

# KatibaNews

Towards a new constitutional dispensation in Kenya

JANUARY 2008

Issue NO. 1.09



## A crowded agenda What's in Parliament's Plate?

- 👉 **The Grand Coalition boat hits the rocks**
- 👉 **Katiba briefs**
- 👉 **Regional integration in Africa**
- 👉 **Trade unionism or labour blackmail?**

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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:

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

This newsletter is meant to:

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

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# A crowded agenda

By Jane Ayumba

The 10<sup>th</sup> Parliament convened on January 15<sup>th</sup>, 2008 at the height of post election violence. There were high expectations from the public that the Parliament would play a defining role in resolving the post election crisis which was grappling the country at the time. After the swearing in of MPs and the election of the Speaker, Parliament was expected to focus on its primary roles of oversight, representation and legislation.

The formation of the grand coalition presented a daunting challenge to the parliamentary accountability system that is primarily dependent on both the Public Accounts and Public Investments Committee (PAC and PIC). This is because virtually all MPs were part of the coalition. The committees are in practice chaired by opposition MPs to ensure independence. Hon Dr Bonny Khalwale of New FORD Kenya was elected the chairman of PAC with PIC being chaired by Hon Mithika Linturi of Kenya African National Union (Kanu). Both Kanu and New FORD Kenya are represented in the Coalition.

On the legislative front, the 10<sup>th</sup> Parliament has been hailed as the most hard working. A total of 17 Bills were enacted in the 2<sup>nd</sup> Session of the House including two constitutional amendments. The first amendment was intended to implement the accord signed between President Mwai Kibaki and Hon Raila Odinga on 28<sup>th</sup> February, 2008. The signing of the accord was the most significant trigger for reduced violence related to the elections. The other amendment entrenched the constitutional review process in the Constitution and abolished the Electoral Commission of Kenya (ECK) by creating the Independent Review Commission (IRC), the Independent Boundaries Commission and the Interim Constitutional Dispute Resolution Court.

ECK was widely blamed for the flawed 2008 General Election and the IRC chaired by Justice Johann Kriegler recommended radical reforms on electoral laws and management system. Parliament is expected to offer leadership in the realisation of a new Constitution. The Parliamentary



Inside the House.

Select Committee on the Constitution Review Process is expected to offer political leadership in the review process. The membership of the Committee has been constituted.

Some of the significant Bills passed by the 10<sup>th</sup> Parliament include the International Crimes Bill, which will be used by the Special Tribunal to define the crimes under its mandate and provide for cooperation with the International Criminal Court; the Kenya Communications (Amendment) Bill, now Act; National Accord and Reconciliation Act, Criminal Procedure (Amendment) Bill, the Accountants Bill; Sacco Societies Bill; Truth Justice and Reconciliation Bill; Biosafety Bill; Anti-Counterfeit Bill and; the Fiscal Management Bill.

## Proposed new Standing Orders

The 10<sup>th</sup> Parliament has adopted a session paper that introduces new rules of procedure. The new Standing Orders adopted by the National Assembly will be operationalised in the 3<sup>rd</sup> session of the 10<sup>th</sup> Parliament scheduled to have commenced on January 20<sup>th</sup>, 2009. The Standing Orders were last reviewed in 1997. The Speaker has been the driving force in pushing for the adoption of the new rules.

Highlights of the changes include that of the position of the Speaker of the National Assembly. If the position falls vacant during a session, the election of the Speaker shall be presided over by the Deputy Speaker but, if the Deputy Speaker is a candidate, by a member of the Speaker's Panel. The election of the Speaker shall be carried out through secret ballot and the candidate who garners the majority votes in the second ballot shall be declared elected. The requirement for a third ballot in Speaker's election has been removed.

The Speaker's Panel shall have a membership of four, one of whom shall be from either gender. The Panel shall be constituted immediately following a General Election with the initial members serving for a period of two years and those elected thereafter serving until the end of the term. Members of the Speaker's Panel

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from page 2 preside over parliamentary business when the Speaker and the Deputy Speaker are not present. Parliament will be required to have regard to the relative party majorities in the House when constituting the panel.

The speech of the President shall be laid in the House and debated for a maximum of four days, a reduction from the current seven days. A sitting head of State may be allowed to address the House. Such address will be permitted after consultations between the Speaker, the Leader of Government Business, the House Business Committee and the Leader of Official Opposition. Parliament will be allowed to extend its sitting hours in a sitting day for the purposes of transaction of business.

The public will be permitted access to journals and records of Parliament. The Speaker will make rules to regulate such access. The Speaker will also develop rules on the live broadcast of Parliamentary proceedings. The Leader of Government Business will be required to inform the House of planned Government Business of the following week on every Thursday or last sitting day of the week without debate. The prime minister will answer questions from members and make statements on Wednesdays from 3 pm to 3.45 pm.

Questions by private notice shall be answered after 24 hours on dispatch by the Clerk. Ordinary questions will be answered after five days from the date of dispatch and answers to questions for written reply will be included in the Hansard Report. Members who raise a point of order during parliamentary proceedings will be required to state under which Standing Order the point has been raised. The new rules have further clarified the doctrine of *sub judice*, which has in the past been used to curtail debate when matters are pending before courts.

Female MPs will be permitted in the Chamber with their handbags. However, all members will be subjected to a security check before entering the Chambers. MPs will be permitted to show respect in a manner consistent with their religious faith and not necessarily bow to the Speaker. The Speaker will be permitted to suspend a member for a maximum of two days in case of gross misconduct without a question being put to members vote.

Back bench MPs will not be required to seek leave of the House prior to introducing a Public Bill. This requirement for leave has in the past lengthened the procedure for introducing a Private Members Bill. After the first reading, a Bill will automatically stand committed to the relevant Departmental Committee. Where the consideration of the Bill is interrupted at the end of a session, the Bill shall be presented in the next session at the stage where it was last interrupted. This will eliminate the need to republish Bills which are not enacted by the House at the end of a session.

#### Budget

The new Standing Orders propose to enhance budget transparency. The Minister for Finance will be required to lay before the House a Budget Policy Statement by March 21<sup>st</sup> each year. The statement will



Speaker of National Assembly,  
Hon. Kenneth Marende

include the assessment of the financial year and a projection for three years, macroeconomic and fiscal policies for the period, targets for overall revenues including domestic and external borrowing and the total resources to be allocated to individual programmes and projects within a sector or Ministry for the period, and the criteria utilised to prioritise allocation. The Budget Committee will consider the Policy Statement and table its report by April 15<sup>th</sup> for debate and adoption.

