the formation of two independent commissions which have completed their mandates and submitted their reports, the enactment of the Constitution of Kenya Review Act by Parliament which creates the roadmap for the preparation of a new Constitution within 12 months, the Truth Justice and Reconciliation Act which will establish as commission to promote peace, justice, national unity, healing and reconciliation,

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Katiba briefs

Dec 7th...Kenya is gradually turning into a 'consensus' nation. The presidency is losing the 'imperial' powers Kenyans fought to have trimmed for decades, and Parliament is the new hump of decision making. Even before the new comprehensive Constitution agreed to in the power-sharing deal signed by President Kibaki and Prime Minister Raila Odinga is born, many things are fast happening.

Dec 10th...Last minute lobbying on the proposed Constitutional (amendment) Bill intended to replace the Electoral Commission of Kenya (ECK) with an interim body betrays failure by leaders to pay attention to potentially contentious issues. Leader of Government Business in Parliament Vice President Kalonzo Musyoka requests that the first reading of the Bill be deferred until the following day to allow for "further consultations".

President Kibaki and Prime Minister Odinga are expected in Parliament to marshal support of MPs to pass the Constitution of Kenya (Amendment) Bill 2008. The Bill seeks to disband the ECK and replace it with the Interim Independent Electoral Commission of Kenya (IIEC).

Dec 11th...Combative MPs defeat a move to pass without amendments a law that would have seen the ECK disbanded, humiliating President Kibaki and PM Odinga who had backed the Bill. The President and PM attended a joint coalition *Kamukunji* (informal session) to mobilise their MPs support to pass the Government-sponsored Constitution of Kenya Amendment Bill (2008), but it degenerated into a bitter exchange.

Dec 13th...Parliament takes over the process of writing the Constitutional (Amendment) Bill 2008 and scraps more than 10 proposals made by the Serena (Hotel) team. That was the thrust of agreement struck by the leaders, which is also the gist of the amended Bill that is set for republishing today.

Dec 16th...A storm is expected today when MPs meet to discuss the amended Bill that will pave way for the disbandment of the electoral commission. A vicious battle erupts within PNU affiliates ahead of the Speaker's informal meeting over the nomination of 27 members to the Parliamentary select committee.

Dec 17th...Parliament overwhelmingly votes to send ECK bosses packing, ending months of nail-biting suspense over their fate. It is now a matter of days before the President assents to the Constitution of Kenya (Amendment) Bill to effectively seal the fate of ECK chairman, Samuel Kivuitu, and his 21 commissioners, roundly accused to bungling last year's General Election.

Retired President Daniel Moi expresses doubt that a new Constitution would unite Kenyans and solve the problems facing the country. Moi says that both the presidential and the parliamentary systems of governance were a challenge. He explains that a Parliamentary system of government would deny the citizens a chance to vote for a leader of their choice while in the presidential system a candidate has to garner 25 per cent from five of the country's provinces.

Law program holds conference

The Konrad Adenauer Foundation last November held a two-day conference on "Constitutionalism in Africa: Myth or reality with specific emphasis on electoral rights". Held in Nairobi at the Holiday Inn, the conference organised by KAF's Rule of Law Programme for Sub-Saharan Africa brought together chief justices and heads of judiciaries, judges, lawyers, government officials from the ministries of justice and foreign affairs, law reform commissions and attorney generals, MPs, regional bar and bench associations, the civil society, human rights organisations, media and academia drawn from several Sub-Saharan African countries. This was the eighth regional conference since the inauguration of the rule of law programme in 2006. Reports from these conferences are available from KAF's website: www.kas.de

Leaders of tomorrow today



Youth running away from tear gas in a scene during the post election violence.

recognise the youth through a Ministry that handles the youth agenda, previous governments never did much to recognise the power in ideas and skills that the youth have.

Inclusion of the youth in the reform agenda

The youth have a major role to play in the social reforms that are being yearned for by Kenyans. They can contribute their ideas, time and energy towards changing the archaic systems of governance. The draft Kenya National Youth Council is an implementation framework for the Kenya National Youth Policy that was put in place to provide a comprehensive supporting framework for addressing youth development.

It received cabinet approval in 2004 and is due for discussion in parliament as a sessional paper No. 3 of 2006. Until now, The National Youth Policy still waits for accent by parliament long after its creation. This goes to show that the youth agenda is not as important to the members of parliament as showing solidarity against taxation among other highly selfish deeds that have left Kenyans in shock.

The Kenyan society would benefit with the involvement of the youth in the broader context of development in the country. The youth are not only a major human resource and inheritors of future society; they are also active contributors to the nature and development of society today. The government should recognise and value the youth as a key resource and national asset and place their needs and aspirations central to national development.

