KatibaNews

Towards a new constitutional dispensation in Kenya

FEBRUARY 2010 Issue NO. 2.10

Climate change

INSIDE:

* Of Senate and county
*The pain of bearing witness
* Electoral justice in Kenya

Kindly supported by: Konrad Adenauer Stiftung

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.

No more drama!

In a recent announcement that seemed straight from heaven, many Kenyans could not believe their ears when members of the Media Owners Association (MOA) called a press conference and stated that they would ensure the Constitution review process is this time successfully completed.

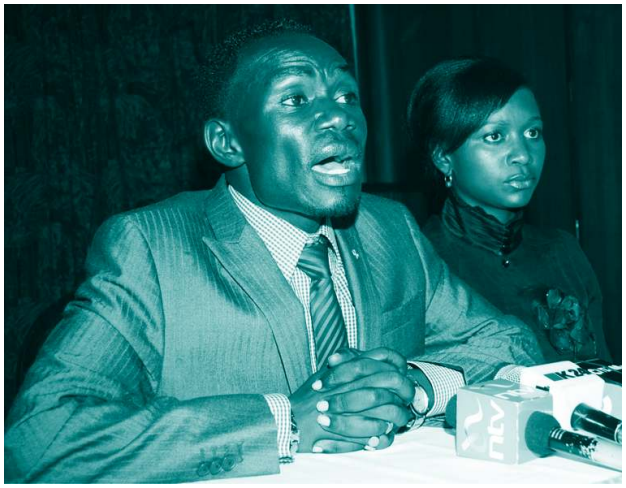
Speaking on behalf of the MOA, Nation Media Group chief executive officer, Linus Gitahi, indicated that the mainstream media in the country will give a blackout to any sideshows that threaten to get in the way of Kenyans finally getting a new Constitution.

Of course, that is bad news to our politicians whose stock-in-trade is peddling rumours, slander and controversy. Just when you think that we have almost made it, some politician emerges from the woods with some really crazy statement that puts a spanner in the works.

As for the hapless citizens who are perennially at the mercy of the same people they so zealously vote for as their saviours, the new approach is a saving grace. For once, the media is involved in some genuine social responsibility. Marketers will not fight for the prime news slot with the notion that the first item will be about the never-ending fallout between Hon PM Raila Odinga and his erstwhile Rift Valley lieutenant Hon William Ruto.

Sorry! News will be about how different stakeholders are tackling emerging issues as the draft continues to now take a life of its own. Well, that's boring but we need no more drama at this critical stage. This is the time for the sober minds to arise and have their day in the sun. We can now hear what the other half that has been intimidated by the loud mouths have to say about the status quo.

But that is still in an ideal world as I wonder whether the media as a whole can really read from the same script. Anyhow, the positive side of the MOA statement is not so much it's possibility, but that the media has inadvertently owned up to the fact that they have a lot of impact on society.



Jazz maestro Joseph Hellon and former KTN presenter Ms Esther Arunga in a press conference.

The agenda setting theory of the media says that while media does not create events or their enormity, the channels can very well decide what majority of people will think about at any particular time. For example, the recent juicy controversy involving jazz maestro Joseph Hellon and former KTN presenter Ms Esther Arunga relegated everything else, including the Raila – Ruto duel, the various financial scams et al into the back burner.

Those hitherto grave issues that have a tremendous impact on the nation just seemed to dissipate in the face of the unfolding soap opera of the controversial and little known Finger of God Ministries. Such is the power of the media when they lead with a particular issue.

So let the media meet the people halfway. While it is common sense that the media is owned by people whose main interests are partisan, it is pertinent that these entrepreneurs think about how their work affects the society as a whole. They owe it to the rest of us who cannot afford channels of our own! Editor KN

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

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

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

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

Managing Editor
Stephen Ndegwa

Associate Editors
Susan Kasera
Patrick Mwangi
Henry Owuor

Office Assistant
Monica Muthoni

Photography
World Wide Web

Art Direction & Design
Khafre Graphics

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

All Correspondence to:
The Editor
Katiba News
P.O. Box 64254-00620
Tel. 2712309
Nairobi, Kenya
Email: mediakenya@yahoo.co.uk

Contents

Climate change

Getting ready for Armageddon

By Albert Irungu

"Climate change is the defining challenge of our time, and local governments have a critical role to play in the fight against climate change."
— UN Secretary General, Mr Ban Ki-moon.

The world is slowly getting under the weather.

The climate change phenomenon is currently in the centre stage of world politics. Climate change is one of the greatest environmental, social and economic threats facing our planet today. Profound shifts are under way to the systems supporting life on earth that will have far-reaching impacts for decades to come. Its impacts are affecting the developing nations more than the developed ones, as most of them lack resources to cope with the changing climate and more so depend on natural resources for survival.

Even so, no one is immune from the catastrophic weather events as witnessed when Hurricane Katrina hit the United States. The United Nations Framework Convention on Climate Change, the United Nations body mandated to deal with climate change issues worldwide defines climate change as "*a change of climate, which is attributed to directly or indirectly to human activities that alter the composition of the global atmosphere and which are in addition to natural climate variability observed over comparable time periods*."

These changes have increased Kenyans' vulnerability to natural hazards and disasters. The weather patterns have become unpredictable and rains unreliable. The climate change phenomenon has been attributed to the rising levels of greenhouse gases. These gases are rapidly warming the earth causing changes in the global climate. The melting of the polar ice cap and the rising of sea levels are examples of global warming effects. Extreme weather conditions like hurricanes, floods, drought and heat waves have become frequent and more severe in many parts of the world.

So what is the source of these greenhouse gases? Burning of fossil fuels has been the major contributor to the rising levels of greenhouse gases. Since the 1800s when industrialisation kicked off, the use of fossil fuels, for example coal, gas and oil, has rapidly increased the amounts of carbon dioxide in the atmosphere.

The gas traps solar heat from the sun in the atmosphere, which with time has increased land temperatures. As a result, the world has developed a phenomenon known as global warming. Although there are scientists and governments who refute its existence, global warming has caused changes in the amount and pattern of rain and snow, in the length of growing seasons for food crops, in the frequency and severity of storms, and in the sea level.