The Annual Estimates in the budget will be laid in the House by June 20<sup>th</sup> and thereafter committed to Departmental Committees. Each Departmental Committee will consider the estimates for the Ministries under it and submit a report within 21 days. Ministers will move the votes for their respective ministries and indicate their views on the recommendations made by Departmental Committees. The time spent on consideration of each vote has been reduced from two days to three hours. The new procedure will shorten and democratise the budget process.

Membership of the House Business Committee has been expanded to 22 members with 30 per cent of the members being non-ministers or non-assistant ministers. This committee determines the agenda for the

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House. Parliamentary parties will nominate their whips to sit in the committee while the Speaker will be an ex officio member. The chair will be nominated by the Government. The quorum will be one third of the membership and meetings will be held in camera. This will be a departure from the current procedure where most of the members of the Committee are ministers and assistant ministers.

Nomination to Select Committees of the House by the House Business Committee shall have regard to relative parliamentary strengths of political parties and the national, ethnic, geographical, cultural, political, social and economic diversity and gender balance. The quorum for the committees shall be three. A member who is adversely mentioned in a matter will be excluded from the deliberations of the committee regarding that matter.

Failure to attend four consecutive meetings of the committee without permission from the Chairperson will lead to relinquishment of the membership in the committee. A committee may resolve that it has no confidence in the chairperson through a resolution supported by a majority of its members. All committee proceedings shall be open to the public. Failure by a Minister to submit a report to the Implementation Committee shall be deemed disorderly conduct by such Minister. The committees will be at liberty to hire experts to offer professional advice.

The new Standing Orders establish new Committees including the Local Authorities and Fund Accounts Committee, the Budget Committee, the Committee on Delegated Legislation, the Implementation Committee, the Committee on Equal Opportunity, and the House Broadcasting Committee. The chairperson of PAC shall be leader of the Official Opposition or a member from a party not in Government elected by the committee. The Chairs of PIC, the Budget Committee, the Local Authorities and Funds Committee shall be members of parties not in government. The initial membership of PAC and PIC shall be for three years and the subsequent team shall serve the remainder of the term. The House shall have 12 departmental committees, an increase of four. The House will introduce an elaborate procedure for public petitions. Such petitions will be used to request the Government to perform or refrain from performing the stated act.

The new Orders are intended to come into force at the commencement of the third Session of the 10<sup>th</sup> Parliament in March this year when the current Standing Orders shall stand repealed. The Standing Orders on visiting dignitaries, statement by the Leader of Government Business on the proposed government business for the preceding week, the allocation of time to address the House to the PM, and the reconstitution of the House Business Committee may come into force earlier subject to directions by the Speaker in consultation with the Standing Orders Committee.

The proposed Standing Orders are no doubt a step in the right direction in assisting Parliament to carry out its constitutional role and deepen democracy by recognising the multiparty nature of Kenyan politics. The creation of an Implementation Committee will ensure follow up of the decisions of the House to ensure such decisions are implemented by the Government, unlike in the past where they were simply ignored.

The legislative agenda in 2009

The 10<sup>th</sup> Parliament has a compact legislative agenda in 2009. The anticipated legislative agenda for 2009 includes the setting of the Special Tribunal for Kenya that will try persons bearing greatest responsibility for atrocities committed during the post election violence. The setting up of the tribunal was recommended by the Commission of Inquiry on Post Election Violence. The completion of the review process is an immediate priority for Parliament. The IIEC needs to be constituted immediately.

The process of recruiting potential candidates for IIEC commissioners lies with the relevant Parliamentary Select Committee. Such nominees must be approved by Parliament. Already, the Court of Appeal, which is the highest appellate court in the land, has stopped the hearing of all election petitions pending the constitution of the Commission. Other laws expected to be urgently reviewed by Parliament include:

- a) The National Assembly and Presidential Elections Act, Which regulates the conduct, management and dispute resolution mechanisms relating to elections.
- b) Election Offences Act, which defines electoral offences.
- c) The Freedom of Information Bill, which was recommended by Justice Waki Commission. The enactment of the Bill will facilitate access by the public to information held by the Government.
- d) The Police Act will be reviewed to introduce civilian oversight and provide for the Police Reform Group. Police reforms were a major recommendation in the Waki Commission report.
- e) The Administration Police Act will be reviewed as part of the police reforms.
- f) The draft Constitution will be presented to Parliament once redrafted by the Panel of Experts for approval. Any changes to the draft must be supported by 65 per cent of MPs.

Parliament will be expected to enact many implementing laws to operationalise the new Constitution after it is promulgated. **KN**

The writer is a freelance journalist.

# The Grand Coalition and emerging cracks

By Macharia Nderitu

*There seems to be a problem in the house of Kibaki and Raila. One year later, some members of the coalition have started feeling like they gave in too easily or like they were shortchanged. Our writer analyses the status quo to establish whether the deal was too good for some!*

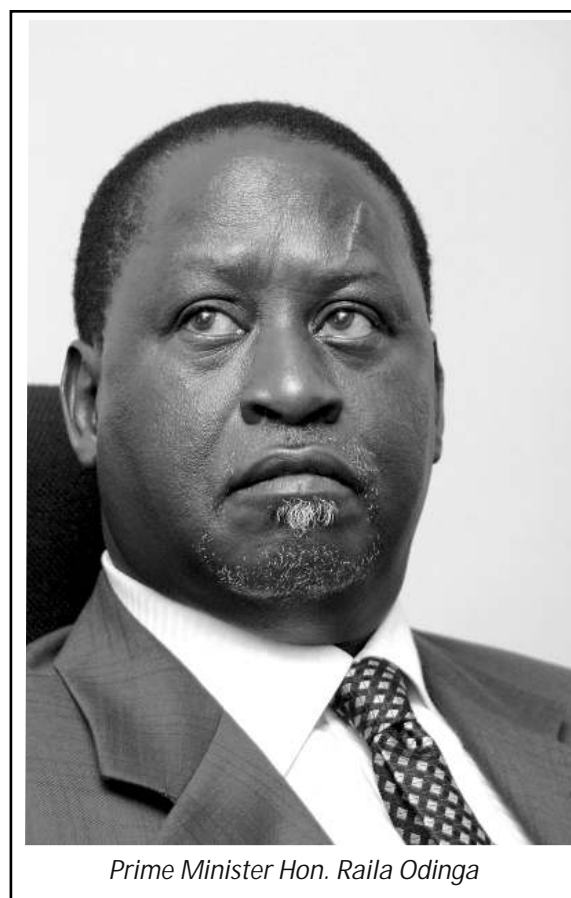
After the political settlement to resolve the post election crisis in Kenya, the Constitution was amended by inserting section 15A of the Constitution which creates the office of the prime minister and two deputy prime ministers of the Government of Kenya. The Constitution further provides that Parliament shall through an Act of Parliament provide for the appointment and termination of office of PM, deputy PM and ministers, prescribe the functions of these posts and establish a Coalition Government.

