

# KatibaNews

Towards a new constitutional dispensation in Kenya

NOVEMBER 2009

Issue NO. 11.09

## Curse or blessing? Oil discovery in Kenya

- \* A reunified Germany
- \* An unhealthy nation
- \* Streamlining the justice system

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# ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

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

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

The MDA aims at:

- Bringing together journalists to entrench friendship and increase professional cohesion; Providing a forum through which journalists can discuss the problems they face in their world and find ways of solving them;
- Organising exhibitions in journalism-related areas such as photography;
- Organising seminars, workshops, lectures and other activities to discuss development

issues and their link to journalism;

- Carrying out research on issues relevant to journalism;
- Organizing tours and excursions in and outside Kenya to widen journalists' knowledge of their operating environment;
- Publishing magazines for journalists, and any other publications that are relevant to the promotion of quality journalism;
- Encouraging and assist members to join journalists' associations locally and internationally;
- Creating a forum through which visiting journalists from other countries can interact with their Kenyan counterparts;
- Helping to promote journalism in rural areas particularly through the training of rural-based correspondents;
- Advancing the training of journalists in specialised areas of communication;
- Create a resource centre for use by

journalists;

- Reinforcing the values of peace, democracy and freedom in society through the press;
- Upholding the ideals of a free press.

Activities of MDA include:

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

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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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# Twenty years of a reunified Germany



German Chancellor, Angela Merkel.

**G**ermany is a European Country with a territory that covers 357,021 square kilometres. The country has a population of 82 million. It has the largest population among the member states of the European Union. In 1949, after World War II, Germany was divided into the East Germany and West Germany, along the lines of Allied occupation.

The German Democratic Republic, commonly known as East Germany was founded on 7 October 1949. Germany is a federal republic comprising 16 states. The capital city is Berlin. Germany is a member of United Nations, North Atlantic Treaty Organisation, G8, OECD, and the World Trade Organisation. It is the world's fourth largest economy by nominal Gross Domestic Product and the fifth largest in purchasing power parity.

Germany was first unified as a nation-state in 1871, when the German Empire was forged. The Kingdom of Prussia was the largest constituent. After the French defeat in the Franco-Prussian War, the German Empire was proclaimed in Versailles on 18<sup>th</sup> January 1871.

This year marks a milestone since the fall of the infamous Berlin Wall that separated one of the greatest nations not just in Europe, but in the world. In marking this momentous event, we take a closer look at events that happened before and after the reunification of Germany, and whether there are any lessons in democracy and rule of law for both Africa and the world as a whole.

By Stephen Ndegwa

The assassination of Austria's crown prince on 28<sup>th</sup> June 1914 triggered World War I. Germany, as part of the unsuccessful Central Powers, suffered defeat against the Allied Powers. An estimated two million German soldiers died in the war. An armistice putting an end to the war was signed on 11<sup>th</sup> November 1918. Germany was forced by the Allied Powers to sign the Treaty of Versailles in June 1919. The negotiation excluded the defeated Central Powers.

### Allied forces

In 1919, there was a revolution and Germany was declared a Republic. The monarchy collapsed and the King abdicated. The struggle for power continued with the Communists seizing power in Bavaria. The Weimar Constitution was adopted with its signing by President Ebert. In 1933, President Paul von Hindenburg, after a series of unsuccessful cabinets, appointed Adolf Hitler as Chancellor. A centralised totalitarian state was established by a series of decrees making Germany a single-party state. Under the reign of Hitler, the industry, which had been affected adversely during the Great Depression and the aftermath of the World War I, was revitalised, with a focus on military rearmament.

In 1939, the Germans launched war against Poland which was divided between Germany and the Soviet Union. This incident was followed by

declarations of war from Britain and France against Germany. As the war continued, Germany and its allies quickly gained control of the majority of Europe. Subsequently, the German army started to retreat on the Eastern front. The Allied forces made advances towards German territory. Germany's defeat soon followed. On 8<sup>th</sup> May 1945, the German armed forces surrendered after the Red Army occupied Berlin. Approximately 7 million German soldiers died during war.

The Third Reich regime implemented governmental policies directly subjugating many dissidents and minorities. About 11 million people were murdered during the Holocaust, including 6 million Jews and sizable number of Gypsies, Poles and other Slavs, the mentally ill and homosexuals and members of the political opposition. The war and the actions of the Nazi regime, the regime of Joseph Stalin in the USSR resulted in 35 million deaths in Europe.

After 1949, two German states and a divided city of Berlin evolved alongside the administration of the Allies occupation forces. West Germany was formed by the American, British and French zones while East Germany was formed by the Soviet Zone. The remaining national territory and Berlin were partitioned by the Allies into four military occupation zones. The areas controlled by the Allies were merged

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on 23<sup>rd</sup> May 1949, to form the *Federal Republic of Germany*. The first Lower Chamber elections were held on 14<sup>th</sup> August 1949 and Konrad Adenauer (CDU) became the first post war West Germany Federal Chancellor. The Soviet Zone became the *German Democratic Republic*. West Germany established its capital at Bonn but declared the status of the capital as provisional,

in order to emphasise its stance that the two-state solution was an artificial *status quo*. East Germany retained its capital at Berlin.

### Iron Curtain

West Germany, established as a federal parliamentary republic with a 'social market economy', was allied with the United States, the United Kingdom and France. The economy of West Germany recovered and enjoyed prolonged growth from 1950s. West Germany joined NATO in 1955 and was a founding member of the European Economic Community in 1957.

East Germany was under political and military control by the USSR through Soviet's occupation forces. The Soviet Union incorporated it into the Warsaw Pact in 1955. The Warsaw Pact was a military alliance of the Soviet Union and several Central and Eastern European countries formed to rival NATO. The Soviet control was ensured by the secret service of immense size. In return, the basic needs of the population were subsidised by the state. A Soviet-style command economy was set up.

East Germany constructed the Berlin Wall dividing the two German territories in 1961 to prevent its citizens from crossing over to West Germany. The Berlin Wall, which was referred to as the Iron Curtain, was the symbol of the divide between the Communist Eastern Europe represented by the Soviets and the Capitalists represented by the United



Germans celebrating the fall of the Berlin Wall 20 years ago.

States, United Kingdom and France. The first German-German summit between William Brandt and Chairman of the GDR Council of Ministers Willi Stoph took place in Erfurt in March 1970. In 1973, the two German states become members of the United Nations.

In May 1989, Hungary dismantled the Iron Curtain and opened the borders causing an exodus of thousands of East Germans going to West Germany through its territory. The effect of the Hungarian act had devastating effects on East Germany and it generated mass demonstrations. All along, the citizens of East Germany supported the unity of the two German states. The East German authorities unexpectedly eased the border restrictions allowing East German citizens to travel to the West.

Originally intended as a pressure valve to preserve East Germany as a state, the opening of the border actually led to an acceleration of the reform process in East Germany. The public held a series of protests by East Germans, known as Peaceful Revolution. These protests led to the first free elections on 18<sup>th</sup> March 1990. On 18<sup>th</sup> May 1990, the two German states signed a treaty agreeing on monetary, economic and social union.

### Basic Law

The Soviets and the Allies signed the Two Plus Four Treaty on 12<sup>th</sup> September 1990 whereby the four occupying powers renounced their

territorial rights. Germany regained sovereignty. This permitted German reunification on 3<sup>rd</sup> October 1990. The parliament resolved on 10<sup>th</sup> March 1994 that Berlin be the capital of the reunified Germany. The former capital of West Germany, Bonn, was converted into a Federal City retaining some ministries. The relocation of the

government to Berlin was completed in 1999.

Since reunification, Germany has taken a more active role in the EU and NATO. Germany sent a peacekeeping force to secure stability in the Balkans and to Afghanistan as part of a NATO effort to provide security. After the war, Germany was bound by the Basic Law to deploy troops for self defence.

