

# KatibaNews

March-April 2011

## The birth of a new Republic

# ICC debate heats up

Inside:

- \* Appointments to public office
- \* Does the new Constitution guarantee democracy?
- \* Implementation of new law inevitable
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# ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

**T**he 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 liking 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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Managing Editor  
Stephen Ndegwa

Associate Editors  
Susan Kasera  
Patrick Mwangi  
Henry Owuor

Office Assistant  
Monica Mugure

Photography  
World Wide Web

Art Direction & Design  
Khafre Graphics



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All are welcomed to send their observations on the constitutional review process to be the Editorial Board.

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### All Correspondence to:

The Editor  
Katiba News  
P.O. Box 64254-00620  
Tel. 2712309  
Nairobi, Kenya  
Email: mediakenya@yahoo.co.uk

# ICC debate heats up but no light

The failure of Kenyan parliamentarians to create a local tribunal mechanism to handle post-election violence (PEV) cases saw Luis Moreno-Ocampo act on a *proprio motu* (of his own initiative) and took up the cases. This has led to Ocampo serving summons to the six who he believes are responsible for the violence. The International Criminal Court (ICC) has finally served summonses to the six suspects believed to hold the greatest responsibility for the violence three years ago. And with that the Hague process has started in earnest...

By Albert Irungu

In the wake of Moreno-Ocampo's summonses for the six Kenyan personalities, the Government initiated intense lobbying to defer the cases for a year. During this one year period it promised to set up necessary

mechanisms that would try the PEV suspects in a local tribunal.

The six are due to appear in The Hague in early April and as of now, all efforts to have the trials deferred have failed. The Government gave Vice-President Kalonzo Musyoka the mandate to

lobby for deferral support from the African Union and by extension other African countries. But even with this backing, the United Nations Security Council rejected the deferment.

Under the Rome Statute, a case for deferment can only be heard in a situation where there are current proceedings of a case in the ICC court. The Government of Kenya's petition was considered to be premature, as the summonses are only to read the Ocampo Six their rights and the charges the prosecutor has preferred against them. Thus with the possibility of seven months lapsing before actual cases start in court, the Government is back to the drawing board trying to re-strategise and weigh its options.

## Lobbying

Analysis of Kalonzo's shuttle democracy shows it was a costly affair that was well covered by the media as he traversed Africa in search of support from African leaders. He met Hosni Mubarak, former Egypt President; the now besieged Libyan President Muammar Gaddafi, South Africa's President Jacob Zuma, and Uganda's President Yoweri Museveni. Kalonzo was part of a Government team that lobbied African countries to support its case.

Other officials were Trade Minister Chirau Mwakwere, Dalmas Otieno (Public Service) and Njeru Githae (Nairobi Metropolitan Development), who were tasked with lobbying Botswana, Lesotho, Ghana, Nigeria and Djibouti. The reason advanced by Kalonzo for



Presidential wannabe, Vice President Hon. Kalonzo Musyoka.

mission was that such a case during an election year would start off a new round of violence.

**Article 16 states the following on deferral of investigation or prosecution:** "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

For the Security Council to pass this resolution, they would have had to believe that there will be a threat to regional security, peace and stability if the ICC cases go ahead. However, majority of the Security Council members do not hold the belief that such a situation will arise. Although the Kenyan Government petition for deferment was rejected on different grounds, this was an argument pushed forward on why there should be a deferral.

#### Desperate

Last December, a group of parliamentarians in support of the Hague six passed a Motion in Parliament seeking to withdraw Kenya from the ICC by repealing the International Crimes Act, which in the Kenyan Constitution the Government is mandated to uphold. Since then, the Government has stepped up its efforts to have the cases deferred. The official Government position for the deferment is to have

ample time to set up a local tribunal to handle the PEV cases.

However, given that after 2008 it had two years to set up a local tribunal and did not, it seems there is more to the Government seeking a deferral than what meets the eye. The Ocampo Six has two Government officials and two aspiring presidential candidates who the Government wants to protect. Looking at the bigger picture, two of the suspects — Major General (rtd) Mohammed *Hussein Ali*, the former Commissioner of Police, and Ambassador Francis Muthaura, Head of Public Service, could not have committed the crimes they have been allegedly accused of without the knowledge and support of the Government machinery.

Thus finding a soft landing for them is in essence protecting the Government's shortcomings

during the post election violence. The Government risks being exposed once the suspects start giving evidence on what happened. More officials will be put in a compromising situation once high-ranking current and former officers from Government security agencies open up on their role and involvement in the post-election crisis.

#### Local tribunal

It is now clear the reason why many a politician supported the ICC process was the perceived long period of time before the court could try the suspects. But with the quick response from the ICC, politicians from both sides of the Coalition Government are now pushing for a local tribunal.

In the case of setting up a local tribunal, the divisions in the Government have made it harder to rally Members of Parliament to pass the Bill. The push for different agendas by Cabinet ministers has made matters complicated. The close scrutiny by the international community on the political mudslinging and all out war of words will make it next to impossible to get a deferral.

#### Judicial capacity

As it is now, we lack the mechanisms to handle the PEV cases. Even with the one year deferral period the Government is asking for, there is a high probability that little or nothing will have been achieved to make it possible to try the Ocampo six in a local tribunal.



It's me against the world, Prime Minister Hon. Raila Odinga



What post election violence! ICC top suspect  
Hon. William Ruto

court. However, the speed with which the ICC prosecutor has fast tracked the process has led to the change of heart. Now politicians are using the sovereignty card to ask for deferment.

Kenyans' trust and confidence in the Judiciary is low. Past injustices and lack of will by the Judiciary to

do its work has left many Kenyans disillusioned. Opinion polls have rated the ICC highly in the eyes of Kenyans, as they prefer it handles the PEV cases.

**Showdown**

The war of words between the two coalition sides of Party of National Unity (PNU) and Orange Democratic Movement (ODM) is escalating day by day with allegations and counter-allegations flying between the two parties on who should be held responsible for the PEV.

While PNU is of the opinion that the ICC trial of Kenyans is surrendering our sovereignty, the ODM side is not confident with the local judicial system, especially now when the proposed judicial reforms have hit a snag. In ODM, the party is torn between politicians who support William Ruto, one of the Moreno-Ocampo's suspects, and the party leader Raila Odinga.

When members of the PNU were working to have the cases deferred, members of ODM on the

other hand were drafting a memo to the UN Security Council requesting it to reject the deferment. 'Rebel' politicians in ODM, those who support Ruto, rejected the memo stating it does not reflect the party stand on deferral.

The 2012 elections will be the only end to this war of words. The one voice of reason has been Kenneth Marende, the Speaker of the National Assembly. His ability to resolve these tussles brought to Parliament in various Motions has cooled down perceived and actual crises in the political scene.

**Political scenarios**

With the 2012 General Election one year and three months away, the stakes have become high as political rivals try to out-do each other. The predicted exit from the presidential race of both Ruto and Uhuru Kenyatta two of the Ocampo six have given candidates a chance to raise their profile.

