

Edition 1, 2012

KatibaNews

The birth of a new Republic

The verdict is out

Four to face international justice at The Hague

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- * Equal before the Law?
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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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All are welcomed to send their observations on the constitutional review process to be the Editorial Board.

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The verdict is out

Four to face international justice at The Hague

The Pre-Trial Chamber II of the International Criminal Court on 23^d January 2012 confirmed the charges against Hon Uhuru Kenyatta, Mr Francis Muthaura, Hon William Ruto and Mr Joshua Arap Sang.

The cases relate to post election violence in former Rift Valley Province of Kenya in December 2007 to January 2008 that led to death of over 1, 133 persons and displacement of over 600, 000 people.

Jane Kwamboka

The National Accord Implementation Committee, which negotiated the political settlement of the post election impasse between ODM and PNU, recommended the establishment of the Commission of Inquiry on Post Election Violence chaired by Justice Philip Waki of the Court of Appeal assisted by two foreign experts.

After public and *in camera* hearings, the Commission recommended the establishment of an independent

special tribunal to try the suspects. A further recommendation was that if such a tribunal was not established, the names and the evidence would be forwarded to the ICC.

The President and Prime Minister supported the special tribunal but Parliament failed to enact the enabling law. In light of diminished political will to establish the tribunal, the case was referred to the ICC by the chief Mediator Kofi Annan in July 2009. Other suspects who were publicly named by the Prosecutor and later issued with the summons to appear by the ICC include Hon Henry Kosgey and Mohamed Hussein Ali, a former Commissioner of Police.

The case

Hon Ruto and Sang are accused of establishing a network that planned and carried out criminal and violent acts against civilian population in Kapsabet, Turbo, Yiamumbi, greater Eldoret Area and the Nandi Hills. They are accused of crimes against humanity including murder, persecution and deportation and forcible displacement. The alleged crimes were committed between 30th December 2007 and 31st January 2008.

Hon Ruto, as an indirect co-perpetrator, was accused of appointing commanders of the network, producing and distributing maps of areas where the targeted civilians lived, arranging for transport of members and establishing a reward and punishment mechanism within the network.

Mr Sang is suspected of contributing to the commission of crimes through advertising meetings of the network, fanning violence through hate messages, broadcasting false murders



The Rift Valley godfather - Hon. William Ruto.

of Kalenjin to inflame violent retaliation, and broadcasting instructions to the network. The targeted civilians were suspected PNU supporters from the Kikuyu, Kamba and Kisii ethnic groups. The court held that there were substantial grounds to believe that Hon Ruto and Mr Sang should face trial for the alleged crimes.

Mungiki

The case against Henry Kosgey was not confirmed due to the failure by the Prosecutor to satisfy the evidentiary threshold. The prosecutor had relied on one witness who was not corroborated by any other evidence. Further, the dates when Hon Kosgey was alleged to have attended the planning meetings were redacted from the witness statement supplied to the Defence. He was discharged by the ICC.

Hon Kenyatta and Ambassador Muthaura are accused of crimes against humanity of murder, rape, persecution, deportation and forcible transfer of population and other inhumane acts as indirect co-perpetrators. They are accused of taking control of Mungiki, a proscribed group and using its members to carry out retaliatory attacks in Nakuru and Naivasha between 24th and 27th January 2008.

The two suspects are accused of holding planning meetings with members of Mungiki on 26th November and 30th December 2007 at State House, Nairobi. A further meeting is alleged to have been held at the Nairobi Club on 3rd January 2008.

The role of Mungiki was further confirmed by NSIS situation reports, where it reported that members of Mungiki were moving door to door in Nakuru looking for members of ODM dressed as police officers. The two suspects were alleged to have financially supported the group to carry out the attacks.

Though the suspects provided *alibi* evidence to show they did not attend the alleged meetings, the court held that the evidence did not rebut the

evidence provided by the Prosecutor. For example, the list of persons who visited State House, Nairobi on 26th November 2007 was incomplete. The report by Nairobi Club did not confirm that the witnesses did not attend breakfast at the Club or that Ambassador Muthaura did not call the Commissioner of Police as alleged.

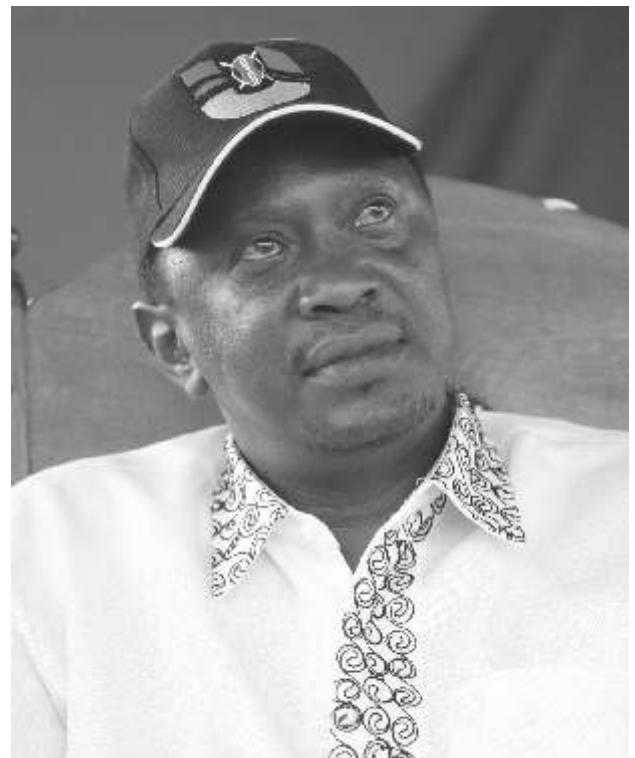
Extortionists

Further, the evidence provided by Hon Lewis Ngunyi proved the link between the suspects and the Mungiki. The Director General of NSIS stated that he could have known if members of Mungiki had attended the State House meeting but the court noted that the NSIS had not filed a report in relation to the contact of Hon Ngunyi with Mungiki. The evidence of Hon Ngunyi was intended to prove that the prosecution witnesses were unreliable extortionists. The court stated that the allegations of extortion had not been proved.

The court stated that Hon Kenyatta and Mr Muthaura were suspected of committing the crimes as they offered institutional and financial support to the Mungiki. They entered into the agreement with Mungiki to commit the crimes, activated the mechanisms to commit crimes and issued orders to commit crimes. They relied on pre-existing structures of Mungiki.

The Chamber stated that the attendance of fundraisers by Hon Kenyatta was not inconsistent with the charges before the chamber. The Chamber therefore ruled that there were substantial grounds to believe that the crimes alleged were committed.

The chamber declined to confirm the charges against Major General



The darling of Central Province,
DPM Hon. Uhuru Kenyatta.

Hussein Ali as there was no link between the Mungiki and the Kenya Police. No substantial grounds had been established to put him on trial. The court noted that the inability of the police to contain the violence could be as a result of the police being overwhelmed by the widespread violence or inaction due to bias of individual police officers.

Defence

There is doubt whether the Chamber treated the suspects fairly during the pre-trial hearing. Whereas the Prosecutor relied on witness statements made by anonymous witnesses, the defence was permitted to provide only two witnesses. Further, the prosecution witnesses' statements were retracted. The defence stated that it was not possible to rebut the evidence of over 20 witnesses using only two witnesses. This may form one of the grounds of appeal against the ruling.

It was argued that Mungiki did not qualify as a 'state like organisation'. The evidentiary threshold required at the pre-trial stage is very low. The Prosecutor needed to demonstrate the existence of substantial grounds to

believe that the offences were committed. The threshold is not proof beyond reasonable doubt which is required in the trial stage.

