January-February 2011

KatibaNews

The birth of a new Republic

Meeting the deadlines

The challenges of filling up constitutional offices

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ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

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

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

The MDA aims at:

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

Activities of MDA include:

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

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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Implement the new constitution now!!!

Meeting the deadlines

The challenges of filling up constitutional offices

Promulgation of the new Constitution was just the first step in a long journey that will take months and years. Anything looked surmountable at the heat of the moment. However, with real politics the Kenyan way, we know the challenges that lie ahead in ensuring that the document becomes a reality within the stipulated time schedules. Our writer gives us the real picture.

By Moses Kipsang'

Having voted in the new Constitution and the same having been promulgated in a colorful ceremony at Uhuru Park, attention and excitement has rapidly shifted to its implementation.

One aspect of implementation is the preparation and passage of legislation required under the new order. However, this has been overshadowed by the dramatic competition for key public appointments introduced by the new law.

The would-be Attorney General Prof. Githu Muigai

It is, therefore, worthwhile to examine what these posts and commissions are, the progress made in filling them, the expected challenges when making these appointments, horse trading as a challenge in the appointments and finally give a preview of the controversial nomination of the Chief Justice (CJ), Attorney General (AG), Director of Public Prosecution (DPP) and the Controller of the Budget by the President.

Plum jobs

Whereas many Kenyans are content with having a new constitutional dispensation, many in the academia, legal field and civil society are more delighted with the fact that the Constitution has created numerous plum jobs.

New commissions have been established while some that were in existence earlier have been remodeled. Article 250 of the Constitution dictates that commissions are to be made up of at least three and not more than nine members. With at least 11 commissions, there will be plenty of positions to be filled up. The commissions established include:

- The Kenya National Human Rights & Equality Commission to deal with the promotion of Human Rights and Gender Equality.
- The National Land Commission charged with the responsibility of managing public land and monitoring land use.
- The Ethics & Anti-Corruption Commission to take over the role of the existing Kenya Anti-Corruption Commission.
- The Independent Electoral & Boundaries Commission, which shall be in charge of conducting elections, referenda and the delimitation of electoral units.
- The Parliamentary Service Commission, which will contrive to render services and facilities for proper functioning of the Parliament.
- The Judicial Service Commission (JSC), which has already been put in place, to promote and facili-

tate the administration of justice by the Courts.

- The Commission on Revenue Allocation, which has the task of recommending the basis of equitable sharing of revenue.
- The Salaries and Remuneration Commission to set up and regularly review the remuneration & benefits of all State officers.
- The Public Service Commission and Teachers Service Commission shall continue with their roles of administration of the Public Service and employment of teachers.
- The National Police Service Commission is mandated to recruit and exercise disciplinary control over persons in the National Police Service.
- The Commission on the Implementation of the Constitution, which is already up and running, has the duty of supervising and coordinating the implementation of the Constitution.

The Central Bank of Kenya, though not a commission is now a body established under the Constitution, but its composition shall be subject to an Act of Parliament.

Key bodies

Other key bodies include the National Security Council to supervise Kenyan Defence Forces, the National Intelligence Service, National Police Service and the Defence Council charged with the supervision of the Kenya Defence Forces. Unlike the commissions, the composition of the National Security Council and Defence Council is restricted to officers who assume the required offices such as the Cabinet Secretary for Defence.

The Constitution also establishes Individual Independent Offices including the CJ, Deputy CJ, AG, DPP, the Secretary to the Cabinet, Controller of the Budget, Offices of the Principal and Cabinet Secretaries, the Auditor General, the Inspector General (Commander of the Police Force), and two Deputy Inspector Generals for the Kenya Police Service and Administration Police.

Lobbying continues to intensity for these posts as their due dates approach. The position of CJ and the AG are to fall vacant within six months and one year and have naturally become the first to gather attention.

Save for the provisions relating to the executive which have been suspended until the next elections, all other new appointments are pursuant to section 29 of the 6th Schedule required to be filled up within 1 year.

Progress

The process of filling the aforementioned positions began but is often characterised by last minute rushes, controversy and relative delays. Indications from the Kenya Law Reform Commission are that the Bills necessary for setting up some of these Commissions and Independent Offices are ready and only awaiting the approval of the Commission for the Implementation of the Constitution (CIC) before their introduction to Parliament.

The first commission to be established was the CIC. It was to be in place within 90 days of the promulgation (27th November 2010), but the members were only sworn in on January 4, 2011. The commissioners are Lawyer Charles Nyachae (chairman), Dr Elizabeth Muli (vice chairperson), Prof Peter Wanyande, Ibrahim Ali, Elizabeth Mwangi, Florence Omosa, Catherine Muma, Kamotho Waiganjo, Philemon Mwaisaka and Kibaya Innana Laibuta.

The JSC was to be in place by October 27, last year, but its members were sworn in on January 11, this year. The commissioners include Hon Isaac Lenaola, Hon Riaga Omollo of the Court of Appeal, Hon Emily Ominde representing the Judiciary, lawyers Ahmednassir Abdulahi and Florence Mwangi representing the Law Society of Kenya, Prof Christine Mango, Bishop Antony Muheria and Mr Titus Gatere of the Public Service Commission.

On January 18, 2011 there was yet another belated swearing in of commissioners. These were members of the Commission on Revenue Allocation (CRA). Like the CIC, the CRA was required to have been constituted within 90 days of the promulgation.

The CRA is chaired by the former Central Bank of Kenya Governor Micah Cheserem, assisted by members Ms Fatuma Abdulkadir, Mr Meshack J Onyango, Prof Wafula Masai, Ms Rose Osoro, Prof Joseph Kimura, Ms Amina Ahmed and Prof Raphael Munavu.

Other than the three commissions above, not much progress has been made in establishing the rest. Worse still, there has been no appointment of persons to fill an independent office yet the CJ is required to have vacated by February 27,

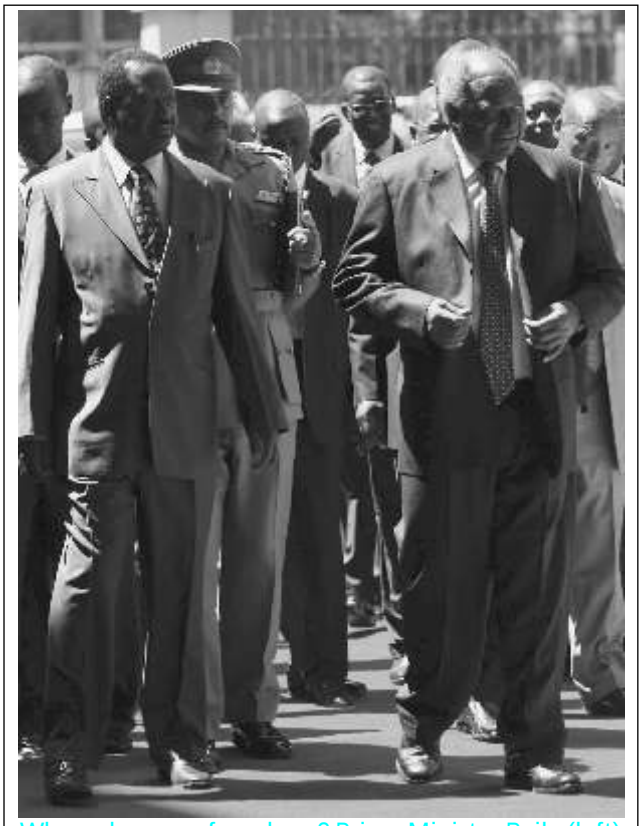
2011 and the rest of the vacancies filled up by August 27.

