# KatibaNews

Towards a new constitutional dispensation in Kenya

JULY 2008

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## Kimunya's exit

- The land of endless commissions
- Changing the constitution
- Katiba briefs
- Crisis of confidence

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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.

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

This newsletter is meant to:
1 Give critical analysis of democracy and governance issues in Kenya.

2 Inform and educate readers on the ongoing Constitution Review Process.

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## THIS MONTH JULY 2008

# Contents

2 Kimunya's exit
Witch hunt or real Government?

6. The land of endless commissions

10. The constitution must be changed

13. Katiba briefs

14. Crisis of confidence
Legal questions in parliaments vote of censure

# Kimunya's exit
## Witch hunt or real Government?

*By Macharia Nderitu*

It seems the government nowadays is working in mysterious ways. The recent spectacle over the selling of the Grand Regency hotel exposed deep rooted doubts on whether members of the government are reading from the same script or it is back to the old nasty and vicious political games.

Kenya has had its fair share of allegations of corruption during both previous and current regimes involving high level public servants and politicians. Indeed, the prevailing view is that Kenya's political leadership has not demonstrated the necessary political will to root out the culture of corruption that pervades the public and private sectors. Political will refers to the demonstrated credible intent of political actors to attack perceived causes or effects of corruption at a systemic level. It is a critical starting point for sustainable and effective anti-corruption strategies and programmes.

The vote of censure passed by Parliament on July 2, 2008 in regard to the repossession and subsequent sale of the Grand Regency hotel has brought into focus the role of Parliament in improving governance, and particularly in checking corruption.

### Parliament and corruption

Members of parliament have a common responsibility to promote systems of good governance centred on active citizenship. Parliament is viewed as having the mission to provide an enabling environment for the development of democratic governance and strengthening accountability, transparency and participation. Parliament often fails to serve as an effective institution of accountability because of highly centralised and executive dominated systems of governance with weak parliamentary, judicial and local government institutions. The strengthening of parliament has been a key plank of the demand for constitutional reform in Kenya.

Parliament needs to evaluate keenly the process of developing and implementing laws to incidences of secrecy which may potentially lead to corruption and maladministration. Parliamentary accountability is at the heart of ministerial responsibility. These responsibilities include political accountability for policies and other political acts and decisions; administrative accountability for the management and administration of public programmes and services; and financial accountability for the expenditure of public funds.

Hon. Amos Kimunya, former Finance Minister

Parliament offers a very conducive forum for addressing the problem of corruption. In the traditional system of separation of powers, parliament offers the necessary checks and balances against the excesses of the Executive and the Judiciary. Parliament plays a crucial anti-corruption role through the agency of legislative watch-dog committees, debates on motions and vetting processes.

The process of strengthening parliament has sought to enable it to play an enhanced and effective watchdog role. This involves controlling corruption and oversight on ministries in their expenditure. It includes an expanded role in budget making. There is increased public interest in the work of departmental committees.

continued pg. 3

from page2

## Parallel investigations: Complementarity or obfuscation?

The sale of the Grand Regency hotel is under investigation by at least four institutions with complementary, overlapping and sometimes competing mandates. The attorney general directed the commissioner of police to investigate the matter and file a report with his office. The parliamentary departmental committee on Finance and Trade is conducting hearings on the matter and will soon be tabling its report in Parliament. The president has appointed a commission of inquiry to examine the appropriateness of the sale and make recommendations. The commission has invited submissions from the public on the matter and will start its hearings soon. It is expected to submit a report within a month.

In exercise of its statutory mandate, the Kenya Anti-Corruption Commission (KACC) should similarly be conducting independent investigations. The commission was at the centre of the 'alleged recovery' of the hotel from Uhuru Highway Development Company Limited. These parallel investigations show poor coordination in governmental investigatory functions. Further, the different investigatory agencies do not seem to complement each other, will report to different institutions and offices and are likely to develop conflicting opinions on the appropriateness of the sale.

The prime minister has also constituted an inter-ministerial committee to probe the matter. However, some of the members of this committee are potential witnesses or participants in the sale of the hotel. For instance, as the chief government legal adviser and prosecutor, the AG has all along been in charge of prosecuting 'Goldenberg cases' without much success. KACC director Justice Aaron Ringera who was present at the handing over of the hotel and participated in the negotiations for amnesty with the alleged principal architect of the Goldenberg scam and former hotel owner Kamlesh Pattni. Another example is Hon James Orengo, who is the Minister for Lands and whose ministry officials registered the transfer of the land

## Parliamentary assertiveness

Parliament has increasingly asserted its independence from its rubberstamp role in the 1970's and 80's. The vote of censure on the former Minister of Finance Hon Amos Kimunya is evidence of this assertiveness. Kimunya had proposed that the allowances of MPs and other constitutional office holders should be taxed during this year's budget. The vote of censure came soon after the reading of the budget and it is clear that many MPs oppose taxation of their allowances. There is a possible link between MPs displeasure with Kimunya as the Finance minister and the unanimity in the vote of censure. This was evidenced by the references by MPs to the minister's perceived aloofness to other MPs during the debate on the motion of censure.

Parliament has shown its potential in keeping the Executive in check through a vote of censure. This is the second vote of censure in Kenya's parliamentary history after the one passed to former Vice President, Dr Josephat Karanja, in 1989. It was clear that the vote and subsequent resignation of Dr Karanja was orchestrated by forces high up who had used MPs to achieve their objectives.

## The selling of Grand Regency

The Central Bank of Kenya (CBK) disposed off the hotel in exercise of chargee's statutory power of sale. This charge on the hotel by CBK was irregular from the beginning as the government's banker has no statutory mandate to lend money to individuals or private enterprises. The charge was created after Kamlesh Pattni, the owner of the hotel through Uhuru Highway Development Company Limited, presented three cheques in payment of a debt owed to CBK but which were dishonoured. He subsequently deposited the title of the hotel as security for the debt.

The law provides two modes of realisation of securities, such as land, charged to a bank. One method is sale through a public auction where the bank instructs an auctioneer to sell the property by public auction after advertising it. The other mode is sale through private treaty. CBK sold the property through private treaty explaining that it was convinced it could get a better price through this method rather than through

continued pg. 4

*Hon. James Orengo, Minister for Lands*

*The real seat of power.*

from page 3

auction. The sale was through invitation of selected international and local bids. Prior to fixing the reserve price, the hotel was valued by the chief government valuer and three consultancy firms appointed by CBK.

A charge does not confer proprietary right to the chargee. In essence, CBK never owned the hotel. The hotel was never transferred from Pattni's company to the bank. The bank was simply supposed to recover the debt due from the company. If the company paid the debt to CBK prior to the sale, the hotel would revert to it.

The Minister of Lands had no direct role to play in the approval or registration of the transaction. The registration of transfers is the sole prerogative of the Registrar of Titles, which is an office constituted by statute. The KACC has no mandate of terminating criminal prosecutions commenced by the AG. Their purported attempt to terminate criminal prosecution has no basis in law and is unconstitutional.

