

September/October 2011

KatibaNews

The birth of a new Republic

Give unto Caesar what is Caesar's

Taxation under the new constitutional order

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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.

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This newsletter is meant to:

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

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

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The right to adequate food

Can the law fix the broken food chain?

By Joseph Kibugu

The media has of late been replete with images of starving Kenyans and dying livestock due to famine. Children are reportedly eating wild fruits. The Government's response to the crisis has loudly and perhaps justifiably been criticised from various viewpoints. The effects of the predictably cyclic famine seem to worsen with each series.

All this is despite local, regional and international commitments and declarations by the Government to secure adequate food for all by undertaking to invest in food production, storage, distribution, marketing and the improvement of infrastructure. This essay briefly examines the ongoing food crisis against the backdrop of these commitments.

Article 43(1) (c) of the Constitution guarantees the right to be 'free from hunger, and to have adequate food of acceptable quality'. Further, Kenya has ratified basic international human rights instruments and supported international declarations that either directly or impliedly guarantee the right to adequate food or commit the State to take specific measures to achieve food security.

For instance, the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Kenya signed in 1972, binds state parties to recognise the 'right of everyone to an



Kenya Red Cross distributing food aid in the North Eastern Province.

adequate standard of living for himself and his family, including adequate food...' The African Charter on Human and Peoples' Rights has been interpreted as guaranteeing the right to food. The first UN Millennium Development Goal targets eradication of poverty and hunger by the year 2015.

The Constitution binds the State to ensure protection of internationally recognised human rights by enacting and implementing legislation to fulfil its international obligations in respect to human rights and fundamental freedoms.

Article 21 of the Constitution provides that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. The duty to respect entails refraining from interfering with its subjects' enjoyment of rights so that

they can freely use their resources in pursuing their enjoyment of their rights (for instance, not unlawfully appropriating private agricultural land).

Remedies

The duty to protect means protecting right holders from interferences by third parties through legislation and provision of effective and accessible remedies (for instance, enforcing criminal sanctions against malicious damage to food crops). The duty to promote rights involves raising awareness and building infrastructure to enable individuals and groups to exercise the rights (such as road construction to improve access to markets by producers).

Finally, the duty to fulfil requires the State to move its machinery and directly provide the basic needs especially for vulnerable population who may not realise the rights on their

own (for instance, provision of relief food to the starving).

The Constitution requires the State to take legislative, policy and other measures to achieve the progressive realisation of the right to adequate food. It further obligates all State organs and public officers are under a duty to address the needs of vulnerable groups within the society.

If a constitutional right (such as the right to adequate food) has been infringed, denied, violated or threatened, the Constitution provides that right holders should have access to an effective remedy.

Ecosoc Rights

Effective remedies ensure that grandiose human rights visions become a reality for the right claimants. Different jurisdictions interpret and shape the contours of state obligations in regard to economic, social and cultural rights (Ecosoc) diversely.

Whereas some are open to 'intrusive' judicial scrutiny of executive's strategy

towards the realisation of the rights, others leave it to the States 'margin of appreciation' and are reluctant to interfere. The real test of the scope of State duties in Kenyan situation will be best ascertained once a judicial interpretation of its parameters has been concluded.

Opponents of judicial enforcement of Ecosoc Rights argue that their enforcement amounts to interference with the role of the executive in resource allocation. They further posit that these rights should be realised progressively and reject the notion that the State is under an obligation to guarantee a basic minimum package, even to populations in dire straits.

For instance, South Africa has shied from ratifying the ICESCR as it would be inconsistent with its interpretation of State obligations for Ecosoc Rights. This issue arose in the South African Constitutional Court in the case of *Mazibuko V City of Johannesburg* where the interpretation of the constitutional provision guaranteeing everyone the 'right to sufficient water' was under judicial scrutiny.

implementation of and elaborates covenant obligations, has affirmed that in circumstances where the population is threatened unless there is immediate intervention, the obligation is to immediately intervene to secure the realisation of the right (ie the State should honour its duty to fulfil the rights).

For instance, direct provision of relief food in case of famine or provision of medical supplies to a poor population in the event of an epidemic. According to the committee, derogation from this duty is only justifiable if the State can demonstrate that it has utilised all the available resources to secure the enjoyment of this right, including a timely appeal to the international community for intervention in cash, kind or technical expertise.

Supreme Court

In 2001, several States in India faced a cyclical drought. The government failed to make the minimum requirement for the starving population. Redress was sought against the government in the Case of *People's Union for Civil Liberties V. Union of India*.

The Indian Supreme Court ordered the government to take concrete measures to secure immediate enjoyment of the right and 'see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children...'

States were required to identify families living below poverty line and articulate to the court how the various government schemes were helping people cope with the crisis. Provision of ration and cooked lunches to all children in government schools was also ordered. The Court monitored and supervised these orders to ensure compliance.

We should scrutinise the reasonableness and totality of government strategy to secure food security to conclude whether the Government is fulfilling its Constitutional obligation. The South African Constitutional



The Minister for Agriculture Dr. Sally Kosgey. Can she deliver food security to Kenyans?

Unreasonable

The Court affirmed the right of litigants to seek judicial enforcement but observed that progressive realisation of these rights takes time and deferred to the executive to determine the measures to be taken to realise the right. To the Court, interference with the decision of the executive would only have been justifiable if the measures taken to realise the right had been unreasonable.

The UN Committee on Ecosoc Rights, which monitors

Court, in *Government of the Republic of South Africa and others V. Grootboom and others* offered helpful guidelines to assess whether there is any violation of Ecosoc rights.

The Court stated that the following should be considered:

- a) Is the relevant government programme comprehensive and co-ordinated that it allocates responsibilities and tasks to the different spheres of government and ensures appropriate financial and human resources are available?
- b) Are the measures adopted directed towards the progressive realisation of the right within the state's available means?
- c) Are they reasonable both in their conception and implementation?
- d) Are they balanced and flexible to make appropriate provision for attention to the right to (food) crises and to short-term, medium and long-term needs?
- e) Do they respond to those whose needs 'are most urgent' and whose ability to enjoy all rights is therefore most in peril?

Crisis

The Kenya Government's strategy to secure the right to food should be examined by considering some of these questions. Is the budgetary allocation to agricultural activities sufficient in view of the critical role of the sector in creating employment and ensuring food security?

Did blatant disregard of adverse weather forecast affect Government's preparedness to deal with the current crisis? What long-term policies are in place to correct the incongruous trend of bounty in one area of the country and starvation in another?

How has poor infrastructure hampered opening up arid and semi-arid areas for agricultural production and trade in food items? How efficient is the Government machinery in detecting needy cases and initiating timely response? What long-term steps exist to accelerate agricultural production and forestall future crisis? Has the Government provided



Shillings and cents! The prices of locally manufactured goods have hit the roof.

incentives for proper land use patterns to promote food security?

Are there credible efforts to correct environmental degradation, maximising use of the available arable land and ramp up land reclamation efforts? Is the Government promoting any alternative to rain fed agriculture?

Kenyan for Kenya

Business enterprises may impact enjoyment of human rights. For instance, sound initiatives to stimulate agriculture, education and health provision advance human rights. Activities such as unplanned mining may introduce toxic waste that may threaten livelihood and threaten the enjoyment of human rights.

Awake to this growing reality and the inability of weak states to hold such businesses to account, in 2005 the UN Secretary General appointed a Special Representative to investigate and clarify the relationship between businesses and human rights and whether they had any obligation to secure enjoyment of rights. At the conclusion of his tenure, the Special Representative advised that the legal obligation to protect human rights still squarely on the State.

The Kenyan Constitution does not impose such a duty on private entities either. The Kenyan initiative is, therefore, a pure act of charity. If the initiative was non-existent or flawed, there would be no

redress by the intended beneficiaries on the basis of violation of human rights. It would simply be charity gone awry.

