

CAPF BILL DIGEST

Though multi-party democracy was re-introduced 16 years ago in Kenya, there is no specific law governing the formation of political parties, their organization, funding, functions and operations

▣ The Political Parties Bill, 2007

The best shot so far

On 20th March 2007, the Minister for Justice and Constitutional Affairs published the *Political Parties Bill, 2007* as a *Special Issue of the Kenya Gazette Supplement No. 24 (Bills No. 3)*. The Bill seeks to provide a framework for the registration, regulation and funding of political parties. Upon its enactment, political parties will be registered and regulated by the Registrar of Political Parties. This will be a departure from the current practice where political parties are registered under the *Societies Act (Cap. 108)*.

Political parties, unlike other social associations or organizations such as trade unions, football clubs, funeral associations and merry-go-rounds or even non-governmental organizations that may be involved in the political arena, are important institutions which determine how the Government is formed and run.

Because of the impact political parties have on the political system and the important

role they play in governance, considerable attention has focused in recent years on how to make parties more national oriented, promote their commitment to justice and democracy, and increase their responsiveness to their constituents.

The *Political Parties Bill 2007*, therefore, comes at a critical time when Kenyan's are preparing for yet another general election. The 2002 General Elections deconstructed barriers and created new hopes, swaying the debate to devising strategies of how to institutionalize and consolidate the process of democracy and good governance in Kenya. But there are still formidable obstacles to the actualization of the same.

The current legal framework governing political parties is generally weak for four broad reasons:

◆ It has no mechanisms in place to check on the mushrooming of unsustainable and unaccountable political parties.

◆ The framework does not provide an enabling environment for the emergence of strong democratic and institutionalized political parties and party system.

◆ Even with the influence of money in politics, the current legal framework does not make provisions for regulating funding of political parties and proper management and accountability of funds received.

◆ Despite the obvious linkage between political parties and political corruption in Kenya, the current legal

framework does not make provisions to address the problem of corruption and corrupt political funding.

ROLE OF POLITICAL PARTIES

Political parties should play a fundamental role in democracy and governance. As instruments of regime change, the role of political parties is to help democratize and institutionalize governance as a means of ensuring the welfare of all people in society. Broadly, it is the role of political parties to:

- ◆ mobilize public opinion;
- ◆ bring together opinions and resources enabling people with similar views or interests, whether economic, social, religious, etc, to

BACKGROUND

For democracy to flourish there must be strong and well-organized political parties and political system. This would ensure political stability and overall national peace and security, which in turn, would stimulate investment and spur sustainable economic growth and development. Apart from serving the interests of members, parties should serve the common good of a nation and ensure that the welfare of all members of society is assured, by ensuring equitable distribution and proper management of resources.

The repeal of Section 2A of the Constitution in 1991 saw the re-introduction of multi-party democracy. But there is no specific law governing

the formation of political parties, their organization, funding, roles, functions and operations.

There were 112 registered political parties as of 9th July 2007, according to Electoral Commission of Kenya records. But only nine are represented in Parliament. The majority exist only in name. For the active ones, the problem of internal governance has persisted over the years and there is increasing demand for their internal democratization.

Political parties are characterized as arbitrary, autocratic and unaccountable. In nearly all, the leadership tolerates no healthy dissent and democratic elections are rarely held or, when held, are perfunctory. Even membership rolls

organize and co-ordinate their activities and lobbying;

- ◆ provide the principle means through which ordinary people can participate in political and constitutional processes and exercise many of their civil and political rights;
- ◆ mediate in several ways between civil society and State institutions;
- ◆ secure the representation of people in State institutions;
- ◆ bring public opinion to bear on government policies;
- ◆ provide the means which bring a section of the people to power and provide cohesion and discipline to the Government;

may not be available. Furthermore: party leaders are utterly unaccountable to their members as well as the public on contributions and expenditure; party leaders treat parties as their personal properties and, therefore, do not perceive of a situation in which they will ever cease to be the leaders of their party; parties exist mostly to serve the personal interest of the leaders; they use them as bargaining chips in the struggle for power and material benefit; the leadership interferes in party electoral processes, especially, the nomination of candidates for elective positions at the national and local levels; and most parties are founded along ethnic and sectarian lines and interests, and national issues are rarely addressed.

