

KatibaNews

May-June 2011

The birth of a new Republic



Is Kenya now ready for a woman president?

Inside

- * Much ado about transparency
- * The bigger fight in the Legal Affairs Committee crisis
- * Extent of external influence in Kenya's Constitution making
- * Does Wanjiku have a say any more?

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.

May/June 2011

This newsletter is meant to:

- 1 Give critical analysis of democracy and governance issues in Kenya.
- 2 Inform and educate readers on the ongoing Constitution Review Process.

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

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

Managing Editor

Stephen Ndegwa

Associate Editors

Susan Kasera

Patrick Mwangi

Henry Owuor

Office Assistant

Monica Mugure

Photography

World Wide Web

Art Direction & Design

Khafre Graphics



Contents

2. Is Kenya now ready for a woman president?
6. Much ado about transparency
The public vetting of judges
9. The bigger fight in the Legal Affairs Committee crisis
13. Extent of external influence in Kenya's Constitution making
17. Does Wanjiku have a say any more?

KatibaNews is published monthly and is distributed free to all media houses, civil society organisations, and the public.

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

Views expressed in this newsletter do not necessarily reflect those of MDA, KAS or partners. Reprinting of materials permitted provided the source is acknowledged.

All Correspondence to:

The Editor

Katiba News

P.O. Box 64254-00620

Tel. 2712309

Nairobi, Kenya

Email: mediakenya@yahoo.co.uk

Is Kenya now ready for a woman president?

Ms Martha Karua is a household name. This article attempts to go straight into the likelihood of a Ms Karua presidency and looks at what difference it would make.

By Macharia Nderitu

Hon Martha Karua was born in 1957. After attending primary and high schools in Kirinyaga County, she was admitted to the University of Nairobi, where she studied for a Bachelor of Laws degree from 1977 to 1980. After graduation and attending the Kenya School of Law, she was recruited as a District Magistrate in 1981.

She served in various stations as a magistrate until 1987 when she resigned to start private law practice. At the time she was serving as a Senior Resident Magistrate and her last stations were Kibera and Makadara. She established a law firm, Martha Karua & Company, and practised law between 1987 and 2002.

On the political front, she was elected as a Member of Parliament for Gichugu constituency in 1992 and has been re-elected in subsequent elections to date.

In 1992, she was elected on a Democratic Party ticket from 1992 to 2002 and served under the Narc ticket from 2003 to 2007. In 1997, she was a key member of the Inter-Parties Parliamentary Group that recommended and lobbied for adoption of minimum legislative reforms aimed at expanding the democratic space.

Referendum

Further, she was a key supporter of the constitutional reform movement that was jumpstarted in 1998 by the Government. These efforts resulted in the Ghai Commission that eventually drafted the Bomas Draft Constitution that underpinned the Constitution that was ratified in the referendum in 2010. In 2007, she was re-elected on a PNU ticket.

President Kibaki appointed Karua as the Minister for Water Resources in



The iron lady, Hon. Ms. Martha Karua.

2003 where she served up to 2005. As the Minister for Water Resources, she was instrumental in reforming the sector by establishing and streamlining water governance institutions contemplated by the Water Act, 2002. After the 2005 referendum vote and the subsequent dissolution of the Cabinet by the President, she was appointed to serve as the Minister for Justice and Constitutional Affairs from

2005 to April 2009, when she resigned.

Her reason for resignation was interference of her duties and she specifically alluded to the appointment of judges of the High Court by the President without her involvement. She has declared her candidature as a presidential candidate in the 2012 elections.



Ms. Karua - Spoiling for a fight.

As the Minister for Justice and Constitutional Affairs, Karua led the Party of National Unity team in the talks mediated by Dr Kofi Annan. The team identified the necessary key reforms required to prevent the country from regressing to violence. Among the recommendations was the establishment of the Commission of Inquiry on Post-Election Violence, which resulted in the summoning of six Kenyans by the International Criminal Court, the Independent Review Commission that re-examined the elections of 2007 and recommended legislative reforms to the electoral system, the establishment of a Truth, Justice and Reconciliation Commission to redress historical injustices, completion of the constitutional review process as well as the Agenda Four on long term reforms, including land reform and youth empowerment.

The Constitution of Kenya Review Act, 2008 drafted and enacted under her watch facilitated the successful ratification of the new Constitution in 2010. The legal framework was time bound and insulated the process from narrow partisan interests that had derailed the 2005 referendum.

2012 elections

There is a movement in Kenya and elsewhere towards involvement of

women in high political offices, including the presidency. Due to post-election violence that ensued after the 2007 elections, the pace of political campaigns has been slow. Indeed, the much-needed constitutional reforms were only endorsed in August 2010. The main candidates for the presidency are yet to announce their plans for the 2012 campaigns while the incumbent President is ineligible to vie for another term.

Karua, who is the chairperson of Narc Kenya, announced her presidential bid in April 2011. Her political and technical team, which will facilitate strategy and the campaigns, has not crystallised partly because the elections are one year away and the fact that no other candidate has openly declared his or her candidacy for the seat or set up the necessary campaign machinery. She has established a fully-fledged secretariat, which will manage the campaigns at the Narc Kenya secretariat. In the run up to the 2012 elections, Karua has sufficient time to build a formidable team and organise her campaigns.

Kenyans seem tired of supporting the old political faces who are responsible for the dysfunction of the State. Imposition of a candidate by a party will lead to rebellion by the voters who may support Karua as she is viewed as

a pro-reform and plausible outsider who has not been captured by a history of scandals in Government. With a new constitutional dispensation, Kenyans have the momentum and seem ready to make history. Karua may capture the imaginations of Kenyans and benefit from the reform momentum that she helped create since the 1980s.

Resource mobilisation

Karua is seen from some quarters as a lone ranger politician who cannot assemble and control a team. The initial supporters of her party have indicated support for different candidates and have openly contradicted her on party positions. Some of the recently elected MPs on the party's ticket seem ambivalent in their support of her presidential bid, for example, Hon Mike Mbuvi and Hon William Kabogo. Some of her earlier supporters like Hon Erastus Mureithi, who was the chairman of the fundraising and resource mobilisation committee of the party, has indicated support for different political aspirants for the high office of President and has opposed the trial of six Kenyans at the ICC.

However, Karua should be credited for intensively lobbying for the establishment of a local tribunal when she served as the Minister for Justice and Constitutional Affairs. Parliament rejected her attempts in clear favour for the ICC trials. Her view on The Hague trials where she has voiced support for the ICC trials has been viewed as a 'celebration' of the misfortunes of her political opponents and has not been taken kindly in parts of central Kenya, where she is expected to draw her core support. Hon Uhuru Kenyatta, who is from the region, has been summoned to the ICC.

