July / August 2011

KatibaNews

The birth of a new Republic

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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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The 2012 General Election red flag

By *Katiba News* correspondent

With the hindsight of the bungled 2007 elections and the violent aftermath, it became more or less mandatory for Kenya to undertake electoral reforms in order to forestall recurrence of violence in future elections.

This article seeks to examine the contents of the new Constitution with specific reference to issues touching on elections, the country's preparedness for the impending 2012 elections, the requisite constitutional measures to prevent future election related violence, the actual date of the next elections and whether it would be prudent to retain the Interim Independent Electoral Commission (IIEC).

The new Constitution has elaborate provisions on elections. This may primarily have been an answer to the perennial complaints on the conduct of elections since the infamous 1988 *mlolongo* elections through to the controversial 1992 elections and finally to the disgraceful elections of 2007.

These provisions include the preamble, which appeals for the attainment of a government based on democracy. Article 10 on the National Values and Principles which highlights the principle of democracy and participation of the people as core values and the Bill of Rights, which under Article 38(2) declares the rights to free and fair elections, the right to be registered as a voter, the right to vote by way of secret ballot and the right for any adult to be a candidate for public office.

Suffrage

However, the substantive provisions on elections are found in chapter seven (7) of the Constitution. The Chapter recognises the principles that the electoral system is required to comply with such as the freedom of citizens to exercise political rights, the principle that no more than tw-thirds of members of elective public bodies can be of the same gender, the need for representation of persons with disabilities, universal suffrage and the requirement of free and fair elections conducted and administered by an independent body.

The chapter also bestows upon Parliament the duty to enact legislation to provide for electoral units, the nomination of candidates, the registration of voters within and outside Kenya, the conduct of elections and the conduct of referenda.

The chapter goes ahead to outline the qualifications of a voter and to provide a window through which independent candidates can stand for elections.

In regard to elections itself, the Independent Electoral and Boundaries Commission (IEBC) is mandated to ensure simplicity of voting, the counting and announcement of votes at each

Pondering his next move, IIEC Chairman Ahmed Isaack Hassan.

polling station and elimination of electoral malpractices.

On electoral disputes, Parliament is directed to pass legislation to ensure the timely settling of electoral disputes and the question of service of petition is finally settled by the provision that a petition may be served in person or by advertisement in a newspaper.

The chapter provides for 90 more constituencies but subject to review after 8-12 years. It provides for election of nominated members both in National Assembly and Senate, it proscribes political parties from being founded on ethnic or religious basis, engaging in violence, establishing a militia, engaging in bribery, and or other forms of corruptions.

Preparedness

The chapter provides the general elections date as the second Tuesday in August of every fifth year. It also specifies the requirements for one to be declared as the winner of the presidential election and the procedures for challenging the presidential elections in court and the time that the swearing in shall take place.

To be fully ready for the 2012 General Election, it is incumbent to establish the IEBC so that it may undertake the full and continuous registration of voters, ensure that there is delimitation of 90 more constituencies and oversee the entire process of elections.

There is also need for a total overhaul of the Electoral Legislation since the Constitution itself under Articles 82, 87 and 92 calls for their change and also because their current content is inconsistent with the Constitution. These include the National Assembly & Presidential Elections Act, the Electoral Offences Act, The Political Parties Act and The Local Governments Act in relation with the Local Government Elections. There is also need for additional legislation to provide for the procedures of how the special seats due to the youth, women and the disabled are to be allocated.

Whereas the above demonstrates the steps needed, the country has little to show on what it has done to meet them save for passage of the Independent Electoral & Boundaries Commission Act 2011. No other piece of legislation in respect of Electoral Laws is to yet to be placed before Parliament for debate and passage.

Civic education

This is a disheartening situation considering that there is only about a month to go before August 27, 2011 when all proposed Electoral Laws are required to have come into effect. Though the President assented to the IEBC Act on July 5, 2011, there is still a lot to be done to give it life.

Interviews and appointment of commissioners must be undertaken, necessary structures must be put in place, staff must be recruited and trained, the voters must be registered, civic education must be conducted to educate the public on how to select eight candidates for various positions on a single day and simultaneously there are the 80 more constituencies required under Article 97(1) and 89 of the Constitution, which must be delimited otherwise the elections would be irregular.

Nonetheless, the IIEC must be commended for having developed a work plan that charts the path all the way to the next elections. It is only hoped that the plan shall be supported by adequate financial resources. The Government gave a good gesture of its commitment when it allocated Sh12.1 billion to the IIEC in the 2011 Budget and it is hoped that it will provide more funds when they are required.

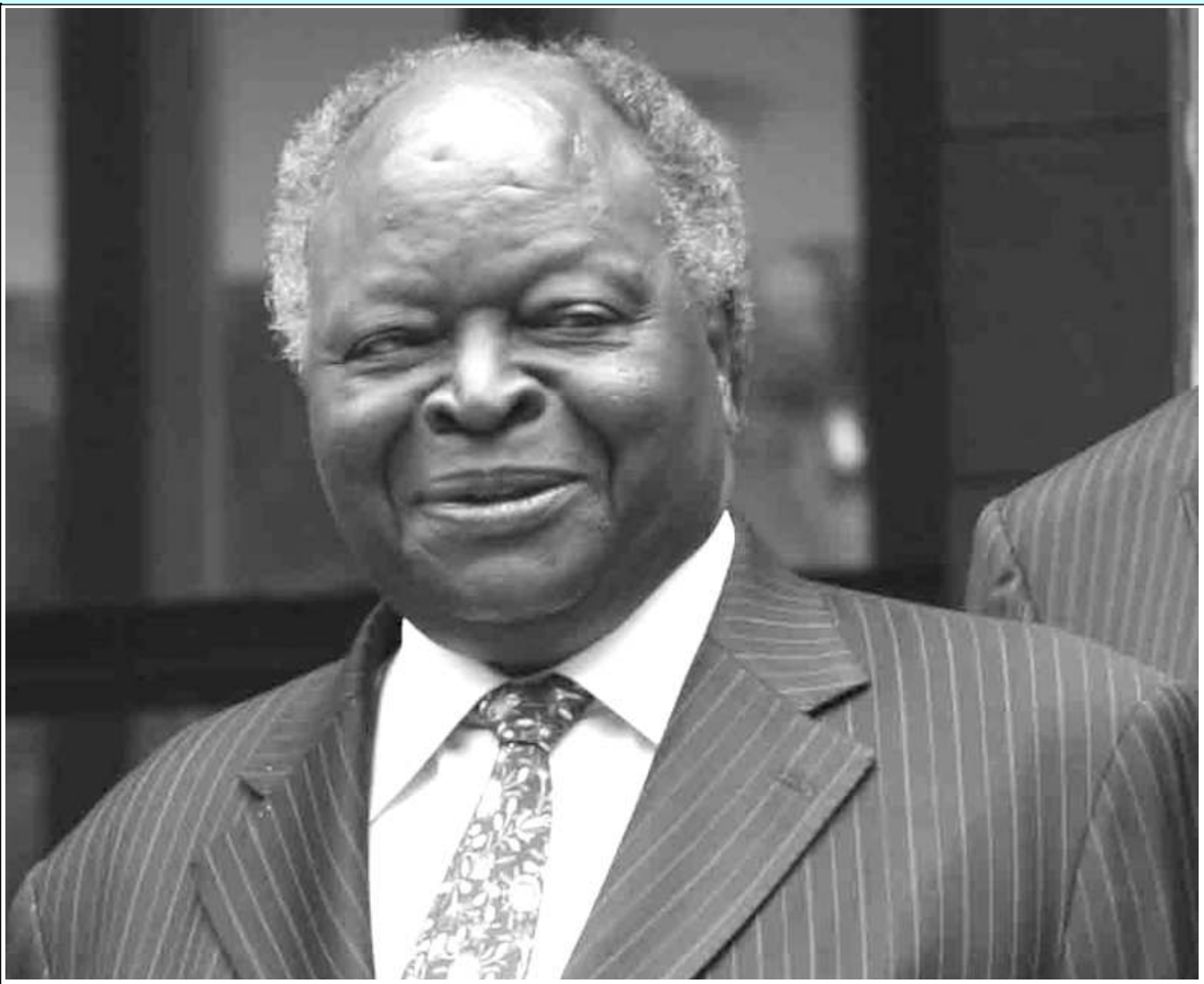
In view of the foregoing, it would not be too far from the truth to state that as at today, we are less than prepared for the impending elections unless we undertake drastic fast tracking of the process.

