

KatibaNews

Towards a new constitutional dispensation in Kenya

SEPTEMBER 2009

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Parliament bares its claws

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ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

The Media Development Association (MDA) is an alumnus of graduates of University of Nairobi's School of Journalism. It was formed in 1994 to provide journalists with a forum for exchanging ideas on how best to safeguard the integrity of their profession and to facilitate the training of media practitioners who play an increasingly crucial role in shaping the destiny of the country.

The MDA is dedicated to helping communicators come to terms with the issues that affect their profession and to respond to them as a group. The members believe in their ability to positively influence the conduct and thinking of their colleagues.

The MDA aims at:

- Bringing together journalists to entrench friendship and increase professional cohesion; Providing a forum through which journalists can discuss the problems they face in their world and find ways of solving them;
- Organising exhibitions in journalism-related areas such as photography;
- Organising seminars, workshops, lectures and other activities to discuss development issues and their link to journalism;
- Carrying out research on issues relevant to journalism;
- Organizing tours and excursions in and outside Kenya to widen journalists' knowledge of their operating environment;
- Publishing magazines for journalists, and any other publications that are relevant to the promotion of quality journalism;
- Encouraging and assist members to join journalists' associations locally and internationally;
- Creating a forum through which visiting journalists from other countries can interact with their Kenyan counterparts;
- Helping to promote journalism in rural areas particularly through the training of rural-based correspondents;
- Advancing the training of journalists in specialised areas of communication;
- Create a resource centre for use by journalists;
- Reinforcing the values of peace, democracy and freedom in society through the press;
- Upholding the ideals of a free press.

Activities of MDA include:

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

This newsletter is meant to:

1 Give critical analysis of democracy and governance issues in Kenya.

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

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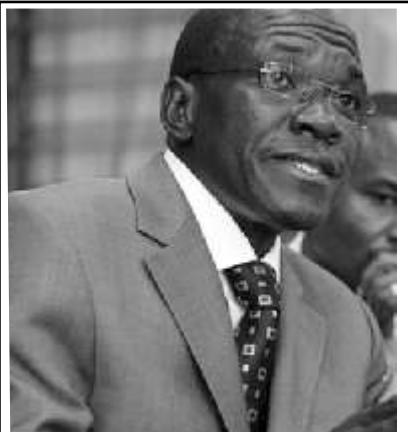
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Parliament bares its claws

The vetting of public officials

Ask Retired Justice Aaron Ringera whether Parliament can be effective in playing its role and you will not be disappointed. The former chief of the Kenya Anti-Corruption Commission has just tasted the wrath of the August House which declared his reappointment as unprocedural. Yes, we need more checks and balances of this kind from the people we choose to represent us.

By Dorothy Momanyi



Trouble maker?
Hon. Bonny Khalwale

Vetting for public officers is a mechanism for enhancing democratic governance by involving Parliament in the appointment of public officials. Parliament is the representative of the electorate. The vetting process is intended to select officials who are accountable and qualified and to institutionalise appointment process for public officers. In Kenya, the President, who is vested executive authority, has in the past made appointments without any consultation.

Due to the demand for reforms and introduction of checks and balances in the execution of the officer of the President, Parliament has enacted laws that require appointee to certain

offices be vetted by Parliament. The Kenya National Commission on Human Rights Act and the Anti Corruption and Economic Crimes Act require parliamentary vetting and approval of public officers appointed under the two Acts. The constitutional review process is underway and more public officers are likely to be brought under the ambit of parliamentary vetting.

The vetting process has at times been viewed by the Executive as a fetter on the discretion and the executive authority of the President. However, certain public officials serve beyond the term of a particular President and it is therefore necessary to ensure that potential candidates are properly vetted so that they execute their mandates in public interest. The Attorney General, for example, has served since 1991.

Two modalities of parliamentary vetting have been adopted. The first model mandates Parliament to select one or more candidates to fill a particular post. After the parliamentary approval, the President is required to select the candidate or one of the candidates to fill the particular post. This model limits presidential choice and discretion. Kenya has adopted

this model for the appointment to the Kenya National Commission on Human Rights and the Kenya Anti Corruption Commission where the choice of the President is limited to a list of names submitted by Parliament for appointment. The second model, adopted in United States of America is where the President selects his officials and Parliament conducts hearings to vet the nominees prior to their confirmation to the various posts.

The President is at liberty to make nominations to public offices but those nominations only become appointments upon approval by Parliament. Article II, Section 2 of the United States Constitution provides that the President 'shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments'.

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Rationale

The reasons that have been advanced to justify vetting of officials include to facilitate the participation of other arms of Government in the appointment process thereby promoting inclusive and democratic governance, to increase the acceptability of public officers across the political divide by promoting bipartisan consultations and approvals, to ensure the best qualified candidates are appointed in public offices to compelling the appointing authorities to propose the best candidates who are likely to be approved during vetting and to ensure political neutrality of public officers who will not be beholden to the partisan appointing authority.

The vetting process must be supported by a credible asset declaration regime. Declaration of assets assists in preventing abuse of power by holders of public offices, protects public assets and interests, deters corruption and instils integrity and fosters public accountability. The framework protects private assets of public officials from expropriation and extralegal confiscation and protects public officials from undue suspicion. Such information must be available to the public and more importantly to bodies, especially Parliament, which are mandated to undertake the vetting process. In Kenya, the records are kept in secret by the responsible commissions under the Public Officers Ethics Act thereby defeating the overall purpose of asset declaration. In Ghana, MPs have complained that the necessary information is kept in secret thereby affecting the objectivity and depth of the vetting process.

Positions that require vetting

i) Kenya National Commission on Human Rights

The Commission is made up of nine commissioners who are nominated by Parliament and appointed by the President. The National Assembly invites applicants through advertisements in the Kenya Gazette and newspapers. The applications are considered by the Parliamentary Committee on Administration of Justice and Legal Affairs which recommends names of qualified persons to the National Assembly. The Parliament recommends twelve commissioners to the Attorney General for onward transmission to the President.

