

# KatibaNews

Edition III, 2012

## The birth of a new Republic

### The Constitution implementation scorecard

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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 linking up with other journalists' organisations locally and abroad.

## Edition III, 2012

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 Constitution implementation scorecard

*The implementation of the Constitution remains the greatest priority of the present Government, but is at the same time the leading challenge in the nation's agenda. The implementation of the Constitution provides the chief route for citizens to avoid ethnic violence but instead utilise their uniting strength to steer the country into a prosperous development path.*

By Dorothy Momanyi

Whereas the Constitution itself is the structure, the process of implementation provides the building blocks for sound nationhood, peace building and emergence from oppressive authorities. This article takes stock

of the implementation process for the (almost) two years since the Constitution was promulgated.

The focal point would first be to examine those legislations required under the Constitution that have been enacted since January 2012. It also studies the outstanding Bills and the reasons for their delay, and finally seeks to identify the way forward, including the question of whether Parliament should be dissolved for failing to meet the requisite timelines.

## Enacted Bills since January 2012

The Sixth Schedule of the Constitution provides the timelines upon which a number of legislations require to have been enacted failure to which sanctions may come into effect against parliamentarians. Other than the Bills that were required to

conhave been in place within one year, those that should have been in place within 18 months of the promulgation include:

- Legislation on land
- Those relating to the removal of a County Governor
- Those relating to the vacation of office of a member of a County Assembly
- Legislation to bring into effect devolved government
- Legislation on revenue funds for county government.

Of these, Parliament has enacted the following:

1. The Transition to Devolved Government Act, 2012 was enacted in February 2012 as Act No 1 of 2012. According to its preamble, the Act is meant to provide a framework for the transition to devolved government pursuant to section 15 of the Sixth Schedule to the



How much has Parliament contributed to both the review and implementation of the new Constitution?

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1. Constitution.
2. The Intergovernmental Relations Act, 2012 was enacted as Act No 2 of 2012 and is according to its preamble designed to establish a framework for consultation and co-operation between the national and county governments and amongst county governments, and to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution. The President assented to the Act on February 27, 2012.
3. The Land Registration Act was assented to on April 27, 2012 and its objective is to revise, consolidate and rationalise the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.
4. The Land Act, 2012 No 6 of 2012 was assented to on April 27, 2012 and was intended to give effect to Article 68 of the Constitution by revising, consolidating and rationalising land laws, as well as provide for the sustainable administration and management of land and land based resources.
5. The National Land Commission Act, 2012 was enacted as No 5 to make further provision on the

functions and powers of the National Land Commission, qualifications and procedures for appointments to the commission and to give effect to the objects and principles of devolved government in land management and administration.

#### Reconsideration

The outstanding Bills that were required to be law by February 28, 2012 are The County Government Bill, 2012 and The Public Financial Management Bill. The former provides for the function, powers and the operations of county governments and the participation of citizens in the affairs of the county.

Surprisingly, this Bill was passed by Parliament, but the President refused to assent to it and sent it back to the House for reconsideration on the ground that some clauses, particularly those express-

ing that the ward and county commissioners shall be under the county governments rather than the national government, were unconstitutional.

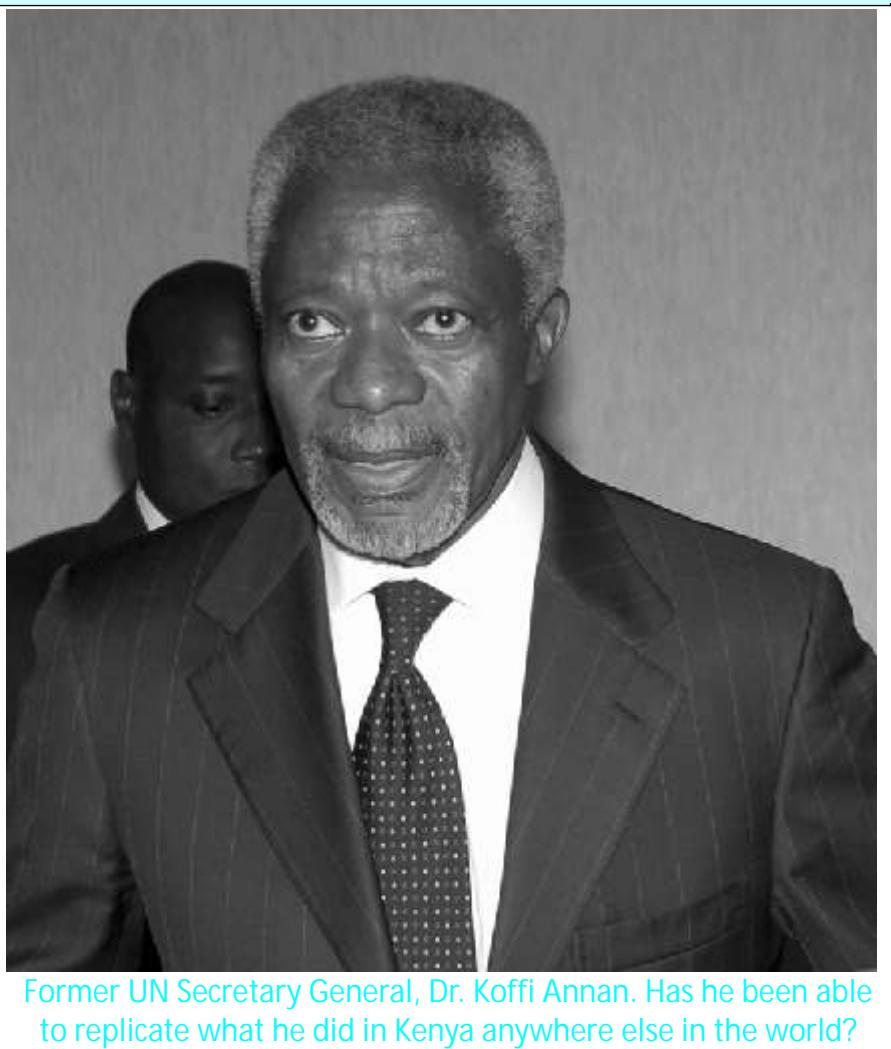
The President's preference was for these administrators to represent the interests of the national government at the counties by being answerable to the national government. Parliament shall debate the Bill once again and if it adopts the position of the President, the Bill will be taken to him for assent.

