

KatibaNews

Towards a new constitutional dispensation in Kenya

JUNE 2008

Issue NO. 06.08

The Electoral Fiasco in Africa

- * Interviews on constitutional review
- * In my opinion
- * Bulldogs of the House
- * Grand corruption in Kenya
- * Katiba briefs

Kindly supported by:



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.

KatibaNews is published by Media Development Association (MDA). This publication has been made possible with the kind support of the Konrad Adenauer Stiftung (KAS) in Kenya.

MDA is not-for-profit organisation registered under the Societies Act.

Managing Editor
Stephen Ndegwa

Associate Editors
Susan Kasera
Patrick Mwangi
Henry Owuor

Office Assistant
Monica Muthoni

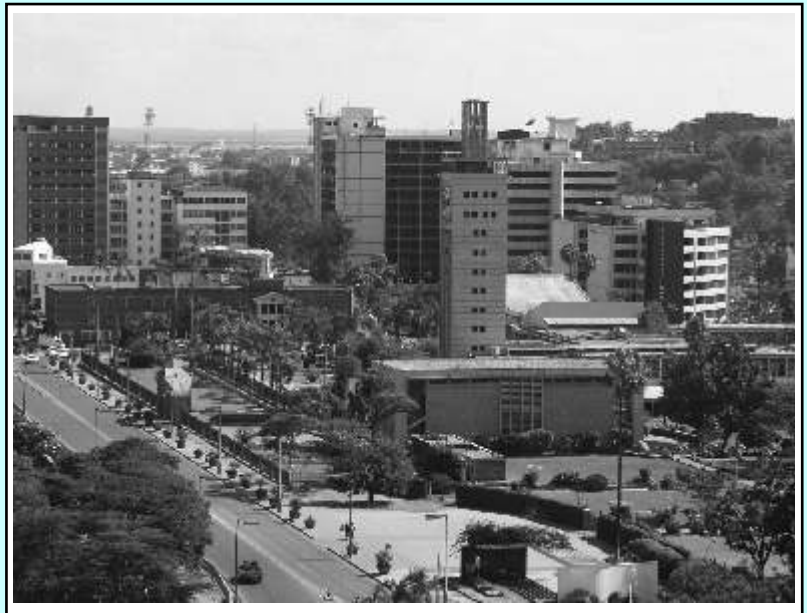
Photography
Carnelian Pictures

Art Direction & Design
Khafre Graphics

KatibaNews is published monthly and is distributed free to all media houses, civil society organisations, and the public. All are welcomed to send their observations on the constitutional review process to be the Editorial Board. Views expressed in this newsletter do not necessarily reflect those of MDA, KAS or partners. Reprinting of materials permitted provided the source is acknowledged.

All Correspondence to:
The Editor
Katiba News
P.O. Box 64254-00620
Tel. 020 2098548
Cell: 0724 376883
Nairobi, Kenya
Email: mediakenya@yahoo.co.uk

THIS MONTH MAY 2008



Contents

- 3 The electoral fiasco in Africa
- 6 Now you see it, now you don't
Interviews on status of constitutional review
- 9 In my opinion - column
- 10 Bulldogs of the House
- 12 Can the monster of grand corruption in Kenya be slain?
- 15 Katiba briefs

EDITORIAL

Democracy by any other name

Something is definitely amiss in the country formerly known as Rhodesia. On June 27 this year, Zimbabweans were back to the polls in a presidential run-off election pitting President Robert Mugabe and MDC leader Morgan Tsvangirai. The March elections had no clear winner after Tsvangirai failed to garner a clear majority against Mugabe.

But the whole thing was more or less a sham after Mugabe decided that the poll must go on as scheduled even after Tsvangirai pulled out of the race at the eleventh hour saying the ongoing violence was not conducive for free and fair polls. As expected, however, the 84-year old veteran of the independence struggle won with a landslide majority and was immediately sworn in for another five-year term - lest a fake president happened on the scene!

Well, whichever way you look at it, the electoral fiasco in Zimbabwe is now water under the bridge and no matter how much Tsvangirai cries, Mugabe is back. Clearly, the two political antagonists do not share the same idea of free and fair elections.

And that is the topic with which we have kicked off this month's edition of *Katiba News*. Africa is clearly a continent in social, economic and political turmoil. Expecting the holding of free and fair democratic elections in many African countries would be akin to expecting the sun to shine at night. From the era of military coups in the continent to extremely corrupted electoral practices, political power in Africa is a matter of who is more wily or violent, than his opponents.

The consequence has been that Africa has been ruled by the so called strong men who hold on to power through hook or crook. On assuming power, most African presidents go on a corruption spree that leaves their fellow citizens impoverished, ignorant and hungry. Not that temptations to misuse power are not in plenty. The African president is

omnipresent, omnipotent and omniscient.

We look at the problems bedeviling the electoral system in Africa and how it can be overhauled to bring the much needed changes in the African continent. Without visionary leadership Africa will continue to wallow in a miasma of backwardness while the rest of the world lives in the information age.

In this issue we also get two different views on the much awaited and seemingly jinxed Constitution review process. We interview the Law Society of Kenya chairman Okong'o Omogeni and his colleague in the profession Harrison Kinyanjui. Ultimately, the question still begs – do our politicians have the political will to change the Constitution or is it a perfect way of playing 'politricks' with the Kenyan people? For once, time has not told on this one!

The third article delves into parliamentary committees – what they are all about in terms of functions, roles, mandate and so on. These are bodies that a lot of us hear or read about but can hardly place a finger on how they influence the law making process in the national assembly.

The fourth article is on the tired topic of grand corruption in Kenya. Times are long gone when the mere mention of the word corruption was enough to make Kenyans run amok on the streets. It now seems a tired story but, unfortunately, grand corruption continues to be the bane of the country's social and economic progress.

In addition to your favourite satirical column, *In my opinion*, we have added *Katiba Briefs* to help our readers keep abreast of the milestones taking place in the review process.

Stephen Ndegwa
Managing Editor

The electoral fiasco in Africa

By Tom Kagwe

Elections in a democracy are meant to enable citizens participate in choosing leaders and also directly participate in choosing how the country will be governed. Therefore, elections are critical elements in representative democracies since without them, citizens have no chance to choose and/or change their leaders, directly determine the fate of their country, and exercise their sovereign authority of the State.

In liberal democracies there are two elements that co-exist. First is a liberal element that limits the scope and reach of government in the name of preserving individual freedoms and rights of the citizenry. Second is an element based on popular sovereignty that calls for majority rule as expressed at the ballot box. While this is true for many liberal democracies in the world, especially in Europe, there seems to be a difference when it comes to elections in Africa.

Over the years, it has been argued that most of the African countries that profess to be democratic are indeed 'illiberal' States. The epic Paper titled, *The Rise of Illiberal Democracies* by Fared Zakaria, has contended that these 'illiberal' democracies are political systems where, although periodic elections take place, citizens are excluded from real power due to the lack of respect for human rights even where provided for by domestic Constitutions. Governments in such a set up believe they have a mandate to act in any way they deem fit as long as they hold regular elections.

Indeed, regular elections may be called, but the outcomes of those elections are in most cases pre-determined in the sense that the seating president will not lose. In other words, the Opposition will not win! About 20 years ago, David Lamb in *The Africans* summarised it thus: "A man who gains power in Africa does not surrender it voluntarily. In the West, a president can be impeached or voted out of office, a prime minister can be brought down by a vote of no confidence...no such tradition of succession exists in Africa. Presidents become life presidents.

However overdue their departure, they stay in office until they are killed or driven out of office, believing that, as with the village chief, their right to rule is inalienable".

When one looks at Robert Mugabe (Zimbabwe), Meles Zenawi (Ethiopia), Muammar el-Ghaddafi (Libya), Omar Bongo (Gabon), Hosni Mubarak (Egypt) and many others that came before them, one would not for a moment think Lamb was harsh on Africa. On the other side, however, there are the handful who forfeited power such as Leopold Sengoh (Senegal), Julius Nyerere (Tanzania) and Nelson Mandela (South Africa).