Forestalling election violence

To be able to understand the measures in the Constitution that are meant to prevent the eruption of election violence, we have to understand the primary causes of the violence in 2007-2008. According to the report by The Commission of Inquiry into the Post-Election Violence (Waki Report) and the report by the Office of the UN High Commissioner for Human Rights (OHCHR), there were three distinct but sometimes concurrent patterns of violence – spontaneous, organised and retaliatory.

While the irregularities in the presidential elections leading to a Kibaki win triggered the violence, the violence was fanned by other underlying factors, including inequalities in land ownership between communities, incitement by political and business leaders and the publication of hate speeches by the media, especially the vernacular stations.

The conduct of State security agencies also contributed to



President Mwai Kibaki - What legacy will he leave Kenyans?

increased violence since they failed to anticipate, prepare for, and contain the violence. In fact, members of the State security agencies were themselves guilty of acts of violence. Finally, when all this had taken place, there was nowhere to obtain redress. The discredited Judiciary could not be trusted to handle a presidential election petition or even to redress the killings. The aggrieved persons therefore, adopted extra legal measures.

Radical changes

Some issues have been addressed through normal legislations rather than the Constitution. These include the amendment to the Media Act 2007, The Kenya Communication Act and the National Cohesion and Integration Act. The Constitution itself contains substantial provisions, which if properly implemented, would forestall future violence. The security forces and in particular the Police force have been restructured into a professional outfit under part 4 of Chapter 14 of the Constitution.

The electoral body was also constitutionally reformed when the discredited Electoral Commission of Kenya was disbanded and replaced with an Interim Independent Electoral Commission and currently, an Interim Electoral and Boundaries Commission (IEBC) is to be constituted while applying the stringent vetting and approvals required by the new Constitution.

As for the Judiciary, radical changes are underway to make it an independent and effective arbiter of disputes. The Supreme Court has been established, a new Chief Justice and his deputy appointed and the vetting of judges and magistrates is about to start, all pursuant to the Constitution.

On the explosive issues pertaining to land ownership, the Constitution has acknowledged the issues and directed the enactment of Legislation on the same within periods ranging between 18 months to five years. As it appears, not much effort has been made on this issue though it

is a perennial underlying cause of election violence. The relevant authorities should realise that unless addressed expeditiously, the issues of land may precipitate another orgy of violence before or after the next elections.

Exact date

No sooner had a draft work plan been prepared by the IIEC showing the elections would be held in December 2012 than a dispute arose between the Constitution Implementation Commission (CIC) and the IIEC on the actual date of the next polls. The CIC maintained that the elections should be held on the second Tuesday of August 2012 as per Articles 101, 136(2) & Article 180 of the Constitution.

The IIEC on the other hand relies on Clause No 10 of the Sixth Schedule to the effect that "The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for its unexpired term". It is, therefore, clear form the said Clause 10 that the parliamentary term of the present Parliament must end first before the next elections are held.

The insistence by the CIC that elections be held on August 14, 2012 can, therefore, not stand since the parliamentary term shall not be over by then. Further, the IIEC's argument that the election must be held on the second Tuesday of August of every fifth year is self defeating because August 2012 will still be on the fourth year. The fifth year's election date, going by IIEC's argument, would then be August 2013.

Under Article 29, the Constitution is to be interpreted in a manner that promotes its purposes, values and principles and contributes to good governance. The Constitution is clear that it was not its purpose to reduce the parliamentary term and by analogy, it is not its purpose either to increase it beyond the term that was legitimately expected under the previous Constitution.

Accordingly, notwithstanding the lack of clarity on a specific date for the elections, it would appear that an election date in the month suggested by the IIEC would fulfill the purposes of the Constitution.

Retention of the IIEC

During debates prior to the passage of the new Constitution and also during the debate on the floor of the House in respect of the Independent Electoral and Boundaries Commission Bill, it became apparent that majority members of the public and their MPs were pleased with the performance of the IIEC.

This happiness was justifiably founded on the fact that the IIEC has performed superbly in all its roles. It had attained some level of independence, it conducted the referendum professionally, it introduced electronic voting and it conducted by-elections in a way that exceeded the expectation of cynics.

As the saying goes, the reward of a thing done well is an opportunity to do more. Therefore, the public appealed that the team at the IIEC be retained when the IEBC is constituted. This was reason behind the inclusion of Clause 28 (2) of the sixth Schedule to the effect that when members of the IEBC are being selected, there be regard for the need for continuity and the retention of expertise and experience.

The need for continuity of a good team is a laudable step to take. It not only ensures that the good work continues, but also that there is retention of experienced staff who are instrumental in supplying institutional memory.

But even as we appeal to for the retention of both the commissioners and the staff members of the IIEC in the IEBC, we must not lose sight of the fact that when people overstay in certain positions, they tend to become complacent. In addition, we must realise that we can never know the worth of a thing or person until we find it.

Therefore, there might be talent out there that may raise the IEBC to even greater heights. Unless a competitive recruitment is done, such talent may never be found. In addition, the IEBC unlike the IIEC's recruitment for office must be done within the confines of the new law.