However, if Parliament maintains that the Bill be retained in its current form, it will need to be passed by at least two thirds of Members of Parliament and the President will have little choice but to assent to it, failure to which the Bill will automatically become law after 14 days of submission.

#### Deadline

The other Bill required by February 28, 2012 was The Public Financial Management Bill, which sets out to promote transparency and accountability in the management of public finances at the National Government and County Government. This Bill seems not to have been debated by Parliament but nonetheless Parliament on May 26, 2012 unanimously endorsed a Motion extending by five months the deadline of the two constitutional Bills whose time

**The President's preference was for these administrators to represent the interests of the national government at the counties by being answerable to the national government. Parliament shall debate the Bill once again and if it adopts the position of the President, the Bill will be taken to him for assent.**

<p>lapsed in February.</p> <p>The two Bills are now due for passage on or around July 31, 2012. Considering that Article 261 of the Constitution allows Parliament to extend time for the passage of a Bill once for a period not exceeding one year, the august House, which is presently on recess, has no choice but to have these two Bills passed before the end of July, this year.</p> <p>As the second anniversary (August 27, 2012) of the promulgation of the Constitution nears, the following legislations require to have been enacted into law.</p> <ul style="list-style-type: none"><li>• Legislation on leadership.</li><li>• Right of recall</li><li>• Determinations of questions of membership of Parliament</li><li>• Right to petition to Parliament.</li><li>• Assumption of office of the president</li><li>• Judiciary fund</li><li>• Financial control</li><li>• National Security organs</li><li>• Command of the National Police Service</li></ul> <p>Considering the limited time remaining before the Bills' deadline and the fact that the Bills are yet to be published or presented before Parliament, and also considering the past parliamentary trend of passing Bills out of time, it is likely that the Bills required by</p>	
<p>August 27, 2012 will not be in place.</p> <p><b>Drafters</b></p> <p>This is coupled by the fact that some of the Bills such as that on Leadership and Integrity are already stirring high emotions and their debate and passage may not be a walk in the park. The implementation process has been</p>	<p>hurdled with numerous challenges. The dearth of experienced drafters is slowing the process down. Hundreds of Bills are required, all of which have crucial deadlines.</p>
<p><b>The National Land Commission Act, 2012 was enacted as No 5 to make further provision on the functions and powers of the National Land Commission, qualifications and procedures for appointments to the commission and to give effect to the objects and principles of devolved government in land management and administration.</b></p>	<p>The concerned offices including that of the Attorney General, the Kenya Law Reform Commission and the Government Printer are most probably strained. Things are not made any better by the heavy schedule of the National Assembly, the looming General Election and succession politics.</p> <p>Financially, the Government is hard pressed to find ways of raising more revenue to support the structures, institutions and commissions that have been introduced by the Constitution. The National Police Service Commission is yet to be formed</p>

and security heads yet to be appointed due to what can only be termed as political infighting.

The Commission for the Implementation of the Constitution (CIC) attributes part of the delay in implementation on the failure by Government to operationalise key constitutional offices. It also rightly points out to the habit of submitting Bills to Parliament late. This trend definitely and immensely contributes to the delay in passage of Bills as Parliament must scrutinise the same seriously.

#### Assent

Of course, the bureaucracy involved all the way from the development of a policy framework, drafting, approval by CIC, approval by Cabinet, publication, parliamentary readings, passage, assent and publications of the final Act takes a toll on the speed at which implementation can take place.

A major question that arises out of the slow pace of implementation is whether Parliament should be dissolved in the circumstances or what should be the way forward. The Constitution certainly provides for dissolution of Parliament as a way of compelling legislators to implement the new laws.

If Parliament fails to pass a law in time under Article 261 (5)-(9) anyone can petition the High Court and the Court may give Parliament one more chance and may stipulate a time within which the law must be passed. If Parliament fails once again, the Chief Justice will advise the President who must dissolve Parliament.

I would personally not support a petition seeking to have Parliament dissolved for a number

**The question that we then ask is how does the society ensure that the police force is itself respecting the same laws it is tasked with maintaining? How does the public enact safeguards that keep police from misusing their powers and abusing their rights and privileges? This is where the issue of policing the Police comes in.**

of reasons. The foremost is that Parliament has lawfully extended the time for the passage of the two pending Bills and hence a suit brought at this stage to initiate its dissolution would be hopeless.

It would make more sense if such a suit is instituted after the lapse of the extended period and Parliament still does not pass the crucial Bills. Dissolving Parliament for not passing only two Bills would be too drastic an action synonymous with responding to a mosquito bite with a hammer.

#### Penalise

Further, Parliament has until August 27, 2012 to pass the legislations required in two years and even after that date, Parliament would still be at liberty to extend the time for the passage of those Bills. A court action would, therefore, be unnecessary at this stage. In addition, considering that the greatest blame in not passing the Bills on time is not with Parliament, it would seem unfair to penalise the Legislature for the mistakes of others, particularly the Executive.

Finally, the process to be followed before Parliament is dissolved is lengthy and tedious. In fact, considering the time to be taken in filing proceedings, getting a

hearing date and obtaining judgement, the life of Parliament will have come to a close and hence an attempt to dissolve it would be in futility.

In all fairness, I would tend to think that we would gain more by having the present Parliament in place till the next elections than sending the members home. If Parliament is to be dissolved, who will pass the crucial Bills as soon as we want them? Kenyans would gain little from dissolution of the present Parliament and in fact, more time would be lost in reconstituting it.

It would, therefore, be a better idea to address the challenges causing the delays effectively by enhancing the capacities of bodies generating the Bills, enhancing the capacities of the drafting agencies and fast tracking the process of presenting Bills to the Cabinet and to Parliament.

Considering that it is not a must a Bill be prepared by the Government, MPs should also be equipped and facilitated to present the constitutional Bills themselves rather than waiting for the Government to do it. That way, much time would be saved and the nation would move to the next stage of operationalising the legislations. [\[KN\]](#)

# Challenging the President

## Controversy over the President's appointment of County Commissioners

By Macharia Nderitu

The system of administration in Kenya commonly known as the Provincial Administration was established at the onset of colonisation. Initially, the personnel in the lower ranks of the administration, namely the village headmen and the chiefs, were recruited from the African population while the district officers, district commissioners and provincial commissioners comprised Europeans.