Further, one judge, Peter Hans Kaul, still remains convinced that the ICC lacks jurisdiction as the crimes do not meet the ICC threshold. The judge dissented in the two cases stating that whereas he acknowledged that violent and serious common crimes were committed during the post election period in 2008, the crimes were within the competence of the Kenyan legal system and had not met the required threshold for the ICC to be seized of the cases.

The crimes were not crimes against humanity. Further, in the Kenyatta and Muthaura case, the judge stated that Mungiki did not qualify to be termed as a state like organisation. The organisation operated in slums and did not possess the wherewithal to carry out the attacks without financial support from other persons. Such an organisation did not meet the definition of 'state like organisation' under the Rome statute on the ICC.

Implications

In the aftermath of the verdict, Hon Kenyatta and Mr Muthaura resigned from their positions as Minister for Finance and the Head of Civil Service respectively pending the hearing of



What next? Amb. Francis Muthaura

the cases or the outcome of the appeal. Hon Kenyatta is still serving as a Deputy Prime Minister in the Grand Coalition Government. All the suspects have appealed against the decision.

The notice and the grounds of appeal were filed within five days delivery of the ruling. The National Accord and Reconciliation Act, which forms part of the Constitution until the next election provides that the Prime Minister or Deputy Prime Minister can only be removed through a vote in the National Assembly supported by more than half of the MPs.

This has been interpreted to mean that the removal through a parliamentary process may result in the collapse of the Grand Coalition as it would amount to a vote of no confidence. Further, the ODM party is not assured of the numbers required to remove Hon Kenyatta as Deputy Prime Minister due to the polarisation occasioned by the ICC ruling.

The cases have been viewed as a necessary step to serve justice to the victims of ethnic violence in Kenya. Since 1992, Kenyan elections have been marked with violence. The ICC trials are the only attempt so far at ensuring justice for the victims. The cases may diminish the incentives to politicians to use violence as a tool for mobilisation.

Two of the suspects, Hon Kenyatta and Hon Ruto, have stated that they intend to vie for presidency in the General Elections expected in late 2012 or early 2013. The ICC restated that the suspects remained innocent until they were proved guilty. There is no provision in the



As free as a bird, Hon. Henry Kosgey.

Constitution that prohibits the two from vying for the Presidency.

Public confidence

The only reference to the conduct of State and public officers is Chapter 6 of the Constitution. Article 73 of the Constitution provides that the authority assigned to a State officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people, brings honour and dignity to the office and promotes public confidence in the integrity of the office.

Article 75 of the Constitution provides that a State Officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties; or compromises any public or official interest in favour of a personal interest; or demeans the office the officer holds.

Any person who contravenes the provision shall be subject to the applicable disciplinary procedure for the relevant office and may be dismissed or removed from office. A

person who is dismissed or removed from office shall be disqualified from holding any other public office. Parliament shall enact legislation establishing procedures and mechanisms for effective administration and enforcement of the provisions. There is no enforcement mechanism for this provision since Parliament has not enacted the enabling law.

Convicted

Section 62 of the Anti-Corruption and Economic Crimes Act provides that a public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge. Section 63 of the Act provides that a public officer who is convicted of corruption or economic crime shall be suspended without pay with effect from the date of the conviction pending the outcome of any appeal. These provisions do not apply to the ICC case since it does not relate to economic crime or corruption.

In the strict letter of the law, there is no provision that required Hon Uhuru or Mr Muthaura to resign. However it must be noted that crimes that are tried by the ICC, including crimes against humanity are the most serious. Suspicion of having committed such crimes will definitely affect the campaigns of the candidates, even

though they are presumed innocent until proved guilty. The Constitution does not provide for its retrospective application to events that happened prior to its promulgation. The alleged crimes were perpetrated in 2007/8 when the Constitution had not been promulgated.

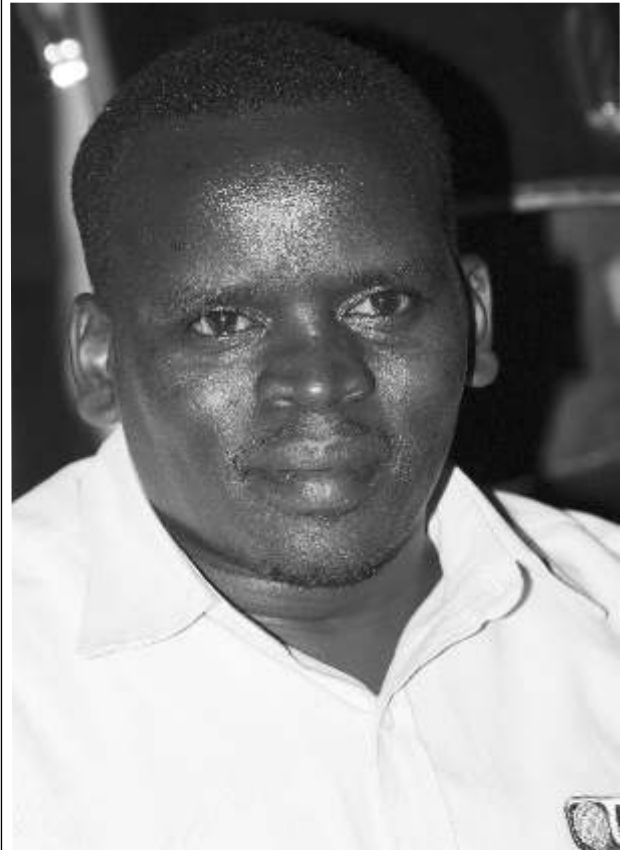
The cases will undermine the ability of Hon Kenyatta and Hon Ruto to carry out effective campaigns. The suspects are required to be physically present during the hearing. Political competitors will constantly refer to the charges facing the candidates to dent their credibility.

There will be increased campaign propaganda against the candidates.

Backlash

Political mobilisation is ethnically based. The Kikuyu, Meru and Kalenjin, the ethnic communities from where the four suspects come from, comprises around 37 per cent of the total vote. There is likely to be community backlash against candidates seen as openly supporting and promoting ICC trials.

The ruling has galvanised ethnic constituencies and most politicians and MPs from the two communities have coalesced around Hon Kenyatta and Hon Ruto. This is demonstrated by the attendance in political rallies mobilised by the Hon Ruto and Hon Kenyatta within days of the ruling. More than sixty MPs are reported to have attended the meetings.



Victim of circumstances, radio journalist Joshua arap Sang.

Hon Ruto and Hon Kenyatta are key pillars in the fledgling PNU Alliance that seeks to field one candidate against Prime Minister Raila Odinga and his ODM party in the elections. The ruling may further marginalise ODM within the ethnic constituencies from which the suspects hail. The conflicts among leaders over the ICC ruling are likely to trickle down to the local level.

The trials have a potential to dent the legacy of President Kibaki. One of the confirmed cases relates to two trusted lieutenants and key managers of his succession plan who were serving as Head of Civil Service and the Minister for Finance. The court declined to consider the statement by the President that Mr Muthaura was not involved in the crimes alleged stating that he had been mentioned as one of the persons present during the planning meetings held at the State House, Nairobi. [KN](#)

The writer is a freelance journalist.



An officer and a gentleman, Major General (Rtd) Hussein Ali.

So, when will the elections be?

Tracing the genesis of controversy surrounding elections date

Since 1991, General Elections have been held in December. This happened in 1992, 1997, 2002, and 2007. Section 57 of the repealed constitution gave the President the power to dissolve parliament therefore initiating a General Election. However, this power has been taken away by the current constitution 2010 and which has set the time for the elections as every second Tuesday of August of every fifth year after elections.