Recently, the PNU Alliance associated with Hon Kenyatta and the President won the Kirinyaga Central seat where Narc Kenya had fielded a candidate. This constituency neighbours Karua's Gichugu Constituency. Her resignation as a minister during the tenure of the President, with whom they have a shared political past since 1992, may

Presidency

<p>be viewed negatively by part of the electorate.</p> <p>Her Excellency?</p> <p>Karua has strong credentials as a reformer. She has pushed for constitutional and legal reforms since 1980s when the Kanu autocracy was at its peak. Further, she has a sound legal mind and is an astute debater in Parliament. In the past and in addition to her Cabinet duties, she has served as the Deputy Leader of Government Business, essentially deputising the Vice President in Parliament.</p> <p>She led the PNU team that negotiated the political and legal settlement to the political crisis that ensued after the 2007 elections. Due to the ethnic nature of Kenyan politics, she must promote her candidature as one committed to carry out the necessary reforms. The implementation of the</p>	<p>new Constitution is underway and the new President will lead the team that will entrench human rights, democracy, constitutionalism and rule of law in the national psyche.</p> <p>She has been effective in her Cabinet assignments. Since she is a mother of young adults and relatively young, she is likely to appeal to the youth who form the bulk of the voters and who are yearning for a reformed and detribalised political environment.</p> <p>The first women to contest for the presidency in Kenya were Hon Charity Ngilu and Prof Wangari Maathai. In 1997, Ngilu defected from the Democratic Party under whose banner she had been elected as an MP for Kitui Central and revamped the Social Democratic Party.</p>	<p>Candidature</p> <p>She recruited seasoned political thinkers to run the party secretariat including Dr Apollo Njonjo and Prof Anyang' Nyong'o. Her candidature was well received, especially in Eastern region of Kenya. The party won 15 seats in Parliament and nominated one MP. Nationally, she emerged in fifth position and garnered 7.90 per cent of the total votes cast. She is the best performing female presidential candidate.</p> <p>Prof Maathai performed dismally with only 0.07 per cent of the electorate voting for her. Maathai failed to win the Tetu parliamentary seat. Due to the ethnic nature of Kenyan politics, voters were reluctant to vote for candidates sourced from other regions. Further, the current President, Hon Mwai Kibaki, who came second in the polls, was vying for</p>
--	---	--



Hon. Mrs. Charity Ngilu, the first Kenyan woman to give the presidency a shot.

<p>the presidency and hails from the neighbouring constituency. Women candidates faced inadequacy of resources to facilitate a fully-fledged campaign and discriminative political party structures, especially in the Moi era when the legal and political system was skewed in favour of a one party state. Later, Maathai was elected to Parliament and appointed an Assistant Minister for Environment. She was the first woman to be awarded the Nobel Peace Prize in 2006.</p> <p>Women leadership</p> <p>Her Excellency Ellen Johnson Sirleaf was elected as the President of Liberia in the 2005 General Election and sworn in in January 2006. She defeated George Weah in the elections garnering 59 per cent of the vote in the run-off. She is the first democratically elected female president in Africa. She studied accounts and economics in College of West Africa from 1948 to 1955 and travelled to the United States in 1961 where she studied for accounting and economics degrees. Sirleaf served as an Assistant Minister of Finance from 1972 to 1973 and later as Minister of Finance in 1979 to 1980.</p> <p>She fled Liberia shortly after the 1980 coup and worked for the World Bank, the Citibank and Equator Bank. In 1992, she was appointed the Director of UNDP Bureau for Africa. She vied for Vice Presidency in 1985, but was unsuccessful. During the campaigns, she was sentenced to ten years in jail for sedition but was pardoned by President Samuel Doe following international appeal. In 1997, she vied for president against Charles Taylor and was ranked second with 10 per cent vote compared to Taylor's 75 per cent vote.</p> <p>In 2005, she vied under the candidature of Unity Party and was declared winner on November 23, 2005 and confirmed as President. She dismissed her Cabinet in November 2010 in an effort to confront corruption in the government and dismissed seven out of her 19 ministers. She assented to the Freedom of Information Act and</p>	<p>has made education free and compulsory for all elementary school aged children.</p> <p>Support</p> <p>Liberia has benefited from national debt waiver with the United States waiving US\$391 million in 2007. Germany, Norway and United Kingdom with the support of the World Bank and the International Development Association have helped Liberia write off its entire external debt. The President has promised to limit borrowing in future to 3 per cent of the Gross Domestic Product. The President was cited by the Truth, Justice and Reconciliation Commission, which she established, for supporting Charles Taylor during the initial months of Liberian First Civil War. The Commission recommended that she should not hold public office.</p> <p>However, the implementation of the report was shelved by Parliament. She has stated that once the intentions of Taylor became evident, she was a strong critic of his actions despite having initially supported him. She is a Member of Council of Women Leaders, a network of current and former women Presidents and Prime Ministers.</p> <p>Germany</p> <p>Angela Merkel was elected the Chairperson of the Christian Democratic Union in 2000 and has been the chairperson of the Christian Democratic Union - Christian Social Union since 2002. She has training in physics and served as a researcher after completing her doctorate studies. She was elected as a Member of the Bundestag in 1990 and was appointed a Minister for Women and Youth in 1992 by Chancellor Helmut Kohl and later served as the Minister for Environment and Nuclear Safety.</p> <p>She headed the Grand Coalition of Germany after the 2005 General Election up to 2009, when her party won the elections and formed the Government. She was the first woman and the youngest chancellor in Germany and the second woman to chair the Group Eight after Margaret</p>	<p>Thatcher. She was re-elected in 2010 as the candidate for the Christian Democratic Union and is serving her second term as the Chancellor.</p> <p>Her agenda has proposed reforms in Germany's economic and social system and reforms in the labour law to remove barriers to laying off employees and increasing the number of work hours. She has proposed phasing out nuclear power gradually and favoured a strong German-American partnership.</p> <p>India</p> <p>Indira Gandhi was the daughter of the first Prime Minister of India, Jawaharlal Nehru. She was elected as Prime Minister of India under the sponsorship of Indian Congress Party in 1966 after the death of Lal Bahadur Shastri, who had succeeded her father as Prime Minister and went on to serve as the Prime Minister of India for three consecutive terms up to 1977.</p> <p>She served a last term from 1980 to 1984, when she was assassinated. Indira promoted left wing economic policies and promoted agricultural activity, with India increasing its productivity in wheat more than threefold and became self sufficient in rice and maize production during her tenure. She was assassinated by her bodyguards due to a standoff in a Sikh temple in which Indian Army invaded a Sikh temple and shot a number of Sikhs.</p> <p>Her son, Rajiv Gandhi, succeeded her in office. The Gandhi family still plays a central role in Indian politics with Sonia Gandhi, widow of Rajiv Gandhi chairing the Congress Party. Her son and daughter, Rahul and Priyanka Gandhi, are also active politically. Unlike Europe, the Indian politics tend to follow a dynastic path where children succeed their parents in political office.</p> <p>Sri Lanka</p> <p>Sirimavo Bandaranaike was the first female head of Government in the world. She served as the Prime Minister of Ceylon, later Sri Lanka, between 1960 to 1965, 1970 to 1977</p>
---	--	---

and 1994 to 2000. She was a long serving party leader of the Sri Lanka Freedom Party. She was a widow of Solomon Bandaranaike, a former Prime Minister of Sri Lanka and the mother of Chandrika Kamaratunga, Sri Lanka's third President.

Her husband was elected to the House of Representatives in 1946 after founding the United National Party. He later formed Sri Lanka Freedom Party and became its party head. The party won a majority in the 1956 elections and Solomon was appointed the Prime Minister. He was assassinated in 1959. The Freedom Party did not have a clear leader and was plagued by internal wrangles. It lost in the 1960 elections.

Sirimavo was appointed to the Senate after a member resigned and was appointed the head of the Freedom Party. She led her party to win the July 1960 election and was appointed the Prime Minister. She was a socialist who pledged to continue her husband's policies including nationalising key sectors of the economy like banking and insurance and all schools, then owned by the Roman Catholic Church. Tamils increased their militancy after she declared that the official language would be Sinhalese. She was isolated by the USA and Britain over the nationalisation programme and she moved the country closer to Soviet Union and China.

In 1970, she won the elections as the head of United Front Coalition. The government was almost toppled in 1971 and she disbanded the intelligence service. Due to its small army, the government sought support from India and Pakistan. A new Constitution was adopted in 1972 and Ceylon was renamed Sri Lanka and it became a Republic.

