November / December 2011

# KatibaNews

## The birth of a new Republic

# Which one will it be - August or December 2012?

Inside

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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 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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# Which one will it be - August or December 2012?

The political crisis that followed the December 2007 elections was largely attributed to poor management of the electoral process. This was a result of suspected interference and political control of the electoral process and institutional failures of the Electoral Commission of Kenya. The Kenya National Dialogue and Reconciliation mediation team, chaired by Kofi Annan, recommended the setting up of the Independent Review Committee, chaired by Justice Johann Kriegler, which carried out an audit of the Kenyan electoral system.

This committee recommended wide ranging reforms to ensure that future elections are conducted in a free and fair manner. The Electoral Commission of Kenya was disbanded and the Interim Independent Electoral Commission (IIEC) and the Interim Independent Boundaries Review Commission were established with an initial two-year mandate.

By Macharia Nderitu

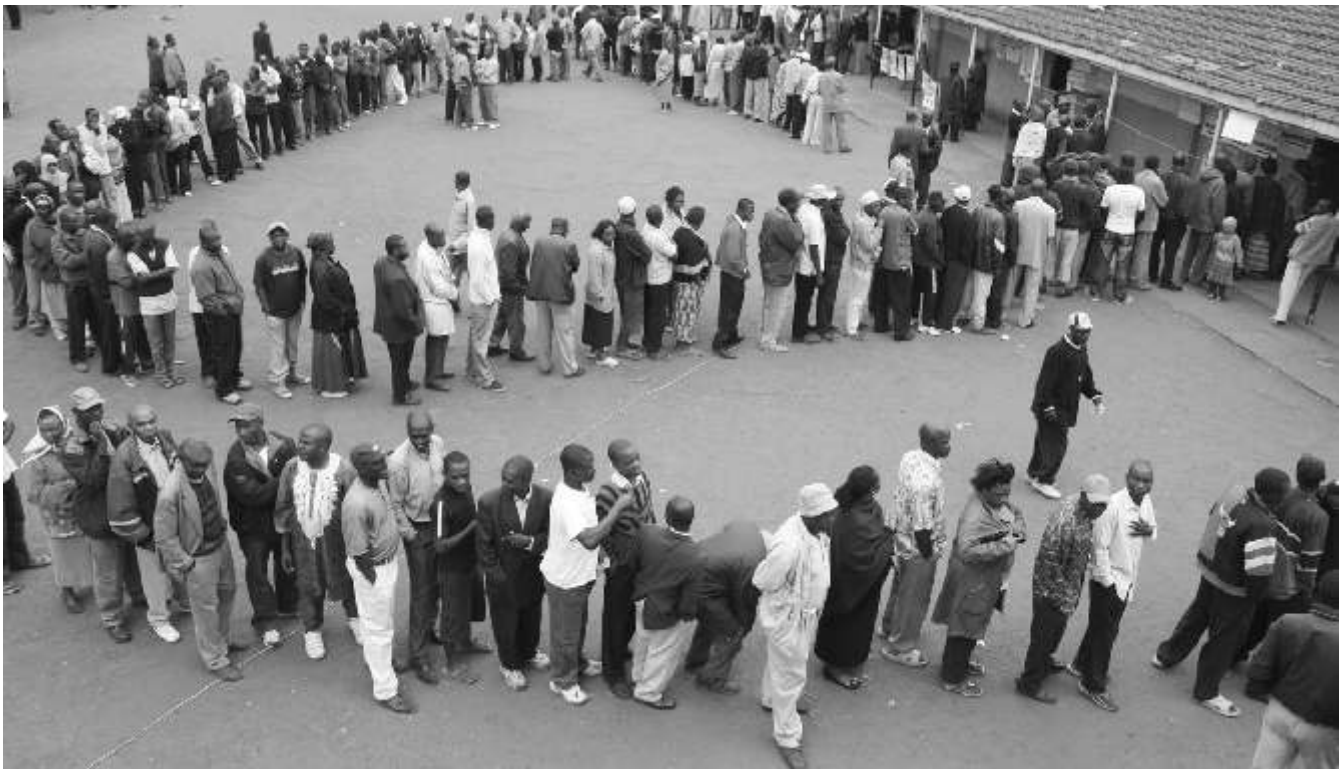
With the promulgation of the new Constitution, further reforms to the electoral systems were carried out incorporating most recommendations of the committee. The Constitution establishes the Independent Elections and Boundaries Commission (IEBC), which is responsible for conducting elections and referenda to any elective body or office established by the Constitution.

This includes continuous registration of voters, regular revision of voters' roll, delimitation of boundaries for constituencies and wards, regulation of the process in which parties nominate candidates, settlement of electoral disputes, registration of candidates for election, and voter education. The Constitution provides for independent candidates.

Parliament enacted the Independent Elections and Boundaries Commission Act to further elaborate on the appointment of commissioners and provide for the operations of the commission. The Act has been implemented and the commissioners have been confirmed by Parliament and appointed. The commission has already commenced its work in light of the tight deadlines. It is in the process of recruiting staff and laying the groundwork in preparation for the 2012 elections.

The Interim Independent Boundaries Review Commission (IIBRC) recommended the establishment of 80 new constituencies. These were provided for in the Constitution, which creates 290 constituencies. Under the Sixth Schedule, the boundaries commission was empowered to complete its work under the new Constitution. However, it was not empowered to review the boundaries of counties.


On the hottest seat in the country today, IEBC Chairman Ahmed Isaack Hassan.



Kenyans are waiting with bated breath to go back to the ballot.

### Dispute resolution

The boundary delimitation for the first election is exempted from the requirement that the process must be completed at least 12 months before the election. However, any boundary review should not result in the loss of a constituency existing at the date of promulgation of the new Constitution. The term of the Interim Boundaries Commission expired. The commissioners of the Boundaries Commission were split on the final report. Parliament has enacted the Elections Act to provide for the management of elections and provide for electoral dispute resolution.

The IEBC's first major task is to complete the delimitation process and submit a list of constituencies. The commission will complete the work of the IIBRC. The commission is intended to operate independently, but given the limited time to the national elections, it may consider the report prepared by the IIBRC to be part of its reference materials.

The commission shall ensure that the number of inhabitants in each constituency shall be equal to the population quota. This may vary taking into consideration geographic features and urban areas, community interest, historical, economic and cultural ties and the means of communication.

The commission shall publish its report in the *Kenya Gazette* and it shall come into effect on the dissolution of Parliament following the publication. Its report may be challenged in the High Court within 30 days after publication.