The reunification was completed on 1<sup>st</sup> July 1990, with the Deutsche Mark as the official currency of Germany. The Deutsche Mark had a very high reputation among the East Germans. While East Germany transferred its financial policy sovereignty to West Germany, the West started granting subsidies for the budget and social security system. Many West German laws came into force in the East. This created a suitable framework for a political union by diminishing the gap between the two existing political, social and economic systems. The five re-established federal states of East Germany formally joined the Federal Republic of Germany, along with Berlin. The State of Berlin was created out of the formally occupied West Berlin and East Berlin.

### National holiday

The Federal Republic of Germany continued legally to exist under the same legal personality that was founded in May 1949. The reunification was not a merger but incorporation, by which West Germany absorbed East Germany. The Basic Law and other laws that were in force in the Federal

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Republic continued to apply to the expanded territory. The day of unification is the official German national holiday. The following month, the elections were held, resulting in an increased majority for the coalition government of Chancellor Helmut Kohl.

On 15 March 1991, the Treaty of the Final Settlement with Respect to Germany that had been signed in September 1990 between the Soviets, the United States, the United Kingdom, France, East Germany and West Germany, and that was ratified by the reunited Germany, entered into force. This put to an end to limitations on German sovereignty resulting from the post-World War II arrangements.

While the economy of East Germany stagnated partly due to the communist policies imposed by Russia, West Germany's economy flourished. The Allies, led by United States crafted the Marshall Plan to rebuild West Germany after the ravages of war. After the reunification of Germany in 1990, the capital city reverted to Berlin. Former East Germany was divided into five states, which joined the 11 existing states of West Germany. The Basic Law of West Germany continued to operate as the constitution of Germany and was amended to recognise the new states. The economy of East Germany has recovered with the support of West Germany.

### Progress of reunification and impact on EU

West Germany was active in European affairs and was one of the founder members of the European Economic Community which converted into the European Union in 1993. Germany support European Integration and has cooperated well with its neighbours, including France. Germany is at the forefront of seeking to advance the creation of a unified European political, defence and security apparatus.

The objective of the European Community was to advance the economic integration of Western Europe, through the elimination of barriers to free trade and investment. Due to changes in Europe and the Soviet Union, progress towards European unity suffered setbacks in 1990s. The foreign policy of the West Germany supported the deepening of the European community. In 1995, Germany was among the first countries to sign the EU Agreement, which abolished border controls between members. The country adopted the European currency, the euro, in 1999

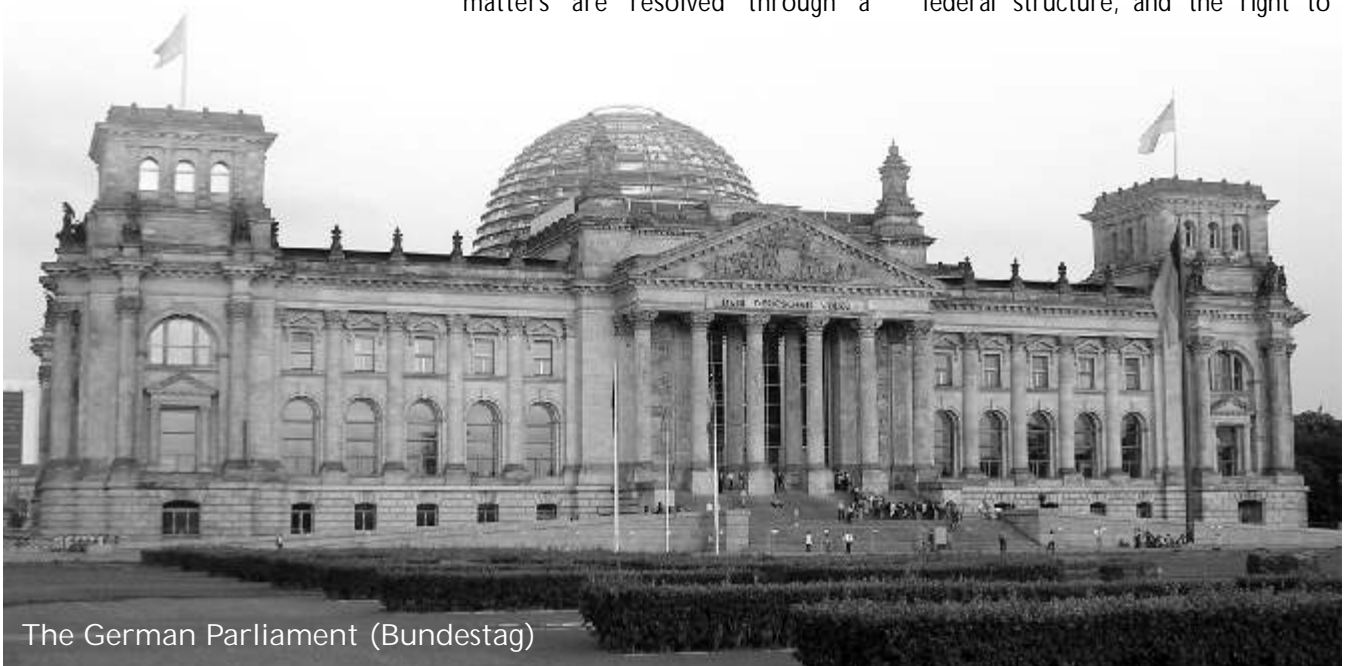
Opponents of the European Union treaty contended that the EU would be controlled by Germany. Britain called for a halt to the process of European Union since the final form would be dominated by the Germans. These arguments were hollow as Germany could not advance its agenda within the EU without compromise and consensus. Issues at EU required approval by all members and other matters are resolved through a

weighted majority voting. This means that Germany has the same number of votes as France or Britain. Few would dispute the incomparable importance of German support in the EU for significant policy initiatives. Germany has been a prime driver of European integration.

### Rule of law, governance and democracy

Germany adopted a Parliamentary system in which the Chancellor is the head of Government. The President, who is elected by a Federal Electoral College, is the Head of State. Christian Democratic Union and the Social Democrats constitute the largest political parties and have held the Chancellorship alternately. When either party has no clear majority, a coalition government is formed. Germany has 16 states. The states are semi autonomous with limited executive and legislative powers. The states are represented in the Upper House of Parliament. Where no party has emerged with a clear majority, coalition governments have been set up to govern the country.

Germany is a federal, parliamentary and democratic republic. The political system operates under a framework laid out in the Basic Law adopted in 1949. The Basic Law was intended to be replaced with the Constitution after German Unity. Amendments to the Basic Law generally require a two-thirds majority of the two Chambers of the parliament. However, the articles guaranteeing fundamental rights, the separation of powers, the federal structure, and the right to



The German Parliament (Bundestag)

# An unhealthy nation

Health for all in Kenya still remains a mirage for millions of citizens. Every national plan and even the millennium development goals categorically acknowledge that without universal health for all people, it is not possible to achieve national development. The writer examines the current state of affairs in the country's health sector and prescribes measures that are necessary for a healthy nation.

By Kipkoech Kiptur



Kenyatta National Hospital in Nairobi.

**T**he Bill of Rights as set out in the Kenyan Constitution provides for civil and political rights, such as the right to life, freedom of movement, freedom from torture, right to a fair trial and freedom of conscience. Social, cultural and economic rights have gained currency since the adoption of the International Covenant on Economic, Social and Cultural Rights in 1976. The right to highest attainable standard of health is a social and cultural right.

The Ministry of Health is responsible for the implementation of health care strategies in Kenya. The public health care system has not ensured accessible, affordable and quality health care. The Government has investigated possible introduction of social health insurance, the use of franchising and output-based approaches, introduction of user fees and exemptions and waivers for the poor, the role of the private sector and voluntary health insurance, and the size and structure of the Ministry of Health budget.

