



Public participation: Kenya's best weapon against graft and poor governance

Keep the tap flowing: Strengthen transparency, accountability and participation mechanisms to improve access to water - Page 5

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Quote of the Month

By Francis Kairu and Mary Maneno

The legendary Alexander the Great has various theories explaining how he ascended to power. One theory is that he severed an intricately tied knot with his sword. Many great men had tried without success to sever this knot famously known as the 'Gordian knot'. Severing the knot with a sword was a simple way of solving a complex and intricate problem. He was highly celebrated and earned himself royalty status. Public participation is the sword through which to sever the Gordian knot of bad governance and perennial corruption.

The concept of public participation has

been heralded by all democracies as the backbone of democratic governance. Democracy author Spiegel notes that, 'Citizen Participation is the process that can meaningfully tie programs to people.'¹ The World Bank defines participation as: 'A process in which stakeholders influence and share control over development initiatives, decisions and the resources affecting them'².

Public Participation under the Constitution

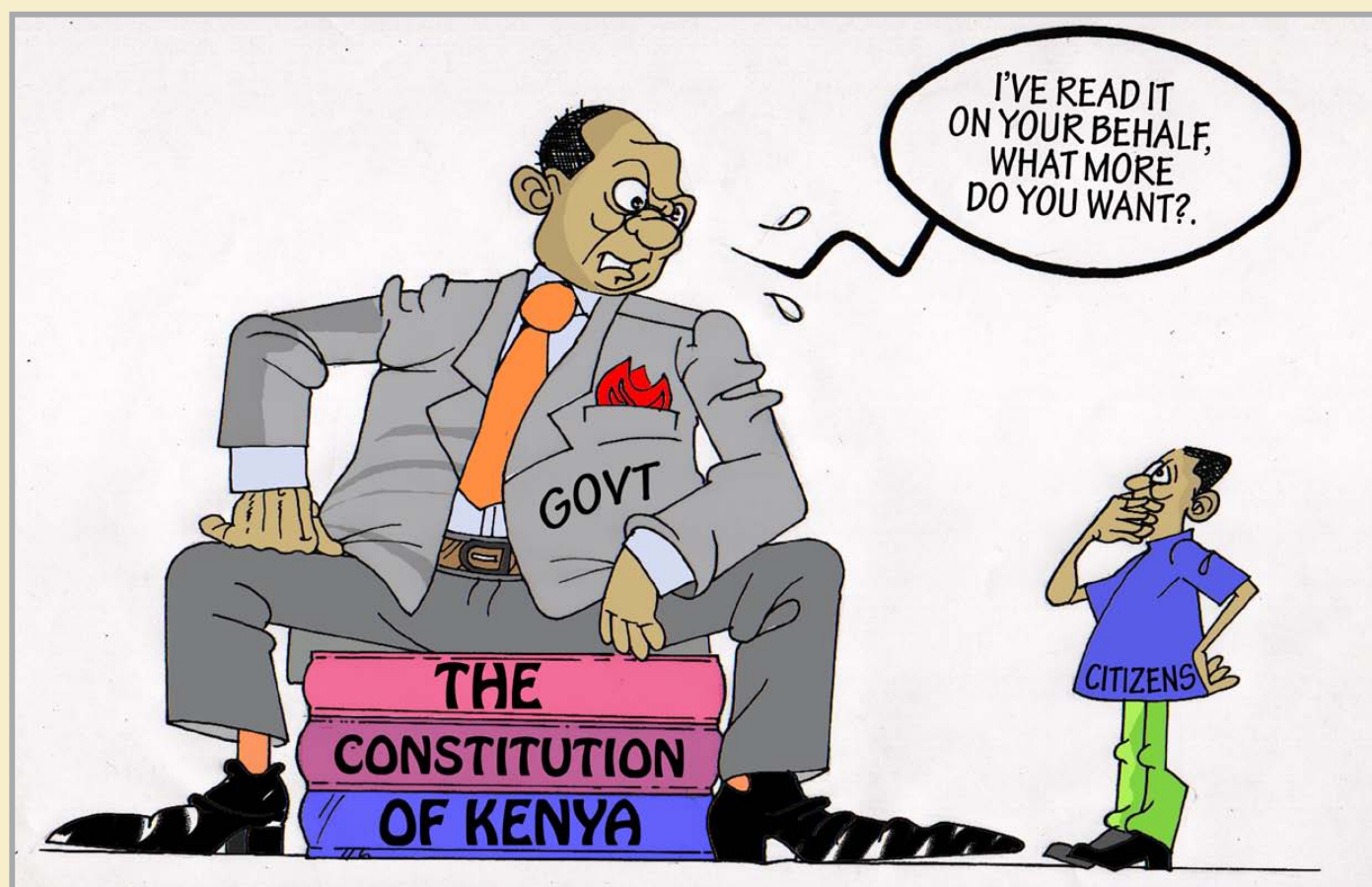
Public participation is a political principle, which has now been underpinned in the