The Committee is at liberty to co-opt a person with the necessary expertise to assist it in the selection process. The Committee shall have regard to Kenyan ethnic, racial, geographical, cultural, political, social and economic diversity and the principle of gender equity. The vetting process gives the President discretion to select nine commissioners from the list submitted by the National Assembly.

The Attorney-General shall convene the first meeting of the Commission within fifteen days from the date of appointment at which the commissioners shall elect from amongst their number a chairperson; and a vice-chairperson, who shall be of opposite gender. The Commissioners serve on a full time basis and the Chairperson shall enjoy the status of a Judge of Appeal and a Commissioner the status of a Judge of the High Court.

ii) Kenya Anti- Corruption Commission

Section 8(1) of the Anti Corruption and Economic Crimes Act, 2003 provides that the Kenya Anti Corruption Commission shall have a Director who shall be the Chief Executive Officer and who shall be responsible for its direction and management. The Commission shall have up to four Assistant Directors to assist the Director. The Director and Assistant Directors shall be persons recommended by the Advisory Board and approved by the National Assembly for appointment to their respective positions. Members of the Kenya Anti-Corruption Advisory Board are derived from 12 nominating

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Facing the House.

entities who submit 2 names to the Minister who then submits the 24 names to the National Assembly for the approval of 12. The Minister transmits the 12 names to the President for appointment.

On the approval of a person by the National Assembly, the President shall appoint the person concerned to the office in respect of which the approval was given. The terms and conditions of service of the Director and the Assistant Directors are determined by the Advisory Board. The Director and the Assistant Directors have security of tenure and may only leave office through resignation, death, if they are convicted of an offence under the Penal Code, if one is adjudged bankrupt, or through the recommendation of a Tribunal set up by the Chief Justice if the Kenya Anti Corruption Advisory Board finds that the Director or Assistant Director is involved in a corrupt transaction or is unable to perform his duties due to physical or mental infirmity.

The First Schedule to the Act provides that the term of office of the Director or an Assistant Director shall be five years. An Assistant Director may be appointed for a term of four years to avoid having the Assistant Director's term expire at the time as the Director's term. A person who has held office as Director or Assistant Director may be reappointed, but may not serve as the Director or as an Assistant Director for more than two terms.

The appointment process compels the President to appoint the candidates selected by the Advisory Board and approved by

Parliament. The President has no discretion to select a different candidate from the one proposed by the KACC Advisory Board. The President has in the past rejected a nominee for the post of Assistant Director. In September 2009, the President reappointed Justice (Retired) Aaron Ringera and his deputies for a term of five years. Parliament, through the Parliamentary Committee on Administration of Justice and the Committee on Delegated Legislation nullified the Gazette Notice on the reappointment. Subsequently, Justice Ringera and Fatuma Sichale resigned from their posts. Dr Smokin Wanjala had resigned earlier as an Assistant Director of the Commission.

The reappointment by the President was widely viewed as illegal. First, the reappointment violated binding precedent. When the term for Dr Mutonyi, an Assistant Commissioner, came to an end in 2008, the incumbent was subjected to a vetting process by the Board and an approval by Parliament. Secondly, the Schedule to the Act cited by the President in justification of the reappointment preserved a right to the incumbent Director and Assistant Director to reapply for the jobs at the conclusion of the first term and the Board to be obligated to consider such application. However, the vetting and approval roles of the Board and Parliament remained. The President, the Advisory Board and Parliament must act in concert and jointly to appoint or reappoint officers to Commission under the Act.

Parliament and the vetting

process

The role of Parliament in the vetting process in Kenya has been carried out in an ad hoc and sometimes inconsistent manner. The proper site for vetting process in Parliament should be the Parliamentary Committees. It is unlikely that the National Assembly will have the appropriate time and skills to vet officials during full sittings. As such, the Committee on Administration of Justice was entrusted with the duty of vetting Commissioners of the Kenya National Commission on Human Rights.

The committees have not set up standardised methods of vetting public officials. A Vetting Manual should be developed to guide and direct the Committees on how to carry out the vetting process. This is particularly important as the Proposed Constitution is expected to significantly expand the number of public officials requiring vetting and approval by Parliament before appointment.

The Parliamentary Select Committee on the Constitution Review has been responsible for vetting Commissioners of the Interim Independent Electoral Commission, Interim Independent Boundaries Review Commission and Members of the Committee of Experts. The Committee was assisted by a human resource consultancy firm to identify the best candidates during the recruitment process. However, challenges in mainstreaming the vetting process remain.

The final say

The vetting process must adhere to the doctrine of separation of powers. The Legislature makes

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Towards free and fair Elections in Kenya

The Chairman of the Interim Independent Electoral Commission (IIEC), Mr Ahmed Issack Hassan, is a man that Kenyans should pray to succeed. If all goes well, Mr Issack should see us through the 2012 Elections after the IIEC becomes fully fledged. *Katiba News* was privileged to talk to the youthful and busy Hassan on what the future holds in the electoral sphere.



Mr. Ahmed Issack Hassan,
IIEC Chairman

KN: Recently a group of former Commissioners of the ECK went to court contesting the legality of IIEC, particularly in relation to separation of powers. Would you say you are properly constituted or is there a risk of contravention of the Law?

Hassan: Let me first correct you on the case. It is not a new case against IIEC but one that was actually pending. As you may recall, when Parliament was debating the Constitution amendment bill to disband the ECK, the former Commissioners went to court to stop the debate. It did not happen and Parliament went ahead to

disband ECK and create IIEC in its place. The IIEC was therefore just recently joined into the case as a further respondent. We are in the process of instructing a lawyer to defend us in court.

