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# KatibaNews

The birth of a new Republic

## From the old to the new

- \* Editorial
- \* The gender agenda
- \* Revising the Standing Orders
- \* Labour unrest

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# ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

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

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

The MDA aims at:

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

issues and their link to journalism;

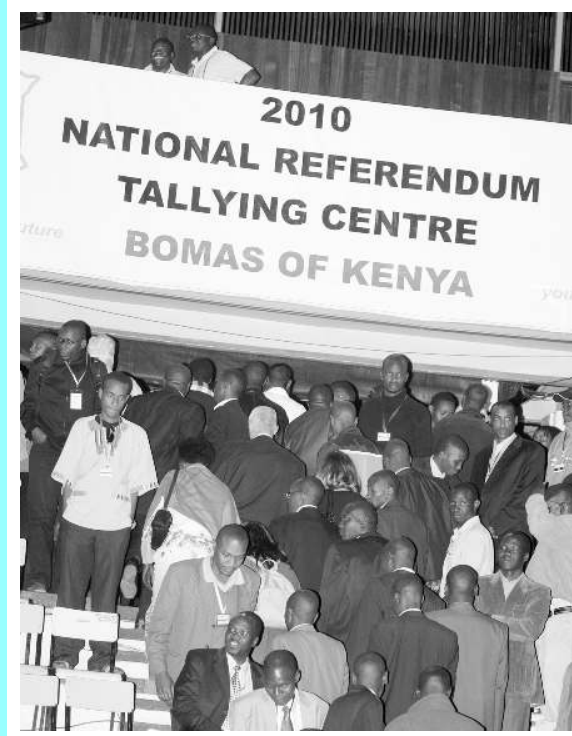
- Carrying out research on issues relevant to journalism;
- Organizing tours and excursions in and outside Kenya to widen journalists' knowledge of their operating environment;
- Publishing magazines for journalists, and any other publications that are relevant to the promotion of quality journalism;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

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

Activities of MDA include:

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

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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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All are welcomed to send their observations on the constitutional review process to be the Editorial Board.

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# The curse of change



**I**t is two months since we bid farewell to the old country that we still know as Kenya. Millions of us braved the long queues that have become second nature in a bid to secure our future by determining how we want to be governed. And, by an overwhelming majority, Kenyans voted for change, and a drastic one at that.

As just indicated, the new constitutional dispensation is a whole new world. From the way we identify ourselves and relate as Kenyans to how we engage in business, things will never be the same again. But that is a romanticist's view. Our current reality is begging to differ as each day passes. How?

## Elections

It is said that the more things change the more they remain the same. The fact that Kenyans still need an irreversible paradigm shift in their thinking was witnessed from the results of three by-elections held in September this year. By an uncanny coincidence, all the three constituencies – Makadara, Starehe and Juja - comprised some of the most hotly contested in the country.

All these constituencies had one or two highly controversial and sensational contestants. It seemed a bygone conclusion to most Kenyans that these people would not see the doors of the August House, both for those who were there before and those still trying.

But shock upon shock! Bribery, lies and manipulation stole the day. All that talk about ushering in a new dispensation was lost to the expediency of the moment. Voters (mostly the youth and the poor) sold their souls for a few dimes. Well, the vicious cycle of ignorance leading to bad leadership and mis-governance continues. Sorry, but we may never learn.

## International scene

Our relationship with the outside world is not bound to get better in a hurry. As if it was a pointer of the fact that change would be a long time coming, Sudan President Omar Al Bashir stomped Uhuru Park on our day of rebirth as we promulgated the new Constitution.

Well, although it was supposedly a gesture of good neighbourliness, it ended up sending very wrong signals.

It would be like having dinner with a most wanted criminal with the aim of persuading him to give himself up to the authorities. We know that the criminal would rather be lynched than be caught alive.

In any case, what is happening now between Kenya and the International Criminal Court (ICC) simply serves to entrench the negative feelings many people may hold that we are still stuck in them murk.

## Sanity

What these couple of examples show is that the mere change of a document cannot change the hearts of men, and women for that matter. May be we thought that we would wake up post promulgation to a country paved with gold and sanity.

If we must make it a chorus, real change will come only when Kenyans will let go all the bad habits that have become a national culture. It is about changing our mindsets to understand that our old ways of thinking are no longer untenable and it is a high time we formed and adopted a new socio-economic and political creed that will take us for the next 100 years! **KN**

# From the old to the new

## The story of 49 Bills

The ripple effect of the promulgation of the new Constitution is just starting to be felt. For it to operate effectively and without conflict, the Constitution will now need a new set of subsidiary legislation for support. With the recent reopening of Parliament, we analyse what is on the plate of the House and what must be done to make the new document work.

By Dorothy Momanyi

The air hovering over the thousands of *wananchi* gathered at Uhuru Park on August 27, 2010 was punctuated by 20 years of anticipation, desire for change and a final almost grandeur realisation that their hopes had finally been translated into reality. The countenance on the faces of those people was one of delightful pride.

No longer would the promises of the past sardonically filter in the minds of the Kenyan people. A new Constitution was going to be proclaimed by President Kibaki that day and they were to witness the great moment. What a lot of Kenyans were unaware of, however, is that this did not just mark the beginning of a new era.

It accentuated the start of a race against time to lay the foundation that would see the Constitution fully implemented. Schedule 5 of the new Constitution lays the Bills that require passage within specified timelines for the Constitution to be fully in force.

Many quarters including the Press, politicians and the civil society have continuously referred to these Bills with a magical number – 49. The likely origin of this figure is in Schedule 5 itself, which outlines the 49 “areas” of legislation. Such a casual approach is unwarranted, as a close analysis of the provisions of the Constitution itself and Schedule 5

reveal that the number of the Bills are not limited to 49.