In the 1950s, several Africans were appointed in the senior ranks of the administration. The system was under the direct control of the Governor, who represented the Monarch as the Head of State and Government. In the pre-colonial times, the Provincial Administration was instrumental in intelligence gathering, maintenance of law and order and suppressing dissent, especially during the Mau Mau uprising.

The Government inherited this system at independence. The independent Constitution established regional governments, in which the provinces served as the regional governments (majimbo). The regional governments coexisted with the Provincial Administration, until they were abolished in 1966 through a constitutional amendment. The Upper House, the Senate, comprised 41 Senators, elected from each of the districts in Kenya at the time.



Attorney General Githu Muigai - Abandoning his boss at his hour of need.

The Provincial Administration has been an effective instrument of exercise of State power. The administration was, and is still, served by an exclusive arm of the police known as the Administration Police, who operate under a different command from the Kenya Police. With the on-going police reforms, the Administration Police and the Kenya Police will be unified under one command structure.

### Public order

The district and provincial commissioners chair the security committees in their areas. Members of the committee include the police and intelligence chiefs in the area. In the past, district commissioners were

responsible for licensing all public meetings under the Public Order Act. At the time, very few meetings were licensed for opposition political parties.

During the reign of the late President Kenyatta and retired President Moi, officers serving in the administration were partisan, openly campaigned for the ruling political party and were agents of repression. For example in 1988, during the infamous queue voting elections, officers serving in the Provincial Administration were deployed as Returning Officers with strict orders to ensure certain individuals were not re-elected.

The mismanagement of these elections increased the impetus for

## The Provincial Administration has been an effective instrument of exercise of State power. The administration was, and is still, served by an exclusive arm of the police known as the Administration Police, who operate under a different command from the Kenya Police.

the calls for the reinstatement of a multiparty state. At the time, Kenya was a *de jure* one party State. In 2010, the Constitution established a devolved system of government. The Constitution provided that the Provincial Administration would be restructured to accord with and respect the system of devolution within five years from the date of promulgation of the Constitution. The Provincial Administration represented the central government at the local level.

Since 2003, the Government has created and deployed district commissioners to more than 250 districts. In 2008, the Government created the positions of 17 regional commissioners and deployed officers to these regions. The provincial commissioners have remained in charge of the provinces. The provinces are no longer recognised in the Constitution.

### Vetoed

The President appointed County Commissioners in May 2012, with a County Commission being designated for each of the 47 counties established by the Constitution. The Gazette Notice was later amended to state that the officers had been 'deployed', and not 'appointed'. Earlier in April 2012, the President vetoed the County Governments Bill and referred it back to Parliament.

The Bill had provided that the County Security Committee was to

be chaired by the Governor and that officers serving in the Provincial Administration within the county would be answerable to the Governor. In rejecting the Bill, the President stated that the duty to reorganise the Provincial Administration was vested in the Executive, and not Parliament. But no Bill to this effect has been presented to date.

The Constitution preserved the offices of the President and Prime Minister and provided that the

incumbents would continue to serve in accordance with the Constitution and the National Accord and Reconciliation Act until the holding of the first elections under the new Constitution.

Section 24 of the Repealed Constitution provided that subject to the Constitution and any other law, the power to constitute and abolish offices of the Republic of Kenya and of making appointments to any such office and terminating any such appointment shall vest in the President.

### The Accord

The promulgation of the new Constitution preserved the provisions of the National Accord and Reconciliation Act, 2008, until the holding of the first election under the Constitution. The Accord created the office of the Prime Minister and resolved the political



Whittling down the President's authority.

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crisis following the disputed December 2007 presidential election.

The Accord demands that all major appointments under the Constitution be done after consultations between the Prime Minister and the President. Section 24 of the Repealed Constitution is, therefore, subject to the provisions of the Accord.

The new Constitution demands that public appointments should be effected through a consultative process and in an open and participatory manner. The Constitution further demands that the appointments should observe the gender rule that no more than 2/3 of the appointments should be from one gender.

The President did the appointments unilaterally without consultation with the Prime Minister. Parliament did not vet the appointees and more than two thirds of them were men, with only ten out of the 47 being women. It was, therefore, argued that the appointments were unconstitutional.

The Attorney General, on behalf of the President, argued that the office of the President was simply designating serving officers in the Provincial Administration to take

lead in the establishment of the county government. No new offices as such had been created as the appointees were representing the office of the President at the county level.

#### **Adhere**

The High Court has rendered a verdict on a petition filed to challenge the appointments. The court held that the appointment of the County Commissioners did not adhere to the gender equality provision in the Constitution.

Further, the President did not consult the Prime Minister as required by the National Accord and Reconciliation Act. The court determined that the appointments were unconstitutional and hence nullified them. The Attorney

General has stated that he does not intend to appeal against the decision, but in the meantime the appointees remain in office.

The County Governments Act has been passed deleting the provisions that attempted to reorganise the Provincial Administration. The Government has stated the National Administration Bill intended to reorganise the Provincial Administration is now ready and will be presented to the Cabinet for approval.

However, the Bill is yet to be published. The Government should publish the Bill and present it to Parliament for enactment. The Government must, however, ensure that the Bill conforms to the Constitution and the laws creating the county governments.

The Executive must realise that the promulgation of a new Constitution in 2010 represents a paradigm shift in operations of the Government. National values of participation, integrity, transparency, equity, equality, human rights, and inclusion bind all levels and all organs of the Government, including the Executive. The Judiciary is independent in exercise of its authority.

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**Revoked**

The Executive must, therefore, seek proper legal advice in light of the changed circumstances. Already, several appointments of public officers carried out unilaterally by the President have been revoked. These include the attempted appointment of the Chief Justice, Attorney General, Controller of Budget and the Director of Public Prosecutions in March 2011 without any consultations and without an open and consultative process.

The office of the President has had a frosty relationship with the office of the Prime Minister. This has led to failure to consult and agree on key appointments of State officers. The President has often made appointments without consulting the Prime Minister. The legal advisers of the President seem to sacrifice the letter and spirit of the law for the sake of political expediency.

The President must rely on sound legal advice at this point of implementing the Constitution and transition, given that the next elections are due early next year. All appointments must conform to the Constitution and the National Accord and Reconciliation Act to ensure that they are legitimate and legal.



Prime Minister Hon. Raila Odinga - Belligerent or always spoiling for a fight?