The main actor was the Central Bank who was the chargee of the property. The supervisory mandate of the Minister for Finance does not extend to directing CBK on its operations. The bank is operationally independent in its actions and the Governor has security of tenure.

## Flouting of Laws

### 1. Public Officers Ethics Act

Section 8 of the Act provides that a public officer shall carry out his duties to ensure that the services that he provides are provided efficiently and honestly. Section 9 of the Act provides that a public officer shall maintain public confidence in the integrity of his office. Under Section 10(1) of the Act, a public officer is required to carry out his duties in accordance with the law. Section 11 (1) of the Act provides that a public officer shall not use his office to improperly enrich himself. By authorising the sale of the hotel, the CBK Governor, the former Minister for Finance and other officers involved in the sale could have breached the Act if it is proved that they or any of them did not adhere to the laid down legal procedures. However, investigations currently underway must be completed before passing judgement on their culpability.

Section 19 provides that a public officer shall not knowingly give false or misleading information to members of the public or to any other public officer. The former Finance minister made a statement in parliament that the hotel had not been sold when a contract had already been designed regarding its sale. If proved that the minister knowingly misled the House, he could be charged under this section.

### 2. Anti-corruption and Economic Crimes Act

Section 46 provides that a person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence. Section 47(1) provides that a person who deals with property that he believes was acquired in the course of or as a result of corrupt conduct is guilty of an offence. Dealing means entering into a transaction in relation to the property or causing such transaction to be entered into. If the hotel can be categorised as property falling under the section, any person who authorised its sale can be charged.

### 3. Public Procurement and Disposal of Assets Act; the Privatisation Act

The argument has been that the hotel was public property and hence could only be sold in compliance with these Acts. The Privatisation Act regulates mode of implementation of privatisation programmes by the government. Since the hotel was subject to a charge by the Central Bank, the legal position is that the hotel was never a public asset to which the Acts are applicable. Further, CBK could not manage the hotel as the Act prohibits it from undertaking commercial enterprises.

## United and effective grand coalition in the run up to 2012

The passage of the vote of censure on Kimunya is an indication of a fractured government. Some of the ministers from the Party of National Unity who were in Parliament during the debate did not rise in support of the embattled minister, notably Hon Martha Karua, the Minister for Justice, National Cohesion and Constitutional Affairs. The minister, who sits in the house business committee, also chaired the committee session that approved the tabling of the censure motion

continued pg. 5

from page 4

and allotted parliamentary time for its debate.

Prime Minister Raila Odinga also denied he was briefed on the sale though he admitted meeting the CBK governor on the matter. But although his role is legally amorphous and perhaps would fall under the function of supervision of government, it means that ministers are not updating him on their dockets as required by law. The vote exposed the possibility of MPs using parliament to settle political scores.

The vote of censure demonstrated evident collapse of principle of collective responsibility, without which the government cannot function. Under section 16 of the Constitution, cabinet decisions are required to be collective and collegial. Hon Orengo and Hon Kimunya have issued notices of intention to sue each other on the basis of defamatory remarks relating to the transaction. Initiation of such legal proceedings further undermines the principle of collective responsibility.

The role of the office of the PM is to supervise ministries and co-ordinate government operations. The PM also attends to cross cutting issues on government functions. For example, he chaired the inter-ministerial committee on the sale of Grand Regency and the inter-ministerial meeting on the Mau Forest. He also led a delegation on investments to London on behalf of the president.

The Constitution does not prescribe the mode of enforcement of his powers of supervision. He has to resort to political sanctions in enforcement of his decisions. Likewise, the standing orders and the Constitution do not envisage a role of the PM in Parliament. He is not the leader of government business and neither does he sit on the HBC. Though his party has dominant control of parliament, the PM has faced outright opposition from some MPs from his party.

For example, despite his opposition to the formation of a grand Opposition, rebel MPs in his party are still championing its formation. MPs from the South Rift have openly complained of not being rewarded with cabinet posts in the grand coalition government. No specific time is allocated to the PM to address parliament. Overall, his office has ineffective sanctions against ministers nominated by parties other than his own. Only the president, as the appointing authority, may discipline ministers from all parties.

## Conclusion

The principal challenge in assessing political will in fighting corruption is the need to distinguish reform approaches that are intentionally superficial and designed only to bolster the image of political leaders, and substantial efforts that are designed on strategies to create change. An initial indicator is the degree of analytical rigor that is utilised to understand the circumstantial complexities that give rise to corrupt behaviour.

Another indicator is the extent to which the government has made the process of combating corruption participatory. The structure of combating corruption should have a system of incentives and sanctions. The record of failure is exceedingly high for measures that use prosecution as the principal tool for compliance.

An elected legislature is a fundamental pillar of any integrity system based on democratic accountability. Its task is to express the sovereign will of the people through their chosen representatives who, on their behalf, hold the Executive accountable. Watch dog, regulator and representative, parliament is at the centre of the struggle to attain and sustain good governance and to fight corruption. To effectively execute these roles, parliament must be comprised of individuals of integrity. An elected parliament is the essence of democracy. Indeed, democratisation in itself presents an opportunity to control systemic corruption by opening up the activities of public officials to public scrutiny. Democracies reduce secrecy, monopoly and discretion.

Public declaration of wealth by ministers and other public servants will enable the public to audit the wealth of public officials. Keeping public wealth secret defeats the overall and primary purpose of the Public Officers Ethics Act. The AG must condemn the corrupt acts and prosecute those mentioned or involved in such deals. The misappropriation and misuse of public resources by public officials amounts to corruption and contributes to further impoverishment of the population.

Corruption is a problem concerning individuals and may not be cured by amending the relevant laws or even the Constitution. In any event the current laws proscribe corruption yet it is still perpetrated with abandon by some public officials. Corruption at all levels of government can be effectively curbed if people have the knowledge and the ability to hold the government to account. Education is critical as well as access to information and freedom of the Press. Proper government systems must be put in place to enhance the capacity for strict financial management and monitoring. Parliament should have a statutory role of overseeing the spending of public resources. KN

The writer is a lawyer practicing in Nairobi.

# The land of endless commissions

By Miriam Kwamboka

If it is broken, set up a commission of inquiry and somehow people will forget. It is a game that the government has perfected. Commissions of inquiry have become a never-ending feature in our country's governance. So what is the sum game of all these commissions?

The commission of inquiry is a derivative from the royal commissions which are formed in the United Kingdom by the monarch. In Kenya, commissions are formed under the commissions of Inquiry Act, Chapter 102 of the Laws of Kenya. The commissions are usually mechanisms to help the government investigate matters of public concern. However, they are not intended to supplement or replace constitutional and legislative organs of the State such as statutory commissions like the Kenya Anti-Corruption Commission, the Kenya National Commission on Human Rights and constitutional organs like parliament, the police and the Judiciary.