### Urgency

In fact, hundreds of Bills are required to fully put the Constitution into effect. If, for instance, we take the issue of family, one may assume that only one Bill under Article 45 will be drafted. However, recent news indicates that three Bills have already been prepared pursuant to that one topic and these include the Marriage Bill, the Family Protection Bill and the Matrimonial Property Bill.

It is, therefore, naïve to assume that only 49 Bills shall be drafted to effect

the Constitution. Furthermore, the last item of Schedule 5 speaks of “any other legislation required by this Constitution”, meaning that there are likely to be more. However, for the purposes of this article, we shall limit ourselves to the fad of 49 Bills.

The task of processing these enactments may appear simple enough to a lay man. But the journey of enacting 49 Bills, albeit unobtrusive, is littered with several challenges. The inadequate numbers of experienced drafters in Kenya, the urgency due to the deadlines, the heavy schedule of the National Assembly, the looming General Election and succession politics are just a few of the challenges that threaten to delay the full implementation of the new Constitution.

### The team

The required Parliamentary Select Committee known as the Constitutional Implementation Oversight Committee is tasked with overseeing the implementation of the new Constitution. It is yet to be established and so is the Commission for the Implementation of the new Constitution.

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Attorney General Hon Amos Wako (standing), witnesses as President Mwai Kibaki signs the new Constitution into law during the August 4th promulgation ceremony at Uhuru Park.

Their absence has, however, not daunted the Government, as measures have been put in place to utilise the existing entities including the State Law Office, the Kenya Law Reform Commission (KLRC), the Office of the Parliamentary Counsel and the Ministry of Justice and Constitutional Affairs to kick start the formulation of the required legislations. The technical staff in these offices is for the time being acting as the team with the gargantuan task of putting life into the Constitution by formulating the necessary legislations.

The team spearheading the drafting of the Bills is jointly headed by the KLRC Chairman Kathurima M'Inoti and the Chief Parliamentary Counsel Margaret Nzioka. Mr Kathurima is very experienced in matters of law and governance. He has a masters Degree in Law from the University of Nairobi, and taught law at the same institution between 1990 and 1993.

He was a senior partner at the leading law firm of Kamau Kuria & Kiraitu Advocates and Chairman of the International Commission of Jurists Kenya between 1994 and 1999. He is presently the chairman of the KLRC and a Commissioner of the International Commission of Jurists. Ms Nzioka is a long serving and experienced drafter at the Attorney General's Office.

However, Prime Minister Raila Odinga, Attorney General Amos Wako as well as Mutula Kilonzo, the Minister in charge of Justice and Constitutional Affairs have been quoted as saying the country lacks experienced drafters in the aforesaid offices. In particular, it has been stated that there are only five experienced drafters out of 12 in the AG's office, four out of six in Parliament, and three at the KLRC.

Consequently, the Government is lobbying other states especially those in the Commonwealth to assist it with drafters to supplement the team of local drafters. In fact, it was reported that the Attorney General was in London in early September to

*It is, therefore, naïve to assume that only 49 Bills shall be drafted to effect the Constitution. Furthermore, the last item of Schedule 5 speaks of “any other legislation required by this Constitution”, meaning that there are likely to be more.*

negotiate for more experienced drafters.

#### Qualifications

It is said legislative drafting is an art more than a precise science. Legislative work and the law have been and are almost the only means available to states through which the conduct of the majority of society can be regulated. Several factors must be adhered to in legislative drafting to ensure quality. Broadly, these factors can be divided into the technical (related to regulatory practice) and substantive (*ius est ars boni et aequi*).

A drafter must have a minimum law degree from a recognised university, be enrolled as an advocate, have a post-graduate qualification in legislative drafting and ought to have some working experience of legislative drafting in a Commonwealth country. He or she must in the present era be enlightened in Information Technology as computer literacy is an essential drafting tool that improves efficiency.

Since drafting involves communication of policy through laws, a drafter must be endowed with high communication and writing skills. These communication skills enable the drafter to have good organisation, aim for uniformity in drafting style, be simple, clear and easy to understand or use. The drafters are also supposed to be adept with Constitutional provisions, laws generally, legislative procedures and legislative quality.

A well drafted Bill is not derived from numerous arbitrary rules, but rather from a thorough knowledge of the subject matter, careful attention to

detail and adherence to some common sense principles such as selecting simple and familiar words, being consistent in the use of language throughout the Bill, organising the Bill in the most useful and logical format so that the reader does not require to have an understanding of a later section in order to understand an earlier section.

#### The Bills

Schedule 5 of the Constitution is the primary source of the exact Bills that have to be formulated for full implementation of the Constitution. Nonetheless, reference must be made to the provisions of the Constitution themselves to get the specifics of the legislations required. In addition, the laws that existed prior to the effective date of the Constitution shall inevitably be a source of the Bills, such that only a few amendments shall be done to them.

Finally, there are a number of Bills that had been formulated prior to the passage of the Constitution, but which were never debated such as the Marriage Bill 2007. Adoption of these previous drafts after modifications to suit the new constitutional dispensation will give the much needed momentum in finishing the drafting of these Bills.

To date, six draft Bills have already been prepared and were on September 7, 2010 being considered by the nine-member Cabinet committee. These Bills are the Judicial Service Commission Bill, the Vetting of Judges and Magistrates Bill, the Equal Opportunities Bill, the Matrimonial Property Bill, the Marriage Bill and

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the Family Protection Bill. The Supreme Court Bill and the Commission on Revenue Allocation Bill are reported to be ready, but yet to be discussed by the Cabinet.

