The Final Submission: Successes and challenges during my four year term – LSK President Eric Mutua
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“We (IEBC) learnt a number of lessons from the 2013 General Elections and we must prioritize intervention ahead of the 2017 polls by initiating advance planning,” – Independent Electoral and Boundaries Commission (IEBC) CEO Dr Ezra Chiloba when presenting a paper at a Continuing Professional Development (CPD) Seminar on Electoral Laws and Political Parties Act at Acacia Premier Hotel in Kisumu.

“Some Constitutional Commissions are a huge financial burden to the State. Each Commission should consist of not less than three and not more than nine Commissioners. Parliament should also allocate sufficient funds to enable each Commission and independent office to perform its functions,” Strathmore University School of Law Dean Dr. Lui Franceschi when presenting a paper on Constitutional Commissions and Offices at a Continuing Professional Development (CPD) Seminar on Public Law at Boma Inn in Eldoret.

“The one third gender rule must be implemented as envisaged in the Constitution. Women should also vie for top seats including to be elected as President of the Law Society of Kenya,” – National Gender and Equality Commission (NGEC) Chairperson Ms. Winifred Lichuma when presenting a paper on Gender Equality at a Continuing Professional Development (CPD) Seminar on Elections & Political Parties Act at Acacia Premier Hotel in Kisumu.

“The Council formed the Taskforce Investigating the Lang’ata Road Primary School Police Conduct to consider the violation of children’s rights, record statements from the children, school management and make recommendations on the incident,” LSK Vice President Ms. Lilian Renee Omondi when launching the Lang’ata Primary School Report at Panari Hotel, Nairobi.

“Lawyers have a major role to play in promoting the Rule of Law. We (lawyers) must ensure that the spirit and word of the Constitution is implemented to the latter,” – Makueni Senator Mr. Mutula Kilonzo Jr. addressing lawyers at the Law Society of Kenya (LSK) Annual Cocktail at The Intercontinental Hotel in Nairobi where he was the Chief Guest.

The judge gave me one year behind bars, the problem is that there wasn’t even a single beer there.
A message from the Executive Editor

I am greatly humbled and privileged to serve the Legal Profession as the Secretary to the Council and the Chief Executive of the Society in the era of the new Law Society of Kenya Act 2014. The operationalization of the LSK Act 2014 and development of the LSK strategic plan 2016-2020 gives us an opportunity to make the society a globally respected bar association, foster advocacy and advance the rule of law.

It is with great humility and honor that I welcome our esteemed readers to Vol. 1/6 of our cherished Advocate Magazine. The “Advocates” provides quality information and thoughtful ideas to our proficient readers.

The editorial team received large number of articles from member and experts in various fields among which 20 papers across the discipline have been features in this issue. We thank each one of the authors personally for imploiring the magazine.

We are confident that these articles will provide useful information and considerate ideas to our proficient readers. We continue to provide enormous support in driving the magazine to attain an envious position in areas of study, development and heighten its prominence. We convey our deep gratitude to the Editorial Team and all office bearers who have made possible the publication of this magazine.

We humbly call authors to submit their papers for consideration for publication in our forthcoming issue (Vol. I/ Issue 7 / July-September 2016). The articles should be submitted by Friday 3rd June 2016. Any comments and observations for the improvement of the magazine are most welcome. We wish all readers significant and quality time while going through the magazine.

Mercy K.Wambua
Secretary/CEO

It is with great humility and honor that I welcome our esteemed readers to Vol. 1/6 of our cherished Advocate Magazine.
This marks the last communication from me (in my capacity as the Chairperson/President of the Bar) to members of the Law Society of Kenya (LSK) and the legal fraternity. The four-year run (no other person has ever served as chairperson for four years in the history of the Society) at the helm of LSK has been challenging, yet a very exciting path for me. It has been the greatest privilege of my life. There has been many positive upshots and experiences but at the same time very vexing moments. I have partnered with old and new friends and many a times earned nemeses (for one to succeed in his responsibilities as a Chairperson of the LSK attracting foes is inevitable). Departing from tradition I will therefore, dedicate this dispatch to providing highlights of achievements and drawbacks by the Council of the LSK under my stewardship.

Constitutionalism and the Rule of Law.
Having come into office (in March 2012) about a year after the promulgation of the Kenya Constitution 2010, it was clear in my mind that as a body of lawyers we had a critical role to play in protecting and promoting aspirations of the Kenyan people, which had been brought about by the new constitutional order. Under my leadership, LSK voiced concerns when the Executive, Legislature and Judiciary acted in contravention of the Constitution. Allow me to provide a few instances when LSK rose to the occasion to protect constitutional gains.

When (in January 2014) the President of the Republic of Kenya declined to appoint Judges of the High Court of Kenya (insisting that he had a role to play by vetting the names of nominees as forwarded to him) after nomination by the Judicial Service Commission (JSC) we advised that such action was in contravention of the Constitution. We subsequently filed suit (Constitutional Petition No.313 of 2014) seeking a declaration that the Presidency was not clothed with such powers. The Executive was unable to offer any plausible response to the suit. Consequently it was constrained to make the appointments.

We believed in the constitutional process of vetting of Judges and Magistrates by the Vetting of Judges and Magistrates Board (JMVB) and hence unreservedly supported the work of the Board. However, we were disappointed and lost confidence in the work of the Board after witnessing the manner in which the complaints against the Hon. Justice Ibrahim (now Judge of the Supreme Court) were handled. Despite
Towards the end of last year, and in January this year, some Supreme Court Judges acted in a manner that, in our view, amounts to misconduct. They went on strike to protest against certain decisions (to the effect that two of the Judges of the court should stop conducting judicial work having attained the retirement age of 70 years) of the JSC. In January this year there emerged serious allegations that one of the Judges of the court (Hon. Justice Tunoi) was bribed to influence the determination of an election petition in favour of the Governor of Nairobi, Mr. Evans Kidero. We have condemned such actions and called for the reconstitution of the entire Supreme Court.

The current National Assembly has over times passed legislation that is in conflict with the Constitution. We have on several occasions pointed out such conflicts and where our voice was ignored we filed suits to challenge such laws. The latest of such action is the suit (Constitutional Petition No.3 of 2016) that we filed in January this year to challenge an amendment to the Judicial Service Act that sought to donate to the President the power to exercise his discretion in the appointment of Chief Justice and his deputy.

Advocates (Remuneration) (Amendment) Order 2014. A meaningful review of the fees chargeable by advocates had been undertaken in the year 1997 (the 2006 review was only a marginal enhancement of the fees in one area of practice), which is 18 years back. Under my leadership, the Council was able to wage through resistance from the public, Government agencies like the Competition Authority of Kenya and banking institutions to secure the publication of the Advocates (Remuneration) (Amendment) Order 2014.

The Law Society of Kenya Act 2014 and Branches of LSK. In order to align the LSK Act with the Constitution, to address challenges and accommodate desired changes in the affairs of the Society, we commenced a review of the LSK Act. In January 2015, the LSK Act 2014 came into force. Under the new Act, four organs of the Society namely, the general meeting, the council, the secretariat and branches of the society have been clearly established and recognized. Through the branches the spirit of devolution, as envisaged under the Constitution, has been captured. For the first time, advocates who practice in Nairobi now belong to a branch. Part of the reason that I pushed for the review of the LSK Act was to address the issue of flawed electoral process. Under the old law, members voted through delivery of ballot papers to the secretariat. This process was not free and fair. It was grossly abused during elections especially the ones held in year 2007 and the subsequent elections. In order to ensure free and fair democratic elections the Act stipulates that the elections of the council of the LSK are to be held by secret ballot and under the supervision of a national electoral body.

Single Business Permits. Majority of us are unaware that all persons and entities that establish any kind of business in any city or town are required to pay a levy termed as a Business Permit. Persons or entities that offer only a particular kind of service like legal service are required to pay for and obtain a Single Business Permit. In March 2014 in a case where I acted for LSK (High Court Miscellaneous Application No.53 of 2007) the court made a determination that the levying of the said single business permits amounted to double taxation and it accordingly quashed the said law.

Lands office and conveyance One of the areas that I have not been able to realize (it was one of my election and re-election pledges) much was reforms at the lands department. Though not an excuse, part of the reason that I was unable to do much in addressing corruption and incompetence at the land registries is because of the enactment (in 2012) and implementation of new land laws coupled with the infighting between the National Land Commission (NLC) and the Ministry of Lands. However, there are two main issues that we were able to address in a positive manner.

LSK Conditions of Sale The first is the fact that we were able to review The Law Society Conditions of Sale 1989. For 25 years majority of agreements...
President’s Dispatch

LSK President Mr. Eric Mutua, OGW chats with Dr. John Khaminwa at the Annual General Meeting. LSK Vice President Ms. Lilian Renee Omondi looks on

In November and December 2012, we examined various public documents including Parliamentary Investment Committee reports, Parliamentary Accounts Committee reports, Parliamentary Select Committee reports, Controller and Auditor reports and reports by various Commissions of Inquiry. We then compiled a report containing names of persons who had been adversely named in such reports. It was a new approach to the question of leadership and integrity. The report published in 2013 is titled Realizing Integrity Law: Walking the Talk.

This year we published three reports namely, Review of The Electoral Processes in Kenya-An appraisal of the 2013 General Elections; Police Conduct at Lang’ata road Primary School and Human Rights Abuse During Police Operations in Mpeketoni.

LSK International Arbitration Centre

My leadership qualities were brought to test in the midwifery of this monumental project of the LSK. It is an idea that I believed in and still strongly believe in. It is not an easy task especially given that a section of our members are opposed to being taxed to fund the project. I keep on reminding our members that four main factors dictate that this project must be supported and concluded (whether as conceived or with alterations) at all cost.

First, our membership has increased and keeps on increasing in an unprecedented manner. Last year we admitted into the Bar about 2,500 advocates. It is projected that this kind of number is to be replicated over the next 5 years. In terms of capacity, the current offices of the LSK, at Gitanga road, cannot sustain the number of staff and storage facilities that is ideal for those kinds of numbers. We have been forced to construct fabricated offices in order to accommodate some of the current personnel.

Second, the LSK Act 2014 has established branches as part of the organs of the Society. The branches have assumed statutory mandates and functions and should therefore, be funded by the Society. The estimated budget for sustaining the eight branches is about 15 million per year. By putting up the building, it will be possible to earn revenue that may be utilized towards funding the branches.

My plea is that subject to the court cases on the issue, we should all reason out and iron out any concerns in order to proceed and fully implement this project. My last take and message on this issue of the Arbitration Centre is that when all is said and done my Council will be judged as having stood on the right side of history.

The newly established Nairobi branch of the LSK has no offices. Being the largest branch it may require a sizeable office block. It would be idyllic to start thinking of the possibility of donating the Gitanga road offices to the Nairobi branch once the Centre is completed.

Third, we are the third largest Bar in Africa. Most Bar associations have or are in the process of constructing their own complexes. We cannot pride ourselves as the premier Bar in Africa yet we are unable to sustain our activities and improve on our infrastructure. I have had the benefit of visiting (in my capacity as Vice-President Pan African Lawyers Union (PALU) and President LSK) many Bar associations within the continent and internationally. Bar associations in developed nations host most events at their own state of the art properties while in Africa 11 Bar associations have either developed their properties or are in the process of undertaking such an exercise.

Fourth, the Constitution and the civil procedure rules provide for and encourage Alternative Dispute Resolution. The Judiciary has just advertised for recruitment of mediators. Nairobi is the commercial hub in East and Central Africa that attracts large commercial transactions. These factors decree that the profession be adequately equipped with facilities that are to be utilized in undertaking resolution of disputes outside the traditional court system. Such a facility is lacking in Kenya. An Arbitration Centre, which is run and managed by the LSK, is likely to attract confidence from the business world and the general public.

My plea is that subject to the court cases on the issue, we should all reason out and iron out any concerns in order to proceed and fully implement this project. My last take and message on this issue of the Arbitration Centre is that when all is said and done my Council will be judged as having stood on the right side of history.

Once again I thank you for giving me the opportunity to serve you as your leader for those four years. I pride myself as a member of this society. God bless the Law Society of Kenya. God bless you all.

Eric Mutua OGW, President, LSK
County governments and traditional community based natural resource management (CBNRM)

The expectation of devolution upon the passage of the Constitution brought with it joy and some innate challenges. The spotlight has turned on how ‘alien’ structures should be integrated with community based structures of local use and benefits over local resources. The County Government Act provides that appointments made to the county executive posts, which consists some of the senior most positions in the counties, must reflect the cultural diversity of communities, marginalized groups and minorities of the people living in the county.

The argument is that by having these persons, the reflection of the county objectives on diversity and inclusivity is blurred. But this criterion is somewhat misapplied in that the procedure of mapping out the county geopolitical zones and identification of skills was not based on empirical data collected. Further, the formalistic structure of seeking applications through the County Public Service Boards meant that, emphasis was placed more on academic grounds rather than the key knowledge value addition of leadership and consensus building that is unique from county to county. Therefore, critical indigenous knowledge in County Governments and Traditional Community Based Regimes of Natural Resource Management (CBNRM) issues and other county-specific natural resource agenda was ignored.

Decentralized Units

The confusion that arises here is in the understanding of the functions that the National Government has over decentralized units and sometimes the title that these decentralized units have assumed in entrenching themselves. National Government representatives within the decentralized units of the counties still call themselves “chiefs”, “assistant chiefs” and ‘village headmen’ with the former positions of district commissioner and district officer being replaced by county commissioner and sub-county commissioner respectively. In addition, the set-up of the decentralized units is such that the leadership is exclusively organized to be headed by sub-county administrators or ward administrators appointed by the County Service Board.

One of the key areas of co-management that the Samburu felt there is need is county protection by the discouraging of subdivision and sale of communal lands.

Infact, the composition of an entity called the village council is such that the head of the said council is a village administrator, also appointed by the County Public Service Board and deputized by a maximum of five village elders recognized as such within such a decentralized unit. The village administrator is designated to deputize the ward administrator. The key issue when setting up these administrative units is whether the community considerations on the type of leadership structure that reflects such communities have been considered. One would assume that in areas where there are established communal systems of governance of land and the resultant resources, the presence of the county bureaucracy would most likely be an unwelcome distraction to already flourishing and working community mechanisms.

The Samburu for instance are one of the communities living around the expansive Northern Rangelands Trust Community Conservancies (NRT). They found that the governance of community lands has always been held by the council of elders which had managed effectively the resolution of disputes. In addition, the elders also had the acumen to deal with entrenched entitlements and rivalries on access to natural resources.

One of the key areas of co-management that the Samburu felt there is need is county protection by the discouraging of subdivision and sale of communal lands. The overwhelming feeling was that it is essential to retain the communal lands because the Samburu live as pastoralists and the need for ‘open access’ to pasture would be severely curtailed if communal land was demarcated and constrained by private ownership regimes.

In Samburu, the county has identified community involvement and the sensitization in natural resource management in the county as a key area to entrench citizen participation. One way of entrenching participation is the enhancement of the abilities of the pastoralist communities. These dynamics, if not managed effectively could trigger disaffection within these participating fora and lead to apathy. Traditional structures of authority within some communities could inhibit people from seeking accountability, thus negating the central theme of the said participatory initiatives.

Lastly, traditional systems of civic education must be seen to work with new county systems of information dissemination. The role of local actors, NGOs and other members of the civil society is very important as they have been recognized to offer an alternative to Government way of doing things.

Mr. Kioni is an Advocate of the High Court of Kenya
It is said that commercial persons are attracted to arbitration as a means of resolving their disputes over several reasons. The reasons include its flexibility, cost effectiveness, expeditious disposal of disputes and the use of an expert neutral. But perhaps key among the attractive attributes of arbitration is its finality or perceived finality. Commercial business persons want a quick and final conclusion to their disputes.

Arbitration vs Litigation.

The jury may still be out on whether commercial arbitration is cost effective, however, practitioners of both domestic and international arbitration are increasingly concerned with the time taken in arbitral proceedings, the costs associated therewith and the creeping of court litigation tendencies such as application of technical rules of procedure. These tendencies are largely blamed on advocates and party representatives with legal backgrounds carrying their courtroom training and influences into arbitration. These developments have robbed arbitration of its lustre and given fodder to the critics and cynics of arbitration as means of dispute resolution. As one famous local leading arbitrator and tutor emphasises to her students in arbitration courses, “lawyers must learn to remove their legal caps while in arbitration”. Training and grounding in arbitration law and practice is therefore an effort at advocates unlearning their court room skills which are mostly unwelcome in arbitration. Whether this has been achieved is a discussion for another day.

Key among the distinguishing features of arbitration that seems to remain undisturbed by the infiltration of courtroom tendencies is its finality, or is it? Most arbitration agreements (usually clauses in a contract) expressly underscore that the decision of an arbitrator or arbitral tribunal is final. But what exactly does finality of the Arbitrator’s decision mean?

Of course arbitration agreements, like any other contract between two private persons, are subject to the laws of the land. In this respect, the Arbitration Act 1995 (as amended in 2009) is the principal piece of legislation that regulates both domestic and international arbitrations conducted in Kenya or whose seat is appointed by either party agreement or default, to be Kenya. Parties in arbitration are free to agree on how to conduct their arbitration and indeed as to whether the findings of the arbitrator are subject to an appeal or not. This free hand is referred to in arbitration parlance or jargon as party autonomy.

Party Autonomy.

Party autonomy is however, subject to public policy safeguards which may include compliance with rules of natural justice and requirements of legality of the agreement. It is therefore, fairly clear that an agreement as to the finality of an arbitrator’s decision or award must conform with or pass the public policy consideration test. Such test includes consistency with regulating Statute such as the Arbitration Act. In other words, parties to an arbitration agreement cannot agree for the decision or award of an arbitrator being final when such agreement can be found to be contrary to or contravening the provisions of the Arbitration Act. Such agreement is voidable.

Finality of Arbitral Awards and Decisions.

Finality of an arbitrator’s decision or award is discernibly at two levels. First, is that finality which, implies that no right of appeal lies. Second, is the finality on the merits of the decision or award. Section 39 of the Arbitration Act recognizes that an Appeal from
The grounds for setting aside or refusal to recognize an arbitral award are six and do not go to the merit of the arbitrator’s decision but on technical competence of either the parties or the arbitrator, public policy considerations, ability of and scope of the arbitrator’s mandate and remit; or that the award was induced or affected by fraud, bribery, undue influence or corruption.

Section 35 sets out the grounds upon which the High Court on application may set aside an award. A carbon copy of those very same grounds is recited in Section 37. In essence, there is no difference in substance between Section 35 and 37 of the Act save that Section 35 refers to setting aside while Section 37 refers to recognition and enforcement of the award. Section 35 is time bound and bars any application for setting aside filed after the expiry of three months from the date of publicatio of the award while Section 37 does not seem to have a time bar except for the operation of Section 4 (1) (c) of the Limitation of Actions Act (Cap 22) which equally affects proceedings for the enforcement of arbitral award.

**Setting Aside**

The grounds for setting aside or refusal to recognize an arbitral award are six and do not go to the merit of the arbitrator’s decision but on technical competence of either the parties or the arbitrator, public policy considerations, ability of and scope of the arbitrator’s mandate and remit; or that the award was induced or affected by fraud, bribery, undue influence or corruption.

A careful and considered study of both Sections 35 and 37 of the Arbitration Act reveals two potential problems to the finality of arbitration. But first, it is important to underscore how one exercises the right to setting aside an arbitral award. Under Section 37(2) of the Arbitration Act, a party seeking to set aside an arbitral award has three months from the date of the publication of the award to apply for its setting aside. Failing which, under Rule 6 of the Arbitration Rules 1997 promulgated by the Chief Justice to give effect to Court intervention in arbitration matters, either party can proceed ex-parte and seek the enforcement of the award. The enforcement proceedings under Sections 36 of the Arbitration Act are preceded by a notice to all parties of filing of the original or certified copies of the award and the arbitration agreement.

Note that even if a party does not challenge an award under Section 35 of the Act, such party still retains a right to challenge the same on the very same grounds during proceedings for the adoption and enforcement of the award. Yet the drafters of Rule 6 of the 1997 Rules were oblivious to the text of Section 37 of the Act which presumes that a party may object to the recognition and enforcement of an award on the basis of the grounds provided therein. It therefore follows that enforcement proceedings under Rule 6 of the 1997 rules cannot be ex parte as the rule suggests.