Since the matter is pending in court, I would not comment on the merits but only to say that as far as IIEC is concerned, its mandate is clearly spelt out in section 41 of the Constitution. For all intents and purposes, the IIEC is the successor of the ECK. We are a creation of Parliament under its law making powers just as the ECK is a victim of the exercise of the same powers by Parliament. Suffice to say that since our appointment, the IIEC has been served with two Writs by the Speaker of the National Assembly to conduct by-elections in Shinalu and Bomachoge Constituencies. We conducted voter registration in these two constituencies and held the by-elections in late August. Those elected have been gazetted and sworn in as members of Parliament.

The IIEC has also taken over the defence of all pending cases and election petitions filed against the ECK and when some of the petitioners questioned the power of the IIEC to take over the petitions against ECK, the High Court, in three separate cases held that IIEC was legally empowered to do so.

KN: Would you say the recent by-elections in Bomachoge and Shinalu were the acid test for the IIEC? Do you now feel confident that your body can handle nationwide elections or the expected referendum on the Constitution planned for next year?

Hassan: Although we were only three months old, the IIEC managed to conduct voter registration within one month and hold the by-elections thereafter. We did these elections under difficult conditions. We had no secretariat staff with elections experience save for some few Civil Servants seconded to us, who were nevertheless very committed and dedicated to the task at hand. Time was also

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very short. However, on the whole, I believe we did well and the by-elections were generally hailed as successful. This is not to say that there were no mistakes or other omissions. Indeed, there were, and we have learnt very valuable lessons which will help us in preparing for the voter registration countrywide and the referendum next year. I am therefore quite confident that the IIEC can competently handle a national election or the referendum and do it very well.

KN: What is your take on the proposed electoral reforms? Do you have divergent or additional views?

Hassan: The reform of the electoral process and system in Kenya will go a long way in laying a firm foundation for the conduct of free and fair elections whose results will be acceptable by all.

The Kreigler Commission report contains several recommendations for electoral reforms. These reforms are targeting the electoral process and the laws governing elections in Kenya and the reform of the elections management body itself. The National Conference on Electoral Reforms held in Nairobi in August also came out with several key proposals for constitutional, legal and administrative reforms of the electoral process and system.

The IIEC is actively engaged in an effort to see through these

proposed reforms. We have met with the Committee of Experts on the Constitution to discuss what should be captured in the new constitution to entrench the proposed electoral reforms such as the form of electoral system, conduct of elections, etc.

We are also in discussion with the Kenya Law Reform Commission and the Parliamentary Committee on Legal Affairs to introduce two new crucial Laws that will set us on the correct path in reforming our Electoral Laws and process. The proposed Laws are the Elections Bill which seeks to consolidate all Laws relating to elections in Kenya and the Electoral Commission bill which deals with the elections management body.

KN: Is Kenya's problem with democracy as a result of the electoral system or is it the tribal based politics.

Hassan: I would say it is both.

The electoral system most certainly contributes to the problem but cannot be said to be the sole cause. Despite the nationalistic and patriotic speeches and statements that we make in public, when the time for election comes, the tribe factor and in some cases, even the clan factor comes into play. Campaigns may be conducted occasionally on the basis of issues but the voting may not be based solely on issues but other factors. Most of the political parties cannot be said to be national and are often associated with a particular ethnic group, region or an influential political leader.

The capacity of some politicians to take advantage of the poverty levels and lack of employment opportunities of the electorate cannot be ignored. This has enabled the political class to corrupt the vulnerable electorate through rampant voter buying.

KN: What do you attribute to the 2007 post election violence? Are there any



Citizens protest after the 2007 general elections.

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interventions that would have nipped it in the bud?

Hassan: The question of the 2007 post election violence has been quite extensively examined by the Kriegler Commission and the Waki Commission whose reports are now public. The implementation of the recommendations of these two Commissions will help us avoid a repeat of what happened after the 2007 elections. If we don't, then the future of the country will be at stake. It has been said that history repeats itself because we tend to forge and every time it does the price goes up.

The causes of the post election violence can be said to have been the announcement of the results of the disputed presidential elections but this must be analyzed in the context of the other factors that fuelled the violence. Historical grievances over land, regional disparities, ethnic rivalries and the high stakes attending the political competition in the country precipitated it all.

The tensions in the country started to build up after the 2005 referendum and the stalemate between the major political players in the country went unresolved and spilled over to the elections. This made it worse. One of the early interventions was to have secured a political settlement to the major differences between the leading political classes. Another intervention measure was to address the

various unresolved land and ethnic clashes that continued to flare up every time without any solution.

The establishment of a truth, Justice and Reconciliation Commission would have provided one option of the people to vent some of the pent up and unresolved historical grievances. The IPPG agreement on the appointment of the members of the Electoral Commission should have been made into Law to remove any misconception on the impartiality of the electoral body.

Given the passions and high stakes attending the presidential elections, perhaps the country could have considered a law to separate the presidential elections from the parliamentary and civic elections. Finally, a programme of preventing and managing election related violence targeting all the different stakeholders could have been implemented to mitigate the tragedy that we witnessed after the 2007 elections.

KN: Drawing from your past experience as a Commissioner with the former CKRC, do you foresee Kenya having a new Constitution by the end of 2010 as envisaged?

Hassan: The late Prof. Okoth Oendo ("the Guru") who was the Vice Chair of CKRC used to say that constitution making is a continuation of politics by other means. This is especially

true when a country is making its constitution in peace time.

My own experience from CKRC is that unless there is some consensus between the major political actors in the country especially on the crucial question of the executive power then the dream of a new constitution would remain steeped in controversy. The major lesson that I have learnt is that the only certain thing about the Constitution Review Process in Kenya is its uncertainty. There are always twists and turns in the process that is informed by the political dynamics prevailing at the time.

In spite of the challenges presented to the constitution-making process by the political class, there are "constitutional moments" which if identified and seized, can produce the desired new constitution. In Kenya, when the CKRC produced its draft in September, 2002 and Professor Ghai convened the National Conference as its Chair, the mood of the country was such that had the former President, Daniel Arap Moi not dissolved Parliament, we would have had the CKRC draft adopted. Again after the 2002 elections when KANU lost and Narc came to power in January, 2003, the country was in the mood to adopt the new constitution had the Government taken the initiative to honour its pledge to deliver a new constitution in the first 100 days.