As it is now, Ruto and Uhuru Kenyatta have realised the inevitability of their situation and are trying to implicate Raila as the person responsible for calling for mass action after the 2008 elections. Once Kibaki's term ends, it will be a free for all. However, Raila's popularity is a threat to other aspirants' presidential ambitions hence trying to minimise his influence.

Majority of Kenyans are disappointed by the current Parliament and chances are not many politicians will make it back. With the current constitutional dispensation, it will prove to be an uphill task for politicians to take advantage of ethnic rhetoric, which they have used in the past. KN

Why is it so? First, the recent debacle in which President Kibaki nominated persons for the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget is one glaring example of the problems that will affect the process of creating the local tribunal. Enabling a transparent process for nominating and hiring qualified persons for these positions will be pivotal in proving that the Government is serious in creating a local tribunal independent of any manipulations or outside influence.

Second, the request for deferral might be another time-buying tactic that Kenyan politicians have become accustomed to. The sincerity of the petition lacks basis considering that in 2009, many politicians sang a different song. The insistence then was on The Hague and a phrase had been coined, "Don't be vague, it's The Hague".

It was the thinking then that the ICC process would take years before the first case saw its day in

# Appointments to public office under the new Constitution

One of the desired changes that Kenyans would like to see under the new constitutional dispensation is transparency and openness in public appointments at all levels. Chapter Six of the Constitution dictates that any appointment to public office should ensure that it brings a person of integrity, competence and suitability and whose appointment is free from favouritism, nepotism or corrupt practices. So, is this the situation now?

By Peter Wendoh

**U**nder the old laws the President enjoyed enormous unilateral and discretionary powers in effecting these appointments. This resulted into the appointment of people with questionable credibility, competences and integrity, which ultimately led to widespread corruption and mediocrity in the public service.

These appointees worked to further the cause of the appointing authority, which was not necessarily in conformity with the expectations of the citizens. Inevitably, the public lost trust and confidence in many public institutions, including the Judiciary whose severe consequences were felt after the 2007 disputed presidential elections.

To address this challenge, the framers of the Constitution established elaborate consultative and participatory mechanisms in the appointment of key public officers to enhance legitimacy of the appointees and guarantee ownership on the part of the public.

The practical aspect of achieving this objective is not very clear and easy under the current Coalition Government that consists of two equal partners. Transitional clauses in the new Constitution recognise the National Accord and Reconciliation Act, which stipulates how the Coalition Government should function. The overriding principle is the requirement that partnership of the Coalition Government must be based on real power sharing, constant consultations, mutual trust and confidence between the partners.

## Engagement

In the foregoing and in the context of the recent controversial judicial appointments, the need for consultation between the two principals especially regarding the appointment of the Chief Justice as provided for under Schedule Six article 24(2) is of paramount importance.

The kind of consultation envisaged in the Act and the Constitution is one where there is meaningful engagement and dialogue between the two principals on matters of national importance to ensure that decisions made are

good for the people of Kenya. This is particularly important in the appointment of judicial officers because it is as a result of one partner of the coalition declaring loss of faith in the competence and independence of the current Judiciary to resolve major political disputes that led the country to the brink of collapse after the 2007 elections.

Whereas the final decision after the consultation may or may not be made in a particular way, the ultimate test of legitimate and genuine consultation will be measured against the extent to which the parties concerned recognised, considered the full breadth of ideas and remained faithful to the views of each other.

The storm that was witnessed after the President's nomination of Justice Visram as the new Chief Justice together with three others seem to suggest that this was not the kind of consultation that took place between the two principals.



Chief Justice Contender the Hon. Mr. Justice Riaga S.C. Omolo

**Surprise**

The Judiciary is at the centre of successful implementation of the new Constitution hence the unprecedented spotlight and emphasis on its reformation as the first critical step in the implementation process. Consequently, the establishment of a new JSC, appointment of a new Chief Justice, creation of a Supreme Court and vetting of judicial officers were placed at the top of the reform agenda.

It was not in doubt that the appointment of the next CJ after Evan Gicheru was going to be based on political considerations more than any other factors. It was the turn the issue took that seems to have caught many by surprise. Most analysts expected the principals to divide the positions of the CJ and the AG between their respective allies, a move that would not have been ideal for most Kenyans who yearn for an independent and effective justice system, and it is just as well that the process stalled, albeit by default.

Being the head of the Judiciary, the position of the CJ is of utmost importance and at the centre of realising the long-standing clamour for judicial reforms in Kenya. Under article 166(1), the President should appoint the CJ and the Deputy in accordance with the recommendation of the JSC subject to the approval of the National Assembly. However, in the current transitional period this article must be read together with Schedule 6 Article 24(2), which stipulates that 'a new Chief Justice will be appointed by the President subject to the National Accord and Reconciliation Act in consultation with the Prime Minister and approved by the National Assembly'. It is at this point that law and politics collide.

From a legal perspective, since the new JSC was already in place at the time when the President made the controversial nominations, reason, commitment and faithfulness to the spirit and the letter of the new Constitution would have prevailed upon the two principals to leave this task to the JSC as stipulated in Article 166 because only then would this have been perceived as a commitment on both sides to push through a reform agenda for the benefit of all Kenyans, and not partisan interests as stipulated in the preamble of the National Accord and Reconciliation Act and Article 10 of the Constitution on national values and principles of governance.

**Private**

The principles of international best practices on judicial appointments also require that these are made on the basis of clearly defined criteria that include public advertisement of vacancies, equality of opportunity for all who are eligible, merit, gender equity among others, if the independence of the Judiciary is to be safeguarded. Such was the approach and experience of South Africa during their transition from the apartheid regime.

A new procedure was required to overcome the challenges inherent in the appointment process that had been used during apartheid and this meant the restructuring of the JSC. In order to make the appointments open, transparent and competitive the JSC publicly announces when vacancies arise in the Judiciary, nominations are made and candidates short-listed and interviewed by the JSC in public. In case of any private deliberations, the JSC makes available the transcript of its discussions concerning its priorities and its general approach to the selection process.

At the end of the process, the commission notifies the President of the names of the successful candidates for each vacancy and the same is announced publicly. When appointing the CJ and his or her deputy, the President is required to consult with the JSC and the leaders of parties represented in the National Assembly. Such an elaborate process is important because any perception that the Chief Justice appointed is likely to protect the interests of the appointing authority is a legitimate concern that can have negative effect on public confidence and trust in the institution.

In what was the first real test of Kenya's new Constitution, the President withdrew his controversial list, which was widely perceived to have been inconsistent with the letter and spirit of the Constitution. All key players including the Prime Minister, Constitutional Implementation Commission, the Judicial Service Commission including the Attorney General, the Speaker of the National Assembly, the Minister of Justice, National Cohesion and Constitutional Affairs and the High Court declared that the nominations were inconsistent with the requirements of the new Constitution.