It is also glaringly possible that a party who has unsuccessfully sought the setting aside of an award under Section 35 of the Act has a second opportunity to challenge the recognition and enforcement thereof, on the very same grounds, before the very same High Court. The only difference is that the latter effort will be at the recognition stage, but it still amounts to the same thing.

In the ultimate, one can discern glaring legislative goofs in the framing of Sections 35 and 37 of the Arbitration Act along with Rule Six of its subsidiary enabling Arbitration Rules 1997. The net effect of the aforesaid internal inconsistencies and lacunae in the law is that the decision and award of the arbitrator is robbed of its finality. Commercial disputants may find themselves in lengthy two tier setting aside and challenge litigation in court, which forum they, by electing arbitration as their preferred dispute resolution mechanism, had hoped to avoid in the first place.

Parting shot: Over to you in the Kenya Law Reform Commission, Rules Committee and Parliament.

Mr. Mutubwa is an Advocate of the High Court of Kenya; a member of the Chartered Institute of Arbitrator (UK) and tutor at CIArb (Kenya Branch).
Embracing Mediation in Courts

Mediation does not involve the mediator telling the participants the solution - or even giving suggestions. It is for the participants themselves to find, with the mediator’s help, and to agree on a solution that meets their needs, concerns, and interests. Control remains with the participants.

By James Mangerere

Access to Justice is one of the fundamental pillars of the Constitution of Kenya. Article 159(2) of the Constitution provides that among the principles that shall guide the Courts and Tribunals in exercise of judicial authority are:

• Justice shall be done to all, irrespective of status
• Justice shall not be delayed
• Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to Clause (3) and the purpose and principles of this Constitution shall be protected and promoted.

Mediation has become a popular means for resolving disputes / conflicts for many reasons. A primary reason is because mediation works, and, more often than not, produces a settlement or begins a dialogue that results in a settlement.

What is Mediation?

Mediation is a key form of Alternative Dispute Resolution (ADR) - an alternative to having a decision imposed by a Judge in court. Mediation is a consensual process, based on self-determination that involves the participants in the dispute, together with their lawyers, advisers, or supporters, if they have any, meeting with a neutral third person. The mutual aim is to find a resolution to the dispute.

It is a without prejudice activity that allows the participants to explore the full range of potential solutions in a safe environment. The mediator may encourage the use of collaborative negotiation, based upon reason and objective criteria. The mediator may reality-test the perceptions of fact, advantage, risk, and cost; and thereby assists the participants to find a mutually acceptable solution.

The solution need not be, and often is not, an outcome that a Judge might or could properly impose through a decision in a court which, is limited by legal constraints, rights, and precedents. It is simply the unique resolution found by the participants in the mediation that is ‘good enough’ for them in all the circumstances.

The resolution is often more comprehensive and creative than a judgment or an arbitral award. Which makes mediation superior to litigation. It can provide a “win-win” outcome for the participants.

Mediation is therefore, generally forward-focused, and does not look at the past. The past cannot be changed, but it can sometimes be cathartic to explore and rebuild relationships where this is an important step in securing a resolution. More commonly, mediation will look to build a solution that works and will be durable.

What it is Not

Mediation does not involve the mediator telling the participants the solution - or even giving suggestions. It is for the participants themselves to find, with the mediator's help, and to agree on a solution that meets their needs, concerns, and interests. Control remains with the participants.

It does not involve the mediator telling the participants what a Judge may or will do, or who is right or wrong, guilty or innocent. Nor does it involve the mediator assessing the merits of the case: after all, the mediator may not be aware of all of the relevant information, or even the relevant law. Mediators are commonly not lawyers and, because participants generally bring their own advisors, mediators do not need to be experts in the legal context of the dispute.

Misconceptions

There are many misconceptions of the role of the mediator, which may hinder participants agreeing to mediate. Some of them are:

Mediation requires compromise from one or both participants - it does not: very often the outcome is unexpected and allows both to grow.

The mediator is an evaluator - there should be no evaluation by a mediator: any assessment of risk or merits is for the participants.

Mediation requires compromise from one or both participants - it does not: very often the outcome is unexpected and allows both to grow.

The mediator is an arbitrator - arbitration is a wholly different statute-based process involving legal assessment by, in effect, a private judge.

The mediator will impose a solu-
tion – a mediator has no such power. The mediator will knock heads together - a mediator has no such role.

The mediator will apply pressure on the participants - the only pressure that participants experience is that from their own assessment of risk.

The mediator will advise the participants what to do – the participants must rely on their own judgment, or that of their advisers.

Mediation is unlikely to be successful – around 90 percent of mediations result in a resolution on the day or shortly afterwards.

**Advantages of Mediation**

Mediation is much less costly than civil litigation for many reasons:

- Mediation is a much faster process than civil litigation.
- The parties are full participants and can express their own opinions and concerns, where in civil litigation the parties’ attorneys are the only ones who represent their party unless the party “takes the stand” and are subject to cross-examination by the opposing attorney.
- It allows the opportunity for parties to work together and reach a settlement and continue to work together - a mediator has no such role.
- Both parties have the opportunity to check the background and experience of the mediator.
- It is a private process and not subject to public knowledge and possible media attention as can be the case with civil litigation.
- It can protect parties from some of the extra problems associated with civil litigation, such as punitive awards, if applicable.
- It is nearly always a better form of dispute resolution than litigation or arbitration.

Most disputes result from poor communication. Mediation is an opportunity to communicate better - to be fully heard, to present your story, and to search for mutually satisfactory solutions. In mediation people often communicate more effectively with one another than in arbitration or court.

Innovative solutions to a problem may be explored. You can create your own solutions rather than have a judge or arbitrator impose a decision on you. Thus, you maintain the power to decide rather than have someone else decide for you.

The outcome of mediation generally produces more satisfaction and compliance among its participants than those who use litigation.

**Court Mandated Mediation**

Our local courts are soon introducing court mandated mediation, we expect a number of challenges that all stakeholders have to be ready to surmount. The introduction of mediation into our courts should be a welcome and refreshing reform - a worthy tool to supplement and complement the generally clogged, complex, tardy and expensive process of litigation. Appreciation for the introduction of this beneficial reform of the Judiciary is due to the entrenchment of mediation into the Constitution and Civil Procedure Act.

The rules of engagement in mediation differ fundamentally from those of trial. The formalities of trial do not apply. Strict rules of evidence have no place. Long-term personal and business interests may be afforded equal or greater importance than the facts of the dispute or the applicable law. Emotions are considered to be directly relevant to the dispute. The roles, responsibilities and opportunities of the parties, advocates and neutral third party differ significantly. Specialized communication and negotiation skills and techniques are the primary tools of a mediator - instead of forceful rhetoric and penetrating arguments.

**Challenges of Entrenching Mediation**

Knowledge and information: How does the ordinary citizen get to know about mediation and internalize the details of its processes, procedure and practice? We need to use the radios, TV stations, print media and other avenues of transmitting necessary information and knowledge to the public. In this regard, we need plans to enhance the blitz with suitable public outreach campaigns going beyond the confines of Nairobi, into the countryside.

Transition: A delicate surgical procedure is needed for this operation – to introduce the new tissue of mediation into the main body of litigation, without the new tearing apart the old, or the old rejecting the new. Rules of mediation have been gazzetted, and the Civil Procedure amended. The pilot program should be managed properly and with people who have the expertise to do so. Failure of the pilot program will send wrong signals to the public about the concept of mediation if it is hurriedly done with people who are not qualified mediators.

Acceptance of the new dispensation by all stakeholders is important. The stakeholders are many – each having a different interest in the introduction of mediation into their court process. There is the Court system in general, and the High Court, in particular – whose overall interest in the reform is to minimize its burdensome case backlog (the judicial gridlock), and to minimize its case disposal (unclog the judicial traffic) and to do so with speed and justice. The courts are yet to fully embrace Mediation.

The second stakeholder is the public whose interest is in an efficient, well-functioning, confidence-giving judicial system to which they look as the fortress and refuge for the protection of their rights. From all available evidence, particularly so the public response to the Mediation pilot program, members of the public have to welcome the mediation concept.

The third and most critical stakeholder is the litigant – the one whose case is either in litigation or mediation. It is the litigant who stands to enjoy the rapture and benefits of winning or to bear the agony and burden of losing a dispute. Mediation seeks to bring a win-win result to both disputants through the medium of their own negotiation and mutual settlement, aided by a skilled impartial professional mediator.

The fourth stakeholder, a key one for the acceptance of mediation, is the litigants’ lawyer. His/her immediate interest is to make a living like all professionals do and is entitled to do. The fourth stakeholder, a key one for the acceptance of mediation, is the litigants’ lawyer. His/her immediate interest is to make a living like all professionals do and is entitled to do. A few lawyers may get carried away with this myopic interest, and attempt to maximize their take by selfishly prolonging litigation. These are the few bad apples in the basket that short-change the profession and themselves, by provoking a perception of a rotten reputation to the learned fraternity.

The real enduring interest of the lawyer, the one that will sustain or fail him/her in the long run, is to see justice done; to see that it is done speedily, efficiently, cost-effectively and humanely. Only then, will the lawyer win more cases, more clients, redouble his work profile and multiply his intake of fees.

The clients, individually and collectively, will perceive of such a lawyer as having their interests as paramount. To date, many lawyers, including eminent ones, have embraced mediation and are serving the interests of their clients well. However, a few lawyers are still unsure of which track to take for their clients. But the clients have raised issues with that stance – to the extent of even falling out with their own lawyers, and openly reporting such fall-out. This is lousy publicity for the lawyer. It sows the seeds of an unfaltering future reputation for such a lawyer from – of all people – the lawyer’s own clients. The moral of the story is that lawyers must show and appear to show fidelity to the paramount interest of their client.

In matters of mediation versus litigation, it is quite evident that the Parties’ uppermost interests are best vindicated through mediation – with litigation as the choice of last resort. LSK through its Committee on Continuing Professional Development should come up with a program of training lawyers on how to represent their clients in mediation sessions.

With all this information about the challenges we are likely to face and how to surmount them, I do hope the pilot program will succeed and vindicate this strange and new mediation concept in the country.

Mr. Mangerere is an Advocate of the High Court of Kenya, President and Regional Representative of the Mediation Training Institute (MTI) – Africa.
By Gertrude Matata

The Chief Justice Dr. Willy Mutunga launched the pilot project for court mandated mediation on 20th April 2015.

After the pilot, in the Commercial and Family Division of the High Court, mediation is intended to be eventually rolled out in all courts countrywide. This will undoubtedly transform legal practice.

It is signalling that there is an evolution of our justice system emanating from the consumers' disenchantment with the quality and system of justice and the Judiciary's timely acknowledgement of the need to rethink the whole.

Paradigm Shift

The disenchanted consumers are clients of the Advocates. If the customers are enthusiastic about embracing mediation as viable option to litigation, then the legal practitioners should better pay attention and know it is time for paradigm shifts, shift gears and evolve with the rest of society. The evolution referred to is no less than the Darwin and Neo Darwinian natural selection theories.

In an article by Francis Steen (Evolutionary Theory), he cites David Sloan Wilson (2000):- “Group-level adaptations will evolve whenever group-level selection is stronger than individual selection”

And that Darwin held that: “The driving force behind the evolution of morality was the process of more moral groups replacing less moral groups not the process of more moral individuals replacing less moral individuals within the group”

What has been happening around us is that groups of Kenyans joining others in the international community have seen the need for functional social exchanges and functional societies where systems not only work, but the people are accorded deserving respect and treated as intelligent and responsible beings capable of controlling their affairs when accorded the necessary framework within which to act.

Article 159 of the Constitution generally puts “the people” as central to the administration of justice and judicial authority is derived from the people. Subsequent Acts of Parliament like the Consumer Protection Act (2012) aimed at protecting and enhancing consumer dignity, economic interests, plus transparency and harmony in consumer relations.

Players in the commercial sector have read signs of the times and reacted in line with the call for social transformation. This among other things recognises that:

i) People (masses) the world over are being recognised as a fundamental resource in driving the democratic agenda; therefore it is a priority to give them the skills especially in terms of self-determination.

ii) Social transformation is in the global benchmarks, governance experience and policy documents of all democratic institutions that we have to work with to make any meaningful progress.

iii) This is an era of greater democratically determined, equitable, just and effective social delivery systems as entrenched in our constitution and emerging legislation.

iv) Borrowing from a leadership trainer, the emerging “low ego/high impact” ethic matters.

All this ties in with mediation which can be taken as a tool for transformation in our judicial system:

Quality of Justice:

Mediation enables parties to deal productively with their differences being guided by a neutral third party who helps them in identifying the problem and focusing on a mutually acceptable solution.

Both parties have equal opportunity in defining the problem and “he/she who defines the problem defines the solution.”

Respect for the Process:

Mediation process respects the clients and considers their time, process, environment and right to listen and be listened to.

(c) Role of the parties’ lawyers

i) All active lawyers have to tune into the philosophy of mediation whether they support it or not. You cannot be for or against without understanding the basics of a subject.

ii) There is a duty to explain every court process to a client before they proceed to court in the most professional, intelligent way keeping the client’s interest paramount.

iii) Giving refined confidence to a client and explaining what to expect is a professional responsibility.

iv) Helping to fully observe the procedures as provided for under Legal Notice 197 of 2015; “The Mediation (Pilot Project) Rules.

v) Evolving from the adversarial mode into the conciliatory; remembering that man is said to have once been an ape and the tool of reasoning and communicating intelligently was key in transforming into a human being.

Evolved human lawyers will get parties talking and a few will remain parties talking and a few will remain. Evolved human lawyers will get parties talking and a few will remain apes to throw sticks and stones in cases of apprehended danger.

So if you must go to mediation with your client, you have done the groundwork, sit back and listen, enjoy the successful outcome as under this process, nobody loses.

-Ms. Matata is an Advocate of the High Court of Kenya, Mediator and member of the Mediation Accreditation Committee.
Espousing Mediation

In Kenya, the breathing meaning of traditional dispute resolution mechanisms in the dispute resolution conundrum has been noted over time with legal philosophers stating that courts only deal with a fraction of all the disputes in society. There are a myriad of disputes that do not reach the courts and are resolved through informal negotiations.

By Tallam K. Marvin

During the pre-colonial era, communities living in Africa and Kenya in particular had their own conflict resolution mechanisms. In any awakening of conflict, negotiations could be done by the disputants. In the belief of age is wisdom, council of elders or elderly men and women could act as third parties in the resolution of the conflict. Disputes could be amicably reconciled by the elders and close family relations and counsel was given on the need to coexist harmoniously. As such, traditional conflict resolution mechanisms were geared towards fostering peaceful co-existence. Additionally, there were certain institutions, principles, values and traditions that were crucial in the resolution of conflicts.

The existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others are enough evidence that the concepts are not new in the country. They are practices that have been in application since time immemorial.

In Kenya, the breathing meaning of traditional dispute resolution mechanisms in the dispute resolution conundrum has been noted over time with legal philosophers stating that courts only deal with a fraction of all the disputes in society. There are a myriad of disputes that do not reach the courts and are resolved through informal negotiations.

Conflict resolution among many communities in Kenya was anchored on the ability of the people to negotiate. However, with the arrival of the colonialists, western notions of justice such as the application of the Common Law of England were introduced in Kenya. The Common Law brought the court system which being adversarial by nature, manifestly eroded the fountain of traditional conflict resolution mechanisms.

Mediation Credence

In a multi-cultural society like Kenya where tribal harmony is highly treasured, we must be culturally sensitive. Considering that the Bantus and Nilotes constitute the major ethnic groups countrywide and have a large history in handling disputes, it may be timely for us to reconsider how we can make institutionalized practice in Kenya more culturally appropriate by incorporating ideas from traditional practices. A key strategy is to offer disputants a range of choices. During mediation it is of interest that the process starts by noting the preferences of disputants.

For instant, we can ask Turkana disputants if they would prefer to have a community elder or a religious leader as a mediator. If they would prefer to have a mediation that incorporates Christian values or invite important family members to the mediation. Difficult mediation should be scheduled after every Saturday or Sunday from church.

Perhaps the parties and the mediator can have a simple meal together just before the mediation. Community elders, religious teachers and key members of the family should be present.

At the opening of the mediation, the religious teacher asks all parties if they would like to join in a prayer for peaceful resolution of the dispute. Prayers are offered and parables from the Bible are shared to set the tone for the mediation and to remind parties of their common religious and community values. Parables can be used to reframe disputants’ mindset toward a more generous and forgiving state.

Disputants may be given the option of representing themselves or being represented by a family elder. Other than these parties who participate directly in the inner circle, all other family members sit in the “outer circle” as observers. In facilitating and controlling verbal behaviors and reframing ideas.

The mediator can use key phrases, proverbs, and parables from the Bible. Ground rules can be reinforced by referencing passages on acceptable behavior from the Bible, or well known Biblical parables and characters.

During the option generation stage, the mediator can test options by asking parties if their solutions are congruent with community fairness and good conduct. In the event of a deadlock, the mediator can suggest that the parties examine certain sections of the Bible for guidance.

The mediator can grant private time for each of the two families to meet, discuss and generate options. The mediator and other influential recourse persons such as community elders and religious leaders can also help guide parties toward acceptable options. When the final agreement is reached, parties can offer a prayer together before departing.

Lon Fuller in his hypothetical case of the Speluncean Explorers points out Justice Handy from the rest of Judges as one who prefers to use a pragmatic common-sense approach rather than abstract legal theories to resolve the case. He criticizes his colleagues obscuring curtain of legalisms when the case simply requires the application of practical wisdom of human realities.

In essence going by Handy’s approach mediation requires such mind - something regrettably to note was robbed by our colonial masters. Indeed am convinced that at the rate at which backlog of cases in court are being determined based on Anglo-European jurisprudence, mediation would be lying ‘in a juridical morgue waiting to be buried beneath unyielding court system tombstone’.

Mr. Tallam is a lawyer
Inclusion of Persons with Disability in the National Transport System: Dream or Reality?

By Alexia Waweru

Ever time I walk in the CBD and I pass by a person on crutches or a wheelchair I wonder, ‘how did this person get transport to the CBD?’ Were they dropped, or did they take a public service vehicle (PSV) or a taxi perhaps?

I see the struggle of Persons with Disability (PWDs) on crutches as they maneuver past the narrow doors of the PSVs. As far as I can push my memory, I am yet to witness a person with a wheelchair boarding a bus or matatu. Can they board the PSV on their own? They would need the assistance of a trained bus or matatu conductor. Their best shot would be to board a bus as opposed to the rowdy and impatient matatus.

Unfortunately the buses are not accommodative of a PWD on a wheelchair. There is no ramp which a PWD can wheel up into the bus, the width of the door is too narrow and the stairs are too steep. Inside the bus, there is no special space set aside for them to sit or put their wheelchair. The space between chairs is also too narrow to allow a PWD to easily maneuver.

So where does the solution lie? The Persons with Disability Act, CAP 133 provides in Section 23 that all operators of a PSV shall adapt it to suit PWDs and that this should be complied with within two years after the Section comes into operation. Section 24 on the other hand provides that an adjustment order will be served upon a service provider where the service is found to be inaccessible to a PWD, to make it accessible to a PWD. Further, the subsidiary legislation developed under CAP 133 provides in Section 13 that owners of PSVs shall from a date as the Minister may by Gazette appoint, adapt buses, among other modes of transport in such a way as to permit easy access. These Sections of the law have never been operationalized.

The Bill

On the other hand, the Persons with Disabilities Bill, 2015, currently being debated in Parliament, and which is meant to replace CAP 133 provides in Section 46 that PWDs have a right to be provided with access to transportation. In Section 47 of the Bill, it provides that adjustment orders shall apply to, among others, PSVs. Further in Section 63 the Bill states that registered owners who improve or modify a PSV to make it accessible to a PWD shall be entitled to an incentive.

There has been progress in the area of making the national transport system accessible, with the launching of the National Action Plan of action on accessibility and disability rights, 2015 on 3rd December, 2015 during the World Disability Rights Day. In this plan of action, access to public transport and how it will be implemented has been elaborated on. It will entail operationalization of standards, enactment of regulations, guidelines and unveiling of public transport that has been modified to make accessibility of PWDs to the national transport system. This will be implemented at both the National and County level.