Scope

By any stretch of Constitutional interpretation, the starving Kenyans cannot be said to enjoy the Constitutional right to adequate food. As they starve and die in indignity, the Constitution provision and international human rights instruments ring hollow to them.

Scholars, lawyers and policy makers will soon debate the contours of this right. The courts may be invited to interpret the scope of the right. However, any interpretation that fails to seriously scrutinise the Government's strategy towards food security and the implementation would buttress the fear that the provision is just but a hollow hortatory as opposed to a hallowed right that protects human life and dignity, should the unnecessary suffering witnessed today recur in future.

The Executive does not seem to have done enough to make this guarantee a reality. Perhaps it is time the Judiciary intervened and interpreted what the right to adequate food means. [KN](#)

The writer is an international human rights lawyer.

Old wine in new wineskins!

The Political Parties Act, 2011

By acknowledging the important role political parties play in enhancing democracy in a state, Kenya has come of age. This realisation has shaped the recent legislative moves to institutionalise these entities. What new political order can we expect in the new Constitution?

By *Katiba News* Correspondent



Will this old House accommodate new thinking after 2012 General Election?

The need also to have the hitherto Political Parties Act 2007, compliant with the new Constitution and the continued lack of political hygiene in the management of political parties has ultimately led to the enactment of the Political Parties Act, 2011.

To comprehend this new legislation, it is imperative to first undertake an overview of the Principal Provisions of the Act and then attempt to forecast the Act's effect on politics in Kenya. Thereafter, it would be apt to take a peep into the recent controversy relating to pre and post-election coalitions and how other nations tackle the issue of coalitions.

Finally, a discussion of the new Act will be incomplete without examining the adequacy of the provisions relating to political parties' funding, the newly introduced concept of and place of independent candidates across all political levels and the safeguards against the detestable but common practice of party hopping.

Preamble

This Act was enacted pursuant to the requirement of a new Political Parties Act under Article 92 of the Constitution. It repeals the Political Parties Act of 2007. Its preamble affirms that the purpose of the Act is mainly to provide for the registration, regulation and funding of political parties.

The Act has six parts. Part I provides the short title, the commencement date and the meaning/interpretation of some terms as used in the Act. Part

It recognises and provides for the formation and registration of political parties. This part requires every political party to be registered and to meet the criteria set out in Article 91, including the bearing of a national character, and evidence of promoting good governance and national unity.

Part II also provides for the provisional registration of parties, the formation of coalitions and mergers of political parties. It requires coalition and merger instruments to be deposited with the Registrar of Political Parties. The part also regulates the manner in which political parties conduct their affairs, outlines the manner of resignation of members and it also criminalises the joining or supporting a party while still a member of a different party.

Part II also designates political parties as corporate entity, requires them to maintain crucial records at their head office and also outlines the mode of changing a party's Constitution or the mode of deregistering it altogether.

Part III of the Act relates to the funding of political parties. It establishes a Political Parties Fund to be funded by the State whose distribution of funds is dependent on the number of votes garnered by a party in the preceding election.

Proscribed

Parties under this part can source funds through membership fees, voluntary contribution and donations but cannot source from foreign governments and NGOs. Individuals are proscribed under this part from contributing more than 5 per cent of the expenditure of the party. Finally, Part III makes it compulsory for parties to furnish audited accounts after every financial year and also at least 90 days before any general election.

Part IV of the Act establishes the Independent office, functions and powers of the Registrar of Political Parties as well as the manner of his appointment. It also provides for the establishment of the Political Parties' Liaison Committee as a platform of

dialogue between political parties and the Independent Electoral and Boundaries Commission.

Part V of the Act establishes the Political Parties Disputes Tribunal and the final part, Part VI, relates to general matters including penalties for offences and winding up of political parties. The Act also has three Schedules. The first has the code of conduct for political parties, the second emphasises the matters to be contained in a constitution of a political party and the third schedule outlines the basic requirements for a coalition agreement.

Democratisation

With the repeal of section 2A of the former constitution, there was hope that the entry of multi-parties would usher in a new era of democratisation. Contrary to expectations, the high proliferation of parties that followed brought with it an era of unprecedented party indiscipline, unhygienic party politics and lack of loyalty to parties.

However, the strict provisions of accountability, transparency and loyalty under the Political Parties Act shall no longer permit the aforementioned undesirable conduct. With no legal framework in the past, it was common to have several parties registered with similar names or symbols such as Ford-Kenya, Ford Asili and Ford People, NARC and NARC Kenya or ODM and ODM Kenya. The new Act empowers the Registrar to refuse registration of a party with names or symbols similar to those of an existing party.

Section 10 and 11 of the Act allows pre- and post-election coalitions as well as mergers of political parties. In the past, most parties were formed for expediency reasons rather than for principles and ideologies. With no remarkable differences of ideologies between them, the existing 47 registered parties are likely to merge or form coalitions in order to survive under the new stringent rules.

Under the new Act, the affairs of the parties shall receive equitable airing

on State media particularly Kenya Broadcasting Corporation (KBC), unlike in the past where only the ruling party benefited with coverage from the state media. Further, the era of failing to keep proper records of members, assets, accounts, liabilities and expenditures is over. Parties now have to shape up or risk deregistration.

National character

The provisions on public funding of parties and the prohibition of certain donations shall free parties from their captivity as personal properties of their leaders and financiers. In the same vein, briefcase parties have been dealt a fatal blow by the provision requiring the maintenance of proper records, the requirement for a party with a national character, the requirement of having in place democratically elected officials and the requirement of a physical address accessible by the Registrar at any time.

The requirement of gender mainstreaming in the management of political parties will increase women participation in political affairs and possibly bring them to the frontline of political parties management.

Finally, the office of the Registrar of Political Parties has been made an independent office free from the control of any person. This independence shall allow the registrar to be expedient and effective in maintaining order and discipline within and between political parties.

During the recent debate on the Political Parties Bill 2011, the most heated arguments related to the question of coalitions. The initial Bill had proposed both pre- and post elections coalitions. The Committee on the Implementation of the Constitution (CIOC), however, introduced an amendment seeking to outlaw pre-elections coalitions on the ground that such past coalitions bred unstable governments like the NARC government.



Prime Minister Hon. Raila Odinga - *Aluta continua!*

Swayed

The CIOC was also of the view that parties intending to work together before an election should form a merger instead of a pre-election coalition. Despite the CIOC acting out of logic and good sense, it failed to appreciate that MPs were to be swayed by political considerations relating to the 2012 election rather than logic.

Accordingly, the MPs allied to the Uhuru/Ruto/Kalonzo axis otherwise known as the G7 Alliance in furthering their objectives of preventing Raila Odinga from ascending to the presidency rejected the CIOC's amendment and in turn amended the provision of Section 10 of the Act to read: "Two or more political parties may form a coalition before or after an election and shall deposit the coalition agreement with the registrar."

The G7 politicians were of the view that Article 108 of the Constitution allowed coalitions of all kinds and it would have been illegal to inhibit the peoples' freedom of association. Though both sides had good arguments, it was unfortunate that the ultimate result was driven by the vested interests of today rather than posterity reasons.

Coalitions are common phenomenon in the developed world. The present UK government is a post-election coalition between the Conservative Party of David Cameron and the Liberal Democrat Party of Nick Clegg. It was formed after both parties failed to achieve a majority to form a government.

Majority

Prior to this, previous coalitions in the UK had been formed only during times of national crisis, including both world wars and the 1930s depression. The failure to achieve parliamentary

majority is usually the reason behind coalitions in the developed world including the Nordic countries, Australia, Austria, Germany, Italy, Japan, Turkey, Israel, New Zealand, Kosovo, Pakistan, India, Trinidad & Tobago, Thailand, Ukraine, Ireland and Switzerland.