**Devolved**

The Executive does not seem committed to urgently implement the constitutional provisions on devolution. Even though the county governments will be in place early next year, the necessary supporting infrastructure has not been set up.

The enactment of the laws on devolution has been delayed and the Government has been

reluctant to provide funding for establishing structures in the devolved units. So far, only the Ministry of Education has deployed officers to the counties.

However, the process of reorganising government ministries, which are intended to reduce from the current 40 to between 14 and 22 Cabinet Secretaries, is still incomplete. This means that ministries will be merged leading to duplication of roles at the counties. Since the Transitional Authority has now been established, it must move with speed to ensure the county governments are functional once the General Election is held next year. The necessary personnel should be seconded to the counties to establish the infrastructure. **[KN]**

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# The Campaign Financing Bill 2012

*Access to financial resources in competing for political office in a participatory democracy is of fundamental importance. Campaign funding plays a critical role in electoral fairness and integrity. Political finance is an important feature of a thriving democracy as it improves the quality of the electoral process.*

*The legal framework for campaign finance promotes disclosure of contributions and expenditures to curb against corrupt practices and creates spending caps to ensure participation of candidates who may not have personal wealth.*

By Macharia Nderitu

In Kenya, there is no regulation of electoral finance. The Campaign Financing Bill promotes increased disclosure of information and enhanced accountability among political parties and candidates for elective offices. Other laws that espouse related objectives include the Political Parties Act and the Freedom of Information Bill.

The Political Parties Act has sought to enhance party discipline and ensure that political parties are accountable. The Act has sought to limit random change of parties by



Retired President Daniel arap Moi who seemed to have bottomless pockets for political and electoral campaigns.

political office holders and has strict disclosure requirements of party funding and membership.

The Act creates the Political Parties Fund to support activities of the party. The financial support is based on the number of votes the party garners during the preceding election. The Freedom of Information Bill promotes the right by the public to access information.

## The Constitution

The Independent Electoral and Boundaries Commission (IEBC) is created in the Constitution to organise or supervise elections to any elective office or body and referenda. The commission shall be responsible for the regulation of the amount of money that may be

spent by or on behalf of a candidate or a party in respect of any election. The Registrar of Political Parties, though an independent office, is housed by the commission.

A political party is enjoined by the Constitution to abide by democratic principles of good governance and to respect the rights of all persons to participate in the political process. Parliament is mandated to enact legislation to provide for the establishment and management of a political parties fund, the accounts and audit of political parties and restrictions on the use of public resources to promote interests of political parties. These constitutional provisions are the basis of the proposed Campaign Financing Bill and the Political Parties Act.

<p><b>Kenyan politicians</b></p> <p>A link has been established between corruption and funding election campaigns in Kenya. The incumbent political parties spend most resources during elections. This is coupled with use of State resources by government officers during elections. Under the repealed Constitution, the president, vice-president and Cabinet ministers were MPs. In ensuing elections, these officers campaigned for re-election using State resources. Political parties were not funded by the State.</p> <p>Some of the incidents of corruption linked to elections include the Goldenberg and National Social Security Fund scandals, which were perpetrated prior to the 1992 elections, the grabbing of land in Karura and other forests in controversial allocations by the Commissioner of Lands prior to the 1997 elections, and the genesis of the Anglo Leasing during and after the 2002 elections.</p> <p>Lack of an appropriate campaign financing framework has led to the development of personality cults in political parties where the leader of the party, usually its presidential candidate, finances the campaigns. Such leader undermines democracy by ensuring direct nomination of his cronies for the party ticket to contest in elections.</p> <p><b>Adding value</b></p> <p>The Campaign Financing Bill is intended to facilitate funding of election campaigns, control the use of funds in the nomination process and election campaigns and provide for management spending and accountability of funds during referendum and elections campaigns. The Bill creates a Campaign Finance Committee. As noted, the overall mandate to control campaign finances is vested on the IEBC.</p>	<p>The Registrar of Political Parties shall be a member of this committee. However, the qualifications and the appointment mechanisms for the members are not stipulated in the Bill. The commission is mandated to register campaign expenditure committees for candidates and political parties. The committee shall have powers to investigate any matters within its mandate.</p> <p>A Party Candidate Expenditure Committee shall comprise of three members nominated by the candidate. This committee shall be the signatory to the accounts, advise on all financial matters relating to nomination of the candidate and prepare a final report of the candidate. A political party participating in an election shall similarly establish a Party Expenditure Committee.</p> <p>A candidate participating in an election shall open a bank account into which all donations and contributions shall be paid. A candidate shall disclose to the Party Expenditure Committee all information relating to his campaign expenditure. Such disclosure shall be treated as <i>prima facie</i> evidence of compliance with the requirement for disclosure. However, such information shall be confidential unless it is subject to a complaint or an investigation.</p> <p><b>Reimbursement</b></p> <p>The commission shall prescribe regulations for the spending limits of political parties and candidates. In making the rules, IEBC shall consider the sizes of electoral constituency, categories of candidates, population in a constituency, number of party members in the constituency, and communication infrastructure.</p> <p>A candidate who exceeds the spending limit shall file a report explaining the reasons for exceeding the same. Any candidate who exceeds the spending limit by more than 15 per cent without justification shall be disqualified from contesting the next election.</p>	<p>The candidate found to have exceeded the limit shall be required to pay to the Campaign Finance Reimbursement Fund a sum equivalent to the amount exceeded. Any services volunteered to the candidate or party shall not be computed as contribution.</p> <p>A candidate may source his campaign funds through <i>harambee</i>. A donation by one person or organisation shall not exceed 5 per cent of the total contribution. A candidate shall not receive funds or donations from anonymous sources. Any candidate who does shall be guilty of an offence and shall be disqualified from contesting the election. A candidate shall not source his campaign funding from the Government or a government institution.</p> <p><b>Party nomination</b></p> <p>The Government or State institution shall not use State resources to campaign for a party or candidate. Any party or candidate who receives such support shall disclose the same to the committee, failing which such candidate or party shall be disqualified from the election. No person shall use public resources to campaign for a party nomination, election or referendum. Public resources are defined to exclude the Campaign Finance Reimbursement Fund and the Political Parties Fund.</p> <p>It is mandatory for parties and candidates to make disclosures under the Act. Failure to make disclosure will occasion disqualification from the election. The commission may impose a fine against the candidate or party that has failed to make the disclosures as required by law.</p> <p>A candidate will be required to pay all surplus funds after the conclusion of the election into the Fund. The sponsoring political party shall be paid 50 per cent of the surplus funds on completion of the audit. Failure to pay the surplus funds shall constitute an offence and the candidate shall be barred from contesting any election for a period of six years.</p> <p>The committee shall administer the Campaign Fund Reimbursement Fund. The fund shall comprise money</p>
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allocated by Parliament, penalties paid by parties and candidates and registration fees of various committees. Independent candidates contesting an election shall be reimbursed expenses for printing policy documents and media coverage. Each party or candidate contesting an election shall keep proper records. All disputes relating to the Bill shall be referred to the commission for resolution.