Marginalisation of the youth in Kenya – historical perspectives

In much of Kenya's history, the youth have been a disadvantaged lot. During the making of the Kenya Constitution in 1962 at the Lancaster House Constitutional Conference, a system of government where the Executive, Legislative and financial powers were shared between

As the quest for a new Constitution restarts in earnest, there is one group of society that always seem to be taken for a ride – the youth. The youth have been used, misused and dumped by politicians as and when the need arises. But we should stand warned. This growing segment is a time bomb that will explode in our face unless we take immediate steps to address their needs. Our correspondent gives us an idea of how youth empowerment can be enshrined in the Constitution.

By Albert Irungu

The youth today are a dissolution generation. They are facing major challenges including lack leadership, marginalisation and disempowerment, national economic, cultural and technological dependence; national governance and identity crises; poverty, HIV/Aids, regional, social, gender and intergenerational inequalities and injustices. Globalisation and its concerns like terrorism, war, climate change/global warming and environmental destruction are the other problems youths face.

In addition to all these problems, there is the political elite composed of people past their prime who are increasingly

becoming self-seeking. Over the years this class has misused the youth agenda to achieve its own political and selfish goals. This was evident in the 2007 General Election which resulted in violence.

The youths' biggest hope and challenge lies in constitutional change. It has been arguably said that a new Constitution will guarantee a future for our young generation. Constitution review in Kenya has failed perennially largely due to the fact that it is usually seen as a State-driven. This has always found fundamental resistance from many citizens who totally distrust the ruling class that control the State.

The country is also at crossroads considering that the draft Constitutions created before vouched for a devolution of power from the president to parliament. However, after the small coups that parliament has pulled on the *wananchi* including the refusal to pay taxes and passing of a controversial communications bill, one is left to wonder what will become of the country once parliament is given autonomy to do what they want.

Majority of the youth related issues are handled by the civil society. Until now when the government has made attempts to have structures that

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central and regional governments was envisaged and introduced. The approach created an authoritative government, which saw citizens' majority of them young people as recipients rather than actors in development. The control became so extreme that 'orders from above became an all too common governance phrase' even at the ministerial level. People were expected to agree with anything which the state officials told them; they were expected to do what they were told by their leadership. This continued until the introduction of multi-party politics in the 1990's.

Even today after both the manifestos of both PNU and ODM promising to have youth oriented and driven agenda in government, the recent party elections proved otherwise. As per the results of the recent party elections, no youth managed to clinch the top executive positions. And, apart from Narc-Kenya's Martha Karua who is the party's chairperson, women were equally given a raw deal in PNU, ODM and other leading parties. In PNU, only Dagoretti MP Beth Mugo got the position of chairperson of Women's Affairs. Gender Affairs Minister Esther Murugi was denied the chance to vie for the vice-chairman's post in favor of Mr Jimmy Angwenyi. In ODM, no woman or youth was elected to the Executive Council.

Improving structures of participation of youth in governance

The history of Kenya's struggles is a history of aborted revolutions largely because nobody bothered to ask and answer the question, "... and then what?" In 2002, the country united to remove an unpopular government. However, because wananchi did not pause to ask themselves "... and then what?" as soon as the common enemy was defeated, people turned on each other and spent the next five years hurling insults on one another and emerged even more divided than we were when we embarked on this leg along the troubled journey to true nationhood.

Kenya's young leaders must avoid this mistake. They must come up with an agenda that goes beyond merely

replacing the old guard. Kenya's population is projected to rise to 60 million by 2030. Sixty per cent of these people will live in urban areas. The challenges we have now will be multiplied hundredth fold. The challenges of providing food, health, housing, security, education, sanitation and other social services will be paramount in the face of dwindling resources. Young people are endeavouring to introduce new thinking for tackling the challenges of modernity. However, this is only achievable if there is a new Constitution. This would bring about proper allocation of resources. Currently, the Constitution in use does little or nothing to stop the wanton misuse of resources. The Constitution will make sure that the government provides services to its people promptly.

There should be structures in place, that are able to represent the youth voice and agenda in the decision making processes in government. Such structures are non-existent thus making the youth's voice a holler in a dark void. Such structures would help in incorporation of the youth's agenda in the policies that are being reviewed or created. It is often very ironical when we have a political class that is over fifty years of age making decisions that affect the youth.

Challenges in youth empowerment

One of the greatest challenges in youth empowerment and participation is how to ensure that young people are passionate about causing transformation in Kenya. Youth empowerment and participation is the quintessential force for causing such transformation. Young people need a youth branded platform from where they can speak powerfully, take appropriate action, and inspire belief that will have a catalytic impact all over the country through youth-led development initiatives.

It is important that there is a system that builds skills and capacity of our young people to face the challenges of living in a globalised world. It is anticipated that the outcome of youth empowerment and participation is

strong contribution to national prosperity, economic competition and reduced unemployment. When empowered, young people can contribute greatly towards good governance and democracy with a passionate desire to be catalyst for national development.