In Germany, coalition governments are the norm. It is rare for either the Christian Democratic Union of Germany or Christian Social union in Bavaria (CDU/CSU) or the Social Democratic party of Germany (SPD) or Free Democratic Party (FDP) to win an unqualified majority in a national election.

The main advantage of coalitions is that they are seen as reflecting the popular opinion of the electorate and that they lead to consensus based politics.

Funding

The Political Parties Act 2007 initiated state funding of parties and the

concept has been retained in the 2011 Act. The thorny issue is whether the criteria of distributing the Political Parties Fund is adequate. Section 25 of the Act states that 90 per cent shall be distributed proportionately by reference to the total number of votes secured by each political party in the preceding general election while the balance of 10 per cent is to cater for the administration expenses of the fund.

The above criterion is equitable and fair to a large extent since the party's hard work in securing many votes shall be paid off in the allocation of funds. This criterion is almost universally accepted, but it is not free from a number of flaws.

One of the flaws is that the criterion leads to a cycle of domination by the stronger parties, particularly the ruling party. It is thus difficult for a newly established party (which under the Act does not qualify for funding) to fairly compete with the established parties yet the new or small parties require the funds even more than the established ones.

In addition, mechanisms need to be put in place to ensure that political parties do not come to over-rely on state funding to an extent of being lethargic in obtaining funds from other lawful sources.

Subsidy

Further, the Act is wanting in terms of giving details on the sharing of funds between parties in a coalition. Finally, Parliament should adopt additional forms of subsidies that will assist political parties in promoting democracy without pegging the subsidy on performance. Tax exemptions on publicity expenses may be a good start.

The new Constitution has achieved another milestone in the provisions allowing for independent candidates to run for elective positions. Article 85 requires that a person contesting as an independent candidate should not have been a member of a party for at least three months prior to the

election. If the person seeks to contest for the presidency, Article 137(1) (d) would require the person to be nominated by at least 2,000 voters in a majority of the 47 counties.

If seeking election to the senate, the candidate must show the support of at least 2,000 registered voters in the respective county and if vying for a position in the National Assembly the independent candidate will need the support of at least 1,000 registered voters in his respective constituency.

It remains a question in our minds whether independent candidates will survive in the face of candidates sponsored by popular parties. In the developed world, the independent candidates have never made a big impact. Nonetheless, it is a good step towards liberty for such candidates and voters to be free from being non-aligned with any party.

Party hopping

This is a widespread but peculiar habit of Kenyan politicians. Since the introduction of multi-party politics, politicians have been seeing parties as a ticket for their entry into Parliament. Just like a person missing a bus, a Kenyan politician who has missed a nomination for elections from one party would without much effort hop into the next available party or form his own.

The histories of the two Kenyan principals are perfect examples of this dishonourable conduct. Prime Minister Raila Odinga was initially in Ford, then Ford Kenya, then NDP, then LDP, then Kanu, then Narc, then ODM Kenya and finally in ODM. President Kibaki on the other hand was in Kanu, then DP, then NAK, then Narc, he had a little dalliance with NARC Kenya before finally settling in PNU, which was a party formed three months to the elections of 2007. The sad fact is that while switching to all these parties, the MPs would still retain their parliamentary positions.

Presently, there are a number of political parties having problems with rebels who for all intents and purposes are no longer in the parties that sponsored them to Parliament. The likes of William Ruto of ODM are now associated with the UDM party while the likes of Juja MP William Kabogo of NARC Kenya are now associated with PNU.

Ideologies

Untamed party hopping is a serious challenge to parliamentary democracy as it distorts the ideal politics. The prevailing problems in the Parliamentary Committee on Legal Affairs owe their origin to such party hopping.

The Political Parties Act 2011 has endeavoured to address this problem in a number of ways. First, it penalises some actions that are prejudicial to a party that sponsored an MP to Parliament. Under Section 14(5) it is an offence to form another party, join in the formation of another party, join an existing party, advocate for the formation of another party or campaign for another party or a candidate of another party while still a member of a different party.

In addition, the statutory notice period prior to resignation from a party is an important safeguard against party hopping. Further, the Elections Act 2011 requires a party to have submitted a list of members of the party way before the nomination of a candidate, hence sealing the loophole of last minute defections.

However, there seemed to have been no true commitment from the Cabinet and Parliamentarians to deter party hopping once and for all. The Cabinet scrapped the provision outlawing the registration of a political party one year to the elections while Parliament rejected the clauses barring a candidate from seeking elections if he was a member of another political party three months prior to the elections. [KN](#)

One year down the line – hits and misses

Status of implementation of the new Constitution

By Nderitu Macharia

Parliament is mandated by the Constitution to enact the necessary implementing legislation to ensure that Kenyans realise the fruits of the new Constitution. Whereas the Constitution outlines the framework, the details will be provided through the legislation.

The Constitution stipulates the timelines by which the Parliament should enact the necessary laws to implement the Constitution. The Fifth Schedule requires Parliament to enact laws on citizenship, Kenya National Human Rights and Equality Commission, Ethics and Anti Corruption Commission, elections, electoral disputes, Independent Elections and Boundaries Commission, recall of MPs, vacation of office of MP, power of mercy, system of courts, vetting of judges and magistrates, urban areas and cities, Speaker of a county assembly, political parties, Contingencies Fund, and loan guarantees by national government within one year from the date of promulgation of the Constitution.

Earlier in the year, Parliament enacted the Commission for the Implementation of the Constitution Act, the Judicial Service Act, the Supreme Court Act, the Vetting of Judges and Magistrates Act, the Independent Electoral and Boundaries Commission Act and Independent Offices Act. Within days of the constitutional deadline, Parliament worked overtime and managed to enact most of the remaining Bills.