Surprise nomination

However, on January 28, President Kibaki in a surprise move nominated Court of Appeal Judge Alnashir Visram, Prof Githu Muigai, lawyer Kioko Kilukumi and Mr William Kirwa to the posts of CJ, AG, DPP and Controller of Budget. The Presidential Press Service indicated that the appointments were made in consultation with Prime Minister Raila Odinga. But the Prime Minister expressed surprise and denied that there was full consultation.

The Presidential team together with the Party of National Unity (PNU) countered the Prime Minister's statement by averring that even little consultation was sufficient and concurrence or agreement on the nominees was not necessary. The significance of this argument lies in the fact that both section 24 and 29 of the sixth schedule to the Constitution require consultation between the President and Prime Minister in accordance with the National Accord submitting the appointments to Parliament for approval.

A flurry of activities followed these appointments. In Parliament



Where do we go from here? Prime Minister Raila (left) Odinga and President Mwai Kibaki at crossroads.

members sought clarification from the Speaker on whether the nominations were constitutional, but the Speaker delegated the mandate of issuing an answer to the Parliamentary Committees on Legal Affairs and Finance.

On the other hand, human rights activists led by Centre for Rights Awareness and the League of Kenyan Women Voters filed Petition No 6 of 2011 challenging the presidential nominations and in an elaborate Interlocutory ruling the High Court declared that any purported processing of the nominations by any arm of Government would be unconstitutional.

The JSC as well as the CIC held that the nominations were against the spirit and letter of the Constitution due to lack of consultation between the principals, the failure to adhere to the National Values and Principles of Governance as required under Article 10. This article requires a competitive recruitment based on the principles of equality, participation of the people, good governance, transparency and accountability.

Competitive recruitment

Both principals should have considered a competitive recruitment, which they clearly did not. Such recruitment would ensure that every Kenyan with the relevant qualifications shall have the opportunity to be considered for any suitable appointment. Behind the scenes appointments, boardroom appointments and horse-trading for positions should be shunned, as they breed cronyism and stifle independence.

The position of CJ is crucial to any government. He heads the Judiciary and is central in determining, interpreting and implementing the Constitution. The CJ also chairs the JSC, which has the responsibility of appointing judicial officers and judges of the Supreme Court. The CJ shall also be involved in vetting of judges, and spearheading the renaissance of the Judiciary from a rigid, inept and ineffective body to an efficient and ideal dispenser of justice.

The AG shall continue to be the principle legal adviser of the Government and shall also represent the national Government in court and other tribunals. He shall, however, have no prosecutorial powers. The AG shall be introducing the relevant Bills in Parliament for debate and hence the full implementation of the Constitution lies in his hands.

The importance of these two positions dictates that the selection

process must be handled with a lot of care lest we recruit individuals who shall jeopardise and scuttle the progress made so far.

Horse trading and other challenges

The process of filing up these new appointments is riddled with many challenges. Top amongst these is what is known as horse-trading. This phrase has less to do with buying and selling of horses as it has to do with negotiations characterised by hard bargaining and shrewd exchange.

In light of the fact that there is a Coalition Government mandated to consent over each appointment, horse-trading becomes inevitable. Initial reports before the controversial nominations by the President were that the two principals were considering sharing out the appointments in such a way that the PNU arm would have a free hand in nominating for example the CJ whereas the ODM side would be free to nominate the AG.

Horse-trading can also be used to obtain political concessions in return for a free hand in the appointments. This type of horse-trading negates national values and principles making nonsense of merit and competitive recruitments. It also encourages the appointment of undeserving cronies and loyalists, who will always have the interests of the godfather at heart rather than national interests.

Tough road ahead

The constant wrangles in the Coalition Government are also a threat to the speedy filling up of the newly created positions. The disagreement over the recent nominations is not only a perfect example, but also a sign of the tough road ahead. Some PNU stalwarts are already threatening to pull out of the coalition and certainly such a move shall jeopardise the progress on appointments.

Neo-colonialist attitude is also a challenge to the appointment process. The media has been awash with reports that the principals had been considering appointing a CJ from the commonwealth.

Whereas many Kenyans are content with having a new constitutional dispensation, many in the academia, legal field and civil society are more delighted with the fact that the Constitution has created numerous plum jobs.

The AG shall continue to be the principle legal adviser of the Government and shall also represent the national Government in court and other tribunals. He shall, however, have no prosecutorial powers.

Nearly half a century after Independence there is no logical explanation why we cannot have a Government made up of Kenyans for Kenyans. Foreigners owe allegiance to their countries and are not suitable in determining and implementing national values that they have not been nurtured in.

The process of appointments shall also involve a delicate balancing act in terms of the diverse interests. Under the Bill of Rights, the youth, marginalised groups, women, persons with disabilities and older members of society have been accorded the right to be considered for appointive positions. For instance, article 54 (2) directs the State to ensure that at least 5 per cent of all appointments go to persons with disabilities.

Candy

Article 250 (4) in addition, directs that appointments to commissions and independent offices shall take into account that the offices taken as a whole reflect regional and ethnic diversity of the people of Kenya. This requirement is a tall order for the two principals as balancing these interests and at the same time ensuring that merit is not compromised is a delicate act.

Finally, we cannot ignore or live in denial of the fact that politics, as the scholar Harold Lasswell points out, is all about who gets what, when and how. Politicians must definitely reward those they owe their success to.

Considering the looming General Election, politicians must position themselves and strategise on how they can win large ethnic blocs. The upcoming appointments may just be the candy to do so. KN

The writer is an advocate of the High Court in Nairobi.

Push and pull at the ICC

By Albert Irungu

After a much anticipated moment, on December 15, 2010, ICC Prosecutor Louis Moreno-Ocampo made a request for summons for the people he believed bore the greatest responsibility in the post-election violence of 2007/08. Kenyans finally knew the personalities behind the Ocampo list a list that made many a politician have sleepless nights. The suspects, three cabinet ministers William Ruto (suspended), Uhuru Kenya and Henry Kosgey (stepped aside), the cabinet secretary Francis Muthaura, and a local radio station journalist, Joshua Sang, are set to appear for trial at ICC to answer to crimes against humanity. The drama continues...