Other activities that the commission must carry out include voter registration, hiring and training of staff, procurement of election materials, voter education, development of a Code of Ethics for candidates and parties contesting the election, and carrying out mock elections to test functioning of the electoral system. The commission will have to prepare adequately due to the historical nature of the first elections under the new Constitution and the high public expectation. The seats to be contested have increased from three to six.

These are the President, the Member of Parliament, Senator, County Assembly Representative, Governor and County Women Representative. The tallying process will be daunting

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and the commission must endeavour to deploy appropriate technology, like the IIEC did, to ensure the public retains confidence in the electoral system and process.

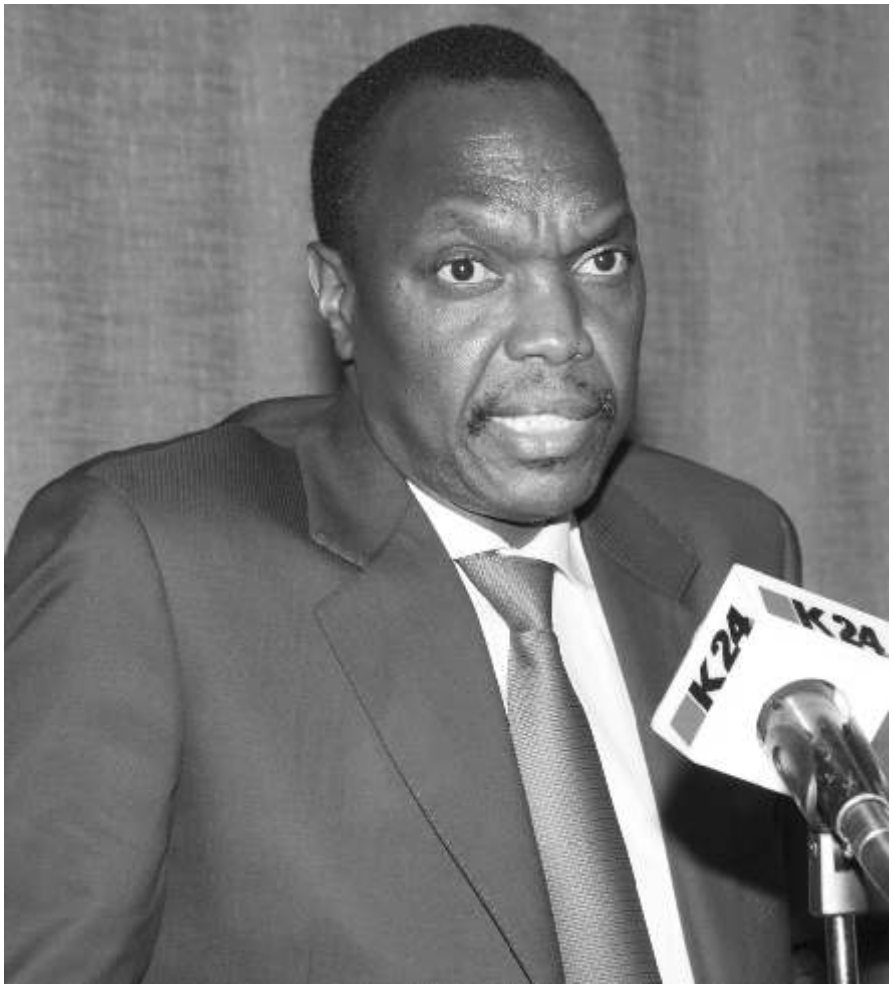
## Why the controversy?

The date of the next election has been mired in controversy. The Constitution states that all elections shall be held on the second Tuesday of August every fifth year. This has been interpreted to mean that the 2012 elections will be held on August 14.

Section 10 of the Sixth Schedule of the Constitution provides that the first elections for the President, the National Assembly, the Senate, the County Assembly and county governors shall be held at the same time and within 60 days after the dissolution of the National Assembly at the end of its term. It further provides that the National Assembly existing immediately before the effective date shall serve as the National Assembly for its unexpired term. This provision preserves the term of MPs.

Under the repealed constitution, the President could dissolve the National Assembly at any time. The intention of some MPs is to fully serve their current term in Parliament. These MPs have, therefore, suggested that the election date should be set for December 2012. The IEBC has stated that a December election date would give it adequate time to prepare for the elections and to restore public faith in the electoral process. The Parliamentary Committee on Implementation of the Constitution has supported a December 2012 election date, stating that MPs should be allowed to complete their terms.

Another argument for deferring the election has been that the national Budget will be read and prepared in June 2012. The provision of monies for the election will be under that budget and it may not be possible to carry out the necessary activities in two months in readiness for the elections.




Ndaragwa MP Honourable Jeremiah Kioni.

## Both sides

The argument that the commission needs adequate time to prepare has merit. The IEBC was appointed recently. Only three of the former commissioners of the IIEC and the IIBRC were retained as members of the commission. The new commissioners will need time to settle down, acquaint themselves with the work of the commission and gain the necessary experience. The commission will also need to reorganise the secretariat and recruit staff. This will include the temporary staff necessary to carry out the election.

The boundaries delimitation process will need to be completed shortly so that the number of constituencies is certain and voter registration can commence. However, with sufficient goodwill from the Government, the commission should be able to prepare so that the elections can be held in August 2012.

The argument that the election date does not afford adequate time for the provision of funds has no merit. The Government can provide the monies through the supplementary budget, which is normally read in March of every year. Policy processes, like the budget process, should be revised to conform to the Constitution.

In any event, even a December 2012 election would face the same difficulty. The commission needs to be funded immediately to commence the preparatory work. The budgets of country members of the East African Community are read in June each year and thus it may be difficult to unilaterally change the date of the national budget.

## Available options

Article 101 of the Constitution sets the date for national elections as the second Tuesday of August each fifth year. The Government has sponsored and published a Bill to amend the

Constitution. The Bill provides for election on the third Monday of December every fifth year. This proposal has been unilaterally sponsored by the Cabinet without adequate consultations and with limited public participation as demanded by the national values espoused by the Constitution.

It is unlikely that the Bill will garner the two-thirds majority in the National Assembly, as some MPs have opposed it. If the amendment is enacted, the national elections will be held in December 2012.

A third argument has been that the term of MPs ends in January 2013 when they were sworn in and therefore elections should be held within 60 days from January 2013. This means that the national elections would be held in March 2013. However, this date is not tenable since the term of the President will have expired in December 2012.

### Dangers of amending the Constitution

The Government is proposing to amend the Constitution to change the election date and create a formula for ensuring observance of the two-thirds gender rule in the National Assembly and the Senate after the next elections.