Whereas the office of the PM is created under the Constitution, Parliament is empowered to enact a law that stipulates the functions and duties of the PM. The functions and duties are set out in the National Accord and Reconciliation Act, 2008.

However, the circumstances that necessitated the setting up of the coalition demanded that the executive authority of the Republic, either legally or in practice, should be shared equally between the coalition partners, headed by the President and the PM respectively. Indeed, the Act states that the composition of the Coalition Government shall at all times reflect the relative parliamentary strengths of the respective parties, and shall at all times take into account the principle of portfolio balance. The constitution of the Grand Coalition cabinet was negotiated in a manner that ensured portfolio balance.

As stated in the Act, the principal role of the PM is supervision and coordination of Government functions. Under the Constitution, the President remains the head of State and Government. The PM chairs four out of five cabinet sub-committees through delegation by the President.

The National Accord and Reconciliation Act, 2008 provides that the PM shall be an elected member of the National Assembly who is the parliamentary leader of the party that has the largest number of MPs or a coalition of parties with the majority of MPs. Each member of the coalition shall nominate one person from the elected MPs to be appointed deputy PM.



Prime Minister Hon. Raila Odinga

The PM shall have authority to coordinate and supervise the execution of functions and affairs of the Government, including those of ministries, may assign any of the coordination responsibilities of his office to the deputy PMs, as well as nominate one of them to deputise him; including performing such other duties as may be assigned to him by the President or under any written law.

The offices of the PM and his two deputies shall become vacant if the holder of the office dies, resigns or ceases to be a member of the

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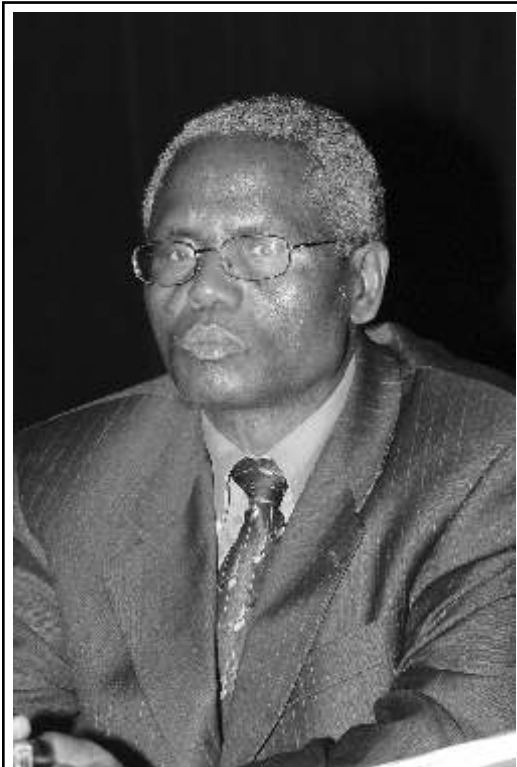
National Assembly; or if the National Assembly passes a resolution which is supported by the majority of all members declaring that the National Assembly has no confidence in the PM or his deputies, or if the coalition is dissolved.

#### Secretary to the Cabinet vs the PM

Historically, the office of the Secretary to the Cabinet, or the Chief Secretary as it was previously named, has been seen as the epicenter in the exercise of Executive authority in Kenya. This is due to the close working relationship between the Permanent Secretary and the President. Indeed, in 1986, MPs complained that the then Chief Secretary, Simeon Nyachae, was acting like the PM without constitutional authority and demanded that the office be abolished.

The functions of the Government are executed by cabinet ministers, each of whom is assisted by a PS. The PSs are public servants and are in charge of the civil servants serving in their respective ministries. Staff serving in the office of the President, therefore, fall under the supervision of the PS in the OP. Therefore, secretary to the cabinet is a delegatee of the President and cannot be answerable to the PM. The PS in the OP has added duties of attending all cabinet meetings, circulating the agenda for such meetings, chairing the meetings of PSs and ensuring the resolutions of the cabinet are implemented.

Section 22 of the Constitution provides that the President may appoint such number of PSs as he may determine. There shall be a PS in the Office of the President. The vice president and



Head of Civil Service, Amb. Francis Muthaura

ministers shall exercise direction and control over their departments and every such department shall be under the supervision of a PS. The office of PS shall be an office in the public service.

Section 23 of the Constitution provides that the executive authority of the Government of Kenya shall be vested in the President and, subject to this

Constitution, may be exercised by him either directly or through officers subordinate to him. Parliament may confer executive functions on persons or authorities other than the President.

Section 24 of the Constitution states that subject to the Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating such appointments, shall vest in the President. Under section 25 of the Constitution, every person who holds office in the service of the Republic of Kenya shall hold such office during the pleasure of the President. This will not apply where a person has entered into a contract in writing with the Government of Kenya which he undertakes to serve the Government for a period which does not exceed three years.

A reading of the Constitution shows that the President has unmitigated control over the public service. The appointments made by the President do not require consultations with any person or authority including the PM. The unilateral appointment of senior public officers and diplomatic corps without consultation seems to be at the centre of the current grumbling in the coalition. The firm control of the Executive by the President was not part of the political negotiations and is a thorn in the functioning and sustainability of the grand coalition and, indeed, the Constitution review process.

Re-examining roles of deputy prime ministers  
The roles of the deputy prime ministers were not sufficiently clarified in the Constitution and the National Accord and Reconciliation Act. Essentially, the deputy PM should assist the PM. Unlike the PM, the two deputies have been allocated full ministerial responsibilities. They were appointed from each side of the political divide forming the coalition. Their working relationship with the PM may, therefore, be affected due to partisan politics.

Executive authority in the new constitutional dispensation is shared between the President, VP, PM and the two deputy prime ministers. The new parliamentary standing orders provide

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that the PM may delegate his role of addressing Parliament by issuing a statement or answering questions every Wednesday to a deputy PM. There is no formal role allocated to the deputies in the Government, except as assistants to the PM. In fact, the two are more focused on carrying out their ministerial functions rather than define the role of the office of deputy PM.