Geographic disparities and socio-economically defined inequalities, which have been noted as an underlying cause of the Post Election Violence in 2008, should be narrowed

by providing access to basic social services including health care. The Ministry of Medical Services has been promoting the establishment of social health insurance while the Ministry of Public Health and Sanitation has focused on expanding the financing mechanisms for health on the demand side.

The Kenyan Constitution excluded social and economic rights. Kenya has ratified the International Convention on Economic, Social and Cultural Rights and the African Charter on Human and Peoples Rights. The treaty provisions are applicable in Kenya. During the constitution review process, there is consensus that the Bill of Rights ought to be revised to include the social, economic and cultural rights.

A number of laws and policies have been adopted to streamline the health sector and ensure access to health services. In 1992, cost sharing charges were introduced in public health facilities due to the budgetary constraints. In 2003, the policy was revised to 20/ 10 policy where the public pays Kshs. 10/- for treatment in dispensaries and Kshs. 20/- for treatment in health centres.

The laws that relate to health include the HIV/AIDS Prevention and Control

Act which was enacted in 2006, though it is yet to be operationalised. This Act was preceded by the Sessional Paper on HIV/ AIDS which was adopted by Parliament in 1999. This policy facilitated the setting up of the National AIDS Control Council, which is in charge of informational and preventive measures on HIV/AIDS in Kenya. The National Health Insurance Fund Act was amended in 1998 to convert the NHIF from a Government department into a parastatal, under the charge of a Board of Directors. The National Social Health Insurance Bill was enacted by National Assembly in 2004. However, the President referred the Bill back to Parliament for further discussions and review.

African countries face the dual challenge of enhancing their health expenditure and drastically improving health care. Basic health services are estimated to cost at least \$ 34 per *capita*. Lack of access to health care is pervasive and is linked to the level of households' out-of-pocket payments for health care. High out-of-pocket payments deter people from seeking care. In Kenya for example, out-of-pocket payments represented about 50% of total health expenditure in 2003.

Social health insurance spreads the

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responsibility of health care financing among citizens and the private sector. The tax systems are challenged since the tax base may need to be widened and strengthened; tax compliance requires improvement, and sufficient allocation must be made towards health services. The public must be willing and able to contribute to the scheme and to comply with its regulations, and accept a degree of financial solidarity.

### The Proposed National Health Insurance Scheme

The National Social Health Insurance Fund Bill sought to transform the NHIF from a contributory scheme which benefits salaried employees into a social health insurance scheme meant to provide health care for all citizens. Persons living below the poverty line rely on out of pocket payments to access health care. The Fund would ensure equity and access to health care by the poor and persons in the informal sector.

The characteristics of social health insurance are that coverage is compulsory by law, the eligibility for benefits is derived from contributions, the benefit package is not directly related to contribution and hence there is redistribution from the rich to the poor. The Fund is a long term plan to finance benefits and is managed by the Government with all revenue being applied to health. The Fund is not controlled by the Treasury. The schemes can generate additional money for health, promote value for money and improve the quality and targeting of health care.

Social health insurance shifts public subsidies from the supply side to the demand side to improve the efficiency and quality of health care. The scheme separates the responsibilities for collecting and managing the fund from the responsibilities for providing health care to patients, whereby services are contracted from providers. Providers are required to be accountable to patients for the quality of services. Citizens only become entitled to receive benefits when they have paid the required premium. The social health insurance is not universal like the universal health insurance financed by general revenues, whereby every citizen is covered. The proposed model in Kenya required eligible persons to pay a stipulated amount and be registered and obtain a card from the Fund.

Due to the direct benefit likely to accrue to the contributors or their dependents, there is less resistance to payment of contributions unlike payment of taxes. However, in resource poor countries, there is little likelihood of generating resources due to scarcity of resources and high levels of poverty. The social health insurance scheme can be a vehicle for universal health coverage. The overall income level and income growth in the country should be sufficient, enabling households, enterprises and government to make contributions commensurate to their legal obligations. Further, external donor financial support would strengthen the revenue base of the scheme. The Fund should build its administrative and managerial capacity.

All Kenyans would be enrolled into the scheme and contribute in a defined manner. The Government would pay the contributions for persons certified as unable to make contributions. The Fund would be constituted through contributions by the self employed, the employed, the poor and permanent residents. The user charges in public health facilities collect Kshs. 2.2 billion per year, which constitutes 3.1% of the total health expenditure. The Bill would make health services effective, accessible and affordable through the delivery of health services and by financing and managing services to guarantee availability, accessibility and affordability. The Fund would finance inpatient and out patient covers.

Social health insurance operates on the principle of the pooling of risk and of contributions. The combined contributions pay for health services thereby giving the members access to health care irrespective of income or social status. The contributions are based on the ability to pay with the Government subsidizing for households which are unable to pay. The private sector is contracted to provide services according to a payment schedule agreed upon with the Fund. In Kenya, the Government proposed to replace cost sharing fees with prepaid contributions to the Fund. The benefits package must balance socially acceptable contributions to the Fund and appropriate levels of compensation for health care providers.

The Fund was intended to set up mechanisms for management and monitoring, quality control, fix mortuary storage periods, establish special review procedures for expensive drugs, regulate cases requiring long term treatment and establish remuneration levels. The Board of Directors was expected to formulate Yearly Plans of administrative overheads. Such costs would not exceed 10% of the total expenditure of the Fund in the first four years and 8% thereafter.

The Fund would create the procedures for registering members and establish mechanisms to minimise fraud. The Fund was expected to collect and manage about Kshs. 40 billion per year. The implementation of



The Aga Khan University Hospital in Nairobi.



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the Fund would be graduated with full implementation expected to take 10 years. The Fund was expected to set up the management structure by establishing contracts, monitoring service use, detecting and avoiding fraud, introducing performance measures, and regulating providers.

The challenges identified in the implementation of the social health insurance scheme included the high poverty levels prevalent in Kenya. Up to 56% of Kenyans live below the poverty line. The resource outlay required to implement a social insurance scheme is very high. Kenya's economy has been growing at a very slow rate and may not be able to sustain the scheme. Further, it has proved difficult in the past to collect revenue from the informal sector, even under the NHIF and the NSSF.

Many Kenyans depend on pastoralist activities and agriculture for a livelihood. It will be difficult to collect the contributions from such persons. This could lead to enhanced contributions for the employed thereby overburdening the taxpayer. Increased payroll deductions may create unemployment since the statutory deductions are high and may deter investors resulting in decreasing contributions to the Fund due to unemployment rates.

The Fund will face the challenge of the logistics and economics of collecting the contributions from sparsely populated areas and persons in the informal sector. Sparsely populated areas increase costs of administration and opportunity cost. About 74% of Kenyans are employed in the informal sector. The Kenya Revenue Authority has faced challenges collecting taxes from the informal sector. The Fund may promote a moral hazard thereby generating high demand for health services due to the marginal cost of the service.

If not well designed, the Fund will subsidise health services of the rich by the poor. A large portion of the NHIF contributions benefit private hospitals where middle income persons go for treatment and very little portion benefit the public hospitals where the majority of the poor go for treatment. The administration costs for the Fund



A cholera victim in Zimbabwe being carried on a wheelbarrow to a clinic.

may be high due to high costs of insurance administration and difficulty in collecting payments due to weakness in weak management structure and capacity. Other challenges include urbanisation of service providers due to ease of managing insurance, limited understanding of the concept of insurance in the community, identification of the poor, challenges of treating HIV/AIDS, fluctuations in employment, the nature of the labour market and the state of the economy in general.

### The National Health Insurance Fund

The Fund is created under the NHIF Act of 1998. The Fund was previously a department in the Ministry of Health. Through the Act, the Fund was converted into a statutory body run by a Board of Directors. The Fund has been subject to fraudulent claims from hospitals and has inherent governance challenges, partly attributable to government interference. Further, part of the resources of the fund has been invested in projects that do not support the core business of the fund. The NSHIF Bill of 2004 was intended to convert the Fund into a compulsory and universal health insurance fund for all Kenyans and permanent residents in Kenya. The Bill was not assented to by the President and was referred to Parliament for further consultations and amendments. The main concern about the scheme was its sustainability and challenges in collection of contributions.