Other countries have taken concrete steps to make the inclusion of PWDs in the National Transport System a reality. An example is South Africa who began with a National Transport Policy for PWDs accessibility to the national transportation system. This was followed by recommendations and provision of PSVs with modifications designed to suite PWDs. In the UK there are rules which were developed to cater for PWDs accessibility to the national transport system and buses designed which are friendly to this cause.

The law as has been demonstrated is very intentional in its desire to ensure that PWDs have access to transportation. The question that begs an answer is, “Should Kenya implement the provisions which provide for adjustment and/or modification or should special buses be procured for this purpose?” Adjustments of the current transport could be met with hostility due to the financial implications. At the end of the day including PWDs in the national transport system is long overdue. It is time PWDs began to enjoy their constitutional rights to equality, freedom of movement and economic rights.

Ms. Waweru is an Advocate of the High Court of Kenya, currently working as a legal officer at the Competition Authority of Kenya. She is also an associate member of the Chartered Institute of Arbitrators.
The Irony of Public Participation

By Pauline Vata

Public participation has become the buzzword in the devolution discourse. As much as Government officials have recognised this constitutional value especially during decision making processes more so in regards budgetary and development purposes, it is still implemented theoretically as opposed to practically.

The Government does not have a good understanding of how to design participation processes to achieve desirable outcomes. If one is keen to scrutinise the existing participation platforms especially at the county level there is a strong disconnect in practice between Article 196 and 35 of the Constitution which, gives express mandates to counties to oversee public participation and enact legislation to that effect, and right to information to all citizens respectively. What counties tend to do is offer space - in the strict sense for public to give views which entails doing a newspaper advertisement in local dailies which most target audience do not have access to and offering seats on the material day. More over, the advertisement is done in some instances two days before the d-day. It is important to note that the documents that the citizenry is supposed to give recommendations to such as budget estimates are not provided well in advance and the poor citizenry are bombarded by a throng of 1000 pagged documents full of figures and complex jargon and at the same time they’re expected to contribute to the annual development plan and give views on the proposed budgetary elements. Alias! ‘Staff Meeting’

I have been fortunate or unfortunate to “attend” a public participation forum in Kakuma and Nairobi, both were a flop and a waste of public funds. The one at Kakuma did not take place at all despite been advertised in the dailies, on further enquiries the area assistant chief revealed to me unknowingly that it had taken place the week before and it was more of a charma meeting as only five people attended - all from the Government. The forum in Nairobi was organised by the Ministry of Health, at least this one materialised but it existed in theory from 1990’s. A careful look at the Physical Planning Act of 1996 for example, had elements of public participation. The Local Authority Service Delivery Action Plan (LASDAP) had an elaborate framework revised in 2009. The Internet has radically increased the opportunity for the public to take part in debate and deliberation, challenging the hegemonic position of the established Government through the media as the facilitators of such debate. As new forums for participation have entered the market, traditional players in television, radio and the press has also transformed their services, strategically aiming to facilitate new forms of participatory services where citizens can engage in discussions, with such democratic platforms, the citizen as the right holder must take advantage of this space.

Designing Public Participation Processes from Theory to Practice is an informative piece written by four scholars; John Bryson, Kathryn Quick, Carisse Schively and Barbara Crosby. It is a well thought out article that gives Government officials insight on evidence-based design guidelines on public participation. Participatory process must be designed to address contexts and problems, which must fit the general and specific context based on a clear understanding of the problem. In this context the Government must seek to understand why citizenry show up at a forum but don’t contribute to discussions. To mitigate this it would be prudent if the relevant official unpackaged the jargon found in budget documents for instance. Secondly, it must analyse and involve all relevant stakeholders who must be involved in different ways at different steps or phases of the process. Stakeholders must learn to take up their spaces during such forums so as not to reduce themselves to mere observers or unsurprised apathetics. Thirdly, the Government must legitimise the process through ensuring all views given by stakeholders are incorporated in the final documents to avoid a rubber stamping process, further there should be appropriate or minimum rules and structures to guide the process through legislation, monitoring and evaluation frameworks to ensure they reach the target audience and get desirable outcomes. Lastly, the Government must allocate resources to show commitment to the process, for instance Kakamega County allocated KShs. 10 for public participation for FY 2015/16; this shows goodwill but the monies must be monitored to ensure they were used for the rightful purpose.

Experience has taught me that people desire to participate and send their reports to the Government but what lacks is the awareness to know the best platform to channel issues. However, this participation must be voluntary in nature, without expecting any hono- rarium. Citizens will be more motivated if their proposals are accepted and incorporated in Government agenda. It will give them more drive to keep participating and channeling concerns to relevant authorities. However, the duty bearer and right holder must conveniently occupy their spaces for the process to make sense. After all Rome was not built in a day!

"In my view to huddle a few people in a five star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation. The exercise should not be a mere formal- ity and counties should take into account notice periods, frequency, feedback mechanisms, reasonable periods for public participation for policy and for legal matters, and the form or mode of public participation.”

The author is an Advocate of the High Court of Kenya and the Executive Director of Hakijamii - A social Justice Institution. She can be reached at: pauline@hakijamii.com; @vata692

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The author is an Advocate of the High Court of Kenya and the Executive Director of Hakijamii - A social Justice Institution. She can be reached at: pauline@hakijamii.com; @vata692
Dispute Resolution and Adjudication in Public Private Partnerships in Kenya

“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.” – Abraham Lincoln

By Kihara Muruthi

Governments are faced by an increasing need to find sufficient funds to develop and maintain infrastructure. Growing populations bring about a host of challenges such as increasing urbanization, rehabilitation requirements of aging infrastructure, the need to expand networks to new populations, and the goal of reaching previously unserved or underserved areas. In light of that, many economies are turning to off-balance-sheet financing, bringing the public and private sectors together, not only to control budgetary expenditure but also to pool these two sectors' specific know-how. This form of cooperation is commonly referred to as Public Private Partnership (PPP).

Boost Development

PPPs are lately being embraced worldwide. A number of emerging economies are lately redefining their PPP policy in a bid to enhance economic development. The strategy has been to improve the domestic environment so as to encourage investors and by extension boost development. These changes have been accompanied by institutional reforms to strengthen the role of the public sector. In Kenya, the PPP Policy was adopted by the Government in 2010. PPPs are not new phenomenon in Kenya. The Mtwapa and Nyali Bridges Concessions were signed in 1959.

There is no single agreed definition of PPPs. The Reference Guide Version 2.0 which was jointly developed by the World Bank, the Asian Development Bank and the Inter-American Development Bank has defined a PPP as "...a long term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance."

In Kenya the Public Private Partnerships Act 2013 (the Act) Section 2 has defined a PPP as an arrangement between a contracting authority and a private party under which a private party undertakes to perform a public function or provide a service on behalf of the contracting authority.

The private party in turn receives a benefit for performing a public function by way of compensation from a public fund or fees collected by the private party from users or consumers of a service provided to them or a combination of both.

Identification – In conceptualizing, identifying and prioritizing potential projects under the Act, a contracting authority shall consider the strategic and operational benefits of entering into a contract compared to the development of the facility or provision of the service by the contracting authority.

Full feasibility — Section 33 of the Act states that a contracting authority shall undertake a feasibility study of the project it intends to implement under a PPP for the purpose of determining the viability of undertaking.

Procurement — Part VII of the Act is a guide to the step by step procurement process which culminates when the preferred bidder is selected.

Dispute Resolution

The need for dispute resolution arises mostly during contract management stage. But possibility of a dispute arising cannot be ruled out even prior to that; say at the stage of procurement where the award of project may be challenged at the PPP Petition Committee which is a Tribunal established to review administrative processes during procurement. At the contract management stage, disputes essentially relating to the validity, enforceability, interpretation or non-performance of a contractual obligation, or seeking injunctive relief, compensation, specific performance, etc., may
come up. However, litigation is not preferred as a mode of dispute resolution presumably due to factors like potential delay and the need for specialised knowledge.

Under the Act, there are two instances where the resolution of disputes is addressed. In the first instance, Section 67 establishes the Public Private Partnerships Petition Committee; a Statutory Tribunal, which considers all petitions and complaints, submitted by a private party during the process of tendering and entering into a project agreement under this Act. Such a petition for a review of the decision should be made within 15 days from the date of the administrative decision. The Petition Committee is akin to the Public Procurement and Administrative Review Board, established under the Public Procurement and Asset Disposal Act, 2015, which is the forum that determines disputes arising from traditional procurement processes. The disputes filed before the Petition Committee are ordinarily completed and a decision delivered within a month. In its review process, the Petition Committee relies almost entirely on documentary evidence as the procurement process is a documented process.

In the second instance, Section 62 of the Act states that the parties to a project agreement shall specify the minimum contractual obligations required to be met by the parties as set out in the Third Schedule of the said Act. The Third Schedule relates to minimum contractual obligations required to be specified in a PPP project agreement. Condition No. 18 requires the agreement to include a mechanism for dispute resolution including resolution of disputes by arbitration or any other amicable dispute resolution mechanism. No particular format or template has been made available by statute or other regulations and the contracting authority has been left to adopt a dispute resolution clause that best suits the parties. In most PPP contracts, various dispute resolution mechanisms are adopted by the parties.

Under the FIDIC Contracts prior to submitting the dispute to arbitration, the Dispute Adjudication Board (‘DAB’) first delivers a decision after reference by the parties. The DAB comprises of one or three persons appointed by the parties to resolve the dispute. However, disputes adjudicated upon by DABs are not final and binding. If a party is unhappy about the decision of the DAB, that party is free to refer the matter for determination by arbitration.

In PPP projects, the contracting authority executes a contract with the private party through a Special Purpose Vehicle (the SPV) which is an organization incorporated by a consortium for the sole purpose of driving the project. Those other parties include the off-taker, lenders, insurers, subcontractors, EPC (Engineering, Procurement and Construction) contractor and suppliers among others. The contracts between the parties that make up the SPV contain Alternative Dispute Resolution (ADR) clauses. There is no hybrid dispute resolution clause but parties adopt a clause that would be appropriate in the circumstances.

One of the cardinal principals in choosing an effective dispute resolution mechanism for PPP projects is generally to avoid formal adversarial proceedings. These are generally ineffectual for resolving most disputes in PPPs and project finance. Secondly, provision ought to be made for special contractual mechanisms that preserve the business relationship, avoid escalation of dispute and prevent disruption of services.

Project disputes are an unfortunate fact of life in most infrastructure developments. But they need not balloon into major conflicts that result in expensive, time-consuming arbitration or litigation. The key is to spot disputes in their early stages and be prepared, through advance planning and proper controls and oversight, to resolve them as quickly as possible. Weighing dispute resolution options parties to a PPP contract need to consider the pros and cons of the various dispute resolution processes in light of their particular case and the jurisdiction.

Mr. Murathi is an Advocate of the High Court of Kenya and a Fellow of the Chartered Institute of Arbitrators. He is also the current Chairman of the Chartered Institute of Arbitrators – Kenya Branch and the Chairperson of the Public Private Partnerships Petition Committee.

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Kenya is a democratic country governed by the Rule of Law. There are established several public institutions each with distinct mandate on key thematic areas. For instance, the service industry, justice dispensation, oversight, regulatory bodies inter alia.

The institutions are established as body corporates and vested with multifarious powers for the proper discharge of their functions. The power to hire shall form the basis of this discussion. As a general rule, powers are discretionary and ought to be exercised only as and when necessary. Depending on the organizations’ structure, the power to hire is a preserve of the secretariat, boards or at times delegated to selection panels.

Jobless Graduates

The current unemployment situation obtaining in the country is dire. There are thousands of qualified people who are currently unemployed. Each year, institutions of higher learning churn out graduates in thousands into the job market whose growth is inversely proportional. The growth of the Kenyan economy has been at best slow-paced due to varied factors ranging from poor economic policies, poor leadership, weak enforcement mechanisms, and population surge among other socio-cultural factors. As a net effect, the economic environment is not conducive for private entrepreneurs to thrive hence occasioning an increasing pressure on the public sector job market. This can be evinced by the high number of applications sent to employers whenever job advertisements are made.

Granted, each job vacancy has a particular threshold of requirements that an applicant must satisfy before s/he is considered for the job. The essence of advertising is two-fold: to make it public and to attract a pool of qualified candidates before settling on the most qualified.

Upon advertisements, the recruitment process ensues. Shortlisting is done to sift and narrow down to the most qualified candidates from the pool. More often, a common number of six candidates are contacted for interviews. Once interviews are done, the panel selects the best suited candidate taking into account the qualifications, the job requirements and suitability with the organization’s
objectives. The common cliché which, candidates are informed is that they will be contacted if successful. In some instances, the panel even gives a time limit. As a matter of practice, only the successful candidate is contacted and the arrangements on commencing duty agreed upon. The other unsuccessful candidates are left in suspense waiting for the communication. With time, their hopes dissipate and eventually they grudgingly come to terms that they might not have been successful.

Now two questions arise: does the promise to be contacted give rise to an obligation to be informed of the final outcome, be it positive or otherwise? Two, does the notification have a cost implication so that it is dependent on the availability of resources?

In the current constitutional dispensation, the tenet of transparency is entrenched both as a national value and as a key principle of public service. All state organs, state officers, public officers are bound to uphold the national values and principles of governance stipulated under Article 10 of the Constitution.

Article 232 of the Constitution further provides for the principles that inform Public Service which, include the tenet of transparency. The Public Service Commission (PSC) which is established as the parent State entity on administrative issues in Public Service ought to be guided by the national values and principles so stipulated in law. The Constitution envisages that State entities shall give timely and accurate information to the public. Though not expressly specified on which matters, it is to be presumed that all affairs should be made public save for privileged information.

It is noteworthy that transparency speaks to the entire process. At its elementary understanding, transparency denotes that all public actions and decisions should be visible, clear and distinct. It requires that public documents, decisions, rules and regulations and process ought to be readily accessible and contain full disclosure of information on a particular issue at hand. It therefore, follows that all the stages of the recruitment process ought to be done in an open manner from the onset to the very end.

Interviewing Panel

Granted, the interviewing panel is under no legal duty to communicate with all interviewed candidates. Rather it is a discretion which most times is not exercised. However, when considered in the spirit of transparency envisaged in the conduct of public affairs, it is a moot point that the interviewing panel might owe a moral obligation to the interviewees to inform them of the final decision. The lack of communication gives rise to suspicions - real or unfounded, that the process is shrouded in secrecy and only serves to negate the spirit contemplated.

Akin to the doctrine of legitimate expectation which is premised on the principles of fairness and reasonableness, the promise to be contacted which though not binding gives rise to a particular interest of being recruited as a potential public officer.

The very essence of the doctrine of legitimate expectation is to prevent abuse by decision makers and hence ensure good administration. Renowned lawyer Mr. Pravin Bowry states that as a legal concept, legitimate expectation establishes that if a public body leads an individual to believe that s/he will have a particular right, over and above that generally required by the principles of fairness and natural justice, then the person is said to have legitimate expectations that they can be protected.

Though not of equal legal status, reasonable expectation can be deduced from the very decision of a candidate to participate in the recruitment process to its logical end. With an exception of a few unqualified candidates who send applications for the sake of it, a person sends an application with belief and in anticipation that s/he will be considered for the job. By and large, all the shortlisted candidates possess all necessary qualifications and satisfy the job requirements.

That informs the rationale of shortlisting them. The final decision on selecting the successful candidate might be on technical grounds or other extraneous factors such as demeanour or first impression which are subjective. Thus it is incumbent upon the panel to inform the other unsuccessful candidates of its final outcome. A candidate who has been eliminated ought to be informed of the reason.

Arguably, the aspect of resources might be raised as a potential challenge. However, it need not attract a cost implication since the organization can basically use the same medium to relay its final decision. For instance, replying via email which in this digital age is barely a click-button away. There are other channels through which such decisions can be made public. For instance, through posting it on the website, publishing on dailies or individual mails. In the same mode that the organizations reached the potential employees, why can’t they invoke the same medium to pass the information?

Notably, in the recruitment of high profile positions the practice has been that names of shortlisted candidates are published and interviewing dates notified. Upon interviewing, the public is informed of the successful candidate. Why the deviation from the common practice?

Perhaps time is nigh to streamline the human resource policies of public institutions to be in tandem with the spirit and letter of the Constitution so far as entrenching transparency in the recruitment process is concerned.

Mr. Changalwa is a Legal Officer at the Kenya National Commission on Human Rights

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Why Hire a Lawyer When You Can Buy a Magistrate

By Patrick Ochieng

The green prison lorry slowly backed up at the court's entrance. Handcuffed prisoners disembarked in pairs, two warders hovering over them. Last out was Joshua; head slightly averted to avoid the sun's glare. His red eyes darted about, before settling upon the one person he knew would be there. Briefly their eyes met before he was nudged into the dark passage that led to the cells.

Esther had arrived early. She always did. Her black bag clutched to her side contained a change of clothes for Joshua. It was the second time she was carrying the clothes. She hoped this time around the Magistrate would keep her word, and set her man free. Fifty thousand didn't grow on trees.

A sharp rap and everyone rose to their feet, staying that way until the big bosomed Magistrate finished bowing and settled on her high-backed chair. In line with the Judiciary's new policy, the clerk introduced the Magistrate, and himself, after which he moved on to pleas, most of which were misdemeanors. It was well after noon when Joshua's file was finally called. Immediately a warder hustled him in from the cells.

Joshua's eyes frantically scanned the court-room. Once he was certain his lanky lawyer with a shrill voice who had introduced himself only as 'Kuto', wasn't in, his eyes settled upon his wife Esther who averted her gaze. Quickly his attention shifted to what the prosecutor was saying. He had no doubt in his mind it would be another application for an adjournment.

Clearing his voice, the prosecutor intoned how they had made frantic efforts to trace witnesses and that their efforts were finally beginning to bear fruits. They now had an idea of where the witnesses had shifted to and would have them in court the next time around. He was therefore requesting for a very last adjournment. After all robbery with violence was a serious charge. He ended by apologizing to the court for any inconvenience caused.

"Any objection?" the Magistrate mumbled, not raising his eyes from his writing.

Why bother objecting? He'd done it before, Joshua thought. Lamenting over his troubles in remand, his ulcers, the inordinate delay, the fact that the court had on previous occasions granted the prosecution a last adjournment, his innocence, was all a waste of time. Who really cared? Would it make any difference if he informed the court of the various assaults he had endured in remand, some sexual in nature.

It was all hopeless. Without a word he swiveled to head back into the cells, only turning when the warder grasped his hand. Even then he made no effort to comprehend what the Magistrate mumbled from her perch. It wouldn't change a thing.

Esther hung around the court long after her husband Joshua had had been transported back to remand prison. She kept trying to catch the court clerk's attention but the man looked everywhere except in her direction. It wasn't until evening when the court adjourned, and the Magistrate exited. Then she trapped the shifty clerk.

"I thought you said it was today, he'd be freed?" She asked without preamble.

"It's okay; we'll work something out," the clerk whispered.

"My fifty thousand shillings, I want it back. I don't even think you gave it to the Magistrate."

Slowly the clerk shuffled files, his hands trembling. Sweat beads speckled his forehead.

"That money was meant for the Advocate, but you said we could buy the Magistrate, instead of hiring an Advocate. Now the Advocate has stopped coming to court and no one has freed my husband."

"Madame just be patient, these things are complicated. Your husband will be freed during the next hearing."

"Maybe I should go to the Magistrate myself and ask for my money," Esther said, the threat in her tone evident.

"Both the giver and receiver of a bribe commits an offence and can be jailed," the clerk said, his eyes hardening. "Do you think they will let you go if you report you gave out a bribe? Your husband has been in for close to two years, another two months won't kill him. Be patient."

The two months wait had been hell. Esther had stopped visiting the remand home to see Joshua. The last time she had visited she was informed he did not want to see her. Today she had positioned herself right at the back of the court room. She wore a dull headscarf, drawn close to her brow. It was as though she wished to remain as anonymous as possible.

Joshua's file was called early this time and immediately Esther's eyes trained upon the dark door behind the dock, expecting to see her husband led out. Seconds ticked by and no one emerged. Now the prosecutor was saying something:

"Your honor we are instructed, the accused was found dead in his cell last night," the prosecutor was saying. "Consequently, we wish to withdraw..."