The integrity of the Constitution should be preserved by limiting unnecessary amendments. Already, a constitutional petition is pending before the High Court for the determination of the election date. The Supreme Court has directed that the hearing of this petition be fast tracked and a determination made. The Government should await the outcome of that petition so that a clear way forward can be designed.

The repealed constitution was subjected to myriad amendments that completely altered and undermined its constitutional architecture as designed at Independence. The new Constitution may similarly be subjected to such amendments. The revision of the Independence constitution led to authoritarian rule, undermined democracy and violated human rights. It further weakened the judiciary and the National Assembly, thus undermining the doctrine of separation of powers.

The Government is forcing the Bill down the throats of Kenyans. There has been no public participation or consultations on the Bill. The public has little trust in Parliament to carry out reforms. The new Constitution was developed through public participation. It was promulgated through a process that placed the public at the centre through the referendum.

### Credible election

There is no basis for Parliament to amend the Constitution without reference to the public who retain the sovereign right. The sanctity of the Constitution should be preserved. In the recent opinion polls, half of the people polled favoured an August 2012 date.

Whether a provision requires a referendum or not, any amendment must be subjected to sufficient public participation to ensure the national values as set out in Article 10 of the Constitution are respected. There is no need to amend the Constitution when the only contention is in regard to the first election.

The term of MPs under the repealed constitution was not fixed since the President could dissolve Parliament at any time. The Constitution should be implemented as it is. The IEBC should be given adequate resources to carry out the preparatory work on the election. This will ensure that it carries out a credible election in August 2012.

As a final resort, the commission should give a professional opinion on the viability of a general election in August 2012. If such election is not viable, then the Constitution should be amended to clarify the date of the first election. Subsequent elections should be held on the 2nd Tuesday of August, as required by the Constitution. KN

The writer is a Nairobi-based lawyer.

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# Achieving the perfect ethno-regional and gender balance

*Since the implementation of the Constitution especially in the formation of commissions and appointment of commissioners and individuals to hold key offices as established, there has been an outcry that ethnicity has become a factor. Less qualified individuals are being given positions leaving out qualified ones in the name of ethno-regional and gender balance as stipulated in the Constitution. This article, therefore, seeks to briefly consider how ethno-regional and gender balance can be achieved without compromising the essence and spirit of the new Constitution.*

By Ivy Wasike

The Constitution provides stipulations for the composition of public bodies. Article 27 lays the foundation of ethno and gender balance by clearly providing that all men and women have the right to equal treatment and opportunities (27 (3), redress to disadvantaged groups or individuals (6) and finally in Article 27(8) states that "...not more than two thirds of the members of elective or appointive bodies shall be of the same gender".

The Constitution establishes various offices and commissions and gives guidelines on their composition in Article 250. This article concentrates on gender balance and ethno-regional balance specifically in sub article (4) & (11). The said articles provide *inter alia* that appointments to commissions and independent offices shall reflect the ethnic and regional diversity of the people of Kenya and that the chairman and vice chairman of all commissions must not be of the same gender.

Thereafter, various sections establishing commissions directly provide for ethno-regional balance in the composition of the commissions and more specifically, the National Police Service Commission (Article 246 (4)) and the Defence Forces (Article 241 (4).


The Supreme Court of Kenya, the highest seat of the Judiciary.

Participants at a Poverty, Gender and Impact Assessment Seminar held in Nairobi early this year. (photo credit: ILRI/MacMillan).

The implication of the above mentioned articles is that in any independent office appointment or establishment of a commission, the Government must ensure the appointments meet the requirements of the Constitution, which basically means there is ethno-regional balance and 1/3 of the gender is either male or female, depending on the majority gender. To achieve this balance, all commissions and independent bodies are to be considered as a whole and not independently.

### Short-listed

Having provided for ethno-regional and gender balance as a whole, the Constitution goes silent on the issue in regard to certain commissions. The independent offices and the offices of commissioners are being advertised for suitable candidates to apply and those short-listed are required to and many have undergone rigorous public interviews. By short-listing the applicants and subjecting them to interviews, it seems the Government is looking for the best qualified candidate for the job.

This usually is the essence of an interview. It is illogical to short-list a candidate best suited for an office and instead pick an applicant who performed poorly in the name of ethno-regional and gender balance. These are key offices and, therefore, those appointed should be qualified and able to deliver and not hold the offices by default of coming from a region or certain gender. This will ultimately lead to individuals being used as puppets or not being able to deliver as quality should not be sacrificed in order to achieve a balance.

The clauses on ethno-regional balance specifically should be a guiding principle only and thus each commission ought to be viewed separately in order to tap the best from each region. Therefore for productivity and professionalism sake, the most suitable candidates for the jobs in each region in regard to different commissions must be considered independently.

### Genuine issues or horse-trading?

The President and the Prime Minister have recently come under attack in regard to appointments to public offices. The Ekuro Aukot-led panel for interviewing and short-listing

The Constitution establishes various offices and commissions and gives guidelines on their composition in Article 250. This article concentrates on gender balance and ethno-regional balance specifically in sub article (4) & (11). The said articles provide inter alia that appointments to commissions and independent offices shall reflect the ethnic and regional diversity of the people of Kenya and that the chairman and vice chairman of all commissions must not be of the same gender.

members of the Independent Electoral and Boundaries Commission stated that they had a problem meeting the 2/3 rule since most women were not qualified to hold the positions. The panel, therefore, had to short-list the women who had performed poorly in order to meet the requirements.

Further, the panel in justifying the short-listed commissioners indicated that they had to give a chance to "other Kenyans" thereby locking out candidates who were more qualified and better suited for the job. It emerged later that some of the applicants who had performed well were locked out because they came from the same region or were of the same ethnic group with individuals who had been considered for other public offices.

This was also the case with the Gender Commission, Commission on the Administration of Justice, the Salaries and Remuneration Commission, the National Environment Management Board and most recently the Ethics and Anti-Corruption Commission.

In regard to the chair of the Ethics and Anti-Corruption Commission, Okong'o Mogeni emerged the best but was not considered apparently because he came from the same area and tribe as the chairman of the Constitution Implementation Committee.

### Disqualified

Due to this, some members of Parliament and the public are of the view that the commissioners are not being picked on merit and candidates are being short-listed by the selection panels in a flawed process. Indeed, this begs the question as to why individuals are short-listed, interviewed and finally disqualified for coming from certain regions or ethnicities. The panels should select individuals from the required regions or ethnic groups.

Knowing too well that there is no region without qualified people and the issue of short-listing candidates from "wrong" regions and thereafter disqualifying them at the last minute has led to horse-trading.