The Bills pending completion relate to those giving effect to the provisions on citizenship, Bill of Rights, leadership and integrity, devolved government, public finance, the Legislature, the Executive, public service and national security, culture, land, consumer protection, ethics and anti-corruption, election disputes, among others.

The objective of these legislations is primarily to alter the content and mode of governance so that the same can be in tandem with the provisions of the new Constitution. It is an accepted practice that a Constitution only outlines the structures and principles of the laws of a state. The main contents are supplied by the ordinary legislations of Parliament.

#### Role of Parliament

Parliament has the largest burden in ensuring the enactment of the more than 49 Bills. Its first role is to establish the Constitutional Implementation Oversight Committee, which will monitor the progress of the implementation and also receive reports from the commission.

Parliament will also need to coordinate with the AG and the KLRC in the tabling of the required Bills. It is also Parliament that will debate these Bills, revise, enact or reject them altogether. It will also facilitate and assist in the creation of county governments and the Senate.



Kenyans now expect MPs to role up their sleeves and kick politics out of Parliament in order to expedite the process of entrenching the new Constitution.

If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court under Article 261 (5) on the development for appropriate directions and orders. According to the Schedule, the time frame for enacting the crucial laws ranges from between one to five years.

#### Challenges

A number of challenges stand in the way of achieving the enactment of these Bills. The first is the shortage of drafters in the AG's Office and in the KLRC. The magnitude of this problem is even higher when one considers the overwhelmingly large number of legislations that require to be drafted within a very short period. It has been proposed that foreign but experienced drafters will be outsourced to alleviate this challenge. However, this will also escalate the costs of the process and overburden the taxpayers.

Another challenge is that some fresh provisions in the new Constitution are so novel that there exists no reference or precedents even from other nations to guide the drafters. The bringing in of foreign experienced drafters is, however, expected to address this problem.

Another obstruction is likely opposition in Parliament, which may result in the stretching of the timelines provided in Schedule 5.

This threat is real considering that some proponents of the "No" campaign may frustrate the efforts to implement the Constitution. Additionally, the already heavy schedule of the National Assembly does not augur well for speedy legislations. In fact, most parliamentarians are expected to shift their energies to laying out campaign strategies for the 2012 General Election.

The story of the 49 Bills should not be a disconcerting one. A great deal of strategy, organisation, dedication and commitment must be provided by all involved in the drafting and enactment of the Bills. The enactment of the Constitution was not so much the end of a journey for change and improvement in the lives of the Kenyan people, but the beginning of a journey towards ensuring that all its provisions are not simply provided for, but enforceable. **KN**

*A drafter must have a minimum law degree from a recognised university, be enrolled as an advocate, have a post-graduate qualification in legislative drafting and ought to have some working experience of legislative drafting in a Commonwealth country.*

# The gender agenda

It has been a long road. As expected, issues of women empowerment could not have escaped their rightful place in the new Constitution. But, even as the writer looks at the spirit of gender equality as enshrined in the document, his final verdict is that there is much more work needed in this area. Eventually, it will take action from all concerned for gender parity to be a reality.

By Dorothy Momanyi

**F**or centuries, women worldwide have suffered under the yoke of inequality. It is in their pursuit of emancipation from numerous cultural, political or economic subjugations that feminist movements grew.

The term gender refers to the economic, social and cultural activities and opportunities associated with either being male or female. In Kenya, gender activism gathered momentum from the 1970's but achieved little success in restructuring of the existing laws. And, even on the effective date of the new Constitution, discrimination was present in laws relating to citizenship, adoption, marriage, divorce, burial and inheritance.

Due to the existing perceptions, potential legislation advancing the cause of women could not see the light day. The Affiliations Act and The Marriage Bill (1985) seeking to give equal rights to spouses in a marriage were rejected in parliament.

The extent of inequality against women transcends other areas as well including education, employment, promotion in employment and political positions whether elective or appointive.

Based on this background, one realises that in both letter and spirit,



Former nominated MP Ms Njoki Ndung'u, the first lady of gender activism in Kenya.

the new Constitution is fully geared towards altering the relation between men and women, facilitating gender equality as well as affirmative action in favour of women.

### Provisions

The new Constitution contains many provisions, some express and others implied which have a direct effect on gender equality. The preamble sets the tone by recognising a government based on equality. The principles of equality, inclusiveness, non-

discrimination and protection of the "marginalised" are recognised as National Values and Principles under Article 10(6).

On citizenship, the hitherto discriminative aspects denying women the right to donate citizenship to their spouses or children have been removed. The greatest provisions on gender equality are found in the Bill of Rights. Article 20 directs the State to give priority to vulnerable groups including women



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when providing housing, health, food, water, social security and education.

Article 27 is the most express provision on gender equality as it states that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”. It prohibits discrimination on grounds of “sex”, “pregnancy” and “marital status”. It also mandates the State to take affirmative action to redress past discrimination and to ensure that in all elective or appointive bodies, no more than two-thirds of the members shall be of the same gender.

### Representation

Political parties are under Article 91 directed to respect and promote gender equality. In addition, Parliament is under Article 100 required to enact legislation to promote representation of women in the House.

The controversial issue of reproductive rights to women is dealt with under Article 43 (1) where these rights have been recognised.

Establishment of the Kenya National Human Rights and Equality Commission under Article 59 (2) (a) is a major win for women as its major roles include the promotion of gender equality, equity generally and facilitation of gender mainstreaming in national development.

An excellent innovation to enforce these rights is under Article 22 (1) granting people, including women, the right to institute court proceedings without paying fees in order to enforce a right.

While land is the greatest resource in Kenya, it is on its proprietorship that women have suffered the greatest discrimination culturally. Article 60 (1) addresses this cultural problem by emphasising that land is to be used in a manner that eliminates gender discrimination in law, customs and practices.