Generally, it has been argued that the traditions and customs of liberal democracy are alien to Africa, even where Constitutions provide that a given country is democratic. That is, democracy seems to be symbolised by elections - but in-between elections there is nothing much to show for it but 'illiberal' elements such as lack of respect for human rights and rule of law, autocratic presidencies, cowed parliaments, lame judiciaries and politically apathetic citizenry among others.

Evolution of electoral democracy in Africa

The evolution of democracy in Africa is a contested field. This is because there are those who argue that as they existed before the entry of colonialism, African communities were inherently democratic, especially those led by a council of elders rather than a king. For purposes of this article, the evolution of liberal and electoral democracy is a recent phenomenon - as late as the 1960s. The recently published book, *Until Elections do us Part*, by Professor Chief Musamaali Nang'oli, is illustrative.



Voters queue to cast their ballots in the December 2007 General Election.

Nang'oli argues that the "white man's culture is the black man's curse", which tends to make Africans part ways ethnically, socially, politically or otherwise. Indeed, he argues that: "Before the white man came, we had no presidential elections. Therefore, there were no election disputes ... these rulers were either hereditary or chosen by a council of wise elders respected by all. There were no political parties. We had no parliaments ... we had no written Constitutions". Therefore, the evolution of electoral democracies can be traced to independent Constitutions drafted and adopted in the capitals of former 'colonial masters' be they in London, Brussels, Lisbon or Paris.

While the Constitutions were negotiated, the technical abilities of African delegations to negotiate satisfactorily were hampered by four reasons. One, the African delegation lacked the know-how of constitutional drafting and constitutionalism, hence hampering the negotiations. Two, the (African) delegation focused primarily on immediate independence and issues such as land rather than on the substance of the Constitutions. Three, the ethnic question was never addressed and the Constitutions assumed that people would live harmoniously ever after. Four, the African spirituality and the traditionally administrative structures were never ignored.

continued page 5

INDEPENDENT REVIEW COMMISSION

(2007 GENERAL ELECTIONS)

INVITATION TO THE PUBLIC

The Independent Review Commission (REC) is a Commission appointed by the President under the provisions of the Commissions of Inquiry Act (Cap. 102) of the Laws of Kenya). IREC has the mandate to inquire into all the aspects of the December 2007 General Election in Kenya with particular emphasis on the Presidential Election.

To ensure the inclusion of the views of as many Kenyans as possible, the Commission has scheduled a number of regional visits to selected locations in the country in order to facilitate the presentation of views by members of the public.

This is to invite any person or group of persons or organization with any views on any of the terms of reference of the Independent Review Commission to travel to the most convenient location on the date and at the venue indicated in the scheduled below to present such views. All public hearings in the regions shall promptly commence at 9.00 am and end at 3.00pm.

PROVINCE	TOWN	DATE	VENUES
Nyanza	Kisumu	11 th June 2008	Kisumu East Municipal Hall
	Homa Bay	12 th June 2008	County Council Hall
	Kisii	12 th June 2008	Gusii County Council Hall
	Bondo	13 th June 2008	Bondo Teachers' Training College
	Kilgoris	13 th June 2008	Kilgoris Social Hall
North Eastern	Garissa	16 th June 2008	County Council Hall
	Wajir	17 th June 2008	Red Cross Hall
	Mandera	17 th June 2008	County Council Hall
Coast	Mombasa	18 th June 2008	Tononoka Social Hall
	Lamu	19 th June 2008	Lamu Fort
	Tana River	19 th June 2008	Tana River County Council Hall
	Kwale	20 th June 2008	Kwale County Council Hall
	Voi	20 th June 2008	Voi Municipal Council Hall
	Malindi	21 th June 2008	Malindi Council Hall
Western	Kakamega	23 rd June 2008	Kakamega Social Hall
	Bungoma	23 rd June 2008	DIDC Hall
	Busia	24 th June 2008	Municipal Hall
	Mumias	24 th June 2008	St. Mary's School of Medicine
Nairobi	Nairobi	25 th June 2008	KICC
	Nairobi	26 th June 2008	KICC
	Nairobi	27 th June 2008	KICC
Central	Limuru	30 th June 2008	Kirathimo Red Cross Hall
	Kikuyu	30 th June 2008	Wangige ACK Church Hall
	Thika	1 st July 2008	Thika Municipal Hall
	Murang'a	1 st July 2008	Murang'a County Council Hall
	Kerugoya	2 nd July 2008	Kerugoya County Council Hall
Eastern	Nyeri	2 nd July 2008	PC's Information Hall
	Embu	3 rd July 2008	Embu County Council Hall
	Chuka	3 rd July 2008	Tharaka Nithi Teachers' Sacco Hall
	Machakos	4 th July 2008	Municipal Council Hall
	Kitui	4 th July 2008	Kitui Multi Purpose Dev. Training Inst.
	Meru	5 th July 2008	Meru County Council Hall
Rift Valley	Isiolo	5 th July 2008	Isiolo Agricultural Centre
	Eldoret	7 th July 2008	Eldoret Municipal Council
	Kericho	7 th July 2008	County Council Hall
	Kitale	8 th July 2008	County Council Hall
	Molo	8 th July 2008	Town Council Hall
	Lodwar	9 th July 2008	Medical Training Centre Hall
	Nakuru	9 th July 2008	Old Municipal Hall
	Narok	10 th July 2008	Town Council Hall
	Naivasha	10 th July 2008	Municipal Council Hall
	Kajiado	11 th July 2008	County Council Hall

THE COMMISSION'S TERMS OF REFERENCE

- Analyze the constitutional and legal framework to establish the basis for the conduct of the 2007 elections and to identify any weaknesses or inconsistencies in the electoral legislation;
- Examine the organizational structure, composition and management systems of the Electoral Commission of Kenya to assess its independence, capacity and functioning during the preparation and conduct of the 2007 elections;
- Examine the public participation in the 2007 electoral process and the electoral environment, including the roles and conduct of the political parties, media, civil society and observers;
- Investigate the organization and conduct of the 2007 electoral operations including: civic and voter education, training, voter registration, logistics and security, polling and counting, vote tabulation and result processing, and dispute resolution;
- Investigate the vote counting and tallying for the entire election with special attention to the presidential elections in order to assess the integrity of the results and make recommendations for improvements, adjustments or overhaul of the system;
- Assess the functional efficiency of the Electoral Commission of Kenya and its capacity to discharge its mandate;
- Perform any other tasks that the Commission may deem necessary in fulfilling the foregoing terms of reference;
- Recommend -
 - electoral reforms including constitutional, legislative, operational and institutional aspects, as well as on accountability mechanisms for Electoral Commission of Kenya Commissioners and staff pertaining to electoral processes, in order to improve future electoral processes;
 - such other legal or administrative measures as the Commission may deem necessary in fulfilling the foregoing Terms of Reference; and to report these findings and recommendations within six months.

Secretary,

Independent Review Commission

2nd Floor, Kenyatta International Conference Centre

P.O. Box 46846 - 00100

Tel: (+254 20) 2211262, 2211256, 2368448, 2368444 Fax: (+254 20) 2211255 Nairobi

Email: irec@dialoguekenya.org

Therefore, it could be argued that Africans who went to the above capital cities were interested and focused on *replacing* the colonialists rather than on *respecting* governance structures embedded in the respective Constitutions. One should not mistake what the independence Constitutions symbolised. These included independence and the creation of a new State, providing a sense of legitimacy for the new rulers and the indication of national unity. But many African countries embarked on amending their Constitutions for the worse. Two main factors were responsible for immediate constitutional amendments in many African countries.

First, African governments inherited Constitutions that were alien and lacked a homegrown contribution in their making. Secondly, given that the nature of colonial governance was entirely dictatorial, many politicians were uncomfortable with the newly established democratic structures provided for within these Constitutions. While the colonialists used dictatorship to rule the colonies, why then should African politicians resort to democracy to rule the new States?