Then all hell broke loose:

Esther was screaming and clawing her way up the Magistrate's dais. The court orderly was tugging at her feet, trying to restrain her, with little success. However, the court clerk; the one person capable of shedding light on how the situation had thus degenerated, was nowhere to be seen.

Mr. Ochieng is an Advocate of the High Court of Kenya
Constitutionalism and Rule of Law are related ideas about how the powers of Government and State officials are to be limited. The two ideas are sometimes equated. However, constitutionalism, generally understood means Government that is not arbitrary or totalitarian. Constitutionalism holds that the exercise of Government power must be controlled in order that it should not be destructive of the very values which the Government was intended to promote. Constitutionalism requires loyalty to the Constitution. The merit of such a philosophy is seen against the background of common experience, and of past models.

Separation of Powers

The common experience was articulated by Montesquieu who opined that ‘constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go, to prevent this abuse, it is necessary from the very nature of things that one power should check on another’.

The various constitutional devices and procedures, such as the separation of powers and independence between the three arms of the Government that is the Legislature, Executive and Judiciary must be safeguarded. The independence of the Judiciary must be highly protected to safeguard the due process and fair hearing which is a non-derogable right under the Constitution - more so for those charged with criminal offences, and respect for individual rights, which are partly constitutive of a democratic system of Government.

In a strict sense, separation of power dictates that, none of the three arms of the Government may exercise the power of the other and there should be complete independence without any interference whatsoever. A system of checks and balances will be created by the independence of the three arms of the Government.

The Constitution is the supreme law of the land and all persons have a duty to respect and uphold it. However, constitutions may or may not embody the principle of constitutionalism. The Constitution of Kenya under Chapters 8 to 10 entail clear checks and balances to the exercise public power, it serves as an underpinning for the principle and practice of constitutionalism. On the other hand, a Constitution which merely establishes the machinery of Government, without providing for balance in the relationship between the machinery and the people, fails to incorporate the principle of constitutionalism. The mere existence of a Constitution is thus not proof of a commitment to the principle of constitutionalism.

Rule of Law

Rule of Law can be defined simply as ‘Government of laws, not of men’ wherein all the persons are equal before the law and are equally protected, that is no one is above the law. The concept of the Rule of Law owes its origin from Greek philosophers, Aristotle in particular. Aristotle on Constitutionalism and the Rule of Law contrasted the Rule of Law and the rule of men. Although Aristotle admitted that man-made law can never attain perfect justice, he nevertheless stressed that, judicial officers should regulate only matters on which the law is silent.

Later, it was Albert Venn Dicey’s conception of Rule of Law which was widely accepted by common lawyers as giving an exposition of the principle of Rule of Law. Dicey summarized the Rule of Law in three heads that is primarily, no man could be punished or lawfully interfered with by the authorities except for breaches of law. In other words, all Government actions must be authorized by law. Secondly, no man is above the law and everyone, regardless of rank, is subject to ordinary laws of the land. Finally, there is no need for a Bill of Rights because the general principles of the Constitution are the result of judicial decisions determining the rights of the private person.

In conclusion, every citizen has a duty to uphold and respect the Constitution of Kenya which will in turn promote constitutionalism and the Rule of Law.

Mr. Oduk is an Advocate of the High Court of Kenya.
Justice is among basic services that everyone should have access to. It is a fundamentally important element of stability which makes the promotion of the Rule of Law important. Equal access to justice is a right based on human rights obligations and is guaranteed against exclusion and iniquity faced by many people living in poverty. Access to justice means people are capable of claiming their rights or see a remedy against exploitation. In Kenya, access to justice has been hindered by high court fees that make it impossible for those wishing to file cases in court not to do so. Other hurdles include complexity of rules and procedures that most of the time are not only written in English but also makes it impossible for the case to come to conclusion, use of legalese which is not understandable by most litigants, backlog of cases that wear out judicial officers making them unmotivated to do their work and delay of justice just to name a few.

Small Claims Court

Access to justice is now a fundamental right guaranteed in the Constitution. Article 48 of the Constitution obligates the State to ensure access to justice for everyone and if any fee is required, to ensure that it is reasonable and does not impede access to justice. It is out of this Constitutional provision and the pursuit to ensure access to justice that a consideration must be put in place to enact the Small Claims Court Bill 2007 that has established the Small Claim Courts as a way of promoting access to justice.

A Small Claim Court - as per the Bill – is designed to provide a judicial determination of dispute involving small amounts but whose procedure is significantly inexpensive, speedy and simple. The courts are subordinate to the High Court and are presided over by an adjudicator appointed by the Chief Justice or the Judicial Service Commission. The language of use in the court is Swahili, English or any other appropriate to the parties.

The jurisdiction of the court is limited to any claim relating to a dispute from any contract for the sale of goods or the provision of service, any claim in tort in respect of damage caused to any property or any claim or thing authorized or directed by any Act of Parliament. The courts have jurisdiction to hear any claim or value of up to Kshs 100,000/= or an amount that the

Chief justice may direct.

Lodging Claims

The Bill under Section 27 outlines that natural persons, the Government, local authorities, body corporates, partnerships, minors and non residents have audience before the court.

A prospective claimant in the court initiates a small claim action by filing with the clerk of the court a prescribed signed form, however a claimant who is not able to complete the form must be assisted by the clerk by making the claim either orally or in writing. The clerk may in accordance with the rules permit a claim to be lodged electronically. It must contain the name and addresses of both the claimant and the respondent, sum of money claimed and particulars reasonable to inform the respondent of the ground of the claim.

The court may - as per Section 20 - upon the filing of a claim invite the parties to the dispute for consultation with a view of effecting an acceptable settlement. The consultation may be conducted by telephone, videophone or any other electronic means.

Acceptable Settlement

If the court is unable to achieve a settlement acceptable to both parties out of the consultation, the claim is then fixed for hearing and a copy of the written claim and a hearing notice served upon the respondent who 14 days to file his response.

The trial of a small claim action is informal, short and uncomplicated as the court is not bound by technical rules of evidence and evidence tendered in court need not be given on oath and the court is not bound to keep a record of the evidence given in any proceedings before it. Whereas the court has control of its own procedure in the hearing of a claim, it must have regard to the principles of natural justice.

Other Jurisdictions

The Bill does not explain how hearings are conducted by the
court, but in other jurisdictions like California, the hearing is key and both parties are asked by the Judge to state all the facts they know about the case and none is allowed to cross examine the other. The Judge then asks questions to clarify on issues he/she may not have understood and a decision is made from the Bench.

In New Zealand, a Referee who is an equivalent to an Adjudicator may adopt such procedures as he/she "thinks best suited to the ends of justice" and no proceedings of a Tribunal or order or other document of a Tribunal shall be set aside or squashed for want of form.

The Referee may receive and take into account any relevant evidence or information, whether or not that evidence or information would normally be admissible in a court of law, he/she may on his/her own initiative seek and receive any other evidence and investigations as he/she thinks fit.

At the hearing, the Referee sits in the same level of the parties, who are usually not sworn, and almost invariably court officials are not present. In South Africa, on the other hand, the proceeds lie in the hands of a commissioner who is not governed by the Rule of Law of evidence.

The Commissioner proceeds inquisitorially to ascertain the relevant fact, and parties are not allowed to question or cross-examine any other party or witnesses unless the commissioner permits. The Commissioner has the power to decide that sufficient evidence has been adduced on which a decision can be arrived, and or order that no further evidence shall be adduced. In South Africa, formalities are given to the proceedings by the requirements that all evidence has to be under oath.

The Bill provides that once a claim has been heard, the court may order a party to pay money to the other party, make a work order against any party to the proceedings, dismiss the claim or make such ancillary orders as may be necessary.

Where the adjudicator grants judgment for the payment of a sum of money, he must enquire from the judgment debtor whether the judgment can be complied with without delay. If the judgment debtor indicates that this cannot be done, the adjudicator may conduct an inquiry into the financial position of that person and the ability to pay the judgment debt.

After the inquiry, the Commissioner may order the judgment debtor to pay the debt in specified installments or suspend the order wholly or in part or in such conditions as to security or otherwise.

High Court

A party dissatisfied with the decision of an adjudicator may appeal to the High Court on any ground involving a question of the law and on the jurisdiction of the court if leave to appeal is given by the Magistrate court.

The main advantages that have been experienced by jurisdictions that have enacted Small Claims court Act and subsequently Small Claim Courts include minimal filing fee or none is paid by the claimant which makes it easily accessible to litigants, no legal representative is required as the claimants are required to appear in person, no legal costs are awarded, proceedings are carried out privately and in an informal and simple manner, illiterate claimants can chose to be assisted by the clerk in presenting their claims orally and claims are completed faster thus doing away with the issue of delayed justice.

It is obvious that the enactment of the Small Claim Court Act will largely promote access to justice for those who are forced to make endless trips to courts for issues that can easily be determined in a simple and informal manner.

-Ms. Muhanda is an Advocate of the High Court of Kenya
info@mudeshimuhanda.co.ke

Office Suite 1B, 2nd Floor,
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The Criminal Justice System in Kenya has long writhed under a dogmatized perception that it is jaded, debased and ineffective. Upon a critical analysis of the same, it is hard to conjure a case to the contrary. Criminal judicial processes in any society are founded on the socio-economic conditions prevalent in the societies they govern. These practices, good or bad, are a reflection of what the society is at that exact moment in time. What does that say about the existing state of our Nation? Criminal law in Kenya suffers a collective stigmatization not just from the general public who see the criminal courts as a leviathan steaming in to put away their loved ones or full of corruption and with no justice to offer; but also from the legal practitioners and officers of those very courts who seem to have lost the impetus to facilitate justice.

Backlogs
This cynicism goes further than what the society ruminates. The directive that Chief Magistrates’ Courts could handle non-capital criminal matters in a bid to decongest the High Court of backlog has not been as efficacious as we would have wanted. The Magistrates’ Courts countrywide have experienced backlogs and accumulation of fresh and part-heard criminal matters of overwhelming numbers. This is a clear sign that it is probably not the quantity of courts or Magistrates in place to handle the matters that is the problem, but instead, it is the manner in which we are handling the matters that fails us. To have a cause list encumbered by twenty five criminal matters in one courtroom, 15 of which are hearings ready to proceed on that day creates a hurdle in all the parties involved. How can such a situation afford fair, just and expeditious hearings to the accused persons? Reasoning logically on the situation, won’t the same be hurried thus leaving mutually disgruntled interested parties all around?

Procedure Code
Whereas the Civil Procedure Rules 2012 provide adequately under Order 11 for an efficient way to run civil disputes from start to finish, the Criminal Procedure Code, even after amendments fails to give a quick and deliber-
Many are times in a criminal court the comical nature of a drunken brawl at the bar are narrated at the stand by an allegedly aggrieved party and the presiding Magistrate simply asks them why this could not be solved outside of court? The police play a crucial role in making sure the courts are not burdened by imprudent disputes but are instead tasked with seeking justice for those with no harmonious solution accessible to them.

If parties are amenable to resolving differences out of court the same should be facilitated in the interests of expeditious settlement of disputes as opposed to prolonged court battles over fairly simple matters. The police should be put in a frame of mind where their first course of action is looking for ways to resolve disputes upon receiving complaints before they end up as cases.

Cause lists
There is an easier way to the headache of overwhelming cause lists which is reducing the amount of cases worked in a day and spreading them out conveniently over the course of each month to have more time to efficiently deal with each matter.

This will also reduce the stress of presiding Judges and Magistrates to have fewer demands. Secondly, it may be time to borrow and enforce certain principles of good practice from civil procedure such as case tracking.

Criminal briefs, prior to trial, need to be tracked and given specific timelines in which they must be completed to the point of judgment and execution. This will help guarantee faster but premeditated conducting and determination of cases. This will ensure stringency in the modus operandi currently lacking in the criminal justice system. It will transform the system into an expeditious machine it was designed to be feting out justice equitably.

Creating practical solutions to the problems of poverty is not something beyond the scope of the Judiciary. Social responsibility has to be paramount to every officer of the court. This has to be engrained in our DNAs that to give is to receive and we should offer our services and resources to the community in any way possible. This not only assuages the misconception that legal practitioners are sharks in the water pouncing on the poor but it assures the public that we who mete out justice care for people’s human rights; that we hold dear more than just our legal fees.

Briefly, there is a way out for our criminal justice system. More importantly, there is a way forward. In order to see a way past the fog, as legal practitioners, we must begin by changing the mindsets of those we serve. Then and only then, will we see change for good in our criminal justice system.

Mr. Issa is an Advocate of the High Court of Kenya
The Deutsche Bank case indicts its board for failure to put in place a clear succession policy, with a comical example of the market being thrown into a panic by the illness of its chairman from a meal of sausages!

By Paul Kamau

If there is a lesson that companies are learning fast, some painfully, it is that there is a major correlation between corporate governance and company success.

Some of the aspects of this relationship are discussed in the Financial Times articles of Alison Smith and Ruth Sullivan of 27th November 2011 and 4th March 2012 respectively, and the three case studies on pages 188-190 of Mallin’s Corporate Governance.

One suggestion that the clippings and case studies (hereinafter ‘the materials’) offer is that board diversity can lead to effective corporate governance.

Sullivan observes that there is an increasing agreement among shareholders that board and management diversity in terms of nationality, skills and gender leads to more transparency and improved governance practice, however painful the path. Alison Smith observes that most companies are unwilling to constitute broadly diverse boards and only do so for commercial expediency. Such expediency may be exemplified by a desire to penetrate emerging markets where there is an issue of language or cultural barriers.

Board Diversity

Puthenpurackal and Upadhyay observe that board diversity for its own sake or for political reasons will harm rather than benefit companies. I agree. Diversity should not compromise merit. I do not think just populating boards with this gender or that race will necessarily improve performance or governance. It is a diversity of skills that will make a positive difference.

The materials also indicate that there is a direct correlation between good corporate governance and company success. Consider Marks and Spencer for instance. An inadequate number of non-executives on its board caused its fortunes to plummet in the 1990s. Before then, its bad corporate governance was ignored as long as it was making profits. Its gatekeepers ignored the lapse, the market did not, and it never does. A subsequent improvement of its corporate governance structure paid dividends, with its Chief Executive Officer (CEO) being named 2006 Business Leader of the Year! This is a clear indication that bad corporate governance is like a cancer that incubates under the surface of seemingly well-performing companies and which, if unchecked, has got the potential to bring down even the biggest enterprise.

Nowhere is this more apparent than in the shameless Italian corporate scandal of Parmalat discussed by Ferrarini and Guidici, where directors, auditors and lawyers all colluded under the nose of the regulators and investors to run a seemingly reputable multinational aground. Just like Marks and Spencer, Parmalat seemed to be doing fine; it was a simmering volcano.

The materials also point at increased shareholder awareness and insistence on adherence to good corporate governance, especially on the distribution of power at the highest echelons of the company. This is best exhibited by the displeasure of Marks and Spencer’s shareholders when the same CEO who was hailed for turning around the fortunes of the company was appointed to hold the double role of chairman and CEO. That combination of roles was reversed in the company’s 2011 annual report.

Succession planning is another pitfall for most companies, whether in Africa, Europe, Asia or the Americas. An example is given of an instance when the Chairman of Deutsche Bank’s management board fell ill and its shares took a steep dive of three percent. This highlights the jitters of the market where there is an apparent lack of a clear successor for a key role in the company. As observed by the Financial Reporting Council of the United Kingdom (UK), the absence of a succession plan can undermine a company’s effectiveness and its sustainability.

Succession Policy

The Deutsche Bank case indicts its board for failure to put in place a clear succession policy, with a comical example of the market being thrown into a panic by the illness of its chairman from a meal of sausages!

Though the board structure of Deutsche Bank was tailored to achieve optimum corporate governance benefits, the clear lack of a succession policy was a blot on its performance. An uncertainty in, or the complete absence of a succession policy, has the potential to make the company’s shares a hard sale.

Marks and Spencer paid the price for ignoring the separation of duties between executive and non-executive directors by having its fortunes plummet in the 1990s.

From the foregoing, one clearly notices that though there is need to diversify board composition, it should be done for posterity and not immediate benefit. It is important to avoid politicising the process so that directors, whether women, Hispanics or coloured, are appointed on merit.

That way, diversity will add value to the company. With the current constitutional debate of the two thirds gender rule raging in Kenya, we should be careful not to be sucked in by political considerations. If either gender has to populate the board, let it be recognised that that person is there because of the contribution that she brings. Anything short of that will amount to discrimination in itself.

On corporate governance, there is no doubt that bad corporate governance begets bad corporate performance as is evident from the Marks and Spencer case. It may take some time, but time always catches up with directors who lead stakeholders up the garden path. It is only painful that the investors pay the ultimate price.

Mr. Kamau is an Advocate of the High Court of Kenya.
Many articles have been written about how lawyers lack entrepreneurship. Lawyers are mischaracterized as risk averse, unimaginative and perfectionists to a fault. They are usually seen with little general business know how but this is a mere assumption as lawyers today are entrepreneurial and innovative - mostly out of necessity.

It is no longer good enough to just have a static website with some basic info about your practice and a “contact me” form. Lawyers and law firms everywhere have a site like that. So how do you stand out from the crowd? How will potential clients discover your site amongst all the others? Business listing on paper is a thing of the past in this digital world.

Consumers today conduct online searches before they do anything else. Their first step towards seeking services or making a purchase begins with the search. Search but how? Accessing computers, laptops, desktops, tablets or phones. With the statistics of mobile subscriptions grown to over 37.8 million and mobile penetration of an impressive 88.1 per cent - a shade under 90 percent, meaning that all Kenyans will soon be on mobile devices. Mobile phone is indeed the fastest way for communication as well as being accessible. For those who are suffering from technophobia, its’ time to curb the fear as Kenyans are fast turning to technology.

Myfinda

An interactive and user friendly mobile application “myfinda” has been designed to create easy access to timely information bridging the gap between you and the world around you. The virtuoos behind this innovation has over 22 years of professional experience in Kenya. Her approach is to provide excellent customer service with a well thought out product and service, with special attention to detail and perfection.

Myfinda comes with diverse features and functionality and is available for free download on platforms such as Google Play Stores and Apple Stores. However, should you wish your business, practice or firm to be listed; simply subscribe for as low as Kshs 1500/- to a maximum of Kshs 6,000/- per annum. With subscription packages tailored to meet various business needs you only pay for features that fit the bill. Features include display of logo, business name, contact details, physical address, exact location and direction, dynamic link to your website, social media integration with facebook, twitter, linkedin, pinterest and vimeo.

Furthermore, a responsive enquiry form, job portals, special offers and deals, list upcoming events, an online shopping cart with integrated payment gateway allowing payments through Visa Card, Mastercard, American Express, Mpesa and Airtel Money.

Whether you are a professional, an entrepreneur or a business, Visibility on myfinda will get you places providing accessibility and reach to target audience.

The app was launched in January 2016 and has since got over 170 subscribers and over a 1000 downloads. Its aim is to make the experience of an end user as well as your business easier.

Your customers will have full access to your contact details, your business location with full instructions on how to get there. Enjoy using the app for free and get timely information on what’s happening around the world with free News, currency conversions, Job openings or simply keep up to date with upcoming events.

Over 1000 categories available for searching and listing whether Advocates, law firms, Notary Publics & Commissioner of Oaths, Architects, Doctors, Healthcare facilities, Dentists, Consultancy firms, Construction companies, Freight Forwarders, Lodges, Hotels, Restaurants and many more. Whether you’re a start-up or wanting to expand your customer base, a great way to spread the word that you are open for business is by subscribing with us. Giving your business a presence in myfinda, you can be found by customers. The new myfinda app helps you get things done, and fast. Moreover you are in control. Create and update listings on multiple sites, enrich your business profile with engaging details. If you want your business to get to the next level, then subscribe with MyFinda today.

To subscribe, simply visit our website www.myfinda.co.ke. For more details you can get in touch with us on +254734270230 or email us on info@myfinda.co.ke or info@myfindamobile.com.

-Ms. Sheikh is the CEO of myfinda
T he formation and winding up of a company in Kenya was for long governed by the Companies Act (Cap. 486). The company legislation in Kenya owes its origin to the English company law. It came into force on January 1, 1962 and is based on the English Companies Act of 1948. The Act provided the basic legal framework for the regulation of companies in Kenya. It made provision for the legal incorporation of companies and laid down rules for their constitution, management and winding up.