Diverse interpretation has been given on whether this set date applies to the first general election after the promulgation of the Constitution. The controversy is exacerbated by a provision that provides that the National Assembly should serve the rest of its term before the general election.

By Joseph Kibugu

There have been three schools of thought regarding the election date. One opines that the next elections should be held in August 2012; another roots for December 2012 and the last one interprets the constitution as requiring a general election in March 2013. This controversy found its way to the High Court (referred herein as the Court) where a petition sought the Court's interpretation of the relevant provisions of the constitution. Two separate suits were instituted in the Court. Another group sought an advisory opinion of the Supreme Court. The Court adjourned the two contentious cases pending the outcome of the advisory opinion in the Supreme Court.

In a ruling delivered on 15th November 2011, the Supreme Court declined to exercise its jurisdiction to offer an advisory opinion and referred the matter to the Court for resolution on a priority basis. It opined that the Court 'is, by Article 165(3) (d) of the Constitution, entrusted with the original jurisdiction to hear and determine any question entailing the interpretation of the Constitution'.

The two cases in the Court were consolidated and the issues for the Court's determination framed. In

finding that it has jurisdiction, the Court stated that the issue before it was not frivolous, had been properly framed and that the Supreme Court, by referring the matter to...[it] for determination was in effect recognising this jurisdiction. It further stated that the constitution would suffer without such a suit and hence it was proper that the suit had been instituted. The parties to the consolidated petition agreed that the determination on when the next general election should be lawfully held was the major issue for adjudication.

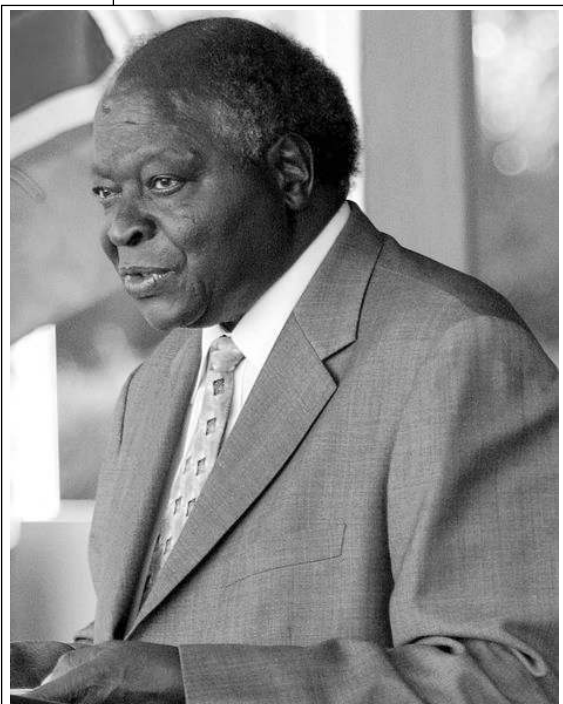
Amend

Contemporaneous with this court proceedings, the government introduced the Constitutional of Kenya Amendment Bill, 2011 in Parliament, which sought to amend Article 136(2)(a) of the Constitution which provides for election on the 'second Tuesday in August, every fifth year'. The Bill proposed that the election date be in December 2012. The stated reason for moving this amendment was the insufficient time that the Independent Electoral and Boundaries

Commission (IEBC) had to prepare for elections should it have been held in August 2012.

The Sixth Schedule of the Constitution contains 'The Transitional and Consequential provisions'. Section 9 of the Schedule states that the first elections for the National Assembly, Senate and the devolved government shall be held at the same time, and within 60 days after the dissolution of the National Assembly. Section 10 further provides that the National Assembly existing before the effective date (promulgation of the Constitution) shall continue as the National Assembly for its unexpired term.

In computing the term of the National Assembly, the Court relied in the Legal Notice No. 1 of 2008 dated January 15, 2008 which gazetted the National Assembly when it first sat under the previous Constitution. The full term of the current National Assembly is



Looking forward to retirement, President Mwai Kibaki.



Will he be third time lucky?
Prime Minister Hon. Raila Odinga

incorporated in the current constitution and provides for such a written agreement as one way of dissolving the coalition government. Regardless of the circumstances under which the general election would be held, the Court stated that the IEBC would be responsible for deciding the election date consistent with a reading of sections 14 to 20 of the Elections Act.

The other two options for the court would have been to adopt the argument of either of the other two parties to the

suit. One would have been to rule in favour of the group, which included the Commission for the Implementation of the Constitution that the date of the first elections is on the second Tuesday of August 2012. However, this would have been in disregard of the 6th schedule to the constitution since the National Assembly would not have served its full term.

The other option would have to rule in favour of the group that supported an election between October 2012 and December 2012, which included the

Attorney General and John Mwau, a Member of Parliament and who was listed as the first petitioner in the consolidated suit. However, as the Court pointed out, holding the elections in either 'August or December 2012...would have to imply the power of the President to dissolve Parliament... [and] the President does not possess such a power...[which according to the purpose of the Constitution reduces] the President's power in relation to the legislature...

Activities

The IEBC is established under Article 88 of the Constitution and operationalised by Act No 9 of 2011. The Constitution spells out the function of the IEBC as 'conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament'.

Both Article 88(4) and Section 4 of the Act provides the functions and activities of the Commission which include registration of citizens as voters; revision of the voters register; delimitation of the constituencies and wards; regulation of the nomination process by political parties for candidates contesting in an election; registration of candidates for an election; voter education; actual conduct of the election on the appointed date; investigation and prosecution of election offences under the Election Offences Act; and ensuring compliance with the code of conduct for elections by candidates before and during elections.

Other laws that relate to the conduct of the elections include the Elections Act, 2011 and the Political Parties Act. After the Court ruling, the IEBC expressed optimism that it will be able to organize elections given that it now has sufficient time. Electoral management will be under serious local and international scrutiny given that a contested election was largely seen as the trigger to the chaos that rocked the country in 2007/2008.

Unless the Court's ruling is overturned on the appeal, the coalition principals

therefore 5 years from this date and hence its full term end on January 14, 2013. Based on this computation, the Court ruled that the election could only be lawfully held conducted within 60 days from 14th January 2013.

The Court further ruled that the second scenario that could trigger a general election before the National Assembly serves its full term is the dissolution of the coalition government by a written agreement of the Prime Minister and the President. This flows from the fact that the National Accord and Reconciliation Act was

In a ruling delivered on 15th November 2011, the Supreme Court declined to exercise its jurisdiction to offer an advisory opinion and referred the matter to the Court for resolution on a priority basis. It opined that the Court 'is, by Article 165(3) (d) of the Constitution, entrusted with the original jurisdiction to hear and determine any question entailing the interpretation of the Constitution'.

have the option of waiting for the term of the National Assembly to run its course in which case the IEBC will *suo moto* set the election date after January 15, 2013. The second option is to dissolve the coalition and trigger an election within 60 days of such dissolution as per the Court's ruling after which the IEBC would then have to set the electoral date and organise elections.

Additional challenges

Given the primacy that elections have taken in Kenya's democratic evolution, it will be incumbent on the principals to ensure that they do not keep the country guessing their intentions. As the year ebbs away, they should let Kenyans know whether they are considering dissolving the coalition sooner than later to ensure that the elections are held in December as they have been traditionally held over the last two decades; or they will let the National Assembly serve its own term and let its dissolution be by the operation of the law. However, they will have to be guided by other considerations such as the preparedness of the IEBC to hold the elections within the 60 days of such dissolution.

The other two options for the court would have been to adopt the argument of either of the other two parties to the suit. One would have been to rule in favour of the group, which included the Commission for the Implementation of the Constitution that the date of the first elections is on the second Tuesday of August 2012. However, this would have been in disregard of the 6th schedule to the constitution since the National Assembly would not have served its full term.