**Transparent**

The CIC is mandated to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution, as well as to work with each constitutional commission to ensure that the letter and the spirit of the Constitution is respected; the JSC on its part is required to promote and facilitate the independence and accountability of the Judiciary



and the efficient, effective and transparent administration of justice; the AG is the Government chief legal adviser and the Minister of Justice is the Government policy leader on matters relating to the administration of justice and constitutional affairs, yet they all faulted the President's action on the basis that it contradicted Article 166 of the Constitution.

The Prime Minister and the Speaker of the National Assembly faulted the process on the basis that it contravened the spirit and letter of the National Accord and Reconciliation Act read together with the transitional provisions of the new Constitution.

Article 132(2) of the Constitution grants the National Assembly the power to vet and approve all key public appointments including the Cabinet Secretaries, AG, judges, Secretary to the Cabinet, Principal Secretaries and members of the diplomatic corp. In regard to the controversial nominations, the Speaker was first of all required to rule on the admissibility of the contested list in the National

Assembly following the tabling of two contradicting positions by the two principals.

By acknowledging the positions of the High Court and the other constitutional and statutory bodies, the Speaker ruled that the process was unconstitutional and the unconstitutionality could not be cured by any act of the National Assembly or its committees and thus returned the matter back to the two principals. He noted that the requirement for consultation was not adequately fulfilled as envisaged by the law in light of the open and express disagreement between the two principals on the matter.

#### Fresh start

This sparked strong protests from MPs allied to the President, who challenged the authority of the Speaker to usurp the powers of Parliament to deliver a one-man ruling although this was not the first time that this Parliament and the two principals had surrendered their powers to the Speaker and thus created a

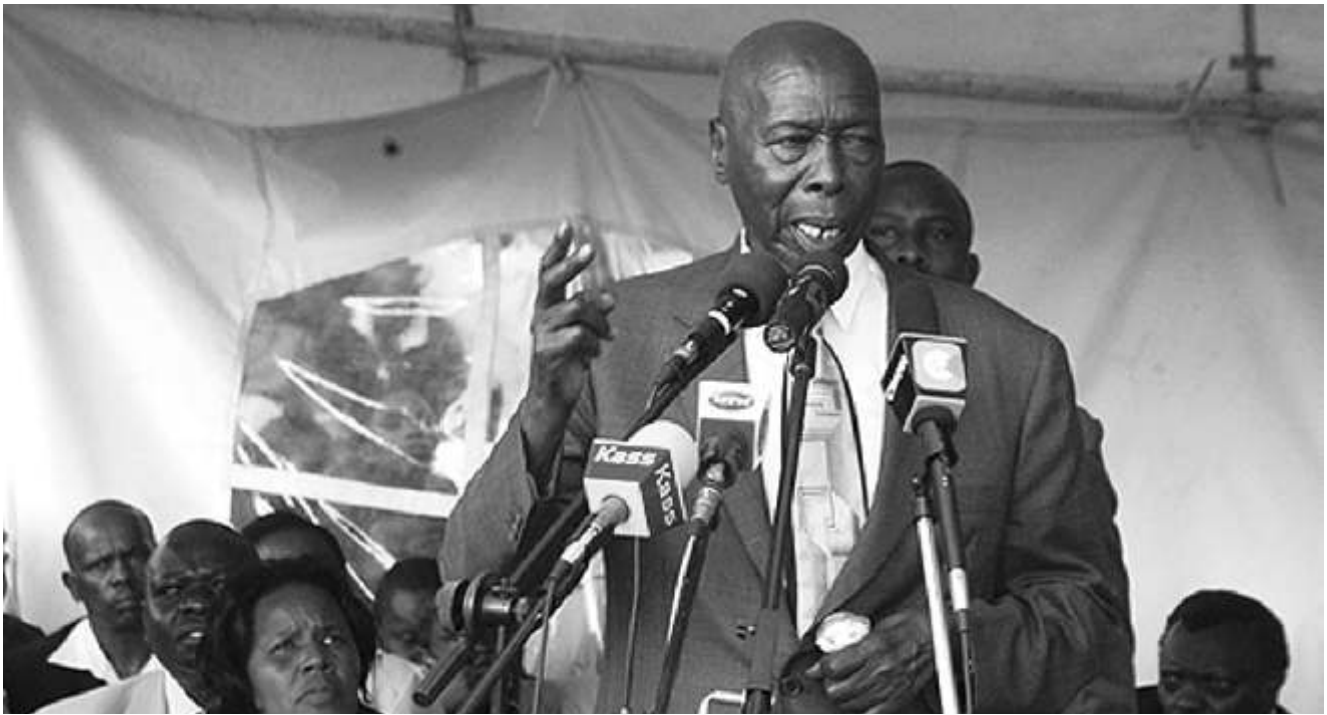
precedent. The President on his part declared that he would seek the interpretation of the Court of Appeal on the issue.

Going by the heat that the matter had generated and in conformity with Article 94(4) of the Constitution, which requires Parliament to protect the Constitution and promote the democratic governance of the Republic, the Speaker's action can be upheld and was indeed vindicated by the President's subsequent withdrawal of the list to pave way for a fresh start as per the provisions of the Constitution.

The High Court, too, declared the President's nomination as unconstitutional mainly on the ground that it violated constitutional requirement of equal opportunity by failing to consider women candidates, thereby violating the spirit of equality and freedom from discrimination as enshrined in the Constitution. On consultation requirement, the judge underscored the significance of the values and principles stated



President Mwai Kibaki and PM Hon. Raila Odinga - Who is the appointing authority?



The master of roadside appointments, former president Daniel Arap Moi.

under Article 10 and the spirit of the National Accord and Reconciliation Act in making the nominations.

Ultimately, the President withdrew the nominations and let the JSC to start the search for the next Chief Justice and the Deputy, who will also serve as the President and Deputy President of the Supreme Court. The President also pledged to appoint the next AG in consultation with the Prime Minister while allowing the Public Service Commission to search for the Director of Public Prosecutions and the Controller of Budget.

This withdrawal is the first indication of a new dawn as regards appointments of key public officers and presents a new opening for Kenya to create an independent, legitimate and credible justice system in line with the checks and balances established under the Constitution.

**Circus**

Article 35 of the Constitution assures Kenyans of the right to information, which includes the

right to know how the next CJ and indeed all other key appointments are made. Anything short of an open and transparent process is likely to erode public trust in the Judiciary and other public institutions thereby returning the country to the dark days when people believed public officers including the judges were beholden to their appointers and, therefore, were not independent, fair and impartial.

It is evident that the process of nominating the four officers was clouded in secrecy and lacked transparency and, therefore, perceived to have been made in consideration of few individuals linked to the ICC process and the 2012 presidential elections.

Justice Visram's appointment disregarded Article 23(1) of the transitional provisions, which requires that all serving judges and magistrates only continue to serve after they have been vetted for suitability as per the Act of Parliament. Without prejudice, Justice Visram had not been vetted to continue serving as a judge let alone being promoted to head the Judiciary.

The circus that ensued in Parliament after the Speaker's ruling should serve as an eye-opener to Kenyans to be wary of allowing politicians to hijack and steer the constitutional implementation process because they are unlikely to deliver in accordance with their desires and aspirations. Had the Speaker not acted as he did, Parliament was bound to fail in its duty of deliberating objectively and resolving issues of concern to the people as provided for by Article 95(2) of the Constitution because of partisan and ethnic considerations.