### Inclusive

The Bill has various shortcomings and is not well drafted. The criteria for membership to the committee are not enumerated and are left to be determined at the sole discretion of IEBC. The appointment process should be open and transparent, but the appointment of members of the committee is vague and not inclusive.

The Bill has limited opportunity for the public to access the records filed by the parties or candidates. The records remain confidential unless there is a complaint or an investigation.

Such information should be proactively disclosed and publicly available. The Bill fails to promote openness, accountability and access to information by the public and public participation. A campaign financing framework can only work effectively with an appropriate access to information and open disclosures.

Compliance is best monitored by the public since the commission and the committee are ill equipped or staffed to carry out effective monitoring. Access to information is the cornerstone of a functional democratic state. The Bill entrenches secrecy by providing that the records shall be confidential, creating an opportunity where corruption may flourish.

IEBC is solely mandated to set spending limits. Limiting campaign expenditure has a direct impact on the candidate's freedom of expression. The proposals of the commission should be subject to parliamentary approval to secure public participation and legitimacy. The Bill is an attempt to level the playing field to ensure every person

has an opportunity to contest for elections. It is hoped that further revision has been made to the Bill prior to its presentation to Parliament for enactment.

### America

The Federal Election Campaign Act establishes the Federal Election Commission, which has the authority to implement and oversee disclosure of political finance, to make administrative rulings concerning interpretation of the law and to levy fines for violations. The contributions and spending limits are set by the Congress and revised from time to time. All contributions above US\$200 to political parties or candidates must be reported.

Any corporations or unions intending to support a party or candidate must establish a Political Action Committee. The regulations assist to prevent laundering of political donations and facilitate mass participation in political financing. Most donations are made to individual candidates. In 2002, all party committees raised US\$1.1 billion while House and Senate candidates raised a sum of US\$970 million for mid term elections.

### UK

The Political Parties, Elections and Referenda Act creates an Electoral Commission, which is charged with administering the disclosure of all candidate and party finances, enforcement of contribution and spending limits, and the implementation of party subsidies. Political parties are given grants totalling approximately 18 million Pounds and each candidate has a spending limit of 8,000 to 9,000 Pounds per district. Most resources are channelled through political parties



If the people really like you, you do not need money to be elected. Hon. Mwangi Kiunjuri, MP Laikipia.

unlike the United States, where candidates and parties spend almost equal amounts. The Press has served as the primary medium of disclosure. Parties are obligated to disclose their donations and expenditure.

### Germany

Since 1967, the state has provided subsidy to political parties at the rate of 2.5 DM per voter. The subsidies account for half of the party finances with the rest being financed by membership dues and private contributions. Any donations above 40,000 DM were required to be reported. A new regulatory regime was established in 2001 establishing fuller disclosure requirements.

This was a result of a scandal in which politicians were investigated for failing to disclose campaign support and for bribery. The contribution by members has been reducing thereby leading to increasing demand for private donations. The political parties are not required to report detailed donations but just total amounts in categories. The administrative framework for the law is also weak. KN

# Kenya anticipates a new face

*The clamour for constitutional reforms leading to the 2010 Constitution is traceable to the early 1990s when political activists and religious leaders led calls for multi-partyism. A combination of domestic and international pressure forced the Government to cede room for political competition.*

*This victory was short-lived. Sooner than later, the political players realised that the incumbent held sway with the electoral commission, the Police, the Judiciary, among other crucial State organs. This made the playing field for political competition skewed in favour of the incumbent. Later calls for 'minimum reforms' followed. However, these were*

*limited to the electioneering process and included giving political parties power to nominate representatives to the electoral commission.*

By Dorothy Momanyi

**G**laring economic inequalities amongst different ethnic and geographical groups fomented perception of ethnic balkanisation. A strong Executive had for a long time whimsically determined access to resources. Only regions that supported the incumbent benefited from State-sponsored development projects.

It was not unusual to find allocation of resources for infrastructural development skewed in favour of areas that had leaders who controlled resources and based on political patronage. A case in point is where electricity poles would be transported to an area to

lure the voters to support the political incumbent only for them to be carried away if the State-sponsored candidate lost.

This form of political patronage led to the marginalisation of some areas, characterised by poor road network, lack of portable water and other basic social amenities. Due to the paternalistic nature of the political competition, groups such as youth and women were not adequately represented in the political class, as they did not have the financial means to get into a fair political contest nor was their participation guaranteed by the Constitution.

## Corrupt

The rule of law was equally wanting. The Police Force was used as an agent of State terror with endemic corruption and was consistently rated by credible organisations such as Transparency International as among the most corrupt institution. The



The High Court of Kenya, one of the public institutions that is changing dramatically in the country.

## Full implementation

Judiciary, as recently exposed by the ongoing vetting of appellate judges, would occasionally support State practices inimical to the rule of law such as torture and unfair detention.

Election petition decisions highly favoured the supporters of the ruling party. Despite widespread corruption, there was hardly any credible prosecution of senior Government officials. The public confidence in the public justice system had considerably waned.

The gradual deterioration of public justice system institutions was the single most important factor that led to the 2007 post-election violence. Given their history in adjudicating electoral disputes, the runner-up presidential contender could not trust the courts to be fair arbiters on the contested poll results. The Police, either due to bias, incompetence or low morale, were unable to quell the riots that took place in different parts of the country.

Ethnic tension had been whipped up due to the perceived favouritism of some ethnic groups that were seen as having access to political power and State resources. It was, therefore, no surprise that securing comprehensive constitutional reforms was top on the list of the commitments in the post-election pact brokered by the international community to bring a cessation to the violence.

### Architecture

The 2010 Constitution represents a break from the past and attempts the myriad shortfalls of the previous constitutional order and the attendant governance architecture. It introduces multilayered checks and

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balances of Executive power; an independent Judiciary; independent Police service; and an independent office of the Director of Public Prosecutions.