Other gases like Methane from fossil fuel production, livestock husbandry, rice cultivation and waste management and Nitric Oxide from fertilisers, fossil fuel combustion and industrial chemical production using nitrogen also contribute to climate change. However, Carbon Dioxide is largely responsible for global warming.

In the Kenya, the situation is slowly turning appalling due to the reduced forest and vegetative cover. Trees absorb carbon dioxide thus reducing the levels in the atmosphere. The less the vegetative cover, the higher the amounts of carbon dioxide and the warmer the weather becomes. Due to poor policies and lukewarm political attitude towards the country's natural resource, there has been poor

continued page 4

from page 3

adaptation strategies implemented towards the effects of climate change.

Case in point has been the fight to conserve and expand Kenya's existing forest cover. With less than two per cent forest cover, the dwindling forests have adversely affected climate, wildlife, natural water supply and human population dependent on agriculture as an economic activity. The Mau complex has been at the centre of one of the biggest struggles to conserve our natural resources.

Politicians have used it to earn popularity contests endangering the lives of millions of people dependent on its wellbeing. However, even though the political will has been lacking, *wananchi*, through the support of corporate and non-governmental institutions, have been the biggest driving force towards the conservation agenda. The Government has taken initiative and created legislation to enforce and cultivate the conservation agenda that will be in the forefront of dealing with climate change vulnerabilities.

Wild forest fires such as these have become a worrying phenomenon. Photo: Anthony Njuguna

Kenya's current forest cover is 1.7 per cent. The Ministry of Environment and Mineral Resources, in conjunction with the Ministry of Forestry and Wildlife, has put in place a programme that will increase it to the internationally recommended 10 per cent. Under this programme, 4.1 million hectares will be brought under forest cover through rehabilitation of degraded areas, creation of new forests, tree planting in farmlands and the dry lands, as well as urban and roadside tree planting.

Kenya is extremely vulnerable since its economy relies heavily on climate-vulnerable sectors such as agriculture, water, energy, transport and tourism, hence the need to develop clear adaptive measures and strategies to address complex impacts of global warming. The Government has created a climate change and coordination office under the office of the Prime Minister to deal with high-level political coordination of climate and environmental change through mainstreaming these agendas into the broad political and development agenda.

This is intended to ensure sustainable natural resource utilisation in order to reduce poverty and abate continued environmental degradation and depletion of natural resources. Another of the State's strategy has been to create a forest master plan to restore degraded forest cover and quality of the environment that will cover all the five major water towers in the country. Promoting the use of renewable sources of energy has been one of the ways to counter the use of fossil fuels. The Government has invested in wind and solar energy, geo-thermal power and bio-fuels.

The creation of an all-enveloping environment strategy is in the pipeline. The key issues that the policy will try to solve are creating biological diversity, creating sustainable land use systems, proper water resource management, pollution control and waste management, producing renewable energy sources, countering climate change and variability, and having a disaster preparedness and risk management plan, among others.

The National Land Policy is another arsenal Kenya has against combating and adapting to the effects of climate change. The Government will ensure that all land is put into productive use on a sustainable basis by facilitating the implementation of key principles on land use, productivity targets and guidelines as well as conservation. It will encourage a multi-sectoral approach to land use, provide social, economic and other incentives and put in place an enabling environment for investment, agriculture, livestock development and the exploitation of natural resources.

This will ensure sound and sustainable environmental management of land-based resources. Dealings in such land will be guided by conservation and sustainable utilisation principles outlined in national environmental laws and policies. The main goal of this policy will be to set comprehensive guidelines for achieving sustainable development. The policy will seek to influence the behaviour of individuals and institutions (both public and private) in production and consumption of goods and services, thereby enhancing their contributions to the realisation of the broader goals of the society in general and of sustainable development in particular.

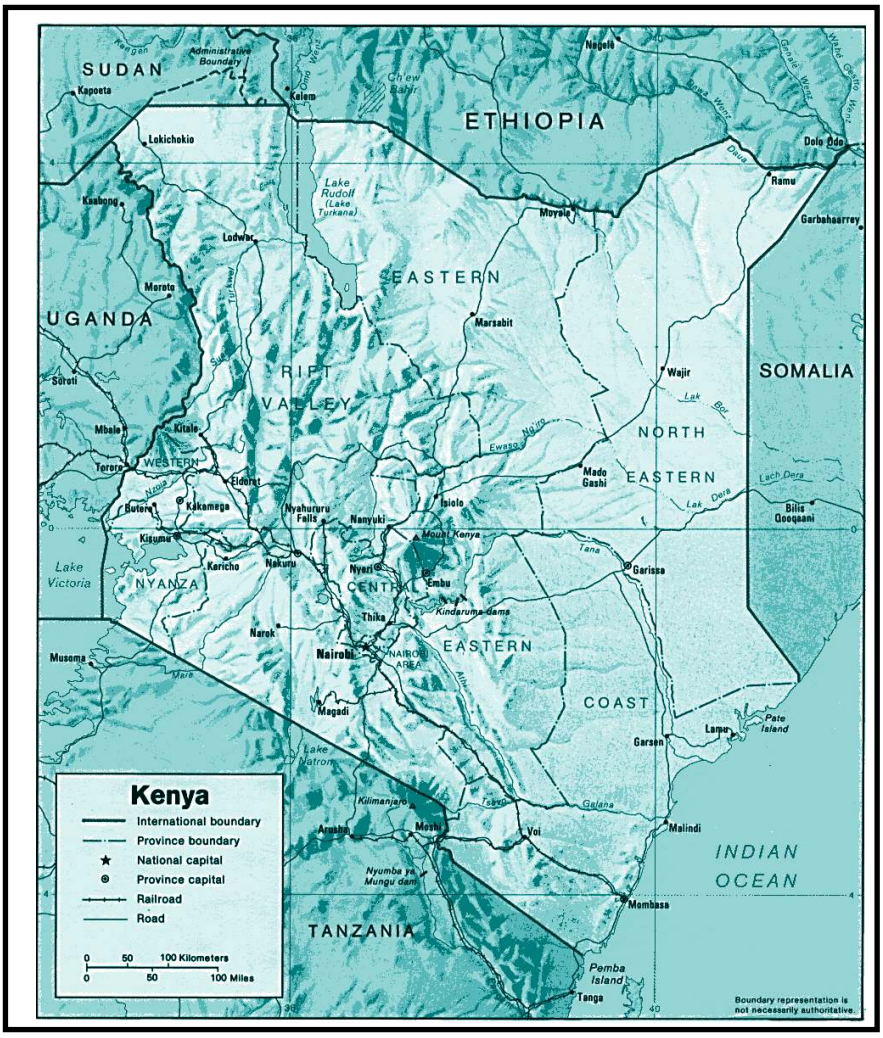
This policy will also seek to reverse environmental degradation and provide guidelines on use of resources. Furthermore, it will mainstream environment concern in national development planning,