The Fund focuses on formal sector employees. NHIF pays for bed occupancy costs. NHIF was centralised in Nairobi thereby significantly limiting access and increasing transaction costs for hospitals and nursing homes outside Nairobi. The Fund has created 28 branch offices which have been authorised to process claims. Some of the obstacles facing the operations of the Fund include the reimbursement policy which encourages growing stays in hospitals, increased value of claims, and the expansion of the private for profit sector.

In 1987/88, 26% of the approved facilities were private hospitals which received 58% of all reimbursements. 26 facilities received 15% of all reimbursements. This has affected the effective funding and running of mission, community and government hospitals. The fund uses up to 25% of the total contributions in administrative costs. National Hospital Insurance Fund is undertaking a number of institutional changes to increase membership and extend benefits in order to be better prepared for conversion into a social health insurance scheme.

### Principles of public healthcare

#### NHIF

The NHIF is a compulsory medical scheme for all employed persons in public and private sectors. Any person who earns more than Kshs. 1000/- per

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month is required to enrol for the scheme. The scheme reimburses public and private hospitals charges at a designated rate for registered members who are hospitalised. At present, the Fund does not cater for outpatient care.

#### Private insurance companies

The insurance companies have essentially afforded health protection policies to employers. Most policies are designed for groups of ten and above members. Recently, the insurance companies have designed packages for individual covers. Medical covers is also [provided by health management organisations. These companies, though registered under the Insurance Act, are not insurance companies but they run clinics in which they treat their members. Admission to hospitals is upon recommendation of the doctors in their clinics. This model assists in cost and quality control. The health management companies were opposed to the setting up of the National Social Health Insurance Scheme. Some employers provide medical services directly to their staff by establishing clinics which are stocked with the necessary medicines and equipment. Qualified personnel are employed in the clinic to attend to company staff.

#### Kenya Medical Supplies Agency

KEMSA is responsible for purchase and distribution of medical supplies, medicine and drugs for use in public hospitals. The Agency is intended to leverage on bulk purchases and negotiate fair prices for the supplies. The Agency has faced governance challenges with its board being implicated in shoddy deals. KEMSA is a specialized medical logistics provider for Ministries of Medical Services and the Ministry of Public Health and Sanitation supported health facilities and programmes. The Agency was formed on 11th February 2000.

The functions of the Agency are to develop and operate a viable commercial service for the procurement and sale of drugs and other medical supplies; to provide a secure source of drugs and other medical supplies for Public Health institutions; and to advise the Health Management Boards and the general public on matters related to the

procurement, cost effectiveness and rational use of drugs and other medical supplies.

The Agency has faced governance challenges resulting in loss of public revenue. In July, 2008, the Board of the Agency was dissolved. In a report by the Inspectorate of State Corporations, it was noted that the board was not employing good corporate governance principles, and was incapable of providing leadership to the Agency. It was noted that there was conflict of interests and that decisions of the Agency were predetermined by the Board resulting in loss. A Task Force was appointed to review its processes and procedures but the Report has not been made public.

#### Improving public healthcare

The Government should increase the overall budget provision for health care. At present, the Government allocates the Ministries of health about 8% of the budget. The African Union Heads of State and Government agreed in Abuja to increase health care budgets to a minimum of 15% of the national budget. Further, the Government should allocate more resources to preventative care from curative care. Fortunately, donor funded programmes in TB, malaria and HIV/AIDS have designed preventive health services resulting in improved health care for the targeted populations, including pregnant mothers and children under the age of five.

The Ministry of Health has been split into the Ministry of Public Health and Sanitation to carry out preventive health care while the Ministry of Medical Services manages curative health care. There should be clear delineation of roles between the two Ministries to avoid overlaps and duplication of roles.

The institutions involved in management of resources in the health sector must demonstrate increased transparency in resource management. The National Health Insurance Fund must be accountable to the contributing public. Its conversion into a social health insurance scheme is partly dependent on its ability to deliver services in its current design.

The KEMSA must streamline procurement procedures and distribution structure to reduce losses in drugs and other medical supplies.

#### United Kingdom

The National Health Service (NHS) refers to the three publicly funded healthcare systems in Great Britain, collectively or individually. There is no discrimination where a patient resident in one country of the United Kingdom requires treatment in another, except in the case of NHS abortions where women from Northern Ireland must pay for the service in the mainland. The consequential financial matters and paperwork are handled by the organisations.

Since its launch in 1948, the NHS has grown to become the world's largest publicly funded health service. It is one of the most efficient, just and most comprehensive. The system developed to provide good healthcare to all, regardless of the ability to pay. With the exception of charges for some prescriptions and optical and dental services, the NHS remains free at the point of use to all persons resident in the UK. It covers comprehensive health care services including antenatal screening and routine treatments for coughs and colds, open heart surgery, accident and emergency treatment and end-of-life care.

Although funded centrally from national taxation, NHS services in England, Northern Ireland, Scotland and Wales are managed separately. The NHS employs more than 1.5 million people with about half of the employees being clinically qualified. NHS employs about 90,000 hospital doctors, 35,000 general practitioners, 400,000 nurses and 16,000 ambulance staff. On average, the NHS deals with 1 million patients every 36 hours while about 700,000 persons visit an NHS dentist every week. About 3,000 persons have a heart operation each week. Each General Practitioner in more than 10,000 practices attends to an average of 140 patients a week.

At inception in 1948, the NHS had a budget of £437 million. In the 2007/8 financial year, the NHS received more than £90 billion. 60% of the NHS

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resist attempts to overthrow the constitution are valid in perpetuity and cannot be amended.

The Chancellor exercises executive power. The current Chancellor is Angela Merkel. The Lower House is elected through direct elections and by proportional representation. The members of the *Upper House* represent the sixteen federal states and are members of the state cabinets. Legislative power is divided at the federal and the state levels. The Basic Law presumes that all legislative power is vested to the states unless otherwise designated by the Basic Law.

The Judiciary is an impartial and independent branch of the government. The executive and the legislative branches do not control the

judiciary. Germany has a civil or statute law system that is based on Roman law. The German Supreme Court determines constitutional matters and exercises the power of judicial review. The German penal system aims to rehabilitate criminal and the protecting the public. The criminal justice system provides for the prosecution and penalties for crimes against humanity, genocide and war crimes. German courts exercise universal jurisdiction where prosecution by a court of the country where the crime was committed, or by an international court, is not possible.

Germany ratified the European Charter on Human Rights on 5<sup>th</sup> December 1952. Germany has ratified the UN treaties on human rights. The Nuremberg trials and the International Military Tribunal for the Far East

(Tokyo war crimes trial) established the principle of international accountability for crimes against humanity. These trials set the foundation for the acknowledgment of the crimes of the Nazis, the complicity of German society, and responsibility for the Third Reich, including the need for reparations to victims.

The involvement of Germany in the European Union can be applied by the East African States of Kenya, Uganda, Burundi, Tanzania and Rwanda as they forge towards the political federation. Already, Protocols establishing a Common Market and a Monetary Union have been signed. The EAC celebrates its 10 anniversary this year.

**KN**

*The writer is the Managing Editor, Katiba News.*

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Public Health

budget pays staff while 20% pays for drugs and other supplies. The rest of the funds are used for buildings, equipment and training costs, medical equipment, catering and cleaning on the other. The Department of Health is in charge of the NHS with a cabinet minister reporting as Secretary of State for Health to the Prime Minister. The department controls England's 10 Strategic Health Authorities which oversee all NHS activities in England.