This means that gender and regional proportionality must be achieved in the commission, a status that cannot be achieved was there to be automatic retention of every IIEC official. Each suitable candidate in the republic has a right to be accorded an opportunity to be interviewed for the positions and if suitably qualified, to be appointed to that office notwithstanding that he or she had not served in the IEBC. KN

Establishing the Supreme Court

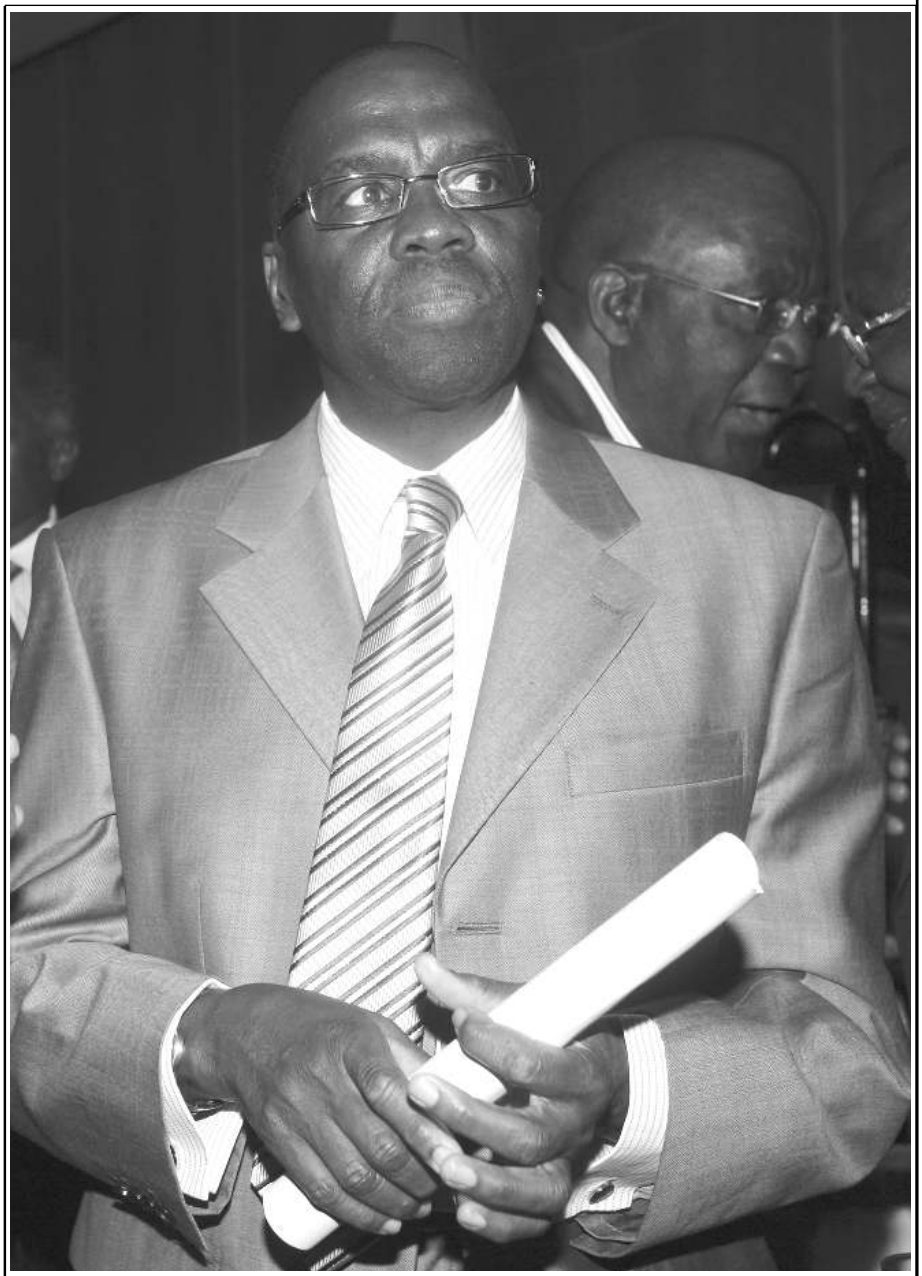
By Ivy Wasike

The Supreme Court of Kenya is established under Section 163 of the Constitution of Kenya and constitutes of the Chief Justice, Deputy Chief Justice and five other judges. Under the said section, a properly constituted bench of the Supreme Court must consist of five judges although the Supreme Court Bill gives instances in which a full bench is not necessary.

The said Court is the highest court in Kenya and other than having appellate jurisdiction, it has exclusive and original jurisdiction for presidential elections disputes. In its appellate capacity, the court is tasked with presiding over appeals that deal with constitution interpretation, matters of public importance and in reviewing of certifications of the Court of Appeal.

Other than the above mentioned, the court also acts as an advisory court to county governments. Under the Supreme Court Act the Court has special jurisdiction, to review judgments of any judge removed or who has resigned from office if the judgment /case was the basis of the complaint.

Prior to the current constitution, the independence constitution did not provide for a supreme court. At independence the independence Constitution under Section 64 established the Kenyan Court of Appeal, which was a superior court with only appellate jurisdiction. The Court of Appeal was retained in the current constitution and is established under Section 164 and maintains its jurisdiction, as before save that it is now the second highest court in the land.



Chief Justice Dr. Willy Mutunga - The hard work is yet to start.

Specific roles

The following are the objectives of the Supreme Court of Kenya as stipulated under the Supreme Court Bill:

i) Custodian of the Constitution

The court's duty is to assert supremacy of the constitution and

in order to achieve this, it is given the mandate to preside over all appeals that deal with constitution interpretation and public importance without a party having to seek leave of the court. Therefore, the court's duty is to ensure that the constitution is safeguarded and interpreted properly and in the interest of the people.

ii) Formulate Laws

In formulating laws, the Supreme Court will do this when exercising both its appellate and original jurisdiction. With the new constitution, depending on the interpretation of the same by the Supreme Court, the legislature may in reaction to decisions of the Supreme Court have to amend existing statutes to conform to the Constitution or make new laws. Further by doctrine of precedence (*stare decisis*) as the highest court in the land all other courts are bound by its decision therefore formulating law through jurisprudence. This new jurisprudence will also largely depend on the interpretation of the constitution since there is no case law on the constitution.

iii) Ensure constitutional and legal transition

This the court can do through both its advisory, original and appellate jurisdiction. As an advisory to the county government, the court should ensure smooth transition from the old provincial administration to the new, which will in turn ensure that the central government works well with the county governments. Through interpretation of the constitution the court shall be aiding in the transition from the independence constitution to the current one without friction, formulating new laws through precedence therefore aiding the legislature in the drafting or re-drafting of laws to conform to the constitution thereby aiding legal transition. It will also aid the courts by setting precedence in transiting from the old constitution.

iv) Improve Access to Justice

The court has special jurisdiction to review judgments where a judge has resigned or been removed from office due to a complaint of the case and come up with its own independent judgment. Further, the court can start an appeal de novo or order that a case be heard afresh. Also on matters of public interest and constitutional matters leave is not needed in order to file an appeal. All these go towards improving access to justice.