- ◆ hold the Government accountable to the Legislature and the people, especially, as opposition parties.

Political parties must, therefore, play a key role in national integration, bringing people in different parts of the country or from different ethnic or religious affiliations together in common organization and with a common purpose, and help to develop a national outlook and values.

Depending on how political parties go about discharging their mandate, they can either be stigmatized as harmful to unity, greatness and sovereignty of the nation, or viewed as the channel through which people exercise both their sovereign right and duty to govern themselves via their elected representatives, as in liberal democracies.

If parties see their primary role as aggregation and articulation of narrow sectional interests, such as ethnicity, they will divide society, rather than integrate it. If they see their main objectives as access to power, rather than safeguarding moral values, common good or national interests, they will engage in intimidation and violence, fundamentally compromising democratic practices. In these circumstances, individual politicians also become self-serving and lose personal integrity or sense of commitment to their constituents, frequently changing parties to suit their personal conveniences and ambitions. In this way, politics and politicians become discredited, people lose confidence in democracy, which they associate with parties and politicians.

WHY POLITICAL PARTIES BILL, 2007

1). The current legal framework is generally weak and ineffective

Political parties are currently registered and governed by the *Societies Act (cap 108)*. This is a law, which was designed at a time when the nature and concept of political parties were unacceptable and poorly appreciated in the country. The legislation was introduced in Kenya in 1952 as *Societies Ordinance*, and like all other ordinances it was transformed into an Act of parliament at independence without even the slightest alteration to its provisions. The 1952 Societies Ordinance was amended in 1968 becoming the current *Societies Act (Cap 108)*. The Act governs societies generally, treating political parties as mere societies despite the unique role they play in electoral and governance activities. It targeted all forms of societies and it is a law, which can never help political parties to grow in terms of expertise regarding their organization, management and supervision.

2). The current state of political parties is not conducive to democracy and good governance

Traditionally, political parties have been regarded as private associations and there has been little or no formal regulation. An examination of the characteristics and the state of political parties in Kenya today makes it clear that their contribution to healthy, stable and democratic governance

has been generally negative for the following reasons:

- ◆ There are too many political parties; mainly because the rule requiring party nomination for parliamentary and presidential candidates encourages this and promotes the tendency towards picking parties off the shelf.

- ◆ Many political parties are inactive.

- ◆ It is both too easy and too difficult to register parties – easy in the sense that there are few legal requirements; difficult in that registration is often politically motivated.

- ◆ Most parties are personal properties of individuals.

- ◆ There is no strong sense of party loyalty as far as most members are concerned.

- ◆ Parties are not ideological and are seen by politicians as avenues to personal power.

- ◆ Few parties have clear or consistent social, economic, or financial policies.

- ◆ Parties have rarely contributed ideas of governance, social justice or a development vision.

- ◆ Parties become active only in connection with elections.

- ◆ Many parties are alleged to have militias and are not averse to using violence.

An examination of characteristics and state of political parties in Kenya makes it clear that their contribution to healthy, stable and democratic governance has been generally negative

3). Money in Kenya's politics and political corruption

The electoral process in Kenya requires considerable sums of money. Candidates and political parties need funds in order to print election literature, to organize political meetings, to produce election broadcasts and for many other undefined campaign expenditures. Politicians and their parties are expected to bribe voters or buy votes, pay for community events such as sports, donate money to local churches, pay school and college fees. While political party costs can be reduced by limiting election expenses, political parties would still need extra funds to ensure proper organization and management of their business. This way, money is linked to the health and strength for electioneering and the power of political influence

Political parties in Kenya source their funds from members' contributions, donations from "well wishers", fund raising activities and sales of documents, publications and souvenirs. It is usually assumed that political parties can, on their own, manage to raise enough funds for activities without state intervention. This problem of political party finance is aggravated by the general poverty of the population, which means that membership contributions *per se* is not a real source of finance for parties and correspondingly heavier reliance on corporate funds. This has made them become vulnerable to "forces of corruption" that try to capture them for selfish ends rather than in the public interest.