### Germany

Germany has established a system where the public compulsorily contributes to a health fund. The Fund was created under the 1883 Health Insurance Act. The statutory health insurance has provided a framework for delivery of public health care. In 1885, the health insurance provided medical protection to 26% of the lower segments of the labour force. This comprised 10 % of the population. The system has a high degree of equity and justice. Universal coverage is carried out at any medical office or hospital. In 1982, the Government introduced modest co-payments for medication, dental treatment and hospitalisation. Drug costs have increased substantially, rising nearly 60% from 1991 through 2005. Despite attempts to contain costs, overall health care expenditures rose to 10.7% of GDP in 2005, comparable to other western European nations.

### Sweden

Sweden's population has equal access to health care services. The health care system is state funded and services are decentralized. The health care system is financed primarily through taxes levied by county councils and municipalities. The role of central government is to undertake quality control, establish guidelines for health care and set the political agenda for health care. The county councils and municipalities are responsible for providing health services. The county council is a political body of elected representatives and is responsible for providing residents with quality health services and promoting good health in the entire population.

Around 90 percent of the Swedish county councils' work involves provision of health services. The population in county councils ranges from 60,000 to 1.9 million. The county councils have discretion to determine how care should be planned and delivered. Costs for health and medical care amount to approximately 9 percent of Sweden's Gross Domestic Product. 71% of health care is funded through taxation. County councils collect income tax. The state pays for approximately 98% of medical costs. The patient pays nominal fees for examination.

### America

The Government support two health insurance programmes, Medicare and Medicaid, and gives tax incentives for persons who subscribe to medical insurance and employers providing health insurance to their employees. Medicaid was established in 1965. The scheme pays for health care expenses of families with low incomes and without assets. The programme is administered by the State subject to Federal Guidelines and financed by the State and Federal Governments. Only the needy are eligible.

Medicare pays for medical expenses for people aged above 65 years, persons with disabilities and chronic kidney disease. The insurance pays for acute care facility, for example hospital, hospice or skilled nursing facility. Long term care in a nursing home is not covered. Since the insurance does not cover all possible health risks, persons covered under Medicare subscribe for supplemental medical insurance which pays for physician and laboratory and diagnostic services. The system has co-payments and deductibles. Hospitals are paid a fixed cost per stay based on the illness of the patient. This helps to control hospital costs. **KN**

*The writer is a public healthcare consultant based in Nairobi.*

# Curse or blessing?

Kenyans might be laughing all the way to the bank in the near future if it is indeed true that we have almost struck oil. But observers say that is the easy part. Once oil drilling becomes reality in the country, the biggest challenge will remain – governance. We analyse where we are coming from with the potential of oil discovery and put up a case for more systematic governance in the energy sector.

By Dorothy Momanyi

**K**enya has been grappling with an energy crisis. The crisis is marked by high prices of oil products and load shedding of electric power. The latest crisis is a recurrence of the power crisis in the late 1990's. The hydropower stations have been producing insufficient energy to meet demand leading to installation of thermal based power stations, which use petroleum products in electricity production.

The Government has expanded the programmes for production of geothermal energy. The production of geothermal power is capital intensive. It is a reliable source of energy. It is estimated that Kenya has the potential to produce over 3000 MW of geothermal electric power. Less than 5% of this power has been exploited. The power sector is dominated by Kenya Power and Lighting Company Ltd, in which the government holds about 51% of the shareholding and the Kenya Electricity Generating Company Ltd, where the Government holds 70% of the shares.

To facilitate investment in the energy sector and given that the two principal players are essentially private companies, the Government formed the Geothermal Development Company Ltd, which is wholly owned by the Government to fund projects in geothermal sector. Another company, the Kenya Electricity Transmission Company Ltd has been formed to construct and maintain high voltage power lines, especially for the remote areas.

## Energy Act

The Energy Act was enacted in 2006 to regulate the Energy Sector. The Act repealed the Electric Power Act which was in force since 1999 to regulate electricity production and sale. The Act remodelled the regulatory framework and centralised regulation in the energy sector in the Energy Regulatory Commission. The ERC is charged with the duty of regulating production,



An oil rig being set up for drilling crude oil.

transmission and use of electrical power, petroleum products and promoting the use of renewable sources of energy. The ERC succeeded the Electricity Regulatory Board which was set up under the Electric Power Act.

The functions of ERC are to regulate supply and use of electrical energy; the importation and sale of petroleum products; the production and use of renewable energy; consumer protection, accredit energy auditors; monitor the implementation the principles of fair competition in the energy sector; research on energy matters, to collect energy data; and to prepare indicative national energy plan.

The Commission has powers to issue, suspend or revoke licences; to propose regulations; to formulate environmental and quality standards; to enforce and review regulations; to prescribe the procedure for applications for a licence or permit; to prescribe procedure for granting of authority or approval; to prescribe the conditions attached to the grant of licences or permits; to make and enforce directions to ensure compliance with conditions of licenses or permits; to review and adjust electric power tariffs;

to approve electric power purchase and network service contracts; to examine and approve electric meters; to investigate disputes; to accredit persons to verify the accuracy of energy meters; prescribe procedure for conducting energy audit; to impose sanctions and penalties for violations; and to grant licences for sustainable charcoal production.

The management of the ERC is vested in the Commissioners. The Board shall consist of a Chairperson who is appointed by the President; the Permanent Secretary in the Ministry of Energy or his representative; the Director General; and five other commissioners appointed by the Minister to represent the private sector. The Minister appoints the Director General on the recommendation of the Commission. The Director General is the chief executive of the Commission and is responsible for the management of the Commission. He is appointed from three names submitted by the Commission after a competitive selection process.

A licence is required to generate, import or export, transmit or distribute

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electrical energy and to supply of electrical energy to consumers. A permit is required to supply of electrical energy to consumers and to maintain and run a generating plant of over 1000 kW. All contracts for the sale of electrical energy, transmission or distribution services are submitted to the Commission for approval before execution.

The Commission considers the impact of the undertaking on the social, cultural or recreational life of the community; the need to protect the environment and to conserve the natural resources; land use or the location of the undertaking; economic and financial benefits; the economic and energy policies; the cost of the undertaking and financing arrangements; the ability of the applicant to protect the health and safety of users; the technical and financial capacity; any representations or objections; and the proposed tariff.

The Act establishes the Rural Electrification Authority. The functions of the Authority are to manage the Rural Electrification Programme Fund; to develop the rural electrification master plan; to implement and source funds for the rural electrification programme; to promote use of renewable energy sources including small hydros, wind, solar, biomass, geothermal, hybrid systems and oil fired components; and to manage contracts for licences and permits for rural electrification. The Minister may impose a levy of 5% on all electricity consumed to form the Rural Electrification Programme Fund. The Rural Electrification Programme Fund supports the electrification of rural areas.

The Fund shall consist of the electricity

sales levy; fees and charges levied by the Commission; moneys appropriated by Parliament; donations, grants and loans; and other moneys lawfully received or made available for the programme. The Rural Electrification Authority was formed to fast track the rural electrification programmes. Previously, the programme was implemented by KPLC. KPLC is a profit driven partly private company which was unable to implement the programme efficiently. The resources allocated to rural electrification continued to accumulate. The Authority is expected to subcontract other companies to complete the rural electrification programme, with a target of 1 million new connections in 5 years.

The ERC issues licenses for importation, refining, exportation, storage or transportation of petroleum. Every vehicle used for transportation of petroleum is required to be licensed. The ERC upon application may grant a licence, with or without conditions or refuse to grant the licence. Any person intending to construct a pipeline, refinery, bulk storage facility or retail dispensing site shall apply in writing to the Commission for a permit. Such application shall specify the name and address of the proposed owner and be accompanied by the plans and specifications.