## The Commonwealth

In the UK royal commissions are committees of inquiry established by royal charter or warrant at the behest of the cabinet to look into issues of considerable public importance. Their membership and precise terms of interest is set by a member of the cabinet. It is intended that their collection of evidence, deliberations, and submission of a report to the cabinet are carried out independently. Royal commissions have an educative impact and may contribute policy proposals which are taken up by the cabinet. They are sometimes used as vehicles for diffusing political problems, or are overtaken by the need to respond to events more rapidly. The Commissions fell out of favour in the UK after 1979 but are still occasionally used on major issues such as the future of the House of Lords in 2000. The idea of setting up commissions has been adopted by many Commonwealth countries.

*The Kenyatta International Conference Centre is the house of commissions*

In States that are Commonwealth realms, a royal commission is a government public inquiry into an issue. They have been held in States such as Canada, Australia, New Zealand and Saudi Arabia. In Hong Kong, Kenya, Tanzania, Ireland and South Africa, a commission of enquiry/inquiry is similarly structured.

A royal commissioner has considerable powers restricted to the "terms of reference" of the commission. The commission is issued by the head of State (sovereign, governor-general or governor) on the advice of the government and formally appointed by Letters Patent. In practice - unlike lesser forms of inquiry - once a commission has started the government cannot stop it. Consequently, governments are usually careful in framing the ToR and generally include in them a date by which the commission must finish its mandate.

Royal commissions are called to inquire into matters of great importance and controversy. These can be matters such as government structure, the treatment of minorities, events of considerable public concern or economic questions. Some critics accuse royal commissions of being a way to end public criticism of government inaction.

Many royal commissions last many years and, often, a different government is left to respond to the findings. In Australia, and particularly New South Wales, royal commissions have been investigations into police and government corruption and organised crime using the very broad coercive powers of the royal commissioner to defeat the protective systems that powerful, but corrupt, public officials had used to shield themselves from conventional investigation.

Royal commissions are chaired by one or more notable figures. Due to the quasi-judicial powers, the commissioners are often retired senior judges. Royal commissions usually involve research into an issue, consultations with experts both within and outside of government, and public consultations. The warrant may grant immense investigatory powers, including summoning witnesses under oath, offering of indemnities, seizing of documents and other evidence sometimes including classified information, holding hearings *in camera* if necessary and, in a few cases, compelling all government officials to aid in the execution of the commission.

The results of royal commissions are published as massive reports of findings containing policy recommendations. While these reports are often influential, with the government enacting some or all recommendations into law, the work of some commissions has been almost

continued pg. 7

from page 6

completely ignored by the government. In other cases where the commission has departed from the warranted terms, the commission has been dissolved by the courts.

## Legal framework in Kenya

Commissions of Inquiry Act, Chapter 103 of the Laws of Kenya provides for the setting up of commissions of inquiry. The Act provides that the president may appoint a Commission to inquire into and report on matters of a public nature referred to the commission by the president. The president has power to prescribe its powers, privileges and duties, and other related matters.

Section 3(1) of the Act provides that the president may, whenever he considers it advisable to do, issue a commission to inquire into the conduct of any public officer or the conduct or management of any public body, or into a matter that is in his opinion in the public interest. The commission shall specify the matter under inquiry and how the commission shall be executed. When making the appointment the president may designate a commissioner as the chairperson. He also has power to appoint a new commissioner if a sitting one dies or is unwilling to act, or in his or her opinion such person is unsuitable to continue serving as commissioner. The president may also appoint a secretary to the commissioners.

A commission set up under the Act has power to summon witnesses and reprimand persons who refuse to appear before it. However, it does not have power to jail or pass sentences on an individual. The nature of proceedings is quasi judicial. Persons mentioned adversely in commission proceedings are permitted to be present at the hearings either in person or through an advocate and ask witnesses questions as appropriate. Such a person may also adduce evidence before the commission in refuting other evidence presented to the commission. The time taken by a commission to complete its work may vary depending on its ToR and the nature of the matter under inquiry.

According to the Act, evidence adversely affecting the reputation of an individual shall not be received unless the commissioner is satisfied of its relevance to the inquiry. Persons mentioned adversely are entitled to a notice of the nature of the evidence or a general nature of the evidence to be presented. The Act empowers the commission to direct that the public shall not be admitted to all or part of its proceedings for purposes of preserving order, protection of the person, property or reputation of any witness at the inquiry, or anyone referred to during the proceedings.

The commissioners have a duty to make a full, faithful and impartial inquiry into the matter into which they are commissioned to enquire, to conduct the inquiry in accordance with the directions of the commission and to report to the president in writing the results of the inquiry and the reasons for the conclusions. The commissioners must subscribe to an oath prior to commencing the inquiry.

Where required, the commissioners should submit a full record of the proceedings of the commission. The commissioners and the secretary shall not be liable to any civil action in relation to acts of omission or commission done in good faith in relation to the commission. On completion of the probe, the commissions submit their findings to the president who may authorise the release of the report to the public. However, most of the reports are never released to the public.

## Types of commissions of inquiry

Traditionally, a distinction has been drawn between common law commissions and statutory commissions. Any body of persons, whether private or public, is competent to establish a common law commission. Religious and communal bodies have from time to time established commissions into matters affecting the interests of the institution in question. Also falling under the category of common law commissions are commissions of inquiry established by the head of State acting in terms of the prerogative powers.

Some Constitutions expressly confer upon the head of State the power to appoint a commission. Commissions appointed by heads of State by virtue of common law or constitutional sources of power are sometimes referred to as "executive commissions". Some Constitutions also make provision for the appointment of specific standing commissions such as human rights, equality, gender and electoral commissions. Such commissions are referred to as "constitutional commissions".

Commissions created by statute are known as statutory commissions. Examples of such commissions include national youth and sport commissions and long term inquiries into political violence. In recent years a species of commission known as "truth and reconciliation" has been developed under this category. Such commissions have been set up in post conflict societies to establish an accurate and impartial account of the past, address the needs of victims, and recommend measures to prevent the repetition of conflict. Such commissions can play instrumental roles in the important tasks of rebuilding shattered lives and destroyed institutions. The Truth, Justice and Reconciliation Commission proposed in Kenya as part of the mediation agreement will be formed under an Act of Parliament and will, therefore, be a statutory commission.

## How commissions operate

Commissions have to act within terms of reference. These generally include a date by which the commission must complete its work and provide a report. A commission of inquiry normally determines its own procedure. For example, it may divide into sub-commissions or committees, each carrying out one or more particular functions on behalf of the commission.

The proceedings of commissions usually involve the carrying out of investigations as well as functions that sometimes resemble the conduct of adversarial contests such as those

continued pg. 8

from page 7

which occur in courts. Often a commission will commence with an investigation and culminate in an adversary situation in the form of hearings. However, a commission is not a court of law. There are no issues for it to try; there is neither plaintiff nor defendant. A commission does not perform the functions of a prosecutor and there are no accused persons. Since a commission is expected to get to the truth of the matter, most commissions adopted an inquisitorial approach to fact finding instead of the adversarial approach normally adopted in the courts.