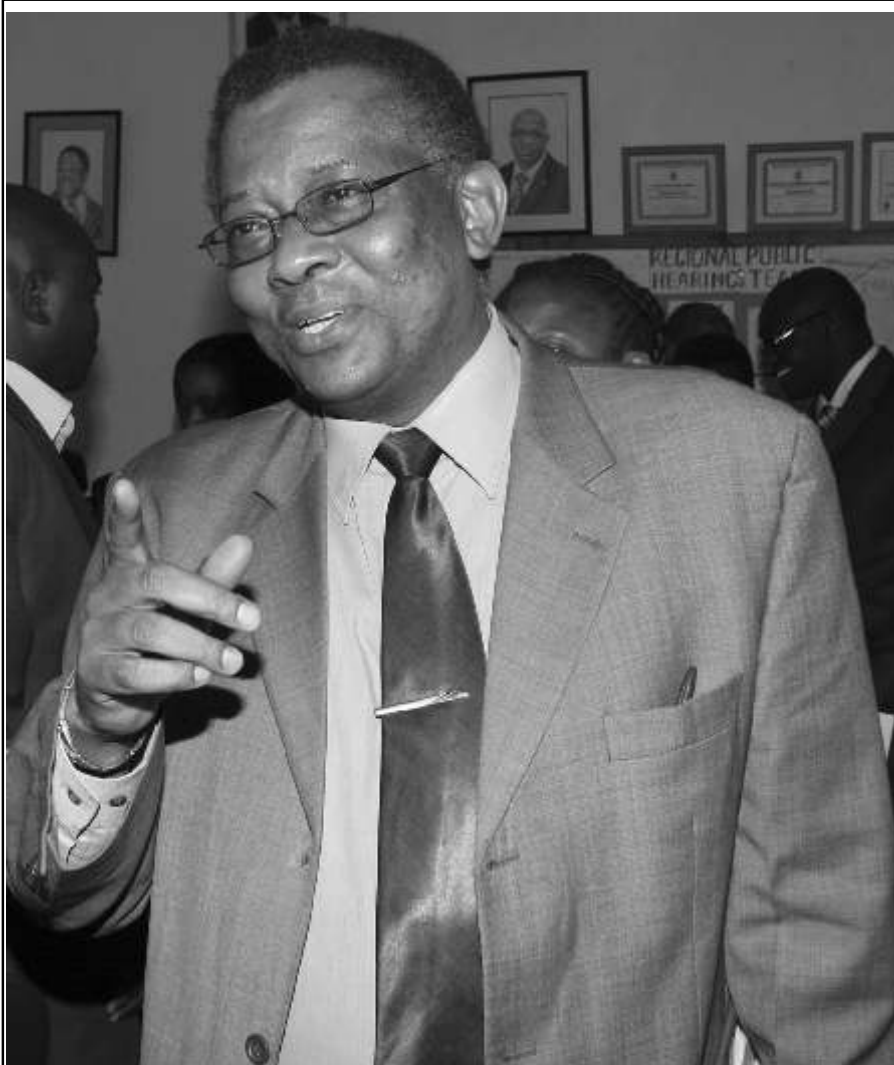
Fast tracked

These were Kenya Citizenship and Immigration Act, Power of Mercy Act, Commission on Administrative Justice Act, Environment and Land Court Act, Commission on Revenue Allocation Act, National Gender and Equality

Commission Act, Contingencies and Counties Emergencies Funds Act, Employment and Labour Relations Court Act, National Police Service Act, Independent Ethics and Anti Corruption Commission Act, Elections Act, National Police Service Act and Political Parties (Amendment) Act.

The Bills were fast tracked and enacted within four days to the deadline. Parliament truncated the Standing Orders and reduced the periods of publication of Bills and timelines for debate to ensure the deadline was met. This was a commendable effort by Parliament.

However, the haste in publishing and enacting the laws may have compromised on quality of the Acts and inhibited public participation in law making. The periods for publications were shortened thereby limiting effective public participation and the Commission for the Implementation of the Constitution was not involved at all in the drafting of two Bills. Already, the Commission has moved to court to challenge these laws, which have been enacted without its input. There is debate on the recommended transitional mechanism for the Ethics and Anti-Corruption Act with an argument that a poor transitional mechanism coupled with a delay in appointing the



Graceful exit - former Chairman of the Committee of Experts on Constitutional Review Mr. Nzamba Kitonga

new Commissioners will compromise ongoing corruption investigations.

Pending

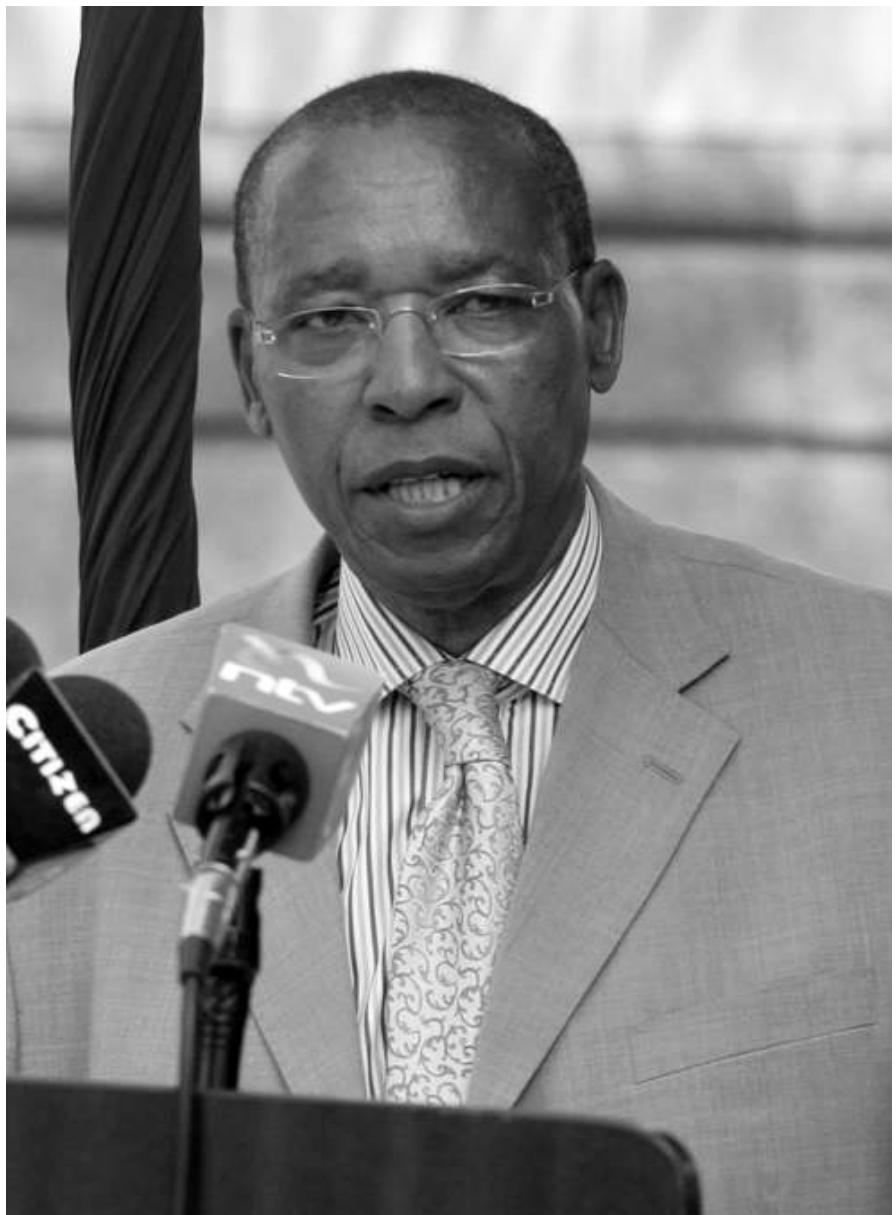
Article 10 of the Constitution provides for the national values and principles, which include rule of law, democracy and participation of the people, inclusiveness, equality, good governance, integrity, transparency and accountability. The effort by Parliament to enact the 12 laws just before the constitutional deadline has severely limited public participation.

The spirit of the Constitution envisages wide consultations in Bill preparation and enactment. The Bills should be published early to ensure that the public has ample opportunity to contribute to the Bills. This measure will enhance public participation in future since many Bills are still pending for enactment.

There should be more structured coordination between the line ministries, Kenya Law Reform Commission, Parliamentary Select Committee on Implementation of the Constitution, the Commission for the Implementation of the Constitution and Cabinet. The AG and the Commission for Implementation should undertake proper prioritisation of Bills to ensure sequenced and quick publication and enactment.

The CIC, AG and KLRC should offer technical support to line ministries to expedite Bill preparation, reduce the lines of disagreement and research and facilitate stakeholder input. At present, many line ministries have set up Task Forces to carry out public hearings on the reform proposals and prepare draft Bills for onward transmission to the AG and the Commission.

The failure to co-ordinate has resulted in preparation of parallel Bills. For example, the Ministry of Finance and the Ministry of Local Government have prepared different Bills on Public Finance and Management with distinct provisions on devolution. The ministries are yet to complete harmonisation of the legislative proposals. The



Feeling left out. Minister for Justice and Constitutional Affairs Hon. Mutula Kilonzo.

delay in enacting the Bills has been occasioned by a long preparation process and the need for Cabinet approval before tabling in Parliament.

Extending deadlines

Article 261 of the Constitution provides that Parliament shall enact legislation required by the Constitution within the specified period. The National Assembly may by resolution supported by the votes of at least two thirds of the Members of the Assembly extend the period prescribed in respect of any particular legislation for a period not exceeding one year.