This is a risky path and a big threat to the implementation process that must be resisted. Any attempts to control the process by few individuals for their own gain must be met with equal resistance as we strive to slay the dragon of impunity that has ravaged this country for years. This Constitution offers us an opportunity to establish strong, credible, legitimate and independent institutions that will serve Kenya for generations to come. [KN](#)

# Does the new Constitution guarantee democracy

The Constitution provides that the Bill of Rights applies to all laws and binds State organs. The rights shall be enjoyed to the greatest extent consistent with the nature of the right. A court interpreting a right shall promote the values that underlie an open and democratic society based on human dignity, equity, equality and freedom and spirit, purport and objects of the Bill of Rights. The Bill of Rights provides for both civil and political rights and economic, social and cultural rights. Our writer looks at whether the new Constitution has or will increase democratic space in the country.

By Macharia Nderitu

**T**he civil and political rights, for example freedom of expression and freedom of assembly, prohibit the State from interfering with the rights of the citizenry, while economic, social and cultural rights, like the right to health and to housing, require States to implement positive measures, provide resources and create an enabling framework for their realisation.

The State shall prove that resources are not available to secure and avail economic, social and cultural rights. The State shall allocate resources to ensure the widest possible enjoyment of the rights and shall consider prevailing circumstances, including the vulnerability of particular groups. The former Constitution protected only civil and political rights.

The Bill of Rights establishes mechanisms for enforcement. This includes a constitutionally protected commission to promote and protect the rights. The Constitution confers *locus standi* on any person who alleges his or her rights have been infringed or denied. The enforcement mechanism is through the High Court under Rules made by the Chief Justice. The Constitution recognises treaties and

conventions, which Kenya has ratified as part of the laws of Kenya, and obligates the Government to domesticate their provisions.

The State has a fundamental duty to observe, protect, promote and fulfil the rights through legislative, policy and other measures and to set standards to progressively

realise economic, social and cultural rights. The State shall enact legislation to fulfil its international obligations in respect of human rights. Most human rights treaties and conventions that Kenya has ratified are not domesticated.

## Infringement

The High Court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of human rights. The appropriate relief by the court include declaration, injunction, conservatory order, declaration of invalidity of any law, compensation and order of judicial review.



Parliament or the Tower of Babel?

Since Independence, the Rules to enforce the Bill of Rights under section 84(6) of the former Constitution were promulgated in 1999. The failure by successive Chief Justices to formulate the Rules made enforcement of rights difficult. These rules will apply until new ones are promulgated. The State may, by legislation, limit the application of the rights to persons serving in the Kenya Defence Forces or the National Police Service in regard to the right to privacy, freedom of association, assembly, demonstration, picketing and petition, labour relations, economic and social rights and the rights of arrested persons.

The rights to freedom from torture or cruel, degrading or inhuman treatment or punishment, freedom from slavery or servitude, the right to fair trial and the right to an order of *habeas corpus* shall not be limited.

Every person has the right to life, which shall begin at conception. A person shall not be deprived of life intentionally, except to the extent authorised by the Constitution or other written law. Though the State has *de facto* outlawed the death penalty by commuting the sentences to life and the Court of Appeal has held that a mandatory death penalty for murder is unconstitutional, this provision has not outlawed the death penalty.

#### Criminal responsibility

Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger or if permitted by any other written law. The Penal Code provides that a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any

person for his benefit, or upon an unborn child for the preservation of the life of the mother, if the performance of the operation is reasonable, having regard to the patient's state of mind at the time and all circumstances of the case.

Every person has a right to freedom of expression, which includes the right to seek, receive and impart information and ideas, freedom of artistic creativity and academic freedom and freedom of scientific research. The freedom does not extend to propaganda of war, incitement to violence, hate speech, advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or expressions that are based on any grounds of discrimination.

The freedom and independence of electronic, print and other types of media is guaranteed. Every citizen has the right to access information held by the State and information held by another person, which is required for the exercise or protection of any right or fundamental freedom.

Every person has the right to acquire and own property of any description in any part of Kenya. Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property or any interest in or right over any property or restrict the enjoyment of the right to property.

#### Court of law

The State shall not deprive any person any property unless the deprivation results from an acquisition of land for a public purpose and is carried out in accordance with the Constitution and any Act of Parliament that requires prompt and full payment of compensation to the person and allows any person who has an

interest in that property a right of access to a court of law.

Where occupants in good faith of the land do not hold title, provision may be made for their compensation. The State shall protect intellectual property rights. The right to property shall not extend to property that has been unlawfully acquired.

The former Constitution stipulated conditions that must be adhered to when the State compulsorily acquires property including the necessity by the State to use the property in the interests of defence, public safety, public morality, public health and related purpose. The State must justify causing hardship resulting from the deprivation of the property and must promptly pay full compensation.

Every person has a right to fair labour practices. Every worker has a right to fair remuneration, reasonable working conditions, to form and join trade union activities and to go on strike. Every person has a right to a clean and healthy environment. Every person has the right to the highest attainable standard of health, including reproductive health, accessible and adequate housing and reasonable standard of sanitation, clean, safe water in adequate quantities, social security, and to education.

#### Opposite sex

A person shall not be denied emergency medical treatment. The State shall provide appropriate social security to all persons who are unable to support themselves and their dependents. This will create a constitutional basis for Government intervention and support of the older members of society who may be unable to afford basic human necessities.

The family is the natural and fundamental unit of society and necessary basis of social order, and shall enjoy the recognition and protection of the State. Every adult has a right to marry a person of the opposite sex, based on free consent of the parties. The State shall ensure access to justice for all persons. If any court fee is required, it shall be reasonable and shall not impede access to justice.

An arrested person has the right to be informed promptly, in a language he understands, the reason for his arrest, the right to remain silent and the consequences of not remaining silent; to communicate with an advocate; not to be compelled to make an admission or confession; to be held separately from persons who are serving a sentence and to be brought to court as soon as reasonably practicable, but not later than 24 hours after arrest.

The former Constitution provided for detention up to a period of 14 days if a person was charged with murder, robbery with violence or treason. A person shall not be remanded in custody if the offence he or she is charged with is punishable by a fine only or by imprisonment for not more than six months. Any person, who is detained and held in custody or imprisoned under the law, will retain the rights in the Bill of Rights, except to the extent that any particular right is incompatible with the fact of detention or imprisonment.

**Hazardous**

Every child shall have a right to name and nationality, free and compulsory basic education, basic nutrition, shelter and health care, to be protected from neglect, harmful cultural practices, violence, inhuman treatment and

hazardous or exploitative behaviour, parental care and protection, which includes the equal responsibility of the mother and father to provide for the child whether they are married or not, and not to be detained, except as a measure of last resort. If detained, a child shall be held for the shortest period of time and separately from adults.