Apart from the Companies Act, we also relied on case law developed by the courts - including the doctrines of ultra vires. The case law and practice have developed many rules useful for filling in gaps which have not been provided by the Companies Act.

The Act required radical reforms and after years of struggle on September 11, 2015, the President of Kenya assented to the Companies Act, 2015 (“the New Companies Act”) which replaced the 1948 Companies Act. It is cited as the Companies Act No. 17 of 2015.

New Companies Act

The New Companies Act has borrowed heavily from jurisdictions such as the United Kingdom, Australia and Canada.

The objects of the Act as set out in Section 2 are to facilitate commerce, industry, and other socio-economic activities by enabling one or more natural persons to incorporate as entities with perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular in the interests of their members and creditors.

The Act is both a consolidation of laws on companies in Kenya and a modernisation of statute law on the subject in order to ease doing business and encourage the informal sector to formalise in order inter alia to access credit.

Section 2 of the New Companies Act empowers the Cabinet Secretary (the Attorney General) to operationalise it at such various dates as he may appoint. On 13th November, 2015 the Attorney General appointed the 6th November, 2015 as the date on which Parts 1 to 14, 23, 31, 32, 38, 40, 42 and the First, Second and Sixth Schedules of the Act shall come into operation. On 18th November, 2015 the Cabinet Secretary published the Companies (General) Regulations, 2015 which came into operation on the 14th day after their publication in the Kenya Gazette.

Registrator’s Rules

The Registrar of Companies has prepared in accordance with Section 876, the Registrar’s Rules that prescribe the forms to be used under the Act which can be accessed from http://www.attorney-general.go.ke/index.php/company-forms/.

The remaining Parts of the Act will be commenced by notice in the Kenya Gazette. Any documents prepared under Cap. 486 should be lodged with the Registrar on or before January 31, 2016. Such documents must be dated before the commencement of the Companies (General) Regulations, 2015.

The role of the Memorandum of Association

The doctrine of ultra vires in company law is abolished except as the objects are restricted by the articles of association (see section 28).

Articles of Association

The Act incorporates provision for the legal incorporation of companies, the regulation of those companies, and laid down rules for their constitution, management and winding up. The Act required radical reforms and after years of struggle on September 11, 2015, the President of Kenya assented to the Companies Act, 2015 (“the New Companies Act”) which replaced the 1948 Companies Act. It is cited as the Companies Act No. 17 of 2015.
The business in that manner com-

for model Articles of Association which are deemed to be a part of a company’s Articles of Association as if they were duly registered by the company. Specifically, the Act provides for different versions of model articles that may be prescribed for different descriptions of companies and a company may adopt all or any of the provisions of a prescribed version of model articles.

Consequently, a company which does not register distinct Articles of Association is deemed to have adopted the model Articles of Association as prescribed. It is permitted to develop detailed Articles of Association to meet the pertinent of peculiar requirements of any special project for a client.

One Man Company

The Act provides that a company can have one member (Salmon v Salmon!). Companies that have already been incorporated can also reduce the members to one member. This is a very useful development especially for single entrepreneurs. Documents may now be validly executed if signed on behalf of the company by one Director in the presence of a witness who attests the signature.

Unrestricted objects

Section 28 provides that unless the Articles of a company specifically restrict the objects of the company, its objects are unrestricted (abolition of the doctrine of ultra vires in company law).

Fines and Penalties

The fines range from KES100,000 to KES15 million. Most fines are in the KES500,000 to KES1 million range. Imprisonment terms for indictable offences run from between one and five years, and in exceptional cases (e.g. fraud) 10 years.

Codification of the Common Law

Section 1002 codifies the common law offence of fraudulent trading by providing that where the business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, each person who knowingly participates in carrying on the business in that manner com-

mits an offence.

Annual Statements

Under Part XXV of the Act, private companies are now required to file financial statements within 9 months after their accounting period while public companies must file within 6 months after their accounting period. Previously, private companies were not required to register financial statements with the Registrar of Companies under Cap. 486 (Sections 686, 687 and 688 of the Act).

At least one natural person

All companies must now have at least one natural person as a director and cannot just have corporate directors. Previously, it was possible for all directors to be non-natural (corporate) persons.

Codification of Director’s Duties

Under division 3 of Part IX of the Act, the general duties of directors as provided for under Section 140 are based on Common Law rules and equitable principles that apply in relation to directors and have effect in place of those rules and principles with respect to the duties owed to a company by a director. These rules are to be interpreted and applied in the same way as common law rules or equitable principles.

Disqualification of Directors

The disqualification of persons acting as directors under Part X of the Act as a result of involvement in fraudulent trading or other abuse of the office of director (section 214).

Written Resolutions

Private Companies may now pass resolutions through the written means i.e. by circulation instead of holding a physical meaning. This provision did not apply previously unless the articles of association were crafted to allow for written circular resolutions. This is provided for under Part XIII of the Act (section 139).

Share buy backs

A limited company having a share capital may now purchase its own shares including any redeemable shares in accordance with Part XVI of the Act.

Financial Assistance

A private company will be permitted to provide financial assistance to purchase its own shares if the company’s principal purpose in providing the financial assistance is not to give it for the purpose of any such acquisition, or the giving of the assistance for that purpose is only an incidental Part of some larger purpose of the company and the assistance is given in good faith in the interests of the company (Sections 440 through 446 of the Act).

Public Offers

The Companies Act introduces the public offer of securities by a company under Part XIX. Section 510 defines a public offer for purposes of the Part to include an offer to any Section of the public, however selected.

The Section goes further to define what is not to be considered a public offer and what is to be deemed a private concern of the person receiving an offer. Section 511 prohibits public offers by private companies, both those limited by shares and by guarantee.

Treasury Shares

This provision applies if the purchase or acquisition of shares by a limited company of its own shares. The company can hold the shares as treasury shares or deal with the shares. If it holds them, it shall enter itself in its register of members/ shareholders (section 527).

-Incorporation Process According to the public guidelines by the Attorney General published in the State Law Office website, the following will apply with effect from January 31, 2016:

-Application and reservation of name. The name search and reservation process can be done at any of the Huduma Centres countrywide, online using the E-Citizen platform and on a Safaricom mobile phone by dialling *271#.

Form CR 1 –Form CR8 and their particulars (see the Companies (General) Regulations, 2015.

Articles of association (if those provided in the Regulations have not been adopted).

Applicants should attach copies of identification documents (national identity card, Passport-size photograph and KRA PIN). For foreigner's it is required to submit copies of the passport together with bio data and the passport-size photograph of the foreigner. General comments

Removal of the bureaucracy for holding annual general meetings (AGMs) for private companies.

Greater privacy for directors and shareholders: shareholders’ addresses have been removed from annual returns; directors’ personal addresses no longer need to be provided, and the ability to restrict access to register of members.

Conclusion

The New Companies Act is certainly a step in the right direction and should assist us in streamlining the business environment for economic growth and creation of employment opportunities.

The provisions on offers to the public introduced in the Act need to be reconciled with the extensive provisions of the Capital Markets Act on ‘public offers’ as contained in the Capital Markets Public Offers Listing and Disclosures Regulations.

The introduction of share buy-backs will benefit public companies whose shares are undervalued, with such purchases enhancing value for continuing shareholders.

The implementation timeline (nine months) is certainly over-ambitious considering that the 2006 English Act took almost two years to implement. It is likely that there will be chaos in effecting the tight implementation timetable as our early observations are that quite a number of the Registrar’s staff are not aware of the actual requirements of the impending changes.

Nevertheless, we look forward to the best in terms of implementation and expediency in incorporation of companies and efficiency in the implementation of the services contemplated under the new Companies Act No. 17 of 2015.

Mr Musau, is an Advocate of the High Court of Kenya, Managing Partner of B M Musau & Co., Advocates and a Lecturer at the University of Nairobi, School of Law.

The article shall be continued in the next edition of this magazine.
Law Reform

By Itoto Echakara

Law reform is the process by which the law is modified and shaped over time to better reflect the social values that society feels are important. The law is dynamic. A major function of the legal system is to respond to changing values and concerns within society, resolve issues as they develop, overcome problems that occur in legal cases or events, promote equality and respond to scientific or technological developments. Law reform is essential if the law is to remain relevant to a changing society.

Law reform tends to be a gradual process, with widespread stakeholder consultation and involvement. Indeed, one criticism of law reform is that it is too slow.

The legal system has many challenges to deal with as:

- Proper constitutional implementation
- Effective devolution
- Addressing new forms of crimes
- Implementation of constitutional rights
- Balancing the rights of victims and defendants
- Rehabilitating offenders and finding alternatives to imprisonment
- Establishing effective security legislation
- Terrorism and counterterrorism measures
- Monitoring and evaluating legislation
- Assessment the impact of legislation on society
- Balancing the principle of separation of powers

The agencies for reforms include Law Reform Commissions, Parliament, Courts and the Kenya Law Reporting Commission

The conditions which give rise to the need for reform include:

- Changing Social Values; the values of societies change over time. This places pressure on the law to change and adapt over time. What is acceptable at tone time may be considered unacceptable at another time.

- New Technology; New technologies create the need for law reform. When technology is in advance of the law then it passes pressure on the law to reform.

- Changing Legal System; Kenya passed a new constitution in 2010 which has resulted in a change in the legal system especially with the advent of devolution.

- International Law; When international law is reformed this can lead to changes within Kenya’s domestic legal regime. This is particularly true when having signed a Convention at the UN.

- Changing Composition of Society; The country is culturally diverse and socially progressive. Australians are, on the whole, tolerant and open. Thus, in seeking to preserve social values, some aspects of the values held dear have been lost.

- New Concepts of Justice; as social values change, so too does our concept of justice. Sentencing laws are continually subject to law reform scrutiny.

Law Reform Agencies

The specialized law reform agency created is the Law Reform Commission to

- To ensure independence of governments, political parties and lobby groups
- To ensure high quality of research of the development of well-respected bodies
- To ensure build-up of specific expertise and authority in our society

The Law Reform Commission does not change the law; it investigates a range of legal issues and makes recommendations to parliament. The Law Reform Commission Act no 19 of 2-13 makes provisions for the body and its functions. The commission, when conducting an inquiring, aims to:

- simplify and modernise the law
- improve access to justice
- remove obsolete or unnecessary laws
- eliminate defects in the law
- suggest new or more effective methods for administering the law and dispensing justice

Legislature or Parliament, both national and county, is the main law-making bodies in Kenya. Another function is to pass amendments to existing laws. Hence, Parliament plays a very important role in reforming the law. It is only
through parliament that any recommendation by the law reform commissions can be enacted into law.

When the Law Reform Commission makes a recommendation for reform to the Parliament, it can be enacted into legislation. Parliamentary reform of law is also a reflection of the policies held by the part in Government at the time. Laws that are altered or enacted by the government are usually a reflection of the political party in power.

Courts, through judicial decisions, can shape the law and reform it. The role of the courts is to interpret the laws made by the Parliament. The rules of common law also allow judges to reform the law by setting new precedents in the cases that come before them.

However, most cases are bound by set sentences and procedures and this inhibits the ability of judges to make laws. When common law is made, it is usually to accommodate a particular situation that is not covered in statute law.

More usually, however, in applying and enforcing the law as it presently exists, courts prompt consideration of change by Parliament or by regulatory bodies. Sometimes a judge or magistrate may openly recommend a change. In recent times there have been a few examples of those cases and the changes have been or could be quite significant.

Sources of Law Reform

The Law Reform commission and many other organisations put forward proposals for law reform. These include;

Government policies-Every government Minister has the job of introducing legislation about matters that fall within the ministry’s portfolio.

Lobby Groups; Individuals cannot change the law but as members of lobby groups they can influence its reform.

Lobby groups are collections of people with similar interests and with specific aims upon which they wish governments to act. Lobby groups try to raise public awareness of their cause; the higher the profile of their cause the more likely it is that the government will listen to their ideas. If they can influence government decision making, then they can achieve law reform in the area in which they are interested. They attempt to achieve their aims by targeting:

- Members of Parliament
- Parliamentary Committees
- Governmental inquiries

- The media
- The public

Statutory Bodies: There is a number of statutory bodies that can also advise and inform Parliament of areas that require law reform. For example, the Witness Protection Agency and Office of the Attorney General among others.

Parliamentary Committees: every parliament has several committees to investigate matters and make suggestions for changes to the law.

Constitutional Commissions:

For example, the Anti-corruption Commission, Kenya National Human Rights Commission, National Gender Commission which are mandated to investigate a particular matter and advise on how the law in that area should be reformed.

Permanent Advisory Bodies:

There are a number of bodies which monitor the operation of, and propose reform to the law in, a particular area.

Independent Authorities:

Some independent bodies can also advise the Government about law reform.

Professional Associations:

The Law Society of Kenya represents the lawyers in the country, while, Association of Professional of East Africa represents all the professional bodies and Kenya private Sector Alliance represents the business sector. These associations regularly suggest amendments to the laws.

Effectiveness of Law Reform Agencies:

The weakness of the law reform commissions, courts and lobby groups is that they rely on parliament either to carry out recommendations or to act upon Judges’ decisions.

While these agencies can strongly influence law reform, ultimately it is only Parliament that can make suggested changes by incorporating them into statutes.

One problem that concerns all reform agencies is the delays that occur before any suggested reform of the law actually takes place, when reform is required; governments often act only when there is a political benefit to be gained.

The article is based on New South Wales Law Reform Commission of Australia revised by Ms. Echakara – LSK Program Officer, Parliamentary Affairs & Legislation
Presently, the use of internet and ICT enabled platforms is not considered a luxury but a requisite especially in the realms of commerce, economics, entertainment and even geopolitics. This article explores how this exponential rise of social media provides avenues for terrorism actors, sponsors and sympathizers to broadcast their appeal and justify their actions. It argues that there is a legal lacuna in correctly identifying terror speech and therefore, there is need for a nationwide civic education effort.

Social Media

Ever since the 2009 Arab Spring revolution, Social media continues to play a critical role in shaping and influencing public opinion beyond what traditional media achieved in previous decades. US President Barack Obama, perhaps the most outstanding politician to have ever mobilized votes and finances online still maintains a powerful social media presence.

A recent poll by Ipsos Mori in the United Kingdom just ahead of the 2015 General Elections found that seven in ten Britons (71 percent) feel that social media platforms are giving a voice to people who would not normally take part in political debate.

This is particularly the case for young people (88 percent of 18-34s, compared with 56 percent of those aged 55+). The study further found that on balance, people also feel that social media platforms are breaking down the barriers between voters and politicians and political parties (by 50 percent to 28 percent). Again, young people are most positive (60 percent agree that social media are breaking down the barriers, compared to 39 percent of those aged 55+).

While all these positions point to the positive, there is an emerging discourse about the role of social media in spreading, heralding and sustaining terrorism ideologies. Such ideologies seek to promote a preferable image of terrorism that downplays the criminal intent and complicity.

Through a diverse range of communication tools including social media, terrorists have been able to amass vast influence that has seen most States with active terrorist cells looking for better intelligence, legal and deterrence approaches to combat these ideologies. This article seeks to contribute to this ongoing discourse by presenting a legal analysis that should be struck when balancing between protecting fundamental freedoms of expression and the emerging trend of promoting terrorism known as terror speech.

Does Freedom of Expression cover terror speech?

Terror speech, which can be construed to include speech acts, artistic and creative expression that promotes, justifies or even rationalizes terror, acts of terrorism or the perpetrators is not considered part of freedom of expression. The 1948 Universal Declaration of Human Rights (UDHR) under Article 19 acknowledges the right to freedom of opinion and expression. Furthermore, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of The African Charter on Human and Peoples’ Rights both guarantee the right to freedom of opinion and expression and this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media.

In Kenya, freedom of expression; freedom of the media and access to information are recognized rights and fundamental freedoms clearly envisaged in Articles 33, 34 and 35 of the Constitution. All these provisions however, come with a rider of responsibility that requires those who seek to use them as legal defences, to appreciate the limits. Article 19 (3) of the International Covenant on Civil and Political Rights is especially outstanding.

Emerging Patterns of Terror Speech

Scholars have argued that the affordability and broad reach of social media platforms such as Facebook, Twitter and Youtube has allowed terrorist groups to communicate and also air their extremest messages not only among themselves but also among the public. A clear example of terrorist groups making use of social media to convey their messages was the January 2009 release of an audio recording purportedly by Osama Bin Laden posted on Islamist
Extremist groups especially those devoted to the cause of terror seek to obtain global, national and local legitimacy through use of the internet and social media by ensuring that their sponsors, members and sympathizers promote their ideologies through their individual accounts.

Malik pledged bayaaat—the oath of allegiance to the Islamic State on Facebook Page. What emerges is that American citizens sympathizers promote their ideologies through their individual accounts. While it is true that preventing, responding and mitigating terror attacks remains the preserve of state security agencies, perhaps it is high time for a joint initiative between the office of the Attorney General, the Director of Public Prosecutions, the Judiciary, Law Society of Kenya (LSK), Bloggers Association of Kenya and the Media Council of Kenya to provide civic education especially on matters of social media and the reportage of terror and terrorism. Such an exercise should acknowledge that governments must respect established internet norms such as freedom of expression and privacy when attempting to regulate social media.

But on the other hand, citizens must understand that the same freedoms do not cover terror speech. A study by Jumia Kenya, The Growth of the Smartphone Market in Kenya indicates that in the next 5-10 years, over 75 percent of the Kenyan population will have access to a smart phone which means that the possibility to be exposed to terror speech will increase. The time to inculcate values and virtues of a terror free society is now. Will the incoming LSK leadership take up this challenge? 

Ms Nyang’ai is an International Law Expert, Principal Partner at JNC & Co. Advocates and a Researcher on Counter Terrorism and Organized Crime Legislation.

She can be reached on info@jnadvocates.com

Extremist groups not only use social media and the internet to relay messages and communicate but also to obtain information. In December 2014, according to ABC News online, in a joint intelligence bulletin issued overnight by the FBI with the Department of Homeland Security, officials strongly urged those who serve in uniform to scrub their social media accounts of anything that might bring unwanted attention from “violent extremists” or would help the extremists learn individual service members’ identities. Moreover, it should not been forgotten that in 2013, Dzhokhar Tsarnaev and Tamerlan Tsarnaev, two brothers wreaked havoc at the Boston Marathon International Event, using basic internet received knowledge to create homemade bombs.

Indeed, the internet and social media are widely cited as the prime hub for ISIS recruitment not only in Sub Saharan Africa but also in Western audiences thus social media is an effective recruitment tool. Peter Bergen, author of the Longest War: The Enduring Conflict between America and Al-Qaeda and a Professor of Practice (FSC) School of Politics & Global Studies at Arizona State University states that ‘online networks are often seen as a boon for would-be radicals, but in fact, many American citizens attracted to the Islamic State propaganda have triggered investigations because of their invertebrate use of social media to proclaim their sympathies’ oblivious that this constitutes terror speech.

Extremist groups especially those devoted to the cause of terror seek to obtain global, national and local legitimacy through use of the internet and social media by ensuring that their sponsors, members and sympathizers promote their ideologies through their individual accounts.

The San Bernadino terror attack that saw a couple Rizwan Farook and his wife Malik storm into a Christmas party for employees of the San Bernadino county public health department where Farook worked wasn’t just unique due to the 14 fatalities, but the fact that Malik pledged bayaaat— the oath of allegiance to the Islamic State on her Facebook Page. What emerges is that social media companies such as Facebook obliged in the aftermath of terror attacks to restrict and possibly deface such accounts to halt sharing of such messages that tend to glorify such acts?

Al-Shabaab

A prime objective of terrorist groups is to produce widespread fear and panic so as to cause submission among the public or influence Government decisions, legislation or other critical decisions. The internet and social media is a strategic tool for fulfilling this as they can then spread messages, most often propaganda which causes to intimidate, harass, weaken or discredit the government and especially the security forces.

Internet uploaded video recorded decapitations popular with radical Islamists have a great impact on the public and are neither technically demanding nor do they require a lot of resources in terms of weaponry, tactics or intelligence.

Most recently when the Kenya Defence Forces camp under AMISOM in Somalia was attacked by Al-Shabaab, it is alleged that the bodies of some soldiers were dragged by the militia through Somali streets and these photos filtered through certain social media sites. It should be known that the sharing of such gory pictures which aim to fuel the Terrorists’ objective of instilling fear among the public amounts to terror speech and is actually criminal.