From the foregoing, it is clear that the Supreme Court is not only an appellate court as may be expected but has its own original jurisdiction and is an advisory court for interpretation of the constitution.

Composition

Is composed of Chief Justice, Deputy Chief Justice and five judges with the Chief Justice as the president of the court. The judges are to be appointed by the president and all judges are to retire at the age of seventy. According to the Supreme Court Act, the CJ is the senior most of the judges followed by the Dep. CJ and for the other judges seniority goes as per when they were appointed or when they took office or professional seniority.

The CJ serves for a maximum of ten years and in the event his/her term ends before reaching retirement age, the CJ remains on the Supreme Court bench. This therefore clearly shows that the number of judges in the said court can be way more than seven. Despite the constitution's stipulation that the court will be properly constituted when there are 5 judges, the Act makes provisions for instances when the court can be deemed as properly constituted with less than 5 judges sitting.

To qualify for appointment as a judge of the supreme Court an advocate must have been a judge for ten years or practiced as an advocate or in an equivalent capacity for fifteen years.

Supreme Court vis-à-vis Court of Appeal

The Appellate Jurisdiction Act Cap 9 of the Laws of Kenya governs the Court of Appeal. As established and constituted it is an appellate court although it is given High

As the highest court in the land and further a very important aspect in the implementing of the constitution and making of new laws, the Supreme Court judges need to be exceptional either as judges, legal practitioners or in Scholars and other than having the same qualifications as all other judges save for the years of practice.

Gender or merit? Deputy Chief Justice Ms. Nancy Baraza.

Court jurisdiction. Appeals to the said court emanate from High Court decisions and are on matters of law. The main objective of the Court of Appeal is to facilitate just, expeditious, proportionate and affordable resolutions of appeals. Therefore the Court of Appeal is basically mandated to accept all appeals from the High Court.

Thus, save for the appellate jurisdiction, the Supreme Court is quite distinct from the Court of Appeal and there is no duplication of work. In order to appeal to the Supreme Court, leave of court must be sought which leave is granted by the Court of Appeal or the Supreme Court itself and also unless it is prescribed in an Act of Parliament that an appeal can lie to the court. Only on matters of public interest and Constitutional interpretation can one automatically appeal to the Supreme Court.

Section 17 of the Act however states that in exceptional circumstances the Court may take appeals that do not emanate from the court of Appeal. Therefore, in cases that leave will not be granted to appeal to the Supreme Court, the Court of Appeal will retain its powers of precedent and the decisions made then by the Court of Appeal will still remain binding to the lower courts as before.

Preference

An analysis of the Supreme Court Act and the Supreme Court as established indicates some shortcomings. Whereas the appointment of the Deputy Chief Justice and Chief Justice must be approved by the National Assembly, the appointment of the other five judges is as before i.e. by the president as advised by the Judicial Service Commission. Therefore the appointment of these 5 judges can be on political preference and can compromise the independence of these judges.

Further, the judges are tasked with hearing all presidential elections disputes yet they are appointed by the president and are not approved by the National Assembly, which may cast doubt on impartiality of the said judges and the criteria that was used in appointing them.

As the highest court in the land and further a very important aspect in the implementing of the constitution and making of new laws, the Supreme Court judges need to be exceptional either as judges, legal practitioners or in Scholars and other than having the same qualifications as all other judges save for the years of practice.

Alternatively senior judges with great experience should be appointed as Supreme Court Judges as is the case of India. To safeguard the independence of the U.S.A Supreme Court all judges to this court though appointed by the president must be endorsed by the Senate. It is a pity that the criteria that was used to appoint the

current judges of the court is not clear.

Though two of them are distinguished scholars it is not clear how distinguished in the legal field the others have been. Senior Court of Appeal judges were by passed therefore setting a trend that seniority would not matter in these appointments and the president may appoint any person.

Leeway

The constitution should have ensured that the National Assembly must endorse any judge appointed to the Supreme Court for purposes of safeguarding it. Further, although the Constitution only gives the minimum number of the judges of Appeal and leaves room for appointment of more, the clause on the number of Supreme Court Judges seems to be static and does not give much leeway to the appointment of more judges to the Court.

With all the mandate conferred on the Court it is likely that within not much time, there may be need to increase the numbers of judges and divide the court into divisions especially into appellate division and special jurisdiction more so if some appeals may be heard de novo. Many jurisdictions like USA, Canada, India etc have like the Court of Appeal, a minimum number of judges stipulated but not a specific number.

It is not specified whether Court martial's are subject to the Court in any matter, which leaves ambiguity. As a Constitutional Court, just as the UK and other jurisdictions, the court should have been given jurisdiction on Judicial Review matters in order to shorten the process in the event of an appeal from the High Court to the Court of Appeal and eventually to the Supreme Court as most Judicial review matters especially issuance of the writ of *habeas corpus* are very urgent.

Since the main function of the Supreme Court is to be a guardian of the constitution and also ensure smooth constitution and legal transition like Germany and Italy though not commonwealth jurisdictions it would have been preferable if a Constitutional Court would have been established to have the mandate of interpreting the constitution, judicial review, power to overrule decisions that it deems unconstitutional, declare legislation ineffective immediately if it contravenes the constitution etc. instead of lumping together civil & criminal appeals together with constitutional matters. Other than its advisory mandate all other appeals would have been left to the Court of Appeal in order to facilitate expeditious and fast conclusion of cases.

Bogged down

This is the case of South Africa where the Court of Appeal though the highest court in the land is subordinate to the Constitutional Court in matters of Constitutional interpretation. However since a Supreme Court should be a court of limited jurisdiction, it should exercise its discretion to grant leave for appeal wisely just as the USA Supreme Court does so that it is not bogged down by numerous appeals which in turn may make careful deliberation by the judges on matters difficult.

Article 14 of the Act gives special jurisdiction for the reviewing of judgments. This clause stands out from the Act as it does not fall under any of the objects of the Court and further it is not clear whether when reviewing these cases if any, new jurisprudence putting in consideration the current constitution or they shall be reviewed using the then existing law. This clause though laudable may work towards clogging the court.

The Court is as yet to make its rules of procedure and it is not clear whether it will borrow heavily from the Court of Appeal Rules since the Supreme Court Act has in most instances borrowed from the drafting of the Court of Appeal Act. The procedure to be followed is not clear yet as only the procedure for lodging the presidential elections dispute has been prescribed.