## The extent of inequality against women transcends other areas as well including education, employment, promotion in employment and political positions whether elective or appointive.

### Matrimonial

Pursuant to Article 68 (c) (iii), Parliament is mandated to enact legislation to regulate the recognition and protection of matrimonial property during or upon the termination of marriage. In this respect, the infamous decision by the Court of Appeal in *Echaria – vs. Echaria Civil Appeal No. 75 of 2001 Nairobi* which declared that non-financial contributions of a wife such as staying in the house, keeping it clean, looking after the children were not factors to be considered in dividing matrimonial property will no longer be law.

The profile of positions held by women is to rise due to the requirement under Article 250 that the chairperson and vice-chairperson of commissions shall not be of the same gender.

On a more indirect note, the recognition of the family unit under Article 45 and its protection is a big plus for women as they are generally the bedrock in the setting up, raising and maintaining of the family. The same Article directs the enactment of legislation to recognise customary marriages which are the most common form.

Another indirect benefit is the establishment of the equalisation fund under Article 204 where the provision of basic services such as water, roads, health facilities and electricity to the marginalised will mostly benefit women. Devolution will also benefit women since resource allocation to the local level will spur economic growth in the informal sector where women are the majority.

On parental rights, the new Constitution confers equal rights and obligations on both parents irrespective of whether the parents are living together or not. This is unlike the Children's Act where the primary responsibility for children is on women.

### Imperatives for implementation

Laws do not operate in a vacuum and unless they are given life by the social-political-economic machinery, they remain impotent.

In Kenya, it is deeply ingrained in the minds of the people that women and men are not and cannot be equal. These cultural and religious traditions that subjugate women must be brought to an end; and so must the habit of women shying away from positions of power and influence.

The government must be proactive in enforcing the new laws unlike in the past where little effort was made to promote equality, notwithstanding the fact that some provisions relating to the same existed. There is need for resolute efforts by major players such as parliament, civil society, women leaders and even men in promoting gender equality principles. For parliament, the work is set out. It must enact the necessary legislation and monitor observance by the Executive to those principles.

It must also be recognised that poverty eradication cannot be achieved without empowering women economically since economics and politics have mutual correlation. The civil society has been robust and vocal on gender issues. Organisations such as FIDA and the

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Women need to be empowered and their role in national development recognised.

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Education Centre for Women in Democracy in Kenya have exhibited relentless pursuit of equality between the genders. Such organisations must continue to enhance their lobbying and spearhead campaigns to sensitise men and women on the benefits and implications of the new Constitution on gender Issues.

**Status**

Women leaders such as Hon Martha Karua and Professor Wangari Mathai must lead in encouraging and enlightening women on the new opportunities and benefits. They must also continue leading by example by going for top leadership positions in the new constitutional dispensation.

Men's role is to acknowledge that uplifting the status of women is uplifting themselves since women are their wives, mothers, daughters and sisters. They must help women achieve gender equity.

The first strategy must be legislative and parliament is required to formulate laws to regulate the mode and methods of achieving gender parity. The legislations on citizen-

ship, marriage, divorce, inheritance and land laws must be given top priority.

Simultaneously or subsequently, the executive should take the affirmative and pro-active measures to achieve equality of the genders. The same applies to positions in commissions, boards, parastatals and authorities whereby the government can take a pro-active role in ensuring that women form at least a 1/3 of the compositions.

**Best practice**

Gender discrimination is prevalent worldwide. It is only in the last century that rights of women to own property, vote or have equal opportunities in the work place were recognised.

Germany was ranked eleventh in the World Economic Forum's Global Gender Gap Report 2008. Political participation of women is very high and the incumbent chancellor is Angela Merkel, a woman. There is public commitment to equality evident through gender mainstreaming programmes such as "Modern State - Modern

Administration" (*moderner staat – moderne ver walting*) at all levels of government.

The principles of Gender Equality in Germany are anchored in Article 3 of the 1949 Constitution known as the Basic Law for the Federal Republic of Germany (Grundgesetz). In spite of the provisions of the Constitution, it was not until 1955 when the Court declared unequal pay for equal work unconstitutional. The 2001 Federal Act on Equal Opportunities between women and men has enforced equality in employment and labour in the public service.

In the United States, the primary Federal Law establishing gender equality include the 1964 Civil Rights Act, the Equal Pay Act of 1963, the Pregnancy Discrimination Act of 1973, the Executive Order 11246 and the Violence Against Women Act of 1994. The common thread in all these provisions is that sexual discrimination is prohibited, especially in work places.

The Civil Rights Act 1964 also created The Equal Employment

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Opportunity Commission with powers to investigate Claims of Discrimination and even to file lawsuits to complain of discriminatory acts by an employer.

However, in spite of such progressive legislations, the United States has failed to ratify the convention on the Elimination of All forms of Discrimination against Women (CEDAW). It was ranked as 31<sup>st</sup> in the 2009 Global Gender Gap report published by the World Economic Forum and is thus far below most European and Industrialised countries.

In sub-Saharan Africa, Rwanda is an island of gender equality in a sea of subjugation. After the 1994 genocide, the Rwanda Patriotic Front government facilitated the passage of the Rwanda's Constitution in 2003 which granted 30 percent women representation in all decision making levels in government.

In 2008, Rwanda became the first country ever to have a majority of

women in the legislature. This achievement was not just made possible by an elaborate and appropriate legal framework, but more by exceptional government support and deliberate campaigns to spread messages of gender empowerment.