In 2008, Parliament rejected a Special Tribunal Bill by Mr Gitobu Imanyara that would have established a local tribunal to deal with all post-election violence cases. It is after this that Ocampo initiated investigation, as it was clear there was no political will to try the perpetrators.
Last December after Ocampo unveiled his list, Parliament hastily passed a Bill by Chepalungu MP Isaac Ruto seeking to withdraw Kenya from the Rome Statute. But many legal experts pointed out that this was a task in futility, as the withdrawal process is long and tedious and does not stop any ongoing trials.

With this list, Ocampo has presented his case to The Hague seeking summons to arraign the six suspects in court. But Ruto, through his lawyers, made an application to the Pre-Trial Chamber II seeking to restrain Ocampo from summoning him.

Tactics

The Government on the other hand has been lobbying support from the African Union and its member states to have the cases deferred to give them a chance to form a local tribunal. Vice-President Kalonzo Musyoka has been carrying out shuttle diplomacy to garner support for the deferment. The proposed changes in the Judiciary this month have been used as justification for the deferment case.

His hands are full. ICC Prosecutor Luis Moreno Ocampo has his work cut out for him.

The appointment of a new Chief Justice, Attorney General and a Director of Public Prosecutions is touted as a reform agenda that will create an environment for the establishment of a local tribunal. The political class vouching for deferment plan to have a local tribunal in place before March 2011 when ICC will hold its pre-trial hearings.

The agenda of pulling out of the ICC has been one of the many tactics used by politicians who support two of the suspects who are presidential aspirants. To many, these attempts to withdraw from the Rome Statute have been met with cynicism. Promises by the political class to create a local tribunal instead of allowing The Hague's due process have been seen as impunity.

In 2008, the Local Tribunal Bill known as the Imanyara Bill was rejected in Parliament. From Kenya's political history, it is evident that the only reason politicians now wish for a deferment is to circumvent any responsibilities for their actions.

Withdrawing from the Rome Statute

As it is now evident, withdrawing Kenya from the Rome Statute will be an uphill task that may not bring the desired effect. Article 2 (6) of the new Constitution makes the Rome Statute a part of Kenya's law and amending this constitutional provision to create an exception would require a referendum, as provided for by article 255 and 256 of the Constitution.

The proposed changes in the Judiciary this month have been used as justification for the deferment case.

Locally, regionally and internationally, this move has received disapproval from human rights organisations. Proponents for the creation of a local tribunal argued that the proposed reforms in the Judiciary and the new Constitution provide Kenya with an opportunity and capability to hear and determine all post-election violence cases.

The Rome Statute in Article 127 says the following on withdrawal: *A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.*

Comply

The second part of Article 127 indicates that even after a successful application to withdraw from being a signatory to the Rome Statute, this will not affect any ongoing trials or other obligations and has a duty to comply to these obligations until such a time that the court deems fit to release it. *A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigation and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.*

Justification for withdrawing from the Statute

What are the good and bad sides of such a withdrawal? Although not many Kenyans and other interested parties are comfortable with this, withdrawing from the Rome Statute, passing of a local tribunal Bill and immediate implementation of judicial reforms would provide Kenya with an opportunity to prove its capability to handle its problems and retain its sovereignty.

One of the arguments against the ICC is the country is not at war or civil strife and, indeed, it is one of the states to ever have its members indicted for crimes against humanity in times of peace.

Change in tune

Having a local tribunal has the possibility to bring to justice the perpetrators of the election violence faster than the ICC. Trials at The Hague can take years to be determined. Many Kenyans would wish swift justice to deter repetition of such crimes in the future, especially now that the country is less than two years away from a general election.

Unless otherwise, there will be no likelihood of Ocampo foregoing the trials of the six suspects even after the establishment of a local tribunal.

The negative side to trying all suspects in a local tribunal is: Why now? Before the naming of the suspects, politicians were advocating for The Hague as a better option to the local tribunal.

Now that the ICC is becoming a reality, there has been change in tune. Experiences from the past have proved to Kenyans that anything local is prone to manipulation to protect individuals. The local tribunal may not be different from such occurrences.
Already the process to hire qualified Kenyans to the highest legal offices

The agenda of pulling out of the ICC has been one of the many tactics used by politicians who support two of the suspects who are presidential aspirants.

in Kenya for the positions of Chief Justice, Attorney General and Director of Public Prosecution a process vital in the credibility and justification of creating a local tribunal has hit a deadlock.

The President and the Prime Minister are in a tussle over whether there were enough consultations before the current nominations to these positions were made.
In the face of such hurdles, confidence in the local tribunal to bring justice for the many Kenyans still scarred by the election violence is nil.

The Local Tribunal

An analysis of the Imanyara Bill shows that the Rome Statute was instrumental in creating it albeit adding the local aspect. It has options for both a trial chamber and an appeals chamber.
The mandate of the tribunal is twofold. It shall investigate, prosecute and determine cases against persons bearing responsibility for genocide, gross violations of human rights, crimes against humanity and other crimes which occurred in relation to the General Election held on December 27, 2007.

Secondly, itshall have the power to investigate prior and subsequent events, circumstances and factors relating to the crimes and to prosecute related offences arising from and connected with the crimes.
With this tribunal, it will be possible to bring to justice past human rights violations in Kenya.

The jurisdiction of prosecution for the tribunal will be to investigate, prosecute and determine cases against persons as recommended by the Commission on Post-Election Violence of 2007, unlike the ICC that is going after only six suspects. The President in consultation with the Prime Minister and The Panel of Eminent African Personalities nominate appointees to the chambers.

Flawed institutions

In itself, the Imanyara Bill is sufficient to handle all post-election violence trials. However, the push for it now is being used as a strategic tool by politicians to convince the ICC and the international community, keenly following the process, that there is political goodwill to prosecute. The unwillingness of Kenyan politicians to take responsibility means that the local tribunal, even though the better option, will never resolve the country's problems.

Was he acting on behalf of the State? Amb. Francis Muthaura.

Going the ICC way will deny Kenya a chance at building confidence in its Judiciary. However, given the popularity of the ICC and its prosecutor with the people, the political landscape is set to change, and in a big way. The era of impunity may very well end.
By threatening potential perpetrators of crimes against humanity with tangible punishment, the ICC can become a powerful deterrent for conflict in Kenya and the wider region. It would be false to state that the ICC will guarantee peace in Kenya and change its flawed institutions.

However, the ICC has the potential to mitigate any future violence, as few if none of the politicians will want to be connected in any violence or tribal skirmishes. By undermining the widespread belief among Kenyans that their leaders are untouchable, the ICC's involvement could be the catalyst for a gradual process of institutional reform. KN

Judicial independence and accountability in Kenya

Which way the new Judicial Service Commission?

By Jane Kwengu

Other than the classic role of resolving disputes between parties, the Judiciary also plays an important role in governance by checking the excesses of the executive and testing the consistency of laws passed by the legislature vis-à-vis the spirit and letter of the Constitution.

Prior to the promulgation of the new Constitution, the executive enjoyed enormous concentration of power that often choked the courts judicial power to the detriment of the citizens.