However, there are challenges that need to be overcome for the youth. These include:

Health – The uneven distribution of health facilities in the country continues to widen disparities in affordability and access to medical care. Apart from the traditional health problems like malaria, tuberculosis and the more conservative sexually transmitted diseases, the exponential spread of HIV/Aids and drug abuse have become issues of major concern.

Mental health is increasingly becoming a common problem among the youth. Depression, anxiety, eating disorders, psychosis and substance abuse are also becoming leading mental problems among the youth. Current health facilities are also not youth-friendly. As such, there is a need for facilities that offer preventive and curative health services for the youth.

Education and training - The 8-4-4 system of education was geared to imparting appropriate skills to enhance self-employment. However, due to the high costs, poverty and lack of facilities, there have been high school dropout rates. Most of the youth either drop out of school or graduate without necessary skills for self employment. The country's training institutions are also either inadequate or lack the essential facilities and technology to prepare students for the challenging market demands.

Recently, sub-standard training institutions have come up to take advantage of shortage of training opportunities to exploit desperate youth. In most cases, there is no linkage between the training institutions and either the formal or informal (*jua kali*) sector. The youth trained in these institutions cannot, therefore, be immediately absorbed

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into the job market. Besides this, society's attitude towards the Jua kali sector discourages many youth from venturing into it, as they do not want to be regarded as failures in life.

Crime and drugs - The early mid 1980's saw a rapid growth in crime, drug and substance abuse among the youth in Kenya. Alcohol, cigarettes, miraa, and cannabis sativa have remained the most popular abused substances. There is a fast emerging trend of injecting drug use especially narcotic. Moreover, abuse of drugs is highly associated with the risks of contracting HIV/Aids and other sexually transmitted diseases especially among the youth. Over 50 per cent of all the convicted criminals are young people aged between 16 and 25 years.

Leisure, recreation, and community service - Leisure, recreation and community service are important for the psychological and physical development of the youth. It contributes to their personal development by promoting good health, personal discipline, leadership and team building skills. It also provides opportunity for appreciation, participation and creative experience in leisure, music, art, dance, drama crafts, novelty events service and cultural activities.

This helps engaging the youth to make good use of their leisure time, express their beliefs and values as well as promote and preserve local art and culture for the benefit of the future youth. However, current investment in leisure and recreation has not reflected its importance. The sector suffers from inadequate funds and facilities while the talented youth lack motivation and are often exploited by organisations. Due to these constraints, it has not been possible to tap fully the talents of many youth.

Youth and environment - Degradation of the environment through pollution, poor waste management and deforestation is a major challenge for Kenya. With the ensuing destruction of water catchments, depletion of fish and other marine stock, pollution of rivers and destruction of plants and animals,



Yes, we can: US President-elect Barack Obama

the youth cannot be assured of quality life in the future. The need to conserve the environment has become increasingly important and many youth organisations are engaged in activities to protect the environment such as tree planting, clean-up campaigns, bio-diversity conservation, wildlife preservation campaigns and agro-forestry.

Information and communication technology - Information and communication technology (ICT) may arguably be the most powerful tool for social and economic change. Rapid and continuing growth and development in ICT is transforming the ways in which youth live and work. Using internet for example, youth can get access to both domestic and international education and job opportunities on line. Due to lack of access to ICT especially in rural areas, youth cannot exploit their career, business and education opportunities.

Access to Financial Resources - Traditional financial institutions have avoided lending to youth due to their relative inability to comply with the high transaction costs, difficulty in assessing and managing their risk profile, and lack of the required financial documentation as well as collateral.

Mainstreaming the youth in governance

Kenya's political landscape is grappling with a generational gap crisis as older politicians cling to leadership at the expense of more energetic and adventurous younger men and woman. In Kenya, a mismatch exists between the ambitions of young people and the opportunities available to them. The majority of young Kenyans have high hopes and aspirations.

However, a demographic bulge of young people, poor macroeconomic performance, a lack of labor market opportunities, an education system that suffers from problems of access, quality and relevance, and a society that negates the self expression of young people mean that many young people are unable to translate their aspirations into a productive and fulfilling future.

High expectations, disappointing employment and life prospects, and marginalisation among young people can fuel frustration and desperation. In response, some of these youths turn to criminal behavior, violence, substance abuse, and commercial sex work. These activities have negative repercussions on the young people themselves and contribute to growing physical insecurity for society as a whole.

It is important that the youth be included in governance for the reason that any decisions made in both the executive and the legislature affect them both directly and indirectly. After the 2007 General elections, there was an increase in the number of young members of parliament under forty years of age. A big percentage of this number has been given ministerial positions albeit that majority is assistant ministers. It is necessary to have them in ministerial positions, where they can use their energy and skills to come up with a different way of doing things. For example, for the vision 2030 to work, the government needs to have more young people involved in it. They are the ones who will be around to teach the next generation about it. **KN**

The writer is a freelance journalist.