Are current legal tools responsive to social media driven terror speech?

Freedom of expression and the freedom of the media under Article 33 and 34 of the Constitution are limited under Section 66 of the Penal Code, in regards to prohibited publication and broadcast contrary for purposes of limiting the publication or distribution of material likely to cause public alarm, incitement to violence or disturb public peace. While it requires a surgical analysis of what actually constitutes incitement to violence and disturbance of public peace, the prosecution should clearly identify the communication, publication and broadcasting that seeks to promote terror speech as a justifiable cause of action and the publication and broadcasting whether in traditional or social media that seeks to merely inform the public of the gravity of the situation.

While it is true that preventing, responding and mitigating terror attacks remains the preserve of state security agencies, perhaps it is high time for a joint initiative between the office of the Attorney General, the Director of Public Prosecutions, the Judiciary, Law
I t was H.L.A. Hart who first distinguished between two types of rules in mature legal systems. Primary rules prescribe substantive rights and corresponding obligations. Take private property rights. They create rules of trespass which forbid others from using objects without permission from the owner. To ensure that primary rules are obeyed, are efficient and do not stagnate, secondary rules are required.

They empower officials to enforce, adjudicate, modify or recognize primary rules. The rule of adjudication promotes efficient division of labour. For Richard Posner, there are two kinds of efficiency, substantive and procedural. Substantive efficiency entails distribution of liabilities so as to encourage self-interested actors to bear the full costs of their actions. For example, the rule against trespass imposes liability upon trespassers to pay compensation to owners.

Procedural efficiency facilitates access by actors to courts and accurate, reliable dispute resolution. For example, in order to prevent work-overload in courts, limitations of actions bars cases from being filed outside prescribed time lines. To reduce information-overload, interest is awarded on damages to successful litigants, thus deterring parties from lodging frivolous suits.

Additionally, law is more than just a system of rules, as Ronald Dworkin famously points out. Administrative discretion to depart from a prescribed rule is not influenced by the authority which creates the rule or grants the discretion. Rather, Judges also invoke “policies, principles and other sorts of standards.” Posner agrees that legal systems comprise both rules and standards.

Yet tension arises between the fact that, on one hand, it is easier for private individuals to accept subjective standards such as reasonableness, good faith or due care and therefore to comply without coercion. However, it is more difficult for Judges to administer standards. On the other hand, objective rules are harder for members of the public to accept at face value.

Yet clear rules, such as prohibiting trespass or theft are written in dry legal language and thus easier for unsophisticated judges to administer. In practical terms, this tension in determining the optimum mix of formal rules and informal standards to include in legal systems is compounded by peculiar circumstances of developing countries, due to our imported legal institutions. First-best justice entails both legal and judicial reforms not only enacting secondary standards, but also selecting sophisticated personnel who are able to exercise discretion to interpret such principles.

**Judicial Reforms**

To guide legal and judicial reforms, Richard Messick identifies two hypotheses: “One hypothesis focuses broadly on the importance of the judicial system in enforcing property rights, checking abuses and otherwise upholding the Rule of Law.”

A second narrower one casts the relationship solely in terms of the judiciary’s effect in enabling exchanges between private parties.” Dworkin favours the former hypothesis where individual “rights are trumps” even over legitimately exercised administrative discretion. Similarly, as regards legal methodology, from one point of view, as Tanzanian law Professors Issa Shivji and Wilbert Kapina suggest, the creators of Ngorongoro Conservation Area violated some of the rights of indigenous residents to land, livelihoods and democratic governance in the name of wildlife conservation. Their view, in 1998 was that “the proposed (Tanzanian) Land Bills were unworkable because they set out in intricate details the powers and responsibilities of bureaucrats in the land administration machinery and sought to exert detailed control over their actions.”

Posner, however, the use of complex standards is only advantageous for sophisticated judges—aided by highly paid advocates—who are able to decide disputes on a case-by-case basis. Instead, his “rules first” theory proposes that “the modernization of poor countries should concen-
1. What is your name?
I am Mr. Silas Mugeria, Advocate.

2. Are you a beneficiary of the LSK Medical Scheme?
– Yes, I am a proud beneficiary.

3. How many people covered under you?
– Three.

4. How were you introduced to the scheme?
– I wrote a letter to LSK proposing the use of our membership numbers to negotiate favourable terms of a suitable medical insurance cover. LSK responded and referred me to Mega Health Insurance Agencies called me before the process of subscription ensued.

5. Which underwriter did you select?
– I had various options to choose from but I opted for AAR.

6. Were you given sufficient information regarding the scheme?
– Yes, a Mr. Sammy Kithinji, Sales Representative of Mega Health Insurance Agencies promptly followed the Agencies telephone call and gave me all the information that I needed.

7. How long did it take you to register for the scheme?
– Once I had satisfied the requirements of Mega Health Insurance Agencies, the registration took about a week.

8. Was there an after-sale service-follow up for feedback?
– Yes there was. Indeed I took up even motor insurances and Professional Indemnity through Mega Health Insurance Agencies.

9. How do you rate the scheme?
– The scheme has less strenuous entry requirements especially for senior citizens compared to individually sourced medical covers. However, LSK should renegotiate and obtain flexible terms as would enable members (i) seek medical services from doctors of their choice and (ii) purchase medications from any other chemist other than specified clinics. Medications are priced higher at the recommended clinics than in some other hospitals and chemists.

10. Would you recommend the cover to fellow advocates?
– I would recommend the cover to fellow Advocates without any reservations.

Economic Development
Since the 1990’s, Kenya’s painful legal and judicial reforms have charted an incrementalist pathway. Their results can be measured by their impact on overall social welfare. Initially came the so-called 2003 “radical surgery” purporting to substitute unskilled Judges with sophisticated ones. Yet the dysfunctional post-colonial constitution with all its eroded human rights protections, remained unchanged. Recently, the 2010 comprehensive constitutional reforms not only subjected judicial personnel to screening and selected fresh stock, but also emphasize that substantive efficiency trumps procedural technicalities.

Economic development thus requires three law-jobs. First, in addition to producing tangible public goods such as physical infrastructure, schools, hospitals and communications to facilitate market access, sufficient taxes should be collected and allocated to remove an intangible sense of injustice. Second, Judges must be sufficiently competent to make impartial, reliable and accurate decisions respected by the executive.

Furthermore, actors should feel inspired to submit their disputes, regarding primary rules, to the jurisdiction of the courts and to voluntarily comply with decisions to reduce requirements for coercion.

Third, choice of administrative policies should not encroach upon substantive or procedural rights. To reinforce checks against abuse of power, policymakers should facilitate criticism by civil society to monitor and express public perceptions regarding whether in fact administrative decisions of rules are repressive or whether standards of justice appear acceptable.

-Dr. Khamala is an Advocate of the High Court.

Mr. Silas Mugeria - Advocate

LSK MEDICAL SCHEME
ENDORSEMENT

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Devolution

By Wangari Karanja

Kenya’s devolution is perceived as amongst the most rapid and ambitious processes going on in the world, with new governance challenges and opportunities as the country builds a new county structure from scratch.

Promulgation of the Constitution of Kenya 2010 marked a momentous point in the country’s history as it provided for enhanced checks and balances within the Government, an enhanced role of Parliament and citizens and a progressive Bill of Rights. In the realization of these structures, the Constitution has provided for a major devolution, not only of resources and functions but also creating a new layer of county governments.

This has brought about a new regime of governance and new laws including but not limited to: constitution of Kenya 2010. This has resulted to numerous litigation cases in courts to resolve stalemates.

The Transition

The Transition Authority was tasked with the mandate of unbundling functions from the National Government to the county governments which it did in three phases which are:

1. Gazettement of the initial functions for transfer
2. Capacity building and laying the relevant framework for transfer of the functions.
3. Actual transfer of functions. The functions that are devolved in the county as at 1st June 2015 include agriculture, county health services, public nuisances, public amenities, transport, trade development and regulation, animal control and welfare, pre-primary education, village polytechnics, home craft centers and child care facilities, county public works & services & control of drugs and pornography.

Devolution has had its fair share of successes and challenges which have left some of the tasks undone as they prepare to pack their bags. Its existence hangs in the balance as debate to renew its term rages on. The big question is, has the mandate been fulfilled in totality? Should the term of the Authority be extended to enable completion of its mandate? Who are the forces behind the refusal to extend this timeline and why?

Intergovernmental relations have not been friendly to devolution efforts, with inordinate delays in release of funds by the National Treasury. A case example of the repercussions is the pattern of county health professionals’ strikes which have become a routine, leading to deaths in the affected counties ensuing from neglect.

Conflicts between the staff of the National and county governments in operationalization of housing and roads function has seen construction of some roads in the country stalled even after funds are released.

We have witnessed wrangles between the National Assembly and Senate, Governors and National Assembly and Governors and key National Government institutions. This has resulted to numerous litigation cases in courts to resolve stalemates.

Devolved Corruption

Corruption especially in the procurement sector has been registered in many counties, with tenders being awarded to those who dish out kitu kidogo (bribe) to officials who call the shots. The resistance by many county governments to adopt IFMIs has created these loopholes for siphoning public funds. Public participation has been treated as a non issue. Governors are the ‘in thing’ on our screens, on the headlines almost daily on allegations of theft (better known as corruption - thanks to ‘pimped’ language) and misappropriation of funds.

We evidently have a long way to go in the realization of the objects of devolution as outlined in Article 174 of the Constitution. The Advocate’s role? Advocates should play an oversight role in ensuring that the legislation enacted in the counties is up to standard and conformity with the existing national laws and whistle blowing when there is an outright infringement of the Law. Together we conquer the Devolution Monster!!

Ms. Wangari is a lawyer
Sound Financial Planning is a roadmap to success

By Eric Njuki

ow that we have a fundamental understanding of financial planning let us delve into the reason why it is important to have an independent financial advisor. The complete human being has to be doing well on four fronts. These frontiers are what keep people motivated and goal oriented. So let us look at the typical wellbeing of the average Kenyan.

Health is the first frontier that you have to look out for. A healthy person can utilize all his/her faculties productively to generate wealth. It is crucial to have an expert look into your health issues and for that we have doctors of all manners of expertise.

Indubitably human beings are at the apex of the food chain. Scholars posit that the difference between us and other animals is the soul, free will, etc. It is therefore safe to say that human beings need to tend to this ethereal appendage called the soul. For our spiritual development and well-being we have religious leaders who tend to those needs. Priests, Imams, Pastors, Shamans and Brahmans have led us down the spiritual path for ages.

Other than the soul we are separated from the beasts by our mental acuity. The ability to create tools, devise solutions to everyday problems and even launch ourselves past the stratosphere has been as a result of disciplined minds bent to reason and logic. Our mental needs such as gathering, application and retention for posterity of collective human knowledge we have entrusted to our scholars, lecturers, teachers and philosophers. It is the reason that many a working man still pursues higher learning in a bid to make more money in the work place.

In fact, the thing that separates the materially wealthy and those wallowing in poverty for no other reason than that they were born into poverty (economic development theory posits that people are poor because they are poor) is how well they handle these four quadrants.

Doctors are great, and we all need them. We have them everywhere, in every shape and form. When you exhibit symptoms of financial marasmus who is the doctor that you go to see? The answer should be your financial advisor/Financial Planner.

An Independent Financial Planner/Advisor (IFA) is the key to your fiscal prosperity. IFAs will advise you on the various ratios that you need to live by to achieve your dreams and aspirations.

How much of your income should go to rent, transport, retirement planning, education planning, savings, entertainment etc. What should you be investing in for the short, medium and long term? Even we Financial Advisors have Financial Planners! The path to a well-rounded fulfilled and accomplished life lies in taking stock of how well or badly you are managing these quadrants;

Learning & Growth – utilize "Professor Google" or enroll in a course and get an education.

Health & wellbeing- eat healthy, exercise, get a medical cover.

Faith & spirituality- that is between your God & your spiritual mentor.

Financial freedom & development – Financial advisor

The only thing that you might not find with an IFA is the faith & spirituality quadrant but more likely than not there is a Financial Advisor in the pew next to you or on the prayer rug behind you. Stay healthy, get an Independent financial advisor!

-Mr. Njuki is an Independent Financial Advisor, Edge Wealth Management Group
emungai@edgewealth.co.ke
Tel: M (+254)722813655
Determination of children cases and since remand centers do not adequately meet the desired goals, the children end up being converted into hardened offenders by the time they finish serving their sentence. A majority of these children get their way back into a life of crime and end up committing more crimes.

Juvenile Offenders

The Constitution is responsible for the dynamic and fast evolving practice trends in the country and children issues should not be left behind as there is need for adoption of viable strategies that would ensure successful rehabilitation of juvenile offenders.

There is need to substitute the traditional court practices with methods that are bound to yield more results and help in the overall shaping up of the child offenders to become upright citizens. Section three of the Children Act provides that the Government shall take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights of the child. Section 187 provides that every court dealing with children matters brought before it shall have regard to the best interest of the child and shall in a proper case take steps for removing them from undesirable surrounding and for securing that proper provision is made for their maintenance, education and training.

Child law experts should be encouraged to give advisory opinions and methods on how to tackle juvenile delinquency in this human rights era. The lawyer then has a duty to sensitize the Government and relevant stakeholders on the need of adopting pro child alternative ways to deal with juvenile offenders which would ensure that the best interests of the children are addressed and that their learning capabilities are taken into account.

I think that the Kenyan children courts should consider and adopt the use of diversion technique or make use of the already existing National Youth Service (NYS) program to rehabilitate juvenile offenders.

Diversion is a system that gears at moving children away from the traditional practice of arraigning child offenders in court through the adoption of alternative systems which would ensure that the juvenile offender participates in projects that would correct their criminal behavior.

By Ann Anyango Rasowo

Children are the future human resource of a country but as they grow up some find themselves in conflict with the law. The Kenyan judicial system aims at rehabilitating juvenile offenders with the view of reintegrating them into society. Nevertheless, there are challenges that cripple the system especially management of the remand facilities.

The main problems faced in the children remand centers are that they are overcrowded and understaffed making it impossible to cater for the welfare of the juvenile offenders adequately. The Kenyan system uses detention as the corrective measure after
Access to Justice: A Case for Children

“The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve.”— Rt. Hon. Beverley McLachlin, PC.
Chief Justice of Canada, 2007

By Joan Kariuki, Peggy Nyambura and Kelvin Gichia

Access to justice is simply defined as the ability to obtain a just, equitable and timely remedy for violations of rights. It is a fundamental human right and an essential prerequisite for the protection and promotion of the Rule of Law. It entails timely settling of cases, legal aid to the poor, affordable legal fees, strong coordination among the different stakeholders in the sector, policy analysis, reform and educating the public on their rights and responsibilities in accessing justice. Access to justice is safeguarded in the Constitution.

The United Nations also recognizes the importance of this right in the Global Sustainable Development Goals and specifically in Goal 16 which tasks Governments, organizations and civil societies to develop frameworks and initiatives that address the justice gap.

Poor Co-ordination

Despite these developments, some issues hinder equal access to justice. Some of these include poor co-ordination among different institutions in the sector, long delays in settling cases, weak and inadequate legal aid to enhance accessibility to the poor, high and prohibitive legal costs and lack of knowledge by the poor and marginalized on how to access justice and ensure accountability.

Children are at a particular disadvantage as most court systems and structures do not make specific provisions for them. In many cases, the court room itself and the court officials with their formal dressing are intimidating.

Without specialized training these officials tend to handle children the same as adults - not giving provision for a child’s vulnerability. In this way most children are not heard during the court process and their side of the story is not given the necessary consideration. In addition, information is not provided to the child in a child friendly manner.

Effective Policies

To ensure protection of children’s rights, effective policies and mechanism need to be developed. In Kenya, the Children’s Act is a good example. It guarantees the right of an accused child to legal or other appropriate assistance. It focuses on the best interest of the child as its guiding principle.

To have a world where access to justice for all is accessible regardless of the status of individuals, there needs to be a collective approach. For Governments, laying strong policy for legal aid and sustained funding will propel the programs aimed at enhancing justice. Governments should also prioritize access to justice programs and align them to their overall strategic plans. Law societies also have a role to play by persuading their members to offer pro bono legal services to the poor and marginalized. They should educate their members on the challenges children encounter and make them appreciate the need to offer their services. For advocates, it is their professional obligation to ensure equal justice to all. They should consider alternative measures such as mediation and alternative disputes resolution mechanisms. They should also contribute to and support law society’s initiatives aimed at enhancing access to justice.

For organizations and civil societies working to promote this cause, educating the community and stakeholders on the barriers and opportunities should be top on their priorities. They should advocate for policy reforms by lobbying Government to adopt best practices. They should ensure accountability in the justice delivery sector and ensure they build strong partnerships with organizations working on this area for expertise and resource mobilization.

For communities, legal empowerment creates demand for uptake of legal services, and a need to hold Governments to account in addressing justice gaps in the society. Communities should be more proactive in claiming their rights.

Despite the setbacks, efforts taken to ensure access to justice is achieved have yielded positive results.

A partnership between The Law Society of Kenya (LSK), Canadian Bar Association (CBA) and key players in the justice sector has proven that access to justice needs a collective approach and sustained commitment. This is achieved through The Supporting Access to Justice for Children and Youth in East Africa (SAJCEA) Project which aims to enhance access to justice for children and youth. The project is being implemented in Kenya, Uganda and Tanzania with financial support from the Government of Canada.

Ms. Kariuki is the Regional Project Manager of Supporting Access to Justice for Children and Youth in East Africa (SAJCEA), Ms. Peggy Nyambura (Project Assistant) and Mr. Kelvin Gichia—Communications Intern
It is common for individuals to post images or documents online that bring them shame and disrepute in future. Furthermore, it is equally easy for the public to get wind of such images or documents simply by using a search engine such as Google.

However, it is important to note that the law has evolved to ensure that mistakes committed do not haunt individuals forever. In 2010, a Spanish citizen lodged a complaint against Google Spain and Google Inc.

He complained that an auction notice of his repossessed home on Google’s search results infringed his privacy rights because the proceedings concerning him had been fully resolved hence the reference to the past was irrelevant.

He requested that Google Spain or Google Inc. be required to remove the personal data relating to him, so that it no longer appeared in the search results.

The Spanish court referred the case to the European Court of Justice. The main question to be determined was whether an individual could request for his or her data to be removed from a search engine and made inaccessible.

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The European Court of Justice thus came up with the concept of the right to be forgotten.

Right of Removal

In its Ruling on the 13th March 2014, the court specifically stated that an individual can request for his or her data to be removed from a search engine but this right is not absolute and should be balanced against other fundamental rights and freedoms such as the right to freedom of expression and the right to privacy.

In addition, in as much as the concept of the right to be forgotten gives individuals the right to ensure that they can request a search engine to remove links with personal information about them, certain conditions must be fulfilled. The conditions include:

- That the information on the individual is no longer necessary in relation to the purposes for which it was collected or otherwise processed.
- That the individual has objected to the processing of his or her information and a court of competent jurisdiction has ruled that the information concerned must be erased.
- That the information has been unlawfully processed.

Once an individual fulfils all the conditions, the onus would then fall on the search engine to process a request for deletion of information on a case by case basis and to apply the criteria mentioned by the European Court of Justice.

Bearing in mind that the European Court of Justice is a court of persuasive precedent and not binding precedent in the Kenyan legal system, it should be noted that for the Kenyan populace to avail themselves of this right, jurisprudence should be developed to this effect.

By Beth Michoma

Right to be Forgotten

Once an individual fulfils all the conditions, the onus would then fall on the search engine to process a request for deletion of information on a case by case basis and to apply the criteria mentioned by the European Court of Justice.

-Ms. Michoma is the Principal Legal Officer, Nyamira County Assembly & Managing Partner, Michoma & Company Advocates
Ignore youth voters at your own peril

By Raphael Obonyo

The recent findings by the Infotrack survey that Kenyans are losing faith in their leaders across the political divide less than two years away from the General Election is something that should worry us.

What is even of more worrying is the growing apathy among the Kenyans demonstrated by low numbers of voters who have turned up since 2013 General Elections to register as voters. Against a target of 11.4 million eligible voters, Independent Electoral and Boundaries Commission (IEBC) has only managed to put in its register a paltry 81,923 in a period of almost three years.