A declaration of emergency or legislation enacted or other action taken in consequence of any declaration, may not permit or authorise the indemnification of the State or of any person in respect of any unlawful act or omission. The Kenya National Human Rights and Equality Commission shall promote respect of human rights, promote gender equality and equity and facilitate and coordinate gender mainstreaming in national development, promote the protection and observance of human rights, monitor, investigate and report on observance of human rights, receive and investigate complaints on alleged abuses of human rights, research on human rights, act as the

principal State organ in ensuring compliance with obligations under treaties and conventions relating to human rights, investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

**Envisage**

The commission will act as an Ombudsman. Any person has a right to complain to the commission, alleging that a right has been denied, violated or infringed or is threatened. Parliament may enact legislation restructuring the commission into two or more separate commissions.

The Constitution envisages comprehensive judicial reform. In the past, the Judiciary has acted as an impediment to protection of the Bill of Rights. Indeed in the 1980s, accused persons were arraigned in court to plead to charges when they had been subjected to torture and cruel treatment. The judicial reforms will assist in establishing a credible enforcement mechanism for the Bill of Rights. The Kenya National



Some things will never end until we are all equal under the law.

Human Rights and Equality Commission will supplement the role of the Judiciary.

The citizenry has scant awareness of the Bill of Rights and the rights enforcement mechanisms. It is important that the civil society and the Kenya National Human Rights and Equality Commission do carry out countrywide awareness programmes to ensure that the citizenry understands the Bill of Rights. Human rights education, including the provisions in the Bill of Rights, should be integrated into the education curricula. This will assist in creating a culture that respects rights at the school level.

Civil society organisations should support public interest litigation to secure rights of minority groups. This will test the effectiveness of the Judiciary and the commission to protect rights. The test cases will apply international human rights principles in the Kenyan legal system.

#### Limitations

The Constitution has removed claw back clauses. Any limitation to the rights must be reasonable and justifiable in an open and democratic society. Further, for economic, social and cultural rights, the rights will be realised progressively since they require State resources to implement. However, the burden of proving that the resources required to realise the rights are not available lies with the State.

The State is obligated to consider the vulnerability of particular groups and individuals in promoting and protecting the rights. The Bill of Rights is more expounded, has few claw backs, has a clear enforcement mechanism and contains more rights than in the former Constitution.

*Godfrey Ngotho Mutiso vs. Republic*, Criminal Appeal Number 17 of 2008, the Court of Appeal held that mandatory death penalty imposed under section 203 and 204 of the Penal Code for the offence of murder was unconstitutional. The Court held that prior to passing the sentence, the court was obligated to record the mitigating circumstances of the case. This case was litigated under the former Constitution.

In *Susan Waithera Kariuki & 4 others vs. The Town Clerk, City Council of Nairobi & 2 others* (Petition Number 66 of 2010) the High Court held that the petitioners were entitled to the right to housing under Article 43 of the Constitution. The 1<sup>st</sup> Respondent had issued a 24-hour notice to the petitioners to demolish their houses and vacate informal settlements in Nairobi. The petitioners filed this suit to prohibit the respondents from demolishing their homes.

#### Endeavours

The court held that under Article 47 of the Constitution, the petitioners had a right to be given reasons for the action, which would result in violation of their rights. The rights enforcement mechanisms have been reinforced in the Constitution. More cases seeking enforcement of the rights will certainly be filed.

The Constitution endeavours to reform the electoral process by creating an independent electoral management body free from political interference. This will restore the public faith in the electoral system. The Constitution provides for democratic elections held every five years. The provisions must be supported by comprehensive electoral legislative reforms.

The Constitution creates a devolved system in which the

citizenry will manage resources and elect representatives at the county level. The Constitution has provided for the revision and strengthening of the political parties. This will create a legitimate political opposition, which is a key ingredient to democracy.

#### Recall

Other mechanisms for holding the Government to account to ensuring democratic governance include the right to a remedy by the citizens in case of a human rights violation. The Constitution entrenches independence of the Judiciary and constitutional commissions. These institutions will check on unlawful acts of the State or its agents.

The Constitution establishes the Supreme Court, which will review the constitutionality of laws. An independent Judicial Service Commission has been reconstituted with powers to competitively appoint judicial officers and carry out an oversight role.

The public will participate in the appointment of State officers through Parliament and through representation to parliamentary committees during the vetting process. Public participation will ensure openness and transparency in the appointment process. The electorate have the right to recall MPs who do not perform.

The Constitution has clear mechanism for separation of powers, which ensure that there are proper checks and balances in exercise of Government powers. The Constitution, therefore, enhances the room for a functional democracy in Kenya with checks and balances to ensure the various arms of Government act in accordance with the law. [KN](#)

# Like it or hate it, implementation of new law inevitable

After decades of struggle for constitutional change, the country's attention has shifted to an even more arduous one of implementing the newly acquired law. The reality of the new status is denoted by the fact that one way or the other, the new law has to be put in effect. The main question then becomes when this will be done rather than if it will be done. Our writer looks at the bumpy road ahead.

By Guandaru Thuita

One positive aspect of the Constitution is its self-propelling mechanism and timelines, which shall ensure that its provisions are met. In fact, by virtue of Articles 258 and 261, the High Court has been bestowed with power to address contraventions arising from failure of Parliament to enact any legislation within the timeframe prescribed under the 5<sup>th</sup> schedule or the failure of any other organ to take a required action on time.

In order to establish how the country is fairing, it is imperative to examine what the nature of the schedule of the implementation is under the Constitution, how this schedule has been adhered to successfully or otherwise, the issues running behind schedule and the impact of politics in the implementation process.