She delayed elections till 1977, but her party performed dismally winning only eight seats. The Freedom Party served as the official opposition till 1994 when it won the General Election. However, Sirimavo was outmaneuvered by her daughter Chandrika, who was appointed the Prime Minister. Chandrika was later elected as the President the same year

and she appointed Sirimavo as the Prime Minister. She resigned the post in 2000 citing ill health.

Any difference?

The idea of citizenship based on personhood of the individual has been slow and is still incomplete. Detaching the meaning of political authority from its literal roots in patriarchy is a precarious and partial process. Women movements change political expectations, refine political interests and remake political networks. Since the 1995 Fourth World Conference on Women, women sitting in parliament globally have increased their numbers from 11 per cent to 18.8 per cent.



Deputy Prime Minister and Minister for Finance, Hon. Uhuru Kenyatta, is the first and major hurdle for Ms. Karua.

The hurdles that women face in politics include lack of political will to increase women representation and inappropriate electoral systems. Proportional representation systems seem to increase women representation in Parliament as opposed to majority or plurality systems. Scandinavian countries lead in women political representation with 40 per cent of all ministers in Norway, Denmark, Iceland and Sweden being women.

Women are described as tending to take a holistic view of politics. Women tend to prioritise societal concerns such as social security, health care, education and children rights. Women representation is evidence of respect for human rights where men and

women have equal access to political rights and participation.

Women in politics make women as a gender visible as citizens and create legitimacy for women acting politically. Political activity by women challenges the conventional distinction between public and private. Political participation by women demystifies the exclusionary and demeaning political interpretation of the role of women as purely domestic. Women in politics create alternative associations and networks for political participation and engagement.

Militate

Some of the challenges women in politics face are the lack of political party support for female candidates, particularly limited financial support and limited access to political networks. Political parties have networks that resist active women participation.

Politics are defined by male-oriented norms and structures that militate against women's public participation, including political party schedules that are difficult to reconcile with parental and family responsibilities. Women political aspirants lack leadership-oriented training and education and most parties lack gender-based programmes. Men dominate the influential decision-making structures in most political parties leading to inadequate redress of women concerns.

Women candidates are routinely short-changed during political party nominations as most parties nominate very few of the women who present themselves for party nomination. Women in leadership positions are passive and lack grassroots support, hence owing their loyalty to male leaders who put them there. Women need to participate more effectively and ground themselves in the party without relying on godfathers. [KN](#)

The writer is an advocate of the High Court of Kenya.

Much ado about transparency

The public vetting of judges

The Constitution provides for public participation and involvement in public affairs and governance. Article 10 of the Constitution stipulates the national and principles of governance that apply to and must be heeded by State organs, State officers and public persons.

These values include democracy, participation of the people, inclusiveness, equality, integrity, transparency and accountability. The Judicial Service Commission (JSC), being a creature of the Constitution and as such a State organ, must apply these values while carrying out its constitutional mandate. We look at how effective the commission was in undertaking this mandate.

By O O'duor

To ensure inclusiveness and transparency, the commission advertised the posts of Chief Justice and Deputy Chief Justice in the newspapers and the *Kenya Gazette*. This was unprecedented as it is the first time in Kenya that an advertisement was made inviting potential candidates from within and without the Judiciary to apply for top posts in the Judiciary.

The recruitment process has in the past been opaque and prone to political interference and manipulation. The recruitment process is mandated by the Constitution, which provides that the President shall appoint the Chief Justice and the Deputy Chief Justice with the recommendation of the JSC and subject to approval by the National Assembly.

Article 24(2) of the Sixth Schedule - Transitional Clauses - of the

Constitution provides that the new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and approval of the National Assembly.

However, since qualifications of the Chief Justice and other substantive provision relating to the office of the CJ are provided for in Article 166 of the Constitution, a purposive interpretation of the Constitution as required under Articles 259 of the Constitution requires that the Judicial Service Commission spearheads the process of recruiting the new Chief Justice and forward its recommendation to the President for his onward transmission to the National Assembly for approval.

Supremacy

The President in consultation with the Prime Minister may accept or reject



Only a small stud stands between the position of Chief Justice and Dr. Willy Mutunga.



Nominee to the post of Deputy Chief Justice, Ms. Nancy Baraza, who is doing a PhD. thesis in gayism.

the recommendation of the commission, in which event the commission will be required to recommend another nominee. International best practices, and most notably the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, which were adopted by Commonwealth countries in 1998, require that judicial appointments should be carried out through an independent process.

The process should guarantee the quality and independence of mind of the judges. The appointments should be made on merit with a provision for progressive removal of gender imbalance. The appointments should be permanent or with an appropriate provision for security of tenure and all judicial vacancies should be advertised. These guidelines have a normative effect and many Commonwealth countries have applied them in their jurisdictions to ensure the judiciary has the necessary impartiality, competence and independence.

In South Africa, the President has the sole right to appoint the Chief Justice, but always relies on the advice of the Judicial Service Commission. The commission carries out the interviews in public but its deliberations are done in private. The names of all the applicants to the posts are published. President is empowered under the South African Constitution to appoint the judges. He has the power to unilaterally appoint the judges of the Constitutional Court.

Majority

However, the JSC conducts the selection process for all permanent appointments, including promotion of judges. The JSC has the power to determine its own procedure and its decisions are supported by a majority of members. When vacancies arise in the judiciary, the JSC advertises the posts, makes nominations and shortlists and interviews the candidates.

The interviews are open to the public and the media, but the deliberations of the commission take place in

private. The JSC has, however, made available transcripts of its discussions on its priorities and the selection process. Article 172 (2) of the Kenyan Constitution provides that in the performance of its functions, the commission shall be guided by competitiveness. The commission shall adopt a transparent process of appointment of judicial officers and staff of the Judiciary and shall promote gender equality.

This provision contemplates a transparent process and the national values must be open and with public involvement to ensure proper monitoring and scrutiny. The Judiciary is the only arm of the Government whose head is appointed, unlike the Executive and the Legislature whose heads are directly or indirectly elected by the public and whose occupants serve for specified terms.

The Chief Justice has fixed term of ten years of service, security of tenure with the retirement age capped at 70 years. An attempt at his or her removal must be sanctioned by a tribunal formed to investigate his conduct. Due to the central role the Supreme Court is expected to play in interpreting and implementing the Constitution, it is important that the public be involved in the appointment process through a transparent and open process.

Nature of questions

Most of the questions posed to the interviewees related to past experience and conduct. For the post of the CJ, eight out of the ten candidates were serving judges of the High Court and the Court of Appeal, while one was a Judge *Ad Litem* at the International Criminal Tribunal for Rwanda. For the Deputy Chief Justice post, six out of the eight shortlisted candidates were serving judges of the High Court and Court of Appeal. The interviews for the judges related to judicial work, especially decisions rendered and how they manage their courts.

For the candidates who were not judges, the questions were based on

their reform credentials and an overview of their legal practice and academic background. This form of interview seemed to prejudice the judges since most of their judicial decisions are in the public domain whereas the nature and quality of services rendered by a private practitioner may not always be in the public domain. The commission relied on reports submitted by the Law Society of Kenya, which regulates the legal profession.

By and large, most of the questions asked were relevant and intended to bring out the vision of a reformed judiciary by each candidate. Further, the commission placed sufficient emphasis on judicial and legal writings presented by each candidate as part of their application process. The extensive grilling by the commission was viewed by some senior judicial officers as unfair and prejudicial. However, most candidates faced similar grilling based on the set of facts that defined their qualifications.