Past electoral commissions have consistently blamed lack of adequate penal and other laws for their inability to check on the rampant electoral malpractices. The Elections Act has now cured this and together with other laws, brings a modicum of civility to the conduct of election campaigns, election financing and even checking the intra-party practices to ensure that they are not repugnant to free and fair elections. A major challenge for the IEBC is to ensure that the laws are enforced so

that it can set a precedent for future election which is no mean a task given the unprecedented complexity of managing the upcoming elections.

Eligibility

Regardless of how well the process is managed, it will be inevitable that candidates and their supporters will cast aspersions on the IEBC because of either the delineation of boundaries or more likely, the conduct of the elections. It will take institutional leadership to weather these storms and find a balance the need to be responsive to legitimate concerns regarding the conduct of the elections and identifying frivolous and unfounded accusations.

The recent confirmation of the charges against the four alleged perpetrators at the International Criminal Court, two of whom have declared their intention to vie for the presidency, presents a challenge to the IEBC in making a determination on their eligibility to vie for the positions.

The Court has settled the question on the election date unless this is overturned on appeal. With all the judicial and legal reforms that have been going on triggered by the post election violence, a major test on whether the country has turned the corner will be if the elections will free and fair. [KN](#)

The writer is an international human rights lawyer.



Raring to go, IEBC Chairman Mr. Isaack Hassan.

Equal before the Law?

The Nancy Baraza saga

"All are equal before the law and are entitled without any discrimination to equal protection of the law."- Article 7 of the UN Universal Declaration of Human Rights (1948)

The principle of Equality before the law is now a basic right recognized in the constitutions of all democratic countries all conventions relating to human rights. The adoption of the principle not only ensures order and fairness within society but also reduces incidences of

discrimination on the basis of socio-economic status.

In its preamble and also in its Article 27, the Kenyan Constitution recognizes and adopts this maxim. It is against this backdrop that we analyse the incident pitting the Deputy Chief Justice, Ms. Nancy Makokha Baraza and a female security guard known as Rebecca Kerubo.

By Thuita Guandaru

According to media reports, the altercation between Ms Nancy Baraza and Ms Rebecca occurred at the Village Market, Shopping Mall at around 6.00 pm. on 31st December 2011. This was New Year's Eve when there is high traffic of shoppers. It is reported that Ms Baraza had just left Nairobi Hospital where she had spent a greater part of the day seeking treatment for an ailing son. Thereafter, she intended to buy some medicines from a pharmacy at the village market.

Ms Kerubo a Security guard at the village market had been assigned duties of frisking all shoppers entering the mall without exception to ensure that they were free of weapons or explosives. Such frisking is now common place owing to the threats issued by the al-shabab militia of Somalia.

It is alleged that upon reaching the entrance, Ms Baraza jumped the queue of those waiting to be frisked and headed straight to a Chemist within the mall. Ms Kerubo followed the strange shopper not knowing who she was and demanded to screen her. Some verbal altercations seems to have taken place between the two at the Pharmacy and perhaps irked by the nagging guard, Ms Baraza pinched MsKerubo's nose and barked at her in Swahili "unafaa ujue watu" (you need to know (big) people).

Ms. Kerubo is said to have afterwards returned to the security desk where she continued frisking other shoppers. On her way out Ms Baraza is alleged to have ordered one of her body guards to shoot Ms Kerubo and upon his refusal to do so, she walked towards



Suspended Deputy Chief Justice Ms Nancy Baraza.

her car and went back to the security desk while brandishing a gun which she pointed at Ms Kerubo. The guard pleaded for her dear life and upon gathering of a crowd Ms Baraza lowered the gun and left.

Intimidated

It's obscure who among the two ladies reported the matter first to the Police. Negotiations were attempted to reconcile the two but bore no fruits as each side maintained it won't be intimidated.

The New Year period is usually dull news-wise and the altercation was a windfall for a scandal-hungry media. Ms Baraza is said to have denied allegations of brandishing a gun but admitted that an "unfortunate incident" had taken place. She attributed her reactions to apprehensions regarding her safety owing to threats she had received.

The Police launched investigations and submitted its report to the Director of Public Prosecution. The DPP initially returned the file back terming the investigations shoddy but the file was subsequently returned to the DPP on 1st February 2012 who shelved the decision to prosecute Baraza pending the outcome of a tribunal investigation.

The JSC's reaction was swift. Its Chairman Dr Willy Mutunga from the outset stated that no one is above the law and went ahead to promptly



Will justice be served equally this time round?

convene the JSC to discuss MsBaraza'sconduct. A sub-committee of the JSC chaired by Reverend Samuel Kobia was formed to investigate the issue and to present a report to the JSC. This sub-committee deliberated over the issue and evaluated witness testimonies as well as the exhibits produced.

A total of 16 witnesses including Ms. Baraza and Ms. Kerubo were called. Other witnesses included Kerubo's husband, the Chief Security Officer at the Village market, a security guard who was on duty with Ms. Kerubo at the material time, a Security guards supervisor at the Village Market, the CCTV operator at the Village Market, the Provincial Criminal Investigations

Officer (PCIO) Nairobi, Officer in Charge of Serious Crimes at C.I.D, the proprietor of the Pharmacy where the altercation took place, Ms. Baraza's body guard and MsBaraza's driver. The Subcommittee also visited the scene of the altercations.

On 13th January 2012, the sub-committee reported to the JSC and made recommendations, which the JSC adopted that a Petition be presented to the president to form a tribunal to investigate and recommend whether the Deputy Chief Justice may be removed for gross misconduct or misbehavior.

Misconduct

The full report of the JSC was not made public thus denying the public an opportunity to inform themselves of the true reasons behind the JSC's recommendations. Nonetheless, it would not be too far an assumption that the JSC must have been convinced that Ms Nancy Baraza truly engaged in misconduct.

In light of the fact Ms Baraza was being discussed by her colleagues at work, one would expect a sympathetic decision issued by the JSC. To hear that the JSC recommended the establishment of a tribunal for her removal would only mean that her colleagues were themselves appalled by her behaviour and had no choice than to let the law apply.

It is alleged that upon reaching the entrance, Ms Baraza jumped the queue of those waiting to be frisked and headed straight to a Chemist within the mall. Ms Kerubo followed the strange shopper not knowing who she was and demanded to screen her. Some verbal altercations seems to have taken place between the two at the Pharmacy and perhaps irked by the nagging guard, Ms Baraza pinched MsKerubo's nose and barked at her in Swahili "unafaa ujue watu" (you need to know (big) people).



Where does he stand? Chief Public Prosecutor Keriako Tobiko

examine the exhibits submitted. Strictly speaking, such tribunals are not bound by the strict rules of evidence under the Evidence Act Cap. 80 of The Laws of Kenya. Witnesses are led in their evidence by an assisting counsel. The subject of the tribunal and in this case Ms Baraza has the right to be represented by counsel(s), the right to cross examine witnesses, the right to testify personally and the right to call her own witnesses.

At the conclusion of the hearing, the tribunal does not write a judgment but instead submits a report and recommendations to the president. Apparently, the Tribunal has a broad discretion on the recommendations to make. It can recommend the dismissal of the complaint, the removal, reprimand or suspension of the Judge and may even recommend institution of criminal proceedings.

Unlike in the past, the recommendations of the tribunal since the promulgation of the new Constitution are binding on the President and he must implement them irrespective of his feelings.