The Minister shall promote the development of renewable energy technologies including biomass, biodiesel, bioethanol, charcoal, fuel wood, solar, wind, tidal waves, hydropower, biogas and municipal waste. The Minister shall formulate a national strategy for coordinating research in renewable energy; create the enabling framework for production and marketing of biomass,

solar, wind, small hydros, municipal waste, geothermal and charcoal; promote the use of fast maturing trees for energy production including biofuels and the establishment of commercial woodlots including peri-urban plantations; promote the use of municipal waste for energy and hydro turbines; promote international co-operation on renewable energy sources; harness opportunities offered by carbon credit trading; promote utilization of renewable energy sources; promote co-generation of electric power by sugar millers; and promote the production and use of gasohol and biodiesel.

Any appeal against the decision of the ERC shall be made to the Energy Tribunal, established in the Act. The Tribunal shall consist of a Chairperson and Vice Chairperson appointed by the President, in consultation with the Judicial Service Commission. The Chairman and his deputy shall be persons who qualified to be judges of the High Court. The Tribunal shall have three other members appointed from persons possessing expert knowledge of the energy matters and who are not in the employment of the Government or a state corporation. The Members shall be appointed by the Minister in consultation with the Attorney General.

The ERC succeeded the Electricity Regulatory Board which had been established by the Electric Power Act. All rights, duties, obligations, assets and liabilities of the Electricity Regulatory Board were fully transferred to the ERC. References to the Electricity Regulatory Board in any contract or document are deemed to be references to the ERC.

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The refinery at the Kenya Pipeline Company.

The Energy Regulatory Commission has proposed measures of stabilising the prices of oil. The Ministry of Energy has provided resources to the National Oil Company of Kenya Ltd, which is wholly owned by the Government, to construct and purchase of fuel stations so that it can create equilibrium in pricing of oil products. At the moment the NOCK has less than 5% market share in the oil industry and has to invest in more stations to enable it have the stabilising effect on fuel pricing. The ERC create a formula for controlling pump oil prices in Kenya. At the time the local oil prices were very high and not justifiable as compared with the international oil prices and trends. The formula has not been gazetted by the Minister.

### Towards energy self sufficiency

Kenya should explore and use renewable and other sources of energy. The oil prices have been escalating sporadically in the international market thereby adversely affecting economic growth. Kenya's manufacturing sector is uncompetitive regionally due to the high cost of production partly attributed to erratic and expensive electric power. The over reliance on hydrogenation has affected electricity supply during dry spells. The dry spells are increasingly frequent due to the changing climatic trends.

Alternative and environmentally friendly sources of energy include wind energy. The northern parts of Kenya have sufficient wind speeds that can be used to generate wind energy. One company has set up a wind field to generating and selling wind energy in Kenya. The mobile phone companies are generating wind energy for use at their base transmitter stations in the Northern Kenya. Wind is a major source of power in Europe. Kenya must explore the use of biogas as a source of energy for domestic use, especially in rural areas where the raw materials are available for production of biogas.

Most of Kenya's energy needs are sourced from charcoal and firewood. Charcoal and firewood are the most widely used sources of energy in Kenya which has contributed to forest depletion. The Government must encourage reforestation to ensure availability of wood products. This should be supported by securing of public forests to minimise unauthorised destruction. The government should promote reforestation with a view to replenishing the sources of wood fuel. The public should be sensitised on the need to plant trees as future source of energy.

The Government has been promoting the use of LPG through valve standardisation and installation of

storage facilities for LPG gas. The poor have been discouraged from using LPG due to high price. The Government has, through the Monopolies Commission and the Kenya Bureau of Standards, standardised the valve for gas cylinders to improve access to LPG. This means that a person can purchase LPG gas from any oil company. Further, Kenya Pipeline Company is building a storage plant for LPG. In the past, Kenya has faced shortages of the gas due to insufficient storage capacity.

Kenya is making efforts to explore oil and has contracted international firms to undertake oil exploration. The Government has been keen to fast track the process since Uganda and Sudan, who are close Kenyan neighbours reported discovery of oil within their territories. At the moment, a Chinese company is drilling a 5,000 metres oil well near Isiolo as part of this exploration exercise.

### Mineral resource management

A primary consideration in the mineral resource exploration and production is the safety of employees and the community at large. Mining creates health risks for workers and the community due to the highly toxic products used in the mining process. Oil exploration companies are known to emit hazardous materials that can affect the health of the workers and neighbouring communities. If the communities will be moved to facilitate exploration, such communities must be compensated for their property and loss of livelihood.

The rights of the people must be prioritised and observed. In the Niger Delta in Nigeria, Shell Development Company has been accused of colluding with the Government of Nigeria to perpetrate human rights violations. Prior to entry of any privately owned land for exploration or mining, the concessionaire must compensate the owner for inconvenience and damage to the land. Many land owners in developing countries have not been granted title documents. The compensation framework must include land owners who are yet to be issued with title deeds and compensate persons with user rights in the areas targeted for mining, for example pastoralists.

The mining companies must implement measures to ensure environmental sustainability. The mining industry has been blamed for increased greenhouse emissions and adoption of practices that destroy the environment. These changes have resulted in climate change. Mining companies must implement measures to protect the environment. The land used for mining must be restored to its original form after cessation of mining activities. Environment degradation has resulted in conflict between the communities and

the mining companies as such degradation results in loss of livelihood.

The Government must ensure that resources gained from mining activities are shared equitably between the community and central government. Specifically, such resources must be applied to alleviate poverty in the affected communities. Communities where mining activities are carried out do not benefit from the resources resulting in resentment and conflict. The exploration efforts in Kenya must be underlined by promotion of good governance, transparency, accountability and inclusiveness in resource distribution. Specifically, the communities which live near the mining sites must benefit from targeted resource allocation to accelerate poverty alleviation.

### Organization of the Petroleum Exporting Countries

The members of OPEC are Algeria, Angola, Ecuador, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela. Norway and Russia attend OPEC meetings as observers. Gabon, Ecuador and Indonesia suspended their membership to OPEC. OPEC is headquartered in Vienna since 1965. OPEC holds regular meetings among the oil ministers of its Members. OPEC's influence on the oil market has been criticized due to its effectiveness in determining oil production and pricing. OPEC members account for 2/3 of the world's oil reserves and 33.3% of the oil production which affords OPEC considerable control over the market.

OPEC decisions have considerable influence on international oil pricing. For example, in the 1973 energy crisis, OPEC refused to supply oil to western countries that had supported the Six Day War in 1973, in which Israel fought against Egypt and Syria. This refusal caused a fourfold increase in the price of oil lasting from October 1973 to March 1974. OPEC members raised crude oil prices by 10% in January, 1975.

The Statute establishing OPEC was approved in January 1961 in Caracas. The initial members of OPEC were Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. The main objective of OPEC is to coordinate and unify petroleum policies of members and determine the best means of safeguarding their interests, individually and collectively. OPEC devises ways and means of ensuring stabilisation of prices in international markets with a view to eliminating harmful and unnecessary fluctuations.

OPEC protects the interests of producing nations to secure a steady income; to ensure an efficient, economic and regular supply of petroleum to

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# Streamlining the justice system

Since the days of independence, Kenyans have perennially been dissatisfied with the way justice is meted out in the country. It is possible to get an acquittal from a crime in one arm of the system and a sentence of the same case in another. Our writer interrogates the investigations and prosecutorial functions in the justice system in Kenya, and reviews the legal and constitutional principles therein.



Police arrest a protester in the streets of Nairobi.

By Macharia Nderitu

**T**he Kenya Police are responsible for criminal investigations. The Criminal Investigations Department, a department within the police force and headed by a Director, coordinates criminal investigations. Due to its colonial legacy, Kenya adopted the common law system with the accompanying adversarial system in criminal prosecution. Under the system, all evidence must be collected and presented before the court by the prosecution.

The police are at the centre of investigation, evidence collection and presentation, given that most prosecutors are police officers who act under the delegated authority of the Attorney General. The judge or magistrate sits as an independent arbiter in the case. Any failure by the police to carry out thorough investigations or present the evidence in court during trial leads to the acquittal of the accused.