#### Politics or the Law?

ODM has been feeling like a junior partner in the coalition since the setting up of the coalition. While the President is the head of State and government, no constitutional amendments were made to ensure proper consultations in the exercise of Executive authority. It appears the nominees of the President and the PM in the Cabinet remain loyal to the respective appointing authority without regard for national interest.

The two partners in the coalition have a vested political interest in the outcome of the constitutional review process and the subsequent General Election in 2012. It has been argued that wounds have not healed sufficiently to conduct a referendum on the Constitution as partisan political interests may capture the process. This is an opportunity for politicians to consolidate their positions in readiness for future electoral wars. Therefore, the genesis of the problem is essentially political with minimal legal hiccups.



Deputy Prime Minister Hon. Musalia Mudavadi

#### Looking into the crystal ball

The frequent squabbling in the coalition does not argue well for Kenya's development. Indeed, the partners have been divided on important national interest issues like the Kenya's Communications Act, 2008 and the mode of disbanding of the Electoral Commission of Kenya. The post election violence has affected the growth of the economy and the inflation rate is at an all time high. Kenya is not ready for another bruising electoral battle.

Kenyans really hope that the coalition will last its full term inspite of the grumbling. The National Accord and Reconciliation Act is silent on what would happen if the coalition collapsed. However, given the illegitimacy of the 2007 General Election, which was well documented by the Krieglger Commission Report, the collapse of the coalition would definitely require the holding of elections. One of the triggers of the collapse could be the

referendum expected to be held this year on a new Constitution. If the coalition partners take opposing views on the content of the draft during the referendum debate, a scenario akin to the 2005 referendum campaigns would be replayed.

The coalition agreement was signed under pressure from the international community. It is

unlikely that the parties would be willing to renegotiate the agreement, especially PNU. However, the differences in the coalition are grounded on differing political viewpoints and not the fine print of the coalition agreement. It would be very difficult to craft an accord that pleases both parties. The accord can be compared to a shot gun marriage imposed as a last resort by the international community. The President has constituted a 14-member team which is expected to resolve disputes that emerge in the coalition. It is not clear whether this team will be able to deliver on this difficult task. The

committee seems to have been formed to take over the roles of the eight members negotiating team.

#### Postscript

The squabbling in the Grand Coalition has to do with succession and constitutional review politics rather than the inadequacy of the law. There is no conflict in the law between the roles of the PS in the Office of the President and the role of the PM. Whereas any PS can be sacked by the President at will, any decision to sack the PM must be endorsed by a majority of MPs.

The question of concentration of Executive power in the Presidency should be re-examined urgently in the context of constitutional review.

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The powers of a directly elected President must be balanced with the powers of a PM, who is the leader of the party with the largest majority in the National Assembly. Public appointments must be preceded by the necessary consultations and approval by the National Assembly. The relationship between politicians (read ministers) and public servants in the running of ministries must be carefully delineated. The Constitution must be reviewed to recognise the redistribution of Executive authority between Office of the President and of the PM, and among other constitutional organs.

Office of deputy PM must be conferred defined duties and roles to ensure its relevance. Current holders of the offices have been unable to clearly define their role. Partners in the Grand Coalition should craft an agreement that will define the roles of each party and establish a dispute resolution mechanism. The role of the

dispute resolution committee set up by the President and the PM is unclear. The committee is likely to have doubtful legitimacy in regard to resolving disputes in the coalition. Already, a group of MPs have been publicly defying their party leaders and fronting positions that have not been endorsed by their parties.

Ultimately, the Grand Coalition partners owe it to Kenyans to work together for a common development agenda while always ensuring that national interest is paramount. Kenya is not ready for another General Election soon as the deep ethnic mistrust generated by the 2007 elections has not healed. **KN**

# Katiba briefs

Jan 15<sup>th</sup> - The road to Kenya's new Constitution appears bumpy, following attempts to stop the Government from implementing the Constitutional of Kenya (Amendment) Act. The 22 former Electoral Commission of Kenya (ECK) commissioners challenge the legality of the Act, which is set to jumpstart the review process.

- A total of 153 applications are received from people seeking to join key teams that will spearhead Kenya's Constitutional and Electoral review.
- At the same time, chief mediator Kofi Annan nominated three Africans and two Europeans to the panel of experts that will drive the constitutional review process.

Jan 16<sup>th</sup> - The people proposed by chief mediator, Kofi Annan, as part of the team to review Kenya's laws are seasoned experts on Constitution matters. The three Africans and two Europeans have all been involved in constitutional reforms elsewhere in the world.

Jan 18<sup>th</sup> - The chairman of the Parliamentary Select Committee on Constitution Review, Abdikadir Mohamed, appeals to leaders to ensure Kenyans get a new Constitution this year. He said it was unfortunate the reforms process has taken nearly 20 years without reaching a meaningful conclusion as politicians have kept hijacking the exercise.

Jan 22<sup>nd</sup> - Anxiety to tackle urgent legislative business in Parliament began to show yesterday with two MPs demanding to know why the Government was not in a hurry to introduce crucial matters before the House.

Jan 27<sup>th</sup> - Leaders of the two main partner parties in the Grand Coalition Government face back-benchers particularly over reform laws. There will be two meetings - one by the Orange Democratic Movement (ODM) MPs and the other to include twin partners in the coalition parties of Party of National Unity and ODM-Kenya.

- Kenya's quest for a new Constitution faces opposition from a group of nine evangelical church bishops, former MPs and members of the civil society. The group, comprising 34 individuals, want the Government stopped from implementing the Constitution of Kenya (Amendment) Act 2008.

Jan 28<sup>th</sup> - Plans by the group of religious leaders to suspend the Constitution review process fail. This follows a decision by High court Judge, Justice Joseph Nyamu, declining to issue temporary orders to halt the implementation of the Constitution of Kenya (Amendment) Act 2008, which provides a road map for the review process. **KN**

# Regional integration in Africa Dream or reality?



*From left: Paul Kagame (Rwanda), Jakaya Kikwete (Tanzania), Yoweri Museveni (Uganda), Pierre Nkurunziza (Burundi) and Mwaki Kibaki (Kenya)*

programmes of the three organisations. The EAC has developed an investment code. The member States are expected to align their investment legislation in accordance with the code. The EAC was originally founded in 1967 but collapsed in 1977. It was officially revived in 2000.

Kenya, Uganda and Tanzania have a long history of co-operation initiated in the 1917 customs union between Kenya and Uganda. Tanganyika joined the union in 1927. The East African Commission was set up in 1948 and the East African Common Services Organisation in 1961 culminating in the East African Community in 1967. The Presidents of the three countries signed the Treaty for East African Cooperation in Arusha, Tanzania on November 30, 1993 which initiated the process of reviving the EAC..