#### Implementation

Without political will, the provisions on gender equality will remain hollow. Accordingly, the first step is to ensure that politicians and policy makers are committed in implementing key legal reforms. The legislature, Attorney General and the Commission on the Implementation of the Constitution must give priority to the drafting and passage of the requisite legislation in this area.

Potential women leaders need ongoing training and education to ensure their preparation for the new positions available to them. The civil society and government must make efforts at educating all citizens on the need for gender equality and campaign for the change of negative

social, cultural and religious attitudes towards women.

Drawing lessons from Rwanda, we must note that fundamental social and cultural shifts also require national leadership, legal reforms, progressive policies, institutional mechanisms, a vibrant women's movement, widespread awareness and public investment in women's rights and gender equality.

#### Remaining gaps

The passage of the new Constitution is a great leap forward in achieving gender parity. However, it is only a means to an end and the necessary legislation must be put in place to bring effect to the principles set out in the document and to repeal existing discriminative laws.

The filling up of posts created for women and social engineering to embrace gender equality will be the greatest challenge in achieving success in this area. **KN**



The bond of marriage is undergoing a major shake up.

# Revising the Standing Orders

It will not be business as usual in our August house. The new Constitution has far reaching changes that must take place to accommodate the new dispensation. One area that will have to be restructured is the standing orders. Our writer looks at what is expected to happen on the floor as far transacting house business.

By Guandaru Thuita

**T**he promulgation of the new Constitution not only heralds a new dawn for the people of Kenya, but also introduces radical changes in the composition and roles of Parliament on one hand and the relationship between Parliament and the Executive on the other. Clearly, such change necessitates revising the Standing Orders of the National Assembly to bring them in conformity with the new Constitution.

The Standing Orders in this respect are the rules governing the procedure and conduct of a legislative body. Since procedure is the hand maiden of substance, these procedures must necessarily flow from the substantive powers either contained under the new Constitution or under any legislation thereon.

## New provisions

One of the greatest changes to the structure of the legislature is that it shall now consist of two houses -the National Assembly and the Senate. Both Houses shall collectively be referred to as Parliament and they are conferred with the legislative role. Whereas the National Assembly shall primarily deal with national issues such as the appropriation, allocation and oversight of national revenue, the Senate shall dwell on legislation relating to counties.

Another new but significant provision is the Right of Recall under Article 104, which gives powers to the electorate to recall their Member of Parliament before the end of the term of the relevant House of Parliament. In addition, the High

Court is supposed to hear election disputes within six months unlike in the past when there was no direction on the period.

In the repealed constitution, the Speaker could be elected from among the Members of Parliament. However, the new Constitution expressly bars MPs from qualifying to apply for the Speaker's post.

The terminologies used in reference to party leaders and Bills has also changed. Terms such as "official leader of the opposition" and "the leader of government business" are henceforth to be found only in history, but not in the new Constitution. In their place are the terms "majority party leader" and "minority party leader".

Bills of Parliament shall no longer be categorised on the basis of the mover. There is no mention of private member's Bill or public Bill. Instead, it appears that the Bills shall be categorised with respect to their content. Consequently, there shall be reference to Bills not concerning county government, Bills concerning county government and money Bills - those concerned with taxes, charges on a public fund, loans and investments of public money.

The President's discretion in assenting to Bills has been significantly trimmed because in the event he declines to assent to a Bill or refer it to Parliament for re-consideration, then the Bill shall be taken as having been assented to after expiry of the requisite period.



Speaker of the National Assembly, Hon Kenneth Marende, shoulders the ambitions and aspirations of the majority of Kenyans.

## Sign language

An interesting change is that sign language has constitutionally been recognised as an official language of Parliament. The quorum of Parliament has been increased from 30 to 50 in the National Assembly and 15 in the Senate. The Speaker's right to vote when there is a tie has also been taken away.

The powers of the President in proroguing or dissolving Parliament are no longer in existence and neither can he participate in parliamentary debate. His role in Parliament is

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limited to attending the sittings to give an address, which he can do at any time. However, Article 132 requires him to annually give a report in an address to the nation on all the measures taken to achieve progress in the realisation of the national values.

Ministers or what are now to be known as Cabinet Secretaries are not to be Members of Parliament and hence the procedure of asking or answering questions shall significantly change. However, Parliament is under Article 125 empowered to summon any person, including Cabinet Secretaries to appear before it to give evidence or provide information.

A new procedure adopted in respect to passage of Bills is that before either House considers a Bill, the Speakers of each shall jointly resolve any question as to whether it is a Bill concerning counties, and if it is, whether it is a special or ordinary Bill. Many interactions between the two Houses are envisaged such as having joint committees or even joint sittings.

*The Standing Orders in this respect are the rules governing the procedure and conduct of a legislative body. Since procedure is the hand maiden of substance, these procedures must necessarily flow from the substantive powers either contained under the new Constitution or under any legislation thereon.*

#### Immediate changes and time frames

In spite of the foregoing drastic changes in the composition, structure and procedures of Parliament, these shall not come into effect immediately. This is because the provisions of Chapter 8 of the new Constitution, which relate to Parliament, have been suspended under the Transitional and Consequential Provision until the first General Election under the new constitutional order.

Consequently, any major changes expected in Parliament shall only become visible in about two years

and three months' time. These changes shall essentially be captured in the new Standing Orders of Parliament, which are now only awaiting formulation and passage.

Given that this county is never keen to shed practices in the commonwealth nations, radical changes in the structure of the Standing Orders of Parliament are not expected. Nonetheless, a great number of changes or amendments definitely have to be made to make the current Standing Orders conform to the new Constitution.

The first of these is that the prayer currently appearing at the beginning of the Standing Orders may be done away with in view of the principle under Article 8 stipulating that there shall be no State religion. The prayer, as it currently appears, is purely Christian and takes no account of other religions. Adopting it in the current circumstances would be against the foregoing principles in relation to religion.