Peers

The composition of the commission is representative with elected representatives of the Law Society of Kenya, a judge of Court of Appeal elected by his peers and an elected representative of the Public Service Commission. A High Court Judge and Magistrate are elected by the judicial officer association. The President appointed two members to represent the public while the Registrar of the High Court serves as the secretary.

The deliberations of the commission and part of the interviews were carried out in private in order to safeguard the privacy of the candidates and the integrity of the commission's decision-making process. The commission

stated that all commissioners agreed on all questions in advance. Further, the names of the nominees by the commission were decided promptly after conclusion of the interview and through consensus.

The public recruitment process for key State offices should be carried out openly, transparently and competitively. The commission has set a precedent for high standards of transparent public recruitment, which mirror international standards on an independent judiciary. A public process inspires confidence on the identified office holder since the public are provided ample opportunity to scrutinise his candidature and present evidence of incompetence and moral impropriety.

Observers

The candidate, on assuming office, is therefore able to implement wide-ranging reforms at the institution. The public also buys in on the particular appointment due to their role in the process as observers. The President and the Prime Minister adopted the JSC model by constituting a recruiting panel to advertise, shortlist and interview candidates for the office of the Director of Public Prosecutions.

The prosecutorial functions, previously bestowed in the office of the Attorney General in the old Constitution, have been vested in the office of the DPP. Article 157 of the Constitution states that the DPP shall be nominated, and with the approval of the National Assembly, appointed by the President. The panel placed an advertisement for the post in the newspapers and the *Kenya Gazette*. Out of the applicants, 13 were shortlisted and interviewed.

The panel included the AG, the Chairperson of the Public Service Commission, two representatives of the Law Society of Kenya, a representative each from the Office of the President and the Office of the Prime Minister and a representative from Central Organisation of Trade Unions. The panel conducted the interviews in private and three names were nominated and forwarded to the President and Prime Minister for deliberations, as required under Article 29(2) of the Sixth Schedule — Transitional Clauses.

The said provision applies the National Accord and Reconciliation Act and mandates the two Principals to consult over all public appointments mandated to be done by the President until elections are held in 2012. The President in consultation with the Prime Minister have selected one nominee and presented his name for approval by the National Assembly.

Transparency

The Speaker of the National Assembly referred the nominee to the relevant committee of the National Assembly for vetting and preparation of a report prior to approval by the National Assembly and consequently appointment by the President. The panel should have conducted public interviews to ensure the process is scrutinised.

The final verdict in the nominations lies with Parliament. The President and the Prime Minister have approved the names. The President thus awaits the conclusion of the vetting process by the National Assembly to formally appoint the nominees. The nominees will be vetted by the Constitution Implementation Oversight Committee, whose report will be

The recruitment process is mandated by the Constitution, which provides that the President shall appoint the Chief Justice and the Deputy Chief Justice with the recommendation of the JSC and subject to approval by the National Assembly.

<p>endorsed by Parliament. The candidates must thus be found to be politically acceptable by Parliament. Already, some MPs have raised concerns over some of the nominees. The debate in Parliament may be punctuated by narrow ethnic and regional agenda, which may supersede competitiveness and integrity. Politicians representing entrenched political interests may want to undermine judicial reforms and the resulting independent Judiciary. This will be a mark of impunity fighting back as a reformed Judiciary will effectively deal a deathblow to the culture of corruption, human rights abuses and impunity.</p>	<p>undermine the nominees who have been appointed from outside the Judiciary. The Chief Justice and the Deputy Chief Justice must, therefore, apply appropriate people management skills to ensure that the serving judicial officers support the intended regeneration of the Judiciary and function as a team. Some of the judicial officers are disgruntled by the vetting process as proposed under the Vetting of Judges and Magistrates Act. The President has</p>	<p>Business Committee. The relevant parliamentary committee for the vetting process, which is the Administration of Justice, Legal and Constitutional Affairs Committee, is inoperative due to decision by members of that committee to remove the chairperson.</p>
<p>Wrongdoing There is demonstrable political will by the Principals to ensure the names are approved and to facilitate judicial reform. Since the Principals control the majority of MPs in their political parties, it is highly likely that the nominees will be endorsed by the Parliament. Further, no concrete evidence of wrongdoing has been tabled so far to prove that any of the three nominees is unsuitable for the posts.</p>	 <p>Popular Nairobi lawyer Ahmednassir Abdullahi who seems to have no kind words for anyone outside his school of thought.</p>	<p>Next steps The Parliamentary Liaison Committee, chaired by the Deputy Speaker, is yet to present its report on the problems bedevilling the committee. The parliamentary committee may undertake its independent vetting process that may contradict the recommendation and outcome of the vetting by the Judicial Service Commission.</p>
<p>Some of the objections to the nominee for the office of the Chief Justice have been dismissed as flippant and directionless, as they do not relate to competence, the reform agenda or suitability of the candidate. The Chief Justice and the Deputy Chief Justice must be able to drive the reform agenda. Already, there are reports that serving judicial officers may resist and</p>	<p>advertised the posts of the Chairperson and Members of the Vetting Board, which is expected to be operational soon.</p> <p>The appointment of the Chief Justice, Deputy Chief Justice and the Director of Public Prosecutions is subject to the outcome of further vetting by Parliamentary Committee. The nominations have been referred to the Constitutional Implementation Oversight Committee by the Speaker after consultation with the House</p>	<p>parliamentary committee for further scrutiny and vetting.</p> <p>The committee is expected to present its report to Parliament for approval within seven days. If the report approves the nominations and is adopted by the National Assembly, the nominees will be appointed to their respective positions by the President.^{KN}</p> <p>The writer is an advocacy officer with a local NGO.</p>

The bigger fight in the Legal Affairs Committee crisis

Pius Tawfiq Ababu Namwamba is presently a man under siege. Six of the 11 members of the Parliamentary Departmental Committee on Justice and Legal Affairs have expressed lack of confidence in his chairmanship and vowed to remove him. Though his Orange Democratic Party (ODM) party technically stands with him and so does his Party Leader Prime Minister Raila Odinga, the writing is clearly on the wall that the honourable member for Budalangi can no longer be at the helm. So, what next? Our writer seeks to establish the genesis of the wrangles bedeviling this committee, to establish the source of the perennial ODM-PNU rifts, to determine ways in which the Constitution implementation is likely to be affected, to consider provisions in the Constitution in respect of House committees and to establish ways in which stability of committees can be sustained.

By Macharia Nderitu

Hon Namwamba took the chairmanship of the subject committee from affable MP for Mandera North Mr Abdikadir Mohamed, who relinquished it after he assumed leadership of the recently established Constitution Implementation Oversight Committee (COIC). Other members of the committee are Hons Millie Odhiambo, Isaac Ruto, Olago Aluoch, Sophia Abdi Noor, Amina Abdalla, Mutava Musyimi,

Mohammed Abdikadir, Njoroge Baiya, Philip Kaloki and George Nyamweya.

A year did not even pass after Namwamba took control of the committee before the majority of the members revolted against his leadership. A variety of simmering factors led to the crisis, but the main trigger arose when the House Speaker referred the contentious appointments of the Chief Justice, the Director of Public Prosecution and the Attorney General to Namwamba's committee for consideration.

Punishing

The verdict by the majority members of the committee was that the President's action was legitimate, but Namwamba backed by fellow ODM lawmakers Millie and Aluoch, dissented and ensured that their minority decision was included in the final report.