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Finally, the post-election violence period provided us with another opportunity to adopt the Bomas draft but this was never to be. So we are left with the option of having to build consensus between political protagonists who are under no immediate threat or pressure. Moreover, we now have a very active, parliament that is asserting its authority and can muster the will to push through the new constitution.

I believe we can have a new constitution and hold a referendum in 2010 if the organs of the review which are listed in the Review Act succeed in building consensus among the major political actors in the country.

KN: From an electoral point of view, do you think review of the district and constituency boundaries is necessary?

Hassan: Of course, yes. There has not been a review of our electoral boundaries for a long time. The last report of the Electoral Commission on the review of the electoral boundaries of the constituencies was rejected following controversy over the choice of the proposed new constituencies. Parliament has now established the Boundaries Commission to review the boundaries of administrative and electoral areas in Kenya. The criteria for the review of these boundaries is spelt out in the law.

KN: What mechanisms are needed for an independent

and efficient electoral body? Can you cite examples of electoral best practice from around the world?

An effective and efficient secretariat that is highly trained is a categorical imperative for any electoral body. A lean Commission whose members are selected competitively from the open market and who do not represent political interests is also important.

The Electoral Commissioners must have security of tenure to insulate them from political machinations. The expenses and budget of the Electoral Commission must be made a charge on the consolidated fund. Some of the best electoral practices which we at the IIEC are keen to study are Ghana, Republic of South Africa and India.

KN: What can you attribute to the increasing disconnect between elections and democracy the world over as many countries end up with highly contested elections?

Hassan: Elections are seen as an end in themselves instead of being seen as a means to an end. Elections are merely the process that leads to the attainment of a democratic Government. Competition for political power is very stiff because it is seen as the key to economic power. Once you have political power, then you can have the means to appropriate the resources of the country.

That is why elections, especially for high political offices, tend to be highly contested. There is also a sense of apathy shown by the middle class towards elections and this leaves room for political mercenaries to take charge to the detriment of the same middle class. The violence that sometimes attend elections also discourages people from participating in the political process hence the disconnect.

KN: Based on your mandate, what can Kenyans expect from the IIEC in the near future and as we look forward to the 2012 general elections?

Hassan: Kenyans can expect us to establish a very professional and highly qualified Secretariat that will be the engine to drive the reform agenda. Already, we have advertised for these positions in the Newspapers and we are now in the process of recruiting the staff. The IIEC is also looking at different technologies available in the market to improve the voter registration system and also to improve the system of collation, transmission and tallying of electoral data. We intend to fully automate the electoral system by use of ICT to make sure that we do not ever have a repeat of 2007. We are also engaged in proposing new Laws to reform the electoral systems and this will be contained in the new bills that we hope will be enacted by parliament in due course.

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laws, the Executive implements the laws and the judiciary adjudicates disputes. In Kenya, the executive authority of the Republic is vested in the President. Under section 24 of the Constitution, the President is empowered to create, constitute and abolish offices of the Government of Kenya subject to any other law. Where a law provides a different procedure for filing the office, the President should comply with such law. The Anti Corruption and Economic Crimes Act and the Kenya National Commission on Human Rights Act are such laws.

Since independence, the Presidency has been making appointments to public offices without reference or consultation with any person. Some of the offices filled without vetting include the Ambassadors and High Commissioners, the Permanent Secretaries, Cabinet Ministers, Commissioner of Police, the Attorney General, Chairman and Members of the Public Service Commission, Chairman and Members of the defunct Electoral Commission of Kenya. The exclusive appointment by the President has undermined public confidence in these public offices as the appointees are seen and often act as political supporters of the incumbent president. The unfettered discretion has also led to appointment of persons who lack the necessary qualifications to effectively carry out their roles.

The filing of a suit to challenge the appointment was the best way of resolving the legality of the reappointments. However, with the case back log in the courts and possible reliance of the President on his immunity under section 14 of the

Constitution, the resolution by Parliament and the consequent pressure by the public helped to reverse the illegality.

Under the new Standing Orders, the Committee on Delegated Legislation of the National Assembly has the duty to scrutinise delegated and subsidiary legislation includes notices to determine their legality or lack thereof. The Kenya National Commission on Human Rights and the Kenya Anti Corruption Commission both fall under the scrutiny of the Parliamentary Committee on Administration of Justice and Legal Affairs. Ministers have in the past made delegated legislation and issued notices without involvement of Parliament.

The Interpretation and General Provisions Act requires that all rules and regulations made by Ministers under the delegated authority of an Act of Parliament should be tabled before the Parliament. However this is seldom done. Under the Interpretation and General Provision Act, subsidiary legislation is defined as any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument. The Gazette Notice therefore was part of delegated legislation which could be considered by the Committee.

The stand off can be resolved by adopting a standardized criteria for vetting public officials. The Executive will be bound to appoint candidates who have been duly vetted by Parliament in accordance with the established

criteria. Due to the large number of officials required to be vetted and the perception that Parliament may be exercising duties that a directly elected President is supposed to execute, the President can nominate candidates for various positions and the Parliament will be required to approve such nominations. Legislative institutions are not equipped with resources to investigate eligibility and competence of candidates who occupy sensitive offices of State. The institutions do not have the requisite skills to determine critical human resource capabilities of the candidates.

One proposal is to have all constitutional office holders vetted by Parliament. The Attorney General, the Chief Justice, the Director of the Kenya Anti Corruption Commission, diplomats and other holders of constitutional offices should be vetted by Parliament before they are appointed for a fixed one term of eight to ten years. After the completion of the term, such officials should not be eligible for reappointment. Judges of the High Court, Court of Appeal and the Supreme Court should be subject to the vetting process. The unilateral appointment of judicial officers by the President has eroded the public perception in judicial independence and thus undermined public confidence in the judiciary. The scope of officials who should be required to undergo vetting should be expanded to include Ministers. In Ghana, after the election of the President, all nominees for ministerial posts are required to undergo vetting by Parliament.