Even though a head of State is not bound to accept findings nor implement recommendations, serious repercussions may still flow from findings and recommendations made by an inquiry. For this reason procedural fairness is normally adhered to during the course of inquiries - which is why commissions are sometimes referred to as quasi-judicial, and are often chaired by retired or serving judges.

A commission is responsible for collecting evidence and obtaining statements from witnesses. It may receive evidence either orally or in writing. It may consider information of any nature, including hearsay evidence and newspaper reports, or even submissions and representations that are nothing more than opinions. Statute law inevitably grants commissions authority to summon and examine witnesses, administer oaths and affirmations and to call for the production of books, documents and objects – inclusive of classified information.

## Past experience

The relevance of commissions of inquiry has been questioned due to non-implementation of recommendations. Many of the reports compiled by commissions are never released to the public. For example, the (Paul) Ndung'u Commission on Illegal and Irregular Acquisition of Public Land, the Justice (Evans) Gicheru Commission of Inquiry on the Death of Hon Dr Robert Ouko, and the Goldenberg Inquiry have never been fully released to the public. Further, there has been little official attempt to implement most of the recommendations generated by the commissions.

Commissions seem an important tool for deflating political tension in the country by postponing Executive action. Commissions are tools for lessening political pressures. The commission of inquiry into the murder of Dr Ouko was formed to diffuse tension arising from mass protests in the wake of the murder of the former minister. However, the commission was disbanded before completing its work.

Some commissions have done excellent work, for example, the commission which researched on the Law of Succession. Its report led to the enactment of the Law of Succession Act. Another commission chaired by Justice Alan Hancox on insurance companies led to the revision of the Insurance Act.

## Other Modes of Inquiry

### i) Parliamentary committees

These operate under the provisions of the Standing Orders and are composed of MPs. Such committees submit their reports to parliament. Parliament may form a select committee to investigate and report on a particular matter of national importance, for example, the select committees that investigated the murders of Hon J. M. Kariuki and Dr Ouko.

### ii) Taskforces and probe teams

They are usually appointed through a ministerial directive and are therefore not commissions under the Act. Many task forces have been formed in particular ministries to deal with specific issues. In the 1990's, the AG set up taskforces to spearhead recommendations on key areas of law reform. Some of the areas included children law, press law, penal law reform, tenants and landlords and company law. Many of the recommended reforms were implemented.

## Criminal law versus commissions of inquiry

It is not ironical that commissions can nurture impunity due to the fact that no persons, especially senior politicians and government officials, are prosecuted after the recommendations. In fact, the commissions seem to serve as an easy route to unofficial but state cordoned amnesty. Impunity for human rights violations and abuses has remained rampant in Kenya. In 1998, the government set up the Akiwumi Judicial Commission of Inquiry on Tribal Clashes, named after its chair, Judge (Rtd) Akilano Akiwumi. It heard testimonies from over 200 witnesses of ethnic violence across Kenya in the run-up to the 1992 and 1997 general elections. The violence had led to ethnic killings and displacement of thousands of people.

The commission submitted its report to former president Daniel arap Moi in March 1999. The report recommended that several former cabinet ministers and other senior government officials be investigated for their role and involvement in the violence and be prosecuted where evidence points to their criminal responsibility. The government has not taken any action on this recommendation to date. None of the individuals mentioned in the report have been investigated and/or brought to justice, something which would have averted the widespread violence that followed the December 2007 General Election.

## Remuneration

The commissioners and the secretaries are paid hefty allowances though this is dependant on provision by the commission. A commissioner is entitled to be paid expenses incurred by him/her in holding the inquiry and costs of employing staff to assist the commission. The manner of appointment is not consultative. The Act empowers the president to set up a commission at his own discretion, with reports submitted to him. The commissions generate recommendations and their decisions and recommendations are subject to review by the courts. Commissions

continued pg. 8

from page 8

must gazette their rules of procedure.

The Act provides that Chapters XI and XVIII of the penal code are applicable to the proceedings of the commissions that are deemed judicial proceedings. These chapters create offences that relate to administration of justice such as perjury, destruction of evidence, conspiracy to defeat justice, interference with witnesses and provision of privilege from allegations of defamation in judicial proceedings.

### Independent Review Commission and the Commission on Post Election Violence

On March 4 this year, parties to the political mediation agreed on the establishment of a Commission of Inquiry on the Post-Election Violence in Kenya. According to the mediated agreement, the commission's mandate includes an investigation of the facts and surrounding circumstances related to acts of violence that followed the December (2007) elections, the actions or omissions of State security agencies during the course of the violence and make recommendations as necessary. The mediated agreement provides that the establishment of the inquiry aims to prevent any repetition of similar deeds and, in general, to eradicate impunity and promote national reconciliation in Kenya. According to the mediated agreement, the inquiry will also be mandated to recommend measures of a legal, political or administrative nature as appropriate, including measures with regard to bringing to justice those responsible for criminal acts.

The inquiry should investigate human rights abuses by both State and non-State actors, and hence include an investigation of the organised and/or spontaneous nature of the post-election violence, the involvement of different armed youths/groups, the role played by politicians in the violence and, the role of the police and other security forces.

Under the mediated agreement, the inquiry will be composed of three impartial, experienced and internationally respected jurists, or experts in addressing communal conflict or ethnic violence. Two of the commissioners are international and one is Kenyan. According to this agreement, the commission shall develop its own work plan and procedures. These will be guided in all respects by principles of fairness, impartiality, transparency and good faith.

The agreement also provides that "Kenyan authorities, institutions, parties and others shall fully cooperate with the inquiry in the accomplishment of its mandate, in response to requests for information, security, assistance or access in pursuing investigations". The commissioners have taken office and commenced public hearings. The commission is chaired by Court of Appeal Judge Philip Waki. Other members are Gavin Mc Fadyen and Pascal Kambale.

The commission must be complementary to the legal system. It should not become a substitute for an independent, impartial and properly resourced judiciary whose rulings are enforced. It should complement pending or ongoing criminal investigations into the post-election violence. If the inquiry obtains information indicating that identified individuals may have been responsible for committing, ordering, encouraging or permitting human rights abuses, that information should be passed to the relevant judicial or law enforcement bodies for investigation with a view to bringing them to justice. In carrying out its inquiry, the commission should bear in mind the rules and conditions for the admissibility of evidence in the criminal process and should ensure that it produces admissible evidence for later criminal proceedings.

The commission should also have the power to recommend changes in law, political or administrative procedures and practice, including mechanisms for training and accountability, disciplinary and other administrative measures against responsible State officials, in particular the police. The results of the inquiry and the commission's recommendations should be officially proclaimed, published and disseminated in a public report issued without undue delay.