It is hoped that it shall not be too technical to approach the court for it to live to its objective of making justice accessible to all yet at the same time it is hoped that the rules shall be technical enough in order to limit the special jurisdiction of the court to enable it do a sufficient job and not be weighed down by numerous cases seeing that its jurisdiction is quite wide and not limited to constitutional matters. Thus the Supreme Court Act gives the court a wide jurisdiction, which may work towards diverting it from its main mandate as a Constitutional Court. KN

The writer is a lawyer and Masters student in international relations at the University of Nairobi.

Much ado about the budget

By Rosemary Kamau

Since Independence, the country has been run through estimates of expected revenue. A budget is a fundamental object in the running of a country. The 2011/2012 Budget experienced a few hiccups, probably because it was a transition year from the operation of the old Constitution to the new one.

There was confusion as to the contents of the budget, when it would be read and who would read it. The new Constitution states that before the end of the financial year, the Cabinet Secretary responsible for finance will present estimates of the country's revenue and expenditure of the next fiscal year.

This gives the National Assembly time to form a committee that would review the estimates, make recommendations before including them in the Appropriation Bill. However, the new Constitution failed to cater for this year. Being a transition year there are no Cabinet Secretaries yet.

Treasury Building in Nairobi. The house of all Kenyan public finances.

The Consolidated Fund is meant to be charged not less than 15 per cent of the monies deposited to it in order to accommodate the yet-to-be a devolved nation. Under the Fifth Schedule it would take at least three years to enact legislation in support of county governments and at least 18 months to enact legislation in favour of the counties revenue.

Full force

With these laws yet to be enacted, how would the Finance Minister have been able to ensure that the estimates in this year's budget catered for the counties? Having not read the estimates two months prior to the end of 2010/2011 fiscal year, Finance Minister Uhuru Kenyatta was seen to be in violation of the Constitution. In part, yes, he did violate the law, as he was meant to alter the current law and adapt the provisions of the new one at least in the spirit of implementing it and giving it full force.

Article 221(1) states that at least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year. After recommendations have been made to the estimates, they are included in an Appropriation Bill

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From left to right, Finance Permanent Secretary Joseph Kinyua, Finance Minister Hon. Uhuru Kenyatta and Deputy Finance Minister Dr. Oburu Odinga take a walk to parliament building for the reading of the budget.

to await assent from the President.

At the beginning of June this year, Members of Parliament stated that they would stop the Finance Minister from reading the estimates. But National Assembly Speaker Kenneth Marende ruled that it was the House to interpret the law in respect to a particular issue. However, he said if there had been a move to court seeking judicial interpretation of the law, then Parliament had no authority other than to respect the judicial interpretation since it was the mandate of the courts to interpret laws.

Lady Justice Jeanne Gacheche ruled in response to an application that the Finance Minister would read the Budget estimates on June 8, the date that all the East African countries would read their budgets as a community. In my view, the Speaker's ruling acknowledged that there is separation of powers in Government and it is Parliament that makes the laws and, therefore, knows the spirit behind a law, while the Judiciary has the mandate to interpret law and can only do so if there is an application seeking judicial determination over it.

But the ruling was also based on facts. A country has to run under a budget and denying the Finance Minister to read the estimates simply because he was out of time would be to deny the whole country its resources.

Financial controls

The new Constitution defines a budget to mean estimates regarding revenue and expenditure, funding for any deficit and should also include how borrowing is to be conducted. In an era of democracy, the new Constitution has ensured that there are financial controls and has involved the public in the budget-making process by ensuring that their views are put into consideration by the Committee of the National Assembly.

Moreover, Parliament shall enact legislation to ensure control and transparency in all government expenditure and establish mechanisms to guarantee their implementation. Article 228 establishes the office of the Controller of Budget, who in every four months is to submit to each of the Houses of Parliament a report on the implementation of the budget for both governments, and shall only appropriate withdrawal of money from public funds in accordance with the law. Article 229 establishes the office of the Auditor-General, who within six

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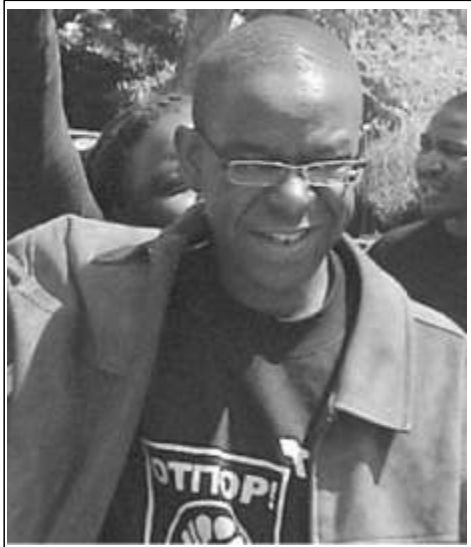
months after the end of the financial year, shall audit and report on the accounts in respect of that financial year.

Despite there being financial controls that ensure public money is being accounted for, a report by the Mars Group shows some discrepancies and thus creates skepticism about the accountability of public money. Mwalimu Mati noted a surplus of Sh87, 325,089,000 and a deficit of Sh163, 781,152,000 in the ministerial statement by the Finance minister. And about Sh251 billion was not accounted for.

Audit

Secondly, it seems there are different audit reports. In November 2008, Treasury stated that the Government had collected revenue of up to Sh516 billion while in June 2009 the minister stated that they collected Sh410 billion. The Controller and Auditor General was to audit the accounts of the National Government and give the report to the Finance minister, who was to present the same before Parliament to take necessary measures.

As per May this year, Mars Group reports that about Sh714 billion was missing and Parliament has not made a statement concerning the matter. Being in control of public money, Parliament should issue a statement to create calmness among the citizens since they entrust their finances with it.



A thorn in the Treasury's flesh, Mwalimu Mati of Mars Group.

Kenyans should demand to see the correct appropriation of funds and the projects set up, and if they are worth our money. Time has come for complete transparency and no half-truths. Despite everything, there has been no outcry by Parliament stating that the reports by Mars Group were false. Either way, there is no smoke without fire.

Conflict

Having the budget reading in mind, there seems to be a conflict of laws. According to the transitional clauses with respect to existing laws, it states that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution (the same has been traversed seriatim).

This, therefore, means that the old law is only applied when all the laws under the new dispensation are not yet in force, but having considered the provisions of the new law. The rule of law should always be upheld, no one is above the law including the lawmakers.

The Constitution is the supreme law and should be followed to the letter with no exceptions. In the event of a conflict, an application can be made to Parliament or to the courts. The former is to know the spirit behind the law while the latter because they are mandated to do so. This will not only prevent commission of a crime, but will show efforts at democracy. KN

The writer is a law student at Kenyatta University, Parklands campus.