continued page 8

Of Senate and county

The political landscape is bound to change radically, with the introduction of a bicameral parliament and county assemblies if the proposed Constitution passes through the remaining stages. Completely different from what Kenyans have ever known since independence, introduction of the Senate and Counties will alter the system of legislature and regional governance. Our writer analyses how this is expected to roll out.

By Maina Kimondo



The Draft proposes a two-tier system, with the Senate as the Upper House and the National Assembly as the Lower House. While presenting the Draft to Parliament, the Committee of Experts (CoE) Chairman Nzamba Kitonga reaffirmed the status of the Senate as the Upper House as opposed to a proposal made in January by members of the Parliamentary Select Committee of Constitution (PSC) converging in Naivasha, who had whittled it down to a Lower House.

The Lower House deals primarily with legislation while the Upper House maintains the checks and balances over the former and the Executive.

Going by the final proposal by the CoE, members of the Senate will be 51, if parliament sustains the proposal. They will be elected from each of their respective 47 county assemblies, acting as an electoral college, and not directly by the voters. Two each will be nominated from special groups, women and youth to make the 51.

This is an alteration from the earlier proposal to have 94 Senators. The counties also become the ultimate regional governance bodies after the proposal for eight regions was dropped. The CoE final proposal retained 47 counties, comparable to the current districts, but sustained the PSC dropping of eight regions as earlier proposed. Each county will have a County Governor who will be elected by members of the County Assembly acting as an electoral college.

The counties will supervise implementation of the national and regional policies.

Other functions of the counties would be capacity building, technical assistance and co-ordination of management and delivery of regional services. Each county is to have a local assembly that is charged with legislative authority of the county, in the same way councils have by-laws.

County Assemblies are to draw their membership from the wards and shall also serve a five-year term. The proposal to have the counties and to drop the

continued page 6

from page 5

eight the regions was reached during the PSC's January retreat in Naivasha. They argued it would be too expensive to run the two-tier regional governments and opted for the counties only.

Even then, the number of earlier proposed counties was drastically reduced by the Mandera Central MP, Mohammed Abdikadir-led PSC. They PSC proposed 47 from 74. The counties would have governors and deputy governors, according to the post-Naivasha proposals.

The PSC had sought to scale down the Senate from an Upper House to a Lower House, but chairman Kitonga, while presenting the final Draft to PSC emphasised that the Senate must retain the upper mandate. The PSC has shaved the Senate of all power of maintaining checks and balances, suggesting it be a Lower House with limited legislative authority and meeting about four times a year to deliberate primarily on matters affecting devolved governments.

This would have been contrary to most countries with bicameral parliaments, for instance the US, where the Senate is the Upper House. Given that the Draft now sustains a purely presidential system, the Senate will provide the checks and balances on the Executive. A powerful Senate with constitutional teeth had been envisaged since the Bomas Draft, Kitonga noted.

The CoE cautioned that without a strong senate, the pure presidential system would rest on shaky foundation devoid of critical checks and balances.

'Constitutional reform in Kenya is not an event but a historical process whose bedrock is the people of Kenya and their elected leadership,' Kitonga said as he emphasized why the mandate of the Senate was of supreme importance in a presidential system.

Hon. William Ole Ntimama who has been in the forefront in the fight for Majimbo in Kenya.

If the process sails through, the Senate will have power to impeach the President and the Vice President. The Senate, on the other hand, is supposed to consider and approve proposals for allocation of equalisation funds to the counties in the national annual estimates of revenue and expenditure as well as annual proposals for division of revenues among the counties.

Also falling under the Senate's role is the approval of any terms and conditions on which the national government may guarantee external loans to county governments and any Bill in the National Assembly that may seek to amend, abrogate or alter the taxation and borrowing powers of a county government.

And, given that it is expected to check on the Executive, it will approve appointments by the Executive as may be required by written law as well as any Bill in the National Assembly that affects or concerns county governments. The two-tier system of government comprising the national government and the counties is expected to improve governance and distribution of resources in the regions.

It is the backbone of the objective of devolution, envisaged since Bomas. According to Morris Odhiambo, Executive Director, Centre for Law and Research International, The system should promote democratic and accountable exercise of power, foster national unity while recognizing diversity and enhancing the participation of the people in making decisions affecting them.

And in light of the perception that decisions affecting the people do not originate from them, it is expected that this mode of governance will recognise the right of communities to manage their own local affairs and to further their development and protect and promote the interests and rights of minorities

continued page 7

from page 6

and marginalized groups, says Odhiambo.

The issue of skewed resource distribution, a problem that is viewed as the epicenter of Kenya's perennial woes, is expected to be addressed by ensuring equitable sharing of national and local resources, in a devolved mechanism. This proposed two-tier system with regional governments seeks to borrow from the US model where Federal Government exists together with 50 states which have varying laws.

The US Congress is made up of the Senate and the House of representatives. The Senate, which is the Upper House, has 100 members with two coming from each state, while the House of Representatives has 435 members from the congressional districts. Senators serve for six years while members of the House of Representatives serve for two years.

Each congressional chamber (House or Senate) has particular exclusive power. The Senate must give "advice and consent" in many important Presidential appointments and the House must introduce any Bills for the purpose of raising revenue. The consent of both chambers is required to pass any legislation, which then may only become law by being signed by the President.