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been approved by the Cabinet prior to its introduction in the House.

Save for certain sections in the Act that are capable of misinterpretation and which require further consultations between the Minister and the media, most of the provisions are satisfactory and regulate other sectors in the information and communication field and not necessarily the media.

Media regulation in other countries

Germany

The regulatory framework was developed in the 1940s and promotes complete self regulation of the media. This was intended to prevent the government from using the media for propaganda and use the media as a tool of tyranny. The legislators designed a broadcasting system that would be as independent from any particular interest. The State was kept at arms' length and broadcasters were made autonomous in their programming decisions – and only answerable to the law and the regulatory body. The system is not, of course, without flaws. Political parties in Germany have tried to gain an influence on public service broadcasting. The appointment of the Director General of the regulatory authority is normally politically divisive. Over half of the population is connected to the internet with major television broadcasters among the most popular content providers.

With regard to the protection of minors, the self regulatory bodies, which were established by law, have the responsibility of monitoring broadcasting and other electronic media. The media authorities will monitor the supervisory activities of the self-regulatory bodies. Media concentration regulations were amended and incentives offered to operators of

regional programme windows on national channels. Films in Germany are regulated through a self-regulation agency with government participation

Broadcasters are combining traditional television, Internet content, and, increasingly, mobile phones, to create a multi-platform product. Media convergence due to the technological platforms has increased and diversified the modes through which minors get access to media content. This had challenged the technology dependent definitions of traditional regulation regimes. The Command-and-control instruments which characterise traditional regulation regimes are increasingly incompatible with current trends in governance that give preference to decentralised and distributed regulation regimes.

United States

According to an article by Robert McKenzie titled *Comparing Media Regulation between France, United States Mexico and Ghana*, newspapers and the Internet are not regulated by a government agency and are protected from regulation by the First Amendment.

The agency for broadcast regulation is the Federal Communications Commission (FCC), which was formed by the Communications Act of 1934. The aim of establishing the FCC was to create an expert agency to implement the policies and statutes of Congress. The governing board of the FCC consists of five commissioners, each serving a five-year term.

The commissioners are appointed by the President and approved by the Senate. Television and radio operations and all telecommunications fall under the regulatory jurisdiction of the FCC. The FCC

has the authority to develop regulations grounded in existing legislation and to enforce such regulations.

Three areas of content regulation overseen by the FCC include indecency. The Act prohibits the broadcasting of obscenity at any time. Obscenity is defined by a test arising out of the Supreme Court case *Miller v. California*, 413 U.S. 15, 24 (1973). Obscenity is defined on whether an average person, applying contemporary community standards, finds that a broadcast appeals to the prurient interest.

Some indecent programming is allowed between the watershed hours of 10:00 pm-6:00 am. Indecency is defined by the FCC as 'language that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. The barometer of indecency is the marketplace of consumers, which generally has reacted unfavourably towards broadcast media content containing nudity and profanity.

The second area of regulation is commercial advertising by a non-commercial broadcaster. Non-commercial broadcasters such as public, college and university stations and community broadcasters are strictly prohibited from airing advertisements. However under strict guidelines, non-commercial broadcasters are allowed to air sponsorships, which are defined by clear boundaries.

A third area of content regulation emphasized by the FCC is children's programming. A set of regulations was developed that require all television stations to provide children's programming. The FCC uses two main

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and the Constitution of Kenya (Amendment) Bill, which implements key electoral reforms recommended by IREC, and lastly, the signing of an agreement by the President and the Prime Minister for the implementation of CIPEV recommendations intended to end impunity and reform the police service.

Annan noted that the Government needs to increase the pace for reform due to the limited window of

opportunity for serious reform. The next elections are scheduled to be held in under four years with a referendum on the Constitution likely to be held within two years. This creates opportunities for derailing the reform effort by politicians.

The Government should act on the fourth agenda that deals with matters of the citizenry including poverty and inequality, youth unemployment, land grievances, ethnic discord, stalled judicial and other institutional reforms and action on corruption. The civil society, private sector, religious leaders, the media and others must work with politicians to advance reforms.

The international community could assist in providing funding to set up and run the Tribunal and provide technical expertise. However, the Tribunal is an essentially Kenyan process and the Government must ensure provision of adequate resources to enable it carry out its mandate efficiently. **KN**

The writer is a legal expert.

Review process at cross roads

We are still at what we know best. Procrastination intrigues, squabbling and fighting. And as we thrive in this jungle fever, Kenyans continue waiting for the proverbial Godot. Pray, when shall we ever get a new Constitution, if ever? This article analyses the recent piecemeal amendments to the Constitution and the major hurdles that must be overcome.