The Independent Review Commission was formed as part of the mediation agreement to review and recommend changes to the electoral laws with a view to preventing post election crises in future. The commission is in the final stages of public hearings and its report is expected soon. It is chaired by a former South African Judge Johann Kriegler and has six members.

### Recommendations for reform

Reports of commissions are usually not released to the public. The Akiwumi Report on Ethnic Clashes was released after a court order was granted by the High Court compelling its release. Other reports have been released after inordinate delays. There is need for a Freedom of Information Act that will facilitate access to information generated using public funds.

The Commissions of Inquiry Act should be reformed to include a criteria for categorisation of commission reports into confidential and for public release. The confidential sections should be released to a designated body like a parliamentary committee. Some of the recommendations by the commissions may have adverse political consequences to the Government, hence the usual delay in releasing them. For example, the Akiwumi report listed senior government officials as culpable in sponsoring ethnic clashes.

Parliament should approve all requests by the President for the formation of a Commission. The Commission of Inquiry's terms of reference, appointment of the members of the Commission, the establishment of the Commission and its operation must ensure its independence, impartiality and thoroughness. Members of the commission should be appointed on the basis of their recognized impartiality, competence, integrity and independence as individuals. KN

The writer is Master of Arts student in politics and governance in the United States.

# The Constitution must be changed

The chairman of the International Commission of Jurists (ICJ), Kenya Chapter, Mr Wilfred Nderitu (pictured), is a visionary. We bring you excerpts from a recent interview with *Katiba News.*

*By Katiba News correspondent*

Q. Please give us a brief background of ICJ-Kenya and its mandate.

A: The Kenyan Section of the International Commission of Jurists (ICJ-Kenya) is a member-based, non partisan, non-profit organisation that is registered under the Societies Act. It is an autonomous section affiliated to the Geneva based ICJ and with similar policy and goals namely, the promotion and protection of systems that foster good democratic governance, the rule of law and respect of all human rights. ICJ-Kenya has been working in Kenya and around the African continent since 1959 by organising activities and programmes that inform, agitate and advocate, in an innovative manner, for the recognition and protection of human dignity at all times.

Q. The constitutional review exercise has now taken us about two decades without success. What reasons do you attribute to the status quo?

A: I think the first and most important reason for the stalling-jumpstarting-stalling vicious cycle in constitution-making has been lack of political goodwill. It needs to be remembered that the clamour for constitutional review started during the early days of multi-party politics under the former president Daniel arap Moi regime. The prime mover for this clamour was civil society, which was largely regarded by Moi as the 'unofficial opposition'. Thus, when Moi seemingly gave way for the process of constitutional reform to commence he was, so to speak, giving with the one hand and taking away with the other. It is unimaginable that he could have been giving his nod for civil society to have its way.

Those surrounding Moi and who favoured his authoritarian rule saw that the formula worked well for him. So when they 'crossed over' in 2002 and joined government upon Moi's retirement, they would be the last to change what they saw as a winning formula. The change in regime in 2002 was to that extent a mere change of guard rather than a change in ideology. The so called agents of change were assimilated into an ideology that was antipathetic to change, and they eventually became all agents and no change.

The second most important reason for the circumstances we find ourselves in has been lack of goodwill from the Kenyan people themselves. We have left constitution-making to politicians, which is inarguably a very dangerous thing to do as politicians have vested interests in the constitutional review process, particularly on the question of devolution of power. The danger of leaving constitution-making to politicians is best exemplified by the fact that almost all civil society crusaders who were later voted into parliament on a constitutional change platform - be it in 1997 or in 2002 - almost immediately abandoned their crusade for constitutional change. I hope that this time the citizenry will be at the forefront in agitating for change and participating in the processes that will guarantee such change.

Q. The coalition government has reiterated its commitment to continue the process in earnest. In what ways can the process be jumpstarted and how would ICJ-Kenya contribute?

A: The starting point for jump starting the process is the enactment of the Bill providing for the review process, together with a separate Bill for amending the current Constitution itself. Both these Bills have already been published. The amendment Bill

*ICJ-Kenya Chairman, Wilfred Nderitu*

provides for the procedure for replacing the current Constitution with a new one, which includes the ratification of such a new constitution through a referendum. The review Bill provides, *inter alia*, for the establishment of a Committee of Experts to identify both agreed and contentious issues in the existing draft Constitutions, to receive presentations on the contentious issues, make recommendations and prepare a draft Constitution for presentation to Parliament.

The Review Bill also provides for the holding of a referendum. In the memorandum of objects and reasons, the Bill states that it seeks to "give effect to the completion of the comprehensive review of the Constitution", which the National Dialogue and Reconciliation Committee (NDRC) resolved to do within a period of 12 months. So, in a manner of speaking, the road towards a new Constitution is in the process of being restarted. It is certainly expected that the two Bills will be debated in Parliament sooner rather than later.

continued pg. 11

from page 10

The NDRC envisaged the enactment of a constitutional review Bill within eight weeks from the date of signing the agreement on March 4, 2008 – that is, by the end of April. We are already in August, yet the Committee on Legal Affairs and Administration of Justice is still receiving representations. Of course, it is becoming increasingly evident that a one year period for the completion of such an enormous task, even barring the disagreeable socio-political milieu, was far too ambitious. This notwithstanding, it is a worrying trend that there is little to show for the review process, and it looks as if the momentum is being lost. I hope that this is a mere perception.

Against this background, ICJ-Kenya has proposed essential and targeted reforms which will include a complete overhaul and reconstitution of the Electoral Commission of Kenya and the Judiciary. We hold the view that undertaking the review process before restoring confidence in fundamental institutions linked to the process would be putting the cart before the horse. After the passing of these essential amendments, Bills aimed at completing a comprehensive constitutional review process would be passed. Under this process, we propose the establishment of a National Constituent Assembly made up of one person from each of the 210 constituencies, and including a further 90 persons to represent various minority/special interest groups.

We think that a Constituent Assembly is paramount if the process is to be seen to be inclusive. We are also proposing the establishment of a Panel of Experts (not the committee of experts contemplated by the published review Bill) who will sieve those nominated to the Constituent Assembly and provide guidelines for those to be nominated as well as oversee the process of composition of the Constituent Assembly. We propose that a Constituent Assembly, representing all parliamentary constituencies, rather than a Committee of 7 Experts as proposed in the review Bill, be charged with the responsibility of coming up with a new draft, guided by the "Wako" and "Bomas" drafts. We are also proposing that the draft be thereafter forwarded to the Judiciary for certification by a panel of judges; that is, for an audit to test its applicability and strength to withstand Judicial scrutiny. Thereafter, the Constituent Assembly will, if necessary, revise the draft and then present a final draft to the Attorney General for publication. Finally, a referendum to ratify the Constitution will be held.