If the President vetoes such legislation, however, both houses of Congress must then re-pass the legislation, but by a two-thirds majority of each chamber, in order to make such legislation law without the need for the President's signature. The

The Late Jaramogi Oginga Odinga. One of the earliest proponents of decentralisation.

powers of Congress are limited to those enumerated in the Constitution; all other powers are reserved to the states and the people.

The Constitution also includes the "Necessary and Proper Clause", which grants Congress the power to 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Members of the House and Senate are elected by first-past-the-post voting in every state except Louisiana and Washington, which have runoffs.

This system has worked well in the US and was a replacement to Confederacy system of government before the 1861 civil war. The confederacy was unpopular since the Federal Government lacked the capacity to tax states thus limiting its control over the then loose federation. Though the Kenyan model has been praised, the Institute of Economic Affairs, called on the enactment of the Devolution Act to detail the operations of the devolved units.

This would supplement its entrenchment in the Constitution and provide for finer details on their operations. If the Senate system is implemented with the powers of the Upper House as envisaged in the Draft, it would take away too much power vested in the hands of the President as well as Executive impunity.

One of the areas in which the President exercises unchecked leverage in public affairs is through unilateral appointment and dismissal of top public appointments like Permanent Secretaries. The appointments have long been seen as one of abuse of power by the presidency. With the Senate having to approve or veto such appointments, the power of political patronage enjoyed by the country's chief executive will be put in check.

The possibility of impeachment of both the President and the Vice President will also ensure the holders of office become sticklers to the rule of law. Law Society of Kenya Chairman Okong'o Omogeni says: 'The Senate as an Upper House has the mandate to watch against abuse of power by the Executive. It enforces good governance and accountability.'

Once Parliament debates the draft law it will be taken back to the CoE for fine-tuning. This will depend on any changes or proposals made by the House. The CoE will then forward it to the Attorney General for publication and eventually the referendum. If all goes according to schedule, Kenya would have a new Constitution this year. KN

from page 4

among other objectives. The socio-economic and political ramifications are already being experienced as natural resources become scarce and conflicts over the existing resources increase. In Turkana District for example, local tribes are constantly fighting over pastures and watering points that have significantly reduced due to recurring drought.

The recently ended dry spell saw the price of food commodities rise to an all time high. Basic food items became unaffordable and many people could barely afford a meal a day. Increase in periods of drought will likely lead to land degradation, damage to crops or reduced yields, more livestock deaths, and an increased risk of wildfires. Such conditions will increase the risks for populations dependent on subsistence agriculture through food and water shortages and higher incidence of malnutrition, water-borne and food-borne diseases, and may lead to displacements of populations.

In the pursuit of creating energy for human consumption, a lot of pollution is produced. Denmark has been one country in the world that produces a big percentage of its energy wants pollution free. It has wind farms that churn 70 per cent of its energy. It produces so much that it sells the excess to its neighbors, Sweden and Germany. In terms of wind speed, Denmark does not have speeds that countries like Australia, Argentina, Morocco or Scotland have. However, its Government's initiative and policies have made it possible for Denmark to be the leading country in harnessing wind for power.

According to the Danish Wind Energy Association, Denmark produces 20 per cent of its electricity from wind power and aims to increase it to 50 per cent by 2025. The Danish Government has implemented a carbon-trading scheme for some of the country's energy intensive industries. Denmark is also implementing a plan to double the size of forested areas. From the current 11 per cent land coverage, the plan is to increase it to 25 per cent.

Logging, unlike many other countries, does not play an important role in the Danish economy thus there is little pressure on the forests. The Danish Forest Act protects a very large part of the existing forestland from conversion to other land uses.

Another country that is working in contributing towards reducing greenhouse gases is Japan. It is the world's second largest economy and the fifth biggest emitter of greenhouse gases. It has ambitious plans of reducing its emissions by 25 per cent by 2020. Japan plans to implement policies that support renovating houses to reduce their energy consumption, subsidising solar panels, introducing low energy technologies for vehicles and emissions trading.

It is also contributing millions of dollars to developing nations to fund them in their climate change adaptation strategies. Since Japan is one of the leading countries in the sector of energy saving technological innovations, it plans to promote the diffusion of these technologies to developing countries. The Government of Japan is leading a national campaign "*Team Minus 6%*", to encourage concrete actions such as changes in lifestyles to stop global warming. Japan calls for other nations, including G8 members, to join hands in public awareness campaigns in the context of each country's circumstances.

KN

Even winters in the Western hemisphere are now becoming unbearable.

The pain of bearing witness

It has been said that evil thrives when good people remain silent. But while many people would like to blow the whistle about serious crimes happening amidst us, they live in mortal fear of the consequences should they be discovered by the perpetrators. This is what has been the force behind drafting of the Witness Protection Act, 2009. *Dorothy Momanyi* looks at the mechanics of this Act and gives us the experience of other countries.

The criminal justice system depends on reporting of crimes and availability and sufficiency of evidence. Witnesses are at the heart of criminal trials. Where a crime is of grave nature or against a powerful or influential suspect, the witnesses are reluctant to adduce evidence in fear of grave consequences. Failure to provide protection to vulnerable witnesses leads to cover up of crime. Witness protection supports law enforcement agencies to detect and prosecute serious crimes like corruption, fraud, crimes against humanity and murder.

The Kenyan legal system is adversarial and depends on presentation evidence to convict suspects. Witnesses are summoned to court. Investigation by the International Criminal Court (ICC) into post-election violence, the enactment of the International Crimes Act and the Anti-Corruption and the Economic Crimes Act have necessitated the establishment of a witness protection scheme. Parliament enacted the Witness Protection Act, 2006. The Attorney General established a unit to run the scheme. However, the AG has noted that this framework is inadequate to protect witnesses and has proposed enhanced autonomy for the unit and strengthening of the Act.

Chief Justice Evans Gicheru

Witness protection may include provision of police escort, provision of residence, use of technology to testify and relocation of witnesses under a new identity. A 'witness' is defined as a person who is eligible, under the legislation, to be admitted to a witness protection programme. The witness protection programme is a covert programme subject to strict admission criteria that provides for relocation and change of identity of witnesses whose lives are threatened due to their cooperation with law enforcement authorities and which is managed by a witness protection authority. The authority is a public body that determines admittance, duration of protection and protection measures.