One of the major challenges to securing judicial independence and accountability world-over has been the process of selecting, appointing and removing judges. In Kenya, this process has often been politicised and beleaguered with allegations of favouritism, nepotism and cronyism, which inevitably have impacted negatively on the ability of the judicial officers to dispense justice fairly and impartially.

Staring at a lost opportunity. Court of Appeal Judge Justice Alnasir Vishram.

Ideally, judicial appointments need to mirror the principles of independence, integrity, legal certainty of conditions of service and security of tenure, mechanisms of discipline, suspension or removal of judicial officers subject to established standards of judicial conduct and with the right of independent review, impartiality, propriety, equality, competence and diligence.

National Accord

The Judiciary in Kenya has over the years been perceived as corrupt, inefficient and incompetent. This perception led to widespread public mistrust and lack of confidence in the institution whose full impact was felt after the 2007 disputed elections. Under Agenda 4 of the National Accord, judicial reform was identified as

one of the priority areas if the country was to move forward.

Many commentators have argued that a clear, predictable and transparent appointment criterion that is free from political interference is the best antidote to redeeming this important institution. When Narc took over power in 2002, it tried to clean up the Judiciary by removing some judges and magistrates on allegations of corruption and incompetence.

Nevertheless, this did not result into the much desired sustainable and progressive judicial reforms that would effectively insulate the Judiciary from political interference, patronage, inefficiency and incompetence. The promulgation of a new Constitution has been seen as a grand opportunity towards achieving real and sustainable reforms in the Judiciary.

It is hoped that full implementation of the new constitutional order will help in addressing some of the inherent challenges that have bedevilled the Judiciary for decades. Chapter ten of the Constitution expressly provides the following:

- Vesting judicial power exclusively in the Judiciary.
- Bolstering the powers and securing the independence and autonomy of the Judicial Service Commission.
- Outlining comprehensive provisions on the appointment and removal of judges.
- Enhanced security of tenure.
- Enhanced budgetary and administrative autonomy and the creation of a Judiciary Fund.

Courts are only as good as those who create and occupy them, hence the importance of an independent, strong and effective Judicial Service Commission. Over the years, the JSC in Kenya has been perceived as weak and ineffective. The old JSC comprised of the Chief Justice, two judges, the Attorney General and the Chairman of the Public Service Commission, all of whom were the President's sole appointees. In a nutshell, the President determined the composition and how the Judiciary functioned.

One of the major challenges to securing judicial independence and accountability world-over has been the process of selecting, appointing and removing judges.

Composition

Section 171 of the Constitution establishes an expanded JSC consisting of the Chief Justice as the chairperson; one Supreme Court judge; one Court of Appeal judge; one High Court judge and one magistrate; the Attorney-General; two advocates; one person nominated by the Public Service Commission; and one woman and one man who are not lawyers to represent the public. The Chief Registrar of the Judiciary shall serve as the Secretary to the Commission.

At a glance, the new commission represents the various interests of the Kenyan society. Their selection also represents a departure from the past with all the key stakeholders namely the judges, magistrates, lawyers and the Public Service Commission being let free to elect and nominate their representatives directly without the President's involvement. The President only appoints the public representatives, but this must be approved by Parliament. Gender balance is also considered under the new order unlike in the past where all members were male.

Prior to the promulgation of the new Constitution, the executive enjoyed enormous concentration of power that often choked the courts judicial power to the detriment of the citizens.

Independence

JSC, like all other constitutional bodies, is independent and subject only to the Constitution and the law. Parliament is obligated to allocate adequate funds to the commission to enable it perform its functions as per its annual budget. Individual members are also not liable for anything done in good faith in the performance of their function of office.

However, to ensure accountability, the commission is required to submit a report to the President and to Parliament as soon as practicable at the end of each financial year or at any time. The President, the National Assembly or the Senate may also require the commission to submit a report on a particular issue. Every

report required from the commission shall be published and publicised.

Tenure of the Commissioners

Members of the commission apart from the Chief Justice and the Attorney-General shall hold office for a term of five years, but are eligible for nomination for another term of five years, meaning a commissioner can only serve for a maximum of ten years. Under section 251, members of the commission may be removed from office only for serious violation of the Constitution or any other law, gross misconduct, physical or mental incapacity to perform the functions of office, incompetence, or bankruptcy. To safeguard the integrity of the commission, any person can petition the National Assembly to have a particular commissioner removed provided that such a person proves his/her case.

After consideration and if satisfied, the National Assembly shall send the petition to the President who may suspend the member pending the outcome of the complaint, and shall appoint a tribunal to assess the facts in respect of the particular ground for removal. The tribunal shall make binding recommendations to the President, who must act in accordance with those recommendations within 30 days.

Mandate

The new commission has been mandated under section 172 to promote and facilitate the independence and accountability of the Judiciary as well as promote and facilitate the efficient, effective and transparent administration of justice. In so doing, the commission shall recommend to the President persons for appointment as judges; review and make recommendations on the conditions of service of judges and other judicial officers other than judges remuneration; appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary; prepare and implement programmes for the continuing education and training of judges and judicial officers; and advise the national Government on improving the efficiency of the administration of justice.

Appointment of judges

Under the Constitution, the President shall appoint the Chief Justice, the Deputy Chief Justice and all other judges in accordance with the recommendation of the JSC, and subject to the approval of the Parliament. In the past, the President solely appointed the Chief Justice and was under no obligation to consult anyone on the matter. Other judges were to be appointed by the

The new look Milimani Law Courts in Nairobi. Can our justice system be as strong as this structure?

President upon the recommendation of the JSC, but many critics doubt that this was the practice.

To address the challenges of unclear and vague appointment criteria, as well as the inherent gender imbalance, the commission is required to adhere to the principles of competitiveness and transparent processes of appointment of judicial officers and other judicial staff and to promote gender equality in the course of its work.

Removal of judges

Under the Constitution, a judge of a superior court may be removed from office only on the grounds of inability to perform the functions of office arising from mental or physical incapacity, a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament, bankruptcy, incompetence, or gross misconduct or misbehaviour.

The removal process can only be initiated by the JSC either acting on its own motion or on the petition of any person to the commission. Thus, only the JSC can recommend to the President to form a tribunal to investigate any judge including the Chief Justice when a question of their removal arises.

Previously, when removing a judge, the President acted on the advice of the Chief Justice only. In the case of the Chief Justice's removal, there were no clear provisions on how he could be removed and who could make representation to the President that the question of removing the Chief Justice had arisen.

Progress and immediate tasks

So far, eight commissioners have been appointed namely Justice Riaga Omolo representing the Court of Appeal; Justice Isaac Lenaola representing High Court and Ms Emily Ominde representing the magistrates; Mr Ahmednasir Abdullahi and Ms Florence Mwangangi representing the Law Society of Kenya; Prof Christine Mango and Bishop Anthony Muheria representing the public; and Mr Titus Gateere representing the Public Service Commission.