The power to extend the period may only be exercised once in respect of

any particular matter and only in exceptional circumstances certified as such by the Speaker of the National Assembly.

The AG is required to prepare the relevant Bills in consultation with the Commission for the Implementation of the Constitution for tabling before Parliament as soon as reasonable practicable. The Commission is mandated to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution, co-ordinate with the AG and KLRC in preparing for tabling Bills in Parliament and to report to the Parliamentary Select Committee on Implementation of the Constitution

Article 10 of the Constitution provides for the national values and principles, which include rule of law, democracy and participation of the people, inclusiveness, equality, good governance, integrity, transparency and accountability. The effort by Parliament to enact the 12 laws just before the constitutional deadline has severely limited public participation.

progress on implementation and any impediments faced.

If Parliament fails to enact the law within the specified time, any person may petition the High Court. The High Court in determining the petition may make a declaratory order and transmit the order directing Parliament and the AG to take steps to ensure that the required legislation is enacted, within the period specified in the order and to report progress to the Chief Justice.

If Parliament fails to enact the legislation as directed by the High Court, the Chief Justice shall advise the President to dissolve Parliament and the President shall comply. The next Parliament shall enact the legislation within the time prescribed in the Schedule from the date of commencement of its term and it shall be subject to dissolution on a petition to the High Court and on the advice of the Chief Justice to the President in the event of failing to enact the law as required.

Derail

Any extension of the periods stipulated in the Schedule must be supported by more than 2/3 of MPs and must result from demonstrable difficulty in having the Bill enacted. With the increased litigation relating to the Constitution, it is likely that any extension may be challenged in the High Court if it is made without any basis or is simply meant to derail the implementation of the Constitution.

The Executive and Parliament have had one year to pass the laws and there will be no justifiable reason to

further delay the Bills or fail to enact the laws within the set time.

The Elections Act has just been enacted. The Independent Electoral and Boundaries Commission Act had been enacted earlier, but the law has not been fully implemented. The stage is set for composition of the Independent Electoral and Boundaries Commission.

The panel that will select the Commissioners has been appointed. The panel has advertised the positions of the Commissioners, but the selection process is yet to start. This means that there is no credible, independent and professional entity that can carry out elections in Kenya. If Parliament is dissolved, there is no framework to guide the electoral process. The elections will be conducted under a weak and incomplete framework and may result in chaos. It would be inadvisable to dissolve Parliament in the prevailing scenario.

Computerisation

The new Constitution has changed the electoral system. A voter will be required to vote for six positions including the President, Senator, MP, Governor, Women Representative in National Assembly and County Assembly Member. This requires enhanced automation and computerisation of the electoral system.

The Commission is yet to design an appropriate formula to ensure that 1/3 of MPs are of opposite gender. At present, Parliament has 10 per cent women representation. The Constitution obligates the State to take measures to implement the principle that no more than two thirds of the members of elective and appointive bodies shall be of the same gender. Due to the recent bungled elections in 2008, the Commission has a difficult task of restoring public confidence in elections.

Once the IEBC has been constituted, its first duty will be to complete the boundary review, which stalled when Parliament rejected the report of the Interim Independent Boundaries Commission. It will, therefore, require some time to settle down and complete the boundary review before embarking on preparation for the elections. The review will result in creation of 80 new constituencies.

The report by the Interim Commission will be handed over to the Independent Electoral and Boundaries Commission though the Commission is intended to act independently and without external influence.

Article 261 of the Constitution provides that Parliament shall enact legislation required by the Constitution within the specified period. The National Assembly may by resolution supported by the votes of at least two thirds of the Members of the Assembly extend the period prescribed in respect of any particular legislation for a period not exceeding one year.

Many Kenyans support efficient implementation of the new Constitution. This was underlined by the support of the Constitution at the referendum and the close scrutiny of Bills that have been published to implement the Constitution.

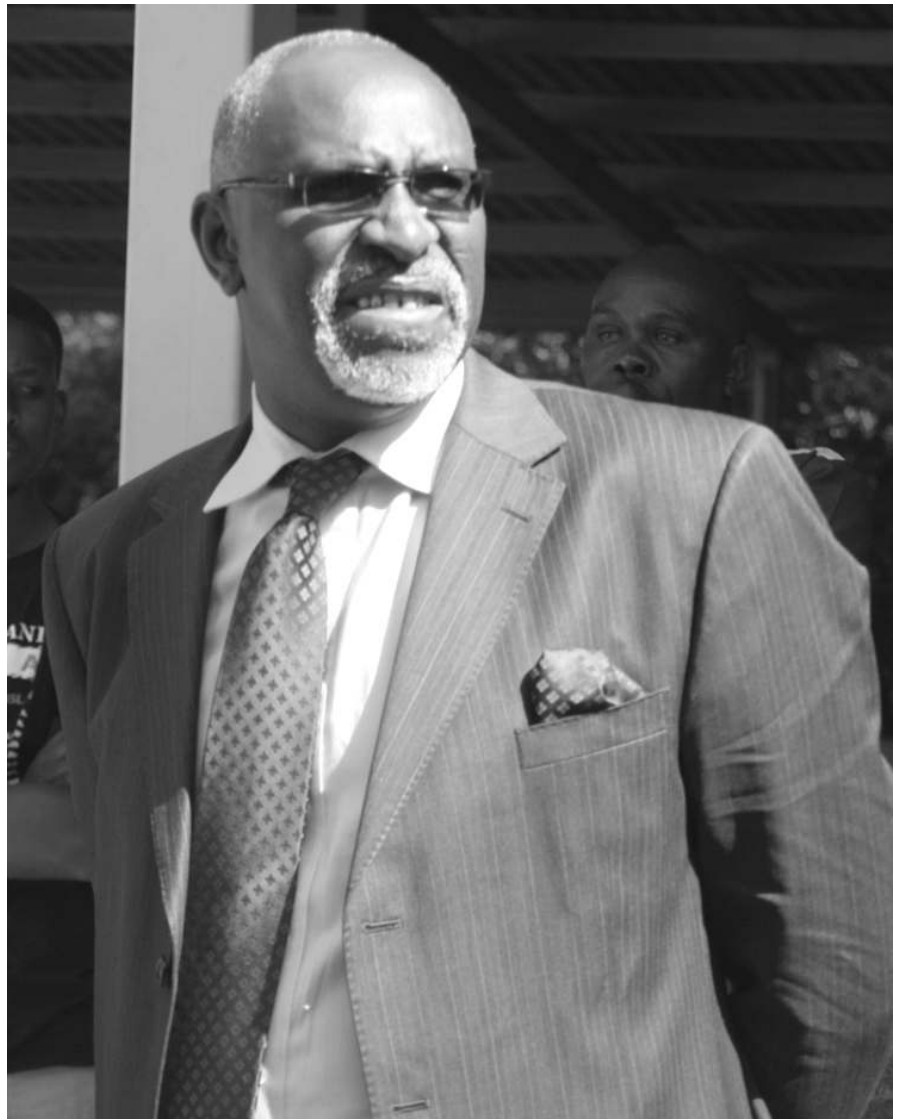
The public has been monitoring the reform process, including the appointment of important judicial staff and state officials. With this interest in mind, Parliament must endeavour to seamlessly implement the Constitution. It is likely that MPs who are deemed to be impeding the implementation process will not be re-elected to Parliament.

The buck

Many important key players in the process include the Attorney General, Kenya Law Reform Commission, the Commission on Implementation of the Constitution, the Parliamentary Select Committee on Implementation of the Constitution, the Parliamentary Committee on Legal Affairs and Administration of Justice, and the line ministries.

The AG has been accused of delaying the publication of Bills and delaying to forward Bills enacted by Parliament for presidential assent. The line ministries have been slow to generate Bills for scrutiny by Kenya Law Reform Commission, AG and Commission on Implementation of the Constitution.