#### Leadership

Certain positions and terminologies shall be removed from the body of the Standing Orders. There isn't contemplated to be a leader of government business since members of the cabinet will no longer be Members of Parliament. The term "Minister" is to be replaced with "Cabinet Secretary". In addition, no reference shall be accorded to the position of the Prime Minister, which is no longer recognised.



Leader of government business, Vice President Hon Kalonzo Musyoka, is now expected to walk the talk.



The sensational newly elected MP for Makadara constituency Hon Gidion Kioko Mbuvi alias Mike Sonko.

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With regard to political parties, Article 108 of the new Constitution refers to them as “majority” or “minority party”. There is no longer to be such terms as “opposition party” or “ruling party” in the Standing Orders. The same applies to the leaders. The leader of the party in leadership shall be known as “majority leader” while the one whose party constitutes the opposition shall be known as “minority leader”.

With regard to Bills to be introduced in Parliament, Article 109 stipulates that all Bills save for a Money Bill can be introduced by any member. The reference to Bills as Private Members Bills is removed. Under Article 110-114, Bills are categorised as either Money Bills, Bills concerning county government, a special Bill concerning county government or an ordinary Bill concerning county governments.

Under the old constitution, a Speaker of Parliament was either elected from among Members of Parliament or from non-Members. However, the new Constitution has changed this arrangement and under Article 106 Speakers shall only be elected from non-Members. The Deputy Speaker shall conversely be elected only from among the members of the House. The Standing Orders in relation to the election of the Speaker and Deputy Speaker shall have to be revised in this regard.

### Presidential powers

The trimming of the President's powers over Parliament under the new Constitution shall definitely have a major effect on the Standing Orders. The President's only residue role under Article 126 of the new Constitution is that he or she shall have the power to address the opening of each newly elected Parliament and shall appoint the place and date of the first sitting of the new House.

Under Article 132 he or she shall address a special sitting of Parliament once every year or any other time and once a year, make an address to the nation on measures taken and progress achieved in realisation of national values.

The hitherto presidential powers of dissolving and proroguing Parliament are not in place and the Standing Orders necessarily have to be revised to reflect this status and to outline the procedure on how Parliament is to be dissolved.

Under Article 126, parliamentary sitting may be held anywhere in the republic and not necessary within the precincts of our National Assembly. The Standing Orders must outline issues relating to parliamentary sittings outside the usual precincts. A quorum of the House used be 30 members under the old constitution, but now is going to be 50 members for the National Assembly and 15 for the Senate.

There is no Prime Minister's position under the new laws and hence part XI of the Standing Orders 2008, which is entitled “Prime Minister's time” shall wholly be removed. With regard to casting of votes, the power of the Speaker to cast a determining vote in situations where there is a tie has been taken away. In case of a tie, the question is to be considered lost and hence Standing Order 65 must be reviewed.

### Mediation

The language to be used in the proceedings in the House was either

Kiswahili or English under Standing Order 69. However, Article 120 adds Kenyan sign language as an official language and hence Standing Order 69 will have to be reviewed.

The procedure of introducing a Bill to Parliament has now been changed. Under Articles 110-114, the Speakers of both Houses must consider a Bill before it is introduced to ascertain what category it is in order to determine whether it requires to be passed by both Houses.

New committees to be known as “mediation committees” have been created by Article 113 and their roles shall be to deal with ordinary Bills that concern counties which have been passed by one House but rejected by the other. Their primary role is, therefore, to seek consensus on the Bills to facilitate passage by both Houses.

The Standing Orders are Procedural Rules and the changes in them shall only be for the purposes of harmonising the procedures of Parliament with the new constitutional status. Their impact is only capable of being felt in Parliament rather than with the populace. But since they give effect to provisions that enhance good governance, then the new changes will make governing easier.

Under Article 124, each House of Parliament is granted the power and duty to make Standing Orders for the orderly conduct of proceedings. This Article seems to indicate that each House shall have its own set of Standing Orders. It is thus expected that they shall be different in respect to their specialised roles. Otherwise, the structure and content shall most likely remain the same.

The County Assemblies are also expected to have Standing Orders though the same have not been provided under the Constitution. Presumably they'll borrow heavily from the Standing Orders of Parliament with only specific variations for their needs. **KN**

# Labour unrest

## Will the new Constitution make things better?

By *Katiba News* Correspondent

This article seeks to analyse the labour rights of persons in employment including the right to fair remuneration, the right to suitable safe working conditions, the right to reasonable expectations of non-discrimination in recruitment and promotion, and the development of labour from the colonial times through to the post colonial era including the new constitutional dispensation.

Just like the clamour for fair employment for Africans during the colonial era led to calls for independence, the need for justice in places of work recently created an avenue and a justification for the change in the legal framework relating to employment of persons.

To put the discussion in the perspective of prevailing circumstances, it is imperative to also examine the history of trade unions, particularly the Central Organisation of Trade Union (COTU), examine the problem of brain drain, the capacity of the country's economy to absorb the high number of persons in need of employment, discuss employment laws with those in Germany, the United States and South Africa and finally, examine the loopholes existing which enable exploitation of workers by their employers.

### Colonialism

The colonial era may be the worst period that Kenyan inhabitants will ever undergo employment wise. The conditions of work during that period is captured in numerous publications but preferably, Anthony Clayton and Donald C. Savage, *Government of Labor in Kenya, 1895-1963* (London, 1974). Employment during this period was characterised by slavery conditions, unimaginable cruelty, exploitation, miserable remuneration and deplorable

working conditions. Native labour was required in the extractive industries and settler agriculture.