This figure is not commensurate to the huge number of those seeking Identity Cards (ID cards) after acquiring the mandatory age of 18 years, meaning that those seeking the cards, largely the youthful population, are doing so for other reasons rather than participating in the next election. This is worrying considering that the youth, the most affected by the numerous challenges facing the country are not likely to vote in large numbers.

The Infotrack survey rated both the opposition CORD and Jubilee Government poorly further indicating that 62 percent of Kenyans feel that the country is moving in the wrong direction. It noted that the current crop of leaders, either the Opposition or the ruling coalition cannot salvage the prevailing situation.

With this apathy and the dwindling numbers of those seeking registration as voters, IEBC will have a herculean task of hitting the ambitious targets.

Although the conduct of the politicians is largely to blame for the slow progress in voter registration, the IEBC is yet to shed off the tag of blame for mismanaging previous election to regain confidence among the voters.

The Opposition side, which lost a sizeable portion of its followers to turn up for the crucial exercise of registering, has not inspired Kenyans by pursuing an issue based political agenda. The opposition has failed to craft a winning strategy that would encourage voters to turn out in the wake of a government that is facing numerous challenges - sufficient to cost it an election victory.

IEBC has a responsibility to build public trust that is essential in enlisting voters ahead of the 2017 elections. The Government has also the responsibility of giving IEBC the support it requires to prepare and conduct free and fair elections. One of the issues that damaged IEBC reputation in the last election was failure of the costly electronic voting machines and system. This system, which was a brilliant idea to guarantee a credible election, was implemented hastily due to delays of acquiring the electronic gadgets and it was bound to fail. However, this failure seems not to have offered good lessons to IEBC and there is very low debate today on how the agency is preparing to conduct the 2017 elections in a free manner.

The IEBC must reinforce its independence by collaborating with civil society, which the current Government has attempted to annihilate, to provide civic education. The civil society in Kenya has in the past-demonstrated huge capacity to conduct civic education and the renewed interest by the sector in the political processes could offer a suitable entry point for this.

The Infotrack observation that the current crop of political leaders cannot be trusted is a wake-up call for providing alternative political mobilization, centering on the youth who have the capacity to sway the electoral contest.

The 2017 Election appears to be too close to craft a winning strategy by external players such as the youth, but it is a good turning point. Proliferation of political parties in Kenya have taken dramatic turns since the inception of multi-party democracy in 2002, with very little to learn.

With approximately 80 percent of Kenya’s population under age 35, youth are the largest voting bloc and can easily start focusing on their future by playing a significant role by constructing their own political destiny.

As Dr Kofi Annan once remarked; when leaders fail to lead, the people can make them follow. Youth must stand prepared and ready to provide a new vision, and leadership that can respond effectively to the needs and concerns of the people.

Youth must become more aware and ensure that they are not used as voting machines. Young people must gather the courage to change the country for the better.

Somebody must step forward and take action, such as creating a youth political movement that can bring a difference.

Mr Obonyo is a Policy Specialist, and Africa Representative to the World Bank’s Global Coordination Board of Youth Anti-Corruption Network

Email: raphojuma@hotmail.com
State Officials Immunity

Under general customary international law, serving Heads of State and Government and senior State officials enjoy immunity from criminal jurisdiction of a third State.

By Edwin Kavulavu

On 1 July 2008, the African Union Assembly adopted a protocol establishing the African Court of Justice and Human Rights. The decision implied a merger of the African Court on Human and People’s Rights with the African Court of Justice. Similarly, in June 2014 the African Union Assembly of Heads of State and Government, at a session at Malabo in Equatorial Guinea adopted the Protocol on Amendments to the protocol on the Statute of the African Court of Justice and Human Rights (ACJHR), hereinafter referred to as the Malabo Protocol.

If the Malabo Protocol comes into force, it will have jurisdiction over the following 14 crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in person, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.

The wide scope of international and transnational crimes stipulated in the Malabo Protocol seems to suggest that Africa is in the right direction in so far as the fight against impunity in Africa is concerned.

State Heads

However, some actors have expressed serious concerns over the protection from prosecution of serving African Union Heads of State or Government, or anybody acting or entitled to act in such capacity or other senior state officials based on their functions, during their tenure of office.

Although the treaty does not define what constitutes the senior State officials, the African Court is given full discretion to define and categorise the persons who may be entitled to such functional immunity on a case by case basis. Article 46A bis, also referred to as the immunity clause is considered to be the most controversial provision in the Malabo Protocol.

Under general customary international law, serving Heads of State and Government and senior State officials enjoy immunity from criminal jurisdiction of a third State.

However, State officials enjoy no immunity before truly international criminal courts and tribunals charged with competence over international crimes.

For example, Article 27 (1) of the Rome Statute provides that the Statute shall apply to all persons without any distinction based on official capacity.

Other examples include: Article IV of the Genocide Convention which provides that persons committing genocide or any of the other acts enumerated in the convention shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals; article 6(2) of the International Criminal Tribunal for Rwanda Statute which provides that the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment; Article 7 of the Nuremberg Charter provides that the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

From the foregoing, it is clear that Article 46A bis of the Malabo Protocol goes against other existing positions in the Statutes and of international criminal Tribunals, hybrid courts, international treaties, sub-regional treaties, and even national jurisprudence and laws, all proscribing and punishing international crimes.

The immunity provision presents a paradigm shift from prosecution of perpetrators of international crimes to creation of impunity.

It is highly likely that the immunity
The immunity provision presents a paradigm shift from prosecution of perpetrators of international crimes to creation of impunity. To diminish the power of the African Court to prosecute perpetrators of the international crimes, in line with the founding principles stated in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Such principles, include the commitment to the right of the AU to intervene in a state in respect of international crimes listed under Article 4(h) of the Constitutive Act of the African Union; the AU principles relating to the respect of democratic principle, human rights, Rule of Law and good governance; obligations relating to condemnation and rejection of impunity as per Articles 4(o), 4(m) and 4(p) of the AU Constitutive Act. More importantly, the immunity provision works to undermine the obligations relating to national, regional and international efforts to prevent serious and massive violations of human rights and ensuring accountability for such crimes.

The immunity provision signals that the African Court will be a court of selective justice. It will mete out punishment to the vanquished and shattered rebels, but not African senior state officials who may have committed similar crimes to the ones committed by rebels.

Challenges that have dogged the court's predecessors

The ACJHR must deal with long-standing problems that have dogged the court's predecessor and related human rights institutions on the continent: the African Court on Human and People's Rights and the African Commission on Human and People's Rights (the Commission). These include:

- Low levels of ratification;
- Severe lack of funding and resources with the result that institutions take many years to establish and begin hearing cases and submissions;
- Limited access: individual victims of human rights abuses and NGOs do not have automatic standing with the ACJHR and can only gain access if the state against which they are complaining has lodged a special declaration allowing such access; and
- Low levels of compliance with recommendations in the case of the African Commission.

Efforts to bring an end to impunity for crimes under international are plausible. However, in order to bridge the impunity gap prevalent in Africa, Article 46A bis needs to be amended to ensure that it complies with international standards. States can also enter reservations to Article 46A bis in the event that the provision is not amended to comply with international standards.

-Mr. Kavulavu, an Advocate of the High Court of Kenya, is a Programme Officer at The Kenyan Section of the International Commission of Jurists (ICJ)
Have you ever wondered why when you take a flight from Jomo Kenyatta International Airport say on Ethiopian Airways to South Africa you first head to Ethiopia which is in the opposite direction before departing from Addis Ababa to Oliver Tambo International Airport in South Africa? Or in the case of flying by Emirates Airways to say the United States of America, you first fly to the United Arab Emirates which is also in the opposite direction before departing from Dubai for the US? This article provides a brief outline of the underlying regulatory framework of public international law which basically provides the framework of the operations of international flights otherwise called freedoms of the air and answers the above questions. However, this is in relation to civil aviation and not military or State aircraft operations.

Legal Framework

First, the legal framework for operation of international flights is the Convention on International Civil Aviation, 1944 (Chicago Convention), which Kenya ratified in 1964. Although there are other aviation law instruments like International Air Service Transit Agreement, 1944 that provide broader details and framework for Bilateral Air Service Agreements (BASA) upon which countries exchange reciprocal rights for flights over their airspace, I will confine myself to the general principles for operation of international air services as provided for under the Chicago Convention.

The Chicago Convention codifies the basic principles of international law relating to civil aviation by granting territorial sovereignty of a State over its airspace and establishing the national airspace. Further, the Convention establishes the framework for registration, marking and recognition of nationality of aircraft (for example, in the case of Kenya its aircraft are denoted by first digits of 5Y, Uganda has 5X, Tanzania 5H, United Kingdom has G, while the United States of America has N and so on). The Chicago Convention also establishes the International Civil Aviation Convention (ICAO), a United Nations specialized agency based in Montreal, Canada which regulates the technical aspects of civil aviation.

There are nine freedoms of the air but for purposes of this article I will confine myself to the first five as originally created by the Chicago Convention. These freedoms set the limits on which origin and destination markets an airline could serve. The first freedom of the air is the right to fly over another country without landing. The airspace over the territory a country belongs to that country. For example, in the case of Uganda, the airspace belongs to it as a State and therefore without this freedom an airline like Kenya Airways (KQ) cannot overfly its aircraft over Uganda airspace say to the Democratic Republic of Congo without being granted this freedom (in which case the freedom is granted to the country of the airline).

Technical Landing

The second freedom of the air is the right to make a technical landing without picking or letting off revenue traffic. An example would be like in the case of a KQ flight to Senegal making a technical stop in Nigeria for refueling.

The third freedom is the right to carry revenue traffic from the country of the airline to another country. Revenue traffic refers to passenger, cargo or mail carried for a fee. An example would be in a case like where KQ carries Cargo or passengers say to South Africa. This freedom is the basis for conducting of business by airlines between States and is exchanged between countries on reciprocal basis.

The fourth freedom is the right to carry revenue traffic from another country other than country of the airline back to the country of the airline. An example would be the case of a KQ aircraft having flown to South Africa carries cargo or passengers back to Kenya from South Africa. This freedom is basically the reverse of the third freedom and just as is the case with the third freedom - it’s granted on reciprocal basis between two countries.

The fifth freedom is the right to pick and let off revenue traffic by an airline between two foreign countries of the airline. An example would be like where RwandaAir picks passenger or cargo from Entebbe, Uganda to Nairobi. Unlike, the first, second, third and fourth freedoms which are more less granted by all the Chicago signatory States as of a right, the fifth freedom is closely guarded by the States and is seldom granted for the simple reason that it allows an airline from a third party State to exploit the traffic rights between two foreign countries without reciprocal benefit to the latter two.

Bilateral Agreements

Having looked at the five freedoms, you realize that granting of freedoms to airlines is basically based on the bilateral arrangements between two States. Therefore, any flights between say Kenya and United Arab Emirates is based on the BASA between Kenya and United Arab Emirates while flights between United Arab Emirates and the United States is equally based on the BASA between United Arab Emirates and the United States. On that basis therefore, if you board an Emirates flight to the US from Kenya the airline utilizes the fourth freedom for traffic from Kenya to Dubai based on the BASA between the two countries then utilizes the third freedom for the flight from Dubai to the US based on the BASA between the two countries.

This explains the reason you cannot take a direct flight between two States unless you board a flight belonging to or registered in either State.

The exception is in cases of charter flights but those are based on ad hoc permits granted by the aeronautical authorities in State and are highly discouraged by many States save for exceptional circumstances. The other lesser reason has to do with the business concept of a hub. Not all passengers on any given flight terminate their flight at that airline’s country of registration. This business concept however, developed out of the legal structure established under the Chicago Convention as explained earlier and is not necessarily the main answer to the questions.

Mr. Wayong’o is a Legal Officer at Kenya Civil Aviation Authority. The views expressed in this Article represent his personal opinion and does not constitute legal advice or expert opinion on aviation law.
It is not in doubt that arbitration has had an enormous influence that extends the traditional commercial province. Indeed, the area of sport, shipping industry, and construction disputes is a case in point where arbitration has been embraced with pronounced success in solving disputes.

However, one area of law has been largely unattended - family law. What then is a family? The Wikipedia defines a family as a human context, a family (from Latin: familia) is a group of people affiliated by consanguinity, affinity, or co-residence. In other words it is the basic unit that makes up a society.

Marital Bliss

According to Article 45(2) of the Constitution, every adult has the right to marry a person of the opposite sex based on free consent of the parties. The marital bliss may fade away and the union may ultimately end up in The Children’s Court - for inter alia hearing and determination of custody of the child or children, child or children support, and other statutory provisions as enshrined in The Children Act, No. 8 of 2001 Laws of Kenya. Further, the same irreparably broken down marriage may find itself in the course list at The High Court Family Division for hearing and determination of inter alia divorce, separation, alimony, and other statutory and common law provisions.

Family law takes cognizance of several modes of marriages which include Statutory marriage as recognized by The Marriage Act Cap150 Laws of Kenya and is conducted at The District Registrar of Marriages. Others are Christian marriage as celebrated between professing Christians and Muslim marriage celebrated between professing Muslims. “Cohabitation” as envisaged in Sec 3(5) of The Law of Succession Act (emphasizes on matters of succession and dependency). Hindu Marriage as celebrated between professing Hindus and African Customary Marriages as celebrated between Africans.

It is not in doubt that it is one thing to annul a marriage and another to distribute matrimonial property. Presently, a court of competent jurisdiction determines how the same will be distributed taking into account monetary or and companionship contribution just to mention a few.

Family Arbitration

There is need to re-engineer our Statutes to cater for arbitration in answering matrimonial property questions. It is imperative to note that currently, there is neither nothing on the Statute books or Common Law that specifically prevents its use, nor there isn’t specific provision recognizing it.

To date, only three countries - Australia, Canada and Scotland (a hybrid Common Law and civil law jurisdiction) have statutory based family arbitration. (Scotland is a recent addition to its Arbitration Act.) While mediation has been largely successful, there is a growing dissatisfaction that it is not suitable for those ‘hard to settle’ cases which require a directive and binding approach but which would be preferable to keep out of court. This is particularly the case for financial disputes, according to the research committee of the Center for Child and Family Law Reform – London.

In these instances, parties have to resort to the less - than – ideal option of court, which is costly and protracted and therefore stressful for families and children involved.

Family arbitration as an option to solving family disputes involving money and property claims will - if embraced, bring on board speed, choice of arbitrator, confidentiality, low-cost, parties being able to choose their own timetable, location, manner of procedure, and less formal way as opposed to the open court litigation.

Mediation Pitfalls

Mediation has had its pitfalls. For starters, mediation is whereby a neutral third party - upon request by the parties - tries to conciliate the disputants. His/her primary aim is to get the parties ‘talking’ he/she is neutral third party - upon request by the parties - tries to conciliate the disputants. His/her primary aim is to get the parties ‘talking’ (Figure 1) and upon hearing and determining the dispute writes an award that is binding, conclusive and enforceable to the parties.

The Chartered Institute of Arbitrators can be in good to offer experienced family law arbitrators when called upon. This is indeed an extension of the Institute’s Royal Charter which is to “promote and facilitate worldwide the determination of disputes by arbitration and alternative dispute resolution other than resolution by the court.”

Cohabiting Couples

Such a scheme can cover, financial disputes arising from divorce, claims on inheritance from a child, spouse and so on; claims made in Kenya after a divorce that has taken place abroad; claims for child maintenance between unmarried parents; disputes about ownership of a property between cohabiting couples, and civil partnership financial claims.

The scheme will not cover disputes directly concerning the liberty of individuals, status of the individual of their relationship, care of parenting children, bankruptcy or insolvency.

What will happen if a party is unhappy with the arbitrator’s award? Can he/she appeal to the court? This is catered for in Matrimonial Causes Act 1973 Section 33 which, provides that any agreements made between parties in arbitration and mediation can be approved by the Family Division of The High Court. This can only be lifted if it is proved that there was improper provision of the children or there was bias or bullying in the process.

To consumers of family law, this has huge potential and also very important because it is innovative. The Legislature should enact such a legislation in furtherance of Article 45 (3), 45 4(a), (b) and Article 68 (c) (iii) of the Constitution.

Mr. Njagi, MCIarb, CPM is an Advocate of the High Court of Kenya
The black law dictionary has defined Jurisdiction as the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or Judge to pronounce the sentence of the law, or to award the remedies referred to the tribunal for decision, and authorized by law to be the subject of or action by that tribunal, and in favor of or against persons (or a res) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.

Child Custody refers to the term applied to the support and control of a child that is determined by the court when the parents of the child are divorced or separated.

Since the promulgation of the 2010 Constitution of Kenya which provides for the establishment of special courts known as ‘The Kadhish Courts’ under Article 169 (b) of the Constitution wherein Kadhish courts are enumerated as subordinate courts and in Article 170 (1) of the Constitution, challenges have emerged on the Jurisdiction of the Kadhish courts on entertaining matters of child custody where wrangling parties profess Islamic religion as anchored in the Kadhish Court Act cap 11 laws of Kenya at Section 6 which states that, “The jurisdiction of a Kadhish’s court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhish’s courts” as reinforced by Article 170(1) of the Constitution.

It therefore, calls for a legal question seeking to define the words, “personal status” to enable jurists to demarcate matters of personal status to Kadhish courts and give exclusive and original jurisdiction to Kadhish courts in the administration of justice in matters per-
Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The superior courts have also failed to develop jurisprudence on the correct position of the Kadhis courts in Kenya’s Judiciary based on the doctrine of stare decisis when making judicial pronouncements whenever this challenging question of jurisdiction of the Kadhis court is placed before them. Likewise, Muslim jurists, known as the Kadhis, have also faced similar problems when it comes to delivering Rulings on preliminary objections raised by advocates appearing before them on behalf of litigants entangled in child custody disputes. Many decided cases by Kadhis on child custody are centered on the preliminary objections raised by parties on the jurisdiction of the Kadhis Court to entertain the issue of child custody vis-à-vis the Children Court established by The Children Act which donates the jurisdiction on matters of personal status, marriage, divorce or inheritance to Children Court. In the recent Rulings, Judges have failed to cure this question judiciously while making pronouncements on the question of the jurisdiction of Kadhis court as elaborated by Muchelule J in the matter of H.M.M Vs. K.J.D (Mombasa HCC Appeal No. 15 of 2013). Justice Muchelule held that:

"My understanding is that the Kadhi’s Court is properly seized of the divorce matter, but may not deal with the issues of custody and maintenance of the children. These issues are not among those in respect of which the Constitution and the Act have donated jurisdiction to the Kadhis Court. These issues can only properly be dealt with by a children’s court under The Children Act No. 8 of 2001. Therefore I am of the opinion that the Kadhi Court has no jurisdiction in determining children matters as there is nowhere any written laws of Kenya which gives Kadhi jurisdiction over children matters."

Separately, High Court Judge Lady Justice Stella N. Mutuku, sitting in Garissa, in the matter of Asan Yussuf Vs. Two Others (Civil Appeal No. 13 of 2012) held that:

"I have taken the view that the Kadhi’s Act does not oust the jurisdiction of the Kadhi’s court and therefore the Kadhi’s court remains the right court with jurisdiction on matters of personal status, marriage, divorce or inheritance where parties profess Muslim religion. The issue before the trial Kadhi and on appeal before this court is not custody of the child per se. The issue involves marriage, divorce and paternity of the child ……….I however find that the Kadhi had jurisdiction to try this matter being a jurisdiction that relates to marriage, divorce and incidentally the paternity of the child in question".

And in The High Court of Kenya at Mombasa Civil Appeal 120 Of 2004 Justice J.K Sergon held that:

"A critical examination of Section 5 of the Kadhi’s Court Act will reveal that the Kadhi’s Court had jurisdiction to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings involving parties who profess the Muslim faith. Issues touching on maintenance and custody fall into the category of personal status."

In light of these two confusing judgments on the jurisdiction of Kadhis particularly on child custody on the strength of Article 170(1) 5 of the Constitution as read with The Kadhis Court Act Section 5 and the reading of Sections 73, and 81(1) of Part VII of the Children Act leads to a serious confusion on jurisdiction which, is very vital in litigation as was held in Owners of Motor Vessel “Lilians” Vs. Caltex Oil (K) Ltd (1989) Klr 1(Cak) at page 14 where Justice Nyarangi stated: "Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

This therefore, calls for a law reform through statutory amendment to cure the question of Kadhis courts jurisdiction or through the doctrine of the Common Law stare decisis so that the question is addressed by getting the correct interpretations of the competing clauses of laws highlighted above.