It seems all the vacant positions have already been profiled and individuals picked and the public interviews serve only as a formality. Indeed, unless a valid explanation is offered on the criteria being used to pick candidates other than "balance" then there is no essence of interviews when appointments do not put in consideration merit.

### Other jurisdictions

The above-mentioned trend needs to be curbed as soon as possible or else it will have many negative consequences. It is a big milestone in our country for the Constitution to set the quota to ensure ethno-regional and gender balance in governance. However, to avoid these teething problems in the implementation of the Constitution, best practices should be borrowed from other jurisdictions.

South Africa, for example, has achieved the required balance through affirmative action programmes. It has also developed skills in gender budget analysis and dissemination for parliamentarians to understand budget allocations and lobby for equality concerns. This is also the case in Brazil, which has also prioritised gender and ethnic equality in participatory budget process, social control and accountability.

This ensures that capacity building and trainings take place to empower the minority groups and gender in governance so that these groups can be in a position to actively participate in decision-making or take up positions in the public sector.

In Malawi, the greatest challenge in ensuring gender balance was implementing affirmative action to achieve gender equality and the issue of professionalism and meritocracy that was the heart of public sector reform. Thus to curb these challenges, the government established guidelines for mainstreaming gender in Human Resource Management in the public sector.

Thus the Kenya Government should also engage professionals in human resource to come up with guidelines that shall guide the panels that are

These are key offices and, therefore, those appointed should be qualified and able to deliver and not hold the offices by default of coming from a region or certain gender. This will ultimately lead to individuals being used as puppets or not being able to deliver as quality should not be sacrificed in order to achieve a balance.

The clauses on ethno-regional balance specifically should be a guiding principle only and thus each commission ought to be viewed separately in order to tap the best from each region. Therefore for productivity and professionalism sake, the most suitable candidates for the jobs in each region in regard to different commissions must be considered independently.

charged with selection of commissioners and or individual office bearers. Alternatively, the Public Service Commission should be charged with selection and guidelines drawn to ensure ethno-regional and gender balance while at the same time upholding merit.

### Integration

Most jurisdictions that have achieved either ethno-regional or gender balance or both attribute this to a long process that had affirmative action as the core. Ghana, which has somewhat managed to achieve ethno-regional balance although still grappling with gender balance, attributes this to the Avoidance of Discrimination Act (1957) that banned formation of political parties on ethnic, regional or religious lines, capacity building and training together with institutionalisation of monitoring and evaluation tools.

Ghana also ensures integration of gender into its Poverty Reduction Strategy Papers and budgeting process targeting women and minor ethnic groups. In Uganda and Tanzania, affirmative action ensured that there is rational approach that helped women obtain qualifications needed to get into leadership and decision-making positions.

Borrowing from South Africa, Tanzania established a National Gender Machinery and Structure from the national & provincial level to district level, developed budget guidelines and through political will and participatory approach to planning and budgeting, empowered women who can now take up public positions.

### Merit

Thus, it is clear that achieving a perfect ethno-regional and gender balance is not a one-day thing, but requires a lot of input from the government, politicians and society. The Government must first be interested, willing and be able to analyse the impact of new policies, and since the policies are for posterity, focus on supporting civil society and learning institutions to focus on certain range of topics and also give scholarships to more women and ethnic groups that have hitherto been marginalised.

This also means empowering women and other minority groups not only in the public sector, but also in the private sector so that when there is need for appointments, they are done on merit.

The Government needs to support equality systems in recruiting and promotion, support training and employment schemes especially to empower women. Also, politicians should desist from forming political parties on ethnic or regional affiliations as this is what perpetuates horse-trading to lure certain ethnicities or regions for votes.

### The perfect balance

In order to achieve the perfect ethno-regional and gender balance in public institutions, Kenya still has a long way to go. There is need to focus on affirmative action, allocate resources for training and come up with clear guidelines on appointments. This will help in stopping horse-trading by politicians, ensure meritocracy and accountability.

Kenya, in order to achieve gender equity, has established the quota system, revised the Code of Regulation for Civil Servants to have gender inclusive language and terminology, established gender desk officers in each ministry and has made plans to itemise and budget for gender related activities, but this is clearly not enough.

If professionals do not draw clear guidelines on public appointments, Kenya risks going the Nigerian way. The 1979 Nigerian Constitution provided for ethno-regional balance just as our Constitution does, but instead of building national unity, it heightened and led to hardening of transient ethnic identities into more fixed and permanent ones.

It also exacerbated inter ethnic and inter regional tension due to the use of non-criteria for appointments. This in turn also led to a weak civil service in professionalism and morale.

The precise application of the proportionality principle in Nigeria led to an undermining of the merit principle. Thus as a country, we must first ensure ethno-regional and gender mainstreaming in all development policies, strategies and interventions at all levels, all stages and not only in the public sector, but also in the private sector before we can purport to achieve the perfect balance. KN

The writer is a Nairobi-based lawyer and student of international relations at the University of Nairobi.

Further, the panel in justifying the short-listed commissioners indicated that they had to give a chance to “other Kenyans” thereby locking out candidates who were more qualified and better suited for the job. It emerged later that some of the applicants who had performed well were locked out because they came from the same region or were of the same ethnic group with individuals who had been considered for other public offices

# Curbing and punishing hate speech

*Freedom of speech is an unalienable right enshrined in our Constitution. The freedom of expression is a sign of a functioning democratic society. However, it can be limited where it is abused, for example, when used to inflame or incitement to violence, as hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm.*

By *Katiba News* Correspondent

In section 33 part 2 of the Constitution, the law limits or denies an individual freedom of speech when they misuse it. In Kenya, many politicians are guilty of use of hate speech. Any time politicians have the opportunity to address any crowd, many tend to incite the public against their rivals. This creates a blurred line between freedom of expression and hate speech.

Hate speech is written or spoken, that offends, threatens or insults groups based on race, ethnicity, colour, religion, national origin, gender, sexual orientation, disability or other traits that are particular to a group. It incites a society to violence and creates tension between groups and leads to contempt and hatred between these groups.

Use of hate speech has had dire consequences in the past. For example, Hitler, a gifted orator could stir up emotions in any audience he addressed. He orchestrated to exterminate the Jewish population in Europe. With his plans in place, he needed support from the citizenry and thus begun his infamous propaganda speeches blaming Jews for the economic woes of the time.

Taking a hardline stance, KNHRC vice chairman Omar Hassan.

By the time the Holocaust — the systematic, bureaucratic, state-sponsored persecution and murder of Jews by the Nazi regime and its collaborators — was over, approximately six million Jews were dead.