¹ S Hans, *Citizen Participation in Urban Development*. Washington, (1968) 52

² World Bank *The World Bank Participation Sourcebook*. Washington: 1996. P. xi.



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new constitution and recognized as an important right. Various provisions provide for it as follows:

- **Article 35** of the Constitution: The right to information is a fundamental right necessary for the enjoyment of all other rights. When fully actualized, it will enable Kenyans to know about their development rights and projects from which they are supposed to be benefiting like CDF. The Freedom of Information (FOI) Bill 2007, when enacted into law, will bring about openness, transparency and accountability.
- **Article 196 (1)(b)** – It requires that the county assembly facilitates public participation in the legislative and other business of the assembly.

- **Section 10(2)(a)** includes participation of the people as part of the national values and principles of governance.
- **Section 201(a)** also outlines public participation as one of the principles of public finance alongside openness and accountability.

Public participation creates a balance between governing *for* the people, and governing *by* the people. The concept emphasizes on the need to enhance further inclusion and meaningful participation of citizenry in the process of decision making within governance structures. Harnessed properly, public participation has the potential of playing a significant role and greatly influencing

decision making and ultimately improves the governance process. The makers of our constitution considered that public participation emphasises on concepts like 'more heads are better than one' leading to productive and sustainable change. Indeed, it is part of a 'people first' or 'people centered' methods of management, which avoids centralised, hierarchical decision-making.

Key actors in promoting public participation

In public participation, the 'public' refers to 'people with an interest in or are likely to be affected, by a decision made, either positively or negatively'.³ It should be

³ <http://www.waterencyclopaedia.com/Po-re/Public-Participation.html> (accessed 12 February 2012)

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noted that inclusion of everyone takes into consideration gender related issues.

The government has to take a proactive role to ensure there are opportunities for public involvement. For instance, the success and effectiveness of public hearings depends majorly on the commitment of local government to transparency and public participation.

Civil society organisations should not only act as watchdogs, but also influence public opinion in terms of supporting or being against local government policies and practices. They often initiate the formation of watchdog committees and citizen advisory groups and facilitate their activities. Civil society organisations have for long played a significant role in enhancing a culture of participation across the world.

The private sector has a herculean task of supporting and scrutinizing public-private partnerships and advocacy campaigns.

Significance of public participation

Public participation aims at bridging the gap between state actors, civil society, private sector and the general public. A society with heavy civic culture participates more in managing their affairs. It is now a legal requirement to consult stakeholders and make development plans and services more responsive to local needs.

The responsibility has now increased two fold for the average Kenyan. The rallying call has changed form just "*haki yetu*" to "*haki yetu wajibu wangu*"

⁴ A Booth & N Babchuk 'Personal Influence Networks and Voluntary Association Affiliation' (1969) 39 Sociological Inquiry 179-188

Section 23 of the Sixth Schedule to the Constitution of Kenya 2010 requires Judges and Magistrates who were employed by the judiciary prior to August 27th 2010 to undergo a vetting process to determine their suitability

Kenyans now have an opportunity to enhance development and service delivery while entrenching governance and accountability. The baby must not be thrown out with the bath water. It's now or never and the merchants of impunity, deplorable leadership and architects of a moribund public service must now be stopped in their tracks.

The UK house of lords has epitomized Kenya's constitution as exemplar in terms of devolution power sharing and accountability. This is because it encompasses freedom of speech, assembly, voting and equal representation. External players provide special insight information, knowledge & experience which contributes to the soundness of community solutions.

It is also common knowledge that public participation leads to behavioral change. This arises when people are aware, informed, and self-convinced that the change is needed. It encourages civic and community responsibility in that citizens feel obligated to support a particular

activity.⁴ Citizen oversight promotes transparency in government and ultimately prevents abuse of power.