Evaluating the Interim Independent Electoral Commission

Further to an interview with the IIEC chairman carried in this issue, we take a bird's eye view of where the commission is at and what we can expect from it as we near the dreadful 2012.

By Macharia Nderitu

The Interim Independent Electoral Commission (IIEC) was created after the disbandment of the Electoral Commission of Kenya (ECK) following the bungled results of the 2007 General Elections and was constituted after the enactment of the Constitution of Kenya (Amendment) Act, 2008. The Chairperson and the 8 commissioners have been appointed by the President following vetting by Parliament. The Commission first task was to undertake the Bomachoge and Shinalu Constituency by Elections. This followed the nullification of the results of Bomachoge Constituency by the High Court after hearing and determination of an Election Petition against the incumbent MP and the death of the MP for Shinalu Constituency.

The delay in holding the by-elections was caused by the disbandment of the Electoral Commission of Kenya which created a vacuum. The Interim Commission was appointed for a period of twenty four months and will serve as the lead agent for electoral reforms, especially the implementation of the recommendations of the Independent Review Committee chaired by Justice Johann Kriegler. The Commission must be strengthened to enable it to undertake effective planning and execution of elections. The performance of elections depend

clear legal and regulatory norms and rules, clear division of election management authority and responsibility, and sufficient election financing and staff capacity-building.

Shinalu and Bomachoge Constituencies by-elections
The Institute of Education in Democracy (IED) conducted a voter observation mission during the by elections in Shinalu and Bomachoge Constituency. The Institute has observed all the elections and by elections since the reintroduction of multiparty politics in Kenya in 1992. The by-elections were a litmus test for the Interim Independent Electoral Commission. Since the 2007 General Elections, the public is increasingly worried about elections and their capacity to spur interethnic violence. The IED assessed the pre-election environment, the voter registration

process, deployed poll watchers during Election day and conducted random visits to polling stations.

The poll watchers covered 97% of the polling stations in the two constituencies. The observation team reported that the outcome reflected the wishes of voters. Due to the time and resource limitations, the IIEC utilised old methods to carry out the elections. The legal and administration framework for the conduct of elections in Kenya requires an urgent overhaul.

The Commission has not established a secretariat and hence the commissioners directly participated in implementation processes. This compromised on their capacity to carry out a supervisory and monitoring role. The officials of IIEC were

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IIEC Committee members with Prime Minister Hon. Raila Odinga & Justice, Constitutional Affairs Minister Hon. Mutula Kilonzo

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transparent and supplied the required information. The Commission conducted a fresh register of voters and conducted the elections.

The Commission prohibited voters from transferring from one constituency to another. To facilitate this, the Commission relied on the discredited register used by ECK. Transferring of the vote is permitted under the National Assembly and Presidential Elections Act and the Commission's act was contrary to the law. The Commission used transparent boxes during the elections. The recruitment process for election officials was transparent. The training of the officials was however wanting as there were disparities in treatment of spoilt ballots in the two constituencies and across polling stations.

The Presiding Officers were swapped across the two constituencies. While the move is laudable to avoid influence of election officials by local politicians, the officials should not be disenfranchised and the preparations for swapping should be elaborate and well planned with the provision of early voting for the officials and adequate time to acquaint themselves with the new polling stations. All polling stations should be designated and gazetted in good time to avoid delays in voting and tallying. The officials carried out their duties professionally and party agents were present in most polling stations. The elections officials were not supplied with easily identifiable attire and party agents were not accredited. The voter turn out in the by elections was above average. Voters were turned away for lack of valid national identity cards, where their names were misusing from the register, where the names were misspelled, where names were missing and in cases of double and multiple

registrations.

There was evidence that political parties were involved in voter bribery. These were Party of National Unity, Orange Democratic Party and Kenya African Democratic Development Union in Shinyalu and Party of National Unity and Orange Democratic Party in Bomachoge. Public servants were involved in the campaigns. Politicians used public resources during the campaigns. There were promises of new administrative divisions, better roads and improved infrastructure. The participation of public servants and use of state resources was apparent during the by election.

These acts are criminal offences under the National Assembly and Presidential Elections Act as they constitute abuse of office and misappropriation of public funds. The Commission ordered the arrest of some of perpetrators but it must ensure the Electoral Code of Conduct and the electoral laws are complied with. The Commission should cooperate with other state agencies to provide, in a timely manner, corrective measures and push for the prosecution and punishment of offenders when irregularities or violations challenge the integrity of the election process.

The party agents verified the results before they were announced. During the tallying process, only accredited officials were permitted into the tallying centre. The Commission organised for adequate and visible security. However, the counting and tallying process was conducted manually. There were delays in the commencement of the voting and the tallying process. The system needs to be improved to ensure efficiency in delivery, tallying and announcement of results. This will include design and installation of a system for collection, collation, transmission and tallying of data.

The manual system creates opportunities for manipulation.

Most polling stations did not have adequate 16A forms. Sufficient copies should be provided and copies should be provided to agents and observers. The results of each polling station should be posted outside the station. In Shinyalu, the Returning Officer developed a tallying sheet at the tallying centre with information on each polling station which was projected on a screen. The voter turn out was 35,773 voters out of 56,188 registered voters in Bomachoge while 25,277 voters out of 39,187 registered voters turned out in Shinyalu. There was gap between the registered voters and potential voters with an estimated 70,000 potential voters in each constituency. The number of registered voters in Shinyalu constituency during the by-election reduced from 65,395 voters during the 2007 elections while in Bomachoge constituency, the number of voters reduced from 70,349 voters. Voter turn out was assessed at about 65% in both constituencies.

Assistance of old and sick voters by election officials in the presence of party agents compromised the secrecy of the vote. The media was generally balanced and fair. The civic education in both constituencies was inadequate and ineffective. This could be attributed to resource and time constraints that faced the commission at the time.