Analysis of the Act

The objectives of the Act is to afford protection to witnesses in criminal cases and other tribunals with quasi-judicial functions and to facilitate administration of justice by facilitating potential witnesses to adduce evidence voluntarily. The provisions of the Act extend to commissions of inquiry. Protection can be offered during the court proceedings or after conclusion of the case. The Act defines a witness as a person who may for any reason require protection or assistance under the Act. This definition means that the Act may not be applicable where information is provided by a whistle blower to prevent the commission of an offence.

The AG is empowered to constitute the programme. The AG may permit a witness to acquire new identity, provide accommodation, relocate witnesses, transport the property of witnesses and provide counselling services with the aim of protecting the witnesses. The AG determines eligibility for admission to the programme. The AG and the witness sign a memorandum of understanding, which defines the basis for protection and provides the conditions that the witness must meet.

Admission to the programme is voluntary. A witness who is issued with a new identity surrenders the old identification documents to the AG. The process must be approved by the High Court through an application made *in camera*. Disclosure of information related to the programme by officers attached to the programme is an offence. The AG may terminate protection of a witness.

continued page 10

from page 9

The wide discretion afforded to the AG in the Act will hinder effective implementation of the programme. The AG admits and terminates the admission of a witness to the programme without assigning reasons.

The Government must provide adequate funding to the programme. The decisions to admit a witness or grant a new identity must be made expeditiously to ensure the safety of the witnesses. The witness should be at liberty to challenge a decision to remove him from the programme. Due the overlapping roles and the track record of the AG, the programme should be implemented by an autonomous and independent authority.

Proposed amendments

The Prosecutor of the ICC has decried the inadequacy of the programme. The Kenya situation is under review at the ICC where the Prosecutor has sought leave of the Chamber to commence investigation. The Act was operationalised in 2008 and the Witness Protection Rules, 2008 were published. The Cabinet has recommended the review of the Act to convert the implementing unit into an independent agency, which will implement the Act.

The Cabinet has approved the Witness Protection (Amendment) Bill, 2010. The civil society has been advocating amendments to the Act with some organisations sheltering witnesses who have been threatened by key suspects. The Bill establishes a Board, which will comprise the Police Commissioner, Director General of the National Security Intelligence Service, the Commissioner of Prisons, Director of Public Prosecutions, the chairperson of the Kenya National Commission on Human Rights and Permanent Secretaries of Ministry of Justice and Finance. The civil society is not represented on the Board and State organs will, therefore, retain influence in the agency.

The role of the Board includes recommending the candidate for Director, exercising oversight on the administration of the agency, approving budgetary estimates and formulating witnesses' protection policies. The audited accounts of the agency will be submitted to the President, and not Parliament. This is meant to preserve confidentiality. The agency shall keep books and records of accounts of expenditure, assets and liabilities. The records shall be classified, preserved and disposed in accordance with the information security policy of the agency.

The agency will establish and maintain the programme, determine eligibility for admission and protection measures required. Witnesses under programme will be entitled to physical and armed protection, relocation, change of identity or other safety measures. The agency will be able to access funds from donors and receive funding from the Consolidated Fund. The Director, Assistant Directors and Protection officers of the agency shall have the power, privileges and immunities of a police officer. The agency shall perform its functions under the Act without interference from any person or any authority. The Bill establishes an appeals tribunal to enhance accountability.

A witness protection programme should have:

a. Independence: The decisions made by the agency must be impartial, independent and in the best interest of the witness.
b. Resources: The Government must invest resources for implementation of the programme. Most governments shy from forming the schemes due to perceived high costs. Funding must be provided for inauguration costs; relocation costs; staff emoluments; travel costs; witnesses' allowances; and psychological assessments and counselling. Most expenses are staff salaries, overtime and travel. Relocation expenses depend on agreed benefits accruing to the witness.
c. Confidentiality: The use of the police to implement the programme may lead to conflict of interest. Police officers are inquisitive and may compromise the security of information. Where the programme is situated in the police force, the covert unit implementing the

continued page 11

Attorney General Amos Wako

from page 10

programme must be isolated from the police. Organisational autonomy is key to the successful implementation of the programme. The protection unit should be separate from the investigation agency and the prosecuting authority.

d. Neutrality: Where the potential witnesses satisfy the admission criteria, they should be admitted to the programme irrespective of the nature of crime being prosecuted or whether they are victims, witnesses or justice collaborators.

Key parameters of a witness protection programme include:

a. Strict admission criteria for the witnesses and victims. The conditions for admission include: The case must be extremely significant and the witness's testimony must be crucial to successful prosecution; protection is the only way of securing the witness's physical safety; evaluation of the witness's psychological profile to establish his ability to abide by the rules and restrictions imposed by the programme.
b. Compensation fund for victims of crimes committed by participants.
c. Signing of a memorandum of understanding outlining the witness's obligations and duties.
d. Mechanisms for redress where the memorandum is breached.
e. Procedures for disclosure of information and penalties for the unauthorised disclosure.
f. Protection of the rights of third parties, including payment of debts and parental rights and responsibilities.

Witness protection by international tribunals

The international criminal tribunals have formulated standards for witness protection. The tribunals include the ICC, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. The main features of their programmes are:-

The face of mayhem. Under whose behest were such people acting on?

a. Special units under the authority of the Court Registrar or the Chambers. The Units provide support and protection services to witnesses and are responsible for physical protection and security. They provide counselling, medical and psychosocial care. The support is provided to victims and witnesses who appear before the court and to persons who are at risk because of testimony given by the witnesses. The Victim and Witness Unit of the ICC is mandated to provide services to victims who present their views to the Court and are entitled to reparation. At the *ad hoc* tribunals, neutral and independent units determine witnesses' needs and applicable measures. At the ICC, the unit provides its services in consultation with the Office of the Prosecutor.
b. Protection measures are available to prosecution and defence witnesses.
c. A judge can grant special procedural measures such as temporary disclosure restrictions, pseudonyms, facial and voice distortion, closed session testimony or testimony via video link, to protect witnesses. These measures conceal the witness's identity from the public or the media.
d. State cooperation with the Tribunals. Where the Registrar determines that a witness's safety concerns after testifying are founded, the unit arranges for the witness's resettlement within the country of residence or relocation to a third country. The tribunals seek to interest countries to consider accepting witnesses by concluding framework agreements. The agreements outline the procedure for relocation and the benefits offered to the witness.