Vetting of public officers

By Albert Irungu

In an unprecedented move, senior public officers will be vetted to determine their suitability and credibility for public office. In the previous constitutional dispensation, the President arbitrarily made appointments to senior public offices without consultation. No probe and/or scrutiny was conducted to ascertain the integrity and competence of candidates to effectively do the work that the position demanded.

But last August when the new Constitution was promulgated, everything changed. Now, personalities nominated for high public offices had to pass through vetting. Never before did Kenyans have a chance to interrogate and scrutinise nominees for these positions.

Kenyans have welcomed the vetting process after decades of rot and corruption in governance and lawmaking institutions. These institutions have been known to work for the affluent and powerful in the society. They have been characterised by corruption, mismanagement and injustices against the majority of Kenyans who they are meant to serve.

With the need to reform Kenya's governance systems and institutions, it was imperative that the Judiciary should be reconstituted to come up with a graft-free system. The vetting process has opened up the appointment of candidates to key public offices through direct and indirect public participation.

Appointments

Vetting has been provided for in section 23 of the Sixth Schedule of the Constitution and the Government has published and operationalised it through the Vetting of Judges and Magistrates (Amendment) Bill, 2011. The process provides an opportunity for the public to scrutinise nominees for high public offices, their professional competence, integrity, fairness, temperament, good judgement, legal and life experience, commitment to public service and communication skills - specifics of which are well elaborated in the Act.

The Constitution provides that the President in consultation with the Prime Minister will nominate candidates to public offices who then will be vetted by relevant commissions then passed on to Parliament for approval before being sworn in by the President. The Constitution states in Article 66 (1): "The President shall appoint (a) the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and (b) all other judges, in accordance with the recommendation of the Judicial Service Commission."

The commission in charge of vetting nominees and applicants for judicial positions is the Judicial Service Commission (JSC) and it constitutes two members appointed by the President, two representatives of the Law Society of Kenya (LSK), as the voice of the legal profession, and three

Parliament Building, the seat of the country's decision making.

members of the Judiciary, each representing the three tiers - the Court of Appeal, the High Court and the magistracy.

The process

The Sixth Schedule of the new Constitution provides in section 23 that within one year after effective date, Parliament shall enact legislation establishing mechanisms and procedures for vetting the suitability of all judges and magistrates who are in office on the effective date of the new Constitution. After the enactment of the proposed legislation by Parliament, the JSC advertised the positions to be filled in the national dailies.

The vetting is two-fold. One, to probe and screen the suitability of new senior public officers, for example the chief justice, his/her deputy, the director of public prosecution, Supreme Court judges as well as new High Court judges, and to scrutinise current judges and magistrates before rehiring them if they pass the ethical and integrity bar.
The public has had an opportunity to actively participate in this process.

The LSK invited written submissions from the public to find out if a serving judge or magistrate has met the constitutional suitability thresholds for appointment as a judge of the superior court or as a magistrate; whether there are any pending or concluded criminal cases before a court of law against the concerned judge or magistrate and if there are any recommendations for prosecution by the Attorney-General or Kenya Anti-Corruption Commission; the track record of the concerned judge or magistrate including prior judicial pronouncements, competence and diligence.

Capitol Hill, United States of America. Which decisions are made here?

Interviewed

The window for any relevant complaints from any person or body but not limited to the LSK, Kenya Anti-Corruption Commission, Disciplinary Committee, Advocates Complaints Commission, the Attorney General, Public Complaints Standing Committee, Kenya National Commission on Human Rights, National Security Intelligence Service, the Police and the Judicial Service Commission are also welcomed.

Short listing of the candidates then followed and were interviewed by the JSC. According to the Constitution, this committee was to propose at least three candidates for each position and forward them to Parliament. But they only provided one candidate per post, which was a bone of contention with the Kenyan civil society.

Parliament through the Departmental Committee on Legal Affairs conducted their own vetting. In this case, the process was taken over by the Constitutional Implementation Oversight Committee, which replaced the Departmental Committee on Legal Affairs due to internal wrangles. The committee then forwarded the candidates' names to Parliament. Members of the House voted and after the majority agreed on the proposed candidates they were forwarded to the President to assent and swear in the chosen personalities.

Recent vetting

Kenyans religiously followed the recent vetting of candidates for the Chief Justice, Deputy Chief Justice and the Director of Public Prosecution in the media. The kind of questions posed to the candidates dug deep into their education and careers. Indeed, questions to do with past rulings, associations, practices and education laid bare the personal and professional lives of the candidates. For example, the newly appointed Chief Justice, Dr Willy Mutunga, was questioned on his stand on homosexuality and if the ear stud he wears is a sign that he is one.

The nominations were received with mixed reactions with various lobby groups, among them the Kenya Christian Professionals (KCP), faulting the process. Among the contentious issues was the logic behind JSC forwarding one nominee per position to Parliament instead of several names, essentially making itself an appointing body. Many felt that

the JSC did not emphasise on personal and judicial philosophies of the nominees, but instead focused more on trivialities.

In the arena of public opinion, there has been mixed reactions to the process. The process does not have any local precedence, thus there has been dissatisfaction in the manner the interviews were conducted. Some Kenyans felt lines were crossed that should not have been. Issues to do with lack of gentility, respect and opportunities to be heard have reigned supreme in any analysis of the recently concluded process.

Atwoli committee

The process conducted by the Public Service Commission (PSC) headed by Francis Atwoli to vet candidates for the Director of Public Prosecution was unlike the vetting of the Chief Justice and his deputy; it was done in secret. In addition, accusations of corruption and incompetence were leveled against the now elected Mr Keriako Tobiko. This was different from the JSC-led vetting, which was done in public and well covered by the media. The PSC team did injustice to the process by denying Kenyans chance to participate.

The vetting for CJ and his deputy came up with unpredictable results — no current sitting judge made it to the two top positions. Leaving out current judges for these positions was a sign of the need to have a new beginning in the Judiciary. With a new chapter this creates renewed confidence in the Judiciary, which has become seriously eroded over the years due to corruption and inefficiency. With new faces in the high positions of the judicial system, reforms will not be met with resistance.

Best practice

America has one of the best systems of voting for judges worldwide. Instead of a sitting President being the sole authority in selecting these superior public officers, he/she nominates candidates who then must undergo vetting by the Senate.

Lawyer Mr Ahmednassir Abdullahi. Demon slayer or simply belligerent?

In South Africa, the Judicial Service Commission plays an important role in the appointment of judges and also advises the government on any matters relating to the Judiciary and the administration of justice.

In Germany, one of the biggest countries in Europe, judges are not chosen from a pool of practicing lawyers, rather they follow a set career path. At the end of their legal education at university, law students must pass a State examination before they can become apprentices that provide them with broad training in the legal profession over several years. They then must pass a second State examination that qualifies them to practice law. At that point, the individual can choose either to be a lawyer or to enter the Judiciary. Judicial candidates must train for several more years before actually earning the title of judge.