Consequently, centralisation of power was very attractive throughout Africa as it was considered crucial for proper planning and managing development in the new States. Further, independence Constitutions became tools of political survival for those parties that formed the new governments, especially for the presidents. In this case, presidents became life presidents, turning elections into an avenue for 'legitimising' their rule rather than replacing them.

Electoral practices in Africa
Electoral practices in the continent can be summarised using Kwame Ninsin's incisive Paper, *The Contradictions and Ironies of Elections in Africa*. Kwame has argued that elections in Africa have become arenas where "the elite contest for the consent of the people to exercise State power. On their part, the people perceive elections as a means for securing development projects to improve their material conditions".

No other statement could better

summarise electoral practices in Africa. In a nutshell, elections cease to be avenues for creating and/or enhancing accountability, albeit many legislators get fired more often than not; elections cease to be avenues for demonstrating sovereign authority but become theatres that demonstrate how culpable and 'bribe-able' the voters can be and; elections cease to be avenues for determining the fate of the country's governance, translating into a bargain where politicians trade-off State power between the dominant political parties.

Indeed, Kwame argues: "The elite employ various mechanisms such as intimidation, election fraud and primordial identities like tribe and religion to bend election outcomes in their favour. Added to these is poverty, which is employed by the elite to reduce the people to dependency within the framework of 'clientism'. The result is that elections in Africa tend to confer popular consent on the exercise of State power, but only in the formal sense. In reality, elections produce choiceless democracies since power is traded between the political elite that never leave the scene, some since the independence.

Even newcomers such as President Bingu wa Mutharika recently unilaterally suspended Malawi's Parliament since legislators had refused to pass the 2008-09 national budget. Power is said to be politically sweet and no one would like to leave the scene particularly given unrestricted State power.

In a 1994 commentary *Powers of the Presidency: Are the Bishops and other Change-the-Constitution Advocates Justified?*, journalist Kwendo Opanga argued: "African presidents love power and they like it in large and unlimited doses, preferably without a prescription as to the time and frequency with which it should be exercised. In Africa, those who have power wield it. The powers vested in the highest office in the land are enormous and monumental ... critics say it is virtually impossible to unseat a sitting president in an election, no matter how free and fair it may be".

Structure of 'illiberal' elections
In elections conducted in 'illiberal' States, many politicians ascend to or retain political power to represent certain class interests, advocate a given personal

cause or improve their social or economic status. Elections are not about representation *per se* but about *real politik*. In Africa, they are basically about who gets what, when, how and even why! Political power then becomes the capacity or capability (of those who wield it) to determine who gets the national goodies.

In this way, access to such power through elections could be used to reward or punish. The nexus between access to, and wielding of, political power after elections and how patronage comes in to distribute or re-distribute national resources using the patron-client networks is evident. What is really unique in this kind of scenario is that each needs something from the other – the patron needs votes while the client needs opportunities to get the scarce resources.

Of course, power everywhere is associated with resources of various kinds including disposable income, information and educational opportunities. Since politicians in Africa generally excel in amassing wealth and democracy is associated with numbers (votes), the need to ensure that these numbers are converted into power necessitates a relationship between those who wield resources and those seeking the same – a kind of patronage between politicians and those seeking social and economic benefits from that relationship. It is a special case of 'clientism' where the patron delivers votes of a group of people with similar characteristics. This constitutes the 'vote bank' as described by Joop de Wit in *Households, Slum Politics and Patronage*.

Once the politician has delivered this 'vote bank' in elections, he or she is likely to be appointed minister, assistant minister or such plum position once the elite has power to form the State apparatus – read government. Evidently, formation of the Grand Coalition in Kenya epitomises 'vote banking' and thus, who got what position depended on arithmetics rather than intellectual prowess. So, what does Africa need to do to ensure that elections are avenues of changing a country's governance and not a source of material benefits for the political class? Second, what needs to be done to project Africa into a new way of

continued page 13

INTERVIEWS

Now you see it, now you don't

The story of constitutional review in Kenya has been a veritable blame game. And as the cat and mouse game continues, Kenyans continue to hold their breath, waiting to exhale. *Michael Ousa* interviewed two prominent Nairobi based lawyers on what ails the review exercise and related legal and governance issues.



Law Society of Kenya chairman, Okong'o Omogeni

Q. Why do you think it has taken almost two decades without a new Constitution in sight?

A. The major problem has been total lack of political goodwill and failure to insulate the process from politicians. The result has been the struggle for political supremacy at the expense of delivering a new Constitution for the country

Q. Where would you place the Constitution review process today and how can it be restarted in earnest?

A. I must say that for the very first time there seem to be unity of purpose from the political class from both sides of the political divide. The crisis the country experienced after the disputed elections seems to have acted as an awakening call for politicians. The passage in parliament of the two

Bills published last week by the minister for Justice is a good step forward in jumpstarting the process. However, I need to throw in a word of caution that the process seems to have locked out non-political actors, which is worrying. Perhaps this is the best historic moment to have a new Constitution.

Q. What role can LSK play in expediting the process?

A. Historically, LSK has been in the forefront in championing the cause for a new Constitution. We have a statutory mandate to assist the government and the public in issues dealing with legislation. We shall seek a window through which we shall engage the government constructively and assist with valuable contributions. Over and above that, our membership will assist in civic education and partnering with other civil society organisations to ensure that the process reflects the true will of the people.

Q. In your view, what should comprise an ideal Constitution for the country?

A. It is hard to answer such a question in one page. However, any good Constitution should focus on strengthening institutions like parliament and the Judiciary, and reducing the imperial powers of the presidency. It should have clear

governance structures that provide for checks and balances on the Executive, have a bill of rights for citizens, principles on land and property, electoral system and process, government structure, national security and so on.

Q. LSK has been accused of being politically biased and even thwarting the course of justice in some cases (for example, in the recent case by the Federation of Kenya Employers against the Central Organisation of Trade Unions on the new labour laws). How do you respond to such accusations?

A. We have always tried, to the best of our ability, to be neutral politically. However, it is hard to fail to rattle some sections of the political elite who often misread our pronouncements. I guess those are the occupational hazards of the job. We are not parties in the FKE and COTU court case. The only suit in court by LSK is the one that challenges the taking away of the right of parties to seek recourse in court if aggrieved by the decisions of the tribunal and the continuing of cases that were pending in court. Otherwise, we fully support the new labour laws like the maternity leave for women, paternity leave for men and protection for casual workers.

Q. What can you say have been your achievements since taking

continued page 7

from page 6

over the chairmanship of the LSK?

A. We did come up with a fidelity fund rules to protect the public from wayward lawyers. Though not passed at the annual general meeting, we are at advanced stages of legislating it. We successfully hosted the commonwealth conference last August and our website should be up and running soon in a more current and user friendly manner. We have also managed to change the law to create disciplinary panels in our five branches and this will be inaugurated soon.

Q. LSK has often accused the Judiciary of being corrupt. But it takes corrupt lawyers to have a corrupt Judiciary?

A. In every basket you will always get rotten eggs and LSK is certainly no exception. However, it is misleading to assert that it is only lawyers who corrupt Judges. One must understand that LSK has no powers to punish corrupt Judges or lawyers and this must remain the obligation of the State. Like any other consumer of justice, lawyers will like to see a clean and corrupt free Judiciary. Majority of my members are not corrupt and wholesale condemnation is being too

cruel.

Q. Compared to other jurisdictions, how would you rate Kenya's legal profession? What are the current challenges facing the profession?