Witness protection in other jurisdictions

Germany

Witness Protection Act regulates criminal proceedings, with a focus on use of video technology for interviewing at-risk witnesses, ensuring confidentiality of witnesses' data at criminal proceedings, and offering legal assistance to victims and witnesses. The Criminal Police Task Force outlined the objectives and

continued page 12

from page 11

measures for implementation by witness protection agencies. Guidelines were issued by the Government to protect at-risk witnesses and they formed the basis for the programme. In 2003, the guidelines were aligned with the legal provisions and serve as the implementing provisions of the Act for all protection offices in Germany. The Act was introduced to harmonise legal conditions and criteria for witness protection at the federal and state levels.

The highlights of the Act are definition of witnesses eligible for admission to the programme and an admission and removal criteria. Under the Act, admission may be granted to persons who are in danger due to their willingness to testify in cases involving serious or organised crime. The entry to the programme is voluntary. The Act provides that the protection unit and public prosecutor should jointly take decisions on admission. The witness protection units determine the protection measures independently by evaluating gravity of the offence, extent of the risk, rights of the accused and impact of the measures.

The information relating to personal data of protected witnesses in other government agencies should be confidential. The files on protected witnesses are maintained by the protection units and are not part of investigation files. The files may be made available on request. The Act stipulates the conditions for the issuance of new identity and supporting personal documentation and the allowances payable when under protection.

The Federal Criminal Police Office protects witnesses in federal cases and coordinates international cooperation. The office prepares annual reports on the programme, organises and conducts training, and facilitates co-operation between state and federal agencies.

South Africa

Witness protection was governed by the Criminal Procedure Act before the adoption of the 1996 National Crime Prevention Strategy. The Act was repressive and used to coerce witnesses to give evidence. The Strategy recognised witness protection as important to secure evidence from vulnerable and intimidated witnesses in judicial proceedings. Witness protection was identified as a weak link in the criminal justice system.

Witness Protection Act was promulgated to reform the programme. The Act established the Office for Witness Protection, under the authority of the Minister of Justice and Constitutional Development, headed by a national director with offices in the provinces. In 2001, the office was reorganised as part of the National Prosecuting Authority.

The Act regulates the functions of the director, including determining admission to the programme. The decision is based on the recommendations of the branch office, the law enforcement agencies and the National Prosecuting Authority. A decision to refuse an application or to discharge a person from protection may be reviewed by the Minister. The Act defines the crimes for which witnesses may request protection, the procedures and eligibility. The director has the discretion to approve protection for a witness in respect of any proceedings where he is satisfied that the safety of the witness warrants it.

The Act provides that civil proceedings pending against a protected witness may be suspended by court to prevent disclosure of the identity or whereabouts of the witness. The Office for Witness Protection institutes all legal proceedings by the witness. The law defines offences and prescribes penalties for disclosure or publication of information regarding protected witnesses or programme officials to ensure their safety. The director authorises any information disclosure. The Minister may enter into agreements with other countries or international organisations to regulate conditions and criteria for the relocation of foreign witnesses to South Africa.

United Kingdom

The witness protection programme is established administratively. The court, the prosecutor and the police collaborate to ensure the safety of witnesses. The court is empowered to withhold the name of the victim or witness in a criminal trial. The Contempt of Court Act provides that the court may give directions to prohibit the publication of names or other matter in connection with the proceedings. The identity of the witness may be kept secret from the accused and the defence lawyer. Evidence transmitted through video conference is admissible where an offence involves an assault or injury or threat of injury to a person, an offence of cruelty to persons under the age of 16, and offences under the Sexual Offences Act.

The Kenyan case in The Hague

Parliament should amend the Act to strengthen the programme. Some witnesses who testified in the Commission of Inquiry in the Post-Election Violence, which led to the ICC investigation, have been threatened and should be protected. Their evidence will be crucial at the ICC if charges are eventually preferred and at the Truth, Justice and Reconciliation Commission.

The TJRC commenced its public hearings. Due to the sensitive nature of evidence that will be adduced, the Commission must establish appropriate protection programme for witnesses and victims. The programme must be comprehensive, long-term and effective and must be supported by special units, mechanisms and procedures to address the experiences of women, children, and vulnerable groups. These mechanisms must be set up urgently. KN

Electoral Justice in Kenya

Over the last several months, we have seen courts doing some real justice to petitioners in the 2007 general elections. At last, it looks like rigging and other electoral malpractices will not go unpunished. We take a closer look at the history of petitions in this country and whether we are finally on the right path to true democratic justice.

By Macharia Nderitu

Elections enable citizens to participate in decision-making and hold their representatives accountable. Elections confer political legitimacy to political leadership and provide a crucial mandate to the government and are an egalitarian method for participation. Regular elections must be supported by functioning institutions. Such institutions include the electoral management body and a dispute resolution mechanism.

Since elections denote competition for power, disputes routinely arise on conduct and outcome of elections. In Kenya, the power to determine disputes in regard to Presidential and Parliamentary elections is vested in the High Court under Section 44 of the Constitution. The electoral dispute resolution system deals with political disputes, which should be settled expeditiously, efficiently and fairly. The High Court has been slow in determining electoral disputes.

The political crisis in Kenya in 2008 was escalated by views of one party, Orange Democratic Movement, that the Judiciary was incapable of independently, efficiently and impartially determining the electoral dispute. The winner-takes-all political system heightened the stakes. The ODM said it could not file an electoral petition since the courts were manned by judges appointed by the Judicial Service Commission, whose members are presidential appointees.