"You know that those who are regarded as rulers of the Gentiles lord it over them, and their high officials exercise authority over them. Not so with you! Instead, whoever wants to become great among you must be your servant, and whoever wants to be first must be slave of all. For even the Son of Man did not come to be served, but to serve, and give his life as a ransom for many." (Mark 10:42-45)

The above words spoken by Jesus' more than 2000 years ago are the ideal yardstick of leadership in the 21st century. It is no longer desirable for people in elevated positions of power

The legal framework relating to the appointment of a Tribunal to remove a Judge other than the Chief Justice is prescribed by Article 168 5(b) of the Constitution. The tribunal is required to be composed of a chairperson, three persons who are either judges or qualified to be so, an advocate of 15 years experience and two other people experienced in public affairs.

The Constitution has proposed that parliament passes legislation to regulate the operations and procedure of such Tribunals. However, no such legislation has been passed yet and so the tribunal will have to regulate its own procedure.

The Tribunal established to investigate Ms. Baraza is not the first one in the country. Numerous such tribunals were established in the wake of the radical surgery of 2003 and the likes of

Justices Waki, Anganyanya, Mbogholi and Nambuye went through them and were reinstated back to the judiciary.

The proceedings in a tribunal though similar is not the same as a court proceeding/ trial. It is more of an inquiry rather than a forum for adversarial confrontation between the subject of the inquiry and the complainant.

Tribunal

The members of the tribunal sit in to hear the testimonies adduced and to

On her way out Ms Baraza is alleged to have ordered one of her body guards to shoot Ms Kerubo and upon his refusal to do so, she walked towards her car and went back to the security desk while brandishing a gun which she pointed at Ms Kerubo.

to behave like demi-gods. Instead, they are required to humble themselves in service to the populace.

Ombudsman

The Judiciary was in the past considered unapproachable. Fear rather than respect held sway over the relationship between its members and the public. In the new Constitutional dispensation however, the judiciary has been keen to lure the public to embrace it as an accessible fountain of justice. Though open days, the transparent recruitment of judges with impressive credentials, the establishment of an internal office of Ombudsman and the discarding of colonial dress codes & terms the Judiciary has set the pace of change in government.

With such an impressive start, it was flummoxing to hear news that a founder member of Federation of Women Lawyers FIDA (Kenya), a women rights crusader, and an educated intellectual would pinch the nose of a hapless female guard, ask a body guard to snuff out the life out of the young woman with 3 children and when the body guard refused, get the gun herself to do the job.

And all this because the lowly security guard would not recognize a whole Deputy Chief Justice of the Republic of Kenya. What is even more upsetting is that the good judge's reaction was not a sudden impulse of anger. It appears that there was ample time for the Judge to go to the car and get a loaded gun. That is what lawyers call premeditated actions.

The Judge must have thought about her intended action and convinced herself that it was appropriate step to take. The question on the lips of most Kenyans is that if the Senior judge could be that unreasonable and ruthless when dealing with a member of the public who was simply doing her job, how rational can she be when handling disputes before her.

Some may term her behaviour as an illustration that the change of guard within the Judiciary was simply an act of putting old wine into new wine

The Tribunal established to investigate Ms. Baraza is not the first one in the country. Numerous such tribunals were established in the wake of the radical surgery of 2003 and the likes of Justices Waki, Anganyanya, Mbogholi and Nambuye went through them and were reinstated back to the judiciary.

skins. The mentality of the old where Judges were Lords and others civilians were mere serfs seems entrenched such that even an appointment from outside the judiciary didn't cure the disease.

Impartiality

The Judicial Code of Conduct requires Judges to carry themselves with courtesy, professionalism, integrity and Impartiality. Even old sayings paint the office of a judge as one close to that of a saint – “as sober as a Judge” or “like Caesar's wife, a Judge must be above reproach”

The incident definitely paints Ms Baraza as a person lacking the temperament, and disposition of a judge. She is now the subject of rude jokes in the social media and may never again be seen as a “sober” judge. However, being an isolated incident, the issue does not in any way paint the entire judiciary as one composed of persons with deadly temper outbursts.

On the flip side though, the Baraza incident demonstrates that the JSC has finally come of age. There are no longer sacred cows and the members of JSC shall exhibit no affinity or restraint to swiftly punish one of their own with wayward tendencies.

Scenes of Judges having altercations with members of the public or taking acts of misconduct are quite rare. The Black Bar authored by Lawyer Paul Mwangi mentions an incident in which a former Chief Justice drank himself silly and started marching in the corridors of power while singing songs in praise of the incumbent President

Moi. Nothing was done to the Chief Justice of course for political reasons.

Integrity

The closest case to the Ms. Baraza incident relates to that of Justice GBM Kariuki who on 21st October 2008 was alleged to have stabbed and wounded a motorist after a Traffic incident. No tribunal was formed but the Judge was simply suspended and charged unsuccessfully with attempted murder.

In Orange County in the US, a superior court judge (Kelly MacEachern), in the year 2006 filed false claims for a legal conference in San Diego and then lied under oath when questioned about them. The Judicial commission investigating her conduct observed that the lack of integrity manifested by her misconduct, compounded by her lack of candor and deceitful testimony under oath necessitated her removal in order to protect the public and maintain public trust in the integrity of the Judiciary."

In the decision and in numerous other pronouncement in the western countries, willful misconduct is considered as the most serious basis for censure or removal. *In the Matter of Mulroy*, 731 N.E.2d 120 (New York), a Judge was removed making derogatory racial remarks about Italian-Americans at a charity dinner and during his election. [KN](#)

The writer is a Nairobi lawyer and political scientist.

Boundary delimitation and Assembly of the Counties

Kenya finally to have an Equalisation Fund

By Macharia Nderitu

The Independent Electoral and Boundaries Commission (IEBC) is an independent constitutional commission which is mandated to organise and conduct elections and referenda.

Its predecessor, the Electoral Commission of Kenya, is largely viewed as a trigger to the violence that ensued after the 2007 General Election. ECK was not independent, impartial and professional in conducting the election and the tallying of presidential votes was flawed. ECK was disbanded in 2008 through a constitutional amendment.

The Interim Independent Electoral Commission and the Interim Independent Boundaries Review Commission (IIBRC) were created in its stead. The two interim commissions had an initial two year term. In August 2010, IEBC was created under the Constitution. Afterwards, Parliament enacted the Independent Electoral and Boundaries Commission Act and the Elections Act. The Elections Act consolidated laws relating to elections which hitherto were contained in myriad statutes. The Independent Elections and Boundaries Commission Act elaborated the constitutional provisions on the IEBC.

The functions of the IIBRC were to make recommendations to Parliament on delimitation of constituencies and local authority electoral units and optimal number of constituencies on the basis of equality of votes taking into account density of population and in particular the need to ensure adequate representation of urban and sparsely-populated rural areas;



Former Chairman of the IIBRC, Mr. Andrew Ligale.

population trends; means of communication; geographical features and community of interest; and community interests; to make recommendations to Parliament on administrative on boundaries, including the fixing, reviewing and variation of boundaries

of districts and other units; and to perform such other functions as may be prescribed by Parliament.

Delimitation

The IIBRC prepared a report on constituency boundary delimitation

that was presented to the President and the Prime Minister. Since the Constitution had replaced the local authorities with counties, IIBRC did not make recommendations on delimitation of wards. The report was not adopted by Parliament to enable publication of the final report. Three of the nine Commissioners prepared a minority report disagreeing with the findings of other Commissioners. The Parliamentary Committee on Administration of Justice and Legal Affairs submitted a report to the National Assembly, identifying issues that required further consideration before the report was implemented.