Emancipation as greatly emphasized by the great martin Luther king jnr, empowers vulnerable groups to demand and exercise their rights.

Tools of public participation

The question then begs how citizens can actively engage with the highest echelons of power.

Civil society movements and organisations have epitomized various avenues to include: Public hearings, forming lobby groups, citizen report cards, social audits and citizen action groups.

Other avenues include *citizens' fora* which are provided for under the Urban Areas and Cities Act and development pacts or MOU's (memorandum of understanding) signed between public service providers and representatives of citizens.

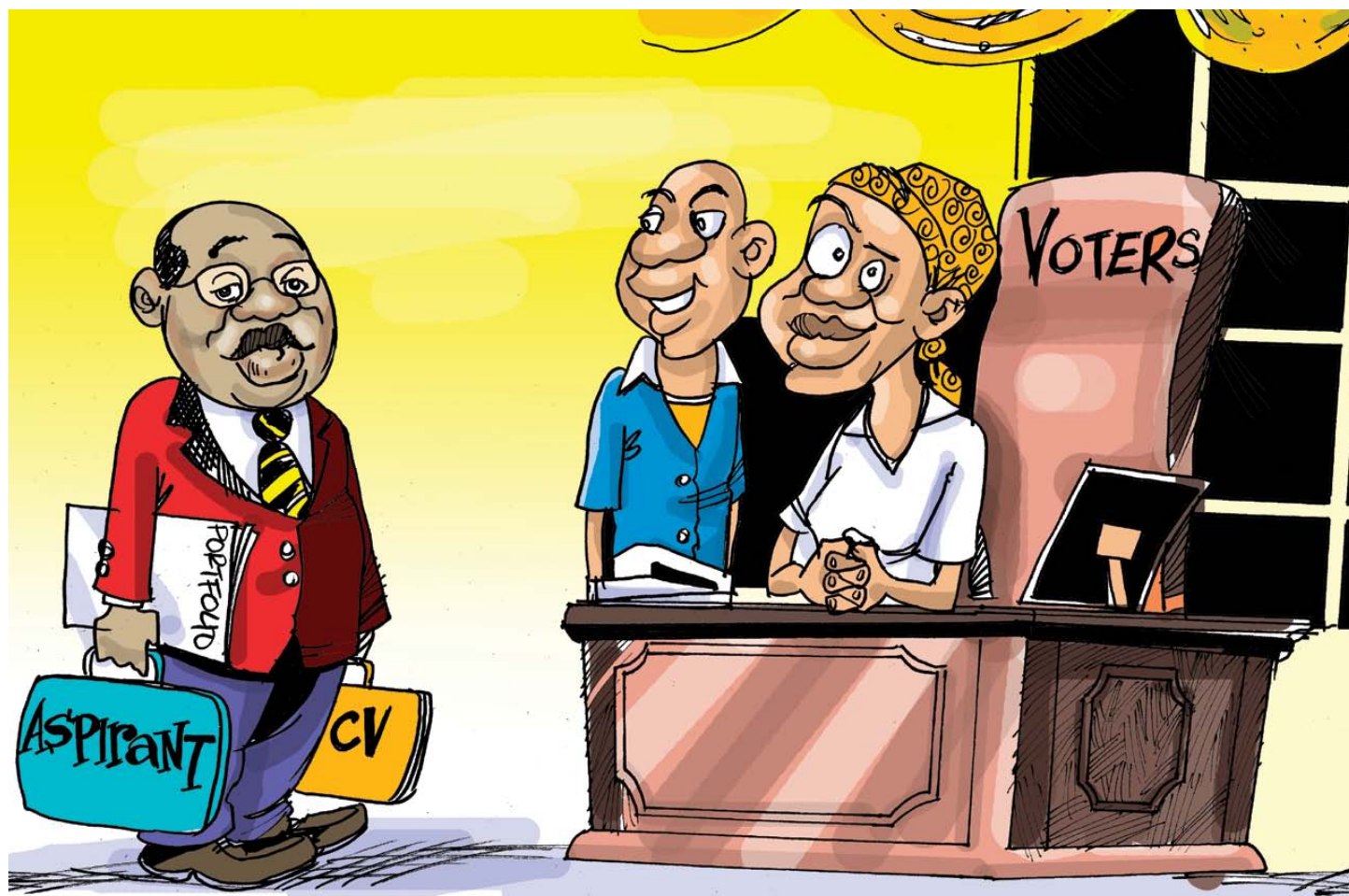
A great future for our country lies in a government that is proactive and not reactive and a citizenry that is active rather than passive. 🌐

Francis Kairu is the Ag. Programme Officer, ALAC Mombasa

Mary Maneno is a former intern at ALAC Mombasa

Public participation in the vetting process

By Debra Gichio



Judges and Magistrates in Kenya have long been perceived as puppets of the political class, corrupt, incompetent, poor human rights protectors and unaccountable leading to the outright public rejection of the Kenyan Judiciary as an independent arbiter of disputes.