The colonial administrators through a plethora of ordinances and regulations set up a legal framework within which labour could be recruited and maintained in adequate numbers and at the lowest cost to the settlers.

The first among these were the 1902 Native Porters and labour regulations. They addressed the issue of desertions by prescribing heavy penalties. Subsequently, a more

substantive ordinance was the Masters and Servants Ordinances of 1906 which introduced racial discrimination in the area of employment as it only applied to "Arab and Native" workers. Discrimination hence became a norm and it was manifested by instances of Africans receiving lower pay than their Asian or European counterparts notwithstanding that the qualifications were similar or duties identical.

### Comply

The Hut and Poll Tax Ordinance of 1910 by directing that the required taxes be paid in cash ensured that all Africans confined in the Special Native Reserves provided labor to white settlers since that was the only way of obtaining cash money.

The Registration of Natives Ordinance of 1915 introduced the infamous "kipande" system requiring every male adult African to have and always carry a card in a container which card must contain details of the Africans' employment hence Africans had to seek employment with settlers to comply. The Vagrancy Regulations criminalised begging and homelessness.

The Native Authority Ordinance gave chiefs and headmen the powers to order people into public works programs or "communal labor" and since exemptions could only be

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The ever popular COTU secretary general, Francis Atwoli, loves a good fight.

obtained on proof of wage employment, more Africans had to seek this type of employment.

The imposition of fines on employment affairs criminalized what was ideally a private affair. The goal of these ordinances and regulations was to ensure the availability of cheap labour rather than ensuring the safety of employees. In 1919, however, inspectors of labour were introduced but the five of them were hardly enough to monitor the entire colony.

### Harassed

Trade unionism was restricted and closely monitored by the administration. Registration of Trade Unions under Ordinance 35 of 1939 would be denied if the union was considered subversive. Trade Unionist such as Makhan Singh were frequently harassed and arrested by the administration.

These colonial practices persisted up to the end of the colonial period but the post colonial successor became imprisoned in the colonial legal framework. The post colonial government did not immediately overhaul the existing laws on employment until recently in the year 2007. Nonetheless, the treatment of labour rights was fairer after independence than before.

The Independence Constitution contained provisions impacting on labour including Section 74 which gave protection from slavery and forced labor, section 79 relating to Freedom of Association, Section 80 (2) (d) on the procedures of registration of trade unions and section 82

relating to protection from discrimination on grounds of race, tribe, place of origin or residence.

To extend the control of the economy to indigenous Africans, the government adopted Sessional Paper no. 10 of 1965 on Socialism and its Application to Planning in Kenya. In this paper and in the subsequent development plans, a policy of Kenyanisation of trade and labour was adopted with the main aim being to ensure that the majority of businesses and significant posts in lucrative professions such as Accountancy, Law and Engineering were in the hands of its citizens rather than expatriates.

### Unemployment

Pursuant to this policy, the government in 1967 developed regulations requiring all non-citizens to take out work and residence permits. Without exceptional skills lacking amongst Kenyans, foreigners would not be granted these permits either to work in the civil service or the private sectors.

According to the World Fact Book, the current status of unemployment in Kenya stands at 40 percent. This is a hazardously large figure and a myriad of reasons explain it. However, the main problem is structural in nature and revolves around the poor state and low growth of the economy. The state of the economy is so bad that it may be considered as one of the worst performing.

About 70 percent of employable people are in the agricultural sector but, unfortunately, half of these

people only do it for subsistence. The heavy dependence on a few agricultural exports which are always vulnerable to world price fluctuation and droughts puts the country at a great risk. The high population growth rate also is unsustainable as it means declining income per head.

Poor governance has scared away potential investors and has had a direct impact on economic growth. The high illiteracy levels, laziness, lack of innovativeness, failure to adopt new technology and engagement in low productivity areas has had adverse effects not only on the general economy but on openings for employment as well.

### Brain drain

Kenya just like other developing countries is greatly afflicted by the problem of human capital flight more commonly known as brain drain. This is the large scale emigration of individuals with technical skills or knowledge from one country, economic sector or field for another, usually for better pay or living conditions. This phenomenon comes with huge economic costs considering that the emigrants carry with them the value of their government sponsored training.

To stem the tide, measures must be taken to address the reasons that led to the emigration in the first place. This includes embracing principles of good governance, taking urgent steps to spur economic growth and improving the terms of services for professionals like doctors and nurses.

### Trade unionism in Kenya

The roots of the trade union can be traced to the agitation for better conditions of work during colonialism and the enactment of 1937 Trade Unions' Ordinance. The ordinance paved way for the registration of trade unions and their numbers gradually rose as agitation for better terms increased. The situation grew tense, and the pioneer of trade unionism in Kenya, Makhan Singh, openly associated himself with Africans despite the existence of colour bar and racial discrimination.

*The new Constitution makes provisions for labour issues in Chapter 4 on the Bill of Rights. Under Article 27, the Constitution recognises gender equality, prohibits discrimination on gender and mandates the State to take affirmative action to redress past discriminations.*





Unlike in the West where manual labour is highly paid, labourers in Kenya live from hand to mouth.

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National Trade Union known as the Kenya Federation of Registered Trade Unions (KFRTU) was formed in 1952 but thereafter, all the leaders of several unions were arrested and detained for allegedly being associated with the Mau Mau freedom movement. KFRTU gave way to the formation of the Kenya Federation of Labour (KFL) but due leadership wrangles many splinter groups were formed. It is only after the government's intervention that KFL was deregistered and in its place the Central Organisation of Trade Unions COTU (K) was formed in 1965. COTU has since grown and presently has about 31 affiliates.