To cure the historical inequalities that highly disenfranchised some areas, it establishes a devolved governance structure and gives guidelines of the allocation of national resources to the devolution units, including affirmative consideration for previously marginalised areas.

In the past, the president had a lot of control over the Judiciary and Parliament. He had the power to dissolve Parliament without recourse to any other institution. He was also in charge of appointing judges on the advice of the Judicial Service Commission, which was obeyed more in breach, as the president would *de facto* have a free hand at making such appointments.

However, the new Constitution gives the Judiciary near complete autonomy from the Executive, making it more independent. The appointment

of judges is vested in the independent Judicial Service Commission. The Police service will now be headed by an Inspector General, who is similarly independent and enjoys security of tenure, unlike in the past where he would serve at pleasure of the president.

### Tenure

The directorate of criminal prosecutions has for a long time been a department within the office of the Attorney General and was grossly under-resourced besides its head serving at the pleasure of the Executive. The Director of Public Prosecutions (DPP) now enjoys security of tenure and constitutionally is shielded from control and direction/interference by any other person or State organ. The electoral body is no longer beholden to the Executive as it similarly enjoys independence. The commissioners are competitively and openly appointed.

Unlike in the past, the Bill of Rights now encompasses social, cultural and economic rights such as basic education, affordable health, food and housing. One of the changes that will contribute to the realisation of these rights evenly in all areas is a new resource allocation formula that should largely be devoid of political manipulation and factors among other issues, the population, size and level of development in a given county.

The current Judiciary has exhibited a good measure of independence. The

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recruitment of the Chief Justice and other Supreme Court judges, the new openness in recruiting High Court judges and other judicial staff has been fairly open. The independence exhibited by judges in a recent number of judicial decisions, including the recent declaration of the appointment of county commissioners as unconstitutional on the basis of failure to consult and the proportion of women elected to those positions, demonstrate a break from the past directly attributable to the new constitutional dispensation and the manner of appointment of those office bearers.

#### Court orders

Several court cases challenging Executive decisions are pending and there is a fair expectation by the public that the judges will follow the law, and that the Executive will obey the

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resulting court orders. There have been other appointments to constitutional offices including the electoral commission, the DPP, the Auditor General and other numerous constitutional commissions.

In a radical shift from the past, the appointments have mostly been

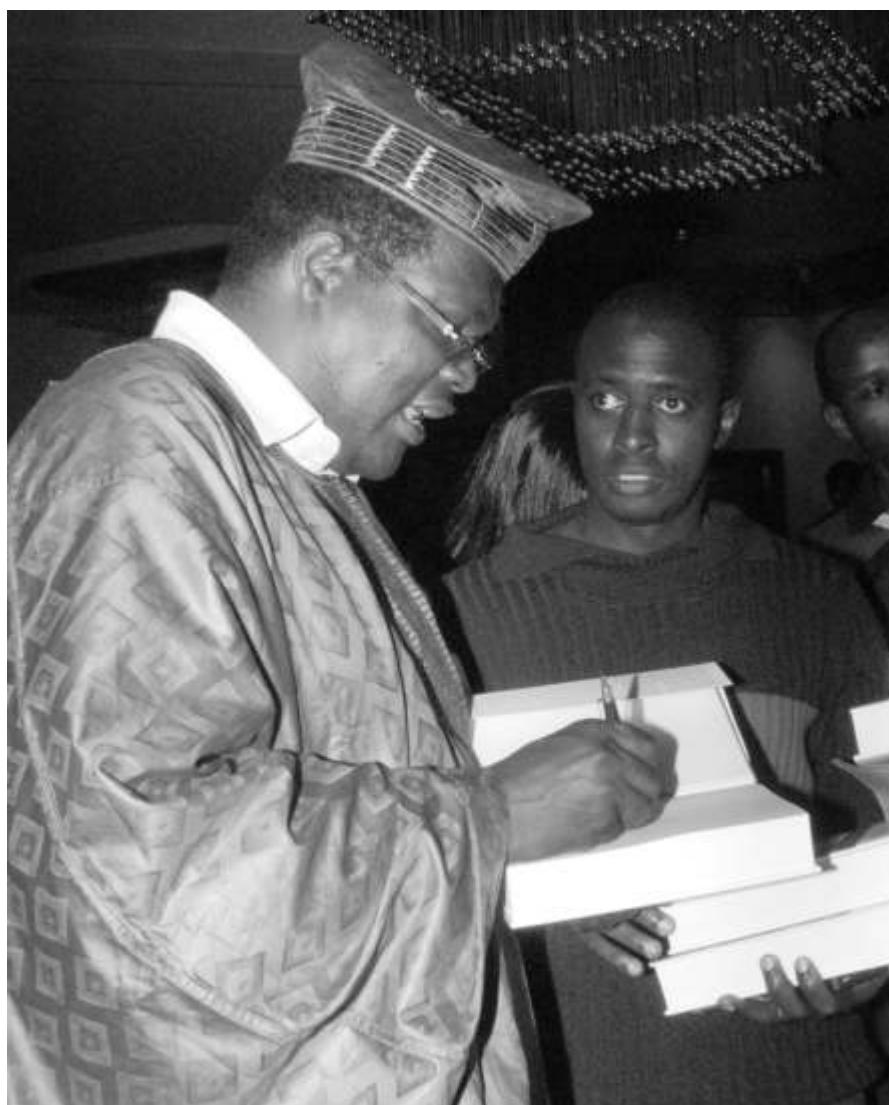
public right from the advertisement of the vacancies, the interviews and the final appointments. This has created a measure of public confidence in those institutions and is expected to give institutional allegiance to the public as opposed to the Executive, besides promoting meritocracy.

There is an increasing trend of consciousness of referring to the Constitution by the political class, public servants and the general populace as well. This growing appreciation of the Constitution is perhaps borne out of the open process of promulgating it and bonds well for the future of constitutionalism in Kenya and will promote respect for the rule of law.

For instance, a few years ago, the Police would detain a suspect for days or even weeks before preferring charges. Though this development came before the promulgation of the Constitution, today there is widespread respect by the Police, awareness by the public and enforcement by the courts of the constitutional safeguard to arraign a suspect in court within 24 hours of arrest.