The fact that five judges of the High Court had been appointed days to the elections heightened the suspicion. The courts have been reluctant to nullify elections where the petition involves an incumbent President. Where a President is serving a second term, a petition on his election may be heard by judges who were appointed during his first term. This creates doubts of impartiality and independence.

Determination of election disputes in Kenya

The law should provide effective mechanisms and remedies for enforcement of electoral rights. The right to vote and to a remedy for violation of electoral rights are fundamental rights. Suffrage rights should be protected, including for election-related conflicts. The Constitution provides that the High Court shall have jurisdiction to hear and determine any question, whether a person has been validly elected to the National Assembly or whether a seat in the National Assembly has become vacant.

The application may be made by a person who was entitled to vote in that election or by the Attorney General. The substantive law for election petitions is contained in the National Assembly and Presidential Elections Act and the National Assembly (Election Petition) Rules. An application to the High Court to hear and determine whether a person has been validly elected as President or an MP or whether a seat in the National Assembly has become vacant shall be made by way of petition.

The petition to challenge the validity of an election shall be presented within 28 days after the date of publication of the result in the Gazette. The petitioner shall give security for costs that are payable within three days of filing the petition. A voter may file a reference in the Magistrates Court to challenge the outcome of a local authority election under the Local Government Act.

continued page 14

Former Matuga MP Hon. Chirau Ali Makwere. Will he retain his seat in the by-election?

from page 13

The determination of the electoral disputes is slow due to case backlog in the courts, over-reliance by parties on technical points of law, the complex legal framework on electoral dispute determination, and contradictory decisions from the courts. Even where an electoral dispute relates to tallying and counting of votes, a petition must be filed. The Electoral Commission has powers to conduct retallying of votes where it is petitioned by a candidate within 24 hours.

Many electoral disputes relate to vote counting and tallying. This time frame is inadequate for retallying of votes from stations that may be located in remote areas. Furthermore, such retallying is not possible in the Presidential elections since it is done manually. The Electoral Commission is required to complete the retallying process in 48 hours. During vote counting, a candidate or his agent may demand that the votes be recounted for a maximum of two times.

A decision by a Returning Officer that a ballot is invalid can only be challenged during a petition. Most court decisions relate to technical points of law. Prior to 2007, the law demanded that respondents in the petition must be served personally. The amended law demands that the petitioner must demonstrate that he has exercised due diligence before serving through substituted service by advertising the petition. This requirement has led to dismissal of many petitions. It is difficult to effect personal service on the President or an MP. MPs can hide where a petition has been filed challenging their election to avoid service.

Analysis of decisions of the High Court on election petitions

a) *Ayub Mwakwesi versus Chirau Mwakwere & 2 others*, Mombasa High Court Petition Number 1 of 2008

The petitioner alleged that the election was conducted in violation of the Constitution and the National Assembly and Presidential Elections Act. The grounds of the petition were irregularities in counting of votes, cancellation of votes from a polling station by the Returning Officer, vote inflation, and exclusion of ODM agents from inspecting the seals in the ballot boxes. The petitioner was a registered voter in the constituency.

Things are not looking up either for Starehe MP Hon. Bishop Margaret Wanjiru

He sought a court order for scrutiny and recount of the ballot papers, counterfoil registers and sheets and nullification of the election. The court held that the election was not free, fair and transparent and was conducted without due regard to the law. The Court of Appeal reversed an order by the High Court declaring that the Returning Officer was duly served and struck out the petition against the Returning Officer.

The court held that there was evidence that the Returning Officer unlawfully cancelled the results at a polling station without any authority and without informing the Electoral Commission of Kenya. The court annulled the election and directed the Interim Independent Electoral Commission to conduct a by-election.

b) *John Kiarie Waweru versus Beth Mugo & 2 others,* Nairobi High Court Election Petition No. 13 of 2008

This was a petition in relation to the elections in Dagoretti constituency. The petitioner alleged that the respondents had flouted the electoral law thereby affecting the electoral outcome. Among the malpractices was a statement made by the 1st Respondent, which was construed by the petitioner as a false statement against his character. The complaints were categorised by the court into conduct of 1st Respondent during the elections, the conduct of elections by the electoral officials and the tallying process.

The court held that where one aspires for a public office, he should be prepared to have unflattering statements made against him. Bribery was not proved to have unduly influenced the voters and was not directly linked to the 1st Respondent. The failure to include the name and address of the publishers of the posters was an omission by both parties and was in contravention of Section 11 of the Electoral Offences Act. It was not proved that the petitioner was prejudiced by that omission.

It was held that Presiding Officers have discretion to extend the voting time for a good cause or where the polling station is opened late. The court held that it was not obligatory for the Returning Officer to

continued page 15

from page 14

announce the results at the gazetted tallying centre and that the change in the venue did not prejudice the petitioner. It was held that the petition was not proved to the required standard and was thus dismissed.

c) *Simon Ogari & Another versus Joel Onyancha & 2 others,* Kisii High Court Petition Number 2 of 2008

This petition related to the Bomachoge constituency parliamentary elections. The petitioners, who were candidates in the election, alleged widespread violence during elections resulting in periodic disruptions during tallying, exclusion of agents from tallying process, the Returning Officer's refusal to retally the votes when requested by the candidates, exclusion of 28 polling stations from the tally, bribery and misuse of government resources by the 1st Respondent.

The court held that bribery was not proved as the evidence of the recipients was not adduced. The allegations of canvassing in the polling stations, abuse of office by the 1st Respondent, violence and intimidation were not proved. The court found that a breach of Rule 35 A of the Presidential and Parliamentary Elections Regulations had occurred. The Rule requires that at the conclusion of voting, the Presiding Officer must open the ballot boxes in the presence of candidates or their agents, and proceed to count and record the votes.

The Presiding Officer and the candidates or agents must sign the Form 16A. Where the agents refuse to sign, the reasons for such failure must be recorded. Where the agents fail to write such reasons or to sign, the Presiding Officer must record that fact. The Presiding Officer must then announce the results before forwarding them to the Returning Officer.