The IEBC Act requires the Commission to complete boundary review in four months. The Commission is independent and subject to the Constitution and

the law and is not subject to direction or control by any person or authority. The Commission shall observe the principle of public participation and consultation in preparing its report. The IEBC Act provides that the provisions of the Fifth Schedule shall apply in addressing the issues arising from the first review. IEBC was granted limited time to complete delimitation. Further, there is a statutory requirement in the Act that the IEBC considers the report of IIBRC. The IEBC preliminary report mirrors the findings of IIBRC. IEBC has published a preliminary report and has invited the public to make proposals for reviewing the report to enable the IEBC to publish the final report.

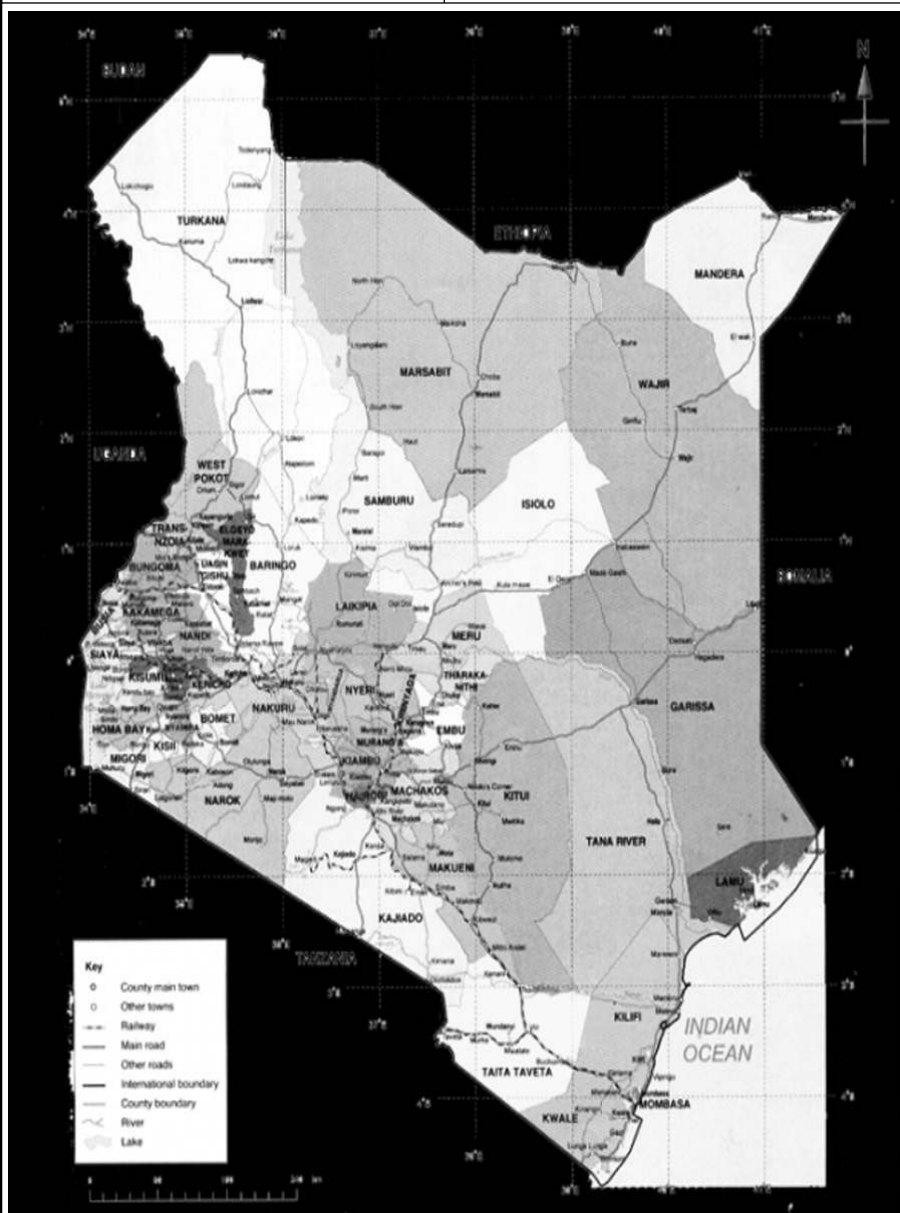
Why IEBC adopted report
The IEBC Act enjoins the Commission

to use the IIBRC report as the primary material in boundary delimitation. The report by the Parliament Committee on Administration of Justice and Legal Affairs will serve as the secondary material. The IIBRC carried out public consultations in 106 public meetings and received views from over 2, 600 persons and organisations. While the Constitution obligates the IEBC to be independent in boundary delimitation, exceptions have been made for the delimitation of boundaries before the first elections under the Constitution.

The Constitution provides that the maximum number of constituencies is 290. The IEBC has set the maximum number of wards at 1450 as recommended by the Task Force on Devolved Government. This means the wards will be reduced from the current over 3,000 wards. The wards will constitute the electoral zones for the members of the county assemblies. The same criterion for delimitation of constituencies was applied to wards. The IIBRC and the IIEC used the data obtained in the 2009 Kenya National Population and Housing Census for the purposes of delimitation. The IIBRC agonised over which data to use in delimitation since this was not defined by law.

The IEBC has completed the delimitation of wards. The IIBRC did not complete ward delimitation as the Constitution was promulgated when they had completed public hearings and the structure of the counties was not clear. The recommendations of IIBRC on the constituencies have been adopted by IEBC. Each constituency will have 3 to 5 wards. The newly created 80 constituencies were distributed as follows: - Nairobi Province got 9 units, Coast Province was allocated 5 units, North Eastern Province was allocated 7 units, Eastern Province was allocated 8 units, Central Province was allocated 5 units, Rift Valley Province was allocated 27 units, Western Province 9 units and Nyanza Province was allocated 10 units.

Population density
The issues arising from the IIBRC report include boundary delimitation in the 8 constituencies whose census data was cancelled. A repeat census ordered by



The new face of Kenya.

the Ministry of Planning has not been carried out. It was noted that IIBRC failed to carry out public consultations in some constituencies. This means that the report was not informed by public participation. It was further noted that IIBRC failed to agree on the definition of cities or urban areas.

In its report, only Nairobi was considered a city for the purpose of the delimitation. All other areas including Mombasa and Kisumu were considered urban areas. Their population density was not considered during delimitation. Further, urban areas and sparsely populated areas were not defined as Parliament did not enact the enabling law.

IIBRC was accused of using a skewed population quota which favoured some regions. IIBRC failed to consider geographical features as mandated. IIBRC used provinces as units of delimitation. Provinces are not recognised by the Constitution. There was no legal basis their use as units of delimitation. IIBRC failed to take into account community of interest and means of communication in some electoral areas.

Constitutional provisions

IEBC's functions include continuous registration of voters, regular revision of voters roll, delimitation of constituencies and wards, registration of candidates for election, settlement of electoral disputes, development of a code of conduct for candidates and political parties, among others. IEBC shall exercise the powers in accordance with the Constitution and the law.

IEBC is empowered to review names and boundaries of constituencies and wards at intervals of between 8 to 12 years. Such review shall be completed 12 months before the General Election. The boundaries of each constituency shall be such that the number of inhabitants is, as nearly as possible, equal to the population quota.

A greater or lesser population than the quota must be justified on the basis of geographical features, urban areas,

The issues arising from the IIBRC report include boundary delimitation in the 8 constituencies whose census data was cancelled. A repeat census ordered by the Ministry of Planning has not been carried out. It was noted that IIBRC failed to carry out public consultations in some constituencies.

community of interest, historical, economic and cultural ties and means of communication. The population in a constituency or ward may be greater or lesser than the population quota by a margin of 40 per cent for cities and sparsely populated areas and 30 per cent for other areas.