The proposed developments in the EAC are the monetary union in 2009 and a political federation by 2013. The latter will have a common president on a rotational basis and a common parliament by 2010. Other plans include the introduction of a single tourist visa and the strengthening of the East African Court of Justice and the East African Parliament. Already, Rwanda and Burundi have nominated their representatives to the Parliament and the Court after their accession to the EAC treaty. The EAC introduced an East African passport in 1999 with the intention of easing border crossing in East Africa. The passport is valid only within East African countries and entitles the

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By James Mwachofi

**A**t its inception in 1963, the Organisation of African Unity identified the need for economic integration as an important prerequisite for economic development in Africa. The regional economic cooperation entities were intended to act as building blocks for full continental economic integration. The African Union (AU) has recognised the need for close involvement of regional economic communities in the formulation and implementation of the programmes of the union.

**The East African Community**  
The EAC was established through a treaty by Kenya, Uganda and Tanzania to revive the East African Community which had collapsed in 1977. EAC admitted Rwanda and Burundi to the EAC on July 1, 2007 after the two States completed their

procedures for accession. The establishment of a customs union was approved and a treaty signed in March, 2004. The union commenced on January 1, 2005 and is being implemented at present. Kenya is the largest exporter in the region and under the treaty, it is obliged to continue paying duty on its goods entering other member countries until 2010 based on a declining scale.

A common tariff regime will apply to goods imported from third party countries. Studies are being undertaken on the setting up of a common market. EAC extended preferential treatment of goods from Common Market for East and Southern Africa (COMESA) and South African Development Cooperation (SADC) until December, 2008. It has also endorsed the tripartite cooperation between COMESA, EAC and SADC in harmonising the policies and

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holder to a multiple stay of six months.

Some of the weaknesses observed in the EAC structure are:

- a. Poor infrastructure in the East African States. Projects to develop infrastructure should be at the centre of EAC activities. Already, Kenya and Uganda are working on enhancing the efficiency of the Kenya - Uganda railway and extending the Kenya Pipeline to Uganda.
- b. High donor dependence by most of the member States due to weak economic bases.
- c. Lack of sufficient political will to push the integration agenda forward, especially for Tanzania. Whereas Uganda, Kenya, Rwanda, and Burundi seem enthusiastic about the regional integration, Tanzania has shown signs of increasing nationalism and lack of enthusiasm for the integration process. For example, Kenya and Rwanda have abolished the requirement for work permits in either country.
- d. Multiple memberships by the East African countries to different regional economic communities leading to unnecessary competition, waste of resources and differing ideological leaning. Whereas Kenya and Uganda are members of COMESA, Tanzania is a member of SADC, having left COMESA in 2001.

Strengths of the EAC include:

- a. A large common market that will assist in accelerated development of member States and spur faster growth. The combined population of the States is over 100 million.
- b. There are opportunities to deal comprehensively with security threats in the region through cooperation.

- c. The expanded jurisdiction of the Court of Justice will be useful in enhancing jurisprudence and ensuring human rights protection in the region.

#### Overview regional blocs in Africa

##### 1. Economic Community of West African States

The Economic Community of West African States (ECOWAS) came into existence through the signing of the treaty of Lagos on May 28, 1975. It has 15 member states. The main objectives of the Community are to promote economic integration, settlement of disputes among member states, active cooperation among members, and recognition, promotion and protection of human rights. The treaty created the ECOWAS Court of Justice, whose part of the mandate was resolution of disputes regarding interpretation of the treaty and promotion and protection of human rights in West Africa.

ECOWAS is made up of 15 member states. The States parties have ratified protocols to strengthen the functioning and relevance of the Community. In 2007, the Executive Secretariat of the Community was transformed into a Commission. The member States have endeavoured to comply with the macroeconomic convergence criteria by applying strict budgetary discipline and structural reforms. Further progress is being sought in relation to the free movement of persons and right of residence. The Commission has been mandated to initiate programmes aimed at enhancing the infrastructure in the region. Such projects include the railway, gas pipelines and establishment of a power pool.

a) West Africa Monetary Union  
This an organisation formed by members of ECOWAS. Member

States include Senegal, Cote d'Ivoire, Mali, Niger, Togo, Benin and Burkina Faso. The member States share a common currency, the CFA Franc. The union aims at enhancing economic competitiveness through open markets, seeking convergence of macroeconomic policies and indicators, creating a common market, coordinating sectoral policies and harmonising fiscal policies. Members of the union adopted a customs union and a common external tariff in 2000.

##### b) The West African Monetary Zone

This is a group of five ECOWAS members that plan to introduce a common currency by 2009. The Zone is dominated by Nigeria and its members include Ghana, Gambia, Guinea and Sierra Leone.

##### c) ECOWAS Court of Justice

The court was created by a protocol signed in 1991. The jurisdiction of the court includes determining disputes between member States over interpretation of the treaty and providing the ECOWAS Council with advisory opinions on legal issues. The court also has jurisdiction on breaches of human rights.

##### 2. Common Market for Eastern and Southern Africa

COMESA is made up of 19 countries including Kenya, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Zambia, Zimbabwe and Uganda. The highest decision making organ is the COMESA Authority which is made up of heads of State and government. COMESA had planned to establish a customs union by December, 2008. A common external tariff was being worked out by the secretariat.

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The Central Bank Governors of respective member States resolved to establish a COMESA Monetary Institute in preparation for the setting up of a COMESA Monetary Union. The COMESA summit authorised the formation of the Regional Investment Authority to spearhead promotion of cross border and foreign direct investments. The secretariat was mandated to establish an inventory of existing and potential industries in the member countries. Member States have been working towards harmonisation of agricultural policies and programmes. COMESA has adopted the East African Power Pool as a specialised institution and an avenue for enhanced energy connectivity in the region. COMESA has been promoting enhanced cooperation with SADC, EAC, IGAD and IOC.

### 3. Southern Africa Development Community

SADC is headquartered in Gaborone, Botswana. Its goal is socio-economic cooperation and integration, political and security cooperation among 14 southern Africa countries. Members include South Africa, Zambia, Angola, Zimbabwe, Botswana, Namibia, Mozambique, Lesotho, Tanzania, Madagascar, Democratic Republic of Congo, Malawi and Mauritius. The organisation has its origins from the struggle against colonialism in Southern Africa. The treaty establishing SADC was signed in August, 1992. SADC has targeted the formation of a common free trade area by 2008 and a customs union by 2010.