Politicians and their parties are expected to bribe voters, pay for community events such as weddings, pay school fees and college fees in order to win votes

The increasing costs of electioneering and party campaign activities have been linked to causes of political corruption within parties.

WHAT THE BILL PROVIDES

The proposed legislation seek to provide a framework for the registration, regulation and funding of political parties. It establishes the office

of the Registrar of Political Parties whose responsibility will be to register political parties. The office shall be an independent office within the Electoral Commission of Kenya (ECK).

The proposed legislation, therefore, provides for the formation, registration and regulation of political parties. The conditions under which a political party may be formed, qualifications of a founding member, participation in political activities and the rights of party members are also established. It also provides for the procedures for registration of a party and the contents of a party constitution and the circumstances under which a party's registration can be cancelled and the effect thereof are also set out.

The proposed legislation also provides for the establishment of a political parties fund to be administered by the Registrar and the manner in which the funds will be sourced and allocated to political parties. Provisions on other sources of funding, restrictions thereof, disclosure and audit of the funds are also set out. It also makes provision for general matters including keeping of records, and winding up of political parties and of making regulations.

WEAKNESSES OF THE BILL

The legal framework provided in the Bill, is, however, not comprehensive enough to deal with some of the critical challenges facing Kenya's democratization process and political process such as political corruption, corrupt political financing, political discrimination and exclusion. As institutions of democratic governance, political parties are very important and their role and functions should be elaborated by law if not in the Constitution. Key to the need to regulate political parties is not just the mere provision of a legal framework for registration, and regulation but appropriate enforcement and monitoring mechanism.

The Bill fails in the following areas:

1) Appointment of the Registrar of Political Parties

While the Bill establishes the office of the Registrar of Political Parties whose responsibility will be to register political parties, it does not express the manner in which the Registrar will be appointed. Though the establishment of the office of the Registrar of Political Parties within the ECK may not be a bad idea, the role of the ECK in registration of political parties and the relationship between the Registrar and ECK should be clearer.

2) It proposes to regulate formation, registration and management of political parties- this is unconstitutional

Unfortunately, the Bill tries to regulate the formation of political parties. The right to form political parties should be protected by the law, subject to the provisions of the Constitution rather than regulated. Qualifications for registration should aim at

ensuring internal party democracy and accountability as well as external accountability. The qualifications for registration should also aim to deal with issues of affirmative action and representation of women and minority groups, and a party once registered should be obliged to subscribe to a Code of Conduct (similar to the one in the Presidential and Parliamentary Elections Act) that imposes legal obligations on the party to observe its terms. Any party in breach of the Code should be liable to penalties and all registered political parties should be required to publish a manifesto before elections.

The Registrar should have the authority to give provisional registration, valid for 12 months instead of six months, to political parties which meet the laid down rules and procedures of registration to enable such to participate in elections. The rights of parties during the provisional registration should be distinguished from those under full registration, such as concerning participation in elections by presenting candidates and campaigning.

3) Breach of Code of Practice for Conduct of Elections, though a serious offence would not result in de-registration of a political party

While the Bill provides for cancellation of a registered party found in breach of its own constitution, it should also make provisions for cancellation of registration of a party found in breach of a Code of Practice for the Conduct of Elections or any law relating to elections. The Bill should also give power to the ECK to institute proceedings against any party that is in breach of a Code of Practice for the Conduct of Elections.

the legal framework provided in the Bill is not comprehensive enough to deal with some of the critical challenges facing Kenyas' democratization process

4) It fails to define functions and roles of political parties

Although the Bill makes provisions for the formation of political parties, it does not make provisions for the functions and roles of the parties. Political parties, as institutions of democratic governance, are very important and their functions and roles should be clearly defined and elaborated in the law. Political parties should be free to participate in shaping the political will of the people, to disseminate political ideas and social and economic and programmes of a national character, sponsor candidates for election to any public office and facilitate participation in public affairs.