IEBC must consult interested parties during the review and progressively work towards ensuring that the number of inhabitants in each constituency and ward is nearly as possible equal to the population quota. A person may apply to the High Court for a review of a decision of the Commission. The application shall be filed within 30 days from the date of publication of the decision. Such challenge shall be heard and determined within 3 months from the date of filing. The population quota means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards into which Kenya is divided.

The IEBC Act provides that the Commission shall resolve all issues arising from the first review. These issues include redistributing wards in affected constituencies and considering progressive effort at democratic equality of constituencies towards attaining the population quota. In the review before the first elections under the Constitution, IEBC shall not consider new definitions of cities, urban areas and sparsely populated areas and shall use the enumerated national census figures. IEBC shall progressively advance towards the population quota in protected constituencies in relation to neighbouring constituencies.

Resolutions

The Commission shall publish a preliminary report which shall be made available to the public for 21 days during which representations will be invited from the public on the proposals.

IEBC shall consider the views received within 14 days and submit the revised report to the Parliamentary Committee, which shall forward the report to the National Assembly within 14 days. The National Assembly shall consider the revised report and forward its resolutions to the Commission within 7 days.

The Commission shall consider the resolutions of the National Assembly and prepare and publish a final report in the Gazette within 14 days. If the National Assembly fails to make a resolution, the Commission shall publish the report. A person may apply to the High Court for review of the Commission's decision within 30 days of the publication. Such application shall be heard and determined within 30 days. After publication, the Commission shall facilitate public sensitization on the boundaries for 30 days. The Commission shall ensure that all documents, materials, publications, reports and recommendations arising from the delimitation process are maintained in an accessible and usable form.

Constitutional Bill

The centre for devolved resource allocation under the Constitution shall be the county. The Constitution establishes 47 counties which will share a guaranteed 15 per cent of the national revenue. The revenue shall be

calculated on the basis of the recent audited accounts of revenue as approved by the National Assembly. IEBC is prohibited under the Constitution from determining the boundaries of counties under the Constitution.

The Constitution creates the Equalisation Fund into which 0.5 per cent of all national revenue collected each year shall be allocated. The revenue shall be calculated based on the most recent audited accounts. The Fund shall be used to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to enhance the quality of the services.

The national government may use the Fund through grants to county governments in which marginalised communities exist. The Equalisation Fund shall lapse 20 years after promulgation of the Constitution. Capping the maximum number of wards at 1450 will assist in conserving the resources of the counties and ensure most resources will be applied towards development projects and not recurrent expenses.

The Senate shall determine the allocation of revenue to counties and exercise oversight over national revenue allocated to counties. Any laws relating to the county government must be approved by the Senate. The Commission for Revenue Allocation shall make recommendations concerning the basis for the equitable sharing of revenue raised by the national government between national and county governments and among the county governments.

The County government will administered through an Executive which shall

be headed by the Governor. The Governor shall be elected directly by voters. The county assembly members, who will be elected from each ward, will form the Legislative arm of the county. The member will be elected directly. Each assembly will in turn elect a Speaker.

The county government will administer the revenue allocated to the county by the national government as well as raise internal revenue for its projects. The county government will therefore play a useful role in ensuring service delivery to the public. The Governor will be accountable to and subject to scrutiny by the County Assembly.

Best practice

The operational design of the counties will be clarified by legislation on county affairs as proposed by the Task Force on Devolved Government. Parliament is expected to enact the laws on devolution to ensure adequate preparations before the next elections. The counties meet the best practice criteria for devolution through:

- a. Fiscal autonomy for counties. The national government will be bound to provide funding to the counties in an equitable manner. The counties will be expected to raise revenue from residents. Some counties may become overly dependent on the allocations of funds by the Commission on Revenue Allocation but the financial allocation will ensure long term sustainability. The revenue will be allocated on the basis of need and equality. For example, in Nigeria, states are allocated funding on the basis of need and equality. A state is entitled to a share of revenue derived from natural



One of the leading *majimbo* proponents, the late veteran politician Hon. Shariff Nassir.

- resources extracted from its territory.
- b. County assembly will ensure representation and oversight over public expenditure. In South Africa, the Premier in the province is elected by the Provincial Assembly. Members of the provincial executive are appointed from the Provincial Assembly. In Kenya, the county executive will not be part of the county assembly. There is complete separation of powers between the county legislature and executive.
- c. The public will be involved in determining the direction of the county through direct election of the Governor and his Deputy and the county assembly members at intervals of five years. This will ensure that the devolved units espouse democracy.
- d. The Senate will protect the rights of the counties at the national level. Each county will elect a Senator for this purpose.
- e. The Constitution defines the roles of the national and county government. This will reduce potential conflict on functions. Any conflict may be referred to the Supreme Court for interpretation. [KN](#)

The writer is a Nairobi based lawyer.

A greater or lesser population than the quota must be justified on the basis of geographical features, urban areas, community of interest, historical, economic and cultural ties and means of communication.

Doing the honourable thing

Why are MP's not quitting Parliament after changing parties?

In the period preceding the 2002 General Election there was a mass defection from KANU and the formation of new alliances. Prior to this in the periods preceding the 1992 and 1997 general elections were marked with a lot of defections and formation of numerous political parties. The trend in defections preceding general elections seems to have changed in the period after 2003-2007 as the defections and party hopping

started after the elections and not before.

By Ivy Wasike

In 1992 after repeal of Section 2A of the then Constitution of Kenya, the Forum for the Restoration of Democracy (FORD) fragmented into two –Ford Kenya and Ford Asili, just before the elections. Other parties that were formed were the Democratic Party (DP) and Kenya National Congress (KNC).

In 1995, opposition parties united under the National Democratic Alliance but in 1997 they disintegrated once again just before the general election. In December 2002 Opposition parties united under the National Rainbow Coalition (NARC) just before the General Election but immediately after NARC came to power, in 2003, the coalition disintegrated.

Later in 2005 immediately after the Referendum, the Orange Democratic Movement (ODM) also split into two, ODM and ODM-Kenya. In September 2007 just before the elections, the Party of National Unity (PNU) was formed as an alliance of various political parties.

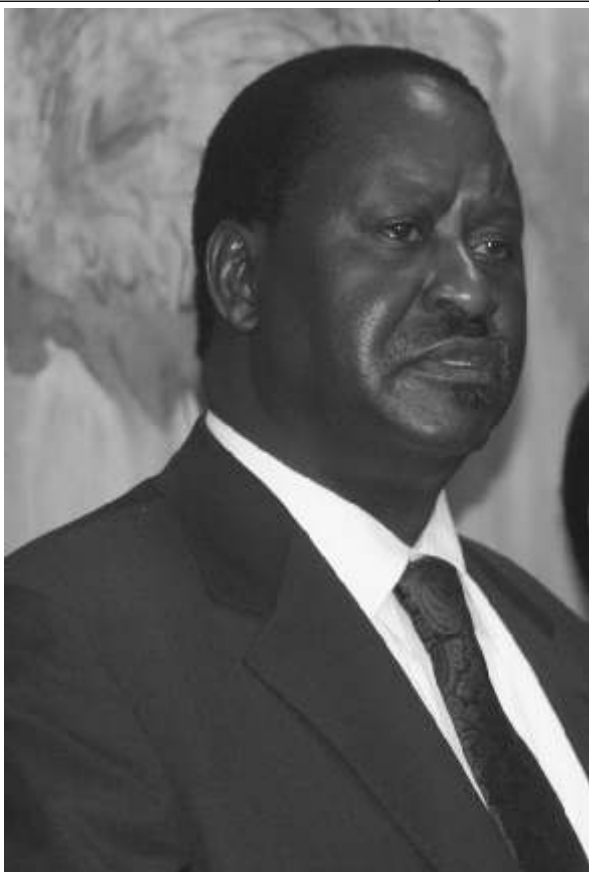
However, after the controversial 2007 elections, there has been an influx of defections. However, it must be noted that, after repeal of Section 2A of the Constitution in 1991 and re-introduction of multi party democracy, there was no specific law governing the formation of political parties, their organization, funding, roles, functions and operations until the enactment of the Political Parties Act of 2007.