By Macharia Nderitu

Parliament enacted the Constitution of Kenya (Amendment) Bill, now, Act, 2008 to kick start the constitutional review process that had stalled since November, 2005. Efforts to reform the Constitution have been on for over fifteen years. The constitutional amendment also sought to implement the findings of the Independent Review Committee on the 2007 General Elections by restructuring the restructuring of the Electoral Commission of Kenya. The President assented to the Bill on 24th December, 2008.

Parliament had earlier enacted the Constitution of Kenya Review Act, 2008 which provides the detailed procedures for the review of the Constitution. Under the agreements signed by the Kenya National Reconciliation and Dialogue, a new Constitution is expected to be realised in a period of 12 months. However, it is not clear from when this period runs. With the enactment of the constitutional amendment and the Act, the process of review should commence in earnest from January, 2009.

Review of the Constitution of Kenya (Amendment) Bill, now Act

The constitutional amendment has established the following institutions:

1. Interim Independent Electoral Commission

The Commission is intended to replace the Electoral Commission of Kenya. The Interim Commission shall consist of a Chairman and eight other members. The Commission shall be the successor to the ECK and all rights, duties, obligations, assets and liabilities of the ECK existing immediately before the commencement shall be automatically and fully transferred to the Commission. The Chairman and the members shall be recruited through a competitive process by the Parliamentary Select Committee and upon approval by the National Assembly be appointed by the President in consultation with the Prime Minister.

Members of the Commission shall be qualified to be appointed if they are citizens of Kenya, hold a degree from a university recognised in Kenya and are of high moral character and integrity. The Chairman shall be a person qualified to hold the office of a judge of the High Court. MPs, members of local authorities, office holders of political parties and public servants will not be eligible for appointment.

Members of the Commission shall be removed only through a resolution of the National Assembly supported by a majority of all its members

The Commission shall stand dissolved twenty four months after the commencement of this section or

three months after the promulgation of a new Constitution which ever is earlier. Members and staff of the ECK shall cease to render services to the Commission. However, members of staff shall be eligible for redeployment in the civil service and the provision shall not apply to the Registrar of Political Parties appointed under the Political Parties Act.

The functions of the Interim Independent Electoral Commission will be to reform the electoral process and the management of elections in order to institutionalise free and fair elections, establish an effective and efficient secretariat, promote free and fair elections, register voters afresh and create a new voter register, efficiently conduct and supervise referenda, develop a modern system a for collection, collation, transmission and tallying of electoral data, facilitate observation, monitoring and evaluations of elections and referenda, promote voter education and the culture of democracy, and settle minor electoral disputes.

The reform of the ECK is necessary to facilitate the conduct of the referendum to ratify the new Constitution and to clean up the voter register. The Political Parties Act establishes the office of the Registrar of Political Parties whose office shall be an office within the Commission. There were initial fears that disbandment of the Electoral Commission would affect the operations of the office of the Registrar. However, the functions of that office were preserved in the constitution amendment.

A further argument against the amendment was that the petitions pending in court will be thrown into disarray as the respondents, mainly returning officers rely on ECK Staff to defend their cases, and that the petitioners will argue that the ECK was sent home for conducting a flawed election. However, this argument is flawed as the Interim Commission is obligated to take over all the assets, liabilities and obligations of the Electoral Commission. It will therefore be legally obligated to prosecute or defend electoral petitions as necessary.

The constitutional amendment does not adequately address the transitional

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The peoples' delegates in a past review process function.



Former CKRC chairman Prof. Yash Pal Ghai (left) with some members of his disbanded commission

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Issues. Currently, there is no body mandated by law to carry out by-elections should the need arise. The President has assented to the Bill, the Parliamentary Select Committee has been set up, and the PSC will give the programme for the review process. Parliament should move with speed to set up the Interim Commissions and the Court to ensure there is no vacuum that could occasion a constitutional crisis.

2. Interim Independent Boundaries Review Commission

Section 41B of the Constitution creates an Interim Independent Boundaries Review Commission which shall consist of a Chairman and eight other members. The Interim Boundaries Commission will assume the boundary review functions of the Electoral Commission of Kenya. The Chairman and the members shall be selected through a competitive process and shall be appointed by the President in consultation with the Prime Minister upon approval by the National Assembly. Such members shall be citizens of Kenya, shall have a degree from a university recognized in Kenya, shall be persons of high moral character and shall possess knowledge and proven experience in public administration and management of public affairs. Members of the Commission may only be removed through a resolution of the National Assembly supported by majority of the members. The Commission shall stand dissolved 24 months after the commencement of this section or three months after the promulgation of a new Constitution which ever is earlier.

The Commission shall be responsible for making recommendations to Parliament on the delimitation of constituencies and local authority electoral units and the optimal number of constituencies on the basis of equality of votes taking into account the population density, population trends, means of communication, geographical features and community interest, making recommendations to Parliament on administrative boundaries, including the fixing, reviewing and variation of boundaries of districts and other units, and performing such other functions as may be prescribed by law. The ECK last carried out a boundary review in 1997 despite being required to carry out the exercise in 8 to 10 year intervals.