#### Employment Act

Prior to 2007, employment laws included the Employment Act cap 226, the Trade Disputes Act Cap 234, the Regulation of Wages and Terms and Conditions of Employment Act cap 229, the Workmen Compensation Act, the Factories and Other Places of Act and the Trade Unions Act.

But these Acts were considered unsuitable for the modern conditions since they had been enacted either during the colonial period or immediately thereafter. In 2007 the following five Acts were promulgated to replace the foregoing laws:

the Employment Act 2007, the Labour Institutions Act, Work Injury Benefits Act, Occupational Health and Safety Act, and the Labour Relations Act.

The Employment Act 2007 strengthens the minimum terms and conditions, prohibits child labour, sexual harassment, discrimination on status of disability or HIV. It introduced the right to paternity and gave safeguards for the workers in the event of insolvency.

#### Redress

The new Constitution makes provisions for labour issues in Chapter 4 on the Bill of Rights. Under Article 27, the Constitution recognises gender equality, prohibits discrimination on gender and mandates the State to take affirmative action to redress past discriminations.

Article 37 recognises the right of workers to peaceably and unarmed to assemble, demonstrate, picket or present petitions. While Article 41 recognises the right to fair labour practices, fair remuneration, reasonable working conditions, right to form or join a trade union, to go on strike, the rights of an employer to join an employers organisation and the right to engage in collective bargaining agreements.

Under Article 59, the Kenya National Human Rights and Equality Commission is mandated with the task of promoting and enforcing the Bill of Rights including labour rights. Accordingly, the avenue for redress has been expanded to include the commission in addition to the Industrial Court and the Ministry of Labour mechanisms.

Being relatively recent, the Employment Act 2007 is connected with the contemporary situations and the new Constitution. However, it may be necessary to alter it in order to embrace affirmative action in places of work and to regulate how the Kenya National Human Rights and Equality Commission shall perform its duties in respect to labour rights.

#### Best practice

The German Constitution as amended by the Unification Treaty of 1990 guarantees freedom of association, free choice of occupation and prohibition of forced labour. It establishes the principle of equal treatment and in particular obliges the state to support the effective realisation of gender equality.

The major sources of labour law in Germany are Federal legislation, collective agreements, works

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agreements and case law. Germany does not have a consolidated Labour Law but has separate Acts dealing with specific labour related issues.

The key Acts include the Civil Code which defines the employment relationship, the Act on Part-Time and Fixed-term Employment Relationship which governs Contracts of Employment, the Home Work Act which caters for home workers, the Occupational Training Act which deals with *Vocational training* contracts, the Works Constitution Act which regulates co-operation between employers and employees and the Act on Collective Agreements.

Germany has numerous other labour legislations which include the Federal Paid Leave Act; Employment Promotion Act; Employment Protection Act, Act regulating the Payment of Wages and Salaries on Public Holidays and in case of sickness; Protection against Dismissal Act; Act on the Commercial Transfer of Employees; Maternity Protection Act; Ordinance on Maternity Protection at the Workplace; Young Workers Protection Act; Working Time Act; Act on the Payment of Child Raising Benefit and Child Raising Leave; Insolvency Ordinance, Labour Court Act, Code of Civil Procedure and Working Time Act.

Unlike Kenya, there is no statutory minimum wage in Germany as the wages are determined by collective bargaining agreements.

### America

The United States labor law is a heterogeneous collection of State and Federal laws. The US Congress has, however, failed to ratify key labour conventions including Convention on the International Labour Organisation.

Employment law in the US is governed by the common law rule of "at-will employment," meaning that an employment relationship could be terminated by either party at any time without a reason or for any reason except on the basis of prohibited discriminations. Cases of employment discrimination in America are usually the subject of the Equal Employment Opportunity Commission.

The Fair Labor Standards Act regulates minimum wages and overtime pay for certain employees while the National Labor Relations Act allows representations by unions while the Labor Management Reporting and Disclosure Act of 1959 also regulates the internal affairs of all private sector unions.

Other relevant legislations include The Employee Retirement Income Security Act, The Occupational Safety and Health Act and The Worker Adjustment and Retraining Notification Act, requires private sector employers to give sixty days' notice of large-scale layoffs and plant closures.

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*Being relatively recent, the Employment Act 2007 is connected with the contemporary situations and the new Constitution. However, it may be necessary to alter it in order to embrace affirmative action in places of work and to regulate how the Kenya National Human Rights and Equality Commission shall perform its duties in respect to labour rights.*

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The South African Constitution has labour rights almost identical to those under the new Kenyan Constitution and we may as well have borrowed their provisions.

Besides the Constitution, there are a number of Statutes dealing with specific aspects of employment laws including the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act, the Skills Development Act, the Unemployment Insurance Act, Occupational Health and Safety Act, the Compensation for Occupational Injuries and Diseases Act. South Africa rejoined the ILO in 1994 and has so far ratified 21 conventions.

### Loopholes

Cases of employers exploiting their employees are commonplace. The upper hand of employers in labour relations coupled with desperation of employees allows such abuses to take place. These abuses manifest themselves as sexual exploitation, underpayment, deplorable working condition, lack of proper equipments when handling hazardous tasks, failure to providing housing and unlawful and arbitral dismissals.

The lack of enough Labour officers and inspectors to continuously monitor working conditions and terms of pay is a great lacuna which allows the exploitations to go on. The minimum wages prescribed are so low that they perpetuate exploitation of workers.

The practice of maintaining employees in short term contracts rather than permanent employment so that they (the companies) can avoid the resultant obligations towards leave and other benefits should be outlawed and legislation should also be enacted to protect interns from being forced to perform heavy duties for little or no pay on the pretext that they are under training. **KN**

The writer is a consultant in labour issues.

# 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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