In a backlash move aimed at punishing Namwamba, six members of the committee complained to the Clerk of

the National Assembly of their lack of confidence in their chairman. They accused him of poor stewardship of the committee, arrogance, writing reports without consulting the rest of the members and attacking members of the committee at political rallies and other gatherings.

An overall perspective of the political scene, however, reveals that the infighting in the said committee is only but a tip of a grand fight pitting ODM and PNU alongside a separate war within the ODM itself. To comprehend this state of affairs, one only needs to look at the functions of the committee vis-à-vis the need to control political power and positions of power, the race towards the 2012 presidential elections and the International Criminal Court process against the so-called Ocampo Six.

Namwamba's committee is central to the Constitution implementation. Its mandate under the Standing Orders is to handle "Constitutional affairs, the administration of Law and Justice (Judiciary, Police & Prison Departments and Community Service orders), public prosecutions, elections, ethics, integrity, anti-corruption and human rights". It is, therefore, tasked with the function of scrutinising crucial Bills as well as vetting candidates for the constitutional positions under its mandate.



Stressed out - Hon. Ababu Namwamba.

Perspective

In short, it would be correct to state that the bulk of the implementation work in Parliament falls on Namwamba's committee. It is this committee that shall determine who gets what constitutional post. Determining "who gets what" defines politics and every politician, particularly presidential contenders, would for strategic reasons want to have control of the process so that only those they consider concomitant to their interests may secure appointments.

Viewed from this perspective, one can discern that the infighting in the Legal Affairs Committee is nothing less than a fight between the politicians allied to different political factions seeking to control the impending appointments and eventually the next elections.

With Namwamba at the helm of the committee, the ODM and by extension Raila appears to have an upper hand in the control of the committee, a situation that does not please his bitter rivals, including William Ruto, Uhuru Kenyatta and Kalonzo Musyoka. That is why the proposal to replace Namwamba with Aluoch was rejected since no mileage would have been gained by replacing a Raila ally with another.

One more thing, the Legal Affairs Committee shall be instrumental in determining the composition of the Judiciary, the State Law Office and the Police. The ICC is monitoring the changes in these institutions closely and while the ICC suspects would want to have a deferment of their cases, they would still wish to maintain control on the heads of these institutions so that their many pending cases before the Judiciary may be determined in their favour.

Finally, it should not be lost on us that elements that opposed the new Constitution are still keen on derailing its implementation. It is, therefore, not strange to find that the people who were previously in the 'No' camp or were 'water melons' during the referendum feature prominently in the protests against Namwamba.

Perennial ODM-PNU rifts

The present Grand Coalition Government has been dogged by never ending rifts since the 2007 elections. Before formation of the coalition, they fought violently on the question of who won the presidential election. A protracted negotiation

between the Prime Minister and the Vice President was higher in the pecking order of the State.

During drafting of the Constitution the two parties differed on many issues, including the system of government with ODM preferring a hybrid system while PNU favoured a presidential one. On corruption, whenever a PNU official was adversely mentioned, his ilk would defend him while the ODM would do likewise for their own.

In this regard, the ODM stood with the Prime Minister, his close allies and relatives during debate on the maize scandal and also stood with Charity

Ngilu over the controversial tendering for dams. On the issue of the controversial sale of the Grand Regency Hotel, only those allied to PNU supported then Trade Minister Amos Kimunya.

On the mandate of the Prime Minister, the ODM defended the unilateral suspension of Ministers Ruto and Sam Ongeri by the PM over the maize and education scandals while their PNU counterparts, through the President, reversed the suspensions and asserted that the PM had no such power.



Student of King Solomon - Speaker of the National Assembly
Hon. Kenneth Marende.

midwifed by former UN Secretary General Kofi Annan brought forth a power sharing agreement imprinted into the National Accord and Reconciliation Act, which halted further violence, but which gave no assurance that the life of the coalition would be smooth sailing between the partners.

Even before the ink dried, the coalition partners were against each other on such issues as the number of ministries, who was to have the majority members in Parliamentary Select Committees, who between the Prime Minister and the Vice President was to assume leadership of the influential House Business Committee, and who

Reject

ODM was content with the Andrew Ligale-led Interim Independent Boundaries Review Commission's report, but the PNU cried foul. On the ICC process, PNU sought deferment of the trial for the Ocampo Six and undertook a shuttle diplomacy seeking support from the United Nations Security Council members on this, but the ODM side lobbied the same Security Council members to reject the application.

Recently, when the President nominated individuals to the position of CJ, AG and DPP, the ODM rejected the nominations for lack of consultations, but PNU supported the President

saying there was consultation. In any event, consultation did not mean concurrence. This impasse triggered the rift discussed above regarding the chairmanship of the Departmental Committee on Justice and Legal Affairs.

As these wrangles persist, the core question remains — what are they fighting about? Most of the actors and analysts assert that the dominant reason for the wrangles is simply the race to succeed Kibaki as president. Pollsters continue to show Raila as the most popular contender for the top seat, a situation his rivals don't take kindly.

They thus exhibit great rivalry against him, fail to support his projects such as the re-acquisition of the Mau forest, half-heartedly supported the Constitution, take all measures in Parliament and outside to trim his influence and some even call for the banning of opinion polls. ODM on the other hand is aggressive in ensuring it maintains control of Parliament and other key institutions. It also supports the ICC process in the belief that the said process shall eliminate two of Raila's main rivals from the 2012 presidential race.

Friction

Another major factor giving rise to the rifts is the competition for the control of power. He who has control calls the shots and determines who is to head crucial departments, boards, authorities, parastatals, institutions and other organs of the State. In this way, the party is able to show gratitude to its cronies and friends by having them appointed to these positions.

In return, the appointees reciprocate by rendering favourable decisions to the appointing party. This is more in consonance with the definition of politics as the "authoritative allocation of values" or "who gets what, when and how". The competition between the warring parties in an effort to achieve these objectives naturally leads to friction and the rifts that we continue to witness.

The demonstration of power by the Principals is also a reason that creates the frictions. The Prime Minister would

want people to believe that he shares power with the President equally and in this regard purported to demonstrate that he can suspend Cabinet ministers, objected to the controversial judicial nominees by the President and tried to veto the calls for the ICC deferrals.

Finally, the animosity borne by each party over the results of 2007 presidential elections constantly fans these wrangles and from time to time, ODM mentions that it was robbed of an election victory while PNU maintains that in spite of a clear victory, it was forced to share power with a party that had clearly lost.

Effects of wrangles

The persistent wrangles in the ruling coalition are not conducive for Constitution implementation. They led to delays in the appointment of members of the COIC, which in turn led to delays in the formation of all subsequent commissions, including the Constitution Implementation Commission. Likewise, the impasse between the President and the Prime Minister over the Judicial nominees ended up wasting a lot of precious time and leading to the unpleasant scenario of having a Judiciary without a head.

Presently, the wrangles in the Committee on Justice and Legal Affairs, which are now entering their third month, are holding back debates on numerous but crucial legislations that need to be in place by August 26, 2011. The wrangles also make MPs lose objectivity in the process of vetting candidates for the numerous positions and the process of considering legislations.

With their focus distracted by political squabbles, the need to ensure their political survival and succession politics, the parliamentarians have little input to make on proposed legislations, thus the quality of these legislations is likely to suffer. The worst result of the wrangles is that they causes tension in a delicate country and in the event that the same flares up into violence, we can kiss implementation goodbye.

Stability of committees

Unfortunately, the Constitution fails to provide mechanisms of preventing or resolving parliamentary committees' wrangles. It only mentions committees in Article 124 whereby it donates to Parliament the power to establish committees and to make Standing Orders for the orderly conduct of proceedings in the committees. Therefore, resort can only be found in the Standing Orders of Parliament to resolve the impasse.