#### Inclusion

The oft-communicated expectation is that national development will take care of the weak and the economically marginalised. The equalisation measures meant to mitigate historical injustices in marginalised areas will hopefully lead to equitable inclusion of all in sharing national wealth.



Man of the Year, Miguna Miguna, during his book launch in Nairobi recently.

Ethnic polarisation will hopefully be reduced by the political power distribution that eliminates a strong presidency responsible for making decisions on resource distribution. A region will not need to produce a national leader to enjoy State resources.

Economically, the country will benefit from new opportunities to be exploited in the counties, including the previously marginalised areas.

It is expected that county headquarters will grow in economic stature through guaranteed injection of funds and the establishment of institutions to support the county governments. Counties will become the centres of economic development countrywide. A credible justice system will spur investment, since entrepreneurs will have fair and expeditious dispute resolution confidence.

This, coupled with the proper financial policies, may spur economic growth and job creation by way of accelerated foreign direct investment. In addition, the economy is likely to benefit from the stability and uncertainty associated with transitions will be minimised.

### Drift

Political parties will enjoy a higher level of discipline as per the Political Parties Act, with checks from the Registrar of Political Parties and determination of any ensuing disputes by the Judiciary. Though this may take a while to be fully realised, there is every possibility that Kenyan voters

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will drift towards embracing issue-based politics where leaders are elected based on their development record or potential, especially if people from one region compare their pace of economic growth to those from other regions.

Devolution will make citizens more connected with decision making, see the direct nexus between the politics of the day, the leaders they elect and the development dynamics. It is hoped that this will reduce the level of cronyism and corruption and inculcate discipline in management of public affairs.

The improvement of the public justice system institutions including the possibility of recourse to an independent and competent Judiciary for settlement of political disputes ranging from political parties contests, electoral disputes, and denial of rights enshrined in the Constitution will hopefully prevent the kind of ethnic violence that followed the 2007 polls

and led to the deaths of more than 1,300 people and displacement of hundreds of thousands, not to mention the economic cost of the violence.

### Vigilance

The promulgation of the Constitution was a remarkable turning point. Though there have been several obstacles to its full implementation, a combination of watchful citizens and lobby groups' vigilance, and an independent Judiciary has been helpful in pointing out those attempts and correcting them by staying the course. This demonstrates that continuous vigilance by the disparate groups will be indispensable in realising the Kenya envisaged in the new Constitution.

However, the promulgation of the Constitution is not an end to itself. Kenyans expect the quality of their lives to improve. This means improved access to health, affordable education, better economic opportunities including employment, and better infrastructure among other social-economic expectations.

Failure to create wealth and improve economic opportunities may create despondency among the youth and general frustration by the masses that their aspirations have not been met. It may be a recipe for renewed resentment and perception of alienation precipitating political unrest. The promulgation of the Constitution does not mean that the battle has been won. Human development is work in progress. **[KN]**

**In a radical shift from the past, the appointments have mostly been public right from the advertisement of the vacancies, the interviews and the final appointments. This has created a measure of public confidence in those institutions and is expected to give institutional allegiance to the public as opposed to the Executive, besides promoting meritocracy.**

# Policing the Police

*One important aspiration of any community is the guarantee of security of property, life and liberty of its members. According to theorists, security was the prime reason why men entered into a social contract that set up a government.*

*The Bill of Rights under Articles 26, 29, and 40 guarantees the right to life, freedom and security of the person as well as the protection of the right to property. In addition, promotion of the rule of law, respect of human dignity and good governance are key values as expressed in provisions relating to the National Values in our Constitution.*

By Thuita Guandaru

For a government to provide security to every person within its jurisdiction, it must form an institution that will protect the public as well as maintain and uphold the rule of law. In most countries, the established organ in playing this role is the Police Force.

This institution has a powerful mandate and is clothed with immense powers. There is an adage that power is nothing without control. Unless a powerful entity such as the police has some control we would end up establishing a monster organisation.

The question that we then ask is how does the society ensure that the police force is itself respecting the same laws it is tasked with maintaining? How

does the public enact safeguards that keep police from misusing their powers and abusing their rights and privileges? This is where the issue of policing the Police comes in.

This paper will first identify and analyse the institutions that have been created by the Government to oversee and control the Police, evaluate the effectiveness of these institutions in policing the Police, and make a comparative analysis with the oversight institutions in other countries before drawing a conclusion.

## Oversight body

In a democratic society, no one should be too powerful to be above the law.

For that reason, there must be an oversight body in place to ensure that the Police do not go overboard in exercise of their powers. This body should hear and investigate complaints from the public about any egregious acts committed by a member of the Police service and most importantly be able to punish misdeeds.

Treaties such as the International Covenant on Civil and Political Rights provide the individuals with the right to seek redress if their rights have been violated. The police force has since Independence to the present Kibaki government been seen as a tool for achieving political ends with maintenance of security being a



Prof. Philip Alston, United Nations Special Rapporteur on Extra-Judicial, Summary or Arbitrary Killings in Kenya.

secondary function. Political assassinations, torture, prosecution and other harassment of perceived political enemies were more often than not perpetrated through the Police.

Members of the force also came to learn how to use their privileged position for self-aggrandisement and offered their service to the highest financial bidder, be it a criminal or a hapless individual seeking police help. Year after year, the Kenya Police always successfully defended its title of being the most corrupt institution, according to Transparency International reports, and most cruel in the world, according to Amnesty International reports. The UN human rights rapporteur, Prof Phillip Alston, delivered a damning report on the Kenyan police force, accusing it of engaging in large-scale extra-judicial killings of suspects.

#### Complaints

The post-election violence and the subsequent prosecution of suspects before The Hague based International Criminal Court, including the then Police Commissioner Major Hussein Ali largely indicted the police force for the violence. Many reports, and most significantly the Waki Report, recommended a review of the laws and issues relating to security and policing, including the establishment of an Independent Complaints Commission and the formation of a Civilian Police Conduct Authority to ensure independent investigations of complaints against the Police.

The question that we then ask is how does the society ensure that the police force is itself respecting the same laws it is tasked with maintaining? How does the public enact safeguards that keep police from misusing their powers and abusing their rights and privileges? This is where the issue of policing the Police comes in.

Subsequently, Parliament has now enacted the Independent Policing Oversight Authority Act, No 35 of 2011, which creates the body known as Independent Policing Oversight Authority (IPOA). Its work is to oversee the work of the Police, both regular and administration. The IPOA is composed of ten members, two of whom are ex-officio while the rest are selected in a competitive process and appointed by the president.