Kenya is still reeling from the effects of the post election violence which led to widespread ethnic killings, looting and destruction of property and forceful evictions leading to over 650,000 internally displaced persons. Lack of confidence in the judiciary

led to the clamour for a local special judicial tribunal to preside over cases of those suspected of masterminding the post election violence. The failure to set up a local process eventually led to the trial of some of the suspects at the International Criminal Court in the Hague, Netherlands.

Due to the dissatisfaction with the judiciary, Kenyans, in developing the Constitution overwhelmingly decided that in order to reform and build public confidence in the judiciary, it was necessary to vet all the judges and

magistrates already serving at the time of promulgation.

Section 23 of the Sixth Schedule to the Constitution of Kenya 2010 requires Judges and Magistrates who were employed by the judiciary prior to August 27th 2010 to undergo a vetting process to determine their suitability to continue holding judicial office. In order to implement the Constitution, Parliament enacted the Vetting of Judges and Magistrates Act No. 2 of 2011.

A Vetting Board comprising of local and

foreign eminent personalities has been formed to conduct the vetting process. In determining the suitability of a judge or magistrate the Vetting Board is to consider the constitutional criteria of appointment, past work history, any pending criminal cases, complaints, recommendations for prosecution against the judge or magistrate, professional and communication skills, integrity, fairness, temperament, quality of judgments and legal experience.

Further, the Act states that all information obtained from personal interviews of the judges and magistrates shall be confidential and that a judge or magistrate can choose whether their hearing should be held in private or public. These two provisions have led to public outrage as the public demands that they be given the opportunity to access any relevant information relating to the judges and magistrates. The public also demands that the vetting proceedings be conducted in public.

In support, Art 10(2) of the constitution states that the national values and principles of governance include participation of the public, integrity, transparency and accountability. Art 35 requires that the state publish any

information it has affecting the nation and that all Kenyans shall have access to this information. Art 159 reaffirms the position that judicial authority is derived from the Kenyan people.

The Vetting of Judges and Magistrates Act promotes public participation by seeking information on judges and magistrates from the public and bodies as evidenced by the Boards recent notice calling on the public to give its views on vetting. Private vetting negates public participation. The Board's recent assurance that it will inform the public on the outcome of vetting and that the procedures will be transparent is not enough to rebuild public confidence in the judiciary. This process does not inspire confidence when the public is locked out in clear contravention of basic constitutional principles.

Thus, the requirement of public participation in the vetting process cannot be lightly dealt with. Contrary opinion suggests that if judges and magistrates are publicly scrutinised this will affect their reputation as they are persons held in high regard. However, it is only through an open process that the Board can gain the full confidence of the public that the outcome of the

process will heal the judiciary of its ethical, competence and suitability deficiencies.

Vetting seeks to rectify observed shortcomings in the judiciary by ensuring that judges and magistrates who are not suitable for office cease holding office. Openness and public scrutiny in vetting will show the Kenyan people that the process is transparent and that judges and magistrates can be held accountable. Those seeking private hearings on the basis of reputation demonstrate their willingness not to be held accountable and will hinder efforts to restore public confidence in the judiciary. To desire public office is to invite public scrutiny. The public has a right to size and assess those who serve them to determine their suitability.

As stated by Honore Balzac 'To distrust the judiciary marks the beginning of the end of society. Smash the present patterns of the institution, rebuild it on a different basis....but don't stop believing in it.'