The Departmental Committee on Justice and Legal Affairs is established under the 2nd Schedule pursuant to Standing Order No 198 (2). Standing Order No 199 establishes a Liaison Committee with key duties being to guide, give advice and coordinate the operations of all committees. It is upon the Liaison Committee with the assistance of the Speaker to mediate over the present wrangling and come up with a solution acceptable to all.

The Speaker adopted a temporary measure when he directed that the work of the committee be undertaken by the COIC. Unfortunately, this step neither addresses the real issue bedeviling the moribund committee nor breathes life to it. In fact, this step was an abuse of discretion by the Speaker since it is only the Liaison Committee that has power under Standing Order 199 (f) to determine whenever necessary the committee that shall deliberate on a matter.

It now behooves Parliament to move with exceptional speed to end the wrangles for the sake of the implementation of the Constitution. To avert future crisis in committees, the Liaison Committee needs to be more proactive in mediating disputes. In addition, since it is composed of chairpersons of other committees, peer influence should be applied to guide chairmen of troubled committees on appropriate styles of leadership. KN

The writer is an advocate of the High Court of Kenya.

Extent of external influence in Kenya's Constitution making

It is generally accepted as a fact that foreign policy and domestic policy are not independent from each other. One of the key determinants of foreign policy is the policy-making factor, which has two major constituents - leadership and the Constitution. It is against this background that our writer analyses the underlying factors that triggered the international community's interest and active role in the constitutional journey.

By Ivy Wasike

Constitutionalism has both prescriptive and descriptive use. This article is concerned with the descriptive use that is defined by Gerhard Cooper as "the historical struggle for constitutional recognition of people's rights and other rights, freedoms and privileges".

This is the presence and development or formation of a constitution, the historical struggle to recognise and enshrine constitutional rights and principles in constitutional order and the ratification of the Constitution. That is the broader definition of constitutionalism as envisaged in this article. Foreign Policy can be defined as the strategy used by governments to guide their actions in the international arena. The international community refers to all people, cultures and governments of the world.

The road to Kenyan constitutionalism effectively started back in 1986 on acceptance of the Report of the Saitoti Review Committee. After various amendments to the old constitution, the Constitution of Kenya Review (Amendment) Act of 2001 and the Kenya Constitution Amendment Act of 2001 were the last amendments paving way to the Constitution of Kenya Review Commission (CKRC) headed by Prof Yash Pal Ghai. The

CKRC was dissolved before the elections in 2002.

However, after Narc came to power in 2002, during the swearing in ceremony President Kibaki pledged that Kenya would have a new Constitution within 100 days of his taking office,

which was not to be. In 2003 the CKRC was mandated to come up with a draft Constitution and the committee came up with the Bomas Draft.

Major diplomatic voices

However, in 2005 the draft was amended in Kilifi bringing about the infamous 'Wako Draft' that was sent to the referendum on November 21, 2005 and voted down. The same was taken as a defeat of President Kibaki's Government and his allies who were supporting the draft. Much, therefore, was not done after the referendum on the review process and Kenya once again went to the polls in 2007 with the Independence Constitution.

It was not until March 2009 that the Committee of Experts on constitu-



US President Barrack Obama. Does he have a clear agenda for his motherland?

tional reforms was constituted with the key mandate of drawing and drafting a new Constitution for Kenya to be approved in a referendum. In October 2009 the committee completed its work and on August 4, 2010, the draft was approved by the people and thereafter promulgated replacing the Independence Constitution about 20 years after the review process had begun.

The above highlighted process did not take place independent of the international community. As far as 1997 before the review process became fully fledged, the United States of America (USA) through the then US Ambassador to Kenya Prudence Bushnell spoke and pressurised the Moi Government for constitutional reforms. The US did this by giving minimal financial support or aid to the Government but channelled finances to non-governmental organisations (NGOs), which were pressing and fighting for constitutional reforms.

Public resources

The reason for using monetary and indirect influence was because the US could hardly exert any political influence in Kenya during the Moi regime. Thus the US managed to indirectly put pressure on the Government through the Opposition and NGOs culminating in the Constitution of Kenya Review (Amendment) Act 2001.

In 2005, when President Kibaki and others under the Banana umbrella were campaigning for the Wako Draft, the international community refused to fund the campaigns and key Western donors notably the USA, UN agencies and NGOs were against the use of public resources to campaign for the same.

This the donors said was because the draft was not people driven and also the executive authority had hammered out what the 2003-2004 National Constitutional Conference

had suggested. In 2008 during the post-election conflict mediation, the US put pressure to the warring ODM and PNU to share power and one of the preconditions was review of the Independence Constitution.

The then US Secretary of State Ms Condoleezza Rice clearly stated that the US wanted to see the agreement signed by the principals implemented and reforms put in place and it would be watching carefully and also supporting the implementation. Japan also stated the same position. The message was clear that the two countries together with the European Union would put pressure on the President and his Premier to have a



Belligerent to the end - former US Ambassador to Kenya Michael Ranneberger.

new Constitution.

NGOs

This was the background to the formation of the Committee of Experts and once again Kenya was on the road to constitutional review. When the CoE was through with the draft, Canada sponsored various NGOs to carry out civic education and the Canadian High Commissioner to the country, Ross Hynes, sponsored the 2nd Muslim Youth Parliament, which brought in Christian youth from across the country to discuss the draft constitution.

The Canadian International Development Agency (Cida) also fully funded and supported a project

known as Constitutional Review Support Project. Canada, through its Minister for Foreign Affairs Lawrence Canon, stated that it supported the constitutional review process and the Draft Constitution. The US Secretary of State Hillary Clinton also stated that it was pleased. In June 2010 in an exclusive interview, the President of the US said he supported the Draft Constitution and immediately thereafter the Vice President of the US also stopped in Kenya to convey the US support.

Although the US government fully supported the Draft Constitution, the American Evangelical Churches on the other hand were funding the 'No' campaign to the draft. US Ambassador to Kenya Michael Ranneberger, in his farewell speech, affirmed that President Obama and his predecessor had fully supported the constitutional review process.

Influence

It is beyond reasonable doubt that without the direct and indirect influence of the international community Kenya would still be working, if at all, on the review. Prior to 2008 the international community did not have much leverage and, therefore, influenced the review process indirectly. However, after the post-election crisis, the international community, especially countries that belong to the Development Co-operation Group that is the US, Canada, European Union and Japan, directly influenced and put pressure on the Government to fast track the constitutional review process.

The new Constitution was a key component in the Accord signed by President Kibaki and Prime Minister Raila. Both their political careers were founded on the Accord and, therefore, the two joined forces to campaign for the Constitution. The two knew the consequences on their political careers in the event the Constitution was not passed as the US through Ms

Rice had already threatened that it would form its own judgement and act accordingly.

Mr Ranneberger reinforced this when he stated that the whole US relationship with Kenya depended on the implementation of the Accord, which entailed enactment of a new Constitution. This meant that the two principals had much to lose politically because the US had recognised PNU, the sitting authority as legitimate, and had helped ODM get a position in the Government on preconditions and since the US could now influence Kenya's politics, the two principals did not want to risk anything. This influence fast tracked the review process.

Concerns

The international community's pressure may be perceived as concern for Kenyans. But when one follows the trail of the review process it emerges that the international community was keenly aware of the need to promote its self interests in the country. The leeway came during the post-election crisis as it could now have direct influence on Kenya's political scene and thus influence the chief law of the country.