In the constitutional review process, it has been proposed that the office of the

Attorney General be split into the office of the AG, who will be the chief government legal adviser and the Director of Public Prosecutions, who will be the chief public prosecutor. Both officers will enjoy security of tenure for a fixed term. This proposal is intended to depoliticise prosecutorial functions. Since the AG sits in the Cabinet and is an *ex officio* MP, he is viewed as a partisan supporter of the Government of the day. Further, the multiple functions vested in his office means that he is not able to carry out prosecutorial functions satisfactorily, thoroughly, independently and in public interest.

The police reforms will equip the officers with the necessary skills to carry out thorough investigations. The Forensic Laboratory project at the Criminal Investigations Department should be completed to enable the police use modern methods to investigate cases. The Commissioner of Police is a constitutional office. However, the holder has no security of tenure and can be removed at will by the President. To enhance independence of the office, the Commissioner of Police should also be granted security of tenure.

The police service should be sufficiently equipped to enhance its capacity to respond to crime and carry out comprehensive and independent investigations. The public has gradually lost confidence in the police service due to lack of discipline in its ranks and the prevalent high levels of corruption. The police need to professionalize their work in order to restore public confidence. An independent oversight authority should be set up to enforce discipline in the police service.

The constitutional principle on criminal trials presumes a person innocent until proven guilty. The police and the DPP must collaborate to ensure that where a crime is reported to have been committed, thorough and impartial investigations are conducted. Any suspects arrested should thereafter be charged in court. The police must enhance their systems to ensure timely detection of crimes.

A member of public is allowed to initiate private prosecution where the AG has failed or neglected to prosecute a suspect in a criminal matter. Cases which are privately prosecuted can be

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terminated by the AG under his powers to control prosecution in the Constitution, especially where they involve politicians. The Kenya Law Reform Commission has prepared a Draft Private Prosecutions Bill to enhance the mechanisms for private prosecution.

### The Anti-Corruption and Economic Crimes (Repeal) Bill, 2009

The Bill proposes to disband the Kenya Anti-Corruption Commission. The powers conferred upon the Kenya Anti-Corruption Commission will be transferred to the Attorney General, if the Bill is passed. The assets and liabilities of the Commission will be transferred to the Government. The Bill intends to disband the Kenya Anti-Corruption Commission. The Bill was proposed when the President reappointed the Director and two Deputy Directors of the KACC without complying with the law.

The appointments have since been reversed by Parliament and the appointees resigned and left office. Since the office of the AG has fundamental and systemic flaws, transferring the powers of the KACC to the AG will not enhance accountability and assist in the fight against corruption. The performance of the AG is deemed unsatisfactory. The mover of the Bill, Hon Danson Mungatana has sought leave of Parliament to include further amendments to the Bill aimed at strengthening KACC.

The Bill does not seek to address the inherent weaknesses in the Commission. The Commission may not have realised its statutory objectives due to its past weak leadership and political interference. If the leadership is

politically impartial and has the will to tackle corruption, the Commission can fight corruption and combat impunity by conducting thorough investigations and publicising its work through an elaborate communication strategy. The Commission has not sought to update the public on its anti-corruption work hence the diminished public confidence in the Commission.

### Inter-agency cooperation and coordination

At present, the agencies in the justice sector operate independently with minimal inter-agency coordination. To further improve their performance, it is necessary to establish a forum for cooperation and coordination between the agencies. For example, the Attorney General is the chief public prosecutor whereas the police conduct criminal investigations. The AG has limited control on the quality of investigations that the police conduct before presentation of the evidence in court. The AG and his officers should evaluate all prosecution files prior to prosecution of cases and advise on the adequacy or otherwise of the evidence. A coordinating agency would assist the AG to evaluate and advise the police on the adequacy or otherwise of the evidence presented for use in prosecution.

A direct result of lack of inter agency coordination in the justice sector is the growing case backlog and overcrowding in prisons. Many criminal cases are not prosecuted in a timely manner due to lack of co-ordination between the investigating officers, the prison officers and the prosecutors. Regular interagency consultations and reviews will minimise such delays and promote efficiency in the system.

### a. The Director of Public Prosecutions. The office of the

DPP is set up administratively and serves as the assistant of the AG in prosecutions. The office is not created under the Constitution and is proposed to be converted into a constitutional office to enhance its independence and offer the office holder protection from political interference. The chief role of the DPP will be conducting public prosecutions. Coordination between his office and the police will facilitate review of evidence prior to its presentation in court. The DPP will professionally advise the police while carrying out investigations into criminal cases. Enhanced cooperation will ensure that criminal cases are prosecuted in a timely manner and based on sufficient evidence.

b. **The Police.** The police are in charge of maintaining public safety, law and order. This includes investigation of criminal cases and presentation of evidence in court. The police must co-operate with other government agencies to ensure efficient presentation and prosecution of suspects in court. The police must respect the fundamental rights of suspects which are guaranteed by the Constitution.

c. **The Judiciary.** The judiciary must seek to reduce the case backlog. This will be achieved through automation of court recording system and setting up of a performance management system for judicial officers. At present, most judicial officers are not adequately monitored to ensure satisfactory performance. This has affected the effectiveness of the judiciary. Further, the independence of the judiciary should not be fettered by direct or indirect threats or interference with judicial officers. In this respect, there is need to expand the Judicial Service Commission to include elected representatives of the Bar and the Bench. The current JSC is composed of presidential appointees.

d. **The Prisons.** The prisons have been overcrowded for a long time. Part of the reasons has been attributed to high number of remand prisoners and the failure of the courts to sentence convicts to Community Service Orders or probation. The prison should therefore be involved in inter agency coordination so that the courts are informed of the situations in prisons. Further, the prisons sometimes do not have the

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Former mungiki leader Maina Njenga being taken to court.



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means to transport suspects to court. Inter-agency coordination meetings would assist in identification of these problems so that the wheels of justice can operate smoothly.

### Inquisitorial and adversarial systems

In adversarial legal system, the judge is an independent arbiter who does not interfere with presentation of evidence in court. The judge acts as an umpire in the dispute. In civil cases, the advocates for the Plaintiff and the Defendant are responsible for presentation of evidence in court while in criminal matters, the accused person is presumed innocent until proved guilty. The prosecutor is obliged to present evidence to support the conviction of the suspect for the offence while the accused is defended by his advocate. In inquisitorial systems, the judge or magistrate is an active participant in the trial and assists in collection of evidence and takes part in questioning the parties in court to establish the truth of the case. The judge actively participates in investigation and resolution of the case.

The adversarial system relies on the contest between each advocate representing his or her party's positions. The trial is conducted before an impartial judge or jury. The system is adopted in common law countries. Justice is deemed to be done when one adversary convinces the judge or jury that his or her perspective on the case is correct.

As an accused is not compelled to give evidence in a criminal adversarial proceeding and he or she may not be questioned by prosecutor or judge

unless he or she waives his rights. The defendants in civil law systems can be compelled to give a statement. Such statement is not subjected to cross-examination by the prosecutor and is not given under oath. The Judge or magistrate in an adversarial system ensures the fair play and due process.

A significant difference between the adversarial system and the inquisitorial system occurs where a suspect admits to a crime. In an adversarial system, there is no more controversy and the case proceeds to sentencing, if the suspect admits the facts as read by the prosecutor. In an inquisitorial system, the fact that the defendant has confessed is merely a fact that forms part of the evidence.

In spite of the confession by the defendant, the prosecution must present a full case. The rules of evidence are considerably stricter in adversarial than in inquisitorial systems and the rules on hearsay are stricter in adversarial systems than in inquisitorial systems. Plea bargain does not exist in inquisitorial system.