A. The legal profession in Kenya is on the right track compared with other third world countries. However, fair distribution of work and negative ethnicity are major challenges being faced by lawyers today. But we appreciate that the government has responded well by allowing open tendering and we hope a new Constitution will create a new Kenya devoid of tribalism. **KN**

Q. Why do you think it has taken almost two decades without a new Constitution?

A. Lack of political will is what has contributed to the long period of time to have a reviewed Constitution. The constitutional review process right now is still in the hands of politicians. Politicians have vested interest in the constitutional make up of any country. As soon they got into parliament, they assumed the normal business of being MPs and forgot to agitate for a new Constitution within parliament. To them there is no urgency. After all, they have 'arrived' and their 'goal' has been achieved - which to them is political ascendancy be it being an MP or cabinet minister. So individually they do not have the drive to push for constitutional change. Collectively, they suffer the same problem. Those who seem to agitate among them for change are like a sore thumb sticking out.

Q. Where would you place the Constitution review process today and how can it be restarted in earnest?

A. My perspective of the

constitutional review process today is that it still ground and marred in succession politics, the dynamics of tribal matrix and the historical deficiency for Kenyans to see themselves as a larger whole as opposed to isolated tribal enclaves. There are those Kenyan tribes who advocate for majimbo (federalism) because they see the current Constitution has not yielded the results they wanted. This led to rejection of the so called Wako Draft and increasing advocacy of the Bomas Draft. This polarisation came out during referendum. I don't think the situation would change if we held a new referendum today. Considering this background, the government has done nothing in term of the need to re-educate people on the need for social cohesion.

Kenyans have not asked themselves what mechanisms need to be in place for a new Constitution. They are only seeing the Promised Land. The process can be restarted if the parliamentary committee dealing with the constitutional review exercise agitated for the fast tracking of the recent draft Bills being fast tracked. Although the LSK is mandated to uphold the rule



*Harrison Kinyanjui,
renowned constitutional lawyer*

of law, I have not heard anything in terms of a conference of lawyers that advocates for constitutional change. The civil society should continue to play an active role in demanding for a new Constitution.

Q. In your view, what should comprise an ideal Constitution for the country?

A. A Constitution that brings cohesion so that everyone in the country feels they have a stake in

continued page 8

from page 7

both its future and governance. The Constitution should bring a kind of national balance. All people must feel that they are protected by the Constitution. However, this will be difficult because we have all these lobby groups who feel they have a stake in the Constitution. We could borrow from the American Constitution which is not a voluminous document but has a culture that seeks to ensure there is rule of law, respect for both human rights and institutions of governance

Q. In your opinion, who has not played their role and what do you think can be done to expedite the process.

A. A lot of people have not played their role, including the civil society and MPs. Members of parliament in the committees charged with constitutional reviews have not been visible in advocating for a speedy conclusion of the review process. In addition, the president himself has not speeded up the process at a personal level by deciding that it is an urgent issue.

Q. The government has persistently been accused of dragging its feet in the review process. Where does the buck stop?

A. I think it comes from your perspective. The government blames the attorney general, who passes the buck to Justice minister, Ms Martha Karua, who points fingers at the Law Reform Commission. The commission will also point fingers at other quarters and say they do not even have drafters! Parliament will also say they cannot debate on Bills unless they are brought to the House. The civil society will obviously blame government for all the ills.

Q. The Serena mediation process has jump started the review

process by giving a roadmap and by having the Justice and Constitutional Affairs Minister draft two Constitution of Kenya review bills. Do you see this as a positive sign?

A. Let us be hopeful that it is. On the other hand, however, I am a bit skeptical because right now there is a rift in parliament that came about soon after the 2007 elections. We have what I would call a mongrel parliament; one without an official Opposition. This deficiency is expected to play itself out in the process. I would have preferred if the process was conducted in an ideal parliamentary situation where we have a genuine Opposition that is not based on political vendetta or trying to settle scores of a political nature.

I still feel that the push and pull between the Orange Democratic Movement (ODM) and Party of national Unity (PNU) will play out in this process the way the last referendum did. Will both camps shift their position and adopt the same position? Time will tell.

Q. Do you think the review process should be started afresh or continued from where the Bomas process left?

A. There are those who view the Bomas draft as the 'zero draft' - where the process should begin - and then there are those who feel that the Bomas draft was not representative of the aspirations of all Kenyans. The latter feel that the Bomas draft was flawed and thus the review should start afresh. Those who support the Bomas draft feel that they do not have to start the process from the beginning and that whatever flaws contained in the Bomas draft can be fine tuned. The question that arises now is who will be in any review team and who will be its appointing authority. There are those who feel the process will be taken from the public domain into a manipulable

domain. It is a make or break situation depending on what that team we come up with.

Q. Do you think the people in the coalition government genuinely need a new Constitution now that they have a new dispensation that appears comfortable for most of the erstwhile proponents for a new Constitution?

A. The people in the coalition government represent two diametrically opposed groups that have been forced to merge for their own survival. Both parties have a stake in the status quo being maintained. However, both sides also have a lot to gain with a new constitutional dispensation. For President Mwai Kibaki, this is his last term in view of the present Constitution. A new Constitution will create a new platform for him. For ODM, a new Constitution will provide a clean slate with a different political platform, which enables them to have political advantage. Mr Raila Odinga is occupying the portfolio of prime minister of the country. If a new Constitution is enacted with an executive prime minister and a ceremonial presidency, then obviously he has a head start as Kenyans will have acclimatised to seeing him occupying the PM position.

Q. How do you rate Kenya's legal profession as a whole and can Kenyans count on it to help push for good governance?

A. Am afraid that LSK has become a political outfit and cannot push for a new Constitution in its current state. The Society has not held any special general meeting focusing on constitutional review. Unfortunately, whenever legal, constitutional or political issues arise, it is always the chairman's opinion that carries the day - whether he is in agreement with the LSK Council or not. **KN**

In my opinion



By the Mirror

Mini Zimbabwe!

It's official. Inflation in Kenya is on an all time high of 35 percent. However, to ordinary Kenyans like me who live from hand to mouth, these figures really mean nothing. What we know is that the cost of living is already becoming unbearable with prices of basic commodities almost doubling. Going to the supermarket has now turned into a very painful exercise with prices rising as you watch. Even so, the situation is no different for those who live on the luxury side of life. The cost of gasoline continues to rise unabated, beer and cigarettes are up and the like. What to do?

According to me, the problem is not that there is inflation as the crunch seems to be an international phenomenon. What is the unfortunate is that the leadership of developing countries like ours has failed the people. That is, the masses have been left exposed to the vagaries of life with nowhere to turn to. Instead of concentrating on building economies to alleviate the abject poverty afflicting millions of their fellow citizens, our politicians are busy wrestling the national cake from one another.

Inflation in Zimbabwe might be simply out of this world but by the look of things, embattled president Robert Mugabe might soon be having company if we do not get our act together.

Collateral damage - Ngilu is right?

In a public meeting last month, cabinet minister Charity Kaluki Ngilu blasted the government for holding hapless suspects of the December 2007 post election violence in police custody while turning a blind eye to their godfathers. Pray, she wondered why the government (how many governments do we have in Kenya?) has not gone for the fat necks – the big guys who masterminded and funded the violence.

For once I agree with the dear lady. It is rather curious that nobody in government is talking about the generals who lay the strategy for the blood letting exercise. As always, it is the small man's fault. Of

course, there should be no excuse for people found guilty of killing, rape and aggravated arson. But like they are going for the big boys in the Rwanda genocide, and like they did with Hitler's boys, we need to see some action in the big arena.

By now Ngilu must surely know that the government works in mysterious ways. Just like in cases of corruption where bribery suspects are mercilessly hurled to the gallows while the grand masters go Scot-free, Ngilu should not hold her breath. In any case, she is sitting in the same government with some of these generals and she might as well be the one to cast the first stone.

Permanent project

Curtains and doors have now closed on the now famous musical talent search show, "Project Fame". Now in its second year, the expanded project seeks to identify and reward the most promising budding talent in the East African region.

I will not go the way of many an observer who feel that the whole exercise is a marketing gimmick mainly targeted at the youth. Rather, let me say that if sponsors East African Breweries sincerely want to help young artists, they need to have something more sustainable. My suggestion is to make the so called music academy a more permanent fixture - without the reality show bit – where youngsters can enroll to learn musical skills over a period of between six months to one year. Otherwise, building talent cannot be a one month publicity glitz affair.