In accordance with the sixth schedule of the Constitution, the new commission is deemed properly constituted despite the fact that there are other vacancies. As per the Constitution, a new Chief Justice must be appointed not later than February 27, 2011. Although desirable, it is highly unlikely that the new JSC will play a role in the appointment of the next CJ in view of section 24(2) of the sixth schedule, which allows the President to appoint the next CJ after consultation with the Prime Minister and subject to the approval of the National Assembly.

Ideally, the commission should have been allowed to advertise for the position, conduct interviews and shortlist three names for the President's consideration in accordance with article 166 of the Constitution, which would have ushered in a new beginning towards total independence of the Judiciary that is free from enormous influence and interference from the executive.

The new commission is required to vet the current judicial officers to determine their suitability to continue holding office in accordance with the values and principles set out in the new Constitution. The commission is also expected to play a crucial role in the establishment of a Supreme Court, which must be established and judges appointed to it not later than July this year.

Concern

A few challenges lie ahead of the new commission as it embarks on the journey of reviving the fortunes of the Kenyan Judiciary. Already, politics has taken centre stage in the appointment of the next CJ, which could lead to a false start. Further, the lack of clarity in the Constitution on how the selection process of the nominees will be arrived at by the President or the JSC is also of great concern.

JSC must allow objectivity and fairness to prevail during the vetting process to ensure that competent and credible judicial officers serving in the current Judiciary are retained while those of questionable credibility are shown the door to pave way for a new breed that will serve the interests of Kenyans with professional independence and impartiality.

Whereas the new Constitution does not address all the challenges facing the Kenyan Judiciary, it provides a good starting point in resolving some of the inherent challenges. Subsequent legislations, policies, political goodwill and the vigilance of the citizenry will be equally important if the desired Judiciary is to be realised. More importantly, the onus is on the Judiciary itself and the entire legal fraternity to fight for its protection and promotion of independence and accountability. KN

Paying for The Hague

Seeking justice or abetting impunity?

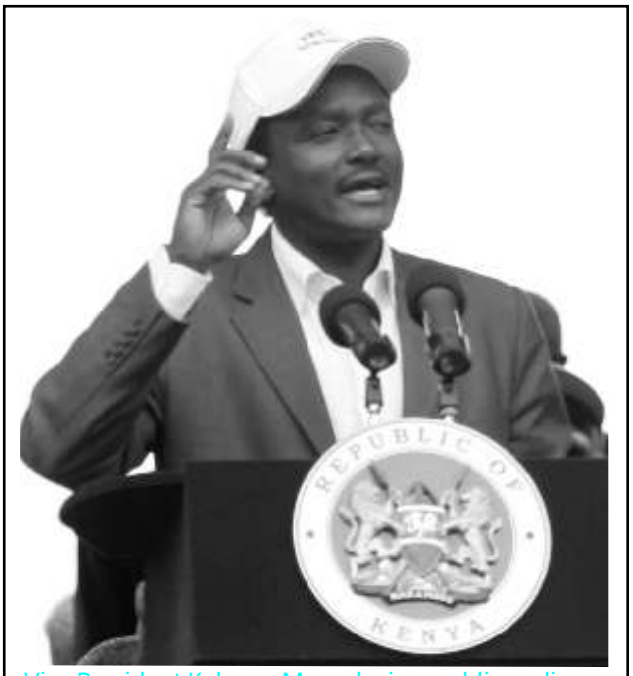
By Dorothy Momanyi

Our correspondent retraces the steps of the 2007 post-election nightmare in Kenya and examines the culpability of those who have now been told to answer for the mayhem at the International Criminal Court. She poses the question whether some of these people, by virtue of acting in their official capacities, should be shielded by the State in one way or the other.

The period preceding the 2007 General Election and the Election Day itself, though peaceful, was tension packed. Mwai Kibaki initially trailed Raila by a significant margin during tallying of votes, but later closed in on Raila and eventually overtook him leading to claims of manipulation of results.

Anti-riot police stormed the tallying centre at KICC, flushed out ODM leaders and within minutes Kibaki was declared winner and hurriedly sworn in at dusk. Within moments, violent protests erupted in ODM strongholds of Eldoret, Nairobi, Kisumu, Busia, Kericho, Kakamega, Migori, Mumias, Homa Bay, Nakuru and Mombasa.

Perceived Party of National Unity (PNU) members, especially Kikuyus, were ejected out of their homes, killed or raped. The most horrific of these incidents occurred on December 30, 2007 when a church in Kiambaa area of Eldoret was set ablaze with more than 100 women and children locked inside.



Vice President Kalonzo Musyoka in a public podium. Can he claim to be the only untainted leader in Kenya today?

Well executed

Violence raged for weeks and deadly retaliation by PNU supporters in areas such as Naivasha, Eldoret and Nakuru took place. The Police gunned down hundreds of ODM protestors.

The Kenya National Human Rights Commission (KNHRC), the Waki Commission and the International Criminal Court (ICC) prosecutor all concluded that the violence was large scale, well executed, planned, coordinated and funded.

On December 15, 2010, the ICC prosecutor applied to Court for issuance of summonses against six Kenyans for massive crimes committed during the post-election violence. This article seeks to explain who these suspects are, the accusations against them, the capacity in which they are charged, the expected defence of each and whether State funding of the suspects defences is tantamount to abetting impunity or whether the suspects have other options of covering their legal fees.

Profiles

The most prominent of the suspects is William Samoei arap Ruto, a former youth winger for the then ruling party Kanu, but now a top politician and an undisputed political leader of the Kalenjin community. He was a powerful campaigner for the Orange Democratic Movement (ODM) party in the 2007 and is presently the MP for Eldoret North constituency. Until his recent suspension from the cabinet over corruption allegations, he was the Minister for Higher Education in the Coalition Government.

Uhuru Kenyatta is a son of the first President of Kenya, Jomo Kenyatta, and is immensely wealthy. He is currently a Deputy Prime Minister, Finance Minister and MP for Gatundu South Constituency. He came second after Kibaki in the 2002 elections and became the Leader of the Official Opposition. He supported Kibaki in 2007 and is presently the top most Kikuyu leader after the President.

Henry Kosgey is a veteran politician having joined Parliament in 1979. He is currently the chairman of ODM and MP for Tinderet constituency. He resigned recently as Trade Minister over corruption allegations and has featured prominently in mega scandals including the disappearance of funds

during the 4th All African games in 1987. He has been the Prime Minister's point man amongst the Kalenjin.

Military career

Major General (Rtd) Ali Hussein, who was once a military commander before heading the Police Force from 2004 as Police Commissioner, had an illustrious military career and chaired the Ulinzi Stars Football club. It was during his tenure as the Commissioner of Police that post-election violence occurred and the police force accused of indiscriminate killings. Presently, he is serving as the Post Master General.