By Debra Gichio - The writer is a Programme Officer, Policy & Governance Programme at TI-Kenya

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If the gains in the new constitution are properly guarded, the next elections will be free and fair

By **Elijah Ambasa**

Kenya's struggle for constitutional reforms has its roots in the desire to correct deficiencies in its post-independence governance framework which was premised upon the highly centralized system established after independence. The main objective of this struggle has been the restoration of power to the people to manage their affairs, particularly, in matters of local development. The post-independence governance framework was characterized by poor governance as evidenced by corruption, ethnic conflict, insecurity, political uncertainty; and poverty. Some of the negative outcomes include the alienation of large portions of society from the mainstream economy and governance; wasteful public investments; underdevelopment, poverty and ethnic animosity accompanied by cut-throat political competition and intolerance.

2007/2008 Post Election Violence

The 2007 elections and violence that followed immediately thereafter had far reaching ramifications on the reform agenda in Kenya. To end the violence, the protagonists in the political dispute settled for a coalition government. They also committed to inject new energy and add momentum to the reform process and address key challenges that had contributed to the escalation of the violence. They also undertook to reconcile the country. The post-election

crisis was largely due to weaknesses in key institutions of governance including the Judiciary, police, Executive, the electoral system, and Parliament. The weaknesses of these institutions can be traced back to the recentralization of power in the executive through post-independence constitutional and legal amendments. This resulted in the monopolization of power as opposition was actively discouraged. Opposition political parties were frustrated and eventually outlawed. Democratic advancement was stifled as the governance of the country drifted from constitutional rule to a one party dictatorship and eventually personal rule. The national goals of fighting poverty, disease and ignorance were abandoned and the leadership was pre-occupied with self preservation.

The Constitution of Kenya, 2010

The promulgation of the Constitution of Kenya, 2010 is the most fundamental reform concluded by the coalition government. The Constitution has fundamentally altered the governance system and structure and greatly altered the way state power is to be exercised.

The powers hitherto exercised by the institution of the presidency were rationalized and some distributed to other state organs, the county

government and independent constitutional commissions. The promulgation of the Constitution has heralded the passage of several legislations by way of implementing the Constitution and ensuring the new governance structure is operational after the next general elections. The judiciary which had for long lost credibility and confidence in the eyes of the public has undergone reforms that have seen rising levels of confidence. The work of restructuring of the security organs, the justice system and other state organs is ongoing, albeit at different speeds.

Periodic, free and fair elections are the only a means through which governance institutions can gain acceptability and legitimacy. The next general elections are critical due to the high stakes involved. These will be the first general elections under the new Constitution and represent the transition from the old order to a new one. The setting up of the county governments as well as constitutionally ordained representation of groups hitherto unrepresented is widely accepted as a leap in addressing the numerous governance challenges facing the country.

Article 92 of the constitution provides for the development of legislation to regulate the funding of political parties. In the past, development of legislation has taken a top-down rather than a bottom-up approach. Given the distorted nature of Kenyan politics and

If the gains in the new constitution are properly guarded, the next elections will be free and fair

considering the weak political will to enact legislation regulating campaign financing, a bottom-up approach in demanding for such legislation becomes a key option. Active citizen participation in the development of various legislations in the fifth schedule of the constitution is provided for in the constitution. The Constitution also provides for the review of electoral boundaries and provides for both national and county governments which will see an increase in the number of elected representatives.

The national values and principles of governance in article 10 of the constitution of Kenya 2010 invest in public trust through enhanced participation in governance issues, inclusivity and transparency in affairs that affect their lives. Article 73 (2) of the constitution of Kenya provides for guiding principles of leadership and integrity. It requires that leadership be on the basis of personal integrity, competence and suitability, or election in free and fair elections. Article 81 (e) of the constitution again provides for the general principle that the electoral system - that elections should be free from violence, intimidation, improper influence or corruption. The system should be impartial, neutral, efficient, accurate and accountable. Chapter six of the Constitution lays down criteria meant to facilitate effective leadership by outlining the roles and responsibilities

The promulgation of the Constitution has heralded the passage of several legislations by way of implementing the Constitution and ensuring the new governance structure is operational after the next general elections.

of state officers in so far as leadership and integrity is concerned.

The constitutional provisions on public participation in ensuring free and fair elections are a justification for members of the public to monitor the forthcoming elections. Effective elections monitoring by the public would increase transparency and accountability of political parties, the elections management body. It would limit possibilities of outlawed behavior, promote systematic legislative change and support existing enforcement agencies. It would promote and assure sovereignty of the people and reduce political corruption.