How many more will have to die

Something is really the matter either with our skies, our planes, our pilots or the flying habits of our politicians. The unfortunate and needless death of two cabinet ministers in a plane crash last month is an incident that should be giving our civil aviation authorities sleepless nights. It is not an issue that will be solved by holding press conferences to read the same predictable script.

It seems a precedent was set by what happened after the National Rainbow Coalition came into power in 2003 when the country lost several MPs in plane crashes. And, as we have specialised, we simply form a committee to investigate such incidents and make recommendations that never see the light of day.

This is simply not on. For the sake of the families and friends still smarting from the loss of their loved ones I do not wish to belabor the point; but something must be done to make our skies safe. Fast!

Bulldogs of the House

How relevant are Parliamentary Committees?

By Michael Nderitu

Ask many Kenyans whether they have any idea about the role and mandate of parliamentary committees and you will be surprised to draw a blank. Indeed, the composition and work of these committees is still shrouded in mystery. This article seeks to lift this veil and give readers an indepth glimpse into their place not just in parliament, but also in public governance.

Parliament is one of the three arms of Government. It is the arm charged with making, revising and amending laws. The other arms are the Executive, which is the implementation arm, and the Judiciary, which interprets and applies laws enacted by Parliament.

In Kenya, Parliament is created under Section 30 of the Constitution and consists of the President and the National Assembly. Kenya has a unicameral parliament since the constitutional amendment in 1966 that abolished the Senate. The Legislative authority of the Republic is vested in Parliament. The National Assembly under section 31 of the Constitution consists of elected and nominated members of parliament, who are currently 210 and 12 respectively. Since 1997, nominated MPs are shared among parliamentary political parties on the basis of their number of elected MPs. On the other hand, the 210 MPS are elected in single member constituencies using a first-past-the-post election system during the General Election held every five years. The president and the vice president must also be elected MPs.

The legislative power is exercised in the form of legislative Bills that are passed by parliament and become law on the President giving his assent. Such Bills are referred to as Acts of Parliament after

enactment and presidential assent. Similarly, in its deliberative role and oversight of the Executive, resolutions adopted by parliament are implemented by the Executive, which is headed by the President. Members of the Cabinet are drawn from MPs and are required to provide answers to questions presented by MPs in the national assembly. Ministers also present legislative Bills proposed by the Government. Thus, use of the term *Parliament* refers to an institution larger than the national assembly and the president in their separate capacities and composition.

The main political parties represented in the 10th Parliament are Orange Democratic Movement (ODM) with 100 MPs, Party of National Unity (PNU) with 43 MPs, Kenya African National Union (Kanu) with 14 MPs, the ODM-Kenya with 16 MPs and Safina Party with five MPs.

Parliamentary Committees

Parliamentary Committees may be created in a number of ways, chief among them through a provision in the Constitution, Acts of Parliament, the Standing Orders or a resolution of Parliament. By its very nature, the committee gives an MP the opportunity to effectuate the three roles of an MP - legislation by reviewing, amending and modifying legislation, as a watchdog by reviewing government spending programmes, and representing views and concerns of constituents in deliberations of

the committee.

Committees are one of the most important mechanisms in which legislatures have an opportunity to call the Government to account in regard to its policies and programmes, to shape legislation, to scrutinise the budget and expenditure and to investigate issues of public concern. The growing interest in parliamentary reform has drawn interest in the effectiveness of parliamentary committees. Without committees, parliament would be overwhelmed by the number of activities that would have to be considered in the plenary. The committees allow parliament to organise its work and perform simultaneous functions. The roles of the committees include:

- Reviewing legislation.
- Reviewing and approving budget and expenditures of the Government policy agenda.
- Scrutinising government activities, policies and programmes and whether they meet the objectives of legislation as intended.
- Conducting investigations on specific issues.
- Examining and vetting executive appointments, for example, for commissioners of the Kenya National Commission on Human Rights and the director and assistant director of the Kenya Anti-Corruption Commission.

The main functions of parliamentary committees include:

- Focusing attention on specific issues and encouraging meaningful deliberations in public interest. The members are able to study in detail the matters referred to them and report to parliament. Committees are designed to be of a size that permits better interaction among the members and the atmosphere of proceedings before committees are less formal than the plenary sessions in parliament.



Parliament in session.

continued page 11

- Public engagement and validation of the democratic lawmaking process. Committees are able to hold public hearings which present an opportunity for the public to make representations. This exposes MPs to different sources of information and different perspectives of the subject matter under consideration.
- Establishing institutional leadership and visibility in the public arena. Members of the committee are able to develop expertise on issues under their consideration.

The committees are the work engines of parliament. They are the place where most of the analytical work in regard to legislation and watchdog roles of parliament takes place. However, the effectiveness of committees has been observed to be dependent on the effectiveness and commitment of their respective chairmen.

Ad hoc select committees

Parliament may resolve to establish an *ad hoc* select committee to investigate, make a report and recommendations in respect to a specific subject matter. Most select committees which have been formed in Kenya have been of an investigatory nature, for example, the select committees to investigate the deaths of Hon J.M. Kariuki in 1975, of Hon Dr Robert Ouko in 2003 and the committee to investigate ethnic clashes in 1996. Other select committees have been formed to spearhead and guide important matters of national importance, for example, the Parliamentary Select Committee on the Constitutional Review Process which was established under an Act of Parliament in 2001. The committee was established to provide political leadership in the Constitution review process culminating in a referendum in November, 2005. The terms of these committees are realised on submission and debate of their report in parliament.

Departmental Committees

These are the standing committees of the House established under the Standing Orders. They have a major role in shaping legislation. Parliament has eight Departmental Committees. Their major function is to scrutinise the work of government ministries and making recommendations on Bills presented in the House. The members of these committees are nominated by the House Business Committee at the commencement of every Parliament. This means that their term runs for five years. In this respect, all Bills are referred to them after the First Reading. Departmental committees in the Kenyan parliament include:

- I. Agriculture, lands and natural resources whose mandate includes crops and livestock production and marketing; lands and settlement; water resources; land reclamation and irrigation; cooperative development and natural resources.
- II. Energy, communications and public works whose mandate includes energy production and distribution; transport and communications; construction and maintenance of public roads; rails and buildings; air, land and sea ports; information and broadcasting.
- III. Education, Research and Technology, whose mandate includes education, training and examinations; research and technological development.
- IV. Health, housing, labour and social welfare whose mandate includes labour and trade union relations; manpower planning; housing policy and development; public health; medical care and insurance and; culture and social welfare.
- V. Administration, national security and local authorities whose mandate includes public administration and internal security; National Youth Service; national disasters; citizenship and immigration; local authorities; prisons; national heritage, children, betting and lotteries.
- VI. Committee on finance, planning and trade whose mandate includes public finance; banking and insurance; national planning and population development; trade, commerce and industry; tourism promotion and management.
- VII. Committee on administration of justice and legal affairs whose mandate includes constitutional affairs and the administration of law and justice; police and judiciary; public prosecutions and; elections.
- VIII. Committee on defence and foreign relations whose mandate includes defence matters, foreign relations; agreements, treaties and Conventions.

Members of the committees are drawn from MPs who have not been appointed ministers or assistant ministers. The Chief Whip compiles a list of proposed committee members in consultation with the party whips which he tables for approval before the House Business Committee. The latter then approves the list before the Leader of Government Business tables the list in parliament. The functions of departmental committees include:

- a. Investigate and inquire into all

matters relating to their mandate, management, activities, administration, operations and estimates of assigned ministries and departments.

- b. Study the programme and policy objectives of ministries and departments and the effectiveness of implementation.
- c. To study and review all legislation after the First Reading.
- d. To study, assess and analyse the relative success of ministries and departments by results obtained compared with the stated objectives.
- e. To make reports and recommendations to the House including recommendations for proposed legislation.