The by-elections were a test on the Commission's capacity, competence and preparedness to discharge its mandate. The IIEC can do better given adequate resources and time. The management of the by election was credible and transparent. The Commission should draw lessons and establish a well functional secretariat and field offices. The IIEC should catalyse

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and lead the electoral laws reform. The Commission organised an International Conference on Electoral Reform in July, 2009 to identify key proposals for electoral reform and learn from the best practices from other jurisdictions.

Voter register must be accurate, current, inclusive, complete and responsive to local conditions. The system should be modernised to reduce cases of disenfranchisement, omissions and misspelling of names. The Commission must provide adequate time for voter registration and verification. The two weeks provided in the two constituencies was grossly inadequate. The registration process should be continuous. The Commission must develop a standardised manual for voter education. The Registrar of Political Parties must enforce the Political Parties Act stringently. Incidents of electoral violence must be prosecuted and punished.

Restoring public confidence
 The Independent Review Committee Report highlighted the most fundamental reforms required to restore public faith in the electoral system. The 2007 General Elections were largely seen as free and fair by observers. However, the tallying process for the Presidential elections was a trigger to the outbreak of widespread violence. The electoral system must be overhauled to eliminate manipulation and enhance transparency. Civic education must be carried out for the public to understand and effectively participate in elections.

Some of the recommendations for reform are:

1. Restructuring of the appointment process of commissioners to establish a consultative and bipartisan process. The ECK Commissioners were

appointed unilaterally by the President, who was participating in the elections as a presidential candidate. The commissioners of the IIEC were interviewed and vetted by the Parliamentary Select Committee on the Constitution Review and thereafter appointed by the President. This is a radical departure from the ECK.

2. Use of technology to collect, collate and tally and announce results to ensure accuracy, transparency and efficiency in the tallying process. The innovation in Shinyalu of displaying results on a screen should be adopted and enhanced.
3. Correction of glaring errors in the register of voters by undertaking a fresh registration of voters. The ECK Register of Voters had about 1 million dead voters and thousands of double and multiple registrations.
4. Strengthening of the IIEC secretariat through recruitment of professionals. This will enable the Commissioners to play the supervisory role. The professionals will preserve the institutional memory and enable the Commission to plan for capacity building and strengthening. The ECK commissioners participated in carrying out implementation of the election programmes, which was essentially the duty of the secretariat.
5. The Commission should be empowered to carry out continuous voter education and sensitisation programmes. This should be coupled with continuous registration of voters.
6. The Commission should ensure the equality of the vote by redrawing of constituency boundaries. The Interim Independent Boundaries Review Commission has been constituted to undertake public hearings with a view to redrawing constituency boundaries.
7. Kenya should consider revising the electoral system. The simple majority or first-past-the-post system adopted at present has led to emergence of zero-sum political games due to its winner-takes-it-all nature and was a major precipitate of violence after in 2007. The mixed proportional representation system combines the simple majority system with the proportional representation system and could be adopted to facilitate adequate representation of the vulnerable groups.

Political parties and elections
 The Registrar of Political Parties has not adequately monitored compliance with the Political Parties Act. For example, during the elections, there were incidents of non adherence to the Act. In Bomachoge, Hon Zephania Nyangwara was allowed to contest on United Democratic Movement ticket after he lost the ODM nominations. The Act requires that a person must be a member of a political party for at least six months to be eligible to be presented as a candidate for the party. Further, a person cannot be a member of two political parties at the same time. These rules were

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Voters queue to cast their ballot.

Living with HIV and AIDS

For at least 20 years now Kenyans have witnessed as the human immunodeficiency virus (HIV) ravages foe, family and friend. According to current statistics, the virus is not about to relent as infection rates remain stagnant and take new trends. We analyse the state of the pandemic and what mechanisms have been used to curb its spread.

By Maina Kimondo

Despite drawbacks that have in the past hampered public programmes on HIV-Aids, Kenya's management of the epidemic is still rated among the performing ones in Africa.

One of the negative points in the history of the fight against the epidemic was the failures to secure Sh24 billion of Round Eight funding from the Global Fund due to submission of poor proposal by the National Aids Control Council NACC. However, the council has applied for Round Nine, which is expected to flow through.

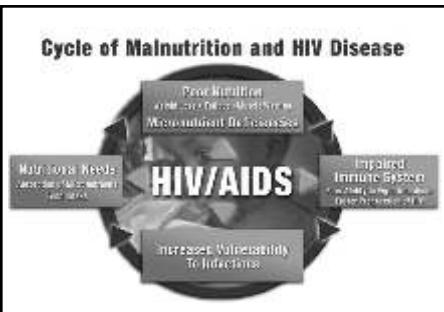
The (NACC) oversees the main implementation of policy on HIV-Aids in the country. These include issues of care, treatment and management of HIV-Aids and preventive measures. The NCC also generally co-ordinates

activities of government and NGOs concerned with the epidemic. However, many challenges continue to loom in the way of a stable management of HIV-Aids in the country.

The challenges complicate the work of NACC, donors and NGOS who have constantly put in place efforts to tame the epidemic. Due to the success of Antiretroviral drugs in managing, treatment stakeholders widely say that behaviour has turned from strict prevention measures to laxity among Kenyans. Kenyans' reckless sexual behaviour could see the country shouldering an extra burden of half a million new HIV/Aids cases in the next five years.

At a rate of 100,000 new infections being recorded in the country annually and about 84 per cent of Kenyans unaware of their HIV status, the statistics on new cases is not far-fetched. In fact, since the last Kenya Demographic Health Survey (KDHS) of 2003, that identified the country's HIV situation as 5.1 per cent, progressive deterioration of the situation was recorded with the 2007 Kenya Aids Indicator Survey (KAIS) showing that the prevalence had taken a turn for the worse rising to 7.1 per cent.