While all the above developments are positive additions to the reform process, they are likely to be eroded if the political landscape does not change and embrace the Constitutional and legal developments in place. The political parties and elections laws are good legislations in so far as bringing sanity in politics and the electoral process is concerned. Despite their coming into force, the political class and the citizenry are yet to embrace them. The citizenry which form a critical cog in the democratization wheel need to take the opportunity provided by the constitution to conceptualize the implications of the new order, their roles and responsibilities, rights and obligations and discharge them accordingly. The elections are less than seven months away and yet the old undemocratic culture is gaining momentum; political competition is cut throat, a matter of life and death and is devoid of ideology but centered on personalities and tribal agenda. Only faithful implementation of the constitution would assure Kenya of free and fair elections in 2013.

By Elijah Ambasa, The Writer is a Programme Officer, Governance & Policy Programme at TI-Kenya

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Freedom of Information law still in the pipeline

By Debra Gichio

The Kenyan Constitution is one of the few constitutions in the world (besides those of South Africa and Uganda) that provides for the right of access to information. Article 35 of the Constitution of Kenya, 2010, provides as follows:-

35 (1) Every citizen has the right to access:

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

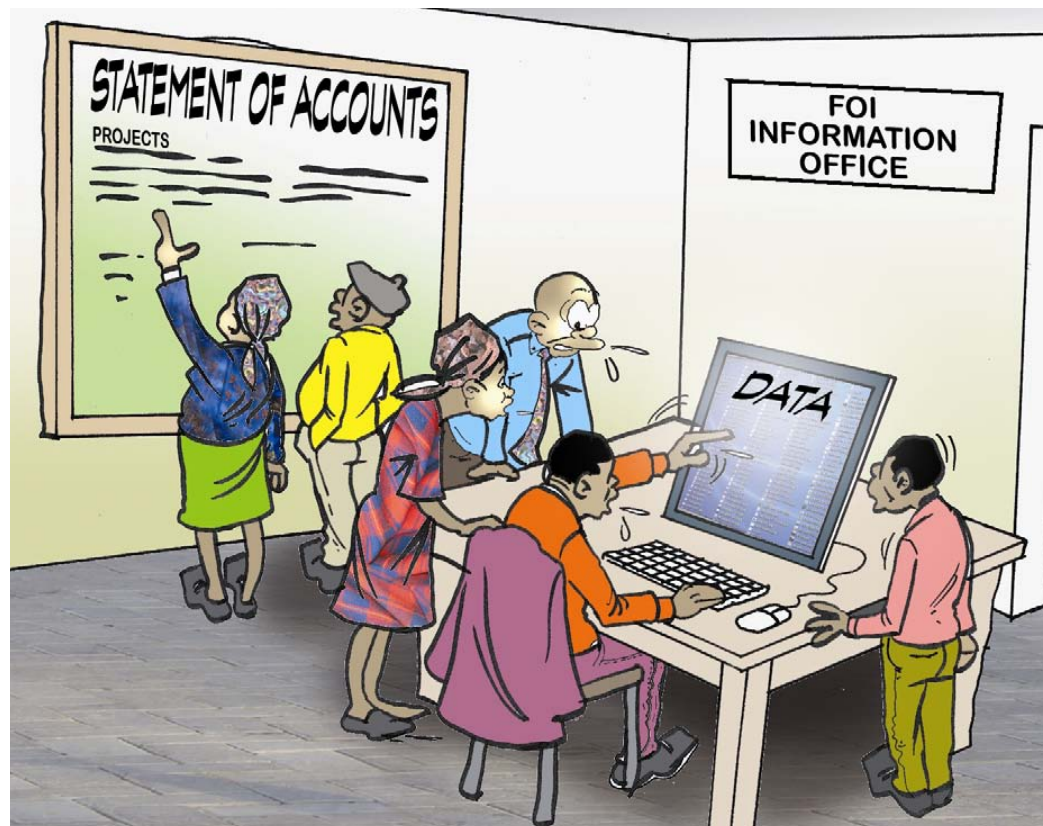
Article 35 on access to information is anchored by Article 10, on national values and principles of governance that include democracy and participation of the people, good governance, integrity, transparency and accountability.

Two years after the promulgation of the new Constitution, and notwithstanding the importance of the legislation, the State is yet to enact legislation to guide holistic implementation of the right to access information. Therefore, the State continues to withhold vital information that compromises the very principles and values of governance espoused by the Constitution. Presently, the framework governing the collection, storage and disclosure of public information is guided by a number of statutes including the *Disposal of Records Act* of 1962, the *Public Archives and Documentation Service Act* of 1966 and the *Statistics Act* of 2006. Other statutes include the *Official Secrets Act* of 1968 (which makes it an offence to disclose certain kinds of information).