Departmental committees are empowered to summon witnesses and request for and receive papers and documents from both the government and the public. However, government departments some times ignore summons by the committees to adduce evidence or produce documentation. The current memberships of these committees reflect the relative numerical strengths of the political parties forming the Grand Coalition.

Public Investments and Public Accounts Committees (PIC and PAC)

The Standing Orders establish two watchdog committees through which parliament exercises its watchdog role and functions over government expenditure. These committees largely depend on the work of the Controller and Auditor General (CAG). Queries raised by the latter form the basis of investigations by these two committees. The committees should be chaired by MPs who are not members of the ruling party or the ruling coalition.

Members of the committees are nominated by the House Business Committee while giving due regard to the numeral composition of the House. After nomination, the committee elects its chairman. The two watchdog committees are select committees. The formation of a Grand Coalition has brought about challenges of constituting the watchdog committees since most parliamentary parties, except KADU, Ford Asili and Mazingira Party are in government. Therefore, it is not possible for these committees to be chaired by MPs drawn from the opposition as envisaged by the Standing Orders.

House Business Committee

The House Business Committee is a select

continued page 13

Can the monster of grand corruption in Kenya be slain?

By Ochieng Omollo

Experience from various countries in the world where there is widespread corruption has shown that the vice can only be fought through the mechanisms of strong governance institutions. In addition, such institutions must be supported by an unstinting political will and commitment to fighting corruption.

The fight against corruption must adhere to the doctrine of the rule of law. Some of the factors that have been identified as contributing to corruption include faulty government development policies, poor conception and implementation of government programmes, inadequate system of checks and balances, an undeveloped civil society, a weak criminal justice system, poor remuneration of public servants, poor parliamentary representation and watchdog structures, and lack of transparency and accountability. One of the causes identified for petty corruption in Kenya is the low remuneration levels for civil servants. These factors are only linked to corruption because it is not always that there will be corruption where any of the factors are found.

The greatest impact of corruption is on the poor since they are least able to absorb its costs. Corruption undercuts public services such as health and education by diverting resources to private hands. Other effects of corruption include reduced investments, undemocratic practices, diversion of public funds and a skewed public policy making process driven primarily by projects and programmes that create opportunities for corruption rather than fulfilling the needs of the citizenry.

One of the areas that was not handled well at independence giving rise to suspicions of corruption and abuse of office include the land distribution schemes where most of the beneficiaries were civil servants and politicians.

At independence, the government was reluctant to permit public servants to engage in business. But it later appointed a commission of inquiry chaired by Duncan Ndegwa. The commission submitted a report in 1971 named the Ndegwa Report which recommended that public servants be permitted to carry out business alongside their civil service jobs.

Political will to fight corruption
Incidents of corruption seem to have a clear connection with scheduling of elections especially since the reintroduction of multiparty politics in 1991. The Goldenberg scam was perpetrated just before and after the 1992 elections. Similarly, massive allocation of public land, which was investigated by the Ndung'u Commission of Inquiry on Illegal and Irregular Allocations of Land, was done in the run up to the 1997 General Election. Most of the allocated land was promptly transferred to public entities, notably the National Social Security Fund, the Kenya Pipeline Corporation and the Kenya Reinsurance Corporation. The Anglo Leasing Scandal occurred in the period preceding and after the 2002 elections.

There seems to be a close connection between corruption scandals and political financing during the elections. This has been partly the reason for advocacy for the enactment of the Political Parties Bill, now Act, which seeks to secure public funding for political parties with a view to strengthening political parties as institutions. The minister for Justice, National Cohesion and Constitutional Affairs, Ms Martha Karua, recently announced that the Act, which was enacted last year, will be brought into operation as from July 1, 2008.

The fight against corruption must be supported by the requisite and demonstrable political will in order to bear fruit. This includes willingness to allow anti-corruption agencies to operate independently without political interference, provision of the required human and financial resources to anti-graft institutions and the ability of political leaders to step aside to allow for independent investigations where they are adversely mentioned as suspects in corrupt deals.

After the expose of the Anglo Leasing Scandal in Parliament, the minister for Finance at the time, Hon David Mwiraria, resigned from office in a huff while the president asked ministers Kiraitu Murungi and Prof George Saitoti to step aside to allow for investigations. Prof Saitoti was being investigated on the Goldenberg scandal whose report had been released at the time. However, all the ministers were later reinstated when the Kenya Anti-Corruption Commission (KACC) stated that it did not have evidence incriminating



KACC Director Justice Aaron Ringera

them in relation to the scandal. The responsible permanent secretaries, who essentially are the accounting officers of the ministries involved, were arraigned in court and charged for abuse of office among other offences. The temporary removal of ministers by the president and subsequent reinstatement was interpreted in some quarters as official condoning and tolerance of corrupt acts by senior government officials. Such acts would breed a culture of impunity.

Anti-corruption institutions

Kenya enacted the Public Officers Ethics Act and the Anti-Corruption and Economic Crimes Act in 2003 to create the required mechanisms and infrastructure for fighting corruption. Previously, in all cases of suspected corrupt conduct by public servants, charges were drawn and prosecution conducted under the Penal Code and the Prevention of Corruption Act. There were very few prosecutions under the Code or the Act not because of the inadequacy in the legal regime but due to lack of political will to fight corruption and apparent acquiescence to the vice. The new Act repealed the Prevention of Corruption Act.

The Anti-Corruption and Economic Crimes Act creates special courts to hear and determine corruption cases. The Chief Justice has appointed special anti-corruption magistrates to hear cases prosecuted under the Act. The Act also created KACC with

continued page 14

from page 5

electoral politics without losing the essence of fairness, representation, justice and equity, all of which are within Africa's antiquity?

Reforming electoral practices

Reforms are essential to transform how Africans view elections. On the surface, reforming the electoral systems of first-past-the-post hold the key to this transformation. More important, however, is changing the structure of the State though a robust and democratic Constitution that not only espouses liberal principles but provides a way in which the same can be secured, protected or promoted. Still crucial is whether Africa wants to adopt liberal democracy or reconfigure how the State is structured with a bias towards African antiquity.

Prof Nang'oli contends: "...The systems Africa devises will have to be African in spirit, philosophy and expression. Must be born of African culture and customs. Systems that all its populace can relate to ..." Prof Adelaja Odukoya adds: "Clichés

such as 'liberal democracy', 'democratic socialism', 'social democracy', and 'homegrown democracy' are products of complex ideological meanings to which democracy could be 'bent', making democracy akin to a journey to an uncertain destination". Therefore, Africa must chart out its destination first before asking what form of democracy it will adopt or adapt to lead to that destination.

Recent examples of electoral fiascos in Africa abound. These include Congo's elections in 2005 which were marked by delays, insecurity, lawlessness and bribery; Ethiopia's elections the same year which were rather a 'selection and endorsement' of President Meles Zenawi than a process of electing a new leader; Kenya's 2007 flawed presidential elections that never distinguished who won the presidency; Nigeria's elections that were marked by 'god-fatherism' where Ben Atiku was pitted against the Yar Adua 'project' of departing Olusegun Obasanjo; and Zimbabwe's 2008 electoral fraud marked by State-sponsored violence, intimidation and

outright fraud by a callous President Robert Mugabe.

Africa must run away from these electoral malpractices. The call for reform is not just about changes in electoral laws and regulations but rather a total transformation of the body politic of African elections. All the above examples depict a situation of 'patrimonial electoral practices' where those who win elections are produced, reproduced and perfected through patron-client networks that seek to perpetuate, retain and solidify the fraudulent nature of how the first elections were conducted in independent Africa. This has been Africa's unfortunate electoral story which has to be totally changed if elections are to make any difference for the common African citizen.