A Political party can be defined as an organization or group of people with similar political beliefs, objectives or ideologies that seek to attain power within a government to further its objectives. In a representative democracy, political parties are very important.

Defection on the other hand can be defined as giving up allegiance from one political party or entity to another and it entails abandoning a cause, person or doctrine to which one is bound by a duty or some tie. In the recent past, defection have characterised the political landscape of Kenya with politicians moving from party to party and forming new parties.

A Political Party is meant to have ideologies, programmes and policies to serve as a compass to the members and to discourage them from defecting. Political parties are very important in democracy and governance as they function as a link between the state and grassroots.

They also are meant to aggregate interests and present political alternatives. Thus parties are meant not only to serve interests of members



PM Raila Odinga - How many times has he changed parties?

but also assume the hub of common good of a nation and the welfare of all members of society.

Unless therefore there are factions in a political party, defection would mean one was not in agreement with the ideologies or cause of a certain party and instead believed in a different cause or ideology. Sadly, in theory, Political Parties in Kenya have for a long time been associations of private individuals with the public purpose or they are affiliated to individuals and only serve as electoral vehicles for the owners.

Further few parties had clear or consistent social, economic or financial policies making them incompetent to contribute to ideas of governance or social justice. Political parties have also been key in aggregation and articulation of narrow sectional interests such as ethnic, religious, racial, gender, regional segregation.

As a result, political parties were used as bargaining chips in the struggle for power and benefits. If then, the objective of the party is that of access to power rather than safeguarding moral value, common good or national interest, then its members will also have no political principles, morality, conscious or ideology.

Stillborn

In Kenya, the defections have been as a result of personality crash and divergent views as was seen in 1997 when factional bickering rendered the



Dreaming of the next party, Hon. Cyrus Jirongo.

National Democratic Alliance stillborn. In 2003 internal conflicts disrupted NARC as a result of party leaders reneging on agreed issues, disagreement on a position and the realization of individuals' personal political ambitions. This was also the

case in 2005 and 2008 in regard to ODM and PNU.

Sec. 103 of the Constitution disqualifies an MP who resigns from a party or being an independent candidate joins a political party. These provisions are reinforced in the Elections Act 2011 which states inter alia in Sec. 38 that if a person is expelled from a party, the seat is allocated to the next candidate or a party's nominee.

Sections 29 & 34 discourages last minute defections from party to party as they provide that one must have been a member of a political party at least three months prior to the nomination and if an independent candidate, one must not have been a member of a political party three months before the election.

Defection on the other hand can be defined as giving up allegiance from one political party or entity to another and it entails abandoning a cause, person or doctrine to which one is bound by a duty or some tie. In the recent past, defection have characterised the political landscape of Kenya with politicians moving form party to party and forming new parties.

Unless therefore there are factions in a political party, defection would mean one was not in agreement with the ideologies or cause of a certain party and instead believed in a different cause or ideology. Sadly, in theory, Political Parties in Kenya have for a long time been associations of private individuals with the public purpose or they are affiliated to individuals and only serve as electoral vehicles for the owners.

once again as a block that will garner in votes for the party. Also it may be the process involved in having a candidate disqualified infringes the right and freedom of expression and association and since the High Court has the jurisdiction, such a petition by a party may be objected to as infringing the rights of the individual MP

Finally the judicial process has been known to be lengthy, expensive and time consuming and therefore discourages many. If maybe the decision for disqualification was left to the Speaker or the Electoral Commission, this would make the process simpler, easier and the individual MP would be required to give a defence that would be simple and also there would be no legal technicalities involved.

The issue of defection is not only prevalent in Kenya. Nigeria is grappling with the same issues that we are due to Constitutional ambiguity. In the case of Zamfara State Governor the Federal Court –Gasau Division clearly stated that the law was silent and did not state that a person could not leave a political party.

This was also reinforced in the case of Abubakar Atiku when the court also stated that a person sponsored by a political party to power could leave

Under the Act, once a party nominates an individual, it furnishes the Commission with a party list which under Sec. 35, cannot be amended during the term of the house the candidate is elected. So members must stick to their party or risk being disqualified. The Act goes further in Sec. 32 to disqualify a candidate who had already been nominated or selected by one party, to be nominated by another party. Under the Political Parties Act, an individual ought to have been a member of a party at least 3 months before elections.

Hopping

Further, if a person is engaged in the formation of a party while he still is a member of another party or forms another party or promotes the ideologies of another party etc, the person is automatically deemed as having resigned from the party.

In the same Act the Registrar of Political Parties is given power to settle certain disputes not related to elections or wrangles in parties. The registrar also acts as a watchdog to the commission. Thus under the IEBC Act, the Commission can refuse to clear a candidate if he has not complied with the law. However the Constitution gives only the High Court power to disqualify individuals.

Despite these legislations that deal with party defections, William Ruto for example, defected from ODM,

joined UDM and is now the founder of URP party and many more parties. Other MP's have also been notoriously hopping from Party to Party and despite complaints and threats of excommunication, these exodus still go on.

Thus it seems parties are not keen on lodging formal complaints with the registrar or complaints in Court seeking to disqualify these individuals since the parties have seem not very keen. One of the reasons can be because these defectors especially Ruto, still claim to be part of ODM.

Infringing

Also the leaders of ODM have indicated their willingness to accommodate him so as to be able to win the Rift Valley region and have it

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the same party to another. Despite these ambiguities, the Constitution of Nigeria is clear that elected Senators, House of Representatives and State legislators must vacate their seats in the house in the event they defect UNLESS they defect as a result of factions in the party.

Abstain

India after grappling with numerous defections in its Tenth Schedule to the Constitution (also known as the Anti-Defection Act) set provisions for disqualification of elected members on the grounds of defection. The grounds are; when an elected member voluntarily gives up his membership to a party and if a member votes or abstain from voting in such a house contrary to directions from his political party.

The committee's function is to exercise oversight over the administration, expenditure and policy of the NSIS. Still on issues to do with oversight of its activities, the Bill proposes to vet members to the PIOC, which will be the overseer of its activities. Such a clause is controversial, as the NSIS would actively have on board committee members that will not 'rock the boat'.

The whip of the party in such instances sends a petition for disqualification of the member to the Speaker or expels

the member. The member maintains his seat in the house until the speaker gives his decision which is final and no court has any jurisdiction on it. Once a member is expelled, he/she can stand for elections for the seat in another party. When two-thirds of members of a Political Party in India join another party, the two parties are considered as mergers.

Other countries with anti-defection laws in their Constitutions are; Belize (Art 59), Namibia (Art. 48), Nigeria (Art.68), Seychelles (Art. 81), Sierra Leone (Art. 77), Singapore (Art. 46) and Zimbabwe (Art. 41). Most of these countries are semi democracies. These laws are rare in established democracies but common in developing democracies.

In fact, in Europe, politicians depend on a great extend upon success of the party. South Africa and New Zealand had Anti Defection Laws which were later abandoned. In nearly all the mentioned countries, once the Speaker is informed of the defection of a member by the party, the Speaker's duty is to disqualify the said member or expel him and the decision cannot be over ruled by any other authority. [KN](#)

The writer is an advocate of the High Court of Kenya and a graduate student in diplomacy at the University of Nairobi.



Leading the pack, Hon. William Ruto.

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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