Member states have been requested to resolve the issue of multiple memberships to other regional economic communities, which has been hampering deeper integration in the region. SADC is seeking to define a road map for

eradicating poverty and proposing measures for fast tracking the implementation of SADC integration agenda. The summit of SADC has approved a Protocol on Finance and Investment. SADC is weak due to being under resourced and the practice of States to protect their sovereignty. The current chairman of SADC is President Kgalema Motlanthe of South Africa. SADC is facing the daunting task of seeking a political solution to the impasse in Zimbabwe after the country's 2007 General Election which are widely seen to have been less than free and fair.

### 4. Customs and Economic Union of Central Africa

The union was established by the Brazzaville Treaty in 1966. The treaty formed a customs union with a free trade area and established a common external tariff. The union signed a treaty establishing Economic and Monetary Community of Central Africa (CEMAC) to promote regional integration through the formation of a momentary union, with CFA Franc as the common currency.

CEMAC aims at promoting economic integration among countries that share a common currency. The Community also aims at achieving free market access and solidarity among members. Member states include Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon.



*President Yoweri Museveni of Uganda with Presint Paul Kagame of Rwanda in a past meeting.*

Member States transformed the organisation into Economic Community of Central African States in 1985. The Community was inactive for several years because of financial difficulties due to non payment of membership fees by members and the conflict in the Great Lakes region.

### Which way regional integration?

For integration to be a success, member States need to develop clear visions for the regional blocs at inception. The citizenry need to be sensitised on the benefits likely to be derived from the integration process. Citizens must be involved in the setting up and running of regional blocs. The blocs should develop regional banks to assist member States finance infrastructural projects and integrate the financial markets through harmonisation of national policies and procedures governing these markets across member States.

Another ingredient of success is political leadership and vision. The presidents of the countries which set up a regional bloc are key drivers of the integration process. The top organ of the bloc, usually the Summit, sets the policy agenda.

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African States must work towards strengthening of intra-Africa trade. Intra Africa trade is still very low accounting for a paltry 10 per cent of the value of total exports compared to the European Union which accounts for about 60 per cent of the world's trade. African States need to mainstream national policies with regional integration efforts. Member States should build credible indicators to monitor and evaluate their regional integration efforts. Also, all regional economic communities must establish and strengthen appropriate dispute resolution mechanisms.

Is the AU relevant?

Regional economic communities are the first port of call in efforts to integrate the continent as a whole. The development of AU will be a lengthy process. Indeed, the impact of the AU has been minimal since it was established in 2003. The Union has failed to set the continent's agenda. In its effort to restore peace in Somalia, the AU has failed to attract enough troops for intervention initiatives.

The AU has failed to act decisively on the Zimbabwe crisis despite clear

evidence of massive human rights violations and electoral malpractices in that country. Consequently, the regional economic communities will be invaluable focal points for the AU when it is established in dealing with regional specific issues and establishing regional presence.

Ultimately, some of the challenges that have been identified as slowing down regional integration in Africa include:

- a) Weak or non-existent enforcement mechanisms to deal with African states that decide not to adhere to protocols and treaties they are signatories to. Many African States do not respect obligations created by international treaties.
- b) Most regional economic communities lack a compensation mechanism for States that lose in the integration process. This acts as a constraint for the full implementation of the integration schemes. Tariffs and other taxes account for a large share of the revenues of many African countries. The potential

loss of this revenue, if all the protocols of the integration process are implemented, inhibits the integration process, even if potential benefits of integration outweigh the cost.

- c) The infrastructural network in Africa is generally weak, which constrains physical integration of the continent. Compounding the problem are numerous roadblocks on African highways, delays at border posts, inappropriate customs clearance and corruption.
- d) Weak macroeconomic and financial environment in Africa. Members of regional economic communities should pursue convergent macroeconomic policies. In most regional economic communities, there are significant differences in tariffs, inflation, exchange rates, debt-to-gross domestic product ratios, rate of money growth and other vital macroeconomic variables. Financial markets and institutions should be strengthened to support the development agenda of regional economic communities.

No doubt, these blocs serve an important role in enhancing cooperation in social and economic development of African nations. Member States must now show increased commitment to these communities in order to reap full benefits from regional co-operation. Members must also establish effective structures to manage the communities effectively and efficiently with appropriate dispute resolution mechanisms. The communities are important blocs in the establishment of a continent-wide economic co-operation arrangement. **KN**

The writer is a governance specialist.



Tanzanian President Jakaya Kikwete

# Trade unionism or labour blackmail?

By Albert Irungu

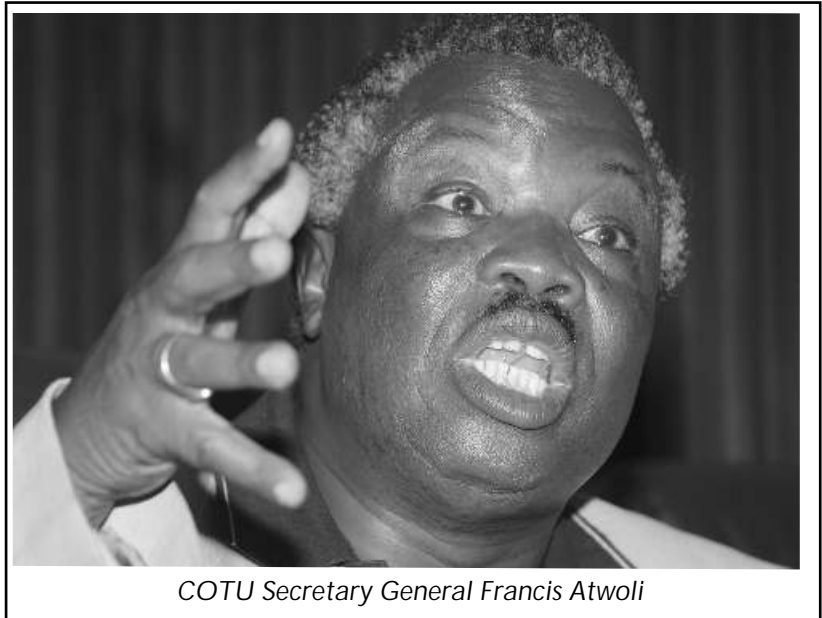
The last two months have been eventful in the world of trade unions. Kenya National Union of Teachers (Knut) and Kenya Union of Post Primary Teachers (Kuppet) have both been fighting for teachers' salary increment.

Every industry is required by law to have a union through which it can be represented. Kenya has about 36 independent trade unions and an umbrella body known as Centre of Trade Unions (COTU). COTU is the overall body that manages these trade unions. Unions' activities have come under close scrutiny due to how they run their internal affairs. Corruption is one of the many ills that has affected the legitimacy of trade unions.