The writer is a senior programmes officer with the Kenya Human Rights Commission (KHRC). The views expressed are the Author's and do not reflect those of the KHRC.

from page 11

committee established under Standing Order Number 145. Members of this committee are nominated by parliament at the commencement of each session. It has a membership of between five and 20 MPs. The committee is routinely composed of government representatives with minimal representation from the Opposition. In the ninth parliament, 14 cabinet ministers sat in the 20-member committee. After composition of the grand coalition in March, 2008 ODM and PNU coalition each selected 10 members to the committee. This committee is very important since it sets the agenda for parliament and meets every Tuesday when the House is sitting. The committee is chaired by the leader of government business, who is also the vice president.

The house business committee is very instrumental in constituting the membership of other committees. It has the power to nominate members of the committees except where the enabling law stipulates otherwise. Where parliament constitutes a select committee in regard to a particular matter, the house business committee still retains the mandate to nominate the members and select the chairman, unless the House at the time of appointment shall have nominated the members. The committee also sets the agenda for the House since it must approve all matters proposed for debate.

The practice in parliament has been for departmental committees to select one of their number as the chairman. The departmental committee lasts the entire period in which a particular parliament sits and their composition is not changed. However, select committees appointed by the House must have their mandates renewed by the House after the end of one session. Similarly, the terms of members of PIC and PAC last for one session of parliament, but the members are normally reappointed.

Other Committees include: Statutory Committees

There are a number of parliamentary committees that are created under Acts of Parliament to perform functions that are clearly stipulated in the enabling law. These committees include the Constituency Development Fund (CDF) committee which is created under the CDF Act, and the National Assembly Powers and Privileges Committee which is created under the National Assembly (Powers and Privileges) Act. The CDF Committee is charged with the role of supervising the implementation of the CDF Act while the National Assembly Powers and Privileges committee deliberates on matters relating to the privileges of MPs while undertaking their role in the national assembly. The Constitution also creates the Parliamentary Service Commission which is chaired by the Speaker of the National

Assembly.

Liaison Committee

This Committee consists of the deputy Speaker as chairman and the chairmen of all departmental committees. The committee is supposed to guide and co-ordinate the operations, policies and mandates of departmental committees, deliberate on the annual operating budget among departmental committees, consider the programmes of departmental committees including their need to travel and hold sessions outside the precincts of the House, and deliberate and decide on which reports of the departmental committees shall be debated in the House.

Library Committee

The role of this committee is to advise MPs on matters relating to the library, make proposals for its improvement and assist MPS to fully utilise it.

Standing Orders Committee

This committee comprises the Speaker as chairman, the deputy Speaker and not more than 10 other members appointed by the House Business Committee. The committee considers and reports on all matters relating to the Standing Orders.

Speaker's Committee

This committee is chaired by the Speaker of the national assembly and its members

continued page 16

from page 12

powers to investigate any matter that raises suspicion of corruption or economic crime or conduct liable to allow, encourage or cause corruption, or conduct constituting corruption or economic crime has occurred or is about to occur; to investigate the conduct of any person that in its opinion is conducive to corruption or economic crime; examine the practices and procedures of public bodies in order to facilitate discovery of corrupt practices; to secure revision of methods of work that may be conducive to corrupt practices and; to educate the public on the dangers of corruption and economic crime.

The Public Officers Ethics Act requires public servants to file annual wealth declaration forms. The forms are kept in secrecy by the receiving commissions appointed under the Act which defeats the primary reason for making the wealth declarations in the first place. The Act has been amended to extend the period of filing the wealth declaration forms from one to two years.

The constitutional mandate to initiate and undertake prosecution is vested in the attorney general, whose offices play an essential complementary role to the work of KACC. The AG can delegate prosecutorial powers to other public officers under the Criminal Procedure Code. However, the Commission relies on the AG, through the Directorate of Public Prosecutions, to initiate and undertake prosecution of cases it investigates. Its powers are limited to investigations and making recommendations.

Other government agencies involved in investigating corruption include the Efficiency Monitoring Unit (EMU), which is set up administratively. The unit was previously under the Office of the President but has been transferred to the office of the prime minister. The Kenya Police and its Criminal Investigations Department still retain an important role in the fight against corruption. Due to their extensive network, experience and expertise, the police are well placed to effect arrests in the event of suspected corrupt conduct. Further, certain provisions in the Penal Code, for example, stealing by servant and abuse of office are still of importance in the fight against corruption. This is essentially because the Anti-Corruption and Economic Crimes Act is applicable to corrupt acts that occurred after its coming into force in 2004 while the Penal Code can be applied to corrupt conduct that occurred much earlier.

The Public Accounts Committee (PAC) and the Public Investments Committee (PIC) are set up under the Standing Orders of the national assembly. PAC's mandate is to examine accounts showing appropriation of sums voted by parliament to meet public expenditure. PIC has the role of examining

the reports and accounts of public investments, examining the reports of the Controller and Auditor General (CAG) relating to public investments and to examine whether the affairs of public investments are being managed in accordance with sound business principles.

In essence, both committees carry out the watchdog role of Parliament and rely on CAG reports to conduct their investigations. Though the reports of the committees are historical in nature, the committee can investigate public expenditure where there is suspicion of non-compliance with public accounting laws or public investment procedures. The Anglo Leasing scandal was investigated by PAC while exercising this investigatory mandate and a report was tabled in Parliament. Therefore, the committees are well placed to complement the efforts of other anti-graft agencies in the fight against corruption.

The government has initiated performance contracting for public servants which entails an annual analysis of whether a public entity or officer has achieved the set targets. A PS in the Office of the President is in charge of this programme. Though still in the nascent phase, this programme has the capacity to reduce incidents of corruption in public institutions through improved performance and constant monitoring by the directorate in charge of its implementation.

The existence of parliamentary watchdog committees, the AG, the Police, the Judiciary, EMU and KACC give the impression of a multifaceted and co-ordinated approach in the fight against corruption. However, the presence of these numerous bodies carrying out competing and often conflicting legal mandates can adversely affect the outcome of the anti-corruption campaign. The doubts are further strengthened by the opaque methods of appointments to these agencies, which is done without established vetting processes and criteria.

Grand Regency hotel and Kamlesh Pattni

In 2004, the government set up a Commission of Inquiry to Investigate the Goldenberg Affair. The commission recommended prosecution of principal suspects in the scam, chief among them Kamlesh Pattni, the late James Kanyotu, Eric Kotut, Job Kilach

and others. The vice president and minister for Finance at the time of the scandal, Prof George Saitoti, filed a constitutional reference in the High Court in which he was cleared from any wrongdoing and his name expunged from the report. Criminal prosecutions were initiated against the other suspects. The commission recommended that the government initiates steps to recover the public funds lost as a result of the scam.

In 2007, parliament amended the Anti-Corruption and Economic Crimes Act to confer powers on the commission to negotiate with suspected offenders for the return of property acquired through corrupt means in exchange for amnesty. This is akin to the approach adopted in Nigeria where the government negotiated with the family of the late president, Sani Abacha, who returned part of the stolen wealth in exchange for non-prosecution for their role in corruption. This strategy proved effective in Nigeria and was deemed a more cost effective and speedier method of recovering corruptly obtained wealth given the lengthy nature of criminal prosecutions.

In April, 2008 it was reported in the press that KACC had reached an agreement with the alleged principal architect of the Goldenberg scam, Mr Kamlesh Pattni, to transfer the Grand Regency hotel from his company, Uhuru Highway Development Limited, to the Central Bank of Kenya (CBK). In return, all criminal and civil cases facing Pattni were to be withdrawn. The consent was recorded in a High Court case pitting Pattni's company and CBK.