A copy of the Form 16A should be affixed at the entrance of the polling station. Failure to comply with these Rules is an electoral offence. The forms were not signed by the Presiding Officers, the candidates or their agents. There was breach of mandatory provisions of Rule 35A. The Returning Officer commenced tallying of results before delivery of all the results in breach of Rule 40. The validity of forms was highly questionable and do not form sufficient proof that the results were genuine. The ECK failed to secure the election materials before and after the elections in breach of the law. The court held that the malpractices were substantial and affected the outcome of the elections. The court nullified the elections of the 1st Respondent and ordered that a by-election be conducted.

d) *Manson Nyamweya versus Omingo Magara*, Kisii High Court Petition No. 2 of 2008

The petition was filed by a candidate in the election. The court noted that failure by Presiding Officers to sign and give statutory comments in Form 16A was a breach to election regulations. Evidence was led that many Presiding Officers failed to sign the document. Such failure is an electoral offence. No reason was provided to the court why the forms were not signed. In one polling station, whereas 74 persons were assisted to vote, the oath of secrecy forms were missing.

During scrutiny of the votes, although there were 110 polling stations in the constituency, the ballot boxes brought for recount were from 107 polling stations. The court noted that most ballot boxes had missing or broken ECK aperture seals. There were many cases of incorrect posting from Form 16A to Form 17A.The grounds of the petition were that the disbanded ECK conducted the election in a manner that was inconsistent with the law and it failed to take any measures to ensure the election was transparent, free and fair.

The petitioner contended that the 1st Respondent was declared the winner without Form 17A being completed in his or his agents' presence contrary to the law. The court held that the election of the 1st Respondent as the South Mugirango MP was not transparent, free and fair and the MP was not validly elected to Parliament. The ECK officials failed to comply with mandatory and important provisions of the law. The court stated that the Interim Independent Electoral Commission should proceed and conduct a by-election. However, the 1st Respondent was not found guilty of any election offence. The court directed that the 2nd and 3rd Respondents would bear the costs of the petition.

Hon. Moses Wetangula must be feeling relieved away from the stress of undergoing a petition.

International best practice

Every voter, candidate and political party should have the right to lodge a complaint with court or tribunal where an infringement of electoral rights has occurred. The *locus standi* before the tribunals should

continued page 16

from page 15

be limited to voters and candidates in the election. The court or tribunal hearing an electoral dispute shall render a prompt and fair decision. The applicant should have the right to appeal to a high court or tribunal. The law should stipulate reasonable deadlines to resolve disputes. Mechanisms should be established to determine some complaints immediately.

All disputes that have the potential to derail the electoral process must be determined promptly. The deadlines for determination of the disputes must be flexible taking into account the jurisdiction of the court and the nature of the complaint. It has been demonstrated that Kenyan courts are capable of delivering expeditious electoral justice. The petition relating to Dagoretti Constituency was determined nine months from the date of the elections, while that of Matuga constituency was determined in two years despite two applications being referred to the Court of Appeal for determination.

All petitions should be determined within one year from elections. Voters have a right to an effective remedy. This right is related to electoral dispute resolution. The hearing must be fair and in public. The electoral management body responsible for the conduct of elections must take all the necessary steps to safeguard the suffrage rights and must respond to complaints presented to it. Disputes of a minor nature can be determined administratively with the electoral commission acting as the single and final arbiter of the disputes. For the Electoral Commission to arbitrate disputes, it must win the confidence of the candidates and voters.

The IIEC was composed through bipartisan consultations unlike the disbanded Electoral Commission of Kenya. It may, therefore, play a dispute resolution role. Under the law, a candidate may request for retallying of votes within 24 hours. Such retallying can be carried out by the Interim Commission if it sets up an electronic tallying system. The Commission has powers to hear complaints against the breach of the electoral Code of Conduct. The Commission should be willing to exercise these powers and further appoint prosecutors under Section 34(5) of the National Assembly and Presidential Elections Act to prosecute electoral offenders.

In the dispute resolution, there must be clear separation between Executive and Judicial powers of the electoral commission. Some disputes may involve malpractices perpetrated by or in connivance with electoral officials and the Commission will, therefore, be sitting to determine its own cause. Where the electoral commission has determined a dispute, the parties should have recourse to appeal to a higher court. However, appeals may be limited in order to respect the need for efficacy in the resolution of electoral disputes.

The dispute resolution process should focus on the process and the results. The commission's powers should be limited to resolution of disputes relating to counting and tallying of votes. The electoral disputes should be resolved efficiently and quickly and prior to assumption of office by the elected officials. A remedy is not effective if offered without the appropriate speed. Since the Judiciary is the final arbiter in electoral disputes, Kenya must seek to enhance its independence, efficiency and impartiality.

Electoral justice reform

Reforms must be carried out to restore confidence to the electoral dispute resolution system. The High Court has proved that it can independently determine electoral disputes in regard to petitions filed after 2007 elections. The petition for Magarini Constituency relating to the 2002 General Election was determined in November 2006. The by-election was held five months to the 2007 elections wherein the incumbent MP lost.

The proposed measures include setting time limits for determination of electoral disputes. The election court can sit daily to exclusively hear the election petition. In the alternative, the Chief Justice can administratively set up an Election Petition Division in the High Court, which can be activated in the period following an election with the mandate of hearing and determining the election petitions. Another alternative is the setting up of an independent electoral disputes court or tribunal. Such court or tribunal will deal exclusively with election petitions after the elections and render decisions. The tribunal will be constituted through a consultative approach and confirmed through Parliament.

Minor disputes in the election process and disputes relating to tallying can be determined by the electoral commission. The law should be amended to enable the Commission act as a Tribunal with powers to impose and enforce penalties on electoral offences and non compliance with the Code of Conduct.

To enhance public confidence in the electoral process, the commission should hold regular consultations with political parties at all stages of the preparation for elections. The Commission should be composed through consultative process to enhance acceptability and legitimacy. The Commission must prosecute electoral offences conferred upon it by the Act. This requires better collaboration with the police and AG. KN

THE KONRAD ADENAUER FOUNDATION IN KENYA

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

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

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

Our aims

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

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

Our programmes

Among other activities we currently support:

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

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

Contact address

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

MEDIA DEVELOPMENT ASSOCIATION

Media for Civic Education