## Multi-ethnic

In Rwanda, hate speech was used as a weapon to dehumanise the Tutsi minority tribe that resulted in the genocide. Over 800,000 Tutsis and moderate Hutus were branded 'cockroaches' and killed in the reprehensible 100 days of genocide.

In Kenya, after the introduction of multiparty politics, the use of hate speech pervaded the society, as politicians used politics of division to curve out support for themselves, especially in multi-ethnic regions.

In the elections of 1992 and 1997, Kenyans living outside their 'ancestral homes' were chased away. In 2007 after a bungled general election, violence broke out and escalated to unprecedented levels. Months of hate speech by politicians before the elections cooked up a perfect storm for extreme violence where neighbour killed neighbour.

The National Integration Cohesion Commission Act of 2008 defines hate speech as using threatening, abusive and insulting words, behaviour, displays or written material, publishing or distributing such written material. Distributing, showing a play, recording of visual images, producing, or directing a programme, which is threatening, abusive or insulting that is intended to stir up ethnic hatred.

## Offences

Institutional reforms were necessary in order to resolve governance and social-economic problems that politicians used to whip up discord for their own benefit. The creation of a commission to monitor and prosecute all instances of hate crime was necessary.

The law has 16 acts that if infringed are punishable under the Act. Broadly, the Act makes discrimination based on ethnic or racial grounds a criminal offence. It bars comparison of persons of different ethnic groups and makes it is illegal to harass someone based on his race or ethnicity.

The Act fights for diversity in the work environment, demands for no discrimination when hiring employees, regional balancing in public entities such that none has more than a third of its staff from one tribe, no discrimination in public resources allocation and against hate speech.

## Cases

Currently, there has been no imprisonment or fines for any individual for violating hate speech laws. The National Integration Cohesion Commission (NCIC) has taken three individuals to court for hate speech. Two Members of Parliament and a politician were recently on trial, but were acquitted for contravening hate speech laws.

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Former Assistant Minister Wilfred Machage, Mt Elgon MP Fred Kapondi and Christine Nyagitha were charged last June for making speeches that were intended to stir up ethnic hatred during the referendum campaigns during the launch of the 'No' secretariat, a forum to campaign against the passing of the Constitution in Nairobi.

This case was important in proving that the NCIC has the ability and power to prosecute and deter use of hate speech. The International Criminal Court also warned the six Kenyans suspected to bear greatest responsibility for the 2007 post-election violence against making inflammatory statements or they risk their freedom.

## Political competition

There is a thin line between competition for political superiority and hate speech. Sometimes the line becomes blurred when politicians result to insults and mudslinging. During the last constitutional referendum in 2010, political competition between the 'No' and the 'Yes' camps became intense.

With the 2012 General Election in sight, the political scene will witness accusations and counter-accusations of hate speech. Indeed, some political alliances coming up are blurring this line, as they exist to fight personalities rather than stand for something. As it is, politicians have accused their rivals to NCIC for hate speech. NCIC is independent and pursues its own investigation without external influence that would be detrimental to its work.

## Monitoring and enforcement

After the passing of the National Cohesion and Integration Act, 2008

Now free from accusations of hate speech, from left, Mrs. Christine Nyaguthi Miller, Hon. Fred Kapondi and Hon. Dr. Wilfred Machage.

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NCIC had to engage full gear to implement this law. Its implementation has seen NCIC monitor all mass media. For example, NCIC has been vocal about the formation of tribal alliances that would essentially alienate particular ethnic groups from such alliances.

The infamous undefined alliance called Kikuyu, Kamba, Kalenjin (KKK) formed by Eldoret MP William Ruto, Vice President Kalonzo Musyoka and Deputy Vice President Uhuru Kenyatta was an entity that the NCIC fought to disband in its early stages.

Social media has become part of our lives. Many people air their opinions freely and many without thought of the consequences of their statements. In many other countries, there have been lawsuits due to posts written on social media. NCIC set up a department whose job will be to search for hate speech in social media. As Kenya fast approaches election period, NCIC will closely monitor online activities.

NCIC introduced a free short text message system, which Kenyans can use to report cases of hate speech. Used effectively the SMS whistle blowing can provide alerts of hate speech instances before they translate to violence. Another concern is coverage of elections. Use of opinion polls in the period leading to the last general election brought contention, as people believe in the results while they are not precise, but more of audiences' opinions on who would win.

However, there are strong feelings that the NCIC is biased in its work. The media has documented instances where some politicians have made inflammatory statements and nothing was done. These statements are usually made in vernacular, which itself is being discouraged especially if it is a politician. The failure to pursue such cases puts the NCIC in an awkward position and diminishes its credibility.

## The Rwandan experience

It is not possible to talk about hate speech without looking at the Rwandan experience. The country is a model on how to fight hate speech and negative stereotyping. In 1994, Rwanda experienced one of the worst genocides in modern day where extremists from the Hutu ethnic group systematically murdered more than 800,000 Tutsis and moderate Hutus.

Use of hate speech has had dire consequences in the past. For example, Hitler, a gifted orator could stir up emotions in any audience he addressed. He orchestrated to exterminate the Jewish population in Europe. With his plans in place, he needed support from the citizenry and thus begun his infamous propaganda speeches blaming Jews for the economic woes of the time.

Hate speech featured prominently before and during the massacres. During this time the rebel group, the Rwandan Patriotic Front gained control of the situation and stopped the killings. Paul Kagame, the leader, became president of Rwanda in a general election held in the year 2000.

Drastic reforms were implemented to stop such a calamity ever happening again. Mr Kagame instituted new stability and national cohesion. He strictly forbade any classification of citizens as Tutsi and Hutu class distinctions. Citizens of Rwanda were called Rwandans. He further advocated for an increase of women representation in parliament.

## Genocide suspects

Women are less likely to resort to violence in times of conflict and more women in parliament would promote dialogue to resolve conflicts. During the trials of genocide suspects at the International Criminal Tribunal for Rwanda in Arusha, Tanzania, there were trials for “hate media”, which saw media owners, editors and journalists accused of use and dissemination of hate speech.

In order to bring reconciliation between perpetrators and victims in the communities, *Gacaca* courts were created. These were community courts for genocide suspects not tried at International Criminal Tribunal for Rwanda.

Kagame is fighting to end corruption, which is small scale compared to its neighbouring countries. This, coupled with setting up policies to make Rwanda a viable investment-friendly country, has opened up new opportunities for its citizens to engage in fruitful business.