In terms of time frame, I think that we should give ourselves two-and-a-half to three years on the outside for the entire process. This would bring us to early or mid-2011 at the latest, and still give us some time to operate under a new Constitution before we go into the next elections. I hold the view that it is better to take time and get the process right once and for all rather than rush into it and disturb a very fragile peace.

Q. Do you think there is genuine political will to get a new Constitution or do politicians just use the platform simply as a campaign tool?

A: History has taught us that politicians will always be quick to play 'the Constitution card' as a campaign tool in whichever way the 'card' gives them utmost advantage. But they just as quickly abandon the issue altogether once campaigns are over and there is nothing to gain personally from the position they had taken in the constitutional debate. I think it would be too simplistic to think that the position will be any different this time round. But having said that, I think there is now ample 'people will', if I may coin the phrase, to see that the process is finally done and done right. It is the people, not the politicians *(pun intended)*, who will deliver us from the evil of not having a new Constitution.

Q. Basically, what would you say an ideal Constitution for the country should contain?

A: In my view, an ideal Constitution must comprise, first and foremost, a comprehensive Bill of Rights. The *sine qua non* for the existence of a human being as a human being is her/his ability to enjoy certain fundamental rights and freedoms. Without enjoyment of these rights and freedoms, democratic governance and devolution of power, separation of powers, a sovereign parliament and an independent judiciary all mean nothing. And when I talk of fundamental rights and freedoms, I mean rights and freedoms which will provide an enabling environment for the protection of human dignity, and which promote non-discrimination, equitable sharing of land and other resources, and a sustainable environment. The other issues I have mentioned - devolution, an independent judiciary, etc - are matters that must go into any ideal Constitution.

Q. There has been a school of thought that holds we really do not need a new Constitution. What is your opinion?

A: I would like to say that I do not believe that there is really such a school of thought, in the sense of a philosophical system, that sincerely believes there is no need for a new Constitution in Kenya. What is happening in reality is that there are certain politicians, guided by their own selfish ends, who would want maintenance of the constitutional *status quo*. For a good majority of Kenyans, the current constitutional dispensation results in social injustice and marginalisation due to the very wide powers given to the Executive. It is, therefore, a lack of candour, rather than anything else, that accounts for the fact that such a suggestion is gaining so much currency.

Q. What have been ICJ-Kenya's major achievements since inception?

A: ICJ-Kenya has, metaphorically speaking, come from very far. I have been a member of the organisation since 1993 and I, therefore, can only comment very authoritatively on achievements during that period. One of the major achievements during this period has no doubt been the preparation of the first draft of the proposed Constitution, something

continued pg. 12

from page 11

which has informed and inspired the pressure for amendment to the current Constitution. ICJ-Kenya has also been at the forefront for the agitation of a Freedom of Information Act. Indeed, we prepared a Bill several years ago from which the current Bill largely borrows from. Of course, we also take pride in having been the organisation that invited the eminent experts who came and unearthed the degree of rot in the judiciary, paving the way for the radical surgery conceptualised by Hon Kiraitu Murungi and implemented by Justice Aaron Ringera.

Q. Give us your evaluation of the so called radical surgery.

A: The purge on the Judiciary which was conducted through the (Justice) *Ringera* committee in 2003 was good, in a sense, but that is not to say that I have no misgivings about it. The purge was good because a time had come when judicial officers had become a law unto themselves, and justice was being sold in very much the same way as one would sell merchandise. Litigants would win awards of damages in situations they did not deserve, particularly in accident cases and in general commercial and civil litigation. Awards for personal injuries, defamation cases and ordinary commercial cases skyrocketed with serious damage to the body politic. Criminals walked out of court houses scot-free, and it is little wonder that the rate of crime continued rising. This had to stop.

What Hon Kiraitu Murungi should have done was to come up with a more encompassing surgery. In treating an infectious disease, you isolate all others who have been infected and treat them as well. You also destroy all micro-organisms or pathogens by cleansing. And you have to put the patient to sleep before the surgery! To take the point home, Kiraitu should have ensured that the committee's work was extended to lawyers, court clerks, clerks at chambers, police prosecutors and all other stakeholders in the justice system including litigants themselves. After all, it takes at least two to engage in corruption, be it bribery, undeserved favours or whatever form corruption takes. And I think it was also rather unfortunate that Kiraitu did not seize the moment to not only deal with corruption but also address the equally serious affliction that is judicial incompetence. There should also have been a well-thought out structure for dealing with corruption and incompetence in the future which, in my view, would be part of wide-reaching reforms within the Judiciary, the police and office of the attorney general.

Q. Are you satisfied with the status of the legal profession in Kenya – both the Bench and the Bar? If not, what reforms would you propose?

A: I am far from satisfied with the state of the profession, and it saddens me that every other day there is a lawyer charged with theft of clients' money. Our standards have really gone down. Although the Law Society of Kenya (LSK) has been hot on the heels of errant advocates, more needs to be done. For example, there needs to be a regular and structured review of advocates' trust accounts if clients are to be protected. Those who are suspected of corrupt practices should be severely dealt with. But that is not to say that there are no lawyers who are practising honestly and providing quality services for their clients.

Those who do so should be recognised by appointment to the Roll of Senior Counsel, appointments to which are currently done in a sporadic manner and without any measure of transparency. LSK should also more proactively defend its membership from excesses of the Judiciary, which include such matters as blanket refusal of advocates to make payment of court fees by cheque as a result of a few bouncing cheques. Matters such as dressing in lawyer's regalia should be standardised through intervention by LSK, or a case made out for their being done away with altogether.

So far as the Judiciary is concerned, I have always been an advocate for a more consultative and transparent Judicial Service Commission, so that appointments to and dismissal from Judicial office can not only be transparent but be seen to be so. The current qualification to be a judge in Kenya today – seven years post-admission experience - falls far short of what is required of an effective judge. Perhaps it was more appropriate when there was only a handful of advocates to pick from. The Bench, including the magistracy, is an important arm of government and the issue of security of tenure should be looked into with a view to expanding it for senior magistrates who technically work just as hard as judges; only often under more difficult circumstances. Their other terms and conditions of service must be constantly reviewed.

Q. What is ICJ-Kenya's official position on the amnesty debate?

A: Amnesty is a legislative or executive act by which a State restores those who may have been guilty of an offence against it or the position of innocent persons. It obliterates all legal remembrance of the offence. Within the context of offence committed by political actors against state power, this has been a popular solution. It is, however, certainly not an acceptable solution to dealing with crimes against humanity, and this position is increasingly becoming recognised by the international community.

Victims have come to be recognised in international criminal jurisprudence within the context of the International Criminal Court and other international tribunals. But it is not only for the sake of international courts and tribunals that the suggestion of amnesty should be repelled. Granting amnesty, as I said, obliterates all legal remembrance of the offence - but does it obliterate all legal remembrance of the harm? Obviously not! And it is this remembrance of harm that can turn victims into villains. Impunity throughout the world has been the major cause of genocide, crimes against humanity and other gross human rights violations. The culture of impunity has to stop if there is to be sustainable peace. And amnesty really is impunity euphemised. KN

# Katiba briefs

July 4: Members of parliament want the proposed National Ethnic and Race Relations Commission to be given adequate powers to check unfairness in the allocation of resources. According to the law makers, the commission will be expected to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence among Kenya's various communities.