A party should have the principal objective of enhancing the well-being of the people of Kenya as well as the common good and welfare of society, whether it is ruling or in opposition, and all the ideals of good governance. The State should observe strict neutrality vis-à-vis all lawful political parties; and State functions or powers should be separated from political parties in government.

5) The Bill fails to address matters relating to internal party democracy

The Bill provides for the conditions under which a political party may be formed, qualifications of a founding member, participation in political activities and the rights of party members but leaves matters relating to internal party democracy to political parties.

To guarantee internal party democracy, the legislation must also make provisions on basic democratic principles which any registered political party must respect. The

provision for basic principles may require registered parties to have a democratically elected governing body; abide by the democratic principles of good governance and promote and practice democracy through regular, free and fair elections within the party; respect the right of others to participate in the party process; including persons with disabilities, workers and other minorities; promote and respect human rights and gender equality and equity.

6) It does not adequately address issues relating to corrupt financing of political parties and individual politicians

One of the principle achievements of the Bill is that it provides for the establishment of a political parties fund and, in doing so, makes provisions on the sources of funding, restrictions on the sources of funding and requirement for disclosure and audit of the funds.

Unfortunately, the Bill does not address the issues in relation to the problem with corrupt funding of political parties. Accordingly, the proposed legislation must seek to regulate the following issues.

- (a) The Bill must seek to regulate and control the sources of funds donated to political parties and individual politicians or candidates. The Bill will regulate and control sources of donation to political parties but not to individual candidates or politicians. In other words, it does not impose restriction, control or regulation on individual candidates or members of a political party receiving donation from any source. In any election, the primary campaigner is the individual candidate not the party.

To guarantee internal party democracy, the proposed legislation must make provisions on basic democratic principles which any registered political party must respect.

The law should, therefore, also be concerned with controlling donations made to candidates.

- (b) It must seek to regulate and control not just donations to parties but also limit the expenditure of political parties and individual candidates in an election. All parties want to win elections and they get under intense pressure to spend up to and beyond their capacity to increase

their chances of doing so. Controlling and limiting donations to political parties must go hand in hand with limiting spending of political parties to address the problem of corruption and corrupt funding of political parties. The Bill provides for the regulation and restrictions of donations to political parties but it does not seek to regulate, control or restrict matters relating to campaign expenditures.

CAPF MEMORADUM TO THE CHAIRMAN OF THE DEPARTMENTAL

The Coalition for Accountable Political Financing (CAPF) is an alliance of governance focused civil society organizations in Kenya intent on coalescing their expertise, experiences and programmatic resources towards the improvement of the regulation, management and culture of political party financing in Kenya.

On 15th May 2007, CAPF and the National Democratic Institute for International Affairs (NDI), organized a stakeholders' forum to review the proposed *Political Parties Bill, 2007*.

The forum analyzed and discussed the Bill and concluded that the mechanisms provided in the Bill are not comprehensive enough to realize its purpose.

The Bill does not;

- ◆ provide clear legal framework that will check and balance the power of State in regulating the formation, registration and funding of political parties;
- ◆ provide clear guiding principles to govern the process of the formation of a political party prior to application for

registration;

- ◆ provide clear democratic principles that will govern the operation of political parties;
- ◆ provide effective institutional mechanisms for the regulation of political parties;
- ◆ provide effective accountability mechanism for public funding of political parties; and
- ◆ Provide a clear scheme for the regulation of the financial affairs of political parties.

Pursuant to the above stated reasons, CAPF submits the following proposals for amendment to the *Political Parties Bill, 2007*

AMENDMENTS

Section 2

THAT section 2 of the Bill be amended by inserting the following definitions:

“Defined expense” means expenses in connection with any conference, meeting or other event organized by or on behalf of the political party; the preparation,

(c) The Bill must seek to provide for the Registrar of Political Parties with full executive and investigative powers in relation to matters of donations to political parties and individual candidates and expenditures of political parties, individual candidates and third parties during election campaigns. The Bill only provides that the Registrar shall have operational autonomy but it does not mandate the Registrar with powers to investigate matters of donations to parties and

individual candidates or executive powers to ensure that parties and individual candidates comply with rules on disclosure of donations.