Rwanda's economy has grown immensely after departing from its past. Rwanda is now the model country that every other nation aspires to be with citizens who are engaged in every aspect of their country's well-being. KN

# The resurfacing of Freedom of Information Bill

The debate about the enactment of freedom of information law has been in the public domain since 2000 with three drafts debated though none has led to the enactment of the requisite law. This article looks at what the freedom of information entails, its advantages, the sources of law recognising its existence and the universally accepted limitations of the exercise of this freedom.

By Joseph Kibugu

Freedom of information is a notion, entrenched in law, that the public is entitled to information bearing on public interest matters, held by a public or a quasi-public body. The terms freedom of information and right to information are often used interchangeably, but some scholars have argued that each has different ramifications.

To them, 'freedom' does not connote an obligation on the Government to proactively provide the information, but the use of the term 'right' carries a higher sense of obligation on the Government to be proactive in giving the information.

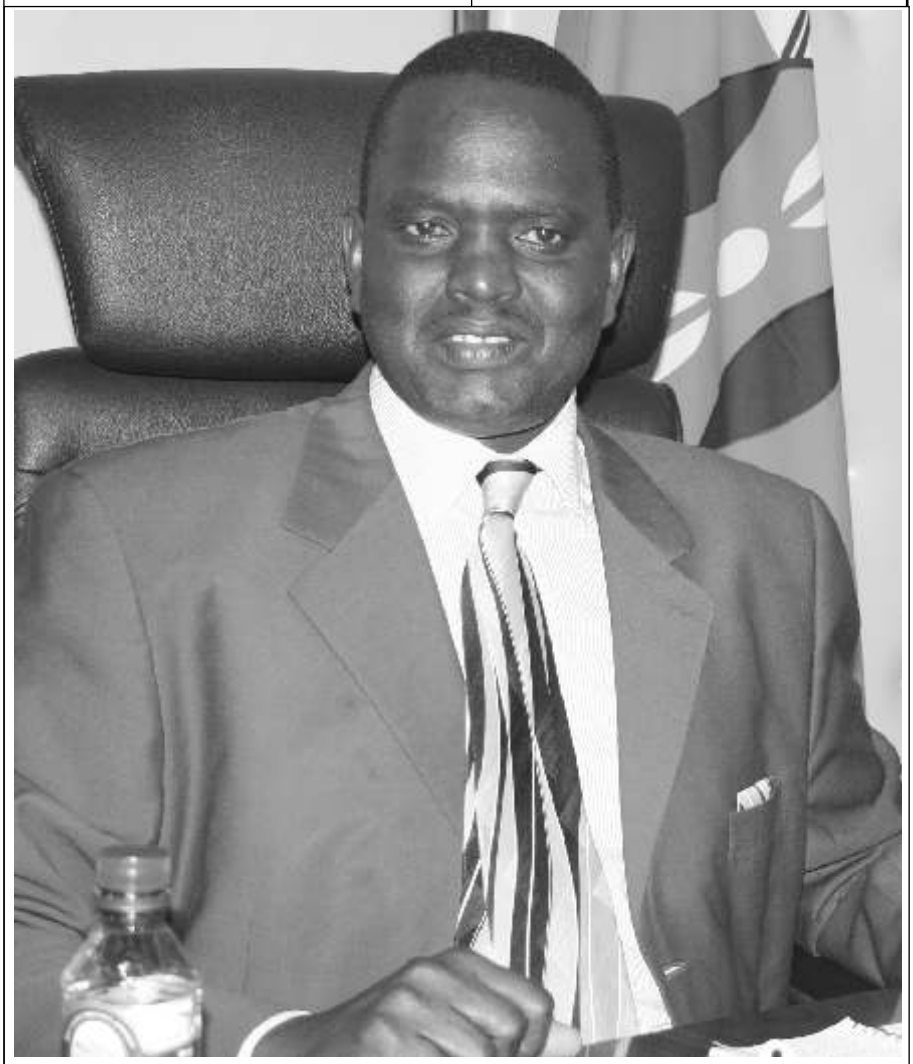
They posit that under the trilogy of the obligations under human rights regime, elevating access to information to a right obligates governments to promote, respect and protect access to information, whereas as a freedom, the Government is merely required to respond to request for such information.

## Benefits

Access to information on how government departments are run enables citizens to make informed decisions on governance issues. The Constitution now envisages a higher level of public participation in governance, which has been anchored in the devolution provisions and also anticipated in the enabling statutes.

For instance, in order to decide who to elect, they would be able to compare their development priorities with the candidates' blueprint and also better evaluate their performance after election. Publicly available information on the utilisation of Constituency Development Fund has shaped public discussion on leaders' management capability and consequently suitability for public office.

Access to information promotes accountability and builds confidence and fosters trust in government institutions. Access to information in a devolved government as enshrined in the Constitution and the attendant



Minister for Information and Communication Hon. Samuel Poghisio.

equitable distribution of resources would ensure that the elected officials are held accountable. It also lessens instances of undetected corruption.

Enjoyment of this freedom buttresses other rights. For instance, where certain groups detect an uneven distribution of national wealth leading to poor health, education and other development infrastructure, they may be in a better position to seek effective remedial measures.

## False starts

A progressive freedom of information legislation opens government to scrutiny by the citizens. The repealed Constitution and attendant legislation was restrictive rather than encouraging of sharing information with the public. For instance, when David Munyakei, a former government official working in the financial sector blew the whistle about malpractices that led to the loss of billions of shillings, he was charged under the Official Secrets Act.

Although the Attorney General later entered a *nolle prosequi*, the official Government outrage was more towards him than those who were involved in the scandal. Freedom of information legislation would put such information, as was held by Munyakei, in the public domain.

In 2007, Freedom of Information Bill, a private member's Bill sponsored and introduced to Parliament on May 17, 2007 did not go beyond the second reading. However, there is no publicly known official hurdle placed on the way of the legislation. It is imperative to note that this was the final calendar year of that parliamentary term, which perhaps explains the failure for Parliament to enact the legislation.

Is the truth manufactured here? The Nation Centre in Nairobi.

After the 2008 election, the Minister for Information and Communication drafted the Freedom of Information Bill of 2008 and undertook to expedite its enactment. However, this was overtaken by the urgent need to enact legislation on issues related to post-election violence and later the time bound legislation mandated under the Constitution. Parliament has prioritised constitutional implementation Bills, which have a strict timeline under the Constitution.

## Basic principles

The repealed Constitution did not expressly provide for the freedom to access information though the existence of this freedom has inferred from Section 79. It provided for the freedom to "hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence". However, this constitutional provision was not supported by any credible legislation and hence the difficulty, if not impossibility, for citizens to enjoy this freedom.

Article 35 of the Constitution guarantees the freedom to information. Every citizen has the right of access to information held by the State and, "information held by another person and required for the exercise or protection of any right or fundamental freedom". The State is

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also constitutionally obligated to "publish and publicise any important information affecting the nation".