The fifth suspect is the Head of the Civil Service and Secretary to the Cabinet, Ambassador Francis Kirimi Muthaura. He was occupying the same docket during post-election violence. He has been a career diplomat and is perhaps President Kibaki's closest ally. He hails from the Meru community and was appointed as the Head of the Civil Service during the first term of Kibaki's presidency.

The final suspect is neither a politician nor a Government official. Joshua arap Sang is the head of operations at KASS FM, a radio station broadcasting in the Kalenjin language. He attended Kenya Institute of Mass Communication and honed his journalism skills in Eldoret first by working for Christian Radio and Television Network -Sauti ya Rehema (Sayare TV) - for five years.
He then moved to Bibilia Husema broadcasting from 2003-2005 before joining KASS FM. He hails from Cherengany and had even expressed an interest to vie for its parliamentary seat, but bowed out in favour of Joshua Kutuny. His morning show dubbed “Lene Met” meaning what is the world saying, earned him a slot on the ICC list of suspects.

The accusations

According to the pre-trial application, the prosecutor indicates that as early as December 2006, Ruto and Kosgey had hatched a criminal plan to attack PNU supporters. Sang was to use his radio programme to collect supporters and provide them with coded signals on when and where to attack.

It is further alleged that Ruto, Kosgey and Sang, with the aim of gaining power in the Rift Valley and punishing their opponents, coordinated a series of actors, institutions and established a network for committing the heinous crimes.

Upon announcement of the 2007 presidential election results, thousands of the network members in a uniform fashion executed the plan in Turbo town, Eldoret, Kapsabet, Nandi Hills and the Kiambaa church.

The fashion was to gather at designated meeting points outside targeted locations, obtain briefing from the coordinators, divide into groups and subsequently perform the assigned tasks, including attacking the targets. Sang is alleged to have coordinated these activities using coded language disseminated through his radio programme.

To counter the attacks and officials close to the President particularly Ambassador Muthaura, Uhuru and Major-General Ali hatched a plan to attack perceived ODM supporters with the ultimate aim of ensuring that PNU remained in power.

Under the authority of the National Security Advisory Committee chaired by Amb Muthaura and for which Ali was a member, Kenya Police and Administration Police officers were deployed into ODM strongholds like Kisumu and Kibera and directed to kill civilian protestors.

Retaliatory attacks

It is also said that these three supported retaliatory attacks against ODM supporters. Uhuru is suspected as being the focal point between the dreaded Mungiki sect and Muthaura.

After meetings, it is alleged that Muthaura asked Ali to direct his subordinates not to interfere with the Mungiki and pro-PNU youth movements planning the retaliatory attacks against ODM supporters in Nakuru and Naivasha.

Consequently, more than 1,000 people died, about 3,500 were injured and approximately 600,000 were displaced. While Ali and Muthaura are to be charged for the role they played in their official capacities as State actors, the other four are charged in their individual and private capacities, since none held public office during the violence or its planning.

Expected defences

It is difficult to predict the defences to be assumed by the suspects since their strategies are not in the public domain and neither have summonses, if any, been issued by the Pre-Trial Chamber.

However, Ruto has been in the limelight over the allegations and had even lodged an application with the ICC seeking to restrain the Prosecutor from naming him as a suspect. Based on that application, one can discern that Ruto will challenge the credibility of witnesses who he claims were coached by KNHRC to give false evidence against him. He faults the prosecutor for failing to lend him an ear.

Ruto may also claim an alibi to the effect that he was in Nairobi and far away from the epicenter of violence for him to have been able to coordinate or organise attacks. He may also claim that the prosecution is launched in bad faith for political reasons.

Exonerating evidence

For Uhuru, he had filed High Court Miscellaneous case no 86 of 2009 in Nairobi praying for orders that his name be expunged from the KNHRC Report entitled “On the Brink of the Precipice: A human Rights Account of Kenya's Post-2007 Election Violence”.

The court agreed that he had not been accorded an

opportunity to give his defence though it still declined to expunge his name. He may fault the ICC prosecutor for failing to consider exonerating evidence. Further, he may claim the alleged meetings he held were for assisting the internally displaced people rather than for organising retaliatory attacks.

Kosgey is also expected to make a denial and require the prosecutor to prove the case against him beyond the required reasonable doubt. Like the rest of the suspects, he is also likely to claim that the investigation was shoddy and the prosecutor did not establish exonerating circumstances.

For Sang, he has publicly declared his innocence and claimed that when the violence broke out, he used his radio programme to ask people to maintain calm and peace. He also alleged that even though he met the prosecutor, he was not asked to give his side of the story.

Troublemakers

Ali is the only one who seems to have owned up to his actions and endeavoured to justify them. He has alleged that he was damned if he acted and damned if he did not. To him, police officers had a statutory duty to protect the lives and properties of the citizens from looters, gangs, demonstrators and arsonists and if they killed to fulfill the duty then they were not on the wrong. He may claim that the troublemakers, being armed, had to be countered using equal force.

Further, one of the findings of the Waki Commission was that the behaviour of some Police officers was influenced by factors outside the formal operational arrangements, chain of command and was in direct conflict with mandated duties. Consequently, Ali can rely on this finding to claim that he cannot be held accountable for the action of such wayward officers.

As for Muthaura, he will like the rest of the suspects challenge the lack of exonerating evidence, deny having given the alleged instructions and demand that the prosecutor proves his case beyond reasonable doubt. He may also claim that the instructions he gave were for the protection of innocent civilians from marauding gangs.

State funding

Recently, calls have intensified for the State to finance the legal fees of all the six suspects. The Government spokesman, Dr Alfred Mutua, has since refuted claims that all the suspects are to be covered, but has confirmed that the Attorney General, pursuant to a cabinet decision wrote to the Treasury requesting funds for the legal defence of Muthaura and Ali.

This request has sharply divided the Government. On one hand are those who support the request and argue that under the public service code of regulations, any officer who in good faith acts in the execution of his official duties for the public interest ought to be defended with funds from the public coffers.

Leading the opponents is Mutula Kilonzo, the Minister of Justice and Constitutional Affairs, who argues that the two suspects have been sued in their individual capacities and can, therefore, not expect representation at the taxpayers expense. He further adds that if any has no money to retain a lawyer, then they are free to apply to The Hague for legal aid.

Liable for indiscretions

Each of these divergent positions carries a lot of weight. On one hand, public officers notwithstanding the fact that they are carrying out official functions should not abuse or exceed their power in a way that borders on criminal acts.

Hitler's men were not exonerated from their crimes on the ground that they were following official policy and Muthaura and Ali, if at all they committed the alleged offences, must have acted in excess of their powers and hence should be liable personally for their indiscretions.

The public, which is in this case the victim of their action, should not be dragged to foot their bill; otherwise it will amount to double jeopardy. In addition, footing their bill when we had submitted to the jurisdiction of the ICC is tantamount to an admission of guilt by the Government over the violence.

The important consideration is for the Government to establish formally either by a task force or otherwise whether Muthaura and Ali acted within their powers. If not, they ought to carry their own cross, but otherwise the Government should foot their costs. As for the rest of the suspects, they did not act at the behest of the Government. No request for State funding of their defences should be entertained.