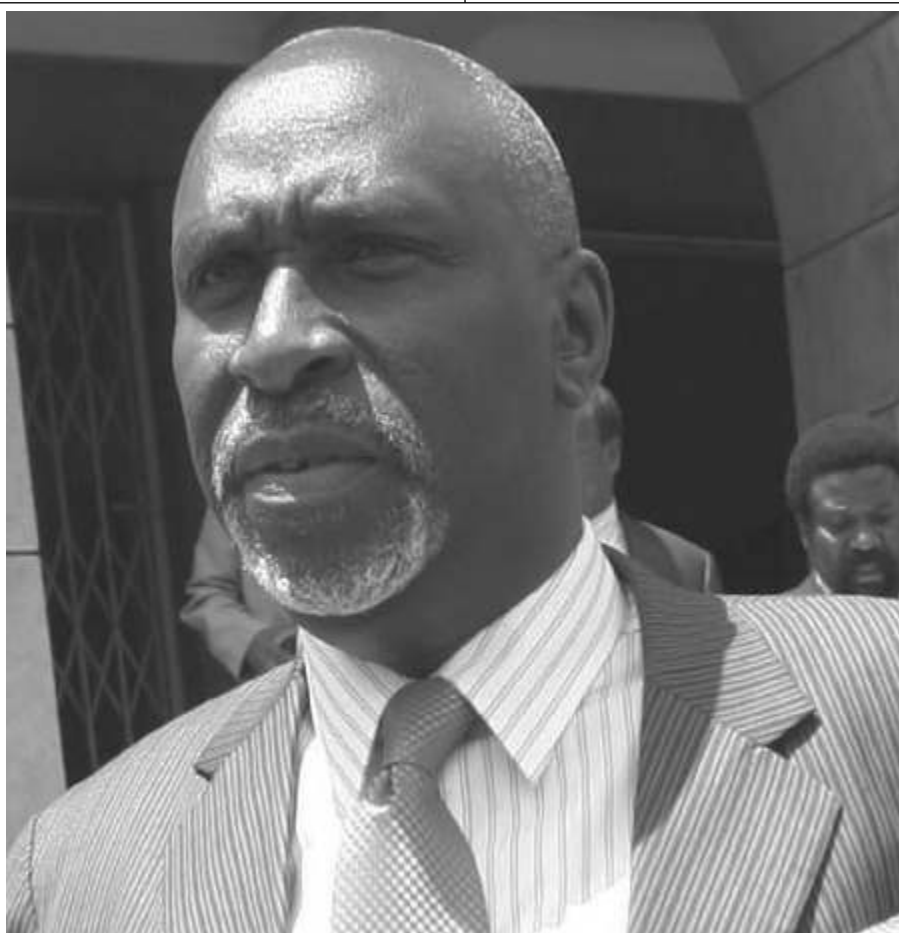
## Schedule

Some aspects of the Constitution particularly those in respect of the declaration of the Republic, the National Values & Principles, the Bill of Rights and those on Leadership and integrity came into force immediately upon

promulgation. However, most others require establishment through normal legislation and/or restructuring or setting up of new offices. Schedule 5 of the Constitution, as read together with schedule 6, provide the time

lines for these actions. Some time lines are in the short term (less than one year), others in the medium term (1-3 years) and others in the long term (4-5 years).

Legislation required in the short term includes that governing the acquisition and renunciation of citizenship, that relating to the conduct of elections, the establishment of the Independent Election & Boundaries Commission (IEBC), that concerning the establishment, management, regulation and allotment of equitable airtime on state owned media for political



Will he deliver? Chairman of the Constitution Implementation Committee Mr. Charles Nyachae

parties, that relating to the establishment of the Ethnics & Anti-Corruption Commission, that relating to resignation from a party by an Member of Parliament, and that concerning establishment of an advisory committee on the Presidential power of mercy.

Others are that relating to establishment and functioning of an Industrial Court, the Supreme Court, Subordinate Courts, the procedure of removing a Superior Court Judge from office, that regulating the Judiciary Fund and the vetting of judges and magistrates, that regulating the election and removal of a speaker of a county assembly, that providing the functions of a County Executive, that establishing the Contingency Fund, and that prescribing how the national government is to guarantee loans.

Short term actions that are not legislations include the establishment a Constitutional Implementation Oversight Committee (CIOC) by Parliament, the establishment within 90 days of the Commission for the Implementation of the Constitution (CIC), the Judicial Service Commission (JSC) within 60 days and the Commission on Revenue Allocation within 90 days. Further, the provisions of Section 29 of the Sixth Schedule require that appointments to fill up positions arising as a result of the new Constitution such as commissions and independent offices be filled up within a year – by August 27, 2011. The independent offices in this regard include that of the Director of Public Prosecution, Attorney

General, Deputy Chief Justice, Controller of Budget, Auditor General, the Inspector General of the Police Service and his two deputies. An exception was the office of the Chief Justice for which the provisions of Section 24 of the Sixth schedule required him to vacate office within six months.

**Security organs**

Legislations required in the medium term include those on land use (18 months), those putting into effect the provision on leadership and integrity, those providing for the grounds and procedure of recalling MPs, those governing the procedure of petitioning Parliament to consider any matter, those governing the procedure and ceremony for the swearing in of a President-elect, those regulating the judiciary fund, those relating to counties generally, those establishing the functions and responsibilities of the National Treasury, the national security organs and finally those providing for the functioning of the office of the Inspector General of the National Police Service.

Legislations required in the long term include those relating to granting royalties to communities for their cultural heritage, legislations to enforce the rights of family, consumer protection laws, legislation on fair administrative action, fair hearing, rights of a detained person, legislations on land save for the legislation on land use under Article 68, legislation to promote the representation of marginalised groups in Parliament, legislation relating to the keeping of financial records and audits of public entities, legislation relating to the

procurement of public goods and services, and legislation to bring into effect the values and principles of public service.

**Adherence**

Less than a year has passed since the effective date and considering that many of the legislations and other actions are required to be in place in periods beyond one year, one cannot state with exact precision whether the Government is on schedule or not. However, for those actions and legislations for which the deadlines have been passed, it is possible to perceive that the Government has been falling behind schedule and is almost certainly going to fall behind in beating the deadlines particularly on actions and legislations required by the end of the first year.

The first major action that was required was the establishment of the CIOC Parliament. This was done albeit late due to the differences between the PNU and ODM parties on the issue of its membership and the chairmanship. Next in formation was the Judicial Service Commission (JSC), which was to be in place by October 27, 2010. However, its members were sworn in almost three months late, on January 11, this year.

The CIC was required to be in place within 90 days of the effective date (November 27, 2010), but the members were sworn in on January 4, 2011. Similarly, CRA was required to be in place by November 27, 2010 but yet again members of the commission were sworn in three months late, on January 18, 2011.

*The appointment of individuals to independent offices and commissions has and is likely to be characterised by horse trading and hard bargaining for political ends.*





What will be my legacy, seems to be the tough question on President Kibaki's mind.

Prime Minister and lack of adherence to the National Values and Principles of Governance.

**Budget**

Much time was wasted on public bickering over the President's step and even after the withdrawal of the names, it would still not have been possible to have the position advertised, applicants interviewed, short listed, nominated, approved by Parliament and appointed by the President by February 27, 2011. The position has since been advertised and the process to recruit going on earnestly. But that doesn't erase the fact that the country has a headless Judiciary.

The provided time is yet to lapse for the appointment of the Deputy CJ, the AG, the DPP, the Controller of Budget, the Auditor General, the Inspector General of the Kenya Police and his two deputies. Whereas the offices of the Deputy Chief Justice, AG, DPP and controller of budget have been advertised, the rest have not and there is little explanation for this failure. The Head of State should take cognizance of the fact that the elaborate procedures of appointments dictate that there be ample time provided before the deadline so that the recruitment process may be done without a mad rush.

Nearly all of these positions require approval of Parliament before appointment. In the event that Parliament rejects any of the names, the process would have to commence afresh and as a result give rise to vacuums in the concerned offices. In respect of legislations, Parliament for seven months since the effective date of the Constitution only managed to pass two legislations namely:- the

The rest of the nine commissions are required to be in place within one year (August 27, 2011). One may be tempted to imagine that we are still on schedule since the one year is yet to lapse. But considering that there are only four clear months remaining to the deadline it would not be too wrong to assume the deadlines may not be met. Many of these commissions require legislations to provide for their further functions and procedures and yet there is no indication that these legislations are ready for introduction to Parliament. In respect to independent offices, the office of the CJ fell vacant on

February 28, 2011 without a replacement having been appointed.