Article 19 of the Universal Declaration of Human Rights stipulates that right to freedom of opinion and expression includes "freedom to hold opinions without interference and to seek, receive and impart information..."

The International Covenant on Civil and Political Rights (ICCPR) provides that everyone "shall have the right to hold opinions without interference (which) shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print..."

Article 9 of the African Charter on Human and People's Rights recognises the right of "every individual to receive information" while Article 9 of the African Union's Convention on Preventing and Combating Corruption obligates State parties to adopt "legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences".

Other progressive human rights systems including the Inter-American System and the European human rights system also recognise the freedom. The Inter-American Court of Human Rights held that Article 13 of the American Convention on Human Rights guaranteeing the right to freedom of thought and expression includes "not only the right and freedom to express one's own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds".

A progressive freedom of information legislation opens government to scrutiny by the citizens. The repealed Constitution and attendant legislation was restrictive rather than encouraging of sharing information with the public. For instance, when David Munyakei, a former government official working in the financial sector blew the whistle about malpractices that led to the loss of billions of shillings, he was charged under the Official Secrets Act.

### Limits

The right to information is derogable and subject to limitations. The repealed constitution recognised limitation to the right in the interest of defence, public safety, order, morality and health, protection of reputations or privacy or authority of the courts or communication and restriction of public officers, as long as this is reasonably justifiable in a democratic society.

The current Constitution also recognises the necessity to limit a right or fundamental freedom by law where such limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors..."

The ICCPR limits the exercise of this right "for respect of the rights or reputations of others; and for the protection of national security or of public order or of public health or morals.' However, to avoid arbitrariness in imposing these limitations, legislation spelling out the contours of such limitation is required.

### Maximum disclosure

In enacting legislation limiting the enjoyment of the right, there is a rebuttable presumption of disclosure of all public information and the onus is on the government agency denying access to such information to demonstrate that the denial is in the public interest. The Constitution seems to have adopted this principle in requiring that such legislation limiting a right or a freedom is invalid unless it express in its intention to limit the right or freedom and the nature and extent of such limitation; must be clear on which right it seeks to limit and; shall not limit a right or freedom to the extent of derogating from its core content.

### Minimum limitation/exemption

This principle can be deciphered from the constitutional guidelines regarding limiting rights in Kenya as discussed above. A further tenet of this principle puts the onus on the person or body intending to limit the right, to satisfy the court or the relevant judicial tribunal that the law has met the required guidelines in regard to the limitation.

In 2007, Freedom of Information Bill, a private member's Bill sponsored and introduced to Parliament on May 17, 2007 did not go beyond the second reading. However, there is no publicly known official hurdle placed on the way of the legislation. It is imperative to note that this was the final calendar year of that parliamentary term, which perhaps explains the failure for Parliament to enact the legislation.

### HRC's interpretation

General Comment on Article 19 of the ICCPR whose subsection (b) includes the right to information would provide a reliable interpretation of the contours of the right to information. General Comments are authoritative interpretations by treaty monitoring bodies on different articles under their respective covenants. The Human Rights Committee, which is the treaty monitoring body of the ICCPR, recently authored a General Comment on Article 19 of the Covenant replacing an earlier General Comment on the same covenant right.

The Committee observed that such information envisaged under the article includes "records held by a public body, regardless of the form in which the information is stored, its source and the date of production". The right further encompasses giving the media access to "information on public affairs and the right of the general public to receive media output".

The Committee observed that "every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes".

The Committee recognised the right of individuals to "ascertain which public authorities or private individuals or bodies control or may control his or her files" and to rectify such data if it is incorrect; the right of prisoners to their medical records; and the right of minority groups to be informed where decision making "may substantively compromise" their way of life and culture.

**The Inter-American Court of Human Rights held that Article 13 of the American Convention on Human Rights guaranteeing the right to freedom of thought and expression includes "not only the right and freedom to express one's own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all**

Electronic media journalists covering a news conference.

### Prohibitive

State parties are required to "proactively put in the public domain Government information of public interest...and make every effort to ensure easy, prompt, effective and practical access to such information". They should facilitate "timely processing of requests for information", ensure that the fees for obtaining information so requested are not prohibitive to "constitute an unreasonable impediment to access to information".

Where the requested authorities decline to give information, there should be an appellate body where applicants may appeal such refusal and/or failure to respond to request for information.

The progressive Bill of rights and the devolved structure of government are meant to check government excesses. Access to information will give citizens the tools to enhance accountability, reducing chances of undetected corruption and foster some trust with the Government. More informed decision-making will ensure that any public interest activity is based on facts than conjecture. An increasingly independent Judiciary will hopefully be the custodian of this right by interpreting it in a manner that most supports the public interest. KN

The writer is an international human rights lawyer based in Nairobi.

**The current Constitution also recognises the necessity to limit a right or fundamental freedom by law where such limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors..."**

# How clever is the National Intelligence Service Bill?

In the 21st century, intelligence gathering has become central to international and national politics. Intelligence agencies have become early warning systems of crises within a country that a state should address.

They act covertly to influence positive outcomes in matters of national interests. In the last two decades, intelligence agencies have become involved in countering terrorist threats to national security. In the Kenyan context, the National Security Intelligence Service (NSIS) is the agency that gathers intelligence for the State. It has become important to protect Kenya's interests and sovereignty from within and out. Its predecessor, the Special Branch, dates back to the colonial era when Kenya was a colony of the British Empire.

By Albert Irungu

The current NSIS Director- General, Major General Michael Gichangi.

During the colonial government in 1952, the Special Branch operated as a secret intelligence unit to keep track of the Mau Mau and the rising African politicians, the likes of Jomo Kenyatta. After Independence in 1963, it became independent from the Kenya Police and in 1969, a presidential charter officially formalised its functions and roles.

In 1986, another presidential charter changed the Special Branch to the Directorate of Security Intelligence, but maintained its structure and organisation. Between the 60s and the 90s, the Special Branch conducted clandestine activities against citizens; political assassinations and detention were commonplace.

This intensified after the 1982 failed coup and the Special Branch, among other State machinery, was used to oppress perceived or real political rivals. Dissident voices were arraigned in court without legal representation and with evidence purportedly extracted through torture.

## Democratic principles

After the introduction of multi-party politics in 1992 through the repeal of Section 2A of the old constitution, the role of intelligence was vague and intimidation of political rivals while denying them civil liberties continued. In the mid-90s, it the need to modernise the intelligence services in Kenya to an outfit that followed democratic principles became clear.