The Parliamentary Committee on Administration of Justice has been bedeviled with leadership wrangles, thereby necessitating its reconstitution. In the interim, the Parliamentary Select Committee on Implementation of the Constitution had been performing its roles, resulting in a work overload and mandate overlaps.



Facing an unenviable task, Chairman of the Constitution Implementation Commission Mr. Charles Nyachae.

Reinvigorate

The Government should develop an inter-agency coordination framework that minimises bureaucratic bottlenecks. The Principals must provide political leadership in the implementation process. The process is in the hands of the Principals since they are the signatories to the National Accord and Reconciliation Act.

The Accord underpins and is the basis of the ongoing reforms. There was a false start in the appointment of CJ, AG,

Controller of Budget and the DPP when the President unilaterally made appointments in breach of the Constitution. Leadership from the Principals will insulate the process from politics of the day.

The appointment of a new AG will reinvigorate the process. Most of the agencies involved in the implementation process are part of the Executive, including the AG, Minister for Constitutional Affairs, National Cohesion and Justice and the Kenya Law Reform Commission.

The Principals should take lead in ensuring the process moves forward and is completed in time. However, with the Bills not enacted, it is clear that the implementation process is on course and is likely to be completed within schedule. **KN**

The power to extend the period may only be exercised once in respect of any particular matter and only in exceptional circumstances certified as such by the Speaker of the National Assembly.

Give unto Caesar what is Caesar's

Taxation under the new constitutional order

By Thuita Guandaru

A tax may be defined as a pecuniary burden placed upon individuals, companies, business entities and property owners to support government programmes. Taxes are levied on monies consumed or income gained and its payment is exacted by legislative authority.

The Constitution provides for imposition of taxes. Article 210 (3) of the Constitution provides that no law may exclude or authorise the exclusion of a State officer from payment of tax by reason of the office held by that State officer or the nature of work of the State officer. The Constitution outlaws any tax exemptions based on the office occupied by a taxpayer.

Clause 37 of the First Schedule to the Income Tax Act provides that all allowances payable to the Speaker, Deputy Speaker, Vice-President, Ministers, Assistant Ministers, and all MPs are exempt from income tax under section 5 of the National Assembly Remuneration Act. The President, Deputy President and MPs are defined as State officers under Article 259 of the Constitution and they are, therefore, obligated to pay tax.

Taxes are levied by Parliament, which is in turn elected by the people. This creates an avenue for people's representation in the taxation process. The Government taxes citizens who in turn demand accountability and services from the Government. By exempting themselves from taxation, MPs have lost moral authority to levy taxes on Kenyans or to monitor Government expenditure through budget oversight.



Times Tower in Nairobi, headquarters of the Kenya Revenue Authority.

The Kenya Revenue Authority is the lead agency in tax collection in Kenya. KRA was set up in 1995 as part of the reform of the tax system and amalgamated the Income Tax Department, Custom Duty, and Sales Tax Department.

Stewards

Most people recognise that taxes fund essential infrastructure and services provided by the central and local governments. In a free and prosperous society, citizens will generally comply with tax levies since the political processes provide citizens with an opportunity to participate and determine the taxation mechanisms and rates.

Further, public officials serve as good stewards of the resources generated by the tax system. Finally, most citizens perceive that tax burdens and benefits are distributed in a fair and equitable manner. A nation's tax system should reflect its communal values. To create a system of taxation, a nation must make choices regarding the distribution of the tax burden and how the taxes collected will be spent. In democratic

nations where the public elects the Government, which is in charge of establishing the tax system, these choices reflect the type of community that the public wishes to create.

One important tenet of taxation is equity and equality in taxation. Equity can be defined as fundamental fairness, the application of the ideal of justice, good faith, and good conscience. This means that a person should treat others as he or she would want to be treated. In this debate on MPs taxation and equity, equity can be vertical, horizontal or inter-group.

Tax burden

Horizontal equity and fairness means that taxpayers with equal income should pay the same tax. Similarly situated taxpayers should be taxed similarly. Where persons earn an equal amount from income, a similar rate of taxation should be applied. In Kenya, MPs have abused their privileged position as lawmakers to shield themselves from payment of taxes. Persons who earn equal income to MPs are subject to full tax.

Vertical equity means that the tax burden should be based on the taxpayer's ability to pay. Clearly individuals with low levels of income should not be subject to high rate of taxes because they need all their resources to provide for subsistence. However and ideally, all citizens should pay some taxes regardless of the amount. Inter-group implies that no group is favoured to the detriment of another without good cause. The tax burden and benefit inequities should be minimised.

Kenyans have long complained about the exemption of MPs from paying taxes for a long time. From the representation by citizenry, the Committee of Experts outlawed the tax exemption of MPs. The Constitution was overwhelmingly endorsed in the referendum. The exemption from taxation has been coupled with increase of the remuneration and benefits of MPs in the Ninth and Tenth Parliament.

The unstructured increase in MPs' pay led to the formation of the Salaries and Remuneration Commission as a constitutional commission. The functions of the Salary and Remuneration Commission include setting and regularly reviewing the remuneration of all State officers and to advise the national and county Governments on the remuneration of other public officers.

The Commission shall ensure that the total public compensation is fiscally sustainable and ensure the need to recognise productivity, performance, fairness and transparency.

The MPs cannot increase their pay without the approval of the Commission, which is in the process of being formed. The Parliamentary Service Commission is represented in the Commission.

Deducted

Previously, there was no mechanism available to compel the MPs to pay. Parliament is responsible for amending laws relating to taxation and approving the budget. The attempt by the



Show me the money! Finance Minister Hon. Uhuru Kenyatta.

Minister of Finance to levy taxes on MPs was resisted in 2006 and largely contributed to the censure Motion against the minister.

Under the Income Tax Act, it is the role of the employer, the Parliamentary Service Commission, to remit tax deducted from MPs' remuneration to the KRA. The Parliamentary Service Commission has publicly stated that it will not comply with the tax demands of the KRA

The Repealed Constitution protected the remuneration, privileges and benefits of the President and the pension and benefits of a former President from adverse revision or reduction. Section 13 (4) of the Repealed Constitution provided that the salary, allowances and privileges of the President could not be varied to his disadvantage while he held office.

Section 13(5) provided that the pension and allowances payable to the President who has ceased to hold office and the facilities and other

benefits available to him could not be varied to his disadvantage during his life time. The new Constitution has similarly protected the remuneration and privileges by providing in Article 151 (2) that the remuneration, privileges and benefits of the President and Deputy President shall not be varied to their disadvantage while in office.

Article 151 (3) of the Constitution provides that the retirement benefits payable to a former President and former Deputy President, the facilities available to and the privileges enjoyed by them shall not be varied to their disadvantage during their lifetime.

Protected

This means that whereas the President and former Presidents are not exempted from payment of taxes, their current remuneration is protected from reduction through taxation. Since their remuneration was previously not taxed, the Government should review the remuneration and include the taxes payable.

The remuneration of judges is similarly protected in Article 160 (3) of the Constitution, which provides that the remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund. Such remuneration and benefits shall not be varied to the disadvantage of the judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during his or her lifetime.

This protection is intended to enhance judicial independence and protect

Most people recognise that taxes fund essential infrastructure and services provided by the central and local governments. In a free and prosperous society, citizens will generally comply with tax levies since the political processes provide citizens with an opportunity to participate and determine the taxation mechanisms and rates.

judges from manipulation through skewed and arbitrary revision of their privileges and benefits and is an internationally accepted standard to ensure judicial independence. However, the remuneration and benefits payable to a judge who is suspended from office shall be adjusted to one half until such time the judge is removed from or reinstated in office.