An attempt had been made by the President to nominate Justice Alnashir Visram of the Court of Appeal as the Chief Justice, but this action boomeranged on him when key institutions and officials, including the CIC, the High Court, Parliament, the Prime Minister, the JSC, the Attorney General the Minister of Justice and Constitutional Affairs as well as key civil society groups declared the nominations as unconstitutional for lack of consultation with the

Vetting of Judges and Magistrates Bill and the Judicial Services Bill, which have recently been assented to by the President. One wonders how many others can be passed in the remaining four months before the first year of the Constitution ends. The slow pace in establishing these legislations is alarming and Parliament will have to work extremely fast to beat the deadlines.

On a positive note, one can seek solace in the fact that the delay establishing the CIC in effect led to the delay in putting up mechanisms to pass the requisite legislations on time. Now that it is in place, we can only hope that it will ensure the fast tracking of the entire process. Fortunately, the Chair of the CIC, Mr Charles Nyachae, has been quoted saying his commission is on schedule in the implementation of the Constitution since it has approved Bills, primarily those to facilitate the smooth running of the 2012 General Election such as the Independent Electoral & Boundaries Commission, the Independent Offices Bill, the Political Parties(Amendment) Bill, the National Police Service Bill, the National Police Service Commission Bill, the Elections Bill, the Devolution Bill and the Supreme Court Bill.

It is hoped that Parliament may pass the Bills without any hurdles. Considering that Parliament was recalled on March 22 by the Speaker to deal with these necessary legislations, it may be presumed that there is willingness on the part of legislators to abide by the deadlines.

Politics

The CIC among other entities are on record denying that current politics, particularly the issue of the International Criminal Court

*Less than a year has passed since the effective date and considering that many of the legislations and other actions are required to be in place in periods beyond one year, one cannot state with exact precision whether the Government is on schedule or not.*

(ICC) summoning six suspects, has not had an impact on the implementation. This is hardly the case since even the National Cohesion and Integration Commission has recognised that the momentum by the Government on the ICC effort has not only drained that of implementation, but has also actually overshadowed it. Focus seems to have shifted from enforcing the Constitution to efforts to block the trials of the ICC suspects.

The impact of politics on the implementation process cannot be denied except by those who want to bury their heads in the sand by feigning ignorance. Constitution making and enforcement is a purely political process propelled, maintained and brought to an end by politics of the day.

By analysing the current affairs one cannot fail to notice how internal political wrangles between the coalition partners have impacted on constitutional implementation issues. The differences between the ODM and PNU primarily led to the disagreements in the judicial nominations. These nominations had in turn been expedited by the need to demonstrate to the world that Kenya had embarked on changes within its justice system in an effort to shield the six ICC suspects from prosecution.

The appointment of individuals to independent offices and commissions has and is likely to be

characterised by horse trading and hard bargaining for political ends. The CIC itself is composed of individuals who have deep links with the Coalition Principals and their appointments were more or less based on political expediency. The looming general election is also likely to accelerate or derail the process. The key Bills likely to be introduced to the House have more or less to do with the elections. Parliamentarians may also focus more on succession politics, tribal alliances or trimming of certain presidential candidates at the expense of concentrating on crucial Bills with specified timelines.

We cannot forget the fact that the individuals who opposed the Constitution in the run-up to the referendum are still in office and may employ objections, rejections and other measures to sabotage the process and render it inoperational. The plus that we have in ensuring that the implementation process advances is that there are independent oversight bodies such as the CIC mandated to ensure implementation. In addition, individuals have been empowered to petition the High Court to compel Parliament to enact legislation within time or else risk having the same Parliament dissolved. In short, it is apt to observe that while it may take long to implement the Constitution, its implementation is one way or the other inevitable. KN

# Countdown 2012

In view of post-election violence of 2007/2008 primarily triggered by the bungled presidential elections, Kenyans can no longer take the issues pertaining to the integrity of electoral system for granted. It is with this understanding that the drafters of the new Constitution anchored elaborate provisions on elections and the electoral systems in it. It is hoped these reforms will deepen democratic governance and enhance transparency and credibility of future elections.

With this hindsight, this article seeks to examine the new electoral provisions in the Constitution, compare and contrast the provisions with the previous ones, consider how they can be implemented fully and on time for the 2012 elections, and finally consider the circumstances that would arise in the event that the electoral laws are not fully implemented.

By Moses Kipsang'



He should be given his job back, Chairman of the former Interim Independent Electoral Commission Isaack Hassan.

The provisions on elections are substantively found in chapter seven (7) of the Constitution entitled Representation of the people. The chapter declares the principles that the electoral system must comply with, including freedom of citizens to exercise political rights, that no more than 2/3 of members of elective public bodies must be of the same gender, the need for representation of persons with disabilities, universal suffrage and the requirement of free and fair elections conducted and administered by an independent body.

The chapter also bestows upon Parliament the duty to enact legislation to provide for electoral units, the nomination of candidates, the registration of voters within and outside Kenya, the conduct of elections and the conduct of a referenda. In regard to elections itself, the Independent Electoral and Boundaries Commission (IEBC) is mandated to ensure simplicity of voting, the counting, and announcement of votes at each polling station and eliminating electoral malpractices.

Parliament is directed to pass legislation to ensure the timely settling of the thorny issue of electoral disputes and the question of service of petition is finally settled by providing that a petition may be served in person or by advertisement in a newspaper. The chapter also establishes the IEBC and specifically provides that there shall be 290 constituencies for the National Assembly subject to

review after 8-12 years. Provision is also made for the election of nominated members both in National Assembly and Senate.

Political parties are to adhere to stated rules and they are also proscribed from being founded on ethnic or religious basis, engaging in violence, establishing a militia, engaging in bribery, and or other forms of corruptions. Provisions relating to elections of MPs are found in Article 101 of Chapter 8. An item worth noting is that the general and presidential elections are to be held on the second Tuesday in August of every fifth year. There is no longer an age limit to qualify for president, but one is required to be nominated by not less than two thousand voters from a majority of counties.

Runners up

Article 138 requires a presidential candidate to garner more than half of all the votes cast and at least 25 per cent of the votes cast in at least 24 counties. If no candidate is elected, then a fresh election pitting the candidate with the most votes and the first runners up is to be held within 30 days. Interestingly, there is also provision for a scenario where the president elect dies before swearing in and in this regard, an election is to be held within 60 days.

A petition challenging the elections of a president is to be filed before a Supreme Court within seven days of the results, and heard within 14 days and if successful, an election is to be held within 60 days. In the event that there is no petition filed, a president is to be sworn in on the 14th day of the declaration of results and in the event of a filing of a petition, the president is to be sworn on the seventh day after the

*More stringent measures in the new electoral provisions than existed ensure that any president elect must be one who is popular. Under the old order, all that a candidate for president needed was to garner more votes than any other candidate and in addition ensure that he received at least 25 per cent of the votes cast in at least five provinces.*

decision declaring the election valid. Also provided for is the election of a deputy president and in this regard, every presidential candidate is required to nominate a candidate for Deputy President.