July 6: The government has been asked to deliver on all its promises to carry out institutional reforms to promote peace in the country. Top among the issues that the US government want assessed is the stalled constitutional review process and, electoral and land reforms, which have eluded the country for decades.

July 7: Muslim leaders have called on the Justice, National Cohesion and Constitutional affairs minister to amend the proposed Constitution review Bills before they are debated in parliament. The supreme Council of Kenya Muslim (Supkem) told Ms Martha Karua that the Bills had overlooked various issues that would see them rejected by the House on technical grounds.

July 10: Only a new Constitution will ensure public property like the Grand Regency hotel is disposed off in a transparent and accountable manner, land minister Hon James Orengo says.

July 15: A parliamentary committee has rejected legislation proposing the creation of a commission on ethnic and racial relations. Members of the Administration of Justice and Legal Affairs committee scrutinised the National Ethnic and Race Relation Commission Bill and said it was faulty. Parliament had debated the Bill for two days and it was clear that MPs were divided over it.

July 23: Kenyans should demand a new Constitution before the next General Election to guard against flared-up of violence, a new report proposes. The report titled "Political Thuggery" says enactment of a new Constitution will enable the country to avoid a repeat of post-election crisis which occurred after last year's election.

July 25: Vice President Hon Kalonzo Musyoka says that only a new Constitution will guarantee peace and stability in the country.

July 26: Some religious organisations fault two Bills aimed at jump starting the proposed constitutional review process. The Ufungamano joint forum of religious organisations said the Constitution of Kenya (Amendment) Bill and Constitution of Kenya Review Bill are Parliamentary-focused" rather than "people-centered".

July 28: The Ethnic Relations Bill will soon be tabled in Parliament to help unravel the genesis of the post-election violence. VP Kalonzo Musyoka said the Act was important to help in the reconciliation process.

# Crisis of confidence

## Legal questions in Parliament's vote of censure

*By John Mambo*

Very rarely do our members of parliament come together and agree on a resolution. Unless, of course, either their collective or individual interests are at stake. The recent motion of censure against former Finance minister Amos Kimunya has created more questions than answers on the legality of such a move. Our writer takes a deep analysis of this development.

Votes of no confidence are the most important tools for parliament in the Westminster model of government, which is essentially a parliamentary system. The fate of a government is ultimately dependent on the support of a majority of MPs. The government needs the confidence of the House for the purposes of approval of the budget and enactment of legislation.

Confidence motions are particularly significant where - a government defeat is possible due to a minority government, where the government has a fragile majority, or where there is considerable internal party dissent. In the United Kingdom, a government is required to dissolve or resign in case of defeat. A significant defeat on any other motion may lead to a confidence motion.

There are three main forms of confidence motions. These include confidence motions initiated by the government, no-confidence motions initiated by the Opposition, and other motions which are regarded as confidence or censure motions. Whereas the government-initiated confidence motions are effectively dissolution threats, the no-confidence motions represent ultimate expression of parliamentary Opposition. They are attempts by the Opposition to remove and replace the current government. A government will only call for a vote of confidence when it has expectation of success. Most times, the Opposition calls for such vote even where it has slim chances of success.

There are certain characteristics that indicate a motion is a vote of confidence. These include:
Timing. Debate of a confidence motion will generally take precedence over the normal business of the day. Parliament may be recalled from recess for such a debate to take place.
Speakers. The debate will normally include speeches by the prime minister and the leader of Opposition, rather than the front benchers with responsibility for the policy area which is subject of debate.
Terms of Motion. The motion will include terms such as confidence or censure and the substantive motion may refer in critical or supportive terms to an issue of current political significance. There are clear, unambiguous confidence motions which the House is expected to vote on and which knowingly and directly determine the continued existence of the government. The other category contains censure motions.

Renowned parliamentary scholar, Erskine May, states that: "From time to time the Opposition puts down a motion on paper expressing lack of confidence in the Government – a 'vote of censure' as it is called. By established convention, the government always accedes to the demand from the leader of Opposition to allot a day for the discussion of such a motion. In allotting a day for this purpose, the government is entitled to have regard to the exigencies of its own business, but a reasonably early day is invariably found. This convention is founded on the recognised position of the Opposition as a potential government, which guarantees the legitimacy of such an interruption of the normal course of business. For its part, the Government has everything to gain by meeting such as direct challenge to its authority at the earliest possible moment".

The ability of a government to carry on in a parliamentary system, like the UK, depends on maintaining its confidence in the House of Commons. A confidence motion directly tests that confidence. The approval of a no confidence motion, therefore, proves that the government cannot continue governing effectively and must resign or seek the dissolution of parliament. Besides the vote of confidence in the government, other mechanisms that lead to change of guard are change in leadership of the ruling political party and fresh elections on conclusion of the term of the House.

### Collective responsibility and vote of confidence

The doctrine of ministerial responsibility is central to the British version of democracy. Britain has a strong executive and the effectiveness of democracy depends on the degree of control which parliament exercises over current government activities and, the extent of accountability including holding the government responsible for past actions. A major

continued pg. 15

from page 14

concern of political and constitutional reformers is to alter the balance between an Executive which is perceived as being over-powerful and a weak legislature.

There are four central aspects of collective responsibility:

a) Individual ministers are answerable to parliament for the actions of their department and civil servants are 'anonymous'.
b) Ministers should take responsibility for mistakes made in their department by resigning. If a minister or his/her officials make errors of judgement, engage in misconduct or maladministration, the minister is expected to shoulder the blame.
c) Ministers have a collective responsibility to each other. This implies that decisions are made collectively, that discussions are confidential and that every minister must accept the collective decision of the cabinet or else resign.
d) Ministers have a collective responsibility to parliament in that if a government is defeated in a motion of censure, it is obliged to resign or ask for dissolution of the government.

Section 17(3) of the Constitution provides that the cabinet shall be collectively responsible to the national assembly for all things done by or under the authority of the president, vice president or any other minister in execution of his office. This means that ministers are collectively responsible for acts done in their particular ministries. Consequently, ministers serving in the grand coalition government would have been expected to come in defence of the former Finance minister Amos Kimunya.

## Parliamentary effectiveness and government system

## Presidential systems

In presidential systems, the Executive and parliament are elected differently, usually for different terms. The president selects the cabinet from outside parliament. The fate of the president and parliament are not intertwined like in parliamentary systems. There is incentive for parliament to create strong parliamentary committees in order to contribute to the policy agenda of the government. The president can veto Bills passed by parliament

*The August house.*

Impeachment in the United States is an expressed power of the legislature which allows for formal charges to be brought against a civil officer of government for conduct committed in office. The actual trial on those charges and subsequent removal of an official on conviction is separate from the act of impeachment itself. Impeachment is analogous to indictment in regular court proceedings; trial by the other house is analogous to the trial before judge and jury in regular courts. Typically, the lower house of the legislature will impeach the official and the upper house will conduct the trial.