3. Referendum

The Act inserted a new Section 47A to the Constitution which provides that the sovereign right to replace the Constitution vests collectively in the people of Kenya and which right shall be exercisable through a referendum. Where the draft Constitution will be introduced in the National Assembly, no alterations shall be made unless supported by a majority of all MPs excluding the *ex officio* members. The National Assembly shall within thirty days after referral of the draft Constitution submit the draft Constitution and any proposed amendments to the Attorney General. The draft Constitution shall then be published in the manner provided by or under an Act of Parliament. Thereafter, the Interim Independent Electoral Commission shall conduct a referendum within 90 days from the date of publication to enable Kenyans ratify the draft Constitution.

The draft Constitution shall be ratified if more than 5 per cent of all votes cast support ratification and at least 25 per cent in five out of eight provinces support ratification. The President shall publish and promulgate the New Constitution of Kenya within 14 days after publication of the final result of the referendum. The New Constitution shall become law and shall have the effect of a New Constitution when published or after the expiry of fourteen days after the publication of the final result of the referendum.

4. Interim Independent Constitutional Dispute Resolution Court

Section 60A of the Constitution creates the Interim Independent Constitutional Dispute Resolution Court which shall have exclusive original jurisdiction to hear and determine all and only matters arising from the constitutional review process. The court shall be made up of nine judges,

three of whom shall be non citizens who are qualified to be appointed judges or have served as judges of the highest court within the Commonwealth and six who shall be recruited through a competitive process by the Parliamentary Select Committee. The judges shall be appointed by the President in consultation with the Prime Minister. The Court shall not be a division of the High Court. The judges shall be qualified for appointment if they are or have been a judge of a court having unlimited jurisdiction in civil and criminal matters in the Commonwealth; if one is an advocate of the High Court of not less than ten years standing; and is a person of high moral character and integrity.

A judge of the Court shall be removed from office if the National Assembly so resolves by a resolution supported by a majority of its members. The court shall stand dissolved twenty four months after the commencement of this section or three months after promulgation of a New Constitution, whichever is earlier.

Parliamentary Select Committee on Constitutional Review Process will hire members of the two Interim Commissions and judges of the Court. The nominees will be approved by Parliament and appointed by the President in consultation with the Prime Minister. The two Interim Commissions and the Court will be composed of 27 persons. This is an addition of five from the 22 commissioners of the ECK. The appointments will run fore a period of 24 months or three months after the adoption of a new constitution, which ever is earlier. This period may not be sufficient to negotiate, draft and subject a new Constitution to referendum. The recruitments into the three bodies will be through a competitive process, which is not clearly defined in the amendment.

One legal challenge that has been posed on the constitutional amendment is that the amendment seeks to fundamentally alter

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constitutional organs by Parliament exercising its legislative authority under section 30 of the Constitution and its power to amend the Constitution under Section 47 of the Constitution. This approach to reform has been challenged on the basis of unconstitutionality of piecemeal reforms. There is an argument that the powers of Parliament under sections 30 and 47 do not extend to carrying out wide ranging reforms to the Constitution involving key governance institutions. Parliament does not have unlimited power to restructure core constitutional institutions. In order for such wide ranging reforms to be carried out, it is necessary to conduct a referendum on the electorate since the supreme authority to fundamentally alter the Constitution is vested in the people. The disbanding of the ECK should follow the provisions of the Constitution including the setting up of the tribunals to investigate the Commissioners for alleged misbehaviour during the 2007 General Elections.

During the initial debate on the Bill and prior to its introduction to Parliament, there was an attempt by the former commissioners of the Electoral Commission of Kenya to injunct parliament from debating and enacting the Bill. The Speaker of the National Assembly ruled that Parliament cannot be injuncted from enacting legislation including constitutional amendments. The Speaker has ruled that Parliament is the supreme law making authority in Kenya and as such will not take orders from other arms of Government while exercising its constitutional authority. He stated: "The order made by the High Court does not, indeed cannot, prevent Parliament from carrying out its legislative function as stated in the Constitution. Neither this High Court order or any other order of the court can prevent a member of this House from introducing any form of legislation'. 'The legislative authority of this House as provided for under section 30 of the Constitution cannot be fettered by any person or authority outside this House. Any member can bring a Bill without any obstruction by any authority and it will proceed according to House procedures."

The Constitution of Kenya Review Act Parliamentary Select Committee has hired a human resource firm to assist in recruitment of the nine-member Committee of Experts that will spearhead the constitutional review. The Constitution of Kenya Review Act was brought into force on the 24th December, 2008. The Committee of Experts will be comprised of six local experts and three international experts. The Committee of Experts is expected to review the Bomas and Wako drafts and receive views from the public before drafting another draft Constitution.