An inquisitorial system is a legal system where the court is actively involved in determining the facts of the case, as opposed to an adversarial system where the role of the court is that of an impartial arbiter. Inquisitorial systems are used in civil legal systems as opposed to common law systems. The inquisitorial system applies to questions of criminal procedure and not substantive law. The system determines how criminal inquiries and trials are conducted, but does not define the crimes to be prosecuted or prescribe the sentences upon conviction.

The trial judge may participate in the

fact-finding inquiry by questioning witnesses even in adversarial proceedings. The rules of admissibility of evidence may allow the judge to act more like an inquisitor than an arbiter of justice. International tribunals have adopted key features of the inquisitorial system, such as the use of professional career judges and the use of a pre-trial examining or investigative division. The main feature of the inquisitorial system in criminal justice is the function of the examining or investigating judge. The examining judge conducts investigations into severe crimes or complex enquiries.

The vast majority of cases are investigated directly by law enforcement agencies. The judge questions witnesses, interrogates suspects, and orders searches for other investigations. The examining judge's goal is not to prosecute the accused, but to gather facts. His or her duty is to examine evidence, whether incriminating or exculpatory. If the examining judge or magistrate decides there is a valid case against the suspect, the accused is tried by a jury in an adversarial trial. The examining judge does not sit in the trial court and is prohibited from hearing future cases involving the same defendant.

Examining judges are used for crimes such as murder and rape, embezzlement, misuse of public funds, and corruption. As a result of judicial investigation and defendants being able to have judicial proceedings dismissed on procedural grounds during the examining phase, cases where the evidence is weak are not submitted to the trial. **KN**

*The writer is a Nairobi-based advocate of the High Court of Kenya.*

The Kenya Anti Corruption Commission offices.



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consuming nations and a fair return on capital to investors in the industry. Membership is open countries with a substantial net export of crude petroleum and which have fundamentally similar interests to the Members. Such member must be accepted by  $\frac{3}{4}$  of full members including concurrent vote of the founder Members. A Member may withdraw from membership by giving a notice at the Conference.

The Conference of OPEC formulates the policy of the organisation, determines applications for membership, confirms appointees to the Board of Governors, decides on reports and recommendations submitted by the Board and has the power to approve amendments to the Statute. The Board of Governors directs the management of OPEC and implements the decisions of the Conference. The Board draws the budget for the organisation and appoints auditors for a one year term.

The Secretariat carries out the executive functions of OPEC under the direction of the Board. The secretariat consists of the Secretary General and other staff of OPEC. The Secretary General shall be a national of a member country. Other departments of OPEC are the research, administration, human resources, public relations and information. The budget appropriations are shared among all members on an equal basis.

### Angola

The Angolan economy has been growing in double digits since the end of the civil war. The economic growth has been funded by resources generated from oil. Civil society has expressed concern about human rights violations and corruption in the public sector. However, western powers, being the primary beneficiaries of the oil exploration and production in Angola have been quiet. Indeed, given the international pressure on Zimbabwe to democratise, there is a perception that international pressure has been used selectively to censure of African regimes guilty of misrule, while ignoring those countries with oil. The economy reported economic growths on the back of oil earnings. Well-connected political and business elite has benefited, while the majority of the country's population lives on less than \$2 a day.

### Chad

Oil prices have hit record high in recent years but the living standards of the majority of the population have not risen to match the vast profits made by the government. Instead, the populace is mired in abject poverty. Since 2003, the government has squandered millions of dollars as oil has become a means for the regime to strengthen its armed forces, reward its cronies and co-opt members



A petrol tanker transports fuel.

of the political class. The oil wealth has become an element in the regime's self perpetuation strategy and has contributed to the country's endemic instability.

In 2000, government representatives met with World Bank officials agreed that the World Bank would finance the development of the oil sector including the building of the 1,600-kilometre, \$4.2-billion pipeline from Chad through Cameroon to the sea while the Government would invest the oil revenue in poverty-relief projects. 10% of the profits would be deposited in a fund for future generations while 80% was earmarked for development. To ensure that the terms of the agreement were observed, oil firms had to pay royalties into an account monitored by an independent watchdog, the Committee of Control and Supervision of Oil Revenues.

In 2008, the United Nations Development Programme (UNDP) ranked Chad 170 out of 179 in its human-development index and Transparency International placed the country 173 out of 180 in its annual list of the most corrupt countries. Oil wealth has contributed to the inherent instability in the country. It has fuelled the civil war, especially in the East near its border with Sudan, and enabled the government to avoid engaging with the opposition in bipartisan discussions on political reform and long-term solutions to the internal political crisis.

The government needs urgently to re-engage in national dialogue about how to make oil wealth beneficial to its population. Oversight mechanisms regarding use of the oil revenues should be strengthened. The simplest way would be to restore the status of the watchdog committee so it can exercise effective oversight in the management of the revenues. The international community has an important contribution to make in the process of national conciliation by linking their support for the regime with the reforms. Oil has become a weapon in the hands of the government and its allies. The impact of the revenue has evaporated, been wasted, or used to benefit the political elite.

### Nigeria

Nigeria is a major producer of petroleum

in Africa. It has established many oil wells in the Niger Delta with 2 million barrels are extracted a day. Since 1975, the region has accounted for 75% of export earnings. The natural gas extracted in oil wells in the Delta is flared, into the air at a rate of approximately 70 million m<sup>3</sup> per day. This is equivalent to 41% of African natural gas consumption, and forms the single largest source of greenhouse gas emissions on the planet. In 2003, about 99% of excess gas was flared in the Niger Delta. The biggest gas-flaring company is the Shell Petroleum Development Company of Nigeria Ltd. Despite regulations introduced outlaw the practice, most gas is flared, causing local pollution and contributing to climate change.

The environmental devastation associated with the industry and the lack of distribution of oil wealth have been the aggravating factors of inter-ethnic conflicts in the region, including recent guerrilla activity by the Movement for the Emancipation of the Niger Delta. 85% of national oil revenues are controlled by 1% of the population, while local indigenous people have seen little if any improvement in their standard of living while suffering serious damage to their natural environment. About 7000 oil spills occurred between 1970 and 2000.

There is an increased in local indigenous activity against commercial oil refineries and pipelines in the region have increased in frequency and militancy. Foreign employees of Shell, the primary corporation operating in the region, have been taken hostage. Such activities have resulted in governmental intervention in the area, and the mobilisation of the Nigerian army and State Security Service into the region, resulting in violence and human rights abuses.

Nigeria has abundance of oil and gas from which it derives a lot of revenue. These revenues do not benefit of the country and the citizens; hence the country remains underdeveloped and the majority of the population lives below the poverty line.

### Norway

Norway is a democracy in Europe. The oil industry is managed by Statoil; a 71% government owned Energy Company. Statoil controls 60% of gas and oil production. Another company, Norsk Hydro, is 44% owned by the Government and it controls aluminium and energy production. Other multinational companies like AMOCO, Conoco Phillips, Exxon Mobil and BP operate as partners of Statoil. Norway adopted a modern legal framework to regulate investment in oil production. The framework is modelled on international rules and regulations on energy extraction, production and trade. **KN**

# THE KONRAD ADENAUER FOUNDATION IN KENYA

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

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

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

## Our aims

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

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

participating in the political, social and economic development of the country.

## Our programmes

Among other activities we currently support:

Working with political parties to identify their aims and chart their development so that democratic institutions, including fair political competition and a parliamentary system, are regarded as the cornerstones for the future development in Kenya.

Dialogue and capacity building for young leaders for the development of the country. Therefore, we organise and arrange workshops and seminars in which we help young leaders to clarify their aims and strategies.

Reform of local governance and strengthening the activities of residents' associations. These voluntary associations of citizens seek to educate their members on their political rights and of opportunities for participation in local politics. They provide a bridge between the ordinary citizen and local authorities, and monitor the latter's activities with special focus on the utilisation of devolved funds.

Introduction of civic education to schools and colleges. We train teachers of history and government in civic education. In addition, we participate in the composition of a new curriculum on civic education.

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

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**MEDIA  
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