There are plans in Parliament to introduce a Bill that will provide a proper framework for vetting. The Public Appointment (Parliamentary Approval) Bill, 2011 will present ground rules on how vetting of any public officer should be conducted. In the absence of these rules, the process was a political showdown with many irrelevant questions being asked and a lot of showmanship taking place. KN

The writer is a communication officer with APHRC.

Can it work?

Merging KNHRC with other commissions

By Macharia Nderitu

The Kenya National Commission on Human Rights (KNCHR) is established under the Kenya National Commission on Human Rights Act. Its functions include to investigate human rights violations; to visit prisons and places of detention to assess and inspect the conditions and make recommendations; public education on human rights; to recommend to Parliament measures to promote human rights; to act as the chief agent for compliance with international treaty obligations; to cooperate with other institutions to promote and protect human rights in Kenya; and to investigate and conciliate complaints on human rights violations.

The commissioners are vetted by Parliament prior to appointment. The commission is independent and accommodates the diversity of the Kenyan people; observes the principle of impartiality and gender equity; has regard to applicable international human rights standards and indivisibility, interdependence, interrelatedness and of equality of human rights and the dignity of all human beings; and observes the rules of natural justice and fairness. The budget of the commission is prepared through the Ministry of Justice and Constitutional Affairs.

In the footsteps of Ahmednassir - KNHRC Deputy Commissioner Omar Hassan.

The National Commission on Gender and Development was set up under the National Commission on Gender and Development Act. Its functions are to participate in the formulation of national development policies; to supervise the implementation of the national policy on gender; initiate and advocate for legal reforms on issues affecting women, and to formulate laws and policies that eliminate discrimination against women.

The commission is also mandated to institute proposals and advise on institutional mechanisms which promote gender equity and equality, and access to education, healthcare, nutrition, shelter, employment and control of economic and national resources; determine strategic priorities in socio- economic, political and development policies; to create public awareness for gender issues; conduct and co-ordinate research activities on gender issues; investigate gender-based violations; and receive and evaluate annual reports on gender mainstreaming and women's empowerment.

Abuse of power

The Public Complaints Standing Committee was constituted by the President under a Gazette Notice. The committee reports to and its members are appointed exclusively by the President. The committee is inept in investigating maladministration since majority of the complaints relate to the

Executive, which is the appointing authority. The committee has not operated independently and is yet to deliver results. It has proved to be structurally deficient since it was formed.

The Constitution establishes the Kenya National Human Rights and Equality Commission. Its functions include to promote respect for human rights and develop a culture of human rights; to promote gender equality and facilitate gender mainstreaming in national development, to promote the observance of human rights; to monitor and investigate observance of human rights; to receive and investigate complaints on violations, act as the principle organ in ensuring compliance with human rights obligations and to investigate complaints of abuse of power, unfair treatment, manifest injustice or maladministration.
Article 59(3) of the Constitution provides that everyone has the right to complain to the commission on alleged breach of human rights.

Parliament shall enact legislation establishing the commission. Such legislation may restructure the commission into two or more separate commissions and assign functions. Each commission shall have the powers equivalent to the powers of the commission under the Constitution. The commission can summon witnesses for the purposes of investigation and shall consist of three to nine members.

Pros

a) Operating three commissions will be expensive to the taxpayer, which will negatively impact on human rights protection and promotion. The commission shall have a maximum of nine members and supporting staff.

b) Human rights and gender issues are overlapping and inseparable and creating multiple commissions will dilute the human rights voice and undermine the interdependence and intersectionality of human rights. The grounds of discrimination listed in Article 27(8) of the Constitution cannot be the basis for formation of separate commissions. Discrimination must be tackled in a multifaceted, structured but unified way.
c) The commission should be centralised to ensure accountability, independence and autonomy. Parliament will face difficulties keeping 12 commissions and independent offices established in the Constitution accountable.
d) One commission will be convenient to the public and will ensure effective service delivery for redress against violations. The commission will manage recommendations and render advice without contradiction or fragmentation. Human rights are indivisible, interrelated and interdependent.
e) One commission will eliminate the possibility of shopping for jurisdiction among multiple commissions. Dispersal of services to the counties will be more effectively, credibly and cost effectively achieved by one well-resourced commission. Article 6(3) of the Constitution requires national organs to ensure reasonable access throughout the Republic. Parliamentary calendar is clogged and hence the need to save parliamentary time by establishing one commission.

Cons

i) It has been argued that gender issues will be inadequately addressed in one commission. Gender Commission should be strengthened structurally and financially. Further, affirmative action and gender questions are central in the Constitution and must be reaffirmed through a separate commission. The Constitution provides that neither gender shall occupy more than two thirds of public appointments. This argument is an attempt by politicians to win favour of women with a keen eye on the General Elections.

The Gender Commission has been ineffective in ensuring gender mainstreaming. The gender question is part of human rights discourse and the unified commission will be adequately staffed and resourced to monitor and protect the gains for women.
ii) The three commissions are anticipated in Article 59 of the Constitution. Article 59(4) and (5) of the Constitution provides for creation of separate commissions on gender and administrative maladministration.
iii) The three commissions are different in structure, substance, execution and mandate. The human rights agendas of the gender development and administrative justice should be pursued independently for the greater and common good of human rights. The institutional gains made by the Gender Commission and Public Complaints Standing Committee will be lost.

The two commissions have been ineffectual and acted as *status quo* commissions. The criterion for appointment of the members was exclusive to the Executive, without an independent vetting mechanism or approval by Parliament. The Gender Commission is bloated with 18 commissioners, with eight Government representatives in the form of Permanent Secretaries and the Attorney General and ten

appointees of the minister. Such a commission cannot be effective, independent and accountable.

Paris principles

The General Assembly of the UN has formulated guidelines on National Human Rights Institutions. The Principles serve as the benchmarks for evaluating establishment and operation of the institutions. The national institution must to be competent to promote and protect rights with a broad mandate sanctioned in law.

The functions include rendering advisory opinion to the Government on human rights including opinion on legislation, situations on violations reports on human rights situations, and drawing attention to the Government on violations; to promote and ensure harmonisation of national legislation with international treaties; to encourage ratification and accession of treaties and to contribute to reports to UN agencies and regional treaty bodies. The institution should cooperate with UN on human rights, assist in formulation of teaching programmes on human rights and publicise efforts to combat discrimination.

The institution should have pluralist representation of the social forces involved in human rights including civil society, universities, trends in philosophy and religion, parliament and Government, in an advisory capacity. The institution shall have adequate funding with its own staff and premises.