Constitution of Kenya Review Act provides that the Minister for Justice, National Cohesion and Constitutional Affairs has the power to chart the course of the review process. The Minister will chair the first meeting of the Committee of Experts that will elect the Chairperson and Deputy Chairperson. The Minister will also receive the list of Committee of Experts from the

Parliamentary Select Committee and transmit it the same to the President for appointment thereby granting the Minister an opportunity to advise the President on whom to pick or drop from the list submitted by the National Assembly.

All complaints of conduct of a member of the Committee shall be channelled to the President through the Minister. The Bill does not create timelines for completion of the process and does not delimit the time line for computation of the 12 months period envisaged in the National Dialogue Agreements. The Act has been assented to by the President. Another role for the Parliamentary Select Committee will scrutinize the Draft Constitution prepared by the Committee of Experts and provide guidance to the House on the review. The inclusion of the PSC may lead to protestation of the review process being led by Parliament to the exclusion of the people.

Implications for the constitutional review process The expiry of 24 months after the coming into force of the amendment and without realising a New Constitution could occasion a constitutional crisis. The process of constitution making in Kenya is marked by twists and turns and is highly politicised and no person or body can tell for sure if the new Constitution will be adopted in the threshold period for the Interim Commissions. On the other hand, the Court is purely transitory as its mandate is restricted to the review process.

A summary of the proposed review process- key stages and milestones

Under the Constitution of Kenya (Amendment) Act, 2008 and the Constitution of Kenya Review Act, the key stages in the reform process are:

- a) The Committee of Experts generate a draft Constitution. This will be after examining the Bomas Draft, the Wako Draft and receiving views from the public.
- b) Parliamentary Select Committee will scrutinise the draft Constitution before presenting it to Parliament.
- c) Parliament will scrutinise and amend or approve the draft Constitution. Any such amendments shall require the approval of 65 per cent of all MPs excluding *ex officio* members.
- d) Attorney General will refine the draft and include any amendments approved by MPs.
- e) Draft Constitution is subjected to Referendum. The referendum will be organised by the Interim Independent Electoral Commission. The threshold for approval for adoption of a new Constitution has been set in the Constitution as more than 50 per cent of votes cast with 25 per cent support in five out of the eight provinces
- f) Promulgation of New Constitution by the President. This will be done within 14 days after publication of the final result of the referendum approving the new Constitution.

Some polarising issues on the constitutional debate, which are reminiscent of the referendum campaigns in November, 2005 include:

- i. Decentralisation, devolution and *majimbo*. The *majimbo* debate has been a cause of polarisation in the political arena since the 1960s. The major post independence parties were ideologically divided along the supporters and opponents of *majimbo*. The political class have not agreed on the most suitable mode of *majimbo*. It is likely to be a determining factor on the level of support the draft Constitution garners at the referendum.
- ii. Referendum. The holding of a referendum, just like the General

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powers of enforcement. The first power of enforcement involves revoking a license or failing to renew a license, a power reserved for cases where a broadcaster demonstrates wilful and repeated disregard for the law. The other mode of enforcement is the fine, which the FCC can levy on broadcasters who violate regulations or statutory law.

Challenges facing the media in its watchdog role

Some of the challenges facing the media in Kenya are:

a) Lack of clear and unequivocal constitutional protection of the freedom of the media. The freedom of the media is derivative right through the interpretation of the freedom of expression provided in section 79(1) of the Constitution. The right has claw back clauses that are often invoked to restrict media freedom which include restriction of the freedom for the interests of national defence, public safety, public order, public morality and public health.

b) There is no constitutional protection of the right to freedom of information and the enabling legal framework. Freedom of information laws help make the Government accountable to the people, promotes self fulfilment by facilitating acquisition of knowledge, acts a weapon against corruption and abuse of power by providing a channel for exposing wrong doing in public officers, contributes to improved quality of official decision making by facilitating public comment and participation, and it enhances the participatory nature of democracy, and it empowers the citizens to actively participate in governmental affairs. The media should strenuously guard the freedom of media, expression and

information.

c) Professional journalism training of a high standard is a prerequisite for development of professional and independent media. More resources should be invested in training high calibre journalists to ensure that high standards of professionalism are nurtured and maintained. There is need for strong media based organisations. These organisations serve as vehicle for lobbying and mobilisation when the freedom of the media is threatened. The media should adopt emerging technologies and explore opportunities in media convergence.

d) The society is slowly developing greater demand for the right to information and the right to have their voices heard. Information is power, and the more people who possess it, the more power that is devolved. Access to information is essential in any modern society. Without it, democratic structures cannot operate effectively, and individuals are left unable to enforce their rights. Corruption cases are undetected. The primary vehicle for taking information to the public is independent and free media. The debate on constitutionalism reform has created opportunities and more challenges for the media, to engage in the debate on the role of the media in a democratic society.