The Independence Constitution was safeguarding the British landowners who owned large tracts of land in the Rift Valley and highlands. It was also made to safeguard British interests in the country. The current Constitution does not though it allows foreigners to lease land, dual citizenship and devolves power. There is a great impact on the formulation of foreign policy in Kenya due to the current presidential system. Prior, negotiations were carried out by the Head of State and there was more use of personal diplomacy.

This included also trade with other states. Britain had maintained strong ties in Kenya and was the major trading partner and source of economic assistance. One of the reasons was due to the Independence Constitution,

which influenced foreign policy. However, with the new Constitution, Britain has lost some ground and the US and Canada, who have been the chief sponsors can now influence domestic politics and as a result formulation of foreign policy. As a result the Government will have to formulate policies that suit the two countries and work towards achieving this.

It is no secret that Kenya is a designated strategic regional pillar in American National Security Strategy as it is the platform for US operations in East Africa. Since 2002 there has also been a steady growth of American business interests as Kenya's role as a hub for East Africa makes it very appealing and the new Constitution gives leeway to these foreign investors.

Kenya as a US security interest may be one of the key reasons the US was keen on having a voice in the domestic politics of the country, as a constitution is also a key determinant of foreign policy. Ranneberger has stated that the roots he put down in Kenya will not be severed and we shall still be seeing more of him. This might be an indication that he will take advantage of the new Constitution and settle down in Kenya, purchase properties, invest and also become a Kenyan citizen.

Future role

The international community notably the US indicated that it would ensure implementation of the Constitution to the end. The Commission for the Implementation of the Constitution (CIC) chairman declared that full implementation of the Constitution will be after 2012. It is presumed that the US foreign policy will not change and they will still consider Kenya a strategic partner and, therefore, pressurise for the implementation of the same.

The Constitution is the factual basis of existing socio-economical political status of the country. Change of a constitution does not always guaran-

tee the Rule of Law or change of the socio-political economic order. There has to be fundamental change in the social, political and economic system and not just the manner in which state organs relate to each other, governance and access to justice. As long as there is a great imbalance in the economic-social order, achieving the rule of law is an uphill task as economics play a vital role for a just state and the international arena.

Foreign investors

Kenya through its Independence Constitution had limited autonomy from the international economic and political system. As a result, it was heavily dependent on the outside world especially Britain for economic and military aid through "polite diplomacy", and was also dependent on the international community for trade and technology. The international community was guided with its own interests and, therefore, did not care about the rule of law.

The Asians or the international community owns major investments in Kenya and this is not about to change with the new Constitution. On the other hand, the Constitution opens doors for more foreign investors and the actors in the international arena have just changed from the UK to the US, Canada and Japan with the US taking the lead role.

Thus whether the rule of law will be upheld despite the feasible checks and balances put in place in the current Constitution is a question which only time will tell. The international community has earlier on not been guided by the rule of law in Kenya when pursuing its interests and thus we still are justified in remaining cynical and await the implementation of the Constitution to see whether the rule of law will be upheld so as to move from the new dawn to a new day. KN

The writer is an MA student in diplomacy at the University of Nairobi.

Does Wanjiku have a say any more?

The effectiveness of any law depends much on its legitimacy within the population. Legitimacy is in turn dependent on the degree of input and participation that the population had in its enactment. Without legitimacy, a law becomes unpopular and lacks any beneficial substance in the eyes of the public. In the words of Martin Luther King Jnr, an unjust law is no law at all.

By Dorothy Momanyi

To assess the effectiveness of the Kenyan Constitution, it is imperative to establish the extent to which it is a people's Constitution, to establish whether and how public participation was achieved during the review process, to assess whether we shall meet implementation deadlines and to determine what kind of pressures the public can exert on politicians to ensure compliance with the implementation deadlines. Finally, it will be worth to comment on the recently released Interim Report by the Taskforce on Devolved Government.

A people's Constitution very much depends on the degree of public participation in its drafting as well as the democratic nature of its articles. Upon applying this criterion to the Kenyan Constitution, one straight-away realises that it is indeed a people's Constitution.

The first thing to note is that the movement towards constitutional change was not initiated by the Government, but rather by the people. In fact, the State under then President Moi initially opposed these calls but subsequently succumbed to pressure and established a

Constitution of Kenya Review Commission (CKRC).

Through this commission, Kenyans were able to give their proposals on the kind of Constitution they wanted. Later, through representatives, they participated in preparing a draft Constitution during the constitutional conference at Bomas of Kenya. Thereafter, they exercised their sovereign power when they took part in the 2005 referendum and rejected the Proposed Constitution more so on the ground that it had received unwarranted executive interference.

Adoption

When the process was later reignited, the earlier drafts and reports were used by the Committee of Experts (CoE) to prepare a harmonised draft, which was subjected to a lot of public and parliamentary scrutiny. Ultimately, the proposed Constitution that was formulated was yet again placed in the hands of the people for



With constitutional reforms getting entrenched in the country, scenes like these will become a rarity.

Public participation

adoption through the referendum held on August 4, 2010.

Unlike the former Constitution that had been adopted under duress from the colonial masters and amended excessively at the executive's whims, the current one was people-driven all the way.

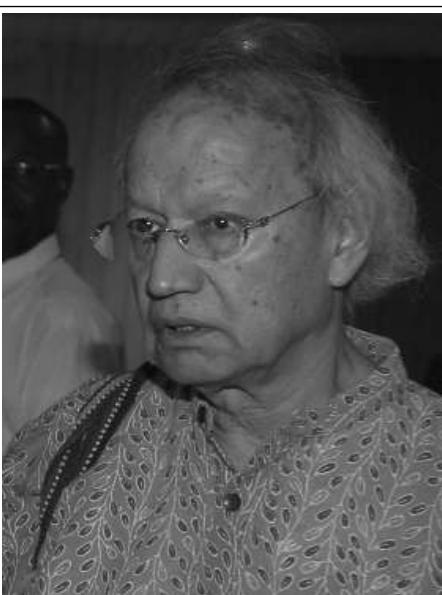
To fulfill the other part of the criterion, a people's Constitution needs to be people-oriented in its content and that's exactly what the Kenyan Constitution has endeavoured to become. The highlights of its provisions are as follows:

The first Article recognises that sovereign power resides with the people.

- It has an elaborate and advanced Bill of Rights that recognises all the three generation rights and establishes a commission to prevent, investigate and address human rights violation.
- It trims the hitherto excessive powers of the executive, removes the age limit for a president and ensures that the President has a popular mandate by requiring that he garners more than 50 per cent of all votes cast.
- It introduces the concept of dual citizenship and removes gender discrimination on matters of citizenship.
- It gives the people the Right to Recall non-performing legislators (Article 104).
- Gender equity is guaranteed in elective bodies by the provision that no more than 2/3 of members shall belong to same gender. Chapter 7, Article 81(b).
- Integrity Chapter shall ensure compliance with Integrity in all Government institutions (Chapter Six).
- Equitable sharing of resources is guaranteed in Chapter 12 — Part 4 & Article 204.
- Any member of the public has a right to bring up a case against the Government on the basis of infringement of Human Rights

and the Bill of Rights — Article 23(1)(2).

- Independence of the Judiciary is affirmed under Article 160 and to sweep the Judiciary of all unsuitable elements, vetting is required of each judicial officer.
- An Independent National Land Commission is created to maintain oversight and manage all Land use— Article 67.
- There is Devolution of Government services to the county level—Chapter 11.
- There is greater separation of power between the executive and legislative branches as MPS shall no longer be able to hold cabinet office.