Acquitted

In any event, Article 85(3) of the Rome Statute states that in exceptional circumstances, the court can award compensation if there was a grave and manifest miscarriage of justice in charging the person who is then acquitted. Suspects can, therefore, recoup costs if they are acquitted.

Finally, it is worth noting that under Article 67 (1) (d) of the Rome Statute, an accused person is entitled to have legal assistance assigned by the court in any case where the interest of justice so require and the accused lacks sufficient means to pay.

The suspects, including Ali and Muthaura should, therefore, not be so worried since if they fail to obtain legal representation from the Government, the court can award them if they show they are incapable of funding their defence.

But we should wait for the Pre-trial Chamber to render its decision on the prosecutor's application for summons before we can speculate on the options for the accused persons. KN

So, what will have to change?

Decentralisation of the country's governance is one of the main pillars of the new Constitution. Citizens will now have a greater voice in the way they are governed at their local level and determine how resources at their disposal should be invested. We analyse how this system will work and its points of departure from the previous one.

By Thuita Guandaru

Devolution can generally be termed as the process where a previously unitary State transfers power to other controlling units at a sub national level such as a regional, local, or state level. Devolution differs from federalism in that powers devolved may be temporary and ultimately reside in the central government essentially meaning that the state remains de jure unitary.

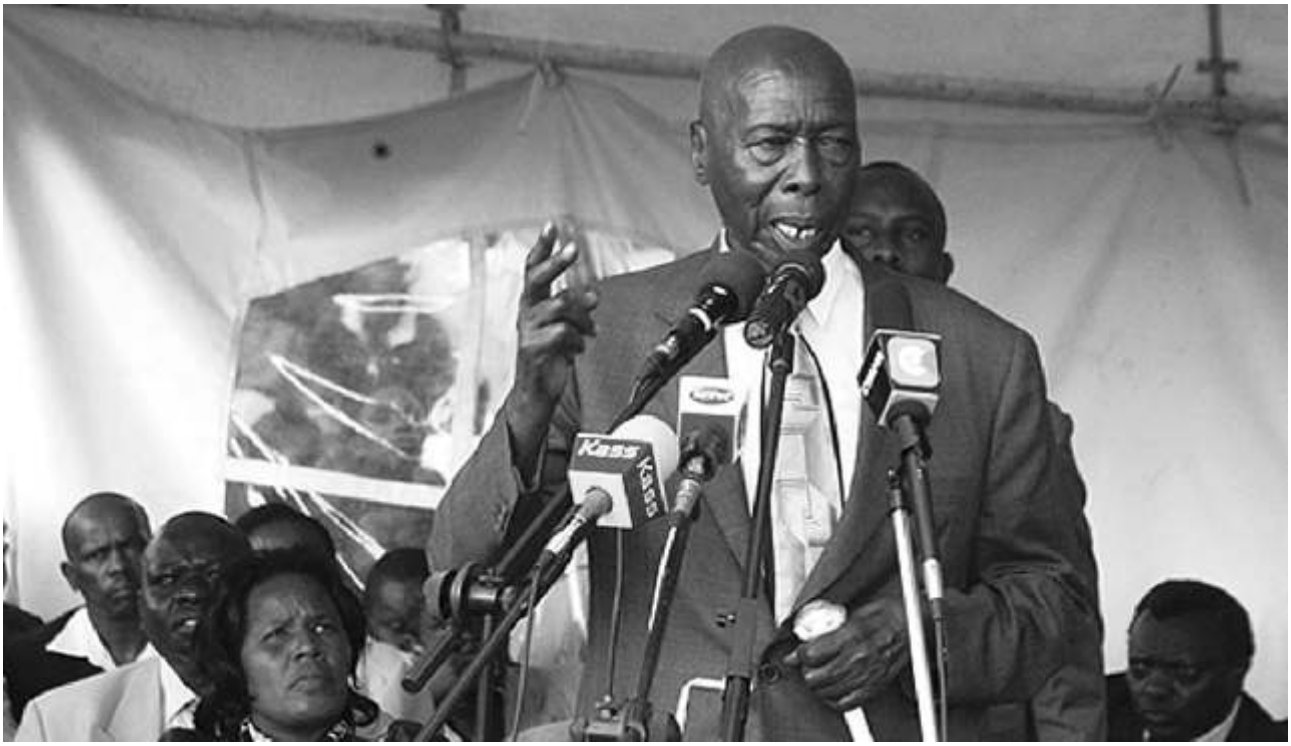
The benefits of dispensing power to different levels through devolution is that good governance is promoted, there is enhancement of separation of powers, bureaucratic effectiveness is reinforced, people's participation in the governance process is captured and transparency and accountability of government power is achieved.

The new Constitution has at Chapter 11 incorporated an aspect of devolution in the structure of government. The Chapter first (Art. 174) begins with an outline of the objects of the devolution, including the promotion of democratic power, the fostering of national unity, the granting of powers of self-governance to the people, the recognition of rights of communities to manage their own affairs, the protection and promotion of the rights of marginalised communities, the provision of easily accessible services, the equitable sharing of national resources, the decentralisation of State organs from the capital and the enhancement of checks and balances.

Illegal

Under this Constitution, the established unit of devolution is the county and in this respect, 47 counties have been established with each having its own system of elected government. The decision to have 47 counties was deliberately made to reflect the legally existing districts as at the time of the passage. It is worth noting that the High Court sitting in Nakuru declared the districts created by former President Moi and President Kibaki as illegal.

A County Government as constituted can best be explained by its appearance as a smaller version of the National Government with a directly



Memories of days gone by - former President Daniel Arap Moi addressing the public in a recent function.

elected county assembly (Art. 177). It has one member for each ward, special seats for women, person with disabilities and the youth.

Each county will have a chief executive known as the governor and he or she will be directly elected by the voters of the county. After being elected, the governor is to appoint an executive committee similar to the present cabinet from among people who are not members of the County Assembly.

Just like the national president, a county governor will only be able to serve for two terms of five years each. The relationship between the County Government and the National Government is that they are supposed to be distinct but interdependent.

Constitutional guarantee

The National Government is supposed to administer laws and policies concerning national issues while the jurisdiction of the County Government is restricted to making laws and administering policies over agriculture, county health services, control of pollution and advertising, cultural and entertainment activities, county road and transport, animal control and welfare, county planning and development, pre-primary and polytechnic education, natural resources and environmental conservation, county public works and services, Police and fire services, control of drugs and control of pornography.

The counties will have the power to levy property rates, entertainment taxes and any other tax authorised by an Act of Parliament. The revenue collected by the National Government is required to be shared equitably between the national and county governments. However, there is a constitutional guarantee that at least 15 per cent of the revenue collected by the National Government is to be allocated to the County Governments.