There are numerous challenges facing the control of HIV/Aids in



the country. Among the major obstacles are the high prevalence of HIV, significant regional variations in HIV prevalence, low levels of HIV testing, a rising promiscuity trend among married couples, multiple partners and concurrent epidemic of other sexually transmitted infections (STIs).

The director of Public Health Dr Shahnaaz Sharif says that although Kenyans are perceived as less reckless than they were 10 years ago, they Government is concerned about sexual behaviour. "It is worrying to know that your daughter's first sexual activity is likely to start at 14.5 years, which is a year lower than before," says Shahnaaz.

Dr Shahnaaz says, despite an increase in condom usage among the sexually active youth age groups, there is need for more intervention to ensure widening practice of safe sex. This is despite the recent controversy over the leaking condoms scare that had sent fear among the public that

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the much publicised protection was ineffective.

Results produced by the Kenya Bureau of Standards (KEBS) revealed that the said brand of condoms had shown 100 per cent failure. KEBS Chief Manager of Quality Analysis and Inspection John Wepukhulu confirmed the 'Hot' brand of condoms was found to be faulty. Wepukhulu said its samples showed that the brand is 100 per cent faulty.

"The quality assurance team has been sampling the brands and found that they do not meet the required standards hence we have recalled it," he said.

The National Quality Control Laboratory (NCQL) director Hezekiah Chepkwony however said they had intensified testing in order to ensure that such cases did not arise in future. Chepkwony said they had received a high-tech machine from UNFPA and another from the Government that can test efficacy of 1,000 condoms in a day.

However, he said, they are currently testing about 2,000 condoms annually, which is below their capacity. He said that HIV infection is now showing a trend of moving from the urban areas where the prevalence had been higher to the rural areas. Substantial provisional disparities have been recorded, he said. He said the emerging shift in the disease to rural areas where 75 per cent of the population resides can return devastating results. But he affirms there is no conclusive survey yet to establish reasons why the shift has occurred.

About one million HIV infected individuals aged between 15 and 64 live in rural areas, compared to 400,000 in urban areas.

This comes at a time when surveys have shown one in 10 married or cohabiting couples were infected by the virus. Dr Shahnaaz said this included 35,000 discordant couples in Kenya where one person has HIV while the other is uninfected.

"In most of these couples neither person knows that one sexual partner has HIV," says Dr Shahnaaz.

Lack of knowledge of HIV status remains the biggest challenge to treatment, care and prevention.



Accurate knowledge of individual status is critical for preventing transmission to others and ensuring access to life prolonging Antiretroviral drugs. But there has been significant progress in voluntary testing with three times more women aged between 15 to 49 years who had tested in 2007 than in 2003, while the number of men who had tested doubled in the same period.

The Kenya Aids Indicator Survey chairman of technical working group Dr Ibrahim Mohamed said their study had shown an overall increase in the number of youths having sex before the age of 15 years. Dr Mohamed noted that

among sexually active HIV infected participants, less than 50 per cent had ever used a condom. But they had noted an increase in condom use among youths aged 15 to 24 years from 2003 to 2007 during first sexual encounter.

Dr Mohamed said the following studies that male circumcision reduces the risk of HIV infection by 60 per cent, the main strategy is now to encourage more people to go for the 'cut'. Male circumcision has proven to reduce the risk of getting HIV. Research results show prevalence among uncircumcised men is three times higher than among circumcised men.

Health experts said increasing circumcision and safer sex behaviour among boys and men of all ages will help reduce new HIV infections. Dr Mohamed said over 80 per cent of Kenyan men are circumcised in all provinces except in Luo Nyanza which is at 49 per cent.

In addition, Dr Mohammed says that it is crucial to encourage more people to go for testing. He says they have widely set up mobile VCT services especially in hard-to-reach areas. He said different approaches to HIV testing have been adopted and intensified, including door-to-door testing, moonlight testing (night) testing in some areas and recommending testing to all patients in health facilities. Since 2007 the number of people on ARVs has increased by 55 per cent with currently 260,000 people on the drugs.

Dr Mohamed says they had found out that among those who had never tested for HIV 47.2 per cent perceived themselves as being at low risk. "There had been an overall increase in testing for

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women from 50.4 per cent in 2003 to 78.6 per cent in 2007. In Antenatal care 61.5 per cent of women aged 15 to 49 years were tested for HIV during 2003 to 2007 period.

However, the National Aids and STD Control Program (NASCOP) director Dr Nicholas Muraguri says the another main challenge now is to encourage pregnant women to deliver in hospitals. Dr Muraguri said 60 per cent of the 1.5 million annual deliveries happen at home under unskilled care, which poses risks to maternal mortality. He said out of the 100,000 HIV-positive women who give birth annually, half do not use the 'Prevention of Mother To Child Transmission' services.

This suggests that out of the 100,000 new HIV infections that occur annually in Kenya, half could be in children. "We are encouraging more mothers to deliver in hospitals. That way, they prevent their children from getting the virus," said Dr Muraguri. Consequently, this obstacle has interfered with the fight against paediatric HIV.

Majority of the women who deliver at home are first-time

mothers in the categories of girls aged below 18 years, single mothers, unmarried women and women in poor communities like slums. Dr Muraguri says majority of these are girls aged below 18 years, single mothers and those who are unmarried.

Studies have shown use of a combination of triple antiretroviral therapy increases the chances of Prevention of Mother to Child Transmission (PMTCT) by 98 per cent. But he notes that PMTCT uptake is very low hence the need to ensure that more mothers deliver in hospital under professional and skilled care so that they can take advantage of PMTCT and protect their unborn children.

They can now breastfeed their children — thanks to discovery of a three anti-retroviral drugs' combination that could lower the risk of HIV transmission. Scientists have discovered that giving a combination of three ARVs to HIV-positive women during pregnancy, delivery and breast feeding cuts the risk of HIV transmission in infants by 42 per cent.