¹ The Data Protection Bill is aimed to protect the right to privacy even within an access to information regime.

Parliament is yet to enact the statutory framework needed to elaborate and implement the right to information, although a draft Freedom of Information Bill has been developed, and according to the Commission for the Implementation of the Constitution (CIC), is currently undergoing stakeholder review, alongside the Data Management and Protection Bill'. Recently, the Attorney General, while addressing the status of some media draft laws, signaled that the FOI and Data Protection bills will be tabled in Parliament soon. The right to information is central in the implementation of crucial laws such as those that touch on vetting of public officials and access to relevant information on individual's suitability to undertake certain roles; and the devolution laws with regard to sharing public information for purposes of civic participation in county governments. It is hoped that the AG's recent promise to table the FOI Bill 'soon' is a solid commitment, and that the Bills will be debated in parliament without undue delay. 🌐

By Sheila Masinde, The writer is a former Programme Officer, Advocacy & Communication at TI-Kenya



Events roundup

TI-Kenya and Water Integrity Network conduct a journalists' roundtable for East African WASH journalists

The perception that WASH stories are 'unattractive' and 'unsellable' is among the top challenges that WASH journalists in East Africa face on a day to day basis. This emerged during a journalists' training-cum-roundtable held by TI-Kenya and the Water integrity network in Nanyuki in July 2012.

The workshop was convened with the aim of empowering East African journalists to do file better quality stories while covering the WASH beat.

Ugandan journalist and CNN award winner Fredrick Mugira, who is also the Co-coordinator Water Journalists Africa, while sharing his experience on reporting on the WASH beat said that the bottom line is that media managers who are running businesses would



Water Integrity Network's Janek Hermann-Friede leads a session during the journalists' roundtable. PHOTO/TI-KENYA

rather go for politics and celebrity news because that is what sells.

TI-Kenya Citizen demand programme officer Sareen Malik who has been

heading the TISDA project in Kenya on the water sector facilitated a session to help journalists find the link between WASH and issues of corruption and integrity 🌐

Communities in Wajir set to benefit from climate financing advocacy led by TI-Kenya

Transparency International Kenya will begin the process of climate finance advocacy with organisations working in Wajir to enable the communities in the county to benefit from climate financing.

During a visit to the county and interaction with both the communities and organisations working with them, TI-Kenya Climate governance programme staff learnt that despite the fact that there are several organisations implementing climate change adaptation activities particularly rain water harvesting, drilling of boreholes, forage harvesting and storage, only Oxfam is aware of climate finance.

In order to empower organisations working with communities in the county and subsequently the communities, TI-Kenya proposed that the organisations join climate governance network for future information sharing, participation and development of climate change capacity to enable them engage more in the sector. 🌐



Climate governance integrity programme Programme Officer Judy Ndichu engages community members in Wajir county. PHOTO | TI-KENYA

Events roundup

33.6 million shillings and counting: The market price of ‘petty’ bribery in Kenya

The market price of corruption in Kenya now stands at just over Ksh. 33.6 million. This is according to the data on ipaidabribe.or.ke derived from 819 bribe stories that Kenyans have shared on the website.

Broken down into counties, Nairobi is the most bribed county with 270 bribe stories, followed by Mombasa, Nakuru, Kiambu and Kisumu in that order.

In terms of departments, Kenya Police leads with 234 bribe stories filed. Municipal services, ministry of lands, immigration & registration (passports & IDs) of persons electricity supply (Kenya Power) follow in that order.

I paid a bribe Kenya is a crowd sourcing website launched in December 2011 to give Kenyan citizens a place to speak about their experiences with ‘petty’ corruption. Kenyans can share their bribe stories by filling out a form on the website (ipaidabribe.or.ke), the mobile site (m.ipaidabribe.or.ke) or by sending an SMS to 2025 indicating the county, department and transaction involved as well as the amount involved in that order.