At the federal level, Article Two of the US Constitution (Section 4) states that, "The President, Vice President, and all other civil Officers of the United States shall be removed from Office on Impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

The House of Representatives has the sole power of impeaching, while the US Senate has the sole power to try all impeachments. The removal of impeached officials is automatic upon conviction in the Senate. The power to impeach serves as a check on the Executive by parliament. If the president is impeached, the effect is that the VP takes over. No fresh elections are held until the completion of that term.

A system where the president shares some executive authority with the PM is called a hybrid system. Like in France, the president has the authority to appoint the PM and the cabinet. The president has the power to refer legislation directly to the electorate through a referendum. Where the president and the PM are from the same political party, the system works very smoothly. However, there is sharing of political power when the two are from different parties, which is euphemistically called 'cohabitation'.

In many countries there is a mixed system. In Kenya, for example, the president is elected directly. However, the cabinet is appointed from parliament. Parliament is also defined as the national assembly and the president. In the wake of the formation of a grand coalition, the position of a PM was created. The office has the role of co-ordinating and supervising government functions. The cabinet was appointed from the Party of National Unity Coalition and the Orange Democratic Movement with consultations between the president and the PM.

## Parliamentary system

In parliamentary systems the

continued pg. 16

from page 15

government is formed by the party which has majority of MPs. Party caucus rather than parliamentary committees make major policy decisions. The PM, the cabinet and bureaucracy control parliamentary business. A vote of no confidence leads to the resignation of the Executive and dissolution of parliament, hence fresh elections. There are high levels of political party discipline and the survival of the government depends on cohesive majority party. The electoral head of the party which wins elections is appointed the PM. The principles of the newly elected government are constituted in the election manifesto. In parliamentary systems, parliament and the Executive are controlled by the same party and the cabinet is virtually elected by parliament.

The cabinet can be forced to resign through a vote of no confidence due to lack of parliamentary confidence in its policies or effectiveness. The parliamentary system therefore provides immediate political responsibility for Executive actions. A vote of no confidence results in the resignation of the government in a parliamentary system. Other countries which have a parliamentary system are India and Pakistan. The vote of no confidence is a very important tool for keeping the government in check in countries which have adopted a parliamentary system of government.

### Kenya and the vote of no confidence

In Kenya, a vote of no confidence in the government would result in fresh presidential and parliamentary elections due to the fusion of the Executive and parliament. The vote requires a simple majority of all MPs, not simply the majority of MPs present in the House. In a system such as Kenya's, a vote of censure on an official may have political implications but does not have specific legal consequences.

Section 59(3) of the Constitution provides that parliament may pass a vote of no confidence supported by the votes of the majority of all MPs excluding the *ex officio* members of which a seven days notice has been given in accordance with the Standing Orders. If on passing such a vote the president does not resign from office or dissolve parliament, the House shall stand dissolved on the fourth day following the date of resolution.

The overuse and irresponsible use of the vote of censure by parliament may create a situation of mob politics. This will violate the rule that a person must be heard before being condemned. Therefore, the censure motion should be exercised responsibly and with sufficient evidence of culpability being availed to parliament prior to passage of such a motion. As we stand, Hon Kimunya was not accorded a fair hearing prior to the vote of censure. Further, no independent and professional investigatory body has found him culpable in relation to the sale of the hotel. There is no parliamentary committee, Kenya Police, Kenya Anti-Corruption Commission, the Judiciary or other inquiry that has determined the former minister or other public officials committed an offence known to law in the sale of the hotel. Kenya seems the only country that has a vote of censure against a particular minister without requiring that the entire government resigns. In the UK, a vote of censure can be used to express displeasure against a particular policy and demand that the government reviews the policy within a prescribed time.

There are deep seated political undertones in a vote of censure as exercised in Kenya. Former VP Hon Dr Josephat Karanja's removal was sponsored and stage managed. There are presidential succession undertones in Hon Kimunya's censure. The Constitution vests all executive authority in the president. The vote of censure should, therefore, be directed to the president who is responsible for implementation of executive decisions. Ministers are simply delegates of the president and it must be assumed that the business of the Executive is discussed and approved by the cabinet prior to implementation. Given the principle of collective responsibility which is part of our constitutional architecture, all ministers should take responsibility for cabinet decisions.

The vote of censure by parliament in Kenya may have political but not legal consequences. It is purely a sign of displeasure by parliament in the actions of a minister. If the minister does not resign or is not sacked, his working relationship with parliament will be soared but there is no other legal action that parliament can take. Parliament has no means of compelling a minister to resign.

Indeed, a reading of section 59(3) of the Constitution indicates that a no confidence motion should be directed at the Executive and not specific ministers. The consequences of such a motion are the resignation of the Executive and dissolution of parliament. The motion must be approved by the majority of all sitting MPs. Since the consequences of such a motion means the MPs will need to seek re-election, it is very unlikely that such a motion can pass in Parliament. Indeed, the thrust of the Constitution of Kenya (Amendment) Bill, 2003 sponsored by Hon Charles Keter was to separate the parliamentary calendar from the presidential elections so that a vote of no confidence would precipitate a presidential election without the necessity of parliamentary elections.

Being the product of a direct election, the president still retains a superintending role insofar as the vote of confidence is concerned. If he feels that such a vote against his government may succeed due to the thin majority in his party, then he can either prorogue parliament indefinitely or dissolve it – then call for fresh elections. KN

The writer is a freelance journalist with international news agencies based in Nairobi.

# THE KONRAD ADENAUER FOUNDATION IN KENYA

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

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

In Kenya, the Foundation has been operating since 1974. The Foundation's work in this country is guided by the understanding that democracy and good governance should not only be viewed from a national level, but also the participation of people in political decisions as well as political progress from the grass roots level.

## Our aims

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

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

## Our programmes

Among other activities we currently support:

- Working with political parties to identify their aims and chart their development so that democratic institutions, including fair political competition and a parliamentary system, are regarded as the cornerstones for the future development in Kenya.
- Dialogue and capacity building for young leaders for the development of the country. Therefore, we organise and arrange workshops and seminars in which we help young leaders to clarify their aims and strategies.
- Reform of local governance and strengthening the activities of residents' associations. These voluntary associations of citizens seek to educate their members on their political rights and of opportunities for participation in local politics. They provide a bridge between the ordinary citizen and local authorities, and monitor the latter's activities with special focus on the utilisation of devolved funds.
- Introduction of civic education to schools and colleges. We train teachers of history and government in civic education. In addition, we participate in the composition of a new curriculum on civic education.

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

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# MEDIA DEVELOPMENT ASSOCIATION

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