Beaten but no broken - former CKRC chairman, Prof. Yash Pal Ghai.

- There are increased checks and balances by creation of independent offices and commissions with stringent processes of appointing their officers.

The above and other provisions demonstrate that the Constitution is people oriented and shall go a long way to foster democracy. Some critics argue that the substantial participation by western countries in both influencing the content and enactment process made the Constitution a western one. However, considering that Kenyans had the final say during

the referendum, the people-ness in the Constitution was not lost.

Pre-referendum

There was a robust participation by the public in the period preceding the referendum because of a number of factors. First there was a vibrant, vigilant and proactive media, which gave prominence and kept people updated of every review step as well as on the substance of the proposed law.

The mainstream newspapers both for profit and/or popularity printed and distributed widely copies of the Draft Constitution. The radio stations, particularly the vernacular ones, provided platforms through which the public would listen to experts or participate in debates in regard to issues in question.

The Government, the civil society organisations, professional bodies as well as institutions charged to handle the process such as the CoE also widely distributed free copies of the Draft Constitution and stirred debate on the issues in it. The CoE, in particular, embarked on wide consultation with the public, invited and met political parties, reference groups and requested wananchi to send it proposals. It also organised civic education forums, printed materials, workshops and other forums for which the attendance and participation by the public was overwhelming.

The politicians' actions in crisscrossing the country both in support or against the Constitution enhanced public participation in the process. The religious leaders, too, in using their pulpits and other platforms to discuss with their congregation the merits and demerits of the proposed law as well as their action of inviting experts to dissect the law for their followers harnessed public participation.

Facebook

The social networks over the internet were also forums of great public participation, especially with regard to



A united people can bring about change.

the youth. There were groups on sites such as Facebook for instance "No Katiba, No Sadaka", "Katiba yes" and "Katiba No" groups where young people freely chatted and discussed the constitutional process.

All these factors made the public to be gripped by a constitutional debate fever. All including school going children were talking about it as the above factors had shown everybody had a stake in it.

A number of legislations and other steps including the filling up of offices under the new Constitution are required to be done within a year of coming into effect of the Constitution – August 27, 2011.

These legislations include those governing the acquisition and renunciation of citizenship, that relating to the conduct of elections, the establishment of the Independent Elections & Boundaries Commission (IEBC), that concerning Political Parties, that relating to the establishment of the Ethics & Anti-Corruption Commission, that concerning establishment of an advisory

Committee on the Presidential power of mercy, that relating to establishment and functioning of an Industrial Court, the Supreme Court, Subordinate Courts, the procedure of removing a Superior Court Judge from office, that regulating the Judiciary Fund, that regulating the election and removal of a Speaker of a County Assembly, that providing the functions of a County Executive, that establishing the Contingency Fund and that prescribing how the national Government is to guarantee loans.

Appointments

Outstanding actions required within a year include filling up positions in Commissions and Independent Offices such as that of the Director of Public Prosecution, Attorney General, Deputy Chief Justice, Controller of Budget, Auditor General, the Inspector General of the Police Service and his two deputies.

Save for the Constitution Implementation Commission (CIC), Commission for Revenue Allocation and the Judicial Service Commission (JSC), no other commission has been filled up. The appointments for the

position of CJ, Deputy CJ and DPP are, however, in the pipeline and may be made by August 27, 2011 unless Parliament rejects the nominees.

On legislations, Parliament has for nine months only managed to pass two legislations namely, the Vetting of Judges and Magistrates Act and the Judicial Services Act. With the squabbles facing the Departmental Committee on Justice and Legal Affairs, one is left to wonder how many other legislations can be passed in the remaining three months. Many of the proposed Bills are yet to be approved by Cabinet leave alone Parliament. In the circumstances, beating the deadlines is almost impossible without a miracle.

The question, which then arises, is what kind of pressures the public can apply on the politicians to hasten the process? The first way is to utilise the means provided under the Constitution. Under Article 261 if Parliament doesn't enact the required legislation within the stipulated timelines, any individual has the right to move the High Court to issue an order directing Parliament to take the

Public participation

required steps, failure to which dissolution of Parliament may be initiated. It is hoped that such a threat would trigger MPs to act.

Oversight

Unfortunately, the General Elections are in a year's time and by the time a hearing is conducted in the High Court, it would be time for the MPs to go home anyway and as such, the threat of sending them home would be hollow.

The public can also lobby the entities that have an oversight function over the implementation to apply the pressure. In this regard, the CIC, JSC, the Kenya National Human Rights Commission, and the Kenya Anti-Corruption Commission have the right, ability and authority to bring pressure to bear on Parliament through media campaigns alongside other means to act.

The Government is known to act when the major donor countries like the United States and Britain and donor institutions such as the IMF, World Bank, UNDP, Sida, DfID, Cida, Danida make the demands. Such countries and institutions, if lobbied, would be very effective especially if they place implementation as a condition to aid.

Alternatively or in conjunction with the above methods, the public can adopt pressure groups style in bringing pressure to bear on the Government and Parliament by way of demonstrations, public protests, lobbies, petitions and mass media

campaigns. Organised civil society groups may also support MPs who would want to bring Private Members Motion in the House with the view of beating the deadlines.

Devolved government

On April 20, 2011, the Task Force on Devolved Government in Kenya published an Interim Report on its mandate. It is a comprehensive document made up of 323 pages. The task force was to make proposals on the policy and legal framework of devolving power, resources and responsibilities to the people of Kenya.

The report provides detailed principles and standards under each chapter, which will provide a good basis for subsequent policy. It discusses such issues as the levels of devolution, the structures of the County Executive and the functional assignment of roles.

It rallies for adoption of Integrated County Development Plans, talks about intergovernmental relations and dispute resolution, participation of the minorities, emphasises the need for public communication and civic education in devolved governance, examines the need for an effective county public service, emphasises the need for proper management of county resources and their management, proposes commercialisation of county facilities, and finally provides a path for transition.

The interim report recommends the enactment of 13 pieces of legislation namely the Devolution Bill, Transition Bill, Transfer of Assets & Liabilities Bill, Devolved Government Elections Bill, County Public Financial Management Bill, Intergovernmental Fiscal Relations Bill, Intergovernmental Relations Bill, Development Facilitation Bill, County Public Service Commission Bill, County Leadership Ethics and Integrity Bill, County Systems Bill, County Government Structures Bill, and Minorities and Marginalised Groups Bill.

Decentralisation

The report has a number of gaps and weaknesses, which if not addressed, may undermine its suitability to inform future policy and legislation. The multiplicity of legislation proposed is undesirable and is likely to fragment implementation and create confusion.

Some legislation such as that on County Leadership Ethics and Integrity Bill is unnecessary as the gist has already been captured under Chapter 6 of the Constitution. The report ought to have identified a proper body such as the CIC to manage the transition rather than line ministries.

On further decentralisation, it would be wiser to only have administrative officials at the sub county level rather than the proposed elective officials. The proposed restructuring of the Provincial Administration and retention of chiefs may lead to an overlap in functions with the county government.

The report is self evident that it is neither final nor conclusive on the recommendations and may be adjusted depending on the people's reaction. The task force, therefore, still has work to do in preparing a final report and preparing drafts of the legislation it proposes. [\[KN\]](#)



2012 is around the corner.

THE KONRAD ADENAUER FOUNDATION IN KENYA

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

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

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

Our aims

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

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

Our programmes

Among other activities we currently support:

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

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

Contact address

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

MEDIA DEVELOPMENT ASSOCIATION

**Media for
Change**