Trade unions contribute to economic development as they seek to bring about improvements in the working and living conditions of workers through protection and promotion of their economic and social rights. Trade unions approach to development is conditioned by the rights-based role they play in society. Their activities are directed at strengthening institutional systems and structures that facilitate the process of promoting fundamental rights of the working people.

## Trade unions in Kenya

The birth of labour law and practice can be traced to the 19<sup>th</sup> century when the colonial government passed legislation that would ensure adequate supply of cheap labour to service the emerging enterprises in agriculture, industry and in the service sector. Terms and conditions of employment were regulated by both the statutes and common law. The law of



*COTU Secretary General Francis Atwoli*

contract in Kenya was originally based on the Contract Act, 1872 of India, which applied on contracts made or entered into before January 1<sup>st</sup> 1961. The Indian Contract Act applied to the three East African countries - Kenya, Tanzania and Uganda. Since then, the Kenyan law of contract has been based on the English common law of contract under the Kenyan Law of Contract Act (Cap. 23), section 2(1).

The first wage earners' associations in Kenya goes back to the early 1940s and soon after the Second World War. The first trade union regulation was made in the introduction of

Ordinance No. 35 of 1939 that required all crafts and organisations to apply for registration which could be granted or denied depending on whether they had legitimate dealings consistent with government policy. The rule also permitted any group of seven people to form a trade union and operate as one upon registration. Cancellation of registration under the Ordinance was not subject to appeal or open to question in a court of law.

In 1948 the Government appointed a Trade Union Labour Officer in order to gain control of the wage earners organisations. The officer's duty was to work with the Labour Department to foster "responsible" unionism. In 1952 a more detailed piece of legislation was enacted for trade unions; but again with considerable exceptions. The legislation required necessary provisions for effective operation of trade unions and did not legalise peaceful protests or provide immunity against damages as a result of strikes.

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On the other hand, the government encouraged creation of staff associations and works committees since they fitted well with its vested interests of confining workers organisations solely to economic concerns.

This uncompromising control of trade unions was maintained by the colonial government until independence. Nevertheless, the movement was able to grow both in numerical strength and power. At independence the total number of members was about 155,000 in 52 trade unions, with four centres formed and registered, namely, East African Trade Union Congress (EATUC), Kenya Federation of Registered Trade Unions (KFRTU), Kenya Federation of Labour (KFL) and Kenya Africa Workers Congress (KAWC).

Industrial conflicts arose not merely from traditional trade union activities, but also from the movement's political role in the struggle for independence, particularly after individual political leaders had been arrested and detained. On the threshold of independence, however, both employers and trade unions felt that it was vital for the new nation to create an environment where capital and labour could work together in harmony. The incidence of strikes and lockouts had to be drastically reduced. As a result, in October 1962, a land mark was achieved with the signing of the Industrial Relations Charter by the Government of Kenya, the Federation of Kenya Employers (FKE) and the Kenya Federation of Labour, the forerunner of COTU.

The Charter spelt out the agreed responsibilities of management and unions and their respective obligations in industrial relations. It defined a model recognition agreement as a guide to parties involved, and it set up a joint Dispute Commission. Since then the Charter has been revised twice, but has remained the basis for social dialogue and labour relations in Kenya. Currently, the "Charter" is under review again. The parties have already produced a draft Charter in 2001 that might be signed in the context of the overall Labour Law

review. With the set up of an Industrial Court in 1964, one additional basic cornerstone was laid for the development of amicable conflict resolution in Kenya.

The formation, structure and organisation of trade unions in independent Kenya is clearly provided for in various legal instruments, namely, Trade Unions Act, Trade Disputes Act and the Industrial Relations Charter. The taskforce on the review of labour laws recently submitted a draft Labour Relations Act, which will repeal the two former Acts when it is adopted. In Kenya, employment is governed by the general law of contract, as much as by the principles of common law. Thus, employment is basically seen as an individual relationship negotiated by the employee and the employer according to their special needs. Parliament has passed laws specifically dealing with different aspects of the employer-employee relationship.

These laws define the terms and conditions of employment and consist mainly of four Acts of Parliament, namely:

- The Employment Act (Cap. 226) and the Regulation of Wages and Conditions of Employment Act (Cap. 229), which makes

rules governing wages, housing, leave and rest, health and safety, the special position of juveniles and women and termination of employment.

- The above Act also establishes a process through which wages and conditions of employment can be regulated by the Minister.
- The Factories Act (Cap. 514) - deals with the health, safety and welfare of an employee who works in a factory.
- The Workmen's Compensation Act (Cap. 236) - provides for ways through which an employee who is injured when on duty may be compensated by the employer.

#### Impact of labour industry

Trade unions have done much to improve the workers welfare. In Kenya, conditions exist for workers to band together to fight for better salaries and against poor working conditions. Trade unions have fought for social dialogue and communication. They have contributed to social and economic matters including the national budget, child labour, gender discrimination at the work place and health issues like HIV/AIDS. These are issues that workers hold at heart as they affect their productivity and pay.

Through educating workers on their rights, workers have become enlightened on their rights and responsibilities. Through providing logistics for the education of workers, trade unions have actively participated in changing how the common worker is treated by their employer. The trade unions participation in the development of human resources is considered an important aspect that is resonant with the values of the trade union movement. The training and education activities they have undertaken for workers have been instrumental in promoting development.

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### Internal democracy

Because of their role in fighting for workers rights, it is taken for granted that trade unions are democratic organisations in the way they run their affairs. However, majority are not. From their constitution to the way they are managed, democracy is non-existent or stifled. Take for example elections of new leaders. For one to be elected, they have to have worked in the industry that the union represents for several years.

Consequently, a candidate who might have vision and good leadership qualities cannot be elected to a

leadership position because of the said clauses. Another factor is how the elections are conducted.

Except for the Dock Workers Union whose members cast ballots, all other unions have delegates. The delegate system in Kenya has always been prone to manipulation. It also keeps women out due to the very nature of how the elections are held. For instance, delegates have to travel over long distances to the venue of elections. Also, in some instances, the elections are held at night which discourages women participation. Candidates for the secretary general position in various trade unions have been known to bribe delegates heavily in order to be voted.

They also give themselves hefty allowances and are never accountable for what they do with their members' annual subscription fees. There is manipulation and corruption due to lack of proper governance. Many trade unions do not have budgets and strategic plans. The Ministry of Labour is required to monitor the activities of trade unions but rarely does so. The Ministry is only jolted to "action" when a trade union calls for a strike - threatening to audit the

union's books of accounts.