The remuneration of MPs is not protected from adverse review or reduction in the repealed or the new Constitution. MPs should pay full taxes on their allowances. Further, MPs do not have security of tenure. Under the former Constitution, the President had power to dissolve Parliament at any time. In the new Constitution, a predetermined elections date has been fixed. The remuneration of the President and Judges cannot be adversely revised once they are in office.

Article 210 of the Constitution took effect immediately on promulgation of the Constitution since there is no transitional clause to defer its full application. Payment of taxes by MPs,

the President and Judges took effect immediately from the date of promulgation of the Constitution on August 27, 2010.

Level of justification

Some MPs, including the President, Prime Minister and Vice President have already complied with the KRA taxation directive. KRA has already sent a demand notice to Parliamentary Service Commission to comply.

There is resistance from MPs to pay taxes. The Judicial Service Commission is in consultations with KRA and the Treasury to facilitate compliance by Judges.

The salaries of Judges and the President should be increased to cover the tax claim. This is because the remuneration of the two offices is protected under the Constitution. However, the MPs remuneration is not protected and should thus be taxed.

The taxation of MPs and the increase of the remuneration of judges and the President will be as a result of a constitutional imperative and, therefore, cannot be challenged on the basis of discrimination.

MPs should not be exempt from taxation since they exercise representative, oversight and legislative roles in Parliament on behalf of the people. How can MPs purport to represent, oversee public expenditure and approve taxation measures for Kenyans when they do not pay taxes?

The argument by MPs that they have many financial commitments cannot stand. Every Kenyan has financial

The Constitution provides for imposition of taxes. Article 210 (3) of the Constitution provides that no law may exclude or authorise the exclusion of a State officer from payment of tax by reason of the office held by that State officer or the nature of work of the State officer. The Constitution outlaws any tax exemptions based on the office occupied by a taxpayer.

commitments. The fact they have spending commitments cannot result in their exemption from paying taxes. MPs do not have a fixed term contract and are subject to regular elections every five years.

Revenue collection

Kenya is grappling with a drought crisis in which several deaths related to famine have been reported. The Constitution provides for the right to be free from hunger and to have adequate food of acceptable quality and to clean and safe water in adequate quantities.

MPs should demonstrate leadership and pay taxes, which can be applied to fulfil the obligation of the Government to provide food and water to all. Full realisation of the social and economic rights secured under the Constitution has been undermined by the lack of adequate resources. The taxes paid by MPs will assist the Government to protect these rights.

By obstinately refusing to pay taxes, MPs have demonstrated that they are insensitive to the needs of Kenyans. About 46 per cent of Kenyans live below the poverty line and are subjected to taxation. Any income, salary, benefit or allowance above Sh12,000 per month is subject to income tax.

Mps are paid more than Sh850,000 per month but they have shielded a huge portion of their pay from taxation and only pay taxes on a salary of Sh200,000. The remuneration of MPs is sourced from the taxes paid by Kenyans. The implementation of the new Constitution is proving to be a costly exercise through establishment of numerous commissions. The MPs should be taxed as part of their contribution to nation building and revenue collection.

Enforcement mechanisms

The provisions of the Constitution are supreme. Any sections or schedules of the Income Tax Act that contravene the Constitution are null and void to the extent of their inconsistency.



Torn between the devil and the deep blue sea, Speaker of the National Assembly Hon. Kenneth Otiato Marende.

KRA has the right to recover the back taxes from MPs without recourse to the Supreme Court and without the need to amend the Income Tax Act, bearing in mind that the amendment will be approved by MPs. A case has been filed in court seeking interpretation, compliance and enforcement of the taxation provision of MPs in the Constitution.

If the MPs are aggrieved, they can file suit in the Supreme Court to challenge the notices that KRA has sent to the Parliamentary Service Commission on the tax arrears owed by MPs. KRA sent a collective notice to the Commission to recover the tax arrears from MPs.

Ultimately, the liability to pay the taxes, penalties and commissions will accrue to the individual MPs and the recovery will be directed against that MP's income and assets. KRA can further issue notices to third parties, including banks and other entities that are holding monies belonging to MPs.

Such banks or entities will be obligated to pay the monies they hold to KRA to offset the tax claim. Already, KRA is levying penalties and interest on the outstanding taxes. This will further increase the tax liability to KRA.

Transparency

Other measures include failure to be cleared by the Independent Electoral and Boundaries Commission to contest for any elective post in the next General Election since the MPs will not have complied with Chapter 6 of the Constitution, especially the provisions relating to integrity and transparency.

It is a standard practice now that all persons seeking public office should demonstrate tax compliance. The Constitution provides that the authority assigned to a State officer is a public trust that should be exercised in a manner that is consistent with the purposes of the Constitution, demonstrates respect for the people, brings honour to the nation and dignity to the office and promotes public confidence in the integrity of the office.

State officers are expected and mandated to offer selfless service based on public interest demonstrated by honesty in the execution of public duties and declaration of any personal interest that may conflict with public duties. [KN](#)

A tall order for the IEBC

This article looks at attempts to look elections in Kenya under the new constitutional order and reviews the independent electoral and boundaries commission act, 2011.

By *Katiba News* Correspondent



Walking through a minefield - Chairman of the Independent Electoral and Boundaries Commission (IEBC), Dr. Ekuru Aukot.

In the aftermath of the 2007 disputed presidential elections, an Independent Review Commission (IREC) popularly known as the Kriegler Commission was established to *inter alia*, analyse the constitutional and legal framework governing elections in Kenya as well as to examine the organisational structure, composition and management system of the Electoral Commission of Kenya (ECK) and its functional efficiency to discharge its mandate.

The findings of the Kriegler Commission established:

- Constitutional and legal framework weaknesses and inconsistencies that weakened its effectiveness in guiding the electoral process.
- Lack of independence and inefficiency on the part of ECK, which was attributable to

weaknesses in its organisational structure, appointment criteria, composition and management systems.

- Anomalies in the way the boundaries of constituencies were marked, which impaired the legitimacy of the electoral process *ab initio*, and
- Poor system of electoral law enforcement and dispute resolution.

The Commission recommended the need for comprehensive constitutional, legal, administrative, organisational as well as dispute resolution reforms to address these challenges. The journey towards these reforms began in earnest with the promulgation of the new Constitution on August 27, 2010.

Discrimination

Chapter 7 of the Constitution on the

Representation of the People provides solid electoral guidelines based on certain democratic principles such as the freedom of citizens to exercise their political rights freely, fairly, equally and without discrimination.

Further, the Constitution recognises the need for an independent, impartial and efficient electoral management body and establishes an Independent Electoral and Boundaries Commission (IEBC) to replace the defunct ECK.

IEBC is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament. In particular, it is responsible for:

- a) The continuous registration of citizens as voters;
- b) The regular revision of the voters' roll;
- c) The delimitation of constituencies and wards;
- d) The regulation of the process by which parties nominate candidates for elections;
- e) The settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- f) The registration of candidates for election;
- g) Voter education;
- h) The facilitation of the observation, monitoring and evaluation of elections;
- i) The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- j) The development of a code of

- conduct for candidates and parties contesting elections; and
- k) The monitoring of compliance with the electoral laws.

Subsequently, an Independent Electoral and Boundaries Commission Act, 2011 No 9 of 2011 was enacted in July 2011 to:

- (a) Provide for the operations, powers, responsibilities and functions of the IEBC to supervise elections and referenda at County and National government levels;
- (b) Provide a legal framework for the identification and appointment of the chairperson, members and the secretary of the IEBC pursuant to Article 250(2) and (12)(b) of the Constitution;
- (c) Provide for the manner of the exercise of the powers, responsibilities and functions of the IEBC pursuant to Article 88(5) of the Constitution;
- (d) Establish mechanisms for the IEBC to facilitate consultations with interested parties pursuant to Article 89(7) of the Constitution; and
- (e) Establish mechanisms for the IEBC to address the issues arising out of the first review.