There exists remarkable difference between the previous and the present Constitution, much of it inspired by the need to address past challenges. One major difference is that the electoral constituencies have been increased from 210 to 290. The new Constitution further requires that the constituencies be of equal size in terms of the population, of course with variations depending on whether the areas are sparsely or densely populated.

The previous constitution had a similar provision, which was flouted more than it was obeyed. For instance in 1997, a constituency like Mandera West with only 4,000 voters was represented by one MP just like Embakasi, which had 113,848 voters. The increase in constituencies sought to address such under presentation and inequality.

Pursuant to the provisions of Section 33 of the old constitution, there were to be 12 MPs nominated to Parliament by parties in accordance with their proportion. The nominated MPs were selected subsequent to the elections to represent a vague category of people referred to as

“Special Interests”. The only principle to be taken into account in those days was gender parity.

However, the situation is now slightly different. Article 90(1) provides that there will be an election of those nominated members based on a party list, which must have been prepared prior to rather than subsequent to the elections. The term special interest, in this regard, has been expanded to denote the youth, persons with disabilities and workers.

This change will transform the much-abused discretion of appointing nominated MPs. In the past, these positions were dished out to cronies, loyalists and relatives rather than to the deserving special interest groups.

Destiny

In the past, Kenyans living abroad or those outside the country during election time never took part in the polls. Their roots, immense properties back home, intention to return to their motherland and the millions of dollars they send back home justifies their right to determine the destiny of the nation and the new provisions allows them to do so.

Freedom of Association necessarily denotes that one also has the freedom not to be compelled to associate with any of the available groups. Under the previous provisions, an electoral

candidate required to stand for elections only through a registered political party. However, the new provisions allow for independent candidates. Further, the principle that the counting of votes should take place at every polling station has now received constitutional backing. The mischief that took place while the votes were on transit to tallying centres has now been addressed.

On gender parity, the new Constitution unlike the old one provides for the election of a woman for each county in the National Assembly. This increased representation of women will hopefully address and alleviate the ills experienced by women in the society.

On another front, all the provisions relating to membership of the Senate, County Government and Governor are all new and thus differ significantly with the previous constitution where there was a centralised Government. Devolved Government under the

new provisions will enable the electorate to elect local leaders who will primarily focus more on local issues.

In respect of the position of president, the limitation on age, which had its origins in attempts to prevent certain individuals from acceding to power, have been done away with under the new electoral laws. The realisation of this abuse and also of the fact that any adult, whether 18 or 80, as long as he or she has the will, determination, focus and ability, can lead the nation.

More stringent measures in the new electoral provisions than existed ensure that any president elect must be one who is popular. Under the old order, all that a candidate for president needed was to garner more votes than any other candidate and in addition ensure that he received at least 25 per cent of the votes cast in at least five provinces. This provision rendered injustice to Kenyans in

the 1992 and 1997 elections since former President Moi was not elected by the majority yet he lorded over them for two terms. Requiring that a candidate garner at least half of all votes cast will ensure that the president elect will have popular legitimacy.

A new addition that was hitherto lacking is the requirement that every presidential candidate prior to the polls selects a Deputy President as his running mate. Not much gain is to be derived by this provision save that the electorate will know before hand who their deputy president will be. Further, the provision may prevent a recurrence of the situation that happened in 1998 when President Moi failed to appoint a Vice President for a considerable period of time.

**Petition**

A major improvement, which addresses most of the poll losers' concerns, is that of service of petitions on respondents that can



2012 is on the way.

now be done by advertisement. Requiring personal service created problems for poll losers, as the winners would simply avoid service and later claim they were not served on time, leading to the striking out of otherwise valid petitions. President Kibaki suffered this fate when his lawyers were unable to serve then President Moi with the petition in 1998, leading to it being struck out.

Previously the Electoral Commission determined election dates. However, under the new dispensation, the date for the general and presidential elections has been identified as the 2<sup>nd</sup> Tuesday of August of every 5<sup>th</sup> year. The President and the Electoral Commission can no longer use the secret of the election date as an election weapon.

Finally, under the old provision, there was no prescription on the time frame within which an election petition challenging a presidential run was to be heard. There was also no allowance for any dissatisfied person to file a petition to challenge the Presidential Election before the president was sworn. In the circumstances, a president elect would steal a match by having a hurried swearing in and once in power, use means at his disposal to frustrate the petition.

The foregoing reveals that indeed the changes in the electoral laws are immense that they necessitate the total overhaul of all other legislations relating to elections, including the National Assembly and Presidential Elections Act and the Electoral Offences Act. To have the new provisions on elections

implemented, the IEBC needs to be set up as a matter of urgency to prepare the country for the elections in August 2012. This body needs to ensure there is full and continuous registration of voters as well as delimitation of constituencies to achieve the required 290 before the elections.

The Political Parties Act also needs to be amended to ensure it is in line with the new constitutional provisions. There also need for legislation providing for the procedures of how the special seats due to the youth, women and the disabled are to be allocated. Also required is an Act to provide the modalities of ensuring that women occupy at least 1/3 of the seats in the senate. Modalities are also required through legislation to ensure the timely disposal of petitions.



Was he really the cause of the 2007 post election violence?  
Former Chairman of the electoral Commission of Kenya Samuel Kivuitu

The good news is that the Committee for the Implementation of the Constitution (CIC) has since stated that they are giving preference to the electoral laws and so far, they have approved the Independent Electoral & Boundaries Commission Bill 2011, the Political Parties (Amendment) Bill 2011, the Independent Offices Bill and the Supreme Court Bill, which are now due to be presented to the Cabinet for approval.

**Crisis**

In the event that these laws are not in place by elections time, the republic may be thrown into a constitutional crisis and it may not be possible to hold elections at all in the absence of an electoral body or an electoral framework. But in the event that the elections are indeed held and the 290 seats in the National Assembly have not been achieved, then the Constitution will have been flouted and it would not be possible to have a fully functioning House.

It would also be impossible to prepare for the special seats and the seats in the senate or the county government. If Parliament realises that it cannot beat a certain deadline, then under the provisions of Article 261 (2) it can extend the period of compliance by a further two years.

Otherwise, any person will be free to move the High Court seeking declarations that the Constitution is being flouted and if satisfied, the Court may give Parliament a timeline within which it is supposed to comply, failure to which the Chief Justice will be in a position to advise the President to dissolve Parliament so that a new one can complete the process. Such scenarios are totally uninspiring and indeed detestable. The relevant entities should, therefore, ensure the electoral laws are in place. KN

*Pursuant to the provisions of Section 33 of the old constitution, there were to be 12 MPs nominated to Parliament by parties in accordance with their proportion.*

# THE KONRAD ADENAUER FOUNDATION IN KENYA

**K**onrad-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.

## Contact address

Konrad-Adenauer-Stiftung  
Mbaruk Road No. 27  
P.O. Box 66471  
Nairobi 00800, Kenya.

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