Bribe Reports: Top 5		
Departments	Counties	
	Reports	Amount (in Shillings)
Police	234	402050
Municipal Services	95	548900
Lands	45	356800
Passports & IDs	31	1086822
Electricity Supply	24	62000

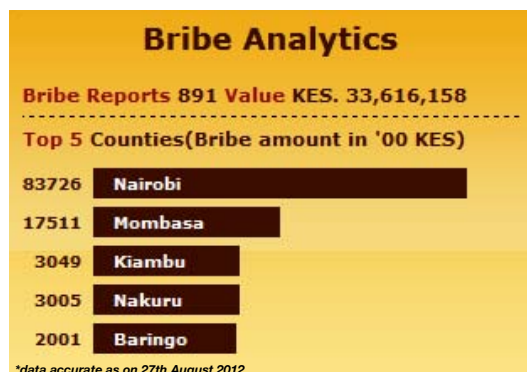
One stop Complaints Center pilot launched in Kisumu

Reporting corruption, administration injustice, human rights violation, discrimination and hate speech has been made easier for Kenyans with the launch of the pilot phase of the Integrated Public Complaints and Referral Mechanism (IPCRM) in Kisumu.

The Integrated Public Complaints and Referral Mechanism (IPCRM) is a one stop center where citizens can file reports on corruption, administration injustice, human rights violation, discrimination and hate speech by visiting the centers, calling or emailing their complaints. During the 3 month pilot phase, residents of Kisumu can report all their complaints at the EACC Kisumu office.

Clients of TI-Kenya’s Advocacy and Legal Advisory Centers (ALACs) potentially stand to benefit from this initiative as their cases will be referred to EACC on the spot while the non corruption cases can also be channeled to the institutions mandated to handle them through the IPCRM.

The Integrated Public Complaints and Referral Mechanism (IPCRM) is a joint effort of The National Cohesion and Integration Commission (NCIC), Ethics and Anti Corruption Commission (EACC), Kenya National Commission on Human Rights (KNCHR), Commission on Administrative Justice (Ombudsman), National Anti-Corruption Campaign Steering Committee (NACCSC) and Transparency International-Kenya.



Bribe Reports: Top 5		
Departments	Counties	
	Reports	Amount (in Shillings)
Nairobi	270	922279
Mombasa	56	1683500
Nakuru	41	265300
Kiambu	35	146250
Kisumu	26	123950

Events roundup

Contract Monitoring Kenya Network officially launched, releases Baseline Report

Public Procurement in Kenya is marred by poor planning, corruption, delays in payment to suppliers and low public participation according to the Contract Monitoring Kenya Network Baseline Report.

The baseline report, launched in June by the Contract Monitoring Kenya Network, a multi-stakeholder forum gives an overview of the current status of public procurement. The study focused on four key public sector areas: education, water, the construction industry (particularly in roads/transport infrastructure) and health (mainly in pharmaceuticals).

As a way forward, CMNK intends to use this baseline study to advise the way forward in espousing transparency and accountability in public procurement.

CMKN is a multi-stakeholder group comprising the following institutions: Transparency International-Kenya (TI-K), Kenya Institute of Supplies Management (KISM), Kenya Alliance of Resident Associations (KARA), Kenyan Section of the International



Contract Monitoring Kenya Network officially launched, releases Baseline Report (PHOTO | TI-KENYA)

Commission of Jurists of Kenya (ICJ), Kenya Private Sector Alliance (KEPSA), Strathmore University, The Public Procurement Oversight Authority (PPOA), Management Science for Health, Kenya (MSH-K), Kenya Medical Supplies Agency (KEMSA), National Taxpayers Association (NTA), Health Action International Africa, Kenya Federation of Pharmaceutical

Manufacturers (KFPM), Ethics and Anti-Corruption Commission (EACC), InterNews Kenya, Forum for Transparency and Accountability in Pharmaceutical Procurement (FoTAPP), Kenya Association of Manufacturers (KAM). This initiative has also been adopted in West, East and South African countries.

I DEMAND my right to know!



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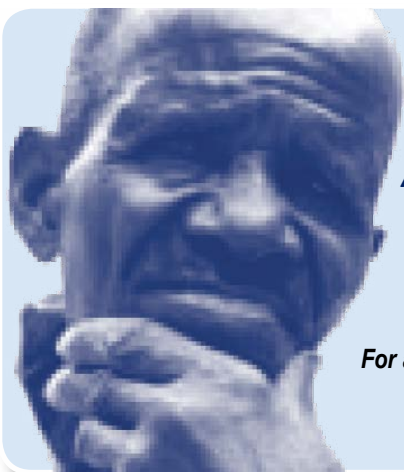
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