(d) It must seek to impose restrictions on the use of public resources to promote the interests of political parties in power. The Bill does not impose any restrictions on the use of public resources by parties in power.

COMMITTEE ON THE ADMINISTRATION OF JUSTICE AND LEGAL AFFAIRS

production or dissemination of any publication by or on behalf of the party; or any study or research organized by or on behalf of the party.

“Donation” means any gift to the political party of money or other property; any sponsorship provided in relation to the political party; any subscription or other fee paid for affiliation to, or membership of, the political party; any money spent (otherwise than by or on behalf of the political party) in paying any expenses incurred directly or indirectly by the political party; any money lent to the party otherwise than on commercial terms.

“Sponsorship” means any act done whose objective is to transfer any form of property or money to a registered political party provided that such money or property is for the benefit of the party, and for the purposes defined under this Act.

Section 3

THAT section 3 of the Bill be amended by deleting the words **“and shall have operational autonomy”** immediately after the word **“Commission”** wherever they appear

in subsection (1) and inserting the following new sub-sections immediately after subsection (3) as follows:

(a) The Commission shall appoint the Registrar from among its members.

(b) The Registrar shall be a person who has held or qualified to hold office of judge of the High Court of Kenya.

(c) A person shall not be qualified to be appointed the Registrar if-

◆ S/he is a member of a registered political party;

◆ S/he is an office bearer of a registered political party;

◆ S/he has at any time been a founding member of a registered political party.

(d) Subject to this section, the office of Registrar shall become vacant at the expiration of five years from the date of his appointment or appointment as a member of the Commission.

(e) In the exercise of its functions, the office of the Registrar shall not be subject to

the direction of any other person or Authority other than the Commission.

Insertion of Part II B

THAT the Bill be amended by inserting another Part so that there is **Part II A and Part II B**. Part II B to come immediately after Part II A and to read and be structured as follows:

PART II B -REGISTERED PARTIES PANEL

3B

(1) There is established a body to be known as the Registered Parties Panel hereinafter referred to as “**the Panel**” which shall consist of representatives of fully registered parties appointed in accordance with this section.

(2) The function of the panel shall be to submit representations or information to the Commission about such matters affecting political parties as the panel think fit.

(3) Where the panel submits any such representations or information, the Commission shall-

- (a) consider the representations or information, and
- (b) decide whether and (if so) to what extent, it should act on the representations or information.

(4) Each fully registered party shall be entitled to be represented on the panel by a person appointed to the panel through an elected governing body of the party.

(5) Subject to subsection (6), a person so appointed shall be a member of the panel

for such period as the elected governing body of the party may determine when making the appointment.

(6) A person so appointed shall cease to be a member of the panel if at any time- his appointment is terminated for any reason by the elected governing body of the party, or the party ceases to be registered.

(7) The panel shall adopt its own procedure of conducting its affairs, giving due consideration of established democratic principles.

(8) The validity of any proceedings of the panel shall not be affected by any failure by the elected governing body of a fully registered party to make any appointment in accordance with this section.

Insertion of Clause 4A

THAT the Bill be amended by inserting the following new section immediately after section 4 to read as follows:

4A

(1) The Commission shall keep under review, and from time to time submit reports to Parliament on, the following matters, namely-

(a) such matters relating to the registration, regulation and funding of political parties to which this Act applies as the Commission may determine from time to time;

(b) such other matters relating to organization, and financial affairs of registered political parties to which this Act applies as the Commission may determine;

(2) At the request of Parliament, and within such time as Parliament may specify, the Commission shall –

- (a) review, and

(b) submit a report to Parliament on, such matters or matters relating to the registration, regulation, and funding of political parties to which this Act applies as Parliament may specify.