### Alternative labour dispute resolution mechanisms

In the 1990s, Thailand developed a system

trademark, to the global arena. Society, commerce and trade all over the world have been beneficiaries of alternative dispute resolution. The mechanism represents a refreshing approach to litigation and a new challenge to the legal profession.



*KNUT officials during the recent teachers' strike.*

known as alternative dispute resolution. When it was first established, there was only one arbitration case concerning a construction dispute. Over a period of nine years, there were a hundred cases involving disputes over constructions and breach of contracts filed at the Arbitration Institute. It has a non-aggressive, non-confrontational approach to dispute settlement by use of the timeless teachings and the practice of Eastern philosophers.

It is only recently that the mechanism has been subjected to critical and scientific analysis. Ironically, it is the academicians in the West who brought it, with its famous 'win-win solution'

Arbitration is one of the oldest forms of dispute resolution. It is clearly not a phenomenon of the 21<sup>st</sup> century. Arbitration is not limited to labour management relations and can also be used to ease the overburdened court systems

around the world. Today, one of the most popular arbitration organisations in the world is the American Arbitration Association (AAA). AAA arbitration has over 800 employees in 35 offices worldwide and represents over 8,000 arbitrators and mediators globally.

Today in America, grievance arbitration is expanding far beyond the scope of industrial relations. For example, in 1996 arbitration was used in disputes arising from drug testing of Olympic athletes. Economists now predict that arbitration may soon become one of, if not the fastest growing industries in America. Over 70,000 grievance and interest arbitration cases are ruled on by arbitrators each year in the US. Due to the final and binding nature of arbitration, less than 1.5 per cent of all arbitration cases heard in America ever end up in court.

### Role of employers' associations

In the year 2000, FKE had a membership of 2541 enterprises. FKE operates through industrial associations by addressing issues affecting individual industries or

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sectors. FKE spearheads the negotiation and signing of collective bargaining agreements on behalf of its member companies at all levels - company, industrial or sectoral. Employers' associations exist to protect employers' interests.

For the very reason that employers are in business to make profit, however, they want a situation where the cost of doing business is reduced as much as possible. Therefore, employers' associations have to ensure that there is a safe working environment for labour while also educating their members on good corporate governance. FKE is a member of the International Labour Organisation (ILO) and is supposed to ensure that ILO conventions are fulfilled in the work place. But there are times when employers' associations conflict with workers unions.

#### Trade unions in the Constitution

Basically, the Constitution guarantees fundamental rights and freedoms of the individual in Articles 70 to 86. Although not explicitly stated, among these fundamental rights are a range of general principles underpinning labour rights. The Constitution provides for principles such as the prohibition of inhuman treatment (Art. 74) and the protection from slavery and forced labour (Art. 73).

Freedom of association is guaranteed in the Constitution under Article 80. This constitutional provision regulates in detail procedures for the registration of trade unions and associations of trade unions. Under this provision, reasonable conditions relating to the requirements for entry on a register of trade unions include conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or members necessary to constitute an association of trade unions qualified for registration. Moreover, the Constitution already names conditions where registration may be refused by the Registrar of Societies. These include "grounds that another trade union already registered or association of trade unions already registered, as the case may be, is sufficiently

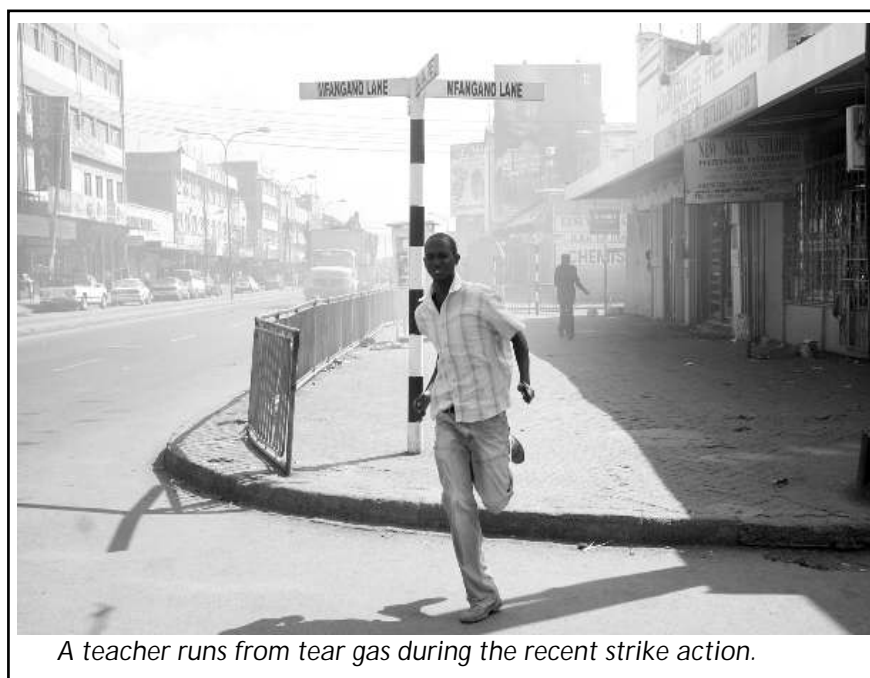
representative of the whole or a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought".

The right to strike is not directly mentioned, but Article 80 (1) protects the right to organise activities serving the purpose of the union. Related to an employee's freedom is also protection of the rights to personal liberty (Article 72), freedom of movement (Article 81), and protection from discrimination (Article 82). Article 82 (3) specifies the anti-discriminatory provision prohibiting different treatment on grounds of race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex.

Labour rights in the draft Constitution  
The draft Constitution contains a Bill of Rights in Chapter Six. This Bill lays down the principle of equality (Section 35, 37), freedom from discrimination (Section 36), freedom from slavery and forced labour (Section 46) and the freedom of association (Section 52). Section 59 on Labour relations determines the rights of workers, employers and trade unions, in particular the right to fair remuneration, the right to reasonable working conditions, the right to join a trade union or employer's organisation, the right to strike and the right to engage in collective bargaining.

All in all, trade unions have fought tooth and nail for workers rights. However, these unions need to change their internal affairs. Although corruption in Kenya has become a national phenomenon, trade unions should be the last moral bastion where those fighting corruption can get support. There is need to overhaul the internal systems of trade unions to make them more democratic and transparent. **KN**

The writer is a freelance journalist



A teacher runs from tear gas during the recent strike action.

# 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.

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