The commission shall be free to consider any questions in its competence, hear any person and obtain information and documents, educate the public, meet regularly, establish working groups, consult with other bodies responsible for promotion of human rights, and develop partnerships on human rights.

The institution may be authorised to hear and consider complaints. The commission shall seek amicable settlement through conciliation or binding decisions on the basis of confidentiality, shall inform party of their rights and promote access to such rights, shall hear complaints and transmit decisions to the relevant authority and make recommendations to competent authorities, including on laws.

Other jurisdictions

Ghana

The Commission on Human Rights and Administrative Justice is set up in the Constitution and an enabling Act. It has a human rights, ombudsman and anti-corruption mandate and is made up of the Commissioner and two

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Deputy Commissioners. The officials are appointed by the President acting on the advice of Council of State.

It has branches in regional capitals and in 100 out of 138 districts and is empowered to investigate complaints of human rights violations, abuse of power, corruption, complaints concerning maladministration, corruption, and educate the public on human rights. It is empowered to investigate and to order the production of documents or records.

The commission cannot investigate matters which are pending in court, relations between Governments or an international body and matters relating to exercise of the prerogative of mercy. Disputes are resolved through negotiation, mediation, panel hearings, and filing cases before competent court for enforcement.

The commission is independent and is not subject to control of any other person or authority and files an annual report with Parliament and recruits its staff in consultation with the Public Service Commission. The salaries and expenses of the commission are charged to the Consolidated Fund. It submits its budget to the Ministry of Finance for approval and is partly funded by donors.

One challenge is the broad mandate and powers over human rights, administrative injustice and corruption. The model appears cost effective. However, the funds allocated do not match the budget. The mandate should be streamlined and clarified. The commission is unduly bureaucratic and overburdened with work, which affects efficiency and quality and it lacks complete financial autonomy.

The procedure for budgetary allocation is cumbersome and the disbursement is irregular. The commission files applications in court to enforce its decisions. A simpler procedure of enforcing its decisions should be adopted. The commission has a high staff turnover due to low salaries and unattractive conditions of service.

The commission has a high reputation locally and internationally and is a forum of choice for dispute resolution due to expeditious and informal dispute resolution mechanism. It has shared its experiences with other African countries including the Gambia, Sierra Leone, Tanzania and Zimbabwe and has demonstrated complete independence.

United Kingdom

The Equality and Human Rights Commission is responsible for promotion and enforcement of equality and non-discrimination in Britain. The commission has merged the functions, which formerly were performed by Commission on Racial Equality, Equal Opportunities Commission and Disability Rights Commission. It was established under the Equality Act, 2006. It has power to apply for judicial review and intervene in court and can issue compliance notices to public authorities. The commission can investigate unlawful discrimination. The commission has been accredited as National Human Rights Institution by the UN. It presents shadow reports to UN treaty bodies.

Germany

The Constitution of Germany emphasises the protection of human rights and provides that human dignity is inviolable. The German Institute for Human Rights was established in March 2001 on the recommendation of Parliament. The mandate of the institute includes the provision of information and documentation, research, policy advice and human rights education. The institute acts as an open communication platform on human rights issues and performs an important bridging function between state authorities and non-governmental stakeholders.

The institute was established in conformity to the UN Paris Principles. To secure its independence from governmental influence, the enabling law regulates decision-making and management procedures. The board of trustees, which approves the work plan and its budget, represents the political and societal pluralism in Germany.

The board has representatives of civil society, academia and media, parliamentarians and government representatives. In line with the Paris Principles, the government representatives do not vote. The core funding of the institute is provided by the Government. The Institute endeavours to address specific human rights issues and has carried out many activities and published expert publications. The institute complements existing human rights protection mechanisms. Its independence is a central asset but it should consult and engage during formulation of legislation.

Germany, at the Federal level, has commissioners who deal with matters relating to rights. The mandate, appointment procedure and independence vary considerably. Some commissioners have an advisory role and act as policy co-coordinators while others have independent ombudsperson functions with an explicit mandate to receive complaints. The commissioners include:

- The Federal Commissioner for Data Protection and Freedom of Information is administratively attached to the Federal Ministry of the Interior.
- The Defence Commissioner, responsible for complaints emanating from the military and is attached to the Parliament.
- The two Commissioners are elected by Parliament for five years and can receive complaints, investigate and request access to authorities' records.
- The Commissioner for Human Rights at the Ministry of Justice represents Government before the European Court of Human Rights and monitors the national execution of the Court's judgements.
- The Commissioner for Human Rights Policy and Humanitarian Aid serves on UN Human Rights Council, provides policy advice, and informs the public on human rights policy in foreign affairs.
- The Commissioner for Patient's Affairs.
- The Commissioner for Disability Affairs.
- The Commissioner for Emigrants and National Minorities.
- The Commissioner for Immigration, Refugees and Integration whose mandate includes receipt of individual complaints against public authorities.

The commissioners have an advocacy role to support the concerns of the relevant groups on government policies. Unless specifically conferred, their mandates do not include receiving complaints. Public bodies are required by law to supply information to and answer the questions of the Commissioner for Immigration, Refugees and Integration and the Commissioner for Disability Affairs.

Other commissioners advise the Government on policy and give opinions on draft legislation. They serve as policy co-ordinators and contact points for government authorities and other interest groups. They are appointed for the term of Parliament and their number varies in each legislative period.

Way forward

The Public Complaints Standing Committee and Gender Commission have performed dismally compared to KNCHR. There is no basis for immediate formation of multiple commissions. The functions are intertwined and can be handled from an indivisible, interdependent and interrelated perspective. The gains supposedly being lost by merging the commissions are minimal and it appears that the campaign for separate commissions is driven by desire to create jobs for sitting commissioners.

The commissioners serving in the three commissions should be barred from appointment once the commission is reconstituted to ensure sober debate and independent thinking. The commissioners should be impartial in the implementation process to facilitate accountability and transparency. KNCHR has interpreted and implemented its mandate well and has established the necessary framework that can be enhanced to create an effective, independent and impartial commission. If the KNHREC proves ineffective, a case will be made for formation of other commissions.

The challenge of a broad mandate can be resolved through adequate financial and human resourcing of the commission. In Ghana, the broad mandate has been cited as a hindrance due to the limited funds made available by the Government to the commission and poor working terms for the staff. The commission should be granted full financial autonomy and be adequately staffed to enable it to establish presence in all parts of Kenya.

Most of the work at the commission will be performed by the staff with the commissioners retaining an advisory and oversight role. It will be expensive to establish the infrastructure and staff for three commissions. The financial outlay will not guarantee effective and efficient service delivery. Unlike in Ghana, the Kenyan Constitution creates the Ethics and Anti-Corruption Commission, which will investigate corruption, as a successor to the Kenya Anti-Corruption Commission. KN

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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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