The study, dubbed 'Kesho Bora' (Better Tomorrow) shows that by giving the ARV triple combination to HIV-positive mothers with CD-4 counts of between 200 and 500 in the last trimester, through birth and six months of breastfeeding, reduces the risk of mother-to-child-transmission and improves survival.

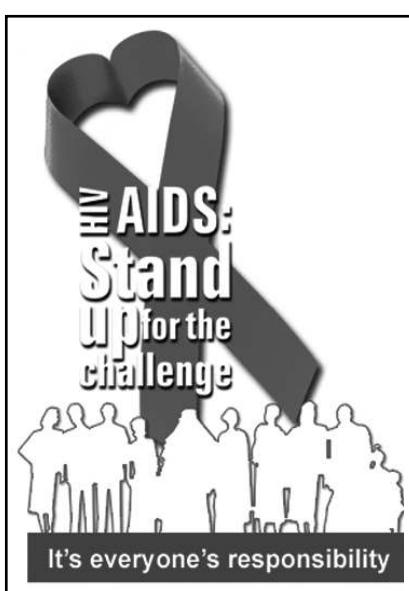
"There is no increase in risk to the health of mothers or their babies associated with the triple ARV regimen," said the report. The report, released recently in Cape Town, South Africa, is one among many studies conducted to prevent mother-to-child-transmission of HIV during

breastfeeding. The study included the anti-HIV drugs zidovudine, lamivudine and lopinavir (ritonavir), from the last trimester of pregnancy and continued for a maximum of six months of breastfeeding.

Women with CD-4 count below 200 are at an advanced stage of treatment and hence ARVS are for their own health and the risk of passing on the HIV virus is higher than those with between 200 and 500 or more. The three-year study involved about 1,140 HIV positive women in Kenya, South Africa and Burkina Faso.

Dr Muraguri says they are now focusing on the new HIV frontiers, such as commercial sex workers, truck drivers and prisons. He pointed out that commercial sex workers (CSW) have for a long time been ignored in intervention messages yet they are the main high risk transmitters. By targeting the CSW, he said, they would be able to reach out to the clients with preventive messages in order to reverse the spread. On the other hand, Muraguri said as they continue to expand treatment and test more people they are encouraging work places to adopt a tolerance policy for people living with HIV/Aids.

In September the Public Health Ministry launched a HIV policy guideline which, Dr Muraguri said, is a major milestone in dealing with issues of discrimination at the work place. For instance, Muraguri says, the guideline touches on extending ARVS treatment to partners of employees who have the disease. The Ministry of Gender and Social services was among the first ministries to adopt and implement the policy. **KN**



meant to protect the integrity of the party and prevent last minute defections.

The Registrar has registered 47 political parties under the Act to date. Some of the parties, especially the small parties have not complied with the stringent requirements of the Act including the establishment of finance offices run by qualified professionals, filing financial reports, and conducting country wide and branch elections. The dominant political parties remain ODM and PNU. ODM won Shinyalu and Bomachoge Constituencies. The two parties also have the majority of MPs in Parliament. Further work must be done to strengthen the parties and ensure wide support and sound ideological foundations.

Fast-tracking electoral reforms

The IIEC should concentrate and drive on the electoral law reform agenda. Already, the defunct ECK had drafted the Elections Bill, 2007 which sought to consolidate all election laws under one statute. The Bill can for a template for the reforms and should be debated and refined. The choice of the electoral system, the inclusion of the right to vote in the Bill of Rights, the redrawing of the boundaries, dispute resolution mechanisms for electoral disputes and the constitution of the Commission must be addressed in the Draft Constitution. In this regard, the Committee of Experts must be urged to complete their work urgently to facilitate legislative reforms on the elections.

Some of the areas that must be included in the Bill are:

1. Electronic collection and tallying system for presidential and constituency elections. Information Technology can be deployed to carry out voter verification and inspection of the register

through the internet. The IIEC website must be developed to provide valuable electoral information to the public. The IIEC has posted the election results for Shinyalu and Bomachoge by-elections on its website thereby enhancing public access to information. The ECK operations were marked by opacity and secrecy.

2. Enforcement of the Electoral Code of Conduct and arrest and prosecution for election offences.
3. Efficient, independent and impartial dispute mechanisms both at the tallying stage and after the announcement of results. The Returning Officers at the constituency level should have powers to order retallying and recounting of voters prior to announcing the final results.
4. Enforcement of the Political Parties Act to strengthen political parties.
5. Setting up of a permanent and well resourced secretariat and regional offices of the Commission. The Commission has advertised for application to fill vacancies at the secretariat and field offices.

The period provided for the IIEC may not be sufficient. The IIEC has a time line of 24 months to complete its task. It was set up as a transitory commission with the mandate of facilitating comprehensive electoral reforms. The Commission will need to collaborate with the Interim Boundaries Review Commission and the Committee of Experts who will similarly be dealing with various aspects of electoral reform. The Committee of Experts is completing the drafting of the Proposed Constitution which will provide for the electoral system while the

Interim Boundaries Commission will determine the constituency boundaries and recommend the number of constituencies.

The IIEC will need to immediately commence the setting up of its secretariat and field offices. This will enable it to register voters and avoid a constitutional crisis that may occur if elections are to be held now. Indeed, the voter registration and verification exercise must be completed before the date is set for the referendum on the Draft Constitution. Electoral reform is very important in seeking to avoid recurrence of political crisis.

International best practices recommend that electoral systems must ensure the meaningful representation of diverse social and cultural groups, including youth and the rural population. The budget of election should be voted directly by the legislative bodies responsible for allocation of budgets. At present, the budget for IIEC is controlled by the Ministry of Justice, National Cohesion and Constitutional Affairs.

The selection and appointment procedures for commissioners should be determined by parliament and should be transparent, inclusive, and sensitive to gender equality and the representation of diverse groups. The Commission should structure a process that allows for public scrutiny and ensures accountability. The demarcation of electoral constituencies and selection of voting stations should be determined by the election management body or a relevant independent body in a manner that facilitates effective participation in the elections.

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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