The Commission on Revenue Allocation is tasked with the responsibility of proposing the manner and amount that will make the sharing equitable. An interesting invention is the requirement that there is going to be in place an equalisation fund for 20 years, which shall be used by the National Government to fund the basic services in marginalised areas. At the national level, the interest of the counties shall be protected by the senate.

The old vs the new

The previous Constitution was remarkably different from the present one in that it absolutely said nothing about devolved government since it only envisaged a National Government. It, however, permitted a system of Local Government, which has all along been administered under the Local Government Act. But a local government is different from a devolved government in that it is more of decentralisation of power than devolution.

In this respect, the national government gave the responsibility

	Old System	New System
1.	There is no mention of any other government other than the national government.	County governments are established as a way of devolved government.
2.	All the laws on local government were under the Local Government Act	County governments are anchored in the Constitution.
3.	The minister in charge of Local Government had power to nominate councilors and to appoint council chairmen.	Nominated members to the County shall be nominated by political parties in proportion to the number of their seats and the minister or cabinet secretary shall have no power of nomination
4.	Resources of the local authorities were uncertain.	Resources to the counties are guaranteed in the Constitution.
5.	There was no representation in the National Assembly for members of local authorities.	The senate shall be composed of members of the County government to represent and protect the interest of counties.
6.	Local authorities could only make by laws.	County governments have powers to make laws - and not just by laws.
7.	There was no mention of gender.	It is required that not more than two-thirds of the members be of the same gender.
8.	Boundaries of local authorities could be altered with ease	Boundaries of a County can be altered only after a resolution by an independent commission supported by two-thirds of all members of the houses.

of providing some services to a system of local government, but for which the laws had been made by the National Government. There was (and for the time being continues to be) another way in which power was decentralised and in particular through the Provincial Administration with the Provincial Commissioners through various levels up to the Chiefs.

This was far from devolution as the people neither had a say over the appointment of the administrators nor did they elect them. The differences between the old and the new system would best be represented in a table as follows: (see table on page 18).

We should now turn our backs to the past and move on to the horizon.

The fate of public servants whose jobs are redundant in the context of the devolved system

Principals

There has been wide speculation over what is to happen to members of the Provincial Administration in light of the fact that the provision of government services has been bestowed on the County Government with little mention on the Provincial Administration.

Both principals of the Coalition Government namely President Kibaki and Prime Minister Raila Odinga, while supporting the new Constitution during the referendum campaigns assured the officials that they would not lose their jobs under the new dispensation.
However, after the Constitution was promulgated, there have been conflicting signals on what shall happen.

Prof George Saitoti, in whose docket the Provincial Administration falls, has indicated plans to retain the Provincial Administration and give it an expanded role. Conversely, the ODM wing of the Government led by Deputy Prime Minister Musalia Mudavadi has criticised the plans and stated that the Constitution (Schedule 6 Para 17) was clear that the administration should be restructured.

Other ministers in the camp including Wycliffe Oparanya and Otieno Kajwang have been more forthright in declaring that the Provincial Administration stands abolished under the new Constitution. They insist that if the executive is interested in dealing with persons on the ground in any county, then he should coordinate with the elected governors.

The Government does not seem sure or decided on what to do with the Provincial Administrators. Schedule 6 Article 17 requires that the national government shall restructure the Provincial Administration in accordance with and the system of devolved government. The term restructuring, as used in this context, is very ambiguous. Should the administration still be answerable to the National Government or should they be the subject of the devolved government?

Should it be eliminated completely and the staff redeployed within the Government? Nobody knows what will happen after the five years that have been provided for the restructuring of the administration lapses. It may be appropriate to form an independent team to plan how to restructure the administration.

Ideal devolved systems

Spain has been termed as the most devolved state in Europe and was considered as a model for devolution in other countries including the United Kingdom. The devolution commenced with the passage of a constitution in 1978 that transformed Spain from authoritarian, highly centralised regime into a pluralistic, liberal parliamentary democracy.
The model of asymmetrical devolution in Spain has been called "coconstitutional" in that it is neither a federal nor unitary model. Autonomous nation-regions exist alongside and within the Spanish nation-state.

Political power is organised as a central government with devolved power for 17 autonomous communities. These regional governments are responsible for the administration of schools, universities, health, social services, culture, urban and rural development and, in some cases, policing. There are also two autonomous cities Ceuta and Melilla.

The government of all autonomous communities is based on division of powers comprising:

- A Legislative Assembly whose members must be elected by universal suffrage.
- A Government Council, with executive and administrative functions headed by a president, elected by the Legislative Assembly and nominated by the King of Spain;
- A Supreme Court of Justice, under the Supreme Court of the State, which head the judicial organisation within the autonomous community.

Remarkable

While provinces (provincias) serve as the territorial building blocks for the communities, the provinces are in turn integrated by municipalities (municipios). Municipalities are granted autonomy to manage their internal affairs, and provinces are the territorial divisions designed to carry out the activities of the State.

Devolved government in the UK is not as remarkable as the one in Spain. Devolution occurred after the referendums in Scotland and Wales in 1997 and in both parts of Ireland in 1998 whereupon the UK Parliament transferred a range of powers to national parliaments or assemblies except national policy on foreign affairs, defence, social security, macro-economic management and trade.

The UK government also remains responsible for government policy in England. The UK Parliament is still able to pass legislation for any part of the UK, though in practice it only deals with devolved matters with the agreement of the devolved governments.

Within the UK government, the Secretaries of State for Scotland, Wales and Northern Ireland ensure that devolution works smoothly, and help to resolve any disputes. They represent their parts of the country in UK government, and represent the UK government in those parts of the country.

The position of England is awkward since it is the only country of the United Kingdom that does not have a devolved parliament. So, while Scottish and Welsh MPs continue to make laws over England on any matters, England MPs cannot make laws over Scotland or Wales on devolved matters.

In tandem

Devolution in the UK being country based is still at a very high level for locals to feel an effect. To meet the citizens? expectations, the devolved governments of Scotland, Wales and Northern Ireland always act in tandem with the Local authorities.

South Africa has a system of devolved government based on provinces and known as Provincial government. There are nine provinces: Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West and Western Cape.

Each province has its own provincial government, with legislative power vested in a provincial legislature and executive power vested in a provincial premier and exercised together with the other members of a provincial executive council.

The premier is elected by the legislature and appoints the other members of the executive council, which functions as a cabinet at provincial level. The devolution of power to municipal level is furthered by the province's ability to assign any of its legislative powers to a municipal council in that province.

Buttressed

National legislation may prevail over provincial legislation in cases where they conflict on matters such as national security or economic unity, the protection of the environment, or in matters prejudicial to the interests of another province. This type of devolution is further buttressed by a well structured and organised local government system.

The South African devolved system, though based on provinces unlike the Kenyan one based on districts, shares a close resemblance with the devolved system in Kenya in terms of the workings of the regional assemblies and Kenya can learn a lot from the South African experience.

We must not also lose sight of the fact that states formulate their devolved systems based on their individual experiences and histories. We must, therefore, establish our devolved system in a way that suits our needs and experiences. 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.

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