e) The proposed economic and political integration in the Africa, including the East African Community, has expanded the role of the media in highlighting available economic opportunities and educating the public on the integration plans.

f) Media accountability. While accountability from public officers to the public and the media is important, the

media should be accountable as well. The media must be answerable to the people and the State for its actions. The media must ensure that the information disseminated to the public strengthens democracy. The media must act in tandem with democratic principles and values. The media must therefore aim at self evaluation, enhanced accountability and improvement.

e) Surge in suits for defamation. Kenya courts are increasingly awarding huge sums of money as damages for defamation. This has increasingly affected the ability of the media to carry out its work. These awards also deter the media from carrying out investigative journalism. Indeed, under the Penal Code, a provision exists for charging a journalist for criminal libel. Though rarely used, the provision is intended to remind journalists that punitive action can be initiated against them even where the complainant has recourse in a civil suit for defamation.

f) Policy and Legislative Environment. Some governments have initiated new policy and legislative frameworks that restrict media freedom. For example, in Kenya the Minister is empowered to impound broadcasting equipment when a state of emergency has been declared. This provision may facilitate governmental punitive action against non compliant and independent broadcast stations. Restrictive regulatory environment including restrictions on entry into broadcasting markets, high license fees, repressive defamation laws create adverse conditions for effective media oversight. **KN**

The writer is a media consultant.

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Elections in Kenya is a cause of deep ethnic and ideological divisions. The situation has not changed since the last referendum and the 2007 General Elections. The electors at the referendum are usually divided along distinct ethnic and political camps. It is therefore likely that the conduct of the referendum will not be peaceful and will divide the country.

iii. ECK. The new Commission may not be competent to organise a referendum and the losing side in the referendum may lay claims of rigging and electoral manipulation.

iv. The Executive. The dwindling faith in Parliament has led to Kenyans to rethink the Executive Prime Minister position. The outcome of Bomas Conference on the Constitution was an Executive Prime Minister with a weaken Presidency. The structure of the Executive will be a dividing factor in the referendum.

ECK – The epilogue

The ECK was officially disbanded when the President signed into law the Constitution of Kenya (Amendment) Act, 2008. The disbandment is expected to pave way for the setting up of the Interim Independent Electoral Commission that will supervise the referendum on the Constitution. The ECK was largely blamed by the Independent Review Commission, chaired by Justice Kriegler, for its failure to establish proper procedures and structures for the conduct

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of elections which led to the disputation of the results of the 2007 General Election and the subsequent widespread violence. The liabilities, assets and obligations of the ECK are now vested in the Interim Independent Electoral Commission. There is little public sympathy for the Commissioners of the ECK who had been publicly requested to resign but declined. The members of staff of the ERCK are expected to be redeployed to the civil service. **KN**

The writer is an advocate of the High Court of Kenya.

THE KONRAD ADENAUER FOUNDATION IN KENYA

Konrad-Adenauer-Stiftung is a German political Foundation which was founded in 1955. The Foundation is named after the first Federal Chancellor, Prime Minister and Head of Federal Government of the then West Germany after World War II. Konrad Adenauer set the pace for peace, economic and social welfare and democratic development in Germany.

The ideals that guided its formation are also closely linked to our work in Germany as well as abroad. For 50 years, the Foundation has followed the principles of democracy, rule of law, human rights, sustainable development and social market economy.

In Kenya, the Foundation has been operating since 1974. The Foundation's work in this country 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 as well as political progress from the grass roots level.

Our aims

Our main focus is to build and strengthen the institutions that are instrumental in sustaining democracy. This includes:

- Securing of the constitutional state and of free and fair elections;
- Protection of human rights;
- Supporting the development of stable and democratic political parties of the Centre;
- Decentralisation and delegation of power to lower levels;
- Further integration both inside (marginalised regions in the North/North Eastern parts) and outside the country (EAC, NEPAD); and

Development of an active civil society participating in the political, social and economic development of the country.

Our programmes

Among other activities we currently support:

Working with political parties to identify their aims and chart their development so that democratic institutions, including fair political competition and a parliamentary system, are regarded as the cornerstones for the future development in Kenya.

Dialogue and capacity building for young leaders for the development of the country. Therefore, we organise and arrange workshops and seminars in which we help young leaders to clarify their aims and strategies.

Reform of local governance and strengthening the activities of residents' associations. These voluntary associations of citizens seek to educate their members on their political rights and of opportunities for participation in local politics. They provide a bridge between the ordinary citizen and local authorities, and monitor the latter's activities with special focus on the utilisation of devolved funds.

Introduction of civic education to schools and colleges. We train teachers of history and government in civic education. In addition, we participate in the composition of a new curriculum on civic education.

Our principle is: Dialogue and Partnership for Freedom, Democracy and Justice.

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