(3) In the exercise of its functions under this section the Commission shall not be subject to the direction of any other person or authority.

Section 5 (1)

THAT section 5(1) of the Bill be amended by deleting the word “**may**” wherever it appears and substituting therefor the words “**shall**” immediately after the words “**political parties**” in subsection (1)

Section 15B

THAT the Bill be amended by inserting the following new Section immediately after Section 15

15B

- (1) A fully registered political party shall
- (a) have a national character;
 - (b) have a democratically elected governing body that reflect at least a third of either gender at every level;
 - (c) promote and uphold national unity;
 - (d) promote and practice democracy through free and fair elections of its leadership;
 - (e) respect the right of its members to participate in the political process within the party;
 - (f) promote and respect human rights and gender equity and equality;
 - (g) conduct annual meeting for its members or delegates

(2) No political party, a member of a political party, office bearer of a political party or any

other person shall use public resources to further the interest of a political party.

(3) Without prejudice to any other penalty prescribed by this Act or any other written law, the Registrar shall cancel the registration of a political party, which refuses or neglects to comply with this section.

Section 18

THAT Section 18 of the Bill be amended by adding a new sub-section (g) after sub-section (f) so as to read as follows- “**is in breach of the provisions of section 15B of this Act.**”

Section 22

THAT section 22 of the Bill be amended by-

- (a) inserting the words “**not more than 1% (one per cent) of all the government ordinary revenue collected in every financial year**” immediately after the word “**estimates**” where it appears in sub-section (1) paragraph (a)
- (b) inserting a new sub-section immediately after sub-section (2) to read as follows-

(3) The Minister may make such regulations for the smooth running of the Fund provided that such regulations made shall first be approved by Parliament before implementation.

Section 24

THAT Section 24 of the Bill be amended as follows:-

- (a) in sub-section (1) paragraph (c) by deleting the words “**bequests and grants**” wherever they appear and substituting therefor the words “**sponsorships and gifts**”
- (b) in sub-section (1) paragraph (c), by

deleting the words “**non-governmental organization**” wherever they appear and substituting therefor the words “**governmental organizations**”

(c) in sub-section (3) by deleting the words “**Provided that the Registrar may, on request, allow a person to contribute an amount exceeding one million shillings**” wherever they appear.

(d) in sub-section (4) by deleting the words “**shall not**” wherever they appear and substituting therefor the word “**shall**”

Section 35

THAT Section 35 of the Bill be amended by deleting the words “**Attorney-General**” wherever they appear and substituting therefor the word “**Commission**”

Section 36

THAT Section 36 of the Bill be amended by inserting a new subsection, sub-section 3, immediately after subsection (2) to read as follows:

In particular, and without prejudice to the generality of the power conferred by subsection (1), the Commission shall make regulations-

The state should observe strict neutrality vis-a-vis all lawful political parties; and state functions and powers should be separated from political parties in government

(a) prescribing the maximum amount of money a political party may spend on election campaign and the manner of expenditure;

(b) prescribing the maximum amount of money a presidential candidate may spend on election campaign and the manner of expenditure;

(c) prescribing the maximum amount of money a

parliamentary candidate may spend on election campaign and the manner of expenditure;

(d) prescribing the maximum amount of money a civic candidate may spend on election campaign and the manner of expenditure.

Published by the **COALITION FOR ACCOUNTABLE POLITICAL FINANCING (CAPF)**

Cordination Committee

Centre for Governance and Development (Convenor) • Centre for Multi-Party Democracy in Kenya (Co-convenor)
Transparency International, Kenya Chapter • Editors Guild • League of Kenya Womens Voters
Institute of Certified Public Secretaries of Kenya • Kenya Women Political Caucus

Source: Stakeholders' Forum to Review the *Political Parties Bill, 2007*, organised by CAPF and NDI, on 15th May 2007

Compilation: Dr. Charles Otieno & Makokha Joseph Paul • L/O & Design: James Mugo & Makokha Joseph Paul
Quality Control: Kennedy Masime



PRODUCED WITH SUPPORT FROM