#### Mandate

The IPOA Act stipulates the mandate of the Authority, which includes investigating all deaths and serious injuries caused by a police officer on duty or as a result of police action; receiving and investigating complaints from both members of the public as well as from police officers; investigating police misconduct on its own motion and making recommendations for disciplinary action or prosecution as well as recommendations to prevent future misconduct. Section 6 of the IPOA Act

spells out all the mandates of the Authority.

#### Powers

Section 7(1) spells out the powers of the body, which includes powers to enter, search and seize necessary materials from police premises to enable it acquire information for its investigation. It has also been granted powers to institute cases against any member of the Police for offences proved after its investigation.

To assist the public, the body is empowered to use information it has acquired to help individuals pursue civil remedies for wrongs done by the Police. Sources of its information are privileged and this is meant to encourage and protect whistle blowers.

The Authority also has power to require regular reports from the Police Service on the implementation of policies.

#### Conflict?

A frequent question may be why have the IPOA when a National Police Service Commission (NPSC) is in place? Aren't these two bodies performing the same tasks? The answer to the latter question is in the negative. Whereas the National Police Service Commission is concerned with the administrative functions within the National Police Service, the IPOA is more concerned with conduct of the Police towards civilians.

The NPSC derives its authority and mandate from Article 246 of the Constitution of Kenya, 2010, as well as from the National Police Service Commission Act, 2011.

This paper will first identify and analyse the institutions that have been created by the Government to oversee and control the Police, evaluate the effectiveness of these institutions in policing the Police, and make a comparative analysis with the oversight institutions in other countries before drawing a conclusion.

The mandate of the Commission is spelt out in Section 10 (1) of the National Police Service Commission Act, 2011, which is to generally oversee the administration and management of the National Police Service. Their power to investigate, discipline, monitor and make evaluations is limited to the organisation, administration and personnel practices of the Service.

As per Section 10 (1) (o) of the National Police Service Commission Act, the commission is to receive and refer civilian complaints to the Independent Policing Oversight Authority, the Kenya National Commission on Human Rights, the Director of Public Prosecutions or the Ethics and Anti-Corruption Commission, as the case may be. This demonstrates that the commission is not mandated to investigate complaints from the public against the Police, but rather forward them to the IPOA or other relevant body.

#### Panel

Unlike the appointment of IPOA board members, which proceeded without

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hiccup, that of commissioners to NPSC has been dogged by controversy ever since the names were presented. The leading complaint was from the Law Society of Kenya, which pointed out that the chairperson selected was not qualified to be a judge and hence the interviewing panel was wrong in recommending her.

Other issues raised concerned failure to consult the Prime Minister on the selections and failure by the selection panel to standardise the

competencies of candidates. There were also reports that some candidates had been blacklisted by such entities like the KRA but were nonetheless nominated to the key positions without any explanation.

Is the IPOA likely to be effective? The answer to this question lies upon the consideration of certain benchmarks including but not limited to:

- a) The complaints system
- b) The organisational independence



Kenya Police officers in a march past during a national holiday.

- c) Funding
- d) Competence and responsibilities
- e) Investigative powers
- f) Raising awareness and the police oversight body's work
- g) Stakeholder engagement
- h) Customer satisfaction
- i) Working with other agencies locally, nationally or internationally

The IPOA has a Herculean task ahead in dealing with a much discredited force. Huge challenges, including those relating to cover ups and individuals happy with the status quo, lie ahead.

#### Disciplinary

The IPOA technically appears to have the necessary "teeth" to perform. Under Section 29 (1) of the IPOA Act, the Authority may after completing an investigation into a complaint recommend the prosecution of that member to the DPP, or recommend disciplinary action to be taken.

The Authority may also apply to the court for the enforcement of any of recommendations contemplated after its investigations. One can only hope that the DPP will not frustrate the work of the Authority by failing to prosecute. The parameters listed above are achievable so long as funding is adequate.

As long as there are funds, ensuring the availability of an accessible complaint system, organisational independence, publicity, competent staff, equipped investigators and customer satisfaction would be a walk in the park.

However, in the event that requisite funds for the IPOA are held back like it happened with the IEBC and the DPP, execution of its mandate would be very difficult. Unlike the NPSC, which receives its funds from the Consolidated Fund, the IPOA will have to rely on the allocations from Parliament and woe unto it if it receives meagre allocations. It may be forced to use police investigators to

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investigate their colleague and thus seriously compromise its mandate.

#### Independent

In South Africa, The Independent Complaints Directorate (ICD) is the primary police complaints body. Established in 1997, its mandate is to investigate deaths in police custody or as a result of police action, police involvement in criminal activity, poor service delivery and failure to comply with the Domestic Violence Act. Though distinct from the South African Police, it nonetheless reports to the Minister of the Police thus appearing less independent than it ought to be.

In Ontario, Canada, they have two oversight bodies. The first is the Ontario Special Investigations Unit, which is a civilian agency mandated to conduct professional and independent investigations of incidents involving the police that have resulted in serious injury, including sexual assault or death. The other is the Ontario Civilian Commission on Police Services, which investigates complaints involving police conduct that do not result in a serious injury or death.

The IPOA is a new phenomenon in Kenya. A lot will be learnt when it gets down to work and depending on the volume and specialisation needed, Kenya may opt to go the Ontario way and have two separate bodies to deal

with different categories of complaints from the public.

#### Civilisation

The upholding of the human rights is the most important aspect in every society, as it maintains the basic tenets of the rule of law. Without this, there is no essence in pretending that we are in a democratic society where institutions are transparent and accountable to its citizens. The idea that people are ruled by law and not by men has been a central feature of the democratic government since the birth of civilisation.

The Police are the ones who maintain the law. They are the ones who also enforce the law. If in the process of doing so they break the law and fail to observe the human rights of an individual by committing acts of misconduct towards the society, then the essence of the rule of law fails.

What remains to be seen is how the IPOA will carry out its mandate and exercise the powers it has been given to effectively assist the public settle their issues with the Police. Most important is how they will handle the hurdles they will face when carrying out their mandates. Since the IPOA has just been formed, it has a chance to win the confidence and trust of the public. KN

# THE KONRAD ADENAUER FOUNDATION IN KENYA

**K**onrad-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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