New Act

In a nutshell, this Act seeks to establish an independent, impartial and efficient electoral management body that has both financial and legal muscles to punish those who flout the rules.

The Act sets up a leaner nine-member Commission all of whom will serve on full-time basis for a single term of six years. It also establishes the office of the Secretary who shall be the chief executive officer of the Commission; the head of the secretariat; the accounting officer of the Commission and custodian of all commission's records.

The secretary will be appointed by the Commission through an open and transparent process and shall hold office for a term of five years but eligible for re-election for a further term of five years. He/she can only be removed from the office by the Commission on grounds of inability to perform arising out of physical or mental incapacity, gross misconduct, bankruptcy or incompetence.

In order to ensure high level of integrity and establish clear lines of individual responsibility among both commissioners and staff, members

and the employees of the Commission shall subscribe to a Code of Conduct prescribed under the Fourth Schedule of the Act and whoever knowingly subverts the process of free and fair elections or knowingly obstructs the Commission in the discharge of its functions or otherwise interferes with the functions of the Commission will be liable to imprisonment for a term not exceeding three years or to a fine of not more than one million shillings or to both, and shall not be eligible to hold public office for a period of ten years following the conviction.

In order to cushion the IEBC from the financial woes that dogged previous commissions, the Act establishes an IEBC Fund from which the Commission will draw its salaries, allowances and other benefits. The Fund will be under the control of the IEBC Secretary and shall be a charge on the Consolidated Fund.

New Act

To enhance accountability and transparency, the IEBC is required to present its annual report to the President and Parliament within three months after the end of each financial year on matters relating to its finances and activities. It is also



Scenes we would like to see in the 2012 polls.

The Act sets up a leaner nine-member Commission all of whom will serve on full-time basis for a single term of six years. It also establishes the office of the Secretary who shall be the chief executive officer of the Commission; the head of the secretariat; the accounting officer of the Commission and custodian of all commission's records.

required to publish an annual report in the Gazette and in at least one newspaper of national circulation.

The Commission is also required to observe the principle of public participation and consultation with stakeholders. A citizen can request for information that is in the public interest from the IEBC as provided for under section 27 of the IEBC Act. Further, the Commission is obligated to publish a notice for public information specifying the location of all its offices and its contact details to enhance accessibility.

IEBC has been given powers to limit the amounts that candidates or political parties can spend in an election campaign, which is a departure from the past practice where there were no limits on amounts candidates and parties could spend on campaigns and neither was there a code of conduct to govern campaigns.

This is aimed at levelling the political playing field and to curb against corruption, voter bribery among other electoral malpractices. In the foregoing, IEBC will require parties and candidates to declare the funds they have raised for their campaigns with a clear monitoring system to report those who will flout the law. Candidates who break the financial and other rules will face stiff penalties.

Monitor

Further, all candidates for all political positions and parties will be required to uphold strict code of conduct and rules that IEBC will set. In particular,

the IEBC will monitor and regulate the nomination of candidates by political parties with a view to locking out those who will act outside the law and to ensure free and fair process.

Previously, electoral commissions only took part in the nominations on invitation by parties and could not tell if the process was fair and democratic. The Act gives the IEBC the mandate to investigate and prosecute all electoral offences by candidates, political parties or their agents, a departure from the past where investigations and prosecutions were left to the police.

In addition to regular revision of the voters' register, the IEBC has the mandate of introducing new technology in the registration of voters and tallying of votes. Section 4(m) requires the Commission to use the appropriate technology and approaches in the performance of its functions. Its predecessor, the Interim Independent Electoral Commission (IIEC) has already pioneered electronic voter registration in selected constituencies.

One of the main functions of the IEBC is delimitation of constituencies and

wards. The Constitution has set 290 as the number of constituencies. Under article 89(2) of the Constitution, the IEBC shall review the names and boundaries of constituencies at intervals of not less than eight years and not more than 12 years, but any review must be completed at least 12 months before a general election of members of Parliament while those of wards shall be reviewed periodically.

Appointments

In reviewing constituency and ward boundaries the IEBC is obligated to consult all interested parties and to progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota in pursuance to the basic principle of equality of the vote.

The IEBC is also mandated to make the necessary regulations for the realisation of the progressive registration of Kenyan citizens residing outside Kenya and putting into effect the progressive realisation of their right to vote.

The process of appointing the first IEBC is already underway. A seven-member selection panel comprising of Dr Ekuru Aukot, chairman, Prof Marion Mutugi, Deputy chair, Justice Isaac Lenaola, Mr Mwanengela Ngali, Ms Rosa Buyu, Ms Irene Cheptoo Keino and Ms Sophie Moturi has already been sworn in and has advertised for the filling of the vacancies.

The IEBC Act under section 6 read together with Chapter Six of the Constitution set out the qualifications for a person to qualify for

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appointment as the chairperson or commissioner of IEBC and lays emphasis on high academic qualifications and high level of integrity.

The First Schedule of the IEBC Act spells out the appointment criteria of the Commissioners by requiring that the positions be advertised in the Gazette, two papers of national circulation, and the Public Service Commission website by the Selection Panel and that the interviews of shortlisted applicants should be conducted in public.

After the interviews, the Selection Panel will forward to the President names of three persons qualified to be chair of the Commission and 13 names of those who can be members. The President in consultation with the Prime Minister will forward the names to Parliament, which should select one nominee for the chairperson and eight for ordinary members of the IEBC.

Once the appointments are made, the Selection Panel shall stand dissolved. Past appointment criteria lacked clarity, merit and participation of all key stakeholders thereby undermining the legitimacy and credibility of the institution and the office holders.

Boundaries review

It is incumbent upon the Selection Panel and the political class to take into consideration the desires, aspirations and interests of Kenyans when choosing the members of IEBC in order to avoid the recurrence of the gory scenes post the 2007 elections.

Delimitation of constituencies as provided for in the Fifth Schedule of the Act shall only apply to the first review under the Act and it shall lapse upon the gazettelement of the final report. In accordance with the Schedule, the Commission is required to resolve all issues arising from the first review relating to the delimitation of boundaries of constituencies and wards and publish its final report within a period of four months from the date of its appointment.



Kenyans are waiting for his comeback, former Chairman of the Interim Independent Electoral Commission, Ahmed Issack Hassan.

In so doing, the Commission shall use the report of the Interim Independent Boundaries Review Commission (the Ligale Commission) as its primary reference material as well as the report of the Parliamentary Committee on the report as its secondary reference material.

The Commission shall then prepare and publish a preliminary report outlining the proposed delimitation of boundaries and the specific geographical and demographical details relating to such delimitation for public scrutiny and input. Having considered the public views, the Commission will submit a revised preliminary report to the Parliamentary Committee for Parliament's input prior to publication in the Gazette.

New dynamics

The delimitation decision of the IEBC can be challenged in the High Court by any person within 30 days of the publication of the decision in the

Gazette and shall be heard and determined within three months of the date on which it is filed.

The Commission shall upon publication of the revised boundaries facilitate sensitisation of the public on the boundaries for a period of 30 days.

Whereas the enactment of IEBC Act is a positive step forward in the country's electoral management process, IEBC will remain toothless and ineffective without effective Elections Act and Political Parties Act in addition to functional electoral dispute resolution court.

The importance of the aforementioned cannot be ignored in light of the bungled 2007 and the forthcoming elections that introduce new dynamics with the devolved government structure. A new electoral body operating under old practices and legal frameworks will not guarantee success. [KN](#)

THE KONRAD ADENAUER FOUNDATION IN KENYA

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

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

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

Our aims

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

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

Our programmes

Among other activities we currently support:

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

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

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