Hon. Omar is the Deputy Chief Kadhi of the Republic of Kenya while Mr. Kassim Shabban is a lawyer based in Nairobi. 

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Hon. Omar is the Deputy Chief Kadhi of the Republic of Kenya while Mr. Kassim Shabban is a lawyer based in Nairobi.
By Mercy Wambua

The events at the Lang’ata Road Primary School on the 19th January 2015, over twelve months ago led to a public outcry both from the local and international community in the manner in which the police lobbed tear gas canisters at pupils and activists who were protesting the grabbing of the school’s playground.

The Law Society of Kenya Council constituted a task force to investigate the incidence and condemned the actions of the police as barbaric and an affront to the fundamental rights of children to care and protection, security and education as enshrined in the Constitution and International Law.

The Council established a taskforce aimed at investigating the actions of the police officers. The taskforce composed of the following: Gertrude Angote-Chairperson, Mercy K. Wambua – LSK Secretary/CEO, Dennis Mosota, Anthony Mulekyo, John Chigiti, Nyamu Mati, Rose Mbanya, Julie Soweto, Michael Muchemi, Oscar Sang, Haron Olando, Maurice Ogoso.

The Taskforce mandate was: tracing, identifying actual victims, investigating and collecting statements from victims and any other relevant evidence and finally giving recommendation to the Council.

The members of the taskforce visited the school, took statements from pupils, school administration as well as other relevant persons and reviewed footage from the media and collected evidence including a teargas canister. LSK secured counseling for the minors affected and partly supported the medical treatment of one of the adversely affected child.

The Committee liaised with the Office of the Director of Public Prosecution and Independent Police Oversight Authority towards prosecution and discipline of the involved officers.

The LSK in conjunction with Kituo Cha Sheria published the taskforce report which was launched on the 12th February 2016 during a CPD seminar held in Panari Hotel.

The taskforce made the following findings:

That on the 19th January 2015 at Lang’ata Road Primary School the police used excessive and unreasonable force and more specifically tear gas on children during the demonstration. The action amounted to an affront to the fundamental rights of children to care and protection, security and education as enshrined both in the Constitution of Kenya and International law.

More than 200 school children suffered both physical and psychological trauma as a resort of use of excessive force by the police at Lang’ata Road Primary School.

A number of persons tasked with the responsibility to care and protect children and their welfare including school administration officials, Kenya police, teachers, Ministry of Education officials and Parents/Teachers Association (PTA) among others fell below the standards expected of them when executing their duties.

The relevant authorities failed to provide and secure a peaceful and enabling environment for the children to exercise their Constitutional rights to assemble, demonstrate and picket as guaranteed under Article 37 of the Constitution of Kenya without fear of intimidation.

There was uncertainty and lack of information on the legitimate ownership of land belonging to the Lang’ata Road Primary School as well as other public schools, including Muthurwa Primary.

Some of the recommendations by the taskforce are:

LSK to consider and convene criminal proceedings by way of public interest litigation case in form of a constitutional petition on behalf of Lang’ata Primary school children. This action to be against the office of the Inspector General of police, the Ministry of Education and others for violation of children’s fundamental rights to care and protection under both National and International Laws, by action, inaction on their part or their servants and/or agents. Furthermore LSK to seek compensation on behalf of the Lang’ata Road Primary School Children from the violating authorities.

LSK to carefully consider and convene criminal proceedings against the violating authorities by way of private prosecution, upon obtaining consent from the Director of Public Prosecution. And/or on the alternative seek by way of judicial review, an order compelling the Inspector General of Police to provide names of specific police officers who were involved in the violation of the rights of the children.

LSK to undertake an audit of all and belonging to all public schools in Nairobi County and to demand a similar audit to be undertaken by the Nairobi City Council Government and published within a specific timeframe.

LSK to seek to be enjoined in the ongoing suit filed by the Lang’ata Road Primary School Advocate.

LSK to send a recommendation to the Kenya government through the relevant departments about the need to undertake nationwide civic education and training to the police, law enforcement agencies and all care givers to ensure that they are well equipped to understand fundamental rights regarding the “best interest of the child” whenever they get in contact with children.

“The conduct by the Kenyan Police of using excessive, unreasonable and disproportionate force following the protests by the Langata Road Primary School children was a clear violation of the fundamental rights and freedom of the Children” Ms. Gertrude Angote, Chair of the TASK Force and Executive Director Kituo Cha Sheria.

“Ms. Wambua is the Secretary/CEO of the Law Society of Kenya.
The Commission for University Education Vs. The Pharmacy and Poisons Board: Overlapping Mandates?

By Edwin Omulama Onditi

1.0 INTRODUCTION

Kenya has recently witnessed an embarrassing tiff between the Commission for University Education (CUE) and the Engineers Board of Kenya (EBK) pertaining to the accreditation of degree courses in engineering.

A not too dissimilar tussle took place almost about the same period. It was the Pharmacy and Poisons Board (PPB) versus the CUE (again), where the former withheld the examination results of a student purportedly because she had not met the minimum standards required for entry for study for a Bachelor of Pharmacy Degree course.

2.0 CASE STUDY: REPUBLIC VERSUS THE PHARMACY AND POISONS BOARD & 2 OTHERS ex parte JULIET LIHEMO AGUF

Juliet Lihemo Agufa responded to an advertisement placed by Mount Kenya University (MKU) in the Press on October 23, 2008, which clearly indicated that the latter was accredited by the Commission for Higher Education to offer, inter alia, a Degree course in Bachelor of Pharmacy.

Having met the set minimum admission requirement which was a mean grade of C+ in the Kenya Certificate of Secondary Education exams, she enrolled for the daunting five (5) year program in 2009.

In her final year (2013), the PPB communicated that it had set new admission criteria to be applied by institutions offering courses in pharmacy. After MKU's intervention, the PPB issued a written confirmation that they had exempted the affected students (Juliet included).

After graduating and sitting for the PPB's examinations as a precursor to proceeding to internship, the Board suddenly reverted to its earlier position forcing her to Court.

At the hearing, it was argued that in Kenya, the body tasked by Parliament to accredit institutions of higher learning to offer various degree courses at the material time was the Commission for Higher Education as established pursuant to Section 3 of the then Universities Act. Section 6 of the said Act set out the functions of the Commission but the Court's attention was primarily drawn to two of them: paragraphs (h) and (j):

“(h) To examine and approve proposals for courses of study and course regulations submitted to it by private universities;

(j) To make regulations in respect of admission of persons seeking to enroll in universities and to provide a central admissions service to public universities.”

The fact that MKU’s Bachelor of Pharmacy degree was accredited meant that whosoever met the admission requirements to study that course and successfully completed the same by way of being awarded a degree had brought themselves under the purview of Section 8 (1) (b) of the Pharmacy and Poisons Act.

Juliet Lihemo Agufa was one such person.

Section 8 sub-sections (1) (b) and (2) of the Pharmacy and Poisons Act was highlighted:

Sec 8 (1) (b) “Every person who satisfies the Board that he holds at least a bachelor of pharmacy degree (whether of Kenya or of some other country) which the Board considers acceptable, shall, subject to this Act, be entitled to have his name in the register (of pharmacists)”

Sec 8 (2) “Every person who satisfies the Board that he holds a diploma in pharmacy approved by the Board of any college in Kenya or any other country shall, subject to this Act, be entitled to have his name entered in the roll”

For degree level, it is obvious that the issue of approval (read accreditation) of the dispensing institutions is outside the purview of the PPB.

The latter part of the highlighted segment of Section 8 (1) (b) is aimed at foreign countries in order to allow the PPB to verify whether the foreign syllabus conforms to the local one.

At diploma level, the PPB has the express power to accredit the relevant colleges. Hence, the wording of Section 8 (2).>

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1. See the article “Universities versus Engineering Board row escalates" by Maina Waruru published on www.universityworldnews.com on 4/09/2015 (website accessed on 01/02/2016).

2. HC Misc Application No. 436 of 2014 (JR).

3. Now known as the Commission for University Education.

4. Chapter 210B of the Laws of Kenya, which was later repealed in the year 2012 by the Universities Act, No. 42 of that year.
Constitutional change of Government in Kenya: Constraints and Opportunities

By Prof Ben Sihanya

President Uhuru Kenyatta has acknowledged a leadership failure that is characterized by manipulation, intimidation, bribery (or corruption), arson, assault, assassination (MIBSA). There are numerous problems. And he has been quoted citing an alibi in Israel by blaming Kenyans for being thieves and whiners.

My overarching argument is that there are opportunities under Article 1, 10, 38, 136 and other provisions of the Constitution and the people of Kenya must seize the moment and seek change in Government and governance for national survival, development, and competitiveness.

Tribalism

I discuss three key research questions. First, the Kenyatta Plus (+) Administration has entrenched lawlessness and tribalism that have facilitated or suffered manipulation, intimidation, bribery (or corruption), sabotage, arson, assault and assassination (MIBSA). Kenyatta’s system has enriched many and impoverished the majority of Kenyans. Some of the most blatant acts or omissions associated with lawlessness and impunity include: first, facilitating, assenting to and promoting numerous unconstitutional Bills and Acts.

Rigging

Most of these are intended to entrench Kenyattaism and facilitate a dynasty through electoral rigging in 2017 and beyond. Examples include, first, amendments introduced to the Judicial Service Act so that Kenyatta becomes a major player in the appointment of the successor to the Chief Justice Dr Willy Mutunga. Second, the amendment of the National Police Service Act on security although the High Court and Court of Appeal nullified some of the amendments. Third, the media law and fourth, the Public Benefit Organisations (PBOs) law.

Second, Kenyatta has taken executive and administrative measures that have compromised the independence and integrity of Commissions and independent offices such as the National Police Service Commission (NPSC), the Ethics and Anti Corruption Commission (EACC) and the Independent Electoral and Boundaries Commission (IEBC). For instance, he has supported IEBC when it was criticized for rigging him in the 2013 Presidential Elections, or when there were indictments in the United Kingdom regarding the “Chicken Gate” scandal. Yet more recently he has unilaterally and unprocedurally moved to intimidate IEBC them over “chicken gate.”

Judiciary

Third, Kenyatta has undermined the integrity and independence of the Judiciary by openly disobeying court orders. Despite being declared unconstitutional, the various Sections under the security amendments of 2014 are still being applied by security and administrative agencies. Furthermore, he outrageously defied the court order that barred 10,000 police recruits from reporting to training claiming he was willing to “take responsibility.” In such circumstances he can only take responsibility by resigning.

My second argument is that there are significant constitutional and legal opportunities for change of Government or governance in spite of the Kenyatta Plus administration’s lawlessness and keenness to retain power in 2017 and beyond at all costs. Kikuyu tribalists are being aided by hired sycophants cronies an clones from other tribes.

The Kenyan people can take appropriate measures to change the governance, Government or President. These relate to at least three scenarios: first, the direct and indirect exercise of sovereignty by the people under Article 1. Second, public participation through elections under Articles 1, 10, 38 and 136 among others. And third, public participation through constant and intense monitoring and evaluation of the Kenyatta administration through complaints, petitions, protests or related forms of civil disobedience. The people have a constitutional obligation to disobey unconstitutional laws and presidential conduct.

Rule of Law

Remarkably, the struggle for good governance, constitutionality and the Rule of Law and due process in Kenya can be traced back to the mid 1960s when the Jomo Kenyatta (K1) Administration confronted the liberal Independence Constitution. Kenyatta Plus has established a political economy run by arrogant Kikuyu cartels and bandits similar to those under Kenyatta 1. Yet in 2010, Kenyans adopted a new Constitution that many believed would guarantee constitutional democracy, liberty, participation, inclusion, prosperity and due process. Kenyans are keen to defend their liberties and dreams that are being nullified, compromised and threatened by counter, anti and un-constitutional measures by (Kenyatta Plus or K+). What next? First, there is need for adequate popular scrutiny and interrogation or rejection of unconstitutional laws and executive or presidential conduct. Second, Kenyans must reject and protest against presidential manipulation or blackmail intended to secure the survival of a regime bereft of any constitutional, juridical, political or moral authority ab initio (from the start).

Kenyatta is aware of the unconstitutionality and illegitimacy of his regime and his conduct. And he wants to manipulate Kenyans.
That is his intention when he said in Israel that “...God has given Kenyans a country that is 20 times better than the one we are in right now. But there is crying, theft... we are experts at stealing, abusing each other, doing other evils and perpetuating tribalism.”

For a man who has surrounded himself with tribal chauvinists and kleptocrats, his intention is at least two fold. First, so that Kenyans don’t blame him for official or personal failure to address corruption, tribalism, mediocrity and lawlessness. Second, so that Kenyans are politically and psychologically convinced that Kenyans are the problem and deserve Kenyatta and his Kikuyu tribal kleptocracy.

Corruption

That tribal kleptocracy has set a new definition and level of stealing, greed or avarice through the Eurobond, National Youth Service (NYS), Standard Gauge Railway (SGR) and others. Third, there is still hope for Kenyans to realize their dreams through constitutional change of governance, government and Kenyatta dynasty especially in the context of the 2017 General Elections. Significantly, the Kenyatta system and IEBC are manipulating the registration of voters through skewed distribution of biometric voter registration (BVR) equipment in favour of Kikuyu areas, engaging NYS in voter registration and movement of Kikuyu voters to Nairobi. There is need for much greater vigilance in the efficient and equitable identity (ID) card registration process, in voter registration, voting, as well as the counting, tallying, and announcement of votes; and particularly in the presidential elections.

Third, the Kenyan people must seize the moment and seek constitutional change of Government through parliament constitutional democracy as stipulated in the Constitution of Kenya. Article 145 of the Constitution of Kenya provides for an elaborate procedure to bring to effect constitutional change of Government.

A breach of any provision of the Constitution is sufficient ground for the National Assembly to invoke the provisions of article 145. But Parliament has missed many opportunities to impeach Kenyatta even where his conduct has exhibited impunity in contravening the Constitution as indicated above.

The people should seize the opportunity and evoke the provisions of Article 119(to petition Parliament) and 145 respectively. When all fails, the various forms of civil disobedience and voting Kenyattaism out are the ultimate remedy to this tribal hegemony that dominates, corrupts and manipulates of public, private and civil society institutions and spaces. This would ensure constitutional change of governance, government and Kenyatta as well as establish the rule of law, due process and good governance.

Prof Ben Sihanya is a Constitutional Scholar and Advocate at the University of Nairobi Law School and Sihanya Mentoring; SihanyaMentoring@gmail.com

The Commission for University Education Vs. The Pharmacy and Poisons Board: Overlapping Mandates?

“The Pharmacy and Poisons Board recognizes every person who satisfies the Board that he/she holds at least Bachelor of Pharmacy degree whether of Kenya or some other country where the Board considers acceptable...”.

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>>Further, “The Competence Requirements for Stage I and Stage II Pharmacy & Poisons Board Examinations and Application Form for Assessment as a Pharmacist”. Page 2 reads: “The Pharmacy and Poisons Board recognizes every person who satisfies the Board that he/she holds at least Bachelor of Pharmacy degree whether of Kenya or some other country where the Board considers acceptable ....”.

This satisfaction is expressed by the presentation of an original degree certificate. If from an accredited Kenyan University, it would be sufficient without more. However, if it came from a foreign country, the Board is bound to consider whether country’s standards are comparable to Kenya’s before deciding to accept or decline it.

The Judgment was in favour of Juliet Lihemo and three Orders issued:

1. Certiorari quashing PPB’s decision to withhold her results;
2. Mandamus compelling the PPB to authorize her progression to internship; and
3. The PPB to meet Juliet’s costs.

However, as far as drawing clear boundaries as between the CUE and the PPB, the aforesaid Judgment was a massive disappointment as it totally avoided addressing that pertinent point. The learned Judge simply picked on one aspect of the case namely; legitimate expectation, and used it to determine the case. That notwithstanding, the position of this paper is that the arguments advanced in favour of the ex-parte Applicant reflect the accurate position in the law.

3.0 CONCLUSION

Even the most neo-conservative interpretation of the repealed Universities Act as well as Section 5 of the operative Universities Act No. 42 of 2012, should confirm that matters of accreditation of Universities have always been, and remain, the exclusive preserve of the CUE. It is also evident that the Commission is tasked with ensuring that all arms of government liaise and co-operate and ensure that standards at Universities are at the required level. It is for the Commission to conduct visitations and inspections of private universities to ensure standards are maintained once accredited.

But in the arena of Diploma and Certificates, the PPB does hold sway. For Degrees, the PPB is supposed to presume that the accreditation of an institution to offer such cause was a pointer to the effect that the CUE ascertained that the requisite standards had been met.

Once presented by a valid Degree Certificate by a recognized University, it (PPB) has no locus to second-guess it. That logic applies to the EBK, the Council for Legal Education and any other similar professional body.

Well, at least Juliet Lihemo Agufa got her dreams back on track.

Mr. Onditi is an Advocate of the High Court of Kenya and Partner at Ngugi Omwenga & Co. Advocates.

5. Chapter 244 of the Laws of Kenya.
6. That is what informed Justice G. Odunga’s decision in The Republic versus The Council of Legal Education ex parte Keniz Otieno Agira HC Misc. Civil Application No. 395 of 2012, a precedent which the PPB annexed as an authority in its submissions against Juliet, but which actually advanced the latter’s cause.
A 40-year-old lawyer who had practised commercial law for 10 years died and arrived at the pearly gates of heaven. The lawyer said to St. Peter, “I am surprised I died so young. I was very active and always ate well. And I’m only 40 years old!” St. Peter looked at his book and looked back down at the lawyer. “Forty years old, you say? According to your billing records, you should be 85.”

A young lawyer was defending a wealthy businessman in a multi-million shilling real estate suit. Unfortunately, the evidence was against his client, and he feared the worst. So the lawyer asked the senior partner of the law firm if it would be appropriate to send the Judge a box of Havana cigars. The partner was horrified. “The Judge is an honourable man,” the partner exclaimed. “If you do that, I can guarantee you will lose the case!” Weeks later the Judge ruled in favour of the lawyer’s client. The partner took him to lunch to congratulate him. “Congratulations,” the partner said. “You can’t eat your own sandwiches in here!” The lawyers looked at each other, shrugged their shoulders and then exchanged sandwiches.

A man had been crossing a street when a car slammed into him. The pedestrian sued the motorist, whose lawyer made the following closing statement. “Your honor, my client was not at fault. He has been driving a car for thirty years, and has never had an accident nor booked for over speeding. I do not think I need to say any more.” Unimpressed, the lawyer for the plaintiff shot up. “Your honor, since Counsel insists on bringing up the matter of experience, may I remind the court that my client has been walking for over seventy years…”

After winning a succession dispute, a lawyer had a bit too much to drink and on his way home rammed into the rear of a Mercedes Benz along James Gichuru Road in Lavington. The lawyer got out of his car, staggered to the other driver, and said, “Boy are you in big trouble! I’m a lawyer!” The driver looked puzzled and replied, “No, you’re the one in trouble. I’m a High Court Judge.”

What’s the difference between a good lawyer and a great lawyer? A good lawyer knows the law, a great lawyer knows the Judge!

At the height of a political corruption trial, the lawyer attacked a witness. “Isn’t it true that you accepted five million shillings to compromise this case?” The witness stared out the window, as though he did not hear the question. “Isn’t it true that you accepted five million shillings to compromise this case?” the lawyer repeated. The witness still did not respond. Finally, the Judge leaned over and said, “Sir, please answer the question.” “Oh,” the startled witness said, “I thought he was talking to you.”

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A man was arrested for drunk driving after failing an alco-blow test along Lang’ata Road on a Friday night and arraigned before the traffic court. The Magistrate said, “What will you take, 30 days or Sh50,000?” The man replied, “I think I’ll take the money.”

It was Christmas and the Judge was in a merry mood as he asked the accused, “What are you charged with?” “Doing my Christmas shopping early,” replied the accused. “That’s no offence,” said the Judge. “How early were you doing this shopping?” “Before the store opened,” replied the accused.

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