The National Security Intelligence Service Act of 1998 gave birth to the NSIS. An Act of Parliament provided for this law. NSIS was separated from the police and removed arresting authority from its powers. The NSIS could only arrest citizens through obtaining orders from the director-general and after other investigative mechanisms were exhausted.

The NSIS was a departure from the past. The Act made provisions for a complaints tribunal. Kenyans now had a channel to voice their complaints if intelligence officers harassed them.

The Constitution in Article 242 provides for the establishment of the National Intelligence Service that will be responsible for security intelligence and counter-intelligence to enhance national security in accordance with the Constitution and perform duties provided by the national legislation – the proposed National Intelligence Service Bill.

The proposed law intended to align the NSIS with the provisions of the new Constitution that notably has a strong and comprehensive Bill of Rights. NSIS is not known to maintain individuals' rights while fulfilling their mandate.

## Controversial provisions

Overall, the National Intelligence Service Bill is a drastic change from the past with provisions that outlaw torture, cruelty or degrading treatment to any citizen. It goes ahead to provide for the imprisonment and fines for any NSIS officer who is guilty of torture. In addition, the hiring of the director-general will have to be approved by Parliament, a departure from the past where the president was the sole hiring power. It also provides for anti-terror intelligence activities as part of the NSIS functions.

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The mysterious former Special Branch Director the late Mr. James Kanyotu.

After the introduction of multi-party politics in 1992 through the repeal of Section 2A of the old constitution, the role of intelligence was vague and intimidation of political rivals while denying them civil liberties continued. In the mid-90s, it the need to modernise the intelligence services in Kenya to an outfit that followed democratic principles became clear.

If passed, the Bill will repeal the NSIS Act of 1998 that heralded the current intelligence service. This realises the requirements of Section 242 of the new Constitution that calls for the establishment of a National Intelligence Service. The Bill is unique in that the NSIS rather than Parliament composed it. Therein lies the problem, as that becomes a potential threat to the civil liberties provided for by the Constitution. According to the new Constitution, the process of creating new laws must be inclusive.

The process of making laws should be participatory. Not engaging Kenyans in this Bill clearly shows there are provisions that the NSIS would not like to see challenged. The clamour for a new constitution was Kenyans asking for an opportunity to have a say in what governs them. In the days of Special Branch, the State used the agency to oppress citizens' rights.

Under the new Constitution, State departments have gone through reforms that have changed both the laws and vetted the staff in these institutions. Trusting the NSIS to reconstitute itself while being in charge of reforming laws governing it will not give the desired results. NSIS has had a history of incompetence when it comes to undertaking its mandate.

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### Drug barons

Its inability to bring to book politicians who have looted State coffers in illegal deals, failure to advise other State organs of the 2007 post-election violence despite prior knowledge of the occurrences, and failure to provide tangible evidence against the drug barons in the country, among others, show the inability of NSIS to do its work.

Another controversial provision is Part II under Composition of the Service that will allow for employees of NSIS to continue with their tenures after the Bill becomes law without any vetting. This contravenes the new law that requires vetting of all public officers before re-instating them to their positions. Judges, magistrates, court officers and high-ranking police officers have all been vetted.

The Bill allows partial audit of its activities and limits them to administration and policy. However, it locks out any attempts to scrutinise its operations. Thus, any act the agency argues out as falling under operations cannot be questioned. The Parliamentary Intelligence Oversight Committee (PIOC) meetings will not be open to the public and their deliberations cannot be published anywhere.

The committee's function is to exercise oversight over the administration, expenditure and policy of the NSIS. Still on issues to do with oversight of its activities, the Bill proposes to vet members to the PIOC, which will be the overseer of its activities. Such a clause is controversial, as the NSIS would actively have on board committee members that will not 'rock the boat'.

In Article 40 (2) of the Bill, the NSIS and its director-general shall not be subject to any court, tribunal or commission of inquiry due to the sensitivity of the work the agency and its head is involved in. However, it will be retrogressive to allow any State organisation funded by taxpayers' money to insulate itself from public accountability and scrutiny.

### Personal freedoms

The Bill has potential infringements on personal freedoms, as some of its provisions allow interference with an individual's communication by tapping a person's telephone conversations. The Bill gives specific grounds when that can happen. However, under the guise of national security, this method of obtaining information is open to abuse especially if the officers do not want to do the hard work of using other investigative processes.

With regard to confidential information held by the NSIS, Article 39 provides that the director-general shall make decisions on the storage or destruction of information and classified documents. This gives leeway to human greed and error for nothing would stop the director-general from being at the beck and call of certain interests if they have

Terrorist suspect Elgiva Bwire Oliacha alias Mohammed Seif in court.

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unfettered authority and requested access or destruction of such documents. The Bill should have borrowed from established best practices from other agencies on preservation and de-classification of confidential material.

Civil liberties will come under threat if the Bill becomes law as it is. The Bill has provisions that infringe on freedom of speech, access to information, freedom of association, and the right to privacy. The proposed law allows the NSIS to obtain "any information, material, record, document or thing and for that purpose enter any place, or obtain access to anything, search for or remove or return, examine, take extracts from, make copies of or record in any other manner the information, material, record, document or thing".

It further allows the service to "monitor electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain any information derived from or related to such emissions, equipment or encrypted material", that is mobile phones and Internet. The service can do this without a warrant in "extreme emergency or existence of exceptional circumstances" and for reasons of national security.

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### Bill of Rights

In any situation, the mention of declaration of 'national security' can give the service opportunity to suppress civil liberties. The definitions for extreme emergency, exceptional circumstance and national security are ambiguous and may be invoked to cover any series of circumstances.

The Bill contains a unique provision in Article 20 Part 3, which prohibits the service from "torture or any other cruel, inhuman or degrading treatment". This by itself is something worth appreciating. However, there is provision elsewhere that allows detention or custodial powers. So, it is suspicious why there is a provision to prohibit the service from torture.

The US Constitution does not allow for torture. This did not deter the CIA from having jails outside US soil (Guantanamo Bay), where they torture terrorist suspects and made known the infamous 'waterboard' torture method.

The general feeling is that with the service itself creating laws to govern itself, they will always be held in suspicion considering that the Bill will not be argued out. Many Kenyans supported the Constitution for the civil liberties it affords us. Any other law that will interfere with the Bill of Rights will bring discontent in its passing and implementation. Failure to address the infringements and controversial provisions will result in a law with loopholes that can be abused. KN

The writer is a journalist and communications officer with the African Population and Health Research Centre.

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# 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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# MEDIA DEVELOPMENT ASSOCIATION

## Media for Change