Curiously, however, this deal did not involve the AG's office which retains all the powers to initiate, undertake and terminate criminal prosecutions under the Constitution. The criminal charges could only be withdrawn with the tacit approval of the AG. Whereas the amnesty provision may be an important starting point in speedier recovery by public bodies of illegally acquired wealth, these provisions of the law must be applied

continued page 16



The August house of anti-corruption

Katiba briefs

June

- ◇ “Kenya has arrived at a constitutional moment. The people have a golden opportunity to enact a new Constitution. The environment is ripe for re-fashioning the primary rules necessary for redefining citizenship, social-economic and political values.” Kivutha Kibwana
- ◇ It goes without saying that the land issues are emotive in Kenya and they ought to be handled with care, attention and fact since any uncertainty is bound to lead to conflagration. In this regard, public statements being issued by our leaders on the land question do not augur well for the nation and it is evident that in the grand coalition government the left hand is not aware of what the right hand is doing. The way land use is governed is not simply an economic question, but also a critical aspect of the management of political affairs.
- ◇ The proposed National Land Policy (NLP) should be effected through the constitutional review framework, says the Law society of Kenya (LSK) national chairman Okong'o Omogeni. He says the proposed NLP had far-reaching changes on land issues in the country and should not be implemented separately but be made part of the review process.
- ◇ Agriculture assistant minister, Japheth Kareke Mbiuki, wants MPs to push for the split of large constituencies through constitutional review. He says large constituencies lagged behind in development since they received similar monetary allocation as others of smaller population.
- ◇ Leaders react to the Budget speech with some asking why no funds were set aside for the Constitution review process. LSK chairman Okong'o Omogeni says he is shocked that Finance minister Amos Kimunya did not deem it fit to allocate “even a shilling” to the review process. The LSK boss described the omission as “tragic” and appealed to the minister to clarify the issue.
- ◇ Prime Minister Raila Odinga says that there are sufficient funds for constitutional review and failure to factor the cash in the budget speech read by Finance minister, Amos Kimunya, does not amount to mischief. Raila says appointment of commissioners to start the process of harmonising the review work would be done soon adding that in case of any financial undertaking a supplementary budget can be approved by parliament.
- ◇ Two key Bills expected to kickstart the stalled constitutional review set to be published. Members of the National Dialogue and Reconciliation team approve the Bills prepared by members of the Law Reform Commission, and direct Justice minister, Martha Karua, to gazette them. Once published, the Bills, which include the Constitution of Kenya (Review) Bill 2008 and the Constitution of Kenya (Amendment) Bill, would be tabled in parliament in two weeks time for debate.
- ◇ Ford Kenya chairman, Musikari Kombo, says the party proposed that parliament be involved in the nomination of the seven members of the committee to oversee the constitutional review process.
- ◇ The 10th Parliament will be judged harshly if it does not deliver a new Constitution to Kenyans, warns vice president Hon Kalonzo Musyoka. Musyoka tells LSK members during their monthly luncheon that parliament would never be trusted again if the current term ends without a new Constitution. The constitutional review, he says, should be transparent and participatory, and guided by national rather than personal, regional or ethnic interests.
- ◇ A new Constitution still seems elusive especially after Justice minister, Hon Ms Martha Karua, announces that a referendum can only be held in June 2009 at the earliest. The announcement does not come as a surprise to many Kenyans as there have been clear signs of lack of seriousness and commitment by the Government to finalise the review exercise.

Courtesy *Daily Nation*

from page 13

include both the ministers for Finance and Public Administration and 10 other members nominated by the house business committee at the commencement of each session. The committee's role is to consider, advice and report on all matters relating to the welfare of members of the House and its staff.

Effectiveness of the committees

Departmental committees have the mandate of recommending wide ranging improvements to proposed legislation. As already noted, all legislation is referred to the committees after the First Reading. However, most of the committees lack specialised technical support from parliamentary staff. The civil society has been playing a complimentary role but only for Bills they have an interest in. For example, civil society organisations involved in advocacy on children rights, gender equality and curbing gender violence were very instrumental in pushing for the Sexual Offences Act.

The Parliamentary Service Commission has established a legislative department in parliament which will assist the committees to draft their recommendations into legislative proposals and conduct legal research on behalf of the committees. This support needs to be extended to research capacity, which is essential to the effective performance of any parliamentary committee.

The watchdog committees often present delayed and outdated reports due to the slow pace of processing of reports by CAG. The government has initiated reforms through the Kenya National Audit Office Act to equip the office of the Controller

and Auditor General with the necessary human and financial resources to enable it produce timely audit reports. The Parliamentary Service Commission should hire experts who can interpret the reports generated by CAG for the committees. The Public Audit Act which was enacted in 2004 requires the CAG office to prepare and submit audit reports within set deadlines.

Similar committees in other countries

Many parliaments provide adequate technical capacity and personnel to assist committees to undertake research on matters that are within their mandate. For example, the United States Congress hires qualified professional staff to assist committees to carry out their functions.

In Canada where they have adopted a parliamentary system, it has been noted that the effectiveness of committees is undermined by appointments based on party loyalty. This has occasioned frequent replacements of committee members, thus inhibiting both the effectiveness and development of expertise of the committees.

In Uganda, there is a committee named the Committee on Government Assurances and State Enterprises that monitors the implementation of parliamentary resolutions. Uganda has also established a Department of Legislative Counsel in parliament through which all Bills must be scrutinised to ensure better quality control. A similar office has been established in Kenya but is yet to receive adequate human and material resources. Such a committee has been recommended for Kenya in the ongoing reform of the

Standing Orders. The committees should also seek to publicise their proceedings and be open to public scrutiny and participation.

Conclusion

To enhance the effectiveness of the committees, the Parliamentary Service Commission must provide adequate technical capacity and necessary personnel to enable them carry out adequate research and analysis for proper execution of their mandate.

The Standing Orders should be amended to provide for public hearings on Bills in order to enhance the participatory process in legislation. Though some of the departmental committees have been inviting comments from the public and the civil society on Bills pending before them, this process needs to be constitutionalised.

The committees should be empowered to seek and receive all relevant information they require for their enquiries from public institutions, government departments and ministries. This will enhance the capacity of parliamentary committees to carry out their watchdog role by availing the necessary information and data.

Likewise, the role of parliament in the budget process prior to and after presentation needs to be expanded. This requires establishment of a committee to specifically analyse the estimates and make recommendations to the House. Further, research capacity will be necessary to assist MPs understand the budget estimates and give appropriate recommendations. **KN**

from page 14

uniformly and transparently.

Winning the war

It is important to establish clear roles and structures for the different agencies involved in the fight against corruption. This will translate into efficient and responsive inter-agency coordination among the anti-graft agencies.

Politicians need to demonstrate increased political will in the fight against corruption in order to curb the culture of impunity. Corruption thrives where the country's leadership seems to have lost the morale to fight it. This should be coupled with the requirement in the public service for higher ethical standards. In countries where the fight against corruption has relatively succeeded, political leaders are always at the fore front of anti-corruption efforts.

The fight against corruption cannot succeed where there is a weak Judiciary. Consequently, the government must implement targeted and comprehensive judicial reforms to facilitate the quick resolution of corruption cases. This will expedite the hearing and determination of civil cases filed by the government and public entities seeking recovery of wealth acquired corruptly.

Since the prosecutorial role of corruption cases is vested in the AG through the Director of Public Prosecutions, it is important to equip the personnel in this department with the requisite skills to ensure successful prosecution of corruption cases.

It is important for the government to collaborate with other States in the fight against corruption. Such international cooperation will assist in the tracing of offshore accounts and investigations of suspect international transactions. At the

international level, there are two main anti-corruption instruments relating to the fight against corruption. The treaties are the African Union Convention on Preventing and Combating Corruption and the UN Convention against Corruption. Though Kenya is yet to ratify the treaties, they underscore emerging international consensus on the urgency of implementing effective strategies to fight corruption and the importance of international cooperation in fighting the vice. Kenya should ratify these treaties to demonstrate its commitment in eradicating the vice.

Anti-graft efforts must be directed at the systems of public procurement. Parliament enacted the Public Procurement Act and the government which is now in the process of implementation. However, procurement rules for all public agencies must be harmonised and compliance monitored closely since most corrupt schemes revolve around public procurement. **KN**

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.

Contact address

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

MEDIA
DEVELOPMENT
ASSOCIATION

*Promoting
Democracy and
Good Governance
through the
Media*